

Submission by



qai

Queensland
Advocacy
for Inclusion

Respect At Work and Other Matters Amendment Bill 2024

Stage 1 of Building Belonging Reforms

To the Community Safety and Legal Affairs Committee

26 June 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.

Introduction

Thank you for the opportunity to make written submissions in relation to Stage 1 of the reforms recommended in the Building Belonging: Review of Queensland's Anti-Discrimination 1991 Report (July 2022) (the **Building Belonging Report**), as provided for in the *Respect at Work Bill and Other Matters Amendment Bill (2024)* (the **Bill**).

QAI expresses disappointment that the implementation of the vitally needed reforms outlined in the Building Belonging Report have been split into two stages. Improvements elevating protections for one attribute (sex) above others is a splintered approach and lacks cohesiveness. QAI and other community organisations and individuals have spent many hours preparing submissions to the Building Belonging Report and a subsequent draft *Anti-Discrimination Bill 2024* that the Department of Justice and Attorney General (**DJAG**) released earlier this year. In our view, the culmination of these extensive consultations represent what Queenslanders see as respect in our workplaces and in public life more broadly.

QAI is nevertheless supportive of the changes proposed in this Bill, which implement some of the Building Belonging Report reforms. The Bill represents a step closer to a society where we are free and equal. We hope that Stage 2 of the reforms will not be far behind and that the modernisation of discrimination law in Queensland is completed in a timely manner.

QAI's submission recommends minor amendments to the Bill that would ensure consistency between federal and state anti-discrimination legislation. These recommendations are contained in Section 1 of the submission.

QAI's submission also highlights the changes that are welcome, and which improve the rights of people with disability in Queensland. This analysis is provided in the table in Section 2 of the submission.

Section 1 - Amendments required

1.1 Eliminate sex discrimination by amending definitions of discrimination

Much of the Bill aims to improve protections on the basis of sex, including enhancing protections against discrimination. In addition to gender-based discrimination, women with disabilities also face disability-based discrimination in the workplace and additional protections are vitally needed. However, the Bill in its current form is working with a broken definition of discrimination, as highlighted by the Building Belonging Report. Amendments to the definition of discrimination are therefore required to eliminate sex discrimination in workplaces for women, including for women with disability.

Currently, complainants seeking to demonstrate direct discrimination must prove that the treatment they received was less favourable than another person without the attribute in question, in circumstances that are the same or not materially different.¹ That is, it requires the comparison between the treatment of a person because of a protected attribute and the treatment of a real or hypothetical person without the attribute – the ‘comparator’.²

In practice, this test is “artificial, contrived, and creates barriers to accessing justice,” particularly for unrepresented parties.³ Its many challenges are summarised at length in the Building Belonging Report and QAI urges the Committee to revisit page 88 of the Building Belonging Report for further analysis.

Similarly, complainants seeking to demonstrate indirect discrimination has occurred must prove that a requirement or term imposed is unreasonable, is one that they cannot comply with because of their attribute and more people without the attribute would be able to comply with the requirement.⁴ This again involves a comparative approach, is difficult to explain and understand and presents a significant evidentiary burden, often preventing complainants proceeding to hearing.⁵

As many people who experience discrimination do so on both direct and indirect grounds, both definitions require change to function appropriately. Without some small but critical amendments to this Bill, Queensland’s anti-discrimination laws will remain impracticable and ineffective in protecting against discrimination in the workplace, including sex discrimination.

¹ Building Belonging Report, page 88

² Ibid

³ Ibid, page 89

⁴ Ibid, page 97

⁵ Ibid, page 98

Our primary position is to adopt the definitions of discrimination in the Building Belonging report.⁶ However improvements could also be made in the interim by changing the definition of discrimination from requiring less favorable treatment, to requiring unfavorable treatment. So rather than requiring complainants to demonstrate they have been treated *less* favourably than others, complainants would instead be required to demonstrate *unfavourable* treatment. The test for direct discrimination should therefore be redefined as a test of ‘unfavourable treatment’ with the requirement to prove that discrimination was ‘one of the reasons’ for the treatment. This would achieve consistency with other jurisdictions.

In relation to indirect discrimination, rather than requiring complainants to demonstrate that a term is one that they cannot comply with compared to others, QAI supports the Building Belonging Report recommendation that the complainant be required to demonstrate that the term *unreasonably disadvantages* them. The test for indirect discrimination should therefore be redefined as a test of ‘disadvantage’. This would also achieve consistency with federal legislation, see for example section 7B of the *Sex Discrimination Act 1984* (Cth).

1.2 Improve protections for women with disability

(a) Timeframes – extend the limitation period of 2 years to all attributes

Women with disability in the workplace need to be able to make a complaint that encompasses both their gender and their disability within the same complaints process. The Bill’s explanatory notes acknowledge ‘the complex reasons which may account for an applicant’s delay in making a sexual harassment complaint’⁷ and the Bill accordingly seeks to extend the timeframe for complaints based on alleged sex discrimination in the workplace from 1 to 2 years.

However, the same flexibility and accommodation is required for all discrimination claims, not just those based upon sex and in the workplace setting. There are a myriad reasons why a person with a disability, for example, may be delayed in making a complaint about an alleged contravention of the Act. This could be due to the person’s need for supported decision making, their lack of access to legal assistance and the inaccessibility of legal processes more generally.

⁶ Ibid, page 95

⁷ Explanatory Notes, page13

In order to ensure equitable access to justice, QAI therefore suggests extending the two-year limitation period to all other protected attributes in addition to sex.

(b) *Combined attributes – consider gender and disability combined*

Women with disability need to be able to be considered through an intersectional lens, rather than artificially dissecting their attributes to show causation. This can be done by amendments providing that discrimination is unlawful where it is based on a combination of attributes. A simple change to the definition of discrimination to include treating a person unfavorably because of one or more of the attributes or because of the effect of a combination of attributes would achieve this goal.⁸

(c) *Assistance Animals*

There is a lack of harmony between protections for assistance animals under Queensland *Anti-Discrimination Act (1991)* the *Guide, Hearing and Assistance Dogs Act (2009)* and the Commonwealth *Disability Discrimination Act (1992)*. So women in the workplace who rely on assistance animals can access their places of employment, the Anti-Discrimination Act (1991) should be amended to provide express protection for assistance animals, using a model that is consistent with the Commonwealth Disability Discrimination Act.⁹

1.3 Create a standalone duty for disability

People with disability in the workplace need additional protections in the form of a standalone duty to provide accommodations (also referred to as reasonable adjustments). This should be in addition to the protections provided through direct and indirect discrimination claims.

The Queensland Human Rights Commission proposed the following clause in their submission to on the Draft Anti-Discrimination Bill consulted on earlier this year and would satisfy this requirement:

Reasonable accommodations for people with disability

(1) A person (the first person) discriminates against a person with disability if:

- (a) the person with disability requests a reasonable accommodation; and
- (b) the accommodation does not impose unjustifiable hardship on the first person; and
- (c) the first person fails or refuses to make the accommodation.

⁸ Building Belonging recommendation 3.3.

⁹ Building Belonging, Recommendation 21.3.

Examples of what may be a reasonable accommodation –

1. A reasonable accommodation for a person with vision impairment may be buying a screen reading software for the person.

2. A reasonable accommodation for a person who uses a wheelchair may be physical modifications to the person's workstation to accommodate the wheelchair.

(2) The first person has the onus of proving that making the accommodation would impose an unjustifiable hardship, on the balance of probabilities.

We also propose an additional clause:

(3) In deciding whether an accommodation in relation to a person with disability would impose an unjustifiable hardship on the first person, the following matters may be considered:

- (a) the nature of the person's disability;
- (b) the nature of the accommodation that would be needed to ensure the person with disability is not treated unfavourably
- (c) the effect on the person with disability if the accommodation were made;
- (d) the effect on the person with disability if the accommodation were not made;
- (e) the cost of the accommodation;
- (f) the nature of any detriment, including financial detriment, to the person making the accommodation;
- (g) the effect of the intersection with other attributes;
- (h) the potential benefit of the accommodation to the person with a disability, including their human rights;
- (i) the potential future benefit of the accommodation for other persons; and
- (j) any other relevant matter.

1.4 Equality in the workplace should reflect equality in society – remove outdated exemptions

Section 46 of the Anti-Discrimination Act (1991) permits discrimination by non-profit organisations when providing provision of goods and services. This is a highly problematic exemption that would allow the establishment of men's only clubs and in the past has been relied on to excuse discrimination by private

hospitals, young people's sporting clubs and hospitality venues.¹⁰ Discrimination in any area of public life impacts on wellbeing and ultimately on workplaces.

QAI is also of the view that section 112 in the *Anti-Discrimination Act (1991)* 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 section 112.

¹⁰ *Haycox v Wesley Hospital* [2005] QADT 35, *PAWES v Queensland Basketball et al (No 2)* [2010] QCAT 471, *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.

Section 2 – Welcome changes introduced by the Bill that enhance the rights of people with disability

During the Disability Royal Commission public hearing into *Violence against and abuse of people with disability in public places*, witnesses with disability described abuse as a common occurrence whenever they leave their homes:

“Mr. Tim Marks told us after he became an amputee, people would refer to him as a ‘cripple’, ‘useless’, or an ‘inconvenience’. Mr. David Gearin described being verbally abused while walking with his guide dog, Odin. He was sworn at, called a ‘bludger’ and spat on. Ricki Spencer, a transgender First Nations woman, was forcefully bumped into, spat on and had things thrown at her. Sexualized comments and harassment are frequently directed at women of short stature. Dr Debra Keenahan described two occasions where she was sexually assaulted by strangers on a train. ‘Jenni’ told us she had been subjected to sexualized comments and abuse since about age 12.”¹¹

The Disability Royal Commission recommended reforms to discrimination laws that would strengthen protections against discrimination, harassment and vilification on the basis of disability. QAI is therefore pleased to see a number of the amendments in the Bill.

The following table summarises the changes welcomed by QAI:

Change	Clause in Bill
Disability-specific measures	
Expanded list of protected attributes	Clause 7 – amended s7 and Schedule 1
Vilification can be on the grounds of impairment (where previously only race or religion)	Clause 21 – new s124C & 124D
Vilification can be on the grounds of a characteristic that a person with an impairment has (or generally has)	Clause 21 – new s124A
General measures that are also likely to help people with a disability	

¹¹ DRC Final Report Volume 4 page 93.

<p>The test for vilification will be an objective test – focused on whether the public act is <i>likely</i> to incite, rather than actual incitement</p>	<p>Clause 21 – new s124D</p>
<p>Positive duty to eliminate discrimination imposed on 'duty holders' – this would capture impairment discrimination</p> <p>This requires that duty holders take reasonable and proportionate measures to eliminate discrimination as far as possible.</p> <p>Duty holders = all persons caught by chapters 2, 3, 4, 5 of the AD Act (i.e. workplaces, schools/education providers, goods/services providers, superannuation providers, insurance providers, accommodation providers, clubs)</p>	<p>Clause 25 – new s131I</p>
<p>QHRC given new powers of investigation regarding compliance with the ADA (including general discrimination provisions), and the positive duty specifically.</p> <p>If the QHRC cannot resolve the investigation through conciliation, it can refer the matter to QCAT (as if it were a complaint).</p> <p>In response to an investigation into compliance with the positive duty, the QHRC can:</p> <ol style="list-style-type: none"> 1. accept a written undertaking; and/or 2. issue a compliance notice 	<p>Clause 39 – new s173B; s173H</p>
<p>Lower threshold for representative complaints.</p>	<p>Clause 31</p>

Conclusion

QAI is grateful for the opportunity to provide comment on the Bill. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.