Review of the *Anti-Discrimination Act 1991* (Qld)

Submission by

Queensland Advocacy Incorporated

to the

Queensland Human Rights Commission

7 March 2022

Level 2, 43 Peel Street, PO Box 3384 | South Brisbane QLD 4101 | **T** (07) 3844 4200 | **F** (07) 3844 4222 | **E** qai@qai.org.au

Contents

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our three advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); and the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues. From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Disability Advocacy Network (QDAN), which includes operating the Disability Advocacy Pathways Hotline, a centralized phone support for all people with disability in Queensland providing information and referral. We have also been funded to provide advocacy for young people with disability as part of the QDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disability;
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

QAI's recommendations

- **Create a mechanism for consultative status for organisations to ensure meaningful engagement under sections 113 and 235.**

- **Replace the term *impairment* with the term *disability* as a ground for discrimination.**

- **Amend the definition of impairment (disability) to make explicit the inclusion of the full spectrum of mental illness.**

- **Remove outdated exemptions from the ADA, including but not limited to:**
  - **Discrimination in the areas of insurance and superannuation on the basis of age and impairment;**
  - **Discrimination in working with children (section 28);**
  - **Limitation of the application of section 46 to assisted reproductive technology services (section 45A);**
  - **Discrimination in accommodation for use in connection with work as a sex worker (section 106C);**
  - **Extend protections against discrimination to include the work of not-for-profits.**

- **Make consequential amendments to remove Part 12A (sections 319A to 319ZL) of the *Corrective Services Act 2006* (Qld).**

- **Expand the attributes listed in section 7 of the ADA to include:**
  - **Victims of domestic and family violence;**
  - **Irrelevant criminal record;**
  - **Irrelevant medical record;**
  - **Non-binary gender identities; and**
  - **In the definition of family responsibilities in sub-section 7(o), amend the definition as follows: "family responsibilities, including responsibilities to a person who is not within the person's immediate family, but for whom the person provides care or support that is required by that person".**

- **Amend section 7 of the ADA to provide that the list of attributes is non-exhaustive.**

- **Amend the ADA to allow a combination of attributes to protect people experiencing intersectional disadvantage.**

- **Amend the ADA to include a duty to make reasonable adjustments, with the failure to make reasonable adjustments an independent ground of unlawful discrimination.**

- **Amend the definition of unjustifiable hardship in the ADA to explicitly include consideration of:**
  - **The equal dignity and worth of all people concerned;**
  - **Standards set by relevant bodies; and**
  - **The benefit to society as a whole of equal treatment.**

- **Remove the comparator requirement from the ADA.**

- **Reverse the onus of proof in the ADA so that the complainant must demonstrate the attribute and area and the respondent must demonstrate that the less favourable treatment was not for a discriminatory reason.**

- **Amend the ADA to include positive responsibilities for public authorities and the private sector.**

- **Amend the ADA so that the time to complain is extended to at least two years. The time limits should be extended in a similar way to that provided under the *Limitation of Actions Act 1974* (Qld), including as articulated for prisoners prior to the 2009 changes.**
- **Introduce an accessible, simple process for representative complaints to be brought.**
- **Amend the ADA to allow complaints of systemic discrimination by relevant entities.**
- **That the Queensland Government consider the option of creating and well resourcing an enforcement body (which may be the Queensland Human Rights Commission), having responsibility for anti-discrimination law enforcement and community education, and potentially separating out the function of complaints and conciliation to be handled by a separate entity.**
- **That in developing a stronger enforcement model, resourcing for any additional enforcement initiatives must not deplete resourcing required for ongoing education, training and monitoring functions.**
- **Re-establish the Queensland Anti-Discrimination Tribunal, or another specialist tribunal.**
- **Afford consideration to establishing a fund to assist complainants to pay for expert evidence in appropriate cases.**
- **Increase funding for specialist legal assistance.**
- **Amend the ADA to align with the DDA and recognise animals that are trained to assist a person with a disability to alleviate the effect of the disability and meets standards of hygiene and behaviour that are appropriate for an animal in a public place.**
- **Provide protections against laws with discriminatory effect and if future laws are discriminatory this must be explicit and reviewable.**
- **Extend protections against discrimination in work to all job seekers, regardless of whether a vacant position is advertised or available.**

Background

Advocating for the right for all people with disability to live a life free from violence, abuse, neglect, exploitation and discrimination is core to QAI's work. As part of our efforts to improve systems for people with disability, QAI has made submissions calling for change in many areas, including education, criminal justice, the National Disability Insurance Scheme, and guardianship and administration. Our Human Rights Advocacy Practice provides legal advice to people with disability who have experienced discrimination and supports clients to make complaints to the Queensland Human Rights Commission under the ADA and the *Human Rights Act 2019* (Qld) (**HRA**), as well as to the Australian Human Rights Commission under the *Disability Discrimination Act 1992* (Cth) (**DDA**). On 8 June 2018, QAI was granted Special consultative status with the UN Economic and Social Council. We have effectively utilised this consultative status to support our engagement with the UN, along with the engagement of persons with lived experience of disability and disability advocates.

Introduction

QAI welcomes the opportunity to provide a submission to the Queensland Human Rights Commission as part of the review of the Queensland ADA. The issues which we wish to raise are based on and extend from the Ten-Point Plan for a Fairer Queensland. The Ten-Point Plan for a Fairer Queensland was prepared by an alliance of Queensland lawyers and advocates as a submission to this review. QAI lawyers actively participated in the preparation of the Ten-Point Plan.

The Ten-Point Plan proposes that the Act adopt language and concepts that attune to the human rights approach and better reflect the principles and values of diversity, fairness and equality. It explains the importance of stating the advantages of accommodating people with protected attributes to society and provides examples of how this is being achieved through contemporary developments in other jurisdictions. It also provides examples of language that seeks to improve the balance between desired outcomes and reasonable cost which can advantage all.

QAI's submission supports the Ten-Point Plan and offers further discussion and recommendations specifically in relation to disability protections. We bring a human rights approach to examining the relevant legislation, informed by the lived experience of people with disabilities.

This submission follows the structure and headings of the Ten-Point Plan.

Formalising consultation

The work of QAI is grounded in the CRPD and we consider there could be additional benefits to people with disability if the practice and wording of this convention were adopted in the ADA. For example, the definitions in Article 2 provide working models for *"discrimination on the basis of disability", "reasonable accommodation"* and *"universal design"*.

As noted above, QAI holds consultative status with the UN due to our work as a disability advocacy organisation. The model of allowing non-government organisations to apply for consultative status relating to certain attributes would also bring benefits if replicated in Queensland. Consultative status under the ADA could provide a clear and accountable process for many of the Commission's powers, especially under section

235(e).[1] Other functions that would be enhanced by a formal recognition of consultative status include sections 113 (3) (c) and 235 (c), (d), (f) and (i). An organisation's consultative status could also assist decision-making on standing for interventions as *amicus curiae* and complaints lodged under the ADA by a relevant entity. It is not the intention of this recommendation to limit consultation in any instance to only organisations with consultative status where this would hamper the purpose of the Act.

Recommendation:

- **Create a mechanism for consultative status for organisations to ensure meaningful engagement under sections 113 and 235.**

A contemporary understanding of disability

Models of disability (such as the medical, social, cultural or capabilities model) provide a framework for the way in which people see and respond to disability in policy and practice.[2] The social model of disability sees disability as a product of society's inability to accommodate impairments.[3] There are many different versions of the social model, though in general they adopt a social constructivist perspective, seeing 'impairment' as a personal characteristic and conceptualising 'disability' as a social construct caused by inaccessible environments that present physical, attitudinal, communication and social barriers and which result in inequality, discrimination, and the segregation of people with disability.[4] QAI advocates for the social model of disability, maintaining that disability is not a disadvantage but a difference and example of human diversity that can and should be accommodated.

The Convention on the Rights of Persons with Disability (**CRPD**) provides a strong and aspirational model for the protection and advancement of the human rights of people with disability. It creates a blueprint for a progressive social model of disability, defining discrimination on the basis of disability in terms of the interaction between a person's impairment and their environment. This is a significant change from the previous medical model, which viewed disability as an impairment inherent to the individual. Yet it is a model that is not fully implemented in Australia. Drafted subsequent to the passage of both the state and federal discrimination, our ADA and DDA have yet to embrace the CRPD approach, and remain rooted in the medical model, defining the disability by reference to its impact on the person.

There is an important distinction to be made between the terminology "impairment" (as used in the ADA) and "disability" (as used in the DDA and the CRPD). Impairment attributes the focus of the limitations on the person and fails to acknowledge the importance of external barriers. In contrast, "disability" is used in the CRPD as an evolving concept, which recognises that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.[5]

---

[1] To consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the ADA.

[2] Mitra, S. 2006. The Capability Approach and Disability. *Journal of disability policy studies,* 16**,** 236-247; Oliver, M. 2009. *Understanding disability : from theory to practice,* Basingstoke, Palgrave Macmillan; Barclay, L. 2011. Justice and Disability: What Kind of Theorizing Is Needed?: Justice and Disability. *Journal of social philosophy,* 42**,** 273-287.

[3] Oliver, M 2004 The Social Model in Action in Barclay, L. 2011. Justice and Disability: What Kind of Theorizing Is Needed?: Justice and Disability. *Journal of social philosophy,* 42**,** 273-287; Shakespeare, T. 2014. *Disability rights and wrongs revisited,* Abingdon, Oxon.

[4] Kayess, R. & Sands, T. (2020) *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre

[5] United Nations *Convention on the Rights of Persons with Disability*, Preamble, (e).

While the ADA uses the term impairment, it is nevertheless encouraging that the Act defines impairment in a way that acknowledges impairments have ramifications. For example, the Act states that the person with the impairment may require services or facilities. However, to provide definitional clarity, consistency with the CRPD and the DDA and with the social model of disability, QAI recommends that the term "disability" be used instead of the term "impairment" as an attribute in the ADA.

While acknowledging that significant reforms are needed to develop the ADA to meet the international benchmark for the protection of people with disability from discrimination in key areas of life, which will be outlined below, the use of the term "disability" is an important amendment.

Mental illness

A review of anti-discrimination legislation amongst States Parties to the CRPD showed that 62% had a definition of disability which explicitly stated mental illness, mental disorder, mental impairment, abnormality of psychological functions, 64% explicitly prohibited discrimination on the grounds of mental illness at the time of recruitment in employment, and 35% explicitly prohibited discrimination on the grounds of mental illness for discontinuance of employment.[6]

Relevantly, the ADA definition includes, similarly to the DDA, a limb that "impairment" includes: "*a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour".*

In the case of *Curran v Yourtown* & *Anor*,[7] *the* complainant described her impairment as relating to her mental health which limited her ability to work (for some periods and full-time at one point). She submitted that her employer demonstrated direct and indirect discrimination and victimisation and provided evidence from her treating clinical psychologist registrar. The Commission member noted that there was insufficient evidence submitted to support the complainant's claim to have an impairment or disability under the terms of the Act, stating that she was "required to produce expert opinion evidence from a person duly qualified to do so."[8] However, this is a burden that is not directly imposed by the ADA which simply states that the complainant must prove her attribute on the balance of probabilities.[9] Any requirement to produce expert evidence comes at considerable expense and difficulty to the complainant and should not be imposed if the QCAT and QIRC process is to remain accessible to self-represented litigants. QAI believes that expert evidence would be of great benefit in many cases concerning impairment, but that this cost should be met by the State, rather than the complainant.

In that case the Member stated that there was no evidence before the QIRC to support the contention that the Complainant suffered from a total or partial loss of the Complainant's bodily functions, being use of her arms and legs and loss of the ability to walk or a malfunction of the Complainant's brain chemistry. The QIRC

[6] Nardooker, R., et al, D. 2016. Legal protection of the right to work and employment for persons with mental health problems: a review of legislation across the world. *Int Rev Psychiatry,* 28**,** 375-384.
[7] [2019] QIRC 059.
[8] [2019] QIRC 059, at [29].
[9] ADA section 204.

accepted that the Complainant likely had anxiety, but did not consider there was evidence of impairment for the purpose of the Act.[10]

This case indicates both the need for a clearer definition of impairment or disability and the need for a greater understanding of impairment by the Queensland Industrial Relations Commission. Any definition of impairment/disability should include the full spectrum of mental illness found in the current Diagnostic and Statistical Manual for mental disorders.

Recommendations:

- **Replace the term *impairment* with the term *disability* as a ground for discrimination.**
- **Amend the definition of impairment (disability) to make explicit the inclusion of the full spectrum of mental illness.**

1. No more excuses for discriminating

The Ten-Point Plan states that the ADA is 30 years old and some things that seemed reasonable in 1991 are now widely regarded as wrong. Over the years, other exemptions, excuses and defences have crept into the anti-discrimination regime – sometimes as a reaction to one specific incident or hype around a particular case. Many of these exemptions and changes have had unexpected or excessive flow-on effects.

As an example, and of specific concern from a disability perspective is the exemption which allows discrimination in the areas of insurance and superannuation on the basis of age and impairment. This discrimination can occur even where there is no demonstrated actuarial, statistical or other data. This exemption has a particularly harsh impact on people with a history of mental illness, even when the mental health condition is diagnosed, treated and well managed. This outdated law entrenches and perpetuates an old stigma about mental illness and, perversely, deters some people from accessing mental health care because they do not want to be denied insurance or superannuation benefits. A better approach would be to require insurance and superannuation companies to have to apply for an exemption and demonstrate the basis for their application, such as under the current section 113 of the ADA.

QAI also supports the removal of outdated exemptions that allow discrimination on the basis of attributes apart from impairment, including but not limited to those found in sections 28, 45A, 106C and the definition of club (limiting protections to for-profits). Many people with disabilities rely on not-for-profit clubs such as Returned Service Leagues for social activities and QAI is aware of instances where such clubs have been engaged in direct discrimination against people because of their disabilities who then have no recourse to discrimination law.

QAI strongly supports the removal of the provisions contained in sections 319A to 319ZL of the *Corrective Services Act 2006* (Qld) that differentiates the application of the ADA and related laws for people in prison, probation and parole and makes the State of Queensland a protected defendant in relation to such actions. Under no circumstances should the State or its Agents be protected against complainants alleging discrimination, sexual harassment, vilification or victimisation. QAI is concerned that people with disability are disproportionately affected by the criminal justice system and these provisions further entrench disadvantage and recommends the removal of these provisions in their entirety.

[10] [2019] QIRC 059, at [36].

Recommendations:

- **Remove outdated exemptions from the ADA, including but not limited to:**
  - **Discrimination in the areas of insurance and superannuation on the basis of age and impairment;**
  - **Discrimination in working with children (section 28);**
  - **Limitation of the application of section 46 to assisted reproductive technology services (section 45A);**
  - **Discrimination in accommodation for use in connection with work as a sex worker (section 106C);**
  - **Extend protections against discrimination to include the work of not-for-profits.**

- **Make consequential amendments to remove Part 12A (sections 319A to 319ZL) of the *Corrective Services Act 2006* (Qld).**

2. Expand who is protected

The Ten-Point Plan states that the list of 15 attributes protected by anti-discrimination laws in Queensland, and far fewer attributes protected against vilification and harassment, is not sufficiently comprehensive to ensure protections for many other people who may also need anti-discrimination law protection. There is currently no way to expand the list of attributes other than by Queensland Parliament amending the legislation. The Plan also states that some people are discriminated against because they have more than one protected attribute or because of the way certain attributes combine (intersectionality). The current law does not respond to this at all.

The Plan references examples of other jurisdictions where the law allows people to combine attributes to where they experience intersectional disadvantage. These include, for example, in the Canadian law where discrimination '...on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds is also unlawful ...', and in the United Kingdom where it is unlawful to discriminate against someone '... because of a combination of two relevant protected characteristics'. QAI supports such an intersectional approach to attributes as the issue of intersectionality and inter-categorical grounds for discrimination is very pertinent when considering the circumstances of people with disability.

The Plan contemplates the addition of additional attributes which QAI considers beneficial, including providing protections for domestic violence victims, irrelevant criminal history and irrelevant medical record.[11] Adding such specific attributes would aid in the public awareness about discrimination on these bases, but the ADA should go further by allowing discretion to respond to additional attributes in the future. Drafters of any law are unable to anticipate all future manifestations of discrimination. For example, Queensland Parliament in 1991 could not have anticipated the NDIS, however an accommodation or service provider now may well see participant status as providing greater financial security and discriminate on this basis. A non-exhaustive list of attributes is also consistent with the HRA and with Article 5 of the United Nations International Covenant on Civil and Political Rights.

In addition to adding attributes and potentially making a non-exhaustive list, the definitions of some attributes should be reconsidered such as to include family responsibilities for carers outside of immediate family and non-binary gender identities.

[11] This is protected in the Tasmanian *Anti-Discrimination Act 1998* and would provide protection to people who are taking preventative medication such as Prep or vaccinations generally.

The Ten-Point Plan states that the law should allow people to combine attributes to protect people experiencing intersectional disadvantage. There are solutions to this in Canadian law where discrimination "...on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds is also unlawful...", and in the United Kingdom where it is unlawful to discriminate against someone "... because of a combination of two relevant protected characteristics".

Recommendations:

- **Expand the attributes listed in section 7 of the ADA to include:**
  - **Victims of domestic and family violence;**
  - **Irrelevant criminal record;**
  - **Irrelevant medical record;**
  - **Non-binary gender identities; and**
  - **In the definition of family responsibilities in sub-section 7(o), amend the definition as follows: "family responsibilities, including responsibilities to a person who is not within the person's immediate family, but for whom the person provides care or support that is required by that person".**

- **Amend section 7 of the ADA to provide that the list of attributes is non-exhaustive.**

- **Amend the ADA to allow a combination of attributes to protect people experiencing intersectional disadvantage.**

3. Make it easier to access adjustments and flexibility

The Ten-Point Plan states that other jurisdictions have modernised provisions about adjustments and special facilities. For example, most European countries use human-rights language to help find the proper balance. Instead of focusing on cost and 'reasonableness', they say indirect discrimination (imposing standard conditions that unfairly disadvantage people with particular attributes) is unlawful unless it '... is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. This still makes for complicated law but, if it is correctly applied, it ensures that decision-makers are asking themselves the right questions about inclusion and substantive equality and that they are taking a globally accepted human rights approach. QAI recommends following a human rights approach to proportionality along the lines of that taken in the HRA.

Disability, behaviour and reasonable adjustments

From a disability perspective, there is the added challenge of knowing whether a reasonable adjustment or accommodation is adequate to the specific needs of the person with disability and whether there is a commitment to continually reviewing its adequacy. The discussion below is provided to demonstrate the complexities of determining reasonable adjustments for children and young people with disabilities who are said to exhibit behaviours of concern in educational settings.

The conceptualisation of such "behaviours of concern" warrants analysis. It is QAI's position that the behaviour of people with disability is frequently misunderstood by people without disability and that this plays a significant role in contributing towards detrimental consequences such as school disciplinary absences. It is imperative for steps to be taken to try to understand a person's behaviour by understanding their experiences

and history, including the quality of current and previous support arrangements and instances of abuse and neglect. People with intellectual impairments often face significant difficulties communicating and this can be aggravated in situations in which they feel unsafe, threatened or disempowered. Behaviour is usually part of a process of attempted communication that has escalated as a consequence of a failure by the service provider to respect the rights of the person to autonomous choice and respect. It is not always easy to get this right – even family members with the best intentions can make mistakes no matter how well they know the person. Measures must be introduced to ensure behaviour is not interpreted out of context or incorrectly labelled as unprovoked aggression or lack of cooperation, with discriminatory outcomes.

When behaviours of concern are exhibited, what is needed is a better understanding of the functions of behaviours of concern and the individual needs of the person and interventions that address those functions and needs.

The ADA can play a role in enhancing this understanding through reforming the comparator and redefining direct and indirect discrimination and including a positive duty to make reasonable adjustments.

The report from the 2020-2021 review of the Disability Standards for Education found that:

> *Educators and providers also expressed a desire for more technical information and guidance on how to develop effective reasonable adjustments. Educators expressed that the current support material do not help where there is disagreement about what an appropriate or reasonable adjustment is;*
>
> *Providers called for a clearer range of illustrative examples, including precedents arising from actual complaints processes. They stated that these would better inform best practice and clarify the boundaries of their obligations.*

These findings may be a useful adjunct in considering amendments to ADA in relation the matter of reasonable adjustments and positive duties.

The seminal High Court decision in the case of *Purvis* v *New South Wales*[12] exemplifies the deficits of equality by same treatment and the need for a more proactive approach to addressing the interaction between disability and environment, that includes the provision of reasonable adjustments. Since the *Purvis* decision, the 2009 amendments to the DDA include the failure to make reasonable adjustments for people with disability as a recognised form of disability discrimination.[13]

Yet in considering the application of this provision, the Courts' focus has remained on the reason for the less favourable treatment, rather than on the impact of the treatment on the person with disability. This narrow interpretation of the test for direct discrimination has led to a narrow interpretation of reasonable adjustments, which focuses on the disability in separation from its characteristics, insofar as they manifest in particular communications and behaviours. This approach to focussing on the reason for the less favourable treatment without considering the characteristics of the person's impairment, and consequently failing to consider reasonable adjustments to extend to those that accommodate behaviour caused by the disability

[12] (2003) 217 CLR 92.
[13] DDA, sub-section 5(2).

(even in circumstances where the connection between the disability and behaviour is clearly established on the evidence), is highlighted in the Federal Court decision of *Connor v State of Queensland*,[14] discussed further below.

Further, the decision of the Full Federal Court in *Sklavos v Australian College of Dermatologists*[15] created further challenges to the application of the reasonable adjustments provisions, that have prompted calls for reform to the DDA (these calls are currently the subject of a Law Council inquiry, which is proposing to advocate to the Commonwealth Government to amend sections 5 and 6 of the DDA to clarify that there is a general duty to make reasonable adjustments, subject to those that would cause unjustifiable hardship, in light of the *Sklavos* decision). In *Sklavos*, the Court held that for a right to a reasonable adjustment to be enforceable, the person with disability must show not only that they are disadvantaged by the failure to provide the adjustment, but also that the failure to provide the adjustment was caused by the person's disability.

In their submission to the Committee on the Rights of Persons with Disability in 2019, the Australian Human Rights Commission noted:

> *The duty to make reasonable adjustments under the DDA is narrower than the reasonable accommodation duty provided by the CRPD and explained by the Committee in General Comment No. 6 (2018). Under the Australian Human Rights Commission Submission to the Committee on the Rights of Persons with Disabilities – 25 July 2019 11 DDA, a failure to provide a reasonable adjustment, may amount to direct disability discrimination or indirect disability discrimination. The Commission is concerned that the decision of the Full Federal Court in Sklavos v Australian College of Dermatologists [2017] FCAFC 128 (Sklavos decision) narrows the scope of the duty to make reasonable adjustments under the DDA, by introducing a requirement that the disability of the aggrieved person be a reason for the failure to make reasonable adjustments, in order for it to amount to direct discrimination. It is the Commission's view that this additional requirement is too onerous. It is also contrary to Article 5 of the CRPD, as clarified by General Comment No.6, which provides that any denial of reasonable accommodation, no matter the reason for the denial, is a form of disability-based discrimination.*
>
> *The Commission has recommended that the Australian Government amend the DDA to address the implications of the Sklavos decision by creating a new standalone provision in the DDA that provides for a positive duty to make reasonable adjustments unless doing so would involve an unjustifiable hardship.*

It has been proposed that the DDA be amended by the inclusion of a general duty, in the form of a standalone provision, to provide reasonable adjustments and rendering the failure to provide reasonable adjustments unlawful discrimination. We support the inclusion of an equivalent, positive obligation provision in the ADA.

Recommendation:

- **Amend the ADA to include a duty to make reasonable adjustments, with the failure to make reasonable adjustments an independent ground of unlawful discrimination.**

The Ten-Point Plan also proposes that any refusal to accommodate or adjust for a person with a protected attribute is unlawful unless it is strictly necessary to impose the standard, condition or requirement without adjustments. The Plan suggests that this is quite straightforward and easy to understand, which reduces

[14] [2021] FCAFC 21.
[15] [2017] FCAFC 128.

complexity and legal costs for everyone involved. Queensland's HRA uses this factor in its balancing test for compatibility.

Disability and unjustifiable hardship

The test for unjustifiable hardship has the capacity to erode equality for people with disability as it places the individual requiring adjustments against a financial balance sheet without recognising the broader social benefits of inclusion. Many adjustments come at a cost with intangible immediate benefits. QAI is aware of instances where an Auslan translator has been requested to assist a deaf student to access education and denied on the basis of cost. What is not calculated in this equation is the benefit to all of the children in the class of growing up familiar with Auslan and having the potential new friend fully integrated into their classroom.

The CRPD talks about universal design as being *"the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialist design."*[16] Such universal standards do not require an individual to prove the adjustment is worth the cost and are a preferable approach. An example here is the Disability Standards for Education.[17]

The concept of unjustifiable hardship has been developed through caselaw that would be better explicitly entrenched in law. The case of *Cocks v State of Queensland*[18] required that the nature of the benefit to those with mobility impairment must be weighed against the detriment to the respondent. This proportionality test included consideration of the **equal dignity and worth** of people with mobility impairment as members of the community. Explicit articulation of this test in the ADA would assist with consistent interpretation in subsequent cases. It would also be useful to incorporate reference to any relevant standards in the definition of what is justifiable, to mandate consideration of universal design.

Recommendation:

- **Amend the definition of unjustifiable hardship in the ADA to explicitly include consideration of:**
  - **The equal dignity and worth of all people concerned**
  - **Standards set by relevant bodies[19]; and**
  - **The benefit to society as a whole of equal treatment.**

The following case studies are provided to highlight the significant impact the implementation of reasonable adjustments can make. In QAI's experience, there is a lack of understanding of what appropriate reasonable adjustments are in the education setting, and obtaining appropriate adjustments can be the result of a significant amount of work. Even where they are provided after protracted advocacy and, unfortunately, the imposition of discipline and periods where the student is suspended from school and loses educational opportunities.

[16] UN CRPD, Article 2.
[17] In Access For All Alliance [2004] FMCA 915, Baumann FM accepted that Australian Standards were relevant in determining what was justifiable in the placement of wash basins outside public toilets.
[18] *[1994] QADT 3.*
[19] Which could potentially be included in a Schedule.

Case study – Delilah*

Delilah is a young indigenous student in year eight at a Queensland High School. Delilah didn't received adjustments in primary school and was only diagnosed with Autism Spectrum Disorder at the end of primary school. Delilah has difficulties concentrating on tasks that she finds too difficult and avoids authority figures by leaving class and spending time in the toilet block and on the oval.*

The school had recorded over 70 'incidents' of Delilah leaving class in the last year. The school had tried different strategies such as a modified timetable, behaviour booklets, detention, and short suspensions. At the time of seeking assistance from QAI's Education Advocacy Service (EAS), Delilah's engagement with school had been declining and more individualized supports were required. Delilah's mother felt as though she had been supportive of the school's attempts so far, however they were not working and she wanted them to engage with specialist supports.
Through proactive advocacy, reasonable adjustments tailored to Delilah were developed and implemented. These adjustments were frequently reviewed and a personalised approach was taken. Delilah ultimately went on to thrive at school and the behaviours of concern ceased. However, without the implementation of personalised and appropriate reasonable adjustments, the outcome for Delilah would likely have been very different.

** Name has been changed*

Case study: Daniel*

Daniel is a senior and attends school via distance education. Up until year 11 Daniel had a modified education plan with adequate supports in place to support his speech and language challenges. Daniel transitioned into senior school and it wasn't until the end of term 1 when it was identified that he no longer had the support / modifications that he required. Daniel struggled through the year with his mother attempting to communicate with the school about the modifications required. Unfortunately, Daniel and his mother received very little communication in response to their enquiries. Protracted, proactive advocacy was required to call for the adjustments required.

** Name has been changed*

As the final case study highlights, many Queensland students experience adverse outcomes that can be attributed to a lack of understanding of the characteristics of their disability and the implementation of reasonable adjustments at an appropriate time.

Case study: Andy*

Andy is a young indigenous student in year eight who had been permanently excluded from his school in North Queensland following an incident of verbal and physical escalation. Andy and his mother felt that the incident occurred as a result of a disruption in his daily routine and a lack of preparation around the changes. These are known triggers for Andy due to his disability – intellectual impairment and Autism Spectrum Disorder. Despite the COVID related disruptions in 2020 Andy and his mother considered that his transition to high school had been successful. Andy wanted to return to the school as he felt they had been supportive of him.*

Following extensive advocacy, the Principal's decision was amended to an exclusion from the school for a period of four (4) months.

Unfortunately, when the exclusion period ended, Andy was not able to easily re-enroll at the school, due to concerns of teachers at the school. Very limited educational support and tools were provided to Andy during this period, and he missed 4 months of schooling.

** Name has been changed*

4. Remove the requirement to compare how people are treated

The Ten-Point Plan calls for removal of the comparator as the test for direct discrimination, positing the limitations of comparing unfavourable behaviour, the difficulties of identifying an appropriate comparator and the way in which this creates barriers for people accessing justice.

The decision in *Purvis*, discussed above, has been referenced over the past two decades as guidance for the application of the comparator test in the context of direct disability discrimination. Since the decision in *Purvis*, the DDA has been amended, including by the expansion of the definition of "disability" to include "characteristics of disability", which was specifically noted to include behaviour that is a symptom or manifestation of the disability (this particular amendment was in response to the majority judgment in *Purvis* that separated the disability from its symptoms or manifestations).[20]The enduring precedent of *Purvis* insofar as the comparator test is therefore now limited. Yet its enduring influence continues to be substantive.

In *Woodforth v Queensland*,[21] the Queensland Court of Appeal distinguished Purvis, noting that the effects of s 8 and 10 of the ADA proscribed discrimination on the basis of a characteristic of an impairment or disability (which the DDA, prior to the 2009 amendments, did not).

Yet the difficulties of distinguishing between the person's disability, and the manifestations of the disability, have continued. The case of *Connor v State of Queensland*[22] illustrates the enduring difficulties created by the comparator test, notwithstanding the law reforms since *Purvis*. In the Federal Court,[23] Rangiah J applied the majority view in *Purvis*, finding that the appropriate comparator for a student with a disability that manifested in particular behaviours who was suspended because of his behaviour was a student without the complainant's disability who had engaged in similar behaviour and was treated in the same way, and this decision was upheld by the Full Federal Court on appeal. Notwithstanding the acceptance of the way in which certain disabilities manifest in behaviour, the courts have maintained that the appropriate comparator is a person without the disability but with the manifestations of the disability. The artificial separation of disability and its characteristics remains ingrained in the caselaw, and poses significant obstacles to complainants. It is clear that the Courts remain concerned to determine whether identified problematic behaviour is attributable to the student's impairment, as understood in a medical sense, or as a consequence of the school's failure to appropriately support and accommodate the student. This binary approach, focusing on pinpointing a causative factor, fails to appreciate the complex and interactive nature of disability, as understood by the social model.

[20] The DDA was amended in 2009, by the extension of the definition of "disability" in s 4(1) to include "behaviour that is a symptom or manifestation of the disability".
[21] [2017] QCA 10.
[22] [2021] FCAFC 21.
[23] *Connor v State of Queensland (No 3)* [2020] FCA 455.

Similarly, in the 2020 case of *Petrak v Griffith University,*[24] in which the construction of the comparator was the determinative factor, the Queensland Civil and Administrative Tribunal (QCAT) Tribunal gave detailed consideration to the construction of an appropriate comparator, finding that, by analogy with the High Court's reasoning in *Purvis*, it can be appropriate in some cases to identify and assess the reason for the treatment before the comparator can be constructed. Following this line of reasoning, and fatal for Ms Petrak's claim, the comparator constructed in this case was another student, without the relevant attributes, who needed adjustments in the timing and manner of her university assessment submissions and failed to provide sufficient relevant supporting documentation. It is notable that this is a Queensland case post-*Woodforth,* demonstrating that, despite the analysis provided by *Woodforth,* the changes to approaching the comparator have not been universally accepted.

We note also the QCAT decision in *BB v State of Queensland*,[25] in which the Tribunal distinguished between incidents and characteristics of behaviour to define the comparator as a misbehaving student without the impairment, notwithstanding that the Tribunal found that the behaviours were characteristics of the student's impairment.

Concerningly, the enduring impact of *Purvis* seems particularly influential in the caselaw on disability discrimination within educational settings, as compared with other spheres of activity. The focus of the courts is on identifying the reason why the student was treated less favourably (whether this was because of their behaviour or because of their disability *causing* their behaviour), thus enforcing the separation of disability and behaviour caused by disability, rather than on whether the student was treated unfavourably.

It is concerning that the decisions of *Petrak* and *BB* are Queensland decisions made after *Woodforth,* and on the basis of laws that align with the DDA post-2009 amendments (which effectively rendered the *Purvis* separationist approach obsolete). This suggests a lack of understanding of disability, particularly "invisible" disabilities that impact intellect, cognition and behaviour, and the perpetuation of stereotypes around particular types of disabilities. In the educational setting, it may also point to the enduring impact of the segregated educational framework, which fosters beliefs challenging the appropriateness of including students who require reasonable adjustments to their environment to thrive.

The Ten-Point Plan highlights alternatives to the use of the comparative model. In Victoria, for example, it is unlawful to treat someone 'unfavourably' because of a protected attribute, rather than 'less favourably'. It is still necessary to prove mistreatment because of a protected attribute, but there is no need to compare that treatment to someone else. This is fairer and much easier to understand and apply. Given the practical difficulties for decision-makers in constructing a hypothetical comparator have been noted in the case law, it would be expected that an easier test would be welcomed by all stakeholders. Most importantly, the certainty and fairness offered by this model are compelling.

In some other countries, the anti-discrimination law talks instead about '... imposing burdens and disadvantages on', and '... withholding benefits and opportunities from people...' with protected attributes without any need to demonstrate how people without protected attributes experience similar situations.

[24] [2020] QCAT 351.
[25] [2020] QCAT 496.

The comparator test and intersectionality

As the above decisions exemplify, the construction and use of the comparator in anti-discrimination legislation is significantly more complex for claims of disability discrimination than for other grounds.[26] The use of a comparator(s) in complaints on more than one ground, or in representative cases, adds further complexity.

Challenges include identifying and assessing the unfavourable treatment in the context of acknowledging the compounding effects of discrimination for people experiencing multiple forms of disadvantage.[27] The comparator test is an ill-fitting and inadequate tool. Approaches taken in other jurisdictions to deal with intersectional discrimination through the vehicle of the comparator test have proved complex and resource-intensive.[28]

An attempt to identify or construct a single comparator when determining a claim of discrimination made on multiple grounds is to fail to appreciate the nature and impact of intersectional discrimination. As Atrey notes, the question becomes for example, in a complaint brought forward by a woman with disability from a refugee background on the grounds of *impairment* and *race* and *gender*, would a white male with a disability as a comparator adequately recognise the binaries of ethnic minority-dominant group and male-female?[29]

As noted above, we support amendment to the law to allow people experiencing intersectional disadvantage to combine attributes. That the use of the comparator is particularly problematic in this context points to problems with the comparator, not intersectional claims.

There is a convincing body of evidence that in dealing with complaints based on either a single grounds of discrimination or on multiple or intersectional grounds of discrimination including disability, the requirement may bring unnecessary complexity and require a resource-intense process. The removal of a comparator requirement will provide a simpler approach, particularly where grounds of disability are included.

Recommendation:

- **Remove the comparator requirement from the ADA.**

[26] Waldeck, E. & Guthrie, R. 2004. Disability discrimination in education and the defence of unjustifiable hardship. School of Business Law & Taxation, Curtin Business School.

[27] For a discussion of critical disability theory, including an inter-sectionalist analysis identifying the sources of oppression and marginalisation facing people with disability and the intersection of race, class, gender and disability, see: Goodley, D. 2013. Dis/entangling critical disability studies. *Disability & society,* 28**,** 631-644; Hirschmann, N. J. 2012. Disability as a New Frontier for Feminist Intersectionality Research. *Politics & gender,* 8**,** 396-405; Erevelles N. & Minear, A. 2010. Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality. *Journal of literary & cultural disability studies,* 4**,** 127-145; Schiek, D. 2016. Intersectionality and the notion of disability in EU discrimination law. *Common market law review,* 53**,** 35.

[28] See, for example, the contextual comparison model adopted in South Africa which takes the approach of first delineating the grounds of differentiation with the help of comparators who do not share one, some or all of the personal characteristics of the complainant, then establishing the unfair impact on the complainant by reference to the relatively privileged position of the comparator grounds from a range of contextual, historical, testimonial, anecdotal or statistical evidence. Note also the approach taken to intersectionality by US courts, limiting claims to two grounds ("sex-plus" or "race-plus"), with discrimination establish through strict comparison: Atrey, S. 2018. Comparison in intersectional discrimination. *Legal studies (Society of Legal Scholars),* 38**,** 379-395, at 393.

[29] Atrey, S. 2018. Comparison in intersectional discrimination. *Legal studies (Society of Legal Scholars),* 38**,** 379-395.

5. When Unfair Treatment happens, make respondents show it was not discrimination

The Ten-Point Plan proposes that amendments to the Act should partially reverse the onus of proof and make the person who engaged in the mistreatment explain themselves and their reasons. Australian employment law has an example of this. The Plan notes that under the *Fair Work Act 2009* (Cth), if a person can prove they were negatively treated in particular ways and that they had a protected attribute (or other relevant protection), then the 'onus of proof' shifts. The person who had responsibility for the treatment being complained about, usually the employer in that context, then has the responsibility of explaining why they did it and how their reasons are not discriminatory or otherwise unlawful. Having a reverse onus of proof in Queensland law would mean that we would not need to rely so much on assumptions and instead hear real evidence about reasons.

QAI supports the approach in the *Fair Work Act 2009 (Cth)* and submits that similarly the onus of proof should rest with the respondent to show why their actions were not for a discriminatory reason. The insidious nature of unconscious bias pervades the areas of public life covered by the ADA. More sophisticated respondents are particularly unlikely to explicitly state (or even recognise) discrimination in their actions. However, the results of such bias are evident in the inequities in society.

Looking particularly at the employment of people with disability, the Australian Human Rights Commission in 2016 highlighted that 50% of Australians with a disability are employed, compared to 84% of Australians without disability, a figure that has not changed for close to 30 years. The rate of full-time employment for people without disability is twice as high as those with disability. The Disability Royal Commission in 2018 found that people with disability have less than half the median gross income as those without disability. The number of people with disability in the labour force has fallen 3% over the past decade and risen 23% for those without disability. Australia ranks 21 out of 29 OECD countries for employment rates of people with disability. This is despite the fact that people with disability tend to be more committed and willing to work and have capacity to perform a wide variety of jobs.

It is only by reversing the onus of proof and asking employers and potential employers, as well as educators and potential educators, gatekeepers to goods and services, etc, to explain why they did not employ, enrol, admit or assist the person with disability that this will start to change culture and cause unconscious and conscious bias to be placed in the spotlight. It is time to stop asking people with disability to bear the burden of proving something that goes on behind closed doors, a process they can only guess at.

Where there has been an instance of discrimination, the evidence for this is usually in the knowledge or physical possession of the respondent. For example, in the employment space, notes of shortlisted candidates and interviews will be maintained by the respondent but inaccessible to the complainant.

For these reasons, once the complainant has demonstrated the applicable attribute and area the onus of proof should shift to the respondent.

Recommendation:

- **Reverse the onus of proof in the ADA so that the complainant must demonstrate the attribute and area and the respondent must demonstrate that the less favourable treatment was not for a discriminatory reason.**

6. Spell out the positive change we want to see in Queensland

The Ten-point plan states that there are a range of ways that positive statements can be included in law to encourage people to behave in particular ways. The Plan suggests that the best positive statements are written as duties, and there should be consequences for non-compliance with those duties—even where harm is not yet caused to anyone.

The Ten-Point Plan suggests that positive duties in Queensland should include a duty to:

- make reasonable adjustments for people with disabilities, older persons and others
- maintain a policy and provide training to prevent and stop sexual harassment in controllable environments such as schools and workplaces
- monitor and take down hateful and racist speech that is posted to social media and similar places.

At a Federal level, the DDA allows the Minister to develop disability standards which allow a proactive approach. This has led to broad changes across a range of industries, including education and construction. The Disability Standards for Education were reviewed in 2020-2021 and the report from the review provides findings which could be considered to benefit the review of the ADA and assist in developing a more positive approach. Findings from the review included that:

- the common theme underpinning successful outcomes relationships built on respect, and the value placed on the individual student's ability and viewpoint
- Investment in consultation and early resolution of issues is important.[30]

The findings from the review of the Disability Standards for Education can be used to formulate positive responsibilities, such as:

- proactively fostering inclusive engagement with people with disabilities and their families to reach decisions; and
- providing accessible information about feedback and complaints mechanisms (using the language, mode of communication and terms that people with disability is most likely to understand) to ensure issues can be identified at an earlier stage.

In the employment context, the continually reported occurrences of disability discrimination indicate the need for better education across the community and industries, especially with employers, and the need for a more effective means of changing employer attitudes.[31]

Internationally, contemporary equality legislation seeks to promote a proactive mainstreaming approach using positive responsibilities to oblige public authorities to promote the rights of people with disabilities, and

[30]https://www.dese.gov.au/disability-standards-education-2005/2020-review-disability-standards-education-2005/final-report.

[31] Data from the QHRC shows that in the 2020-2021 period 37% (80) of all accepted discrimination complaints on the ground of impairment (216) are related to work: QHRC Annual Report 2020-21.

extend the principle of reasonable adjustment and accommodation requirements and are in essence preventative.[32] In the UK there is compliance regime for ensuring that the objectives of the positive duties are being met. (The UK enforcement framework is discussed below in section 9.)

Recommendation:

- **Amend the ADA to include positive responsibilities for public authorities and the private sector.**

7. People, especially children, need more time to complain

The Ten-Point Plan highlights the need to provide sufficient time for complaints to be submitted because people are highly reluctant to complain when they are still within the environment in which they are mistreated for fear of further mistreatment and victimisation. Additionally, many people who experience sexual harassment, discrimination or vilification are traumatised and mental illness is a common injury. These people need time to recover first before they can take legal action. The plan emphasises the too-short timeframes for young children who have been harmed because of discrimination to bring their claim or take legal action.

It is worth noting that in 2020-2021, of the total accepted discrimination complaints through the Queensland Human Rights Commission, about 47% (216) were brought on the ground of impairment, and about 9% (19) of these were in the area of education and likely these were in relation to children and young people.[33]

For a people with disabilities transferring from one service to another, particularly if it is a disability accommodation service, allowing time for selecting a new provider and ensuring that there is no suspension of supports during a transition may take more than a year. A complaint against the current provider would likely be put aside during this time of uncertainty.

Parents of school-aged children with disabilities attending schools in rural areas would have little chance of feeling that remedies would be likely in areas where there is only one school and allied health services for special needs students are likely provided through outreach without other options. In this environment a culture that supports complaint making is difficult to envisage… until perhaps the child has left that school. For some children whose parents are not supportive of a complaint but who suffer lifelong damage due to discrimination, the lack of capacity for the entirety of the valid time limit effectively precludes their raising their complaints at all. The DRC has demonstrated the need to raise issues relating to discrimination and the ability to effectively prove these years after the allegation arises.

For people with disability, there is a need to stay the time limit while they are without capacity to initiate proceedings in circumstances where there is no guardian that is ready, willing and able to act as the agent in their matter.

[32] O'Cinneide, C. 2005. Disability Rights in Europe. Bloomsbury Publishing (UK).
[33] QHRC Annual Report 2020-21.

Queensland law elsewhere recognises impaired capacity of people with disability and children, such as the *Limitation of Actions Act 1974* (Qld).[34] Until 2009, this also included people in prison.[35]

Finally, it is also relevant to note that internal complaint processes and attempts to informally resolve issues can be a valuable, but protracted, way of addressing discriminatory treatment, that occur prior to the lodging of a complaint. As the following case study demonstrates, even leaving aside the other factors noted above, internal delay can have the effect of rendering a complaint out of time.

Case study: Ruby

Ruby started prep at her local school in 2020. Ruby's mother first started to raise concerns about the appropriate supports and adjustments in relation to Ruby's diagnosis of Autism Spectrum Disorder for Ruby in 2020 without receiving an adequate response. This year Ruby started in year 1 and the lack of communication and supports from the school escalated. Ruby's mother attempted to raise these concerns with the school and regional office. The regional office suggested that Ruby's mother contact the EAS for assistance. The EAS Advocate attempted to resolve the concerns with the regional office without success. The EAS Advocate drafted and sent a formal complaint on behalf of Ruby to the Department of Education, requesting a separate regional office review the complaint due to the region's previous involvement. The Department decided to send the complaint back to the same regional office for an outcome. Despite numerous attempts to follow up the complaint and seek an outcome, it took 15 weeks for the regional office to provide a response.*

* Name has been changed

Recommendation:

- **Amend the ADA so that the time to complain is extended to at least two years. The time limits should be extended in a similar way to that provided under the *Limitation of Actions Act 1974* (Qld), including as articulated for prisoners prior to the 2009 changes.**

8. People who experience the same discrimination should be able to work together

As noted in the Ten-Point Plan, when the ADA was written, it contained representative action provisions designed to help drive systemic change and provide protections to groups in the community. This is because it is not possible to bring legal action every single time there is a breach of the law. Also, it is unnecessarily expensive to bring separate legal actions when a group of people have all experienced the same discrimination. However, these very important laws have not achieved their objective. The way they are drafted makes them nearly impossible to use effectively – they are complex and provide limited remedies.[36] This means more expensive legal actions, and outcomes are limited to only remedying individual situations.

The case of *Harris and Pyne v Transit Australia Pty Ltd and Queensland Transport*[37] is another which highlights the difficulty of achieving systems change through a complaints system which is largely individually focussed. The complaint was that the complainants were unable to use Transit's buses because they are quadriplegics.

[34] Section 5.
[35] *Corrective Services and Other Legislation Amendment Act 2009* (Qld).
[36] MacDermott, T. 2018. The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants. *International journal of discrimination and the law,* 18**,** 22-39.
[37] [1999] QADT 1 (25 February 1999).

Rather than an individual remedy, they sought relief in the form of an order seeking the introduction of low floor ramp buses to be acquired by Transit and sought to have their complaint dealt with as a representative complaint by the Tribunal following its unsuccessful conciliation. This request was defeated by lack of evidence identifying the class, and the case was ultimately progressed as two individual complaints.[38] The onus on the initial complainants to tender sufficient evidence, as required for a representative complaint, is unreasonable when the population group's characteristics are so diverse, and is a barrier for many representative complaints.

The capacity to bring a complaint as a relevant entity is presently limited to vilification complaints, in which there have been successful cases brought to combat systemic complaints by relevant entities. QAI recommends relevant entities also be authorised to bring discrimination complaints. This would be particularly powerful in complaints relating to systemic change, such as *Cocks v State of Queensland*.[39]The value of enabling representative organisations to bring discrimination actions was recognised in the case of *Innes v Railcorp (NSW)*.[40] We anticipate that this extension would be a powerful way of addressing systemic discrimination. For example, QAI recently provided advice on issues regarding road safety to a disability organisation. Such an entity would be well placed to complain about an issue to do with the building of accessible facilities or roads, rather than placing this responsibility on an individual person with disability.

Recommendations:

- **Introduce an accessible, simple process for representative complaints to be brought.**

- **Amend the ADA to allow complaints of systemic discrimination by relevant entities.**

9. An enforcement body to make sure anti-discrimination law is followed

The Ten-Point Plan states that the responsibility of eliminating discrimination currently rests entirely with people who have experienced discrimination. This is very onerous and many people give up some way along the long road to justice. We need a proactive, more powerful statutory body that is resourced and empowered to conduct investigations, enforce breaches of the laws, make sure all parties comply with agreed obligations or decisions, and make more rulings and reports. The Queensland Human Rights Commission or equivalent body should be given additional powers and resources it needs to take a properly active role in the elimination of unlawful discrimination, sexual harassment and vilification.

A model of enforcement

A model of anti-discrimination enforcement that also includes a strong educational responsibility may be found in the model on which the British Equal Opportunities Commission is based.

Dominique Allen provides a useful comparison of the Australian and (significantly different) British model for enforcement of anti-discrimination laws.[41] Allen notes that in the *Innes v RailCorp* case, if the AHRC had been

[38] H*arris and Pyne v Transit Australia Pty Ltd [2000] QADT 6* and *Harris and Pyne v Transit Australia Pty Ltd [2000] QADT 14.*
[39] [1994] QADT 3.
[40] Innes v Rail Corporation of NSW (No 2) [2013] FMCA 36 (1 February 2013).
[41] Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335, at 312.

able to take enforcement action the case may not have been litigated as it would have investigated the complaints and moved to seek enforceable undertakings from RailCorp make system changes which, if not acted upon by RailCorp, would have led to the AHRC would have issued a compliance notice with threat of civil penalty. Unfortunately the AHRC did not have such powers and the litigation burden was borne by the individual. By contrast, when the British Equal Opportunities Commission was first established it was expected to play a major role in enforcing the law in the public interest and given appropriate powers. The system which was developed was based on the framework represented by the equality enforcement pyramid as shown in this figure. (While Allen is discussing this model to be considered at federal level in Australia, it may also provide a model worthy of some consideration for state anti-discrimination entities.)

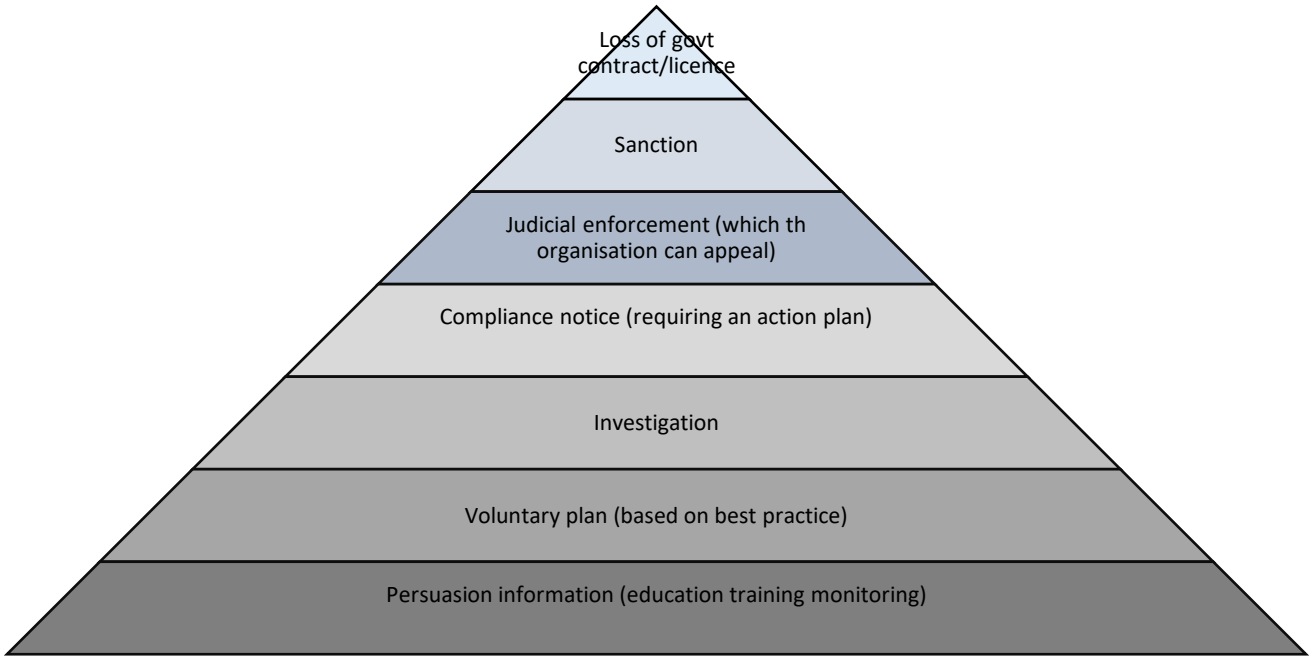

Figure 1 *Equality Enforcement Pyramid*.[42]

Allen explains that the lower two steps of the pyramid indicate where much effort is placed. It should be noted, however, that this model designed to guide enforcement does not include a complaints and conciliation function and other bodies are charged with handling the complaints process.

Allen proposes that dividing the complaint handling and enforcement functions is based on three reasons:

- To ensure that resources allocated for the express purpose of enforcements are not consumed by the complaints handling responsibilities
- To avoid conflict of interest that would arise if the one agency handles both complaints handling and law enforcement
- The existing agency would be re-cast as an enforcement agency sending a strong message.[43]

With this type of model, clarity about which of two agencies can or should be approached by an individual complainant is needed - the agency established to handle complaints through conciliation/dispute resolution

[42] Based on the work of Hepple, Coussey and Choudhury, cited in Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335, at 315.
[43] Allen, D. 2016. Barking and biting: the Equal Opportunity Commission as an enforcement agency. *Federal law review,* 44**,** 311-335.

or the enforcement agency which is likely in cases of significant public interest to pursue an investigation thus lengthening the time before an individual complainant is likely to see a resolution.

The report from the 2020-2021 review of the Disability Standards for Education found that:

- a common suggestion to address the issues of a lack of consequences and accountability was to have an independent body to handle complaints and to actively monitor providers' compliance with the Standards. This concept was raised by participants across all education sectors. Many participants advocated for this body to audit providers' compliance, with some suggesting that each provider be given a 'score' based on the audit's result. Some participants suggested that the remit of the AHRC be expanded to include this function, or that a new authority be established for this purpose.

- Participants felt that the current complaints-based mechanism used for compliance under the DDA has the effect of addressing individual situations (when issues or complaints are successfully raised and resolved) but does not readily support or drive systemic change. Additionally, proportionally few complaints progress through the formal process, limiting the lessons that can be learnt by the system as a whole.

Recommendations:

- **That the Queensland Government consider the option of creating and well resourcing an enforcement body (which may be the Queensland Human Rights Commission), having responsibility for anti-discrimination law enforcement and community education, and potentially separating out the function of complaints and conciliation to be handled by a separate entity.**

- **That in developing a stronger enforcement model, resourcing for any additional enforcement initiatives must not deplete resourcing required for ongoing education, training and monitoring functions.**

10. Have experts making decisions about anti-discrimination cases

The Ten-Point Plan emphasises that that lack of a specialist tribunal with an exclusive anti-discrimination jurisdiction in Queensland is problematic. Now, applications are dealt with by the Queensland Civil and Administrative Tribunal (QCAT) or, in workplace-related matters, the Queensland Industrial Relations Commission (QIRC). Both tribunals are generalist bodies covering wide areas of law, albeit more specialised in the QIRC. Even if we simplify the ADA, these cases are still legally, conceptually and factually complex.

Sometimes non-legal concepts like 'unconscious bias' or 'social construction' are put before the tribunal. There are often difficult medical questions, including psychiatric assessments, to digest, understand and apply as part of the decision-making process. Not all generalist decision-makers deal well with these complexities and sensitivities. The Plan puts forward options for addressing this gap in expertise within the structure for handling complaints.

Additionally, we note the value of expert evidence to inform decision-making in disability discrimination complaints in particular. In discrimination cases, an expert witness is generally one:

- who has knowledge, skill, experience and education/training and is thus qualified and able to explain information about a particular condition based on scientific research relevant to the case and are able to offer specialised knowledge; and/or
- one who can provide advice with regard to reasonable accommodations in relation to the case in ways that may best enable an entity to comply with the anti-discrimination laws.[44]

Disability expert clinicians/practitioners may be psychologists, neuropsychologists, allied health practitioners, mental health nurses with disability specialisation, behaviour management practitioners. We consider that further consideration should be given to the funding for expert evidence in appropriate cases, with a fund established to support complainants to obtain appropriate evidence.

QAI believes that there was a greater consistency and expertise in discrimination law when there was a specialised discrimination Tribunal. A return to this model would help to make discrimination law understandable and predictable for all parties.

Recommendations:

- **Re-establish the Queensland Anti-Discrimination Tribunal, or another specialist tribunal.**
- **Afford consideration to establishing a fund to assist complainants to pay for expert evidence in appropriate cases.**
- **Increase funding for specialist legal assistance.**

Other matters

Job Seekers

QAI is concerned that following the case of *Lyons v State of Queensland*[45] any potential impact of section 106 of the ADA is limited. In that case, a deaf juror was excluded from duty because of the requirement that an interpreter assist her. This was found not to be discrimination because the sole reason for excluding Ms Lyons was because of the *Jury Act 1995 (Qld)*. This case demonstrates a failure to comply with obligations under the CRPD and it has the effect that discriminatory laws can continue. A stronger precedent to protect against discriminatory laws is found in section 10 of the *Racial Discrimination Act 1975 (Cth)*, which preserves the principles of non-discrimination in the face of laws that purport to exclude or limit rights on the basis of race. The AHRC describe this law as follows:

> *Section 10 may operate to repeal racially discriminatory Commonwealth legislation enacted prior to the enactment of the RDA on 31 October 1975.60 Whether repeal of the inconsistent law has occurred will be determined on a case by case basis. Section 10 cannot, however, prevent the enactment of a discriminatory Commonwealth law after 31 October 1975 which expressly or impliedly authorises the discrimination notwithstanding the terms of the RDA.*[46]

[44] Millenson, D. 1995. The role of the expert witness in disability discrimination cases. *Optom Vis Sci,* 72**,** 338-342.
[45] *[HCA] 38*
[46] AHRC, 2016, Federal Discrimination Law, p34.

Enacting such a provision in the context of Queensland laws would need further clarification regarding any subsequent laws with discriminatory effect. QAI considers that any law with discriminatory effect should be made explicitly and reviewed regularly. A clear precedent for this process is found within the HRA, where laws that are in breach of human rights must be declared and reviewed. Given that section 15 of the HRA protects against discrimination, extending these provisions to the ADA is reasonable.

Recommendation:

- **Provide protections against laws with discriminatory effect and if future laws are discriminatory this must be explicit and reviewable.**

Guide, Hearing and Assistance dogs

As noted above, the definition for impairment in the ADA includes reliance on a guide, hearing or assistance dog, wheelchair or other remedial device. The ADA is more limited than the federal legislation in this regard, as it restricts the anti-discrimination protects only to animals certified under the *Guide, Hearing and Assistance Dogs Act 2009* (Qld) (GHADA).[47]

The DDA takes a more expansive approach to assistance animals, encompassing animals accredited under state or territory laws, by an animal training organisation organisation prescribed by regulation and animals trained to assist a person with disability to alleviate the effect of the disability, provided it meets the standards of hygiene and behaviour that are appropriate for an animal in a public place.[48] This latter form of certification was confirmed in the recent Federal Court decision of *Mulligan v Virgin Australia Airlines Pty Ltd*.[49]

Some of our clients have raised the issue of the inconsistency between the DDA and ADA in recognition of assistance animals. If ADA is not aligned with the DDA, this will cause confusion for people with disabilities and providers of goods and services alike, as they are still required to comply with the DDA even if the Qld law sets a higher standard of accreditation.

Recommendation:

- **Amend the ADA to align with the DDA and recognise animals that are trained to assist a person with a disability to alleviate the effect of the disability and meets standards of hygiene and behaviour that are appropriate for an animal in a public place.**

Job Seekers

The recent case of *Grimsey v Laketrend Pty Ltd*[50] has confirmed that job seekers are not adequately protected by the ADA. Many job seekers demonstrate initiative in canvasing for employment opportunities beyond listed vacancies. In many instances such efforts prove fruitful. However, the lack of legislative protection against discrimination in such endeavours will cause a loss of hope and determination to continue the often gruelling search for employment. This is particularly pertinent for people with disabilities who face a higher rate of unemployment due to negative stereotypes, unconscious bias and discrimination. QAI recommends that pre-employment protections against discrimination extend to persons seeking work including where there is no known job available.

[47] See section 9 and Schedule 1 of the ADA, and Schedule 4 of the GHADA.
[48] See DDA section 9.
[49] [2015] FCCA 157.
[50] [2022] QIRC 32.

Recommendation:

- **Extend protections against discrimination in work to all job seekers, regardless of whether a vacant position is advertised or available.**

Conclusion

QAI thanks the Queensland Human Rights Commission for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request. We support any actions the QHRC may take to engage directly people with disabilities to ensure their input to the review of the ADA in line with the principle of "nothing about us without us".