

Respect at Work and Other Matters Amendment Bill 2024

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Respect at Work and Other Matters Amendment Bill 2024 (Qld)

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make submission in response to the Respect at Work and Other Matters Amendment Bill 2024 (Qld) (the “**Bill**”) which proposes amendments of the *Anti-Discrimination Act 1991* (Qld) (the “**AD Act**”) and related legislation.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997* (Qld), LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

Of particular relevance to this submission is the experience of LAQ’s Civil Justice Services lawyers in the Human Rights, Anti-Discrimination and Employment team (**HRADE**), who regularly provide specialist advice and representation to complainants in discrimination, sexual harassment and vilification matters under both State and Commonwealth legislation. Accordingly, this response is informed by the knowledge and experience of LAQ lawyers working with complainants in those matters.

Given the short timeframe that has been allowed for submissions, LAQ’s comments are limited to those aspects of the Bill that are considered most relevant to LAQ’s work.

Executive Summary

LAQ notes this Bill forms part of legislative reforms anticipated as a result of:

- the Queensland Human Rights Commission’s (“**QHRC**”) “Building Belonging” review of Queensland’s AD Act (“**Building Belonging**”), published in July 2022
- subsequent commitments made by the government in March 2023 in response to Building Belonging to repeal and replace the AD Act within the current term of government.¹

LAQ has made extensive written submissions and participated in consultations in relation to both the Building Belonging review and an earlier draft *Anti-Discrimination Bill 2024*. In

¹ See Recommendation 1.1 - “Final Queensland Government response to the Queensland Human Rights Commission’s report Building belonging: Review of Queensland’s Anti-Discrimination Act 1991” dated 28 March 2023, available online at: <https://www.publications.qld.gov.au/dataset/6395fb44-7455-4754-b84d-fa0e7e1a2cf4/resource/c0fd9b56-1086-4a1e-87e1-81b4a9aae7aa/download/final-queensland-government-response-building-belonging-report.pdf>

general terms, LAQ commended the introduction of a draft *Anti-Discrimination Bill 2024* earlier this year and was pleased to see a number of changes being introduced in the draft legislation which reflected earlier recommendations in that consultation process.

LAQ maintains the position expressed throughout the consultation process, i.e., that new anti-discrimination legislation is necessary to properly update these protections to reflect contemporary community standards, and address discrimination on a systemic level.

Unfortunately, this Bill represents a significant winding-back of the positive reforms that would have been provided by the draft *Anti-Discrimination Bill 2024* (Qld). However, LAQ acknowledges the government has now committed to progressing reforms in two stages, with a second stage to occur following further consultation.

In general terms LAQ supports:

- updating the pre-existing protected attributes of “family responsibilities”, “parental status”, “pregnancy”, “trade union activity”, “race” and “sexuality”
- the introduction of all the proposed new protected attributes
- the introduction of protections against sex-based harassment and hostile work environments on the basis of sex (but note recommendation below)
- amendments to vilification provisions (s124B)
- the introduction of a positive duty
- the introduction of new provisions setting out how representative complaints are to be made to the QHRC and progressed in the Tribunal, including clarifying the process for opting out, issuing notices, and the costs liability of class members
- expansion of the QHRC’s investigation and enforcement powers (but note recommendation below)
- the introduction of a process for the QHRC to run a complaint in the Tribunal under s173H (but note recommendation below)
- amendments to the “compliance with other laws” exemption (s106) (but note recommendation below).

LAQ recommends:

- replacing the term “gender” within the definition of “sexual orientation” to “gender identity” to promote consistency with the remainder of the AD Act, and also s 213E of the *Public Health Act 2005* (Qld)
- introducing a definition of “sex” that is consistent with the *Births, Deaths and Marriages Act 2023* (Qld) (“**BDMR Act**”)²
- introducing a definition of “homelessness”
- renaming the protected attribute “lawful sexual activity” as “sex work activity”
- introducing the new attribute of “sex characteristics” which was previously proposed in the draft *Anti-Discrimination Act 2024*
- recognising intersectionality by amending s7 of the AD Act to clarify that discrimination can be on the basis of “a combination of 2 or more of any protected attributes”
- expanding protections against attribute-based harassment and hostile work environments to cover all attributes
- increasing the time limit to complain to 2 years for all types of complaints

² See *Births, Deaths and Marriages Registration Act 2023* (Qld) s 47.

- with regards to positive duty, amending the list of factors relevant to deciding whether a measure is reasonable and proportionate (under new s131J) to emphasise additional factors that focus on the risk of harm and prevalence of discrimination in that industry, and potential benefit of introducing the measure
- with regards to the QHRC's investigative powers, amending s173B(3) to remove "on the basis of sex" and deleting sub-section (b) to allow systemic discrimination on the basis of any attribute, in any area of life, to be the subject of an investigation
- in relation to the QHRC's public reporting function after an investigation has concluded, amending ss173O-173P to allow publication of reports about any systemic issue that is investigated (rather than limiting this function to only sex-based discrimination at work)
- extending the power of the QHRC to refer a matter to the Tribunal under s173H to any matter investigated under s173B(3) (with the above amendments)
- amending s106 to also require that the person engaging in the alleged discriminatory conduct could not have reasonably acted differently or made a different decision because of the other Act or law upon which they intend to rely
- additional resources be allocated to the QHRC, QCAT, specialist legal advocacy services such as LAQ's HRADE team, and community legal centres.

LAQ does not support:

- the introduction of additional protections that only apply to the attribute of sex, when the legislative framework of the AD Act provides coverage for all protected attributes
- different time limits for sex discrimination at work compared to discrimination on the basis of any other attributes
- the lack of any recognition of intersectionality in the Bill, which remains a major issue to be rectified.

Submissions

Expansion and Updating of Protected Attributes

Updated attributes

LAQ strongly supports the following proposed amendments to pre-existing protected attributes:³

- re-naming the "family responsibilities" attribute to "family, carer or kinship responsibilities"⁴
- updating the definition of "parent" to include parental relationships which fall outside the scope of biological parenting, such as step-parenting or cultural relationships of parenthood⁵
- updating the definition of "pregnancy" to include "potential pregnancy" and providing a definition of "potential pregnancy"⁶

³ Respect at Work and Other Matters Amendment Bill 2024 cl 7(3).

⁴ Ibid.

⁵ Ibid cl 52(5) (definition of "parent").

⁶ Ibid cl 52(2) (definition of "potential pregnancy").

- re-defining the “trade union activity” to the definition of “industrial activity” under s290 of the *Industrial Relations Act 2016* (Qld)⁷
- expanding the definition of “race” to include immigration or migration status and caste.⁸

LAQ also broadly supports changing “sexuality” to “sexual orientation” but suggests replacing the term “gender” within the definition of “sexual orientation” to “gender identity” to promote consistency with s 213E of the *Public Health Act 2005* (Qld).⁹

LAQ considers that a definition of “sex” should be introduced in Schedule 1 of the AD Act which should be consistent with the *Births, Deaths and Marriages Act 2023* (Qld) (“**BDMR Act**”).¹⁰

New attributes

LAQ strongly supports the introduction of all the proposed new protected attributes contained within clause 7(3) of the Bill.¹¹

LAQ considers that additional clarity could be provided by introducing a definition of “homelessness”. LAQ considers that leaving the term undefined may leave it susceptible to too narrow interpretation. LAQ recommends defining homelessness as “*having no fixed or secure place of residence and an inability to obtain appropriate housing due to limited housing supply and/or because they are experiencing poverty*”. Further examples could be provided to assist with the definition such as “*a person living in their vehicle*”, “*a person accommodated in short-term emergency housing for people experiencing poverty, homelessness or domestic and family violence*”, or “*a person couch-surfing*”.¹²

LAQ also recommends adding “sex characteristics” to the new protected attributes under s 7, as LAQ previously supported in submissions regarding the draft *Anti-Discrimination Act 2024*. LAQ notes that sex characteristics will be included in the vilification protections and so to maintain consistency with the remainder of the Act, should also be added to the list of attributes in s7.

LAQ echoes the previous submissions in relation to the Review of the Anti-Discrimination Act¹³ and draft *Anti-Discrimination Act 2024*¹⁴ in proposing that discrimination on the basis of “a combination of 2 or more of any protected attributes” (i.e., intersectionality) should be expressly included as an attribute under s 7. LAQ considers that this would also help to

⁷ Ibid (definition of “trade union activity”).

⁸ Ibid (definition of “race”).

⁹ See also Legal Aid Queensland, *Submission on the Anti-Discrimination Bill 2024 (Consultation Draft)* (22 March 2024) 8.

¹⁰ See *Births, Deaths and Marriages Registration Act 2023* (Qld) s 47.

¹¹ For the purposes of clause 7(3) of the Bill, LAQ considers “new attributes” to be those which are not being re-named or having their definitions updated: “subjection to domestic or family violence”, “homelessness”, “physical appearance”, “expunged conviction”, “irrelevant criminal record” and “irrelevant medical record”.

¹² Legal Aid Queensland, *Submission on the Anti-Discrimination Bill 2024 (Consultation Draft)* (22 March 2024) 9.

¹³ Legal Aid Queensland, *Submission on the Review of Queensland’s Anti-Discrimination Act 1991* (4 March 2022) 14-17.

¹⁴ Legal Aid Queensland, *Submission on the Anti-Discrimination Bill 2024 (Consultation Draft)* (22 March 2024) 9.

promote the other protections contained within the current Bill. This drafting was previously adopted in the draft *Anti-Discrimination Act 2024* (s 10(v)) and should be utilised here.

New protections against sex-based harassment and hostile work environment on the basis of sex

LAQ supports expanded protections for harassment on the basis of sex and hostile work environments on the basis of sex in principle. However, LAQ holds concerns about the manner in which these protections have been introduced which seem to prioritise sex-based discrimination at work above all other forms of discrimination.

Firstly, it is unclear why those protections have been introduced only in relation to the attribute of sex, and only at the workplace, as this creates an unnecessary disconnect about who Queensland's anti-discrimination laws should apply to and in what context.¹⁵

LAQ is reluctant to support different protections being afforded to people with only a particular protected attribute given that:

- people with other or additional protected attributes should be entitled to equal protections from the same kind of conduct or hostile environments
- people are susceptible to and should be entitled to protection from conduct of this kind in all areas of public life
- people being harassed at work or subjected to a hostile workplace environment on the basis of their sex may experience compounding and intersectional disadvantage that is not appropriately recognised or protected by the Bill (e.g. a single mother will be protected because she is female, but not because she is a parent or because she is single, despite these three attributes often being inherently linked and inseparable when determining the actual harm caused by, or personal effect of, this kind of conduct).

LAQ notes that the proposed protections are largely modelled on the current protections under ss28AA and 28M of the *Sex Discrimination Act 1984* (Cth) but are slightly broader than those protections.¹⁶ At the Federal level it makes sense that these changes were only introduced in relation to sex because the *Sex Discrimination Act 1984* (Cth) is focused on that kind of discrimination. In Queensland, there is one piece of legislation covering all types of discrimination. Therefore, if protections from harassment and hostile environments are going to be introduced in Queensland, they should protect all attributes in all areas of public life.

LAQ acknowledges the need to strengthen protections for women in the workplace but considers that the proposed amendments only go so far. In the experience of LAQ's lawyers, "sex" is often only one issue at play. If the intention of the Bill is to provide greater protection

¹⁵ The same issue is not as apparent at the Federal level, where the range of anti-discrimination legislation that exists for different attributes means that amendments were made in relation to sex-based discrimination and harassment under the *Sex Discrimination Act 1984* (Cth) without creating inconsistency within that piece of legislation. However, where Queensland's anti-discrimination law operates under only the AD Act, creating separate protection for different groups of people is less appropriate and likely to cause confusion.

¹⁶ For example, clause 18 of the Bill extends protection from harassment on the basis of sex to include the presumed or previous sex of the person being harassed whereas s28AA of the *Sex Discrimination Act 1984* (Cth) does not. Likewise, clause 22 of the Bill provides that it does not matter if a workplace is hostile for 2 or more reasons so long as one of those reasons is the person's sex, whereas s28M of the *Sex Discrimination Act 1984* (Cth) does not provide this clarity.

for women, this should extend to women of colour, single mothers, women with disability, women of diverse sexual orientations, or women whose experiences may intersect with any of the other protected attributes within s7 of the AD Act. For this reason, LAQ recommends including another attribute under s7 of “a combination of 2 or more of any protected attributes” (i.e., intersectionality).

Should the current proposed provisions be retained and not expanded upon, LAQ considers that there is work to do to further clarify who will be protected and how. For example, having regard to the lack of definition of “sex”, it is unclear in what circumstances these protections will apply – will a non-binary person who is harassed at work on the basis of their gender identity be protected by these provisions? Does “sex” extend to a person’s lawful sexual activity (which could be an expression of their sexual orientation), or cover sex work?

With regards to the varying time limits being introduced, LAQ notes that not defining “sex” for the purpose of these provisions also creates difficulties in conjunction with clause 29 of the Bill as it becomes unclear in what circumstances a person will have 2 years to make a complaint and in what circumstances a person’s time limit will only be 1 year.

Amendments to vilification provisions

LAQ strongly supports clause 21 of the Bill.

LAQ reiterates the comments regarding the definition of “sex” above.

LAQ also suggests that the proposed s 124B(2) should include “common property in a body corporate” as an example of when a public act may happen on private land or in a place that is not ordinarily accessed by the general public.

Timeframe for filing complaints

Like the comments in relation to sex-based harassment and hostile workplace environments above, LAQ is concerned about the operation of clause 29 because:

- it is unclear why different groups of people are given different protections under the same anti-discrimination regime, noting this is inconsistent with the right to equality before the law under s 15 of the *Human Rights Act 2019* (Qld) and fails to recognise intersectionality
- if “sex” is undefined, it is unclear when a person may be entitled to make a complaint within a 2-year timeframe instead of a 1-year timeframe¹⁷
- LAQ anticipates the issue of whether the 1 or 2 year time limit applies could become a highly contested matter, and result in unnecessary litigation.

When Respect@Work amendments were introduced in the *Sex Discrimination Act 1984* (Cth) that increased the time limit for complaining to the Australian Human Rights Commission (AHRC) to 2 years, that time limit was extended to all complaints made to the AHRC (whether those complaints are brought under the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) or the *Age*

¹⁷ Using the same example as above, if a non-binary person is harassed at work it is unclear in the Bill whether that person will be entitled to make a complaint of discrimination, sex-based harassment and/or hostile workplace environment based on sex within 2 years, or whether they are restricted by the shorter 12-month timeframe as their circumstances do not fall within the definition of “sex”.

Discrimination Act 2004 (Cth)). Introducing a longer timeframe in the AD Act for sex-related conduct at work only creates a disjointed anti-discrimination framework within Queensland for no clear reason. In a practical sense, this means the HRADE lawyers must give even more complex advice to clients regarding time limits, an issue that is already confusing and overwhelming for many clients who are typically experiencing other life stressors while dealing with discrimination.¹⁸

LAQ strongly recommends that the time limit for filing any kind of complaint under the AD Act should be increased to 2 years, to ensure all attributes receive the same protection at law, allow for uniformity with the Federal legislative framework and simplify the complaints process for the general public. This would also reduce some of the workload of the QHRC in relation to dealing with requests for out-of-time complaints to be accepted.

Positive duty

LAQ generally supports the introduction of a positive duty under new chapter 5C.

In relation to the factors that are relevant in deciding whether a measure is reasonable and proportionate (under new s131J), LAQ notes that all the factors to be considered are focused on the needs of the business or operations and do not sufficiently emphasise the countervailing factors in favour of positive duties. LAQ recommends the insertion of additional factors to achieve this purpose, namely:

- (a) *the consequences of failing to implement the measure;*
- (b) *the prevalence or likelihood of discrimination, sexual harassment, vilification and victimisation occurring within the business, operations, state or public entity;*
- (c) *the nature of any broader beneficial effect for persons who may be affected by the implementation of the measure.*

Investigation and enforcement powers of the QHRC

LAQ supports increasing the investigation and enforcement powers of the QHRC, including adding the ability to seek undertakings and issue compliance notices, but notes that the ability to conduct an investigation into systemic issues under s173B(3) and report on those investigations is limited only to sex-based contraventions that are work-related.

For the same reasons raised above in relation to special protections being introduced for sex-based discrimination only, LAQ does not support this limited scope of the reform. It is necessary to expand the scope of these provisions to all attributes and areas of discrimination to:

- appropriately recognise intersectionality
- appropriately recognise the harmful and insidious nature of systemic discrimination, in all forms

¹⁸ Noting the varying range of time limits that may apply to work-related discrimination at present i.e. any time during employment to file a stop sexual harassment application in the Fair Work Commission (FWC), 2 years to file a sexual harassment dispute with the FWC, 21 days to file a general protections application with the FWC, 6 years to file a general protections (non-dismissal) application with the FWC, 2 years to file in the AHRC and (currently) 12 months to file in the QHRC.

- ensure this legislation is compatible with the right to equality before the law (s 15 *Human Rights Act 2019* (Qld))
- promote public accountability for discriminatory conduct
- send a strong message to the community that discrimination on the basis of any attribute, in any area of public life, is harmful and all persons who experience discrimination are deserving of protection.

LAQ considers the public reporting function of the QHRC to be vital in ensuring transparency and accountability, as well as raising awareness of the protections that exist under the legislation. It is LAQ's strong view that the public reporting function should be extended to all kinds of systemic discrimination under the AD Act, rather than being limited to sex-based discrimination.

On those grounds, LAQ strongly recommends that s173B(3) be amended to remove "on the basis of sex" and sub-section (b) be deleted entirely, and ss173O-173P be similarly broadened to allow publication of reports about any systemic issue that is investigated.

Otherwise, LAQ strongly supports the introduction of a process for the QHRC to refer a matter to the Tribunal as if it were a complaint under s173H. However, this avenue should also be available for matters that are investigated under s173B (with the above amendments), so that Ministerial approval is not a pre-condition to the QHRC taking this type of action. This will allow the QHRC to effectively initiate the complaint process where it has identified systemic issues of public concern, which is particularly helpful in circumstances where complainants are unable to take action themselves (for example, if they are intimidated by the complaints process, at risk of victimisation if they do complain, or experience barriers to accessing the complaints process). Removing the requirement for Ministerial approval will ensure that the same level of protection, transparency and accountability extends to the area of administration of State laws and programs.

Representative complaints

LAQ supports clauses 31 and 37-38 (new ss146 – 152A, and amendments to ss170 and 172) which introduce a new process for making representative complaints to the QHRC and allows unions to bring representative complaints in relation to work-related matters. LAQ notes this will provide more clarity about the complaint process for representative complaints and is a welcome update.

LAQ also supports the introduction of new representative complaint processes for the Tribunal in clauses 47-48 (new ss194 – 203A, and amendments to s209), which clarify the process for opting out, issuing notices to class members, and orders that can be made (including for costs) in representative complaint proceedings.

Exemptions

Compliance with other laws

LAQ broadly supports the proposed amendments to s106 of the AD Act pursuant to clause 13 of the Bill, and s124 of the AD Act pursuant to clause 20 of the Bill.

Further clarity could be achieved under s106 by also requiring that the person engaging in the alleged discriminatory conduct could not have reasonably acted differently or made a different decision because of the other Act or law upon which they intend to rely. LAQ notes that this

would also promote consistency with the *Human Rights Act 2019* (Qld) and contribute to the development of a human rights culture by clearly embedding proportionality considerations into that exemption.

Conclusion

Thank you for considering these submissions.

LAQ also wishes to take this opportunity to highlight the importance of additional funding and support for the QHRC, QCAT, specialist legal advocacy services such as LAQ's HRADE team, and community legal centres in order to ensure that the benefits of this legislative reform are able to be accessed by the general public.

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