

Submission of the

Australian Discrimination Law Experts Group

in response to the

Queensland Department of Justice and Attorney-General

Anti-Discrimination Bill 2024 Consultation

22 March 2024

Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group (ADLEG), a unique, national group of legal scholars with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on the draft Anti-Discrimination Bill 2024 (Qld) We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry by emailing: altaylor@bond.edu.au.

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Overview

ADLEG supports the proposed Bill, and endorses the recommendations in the report of the Queensland Human Rights Commission (QHRC), *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (the Building belonging report). These reforms are an important step to strengthen protection from discrimination in Queensland.

In particular, ADLEG commends the inclusion in the Bill of the following:

- Recognition that discrimination can occur on the basis of multiple grounds, and is cumulative: Preamble, clause 11(2).
- A requirement for interpretation beneficial for those with protected attributes: clause 7.
- Recognition that a single discriminatory act can be both direct and indirect: clause 13(2)(a).
- Defining direct discrimination as 'unfavourable' treatment: clause 14(1); reducing reliance on the comparator test.
- Adopting a positive equality duty to eliminate discrimination, sexual harassment, vilification and victimisation: clause 19.
- Clearly identifying the circumstances in which religion is a genuine occupational requirement for religious organisations: clause 29.

Suggested Amendments

While ADLEG recognises that the Bill represents an important step forward in equality rights in Queensland, the Bill as currently drafted could be improved for better protection and clarity in its terms. In particular, ADLEG recommends the following changes to the Bill to further the goal of eliminating discrimination and promoting substantive equality in Queensland:

1. Amending the preamble and clause 8 of the Bill to specifically refer to the goal of substantive equality and to provide greater clarity as to the kinds of actions which constitute discrimination and the continuing and cumulative effects of discrimination.
2. Amending clauses 14 and 15 to cross-reference clause 11(2) of the Bill to ensure clarity that the reference to 'a protected attribute' includes multiple and intersecting attributes as required by clause 11(2) of the Bill.
3. Amending clause 12 to ensure that reasonable accommodation applies to all attributes, rather than limiting it to disability. This would also require amendment to clause 14(2) and a new provision following clause 18.
4. Removing clause 16(3) which provides an alternative test for affirmative action measures on the basis of race. Clause 16(3) could potentially make it more difficult to argue that a measure is an affirmative action measure on the basis of race as compared to affirmative action measures for other groups.
5. Amending clause 19(1) of the Bill to include government entities as an entity which must take positive measures to eliminate discrimination, sexual harassment, vilification and victimisation.
6. Narrowing the exception in clause 31 with respect to the circumstances that discrimination can occur for domestic and personal services.
7. Narrowing the exception in clause 32 with respect to the circumstances in which discrimination can occur with respect to work involving vulnerable persons on the basis of an irrelevant criminal record.
8. Amending clause 39 to include voluntary bodies as bodies which have duties pursuant to the Bill and ensure that volunteers are protected from discrimination.
9. Introducing a shifting burden of proof in clause 212 to lessen the burden on claimants.
10. Introducing a new provision in Part 8 to clarify who is liable for algorithm-facilitated discrimination.

ADLEG previously made a number of other recommendations to the Queensland Human Rights Commission in response to its review of the *Anti-Discrimination Act 1991* (Qld).[1] That submission can be found here.

Preamble and Main Purposes of the Act

ADLEG **supports** the Bill specifying broader and more systemic objects that reflect the underlying causes of discrimination and the need for interpretation that is beneficial to both the individual with a protected attribute and to the achievement of the public good of a society founded on the right to equality and equal opportunity for all.[2] ADLEG **recommends** three amendments to the preamble and main purposes of the Act.

ADLEG **recommends** amending paragraph 3 of the preamble to state that:

> The ***cumulative and continuing*** personal, social and economic harm caused by discrimination, sexual harassment, vilification and victimisation—
>
> (a) can happen on the basis of a single attribute
>
> (b) can happen on the basis of having two or more attributes
>
> (c) can happen on the basis of the combination of two or more attributes.

The wording recognises that the harms of discrimination can often continue past the original act of discrimination and can have a cumulative effect on a person where they have one or multiple attributes.

ADLEG **recommends** amendments to the preamble and the main purposes of the Bill as articulated in clause 8 to specifically refer to substantive equality and to specifically identify some of the behaviours which undermine the right to equality.[3] In particular, ADLEG suggests that paragraph 4 of the preamble is amended to refer to:

> the achievement of ***substantive*** equitable outcomes and equal opportunities may require—
>
> (a) different application of a rule to different groups; and

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1 Australian Discrimination Law Experts Group (ADLEG), Submission No 97 to the Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (1 March 2022) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0008/38519/Sub.097-Australian-Discrimination-Law-Experts-Group-ADLEG_Redacted.pdf>.

2 Alice Taylor, *Interpreting Discrimination Law Creatively* (Hart Publishing, 2023).

3 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188.

(b) the making of reasonable accommodation and taking of affirmative action measures.

The inclusion of the term 'substantive' would be consistent with the 'substantive' found in the affirmative action provision provided for in clause 16.

ADLEG **recommends** that the main purposes of the Act in clause 8 be amended to include an articulation of the kinds of behaviours the Bill is intended to eliminate and specifically to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion. This could be added as a sub-clause (c) to clause 8.

Intersectionality

ADLEG **commends** the inclusion of intersectionality in the Bill. This is critical for ensuring the Bill reflects how people experience discrimination in practice, and helps to address the way structures and systems affect those with multiple protected attributes.[4]

Clause 11(2) says:

> Also, for this Act, engaging in conduct in relation to a protected attribute in relation to a person who has 2 or more protected attributes includes engaging in the conduct in relation to—
>
> (a) any of the protected attributes; or
>
> (b) 2 or more of the protected attributes; or
>
> (c) the combined effect of 2 or more of the protected attributes.

The formulation in clause 11(2) is helpful in articulating that discrimination can occur on the basis of any attribute, or attributes in combination. However, for clarity, ADLEG **recommends** also including some cross-reference to this in clause 13(1), which defines discrimination as occurring 'on the basis of *a* protected attribute' [*emphasis* added]; in clause 14(1), which defines direct discrimination as occurring 'because the other person has *a* protected attribute'; and clause 15(1), which defines indirect discrimination as on the basis of '*a* protected attribute'.

Further, the conduct may not be engaged in 'in relation to … the combined effect of 2 or more of the protected attributes' but rather because the person has a combination of two or more attributes. The current framing suggests it is necessary for the combination of attributes to have an effect different to that of one or other attributes. This overlooks the reality that, at least at

[4] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.

times, the conduct is not in relation to any effect the attributes have on the person with them, but rather on the perceptions of that person by others engaging in conduct. As such, ADLEG **recommends** that clause 11(2)(c) be amended to 'the person having 2 or more of the protected attributes'.

Reasonable accommodation

As discussed in the ADLEG submission to the review of the Act,[5] a duty to make adjustments or accommodations should apply to all attributes. This has two benefits. Firstly, it would ensure the needs arising as a result of any attribute are to be accommodated unless it results in unjustifiable hardship (and therefore not setting a different standard in relation to disability). Second, it has the benefit of the process of considering reasonable adjustments being incorporated into organisational policy and practices more broadly and becoming a standard workplace practice. ADLEG **recommends** that the requirement for reasonable accommodation should be expanded to encompass all attributes.

Affirmative action

We welcome the extensive provision for affirmative action measures in clause 16. This clause recognises that substantive equality requires more than simply the removal of discriminatory barriers but can require beneficial measures to achieve substantive outcomes.

To better achieve this for people on the basis of race, ADLEG **recommends** the removal of clause 16(3) to ensure the Bill does not inadvertently make it more difficult to implement affirmative action measures on the basis of race than any other attribute group. To ensure appropriate consultation is undertaken with respect to any affirmative action measure on the basis of race, ADLEG **recommends** that clause 16(7) applies to the entirety of clause 16(2) rather than only clause 16(2)(a).

Positive equality duties

We fully support the Bill's inclusion of a positive equality duty in clause 19. Positive equality duties are critical for moving beyond reliance on individual enforcement mechanisms, and for ensuring a proactive, preventative approach to addressing discrimination.[6] We note, though, that the duty in clause 19 is more limited than that under the *Equal Opportunity Act 2010* (Vic), on

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5 ADLEG (n 1) rec 3 and 21-24.

6 Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98.

which it is modelled. While the Victorian duty applies to all those with a duty not to discriminate, the Bill's duty only applies to those carrying on a business or operations, as a corporation, partnership, unincorporated body, or individual. Concerningly, this appears to exclude government entities, including state and local government, from the scope of the duty. Governments can play a critical role in advancing equality; it is important that they are included within the scope of any duty, as in Victoria. ADLEG **recommends** that clause 19 be amended to omit sub-clauses (a) and (b).

Domestic or personal services

We note that clause 31 makes an exception for domestic or personal services provided in the home. ADLEG **recommends** this exception be further limited, given it is likely to disproportionately affect women, who most often provide these services in the home.[7] We suggest adopting a similar approach to that adopted in the ACT following the *Discrimination Amendment Act 2023* (ACT). Under those reforms, discrimination against those providing domestic duties in the home must be 'reasonable, proportionate and justifiable in the circumstances' for the exception to apply.

Irrelevant criminal record and work involving particular groups

ADLEG **recommends** that clause 32, which allows for discrimination on the ground of irrelevant criminal record with respect to work involving children, people with disability or aged persons, be removed, or at least narrowed so that it is clearer about the types of criminal record that can be considered when working with people in these groups. Currently, the definition of irrelevant criminal record includes persons who have been charged but not convicted, persons who have been acquitted, persons whose conviction has been quashed, and persons whose convictions have been expunged under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld). The consequence of the breadth of definition combined with the breadth of the exception means that a person could still be discriminated against on the basis of sexual orientation (if they were previously convicted under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld) or sex-work activity, if they have previously been charged for sex-work-related activity prior to legalisation. ADLEG considers the wording of the relevant protected attribute already clearly indicates that those with relevant criminal records would be prevented from working with members of the identified groups as people with *relevant* criminal records could not argue that the protected attribute applied to them.

[7] Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085.

Voluntary bodies and volunteers

Clause 39 of the Bill currently allows for voluntary bodies to discriminate against persons in the admission of members of the body and in the provision of benefits and services to members of the voluntary body. Clause 39(2) does indicate that clubs and unions, amongst other entities are excluded from the exception in clause 39. There is no principled reason why discrimination laws should not apply to voluntary bodies. Many people, particularly those with protected attributes gain considerable benefits and experiences from their interaction with voluntary bodies and this should be protected.

With respect to voluntary bodies, ADLEG **recommends** that Queensland adopts the approach in section 31 of the *Discrimination Act 1991* (ACT), which will come into force on 11 April 2024 with respect to voluntary organisations and clubs:

> Part 3 does not make it unlawful for a club or voluntary body, or the committee of management or a member of the committee of management of the club or body, to discriminate against a person if—
>
> (a) the club or body is established to benefit a class of people sharing a protected attribute; and
>
> (b) the discrimination—
>
> (i) is in relation to the provision of membership, benefits, facilities or services to the person; and
>
> (ii) occurs because the person does not have the protected attribute; and
>
> (iii) is reasonable, proportionate and justifiable in the circumstances.

This ACT provision acknowledges that differential treatment can occur where voluntary bodies are designed to provide benefits for protected persons but that the differential treatment must be reasonable, proportionate and justifiable. In all other circumstances, voluntary bodies should have obligations pursuant to discrimination laws.

With respect to volunteers, ADLEG **recommends** that the Bill be amended to clarify that it protects volunteers as well as those in paid employment.

Burden of Proof

ADLEG **recommends** that the Bill adopt the rebuttable presumption modelled on section 136 of the *Equality Act 2010* (UK). The current approach adopted in clause 212, which requires the complainant to prove discrimination on the balance of probabilities, will continue to lead to considerable uncertainty for both parties as most—sometimes all—of the relevant evidence is held by respondents. A lack of proof—and the burden of proof—are major barriers to discrimination claims in Australia.[8] Shifting the burden of proof in discrimination claims in Australia could therefore be 'incredibly beneficial' to claimants.[9]

Comparable jurisdictions such as Canada, the US, the UK, and all of the European Union require a complainant to establish an arguable case, and then shift to the respondent the evidentiary burden of establishing the reason/s for the impugned conduct or conditions. They do so on the basis of the well-documented and widely appreciated difficulty of one party's having to prove the other party's motivation for acting, where little or none of the evidence about subjective motivation is likely to be in their control. A shifting onus has a long and unremarkable history in Australian industrial law and continues in sections 361 and 783 of the *Fair Work Act 2009* (Cth) (FWA).

In the UK, the burden of proof shifts once a claimant has established a prima facie case. The *Equality Act 2010* (UK) says:

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues, and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was

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8 Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1; Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

9 Ibid.

discriminatory, and will lead to clearer case decisions that will provide better guidance on the law.

To 'prove otherwise', the respondent could provide evidence of a lawful reason for the treatment, or could challenge the allegation that the behaviour was unfavourable. The respondent would also have access to exemptions and defences.

A shifting burden of proof is only likely to be determinative in finely balanced cases with very particular fact scenarios. However, given the respondent typically holds most information, it is appropriate for the burden of proof to shift once a prima facie case has been established.

Liability

Decisions are increasingly made by or with the assistance of algorithmic systems and artificial intelligence (AI systems). It has been recognised that difficulties may arise in assigning liability under the direct discrimination provisions in Australian discrimination laws to persons and/or organisations deploying such systems.[10] As an algorithmic model does not have legal personhood and cannot, therefore, be considered a 'person' for the purpose of discrimination law, ADLEG **recommends** that legislative amendment is required to provide clarity and certainty regarding questions of liability in this situation.

The Australian Human Rights Commission's *Human Rights and Technology: Final Report*[11] proposed that federal legislation be introduced to establish:

> a rebuttable presumption that, where a corporation or other legal person is responsible for making a decision, that entity is legally liable for the decision regardless of how it is made, including whether the decision is automated or is made using artificial intelligence.

Another approach would be to enact an express statutory rule of attribution like that in the *Migration Act 1958* (Cth). Section 495A(2) of that Act provides that a 'decision' made by 'the operation of a computer program' is 'taken' to be a decision of the relevant Minister.[12]

ADLEG **recommends** this latter approach be adopted, as it is more consistent with the drafting in the current Bill, and a provision inserted into Part 8 to the effect that:

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[10] Natalie Sheard, 'Employment Discrimination by Algorithm: Can Anyone Be Held Liable' (2022) 45(2) *University of New South Wales Law Journal* 617.

[11] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, March 2021), recommendation 11 <https://humanrights.gov.au/our-work/technology-and-human-rights/publications/final-report-human-rights-and-technology>.

[12] See also *Social Security (Administration) Act 1999* (Cth) s 6A.

> any act done or omitted to be done in contravention of this Act by the operation of a computer program is taken to have been done or omitted by the person who authorised the deployment of that program.

Not only would such an amendment provide clarity on the position regarding liability when AI systems are used, it also makes plain that it is people who are in control of systems utilising AI and responsible for them.