

Submission by



qai

Queensland
Advocacy
for Inclusion

Anti-Discrimination Bill 2024

To Department of Justice and Attorney General (DJAG)

28 March 2024

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (QAI) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the 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 guides our work and values.

QAI has been engaged in systems advocacy for over thirty five years, advocating for change through campaigns directed at attitudinal, law and policy reform.

QAI also provides individual advocacy services in the areas of human rights, disability discrimination, guardianship and administration, involuntary mental health treatment, criminal justice, NDIS appeals, and non-legal advocacy for young people with disability including in relation to education. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN). QIDAN members work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability in Queensland.

Contents

1. Introduction.....	4
2. Positive Duties.....	4
3. Exemptions.....	8
4. Definitions.....	9
5. Procedure.....	10
6. Areas of Public Life.....	13
7. Conclusion.....	13
8. Schedule 1 - List of QAI's Recommendations.....	14

Introduction

- 1 Thank you for the opportunity to make written submissions to the Department of Justice and Attorney General (**DJAG**) in relation to the reforms recommended in the Building Belonging: Review of Queensland's Anti-Discrimination 1991 Report (July 2022) (the **Building Belonging Report**), which are to be, in part, codified in the Anti-Discrimination Bill 2024 (the **Bill**).
- 2 On balance, QAI is supportive of the work that has been done to codify the recommendations of the Building Belonging Report into the Bill and the steps being taken to improve anti-discrimination in Queensland.
- 3 QAI does however hold some concerns about the Bill as drafted and how it aims to operationalise the recommendations in the Building Belonging Report. These concerns are the focus of this submission. Although QAI has focussed this submission on its primary concerns, a comprehensive list of matters QAI is concerned about in the Bill are set out in **Error! Reference source not found.**
- 4 For completeness and noting the concerns that we have raised in this submission, QAI is of the view that the passage of the Bill into law should not be delayed any further. Noting that the Building Belonging Report recommended a new Anti-Discrimination Act be drafted and passed into force by 1 July 2023,¹ it is important that the Bill is passed through Parliament as a matter of priority.

Positive Duties

Clause 12

- 5 QAI supports the inclusion of a clause in the Bill which creates (in conjunction with clause 18) a positive duty to make reasonable accommodations for people with disability. The making of accommodations and other affirmative measures are crucial to removing systemic discrimination and achieving substantive equality.
- 6 In clause 12 of the Bill, QAI notes that the terminology '*reasonable adjustments*' has been changed to '*reasonable accommodations*'. Recommendation 4.25 of the Disability Royal Commission (the **DRC**) was that the terminology '*reasonable adjustments*' should be changed to '*adjustments*'. The DRC's explanation was as follows:

¹ Building Belonging Report, page 20, Recommendation 1.1.

*'The focus would then be on whether there has been a refusal to make an adjustment, and if so, whether making the adjustment would impose unjustifiable hardship on the respondent.'*²

7 QAI supports the reasoning of the DRC and believes that this should apply to clause 12 of the Bill. Accordingly, QAI submits that clause 12 of the Bill should be titled '*accommodations*', rather than '*reasonable accommodations*' and that the term '*accommodations*' should replace '*reasonable accommodations*' throughout the Bill.

8 For completeness, QAI notes that the term used in the DRC's Final Report is '*reasonable adjustments*' and the term '*reasonable accommodations*' as used in the Bill are functionally similar.

9 Clause 12 of the Bill proposes to create a positive duty, that a person must make reasonable accommodations for people with disability and where such an accommodation is not made, must prove that the accommodation was not made because making the accommodation would impose an unjustifiable hardship on the individual. QAI is broadly supportive of this intention.

10 QAI is concerned however that the language used in clause 12(3) of the Bill may, when operationalised, create further ambiguity regarding the application of clause 12(3) for people with disability and the individuals supporting and representing them.

11 One of the key findings of the Building Belonging Report was that legal tests are too complex.³ The Building Belonging Report recognised that, in relation to discrimination law specifically, the legal tests are almost impossible to understand and apply, especially for people with disability who do not have legal representation.

12 We note that clause 12(3)(c) of the Bill refers to the '*feasibility and effectiveness*' of the accommodation made for the person with a disability. This language is superfluous and could worsen outcomes for parties required to engage with the reasonable accommodation obligation, for the following reasons.

(a) Firstly, the feasibility (i.e., the ease) of accommodating people with disabilities, particularly in a workplace, should not be a factor in deciding whether the person providing the accommodation is suffering unjustifiable hardship. Consistent with the substantive equality principles that underpin the Bill, we believe that people should be encouraged to actively and positively make reasonable accommodations for people with disabilities. The word '*feasibility*' has the potential to undermine and complicate the achievement of that purpose.

(b) Secondly, the word '*effectiveness*' is unnecessary in light of clauses 12(3)(d) and (e), which consider '*the effect on the person with disability*'. These provisions already

² DRC Report, Volume 4, page 308.

³ Building Belonging Report, page 70.

capture whether the reasonable accommodation is effective. We believe that the inclusion of that language has the potential to complicate the legal test and should be removed.

- (c) Thirdly, recommendation 5 of the Building Belonging Report does not refer to the feasibility and effectiveness factors that have been inserted into clause 12(3)(c) of the Bill.⁴ The Building Belonging Report does recognise that the consequences for the person required to provide the accommodation should be considered. We submit that the consequences for the person required to provide the accommodation are appropriately captured by clauses 12(3)(f) – (h), which consider the cost of the accommodation, the detriment to the person making the accommodation and a catch all provision for any other '*relevant matter*'.

13 Accordingly, QAI submits that clause 12(3)(c) of the Bill should be removed.

14 The foundations of the Bill are the principles of dignity and equality for everyone.⁵ The long title and preamble affirm that the quality of democratic life should be improved by respect for the dignity and worth of every person in society.

15 The Convention on the Rights of Persons with Disabilities (the **CPRD**) defines a '*reasonable accommodation*' as:

*'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to people with disability the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'*⁶

16 QAI submits that clause 12 of the Bill should include more factors in considering whether there is unjustifiable hardship on the person not making a reasonable accommodation, including:

- (a) any intersectional attributes that might provide further important context;
- (b) the potential benefit of the accommodation to the person with a disability, including their human rights; and
- (c) the potential future benefit of the accommodation for other persons with disabilities (i.e., the installation of a lift will ordinarily have a number of ongoing benefits for people with and without disabilities who attend that location, in addition to the benefits it may provide the person with a disability at the current time).

⁴ Building Belonging Report, page 21.

⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193 (DM Wells, Attorney-General).

⁶ United Nations General Assembly, CPRD art 2.

17 It is important that this provision considers the human rights and dignity of the person with a disability being impacted by this decision. It is important to go beyond just the effect of the accommodation and the cost of the accommodation and ensure that people are actively considering how the accommodations proposed to be made may improve and support the fundamental human rights of people with disabilities now and in the future. This is consistent with the purpose of the Bill and the definition of reasonable accommodations under the CPRD.

Clause 15

18 Similarly to clause 12, clause 15(5) of the Bill does not address human rights, dignity, or positive obligations in deciding whether a condition is reasonable in relation to indirect discrimination. In our view, those considerations could strike a better balance between the considerations for the person with a disability and the person imposing or proposing the condition, requirement or practice.

Clause 16

19 QAI supports clause 16(1) which includes affirmative measures to be taken to '*promote or realise substantive equality*'. However, we have some concerns about the test for affirmative measures for race. QAI commonly recruits for identified roles including Indigenous Advocates. The purpose of these roles is often intersectional, given our focus on disability. We do not want the 'sole purpose' test for race to limit our capacity to recruit, for example, Indigenous Advocates at QAI.

20 To remedy this, in relation to clause 16, QAI submits that:

- (a) the elimination of an existing substantive inequality should be included in this clause as the basis for implementing an affirmative measure; and
- (b) the sole purpose test in clause 16(3)(a) is too restrictive and will constrain use of the clause to promote substantive equality. This is because it would prevent consideration of other positive impacts that a measure may have in promoting or realising substantive equality, in the event that this promotion is not the '*sole*' purpose of the measure.

Clause 20

21 The DRC recommended that a positive duty to eliminate disability discrimination should be implemented through amendment to the *Disability Discrimination Act 1992* (Cth).⁷ In its recommendations on the language in the provision, the DRC included two important considerations which have not been included in the Bill, namely;

⁷ DRC Executive Summary, page 205.

- (a) the nature and extent of the person's consultation with any person with disability concerned; and
 - (b) whether the person has a disability action plan.
- 22 QAI submits that clause 20 of the Bill, which decides whether a measure is reasonable and proportionate for a person to comply with their positive duty under clause 19(2), should include the above-mentioned factors.
- 23 Information arising from consultation with a person with a disability is vital to ensuring that we achieve the purpose of the positive duty (that is, substantive equality). It ensures the principle of “nothing about us, without us”. To exclude this to simply commercial factors affecting the business or operations undermines the purpose of the Bill. Moreover, it makes sense for the provisions to include a reference to disability action plans which are covered by clauses 151 and 152 of the Bill. To the extent that an action plan has been implemented, it should become a relevant factor in determining whether the measures are reasonable and proportionate to comply with the positive duty to prevent discrimination.

Exemptions

Clause 65

- 24 Regarding Clause 65, QAI is of the view that the explicit provision exempting discrimination in situations of legal incapacity is unnecessary and inconsistent with the presumption of capacity under the *Guardianship and Administration Act 2000 (Qld)*. Decision making capacity is contextual, being decision, time and situation specific. All adults are presumed to have decision-making capacity at law until proven otherwise. The existence of a legal incapacity in one area of life, would not preclude decision making in another area of life. This exemption is far too broad to achieve any practical purpose. QAI contends explicit mention of legal incapacity could contribute to reinforcing undesirable stigmas associated with people with disability. Accordingly, QAI recommends the removal of this clause.

Clause 29

- 25 Many people with disability have to rely on services provided by religious bodies for health and disability supports. There are often thin markets for service provision and difficulty recruiting and retaining staff. Clause 29 of the Bill is an improvement on the current legislation and addresses many of the concerns held by QAI. However, QAI is concerned about the interaction between clause 61, 62, 29 and clause 22(2)(c) of the Bill which may widen the scope for

discrimination beyond the Building Belonging report or the more recent Australian Law Reform Commission recommendations.⁸

QAI submits that it is sufficient to protect the rights of religious organisations by permitting them to discriminate in making religious observance a genuine occupational requirement, and accordingly the protection in relation to dismissals is not required. We consider the existing caselaw of *Walsh v St Vincent de Paul Society of Queensland (No.2)* [2008 QADT 32] strikes an appropriate balance of these rights.

Clause 36 (2)

26 Clause 36(2) provides an important protection for the intersectionality of attributes. However, it is not clear why this protection would only apply to one exemption. We are concerned that the principles of statutory interpretation will mean that intersectionality is read to only apply to this exemption. QAI submits that the clause 36(2) qualification should be added to all relevant exemptions within the Act.

The State as Protected Defendant

27 The Bill proposes to amend the definition of protected defendants under the *Corrective Services Act 2006* (Qld). QAI is opposed to the State remaining a protected defendant under this Act. In this respect we support the recommendations in the Building Belonging report. Since the introduction of the *Human Rights Act 2019* (Qld) there is no justification for public entities to have enhanced protections from claims of discrimination, sexual harassment and vilification.

Definitions

Disability

28 There were a number of submissions in consultation for the Building Belonging Report that recommended the definition of disability should include addiction.⁹ Ultimately, the Building Belonging Report recommended that it would be beneficial to clarify that the attribute can extend to protection of people experiencing addiction, and that this could be achieved by a legislative note.¹⁰

29 QAI submits that if it is the intention of the definition of disability to protect people experiencing addiction, the definition should be amended to expressly include addiction. QAI believes that protecting people experiencing addiction is a pressing and important issue, which justifies why it should be included in the Bill as opposed to a legislative note. Expressly including addiction in the definition improves clarity of the legislation and carries greater force than including

⁸ Maximising the realisation of human rights: Religious educational institutions and anti-discrimination laws (ALRC Report 142, December 2023).

⁹ Building Belonging Report, page 270.

¹⁰ Building Belonging Report, page 271.

addiction in legislative note, which is only interpretive in nature. Moreover, if the definition includes addiction, the common law can play its role in interpreting the legislation, providing greater context and a deeper understanding for those who interact with this area of the law.

Accommodation

30 The definition of accommodation in the Bill does not specify whether this extends to people living on a watercraft or houseboat. Consistent with the goal of avoiding complexity and confusion (as recommended by the Building Belonging Report), we submit that a watercraft or houseboat should be added to this definition in the Bill.

Public entities

31 We believe that public entities should be included in clause 19. In QAI's view, if the intention is that public entities fall under the purview of this clause (which may be the case, considering the broad nature of its wording), we believe that public entities should be expressly included, to avoid ambiguity in the application of this clause.

Race

32 QAI submits that the definition of race should include physical appearance and language (including accent). The Building Belonging Report stated that people who experience discrimination because of cultural or religious tattoos or piercings will still be covered under the race and religious belief or activity attributes.¹¹ To ensure that it is clear that this intention from the Building Belonging Report is included in the Bill, QAI submits that the definition of race should expressly include these attributes.

Work and employer/employee

33 The definition of work in the Bill includes work on a voluntary or unpaid basis. QAI submits that the definition of employee should be consistent with this provision, rather than only applying to persons engaged under a contract of service.

Procedure

Positive injunctions

34 We note that the purpose of the Bill, and in particular the affirmative measures, is to move towards achieving substantive equality. Clause 199 currently allows interim orders to be made, but only to the extent that the order is to prohibit a person from doing an act that might prejudice an order the tribunal might make after a hearing. In light of the affirmative measures

¹¹ Building Belonging Report, page 328.

in the Bill, QAI believes that it is important that clause 199 also allows interim orders which uphold the positive duties contained in Part 3 of the Bill.

35 By way of an example, QAI is concerned that if a person with a disability requires a reasonable accommodation to be made, there is no ability for the person to obtain an interim order which ensures that the reasonable accommodation is made prior to the tribunal hearing the matter. By allowing for such interim orders to be made, the Bill could be more consistent with its purpose, the Building Belonging Report, and, more specifically the meaning of clause 199 which is to protect the complainant's interests.

Burden of proof

36 QAI maintains its position that the Bill should include a full reversal of the burden of proof. This would be consistent with the approach taken in the *Fair Work Act 2009* (Cth) and would be a more appropriate approach to ensuring positive change through the hearing process in the Bill.

37 In the event that the drafting remains substantially similar to what is currently proposed, QAI is of the view that it is vital that clause 212(2) in the Bill be amended so that the words '*...the tribunal may*' read that '*the tribunal must*'.

38 Recommendation 13 of the Building Belonging Report stated that the provision which adopts a shared burden of proof should be based on section 136 of the *Equality Act 2010* (UK).¹² That section reads as follows:

*'if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court **must** hold that the contravention occurred.'*

The use of permissive wording in clause 212(2), rather than the mandatory wording used in the UK provision upon which this clause is based, is a significant change which undermines the effectiveness of the provision and the shared burden of proof recommended by the Building Belonging Report.¹³

39 Given that the Building Belonging Report recommends that the provision is based on this language, QAI submits that the word '*may*' should be changed to '*must*'.

Complaints by representative bodies

40 Clause 103 of the Bill allows a representative body, such as QAI, to submit a claim on behalf of a person for vilification.

41 QAI submits that clause 104 should be amended to permit representatives bodies, such as QAI to submit similar claims in relation to discrimination. There are a number of individuals QAI

¹² Building Belonging Report page 203.

¹³ Building Belonging Report, page 24, recommendation 13.1.

engages with who complain of discrimination but for many reasons are not able to bring a complaint individually. Amending clause 104 to allow bodies such as QAI to complain of conduct impacting these people would improve access to justice. The case of *Cocks v State of Queensland* [1994] QADR 42 is an example of a discrimination complaint that could have been brought by a representative body as an alternative to an individually named complainant.

Consistency with federal legislation

42 The Building Belonging Report contains a number of recommendations which are intended to ensure greater consistency between federal, state and territory anti-discrimination laws.¹⁴ QAI is supportive of the Bill achieving consistency with other legislative drafting, provided that there is a primary emphasis placed on substantive equality, and that the drafting does not undermine this primary purpose.

43 Similarly, QAI is of the view that the Bill should, where possible, adopt recommendations from the DRC, where relevant to the drafting of the Bill.¹⁵ The DRC considered the issue of systemic discrimination against people with disability at length, as well as recommended a number of legislative changes to be made to the DDA. The recommended changes to the DDA were formulated following significant consultation with people with disability and those who provide them with support, over the four and a half years that the DRC was in operation. In consideration of the significant overlap between the DDA and the Bill, it would be logical for the legislature to have regard to the recommendations of the DRC when preparing the Bill, to ensure that, as far as possible, it is consistent with the DDA.

Interaction with other legislation

44 QAI is concerned by the inclusion of conduct that is '*authorised*' by another Act or an Act of the Commonwealth being included in clause 56(1)(a) of the Bill.

45 This would have the effect of permitted individuals who are in a position of authority being able to exercise discretionary legislative powers to discriminate in the exercise of those powers.

46 By way of example, a prison or parole officer may issue a 'lawful' instruction, authorised by relevant legislation¹⁶ which may nevertheless be discriminatory. Clause 56 may prohibit further examination of such discretionary government decision making. Similar statutory provisions authorising discretionary behaviour also exist in a range of legislation which governs the interaction between people with authority and vulnerable individuals, including school settings.

47 QAI is of the view that clause 56 should be removed or amended to expressly exclude the exercise of discretionary powers.

¹⁴ Building Belonging Report, pages 263, 265, 282, 365,

¹⁵ The DRC Report: <https://disability.royalcommission.gov.au/publications/final-report>

¹⁶ Section 5(a) *Corrective Services Regulation 2017*, section 200(1)(b) *Corrective Services Act 2006*.

Areas of Public Life

- 48 QAI is broadly supportive of the changes to areas of public life following the recommendations of the Building Belonging report. However, we are concerned about a particular gap in coverage whereby unions are using their significant authority and power to require their members to withhold services from individuals, resulting in discrimination. This area of public life is not covered by the current law or proposed Bill and should be included.
- 49 QAI is aware of a number of cases where teachers have been issued directives by their union not to supervise or instruct particular students who we know to have disabilities, even in primary school settings.

Conclusion

- 50 Although QAI has outlined a number of concerns about the Bill in this submission, QAI is committed to and supportive of the objectives that DJAG and the legislature are seeking to achieve through the operationalisation of the Building Belonging Report in the Bill.
- 51 If DJAG requires further assistance in its consideration of the Bill, or QAI is able to provide further assistance, please let us know.

Schedule 1 - List of QAI's recommendations

Clause reference in <i>Anti-Discrimination Bill 2024</i>	QAI concern
12	As discussed in the submission (see paragraphs 5 to 9)
12(3)(c)	As discussed in the submission (see paragraphs 10 to 13)
15	As discussed in the submission (see paragraph 18)
16(1)	As discussed in the submission (see paragraphs 19 and 20)
16(3)	QAI holds concerns about clause 16(3), specifically about the fact that affirmative action for race is more limited than the affirmative action provisions contained in the Bill for other attributes.
19	<p>QAI holds concerns that State and public entities appear to not be included in clause 19, which only applies to businesses and similar entities. In QAI's view, the State and public entities should be expressly included in this clause.</p> <p>Further, it appears unclear who carries the duties and how they can be actioned other than by compliance notices from the Queensland Human Rights Commission (the QHRC).</p>
29	As addressed in the submission (see paragraph 25)
32	Restrictions on employment for people who work with vulnerable people is regulated in other ways (such as through NDIS provider registration, aged care worker screening, Blue/Yellow Cards and professional registration). The inclusion of this provision may create confusion and a lack of consistency. QAI notes that the relatively subjective standard of <i>'psychological and emotional'</i> reasons is not replicated elsewhere and may impact on the supply of services to vulnerable people. It may also simply serve to further stigmatise individuals who would fall within the ambit of this clause. Accordingly, QAI recommends the removal of this clause.
36(2)	As addressed in the submission (see paragraph 26)
56(1)	As addressed in the submission (see paragraphs 44 to 47)
65	QAI is of the view that the explicit provision exempting discrimination in situations of legal incapacity is unnecessary. Existing legal frameworks already encompass this exemption and accordingly they do not need to be restated in the Bill. QAI contends that such explicit mention could

Clause reference in <i>Anti-Discrimination Bill 2024</i>	QAI concern
	inadvertently contribute to reinforcing undesirable stigmas associated with legal incapacities. Accordingly, QAI recommend the removal of this clause.
96(3) and (4)	QAI notes that clauses 96(3) and (4) of the Bill provide an additional defence for employers which is not currently included in the <i>Anti-Discrimination Act 1992</i> (Qld). QAI queries what is being achieved by including this additional defence.
103 and 104	QAI is of the view that clauses 103 and 104 should be amended to allow relevant bodies to bring representative complaints without needing to rely on a named individual.
134	Although the language in clause 134 has been brought across from the <i>Human Rights Act 2019</i> (Qld) (<i>HRA</i>), QAI is of the view that this limits the scope for individuals to be represented when attending a conciliation conference and prevents the QHRC from having regard to the wellbeing and impact on people with disabilities when determining whether they should be represented at a conciliation conference.
171	The HRA is no longer referenced in the functions of the QHRC as set out in clause 171 of the Bill. QAI is of the view that the HRA should be referenced and that the QHRC should be given a mandate to protect and promote human rights in clause 171, as the Australian Human Rights Commission has Federally.
199	As addressed in the submission (see paragraph 34)
212	As addressed in the submission (see paragraphs 36-39)
Definition of Attributes	QAI holds concerns that by including physical appearance in the definition of attributes, and limiting it to matters within choice, this may prevent other characteristics (for example, face tattoos for people of Maori heritage, or certain hairstyles associated with people from the queer community) from being captured by this definition. QAI also notes that the definition of attribute should also include addiction.
Definition of Accommodation	As addressed in the submission (see paragraph 30)
Definition of Disability	To include addiction (see paragraphs 28 and 29)

Clause reference in <i>Anti-Discrimination Bill 2024</i>	QAI concern
Definition of Employee	To align with definition of work (see paragraph 33)
Definition of Race	QAI is concerned that the definition of race, as drafted will not include matters that we know otherwise form an aspect of race, such as culture and features of a person’s appearance associated with culture. We are concerned that the new physical appearance clause which specifically excludes hair and tattooing might bleed into people’s understanding about protections for race. Additionally we are of the view that subsection (a) relating to colour should have some more physical items added, including hair, cultural clothing and cultural tattooing.