

Respect at Work and Other Matters Amendment Bill 2024

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Committee Secretary
Community Safety and Legal Affairs Committee
Parliament House
George Street
Brisbane QLD 4001

By email: cslac@parliament.qld.gov.au

Dear Committee Secretary

Respect at Work and Other Matters Amendment Bill 2024

Thank you for the opportunity to provide a submission to the inquiry considering the Respect at Work and Other Matters Amendment Bill 2024 (**Bill**).

The submission has been compiled with the assistance of the Queensland Law Society's (**QLS**) Human Rights and Public Law Committee (**HRPLC**) and Industrial Law Committee (**ILC**), whose members have substantial expertise in this area. However, given the current workload of these committees, whose members are volunteers, we have not been able to consider each clause of the Bill in detail. As a result, there may be drafting or other issues that are not addressed in this submission.

Introductory comments: need for comprehensive reform following reviews and inquiries

The Bill seeks to implement the first stage of reforms to Queensland's anti-discrimination laws. QLS considers this staged reform process is not optimal given that comprehensive reform to the State's anti-discrimination framework has been called for by the Queensland Human Rights Commission (**QHRC**) in its *Building Belonging: Our review of Queensland's Anti-Discrimination Act* report (**Building Belonging report**), and was committed to by the Government.¹

We call for the introduction of the new Anti-Discrimination Bill that was consulted on earlier this year. A number of the amendments in this current Bill should be considered in the context of other proposed amendment to ensure their functionality and avoid unintended consequences.

In lieu of this approach, we make the following recommendations in respect of this Bill which should be addressed prior to the passage of this legislation.

Recommendations

¹ Queensland Government response to the QHRC Anti-Discrimination Act review:
<https://www.justice.qld.gov.au/initiatives/qld-govt-response-qhrc-anti-discrimination-act-review>

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1. While QLS welcomes the expansion of protected attributes in the *Anti-Discrimination Act 1991 (AD Act)*, some members recommend further amendment to accommodate intersectionality by recognising that discrimination and vilification may occur based on a confluence of protected attributes giving rise to varied and unique experiences of disadvantage.
2. The prohibition of harassment on the basis of sex should:
 - a. Not be inserted into the AD Act at this time. While there is some support for this prohibition from QLS members, the amendment should be considered further when comprehensive anti-discrimination legislation is progressed.
 - b. If and when a prohibition of harassment on the basis of sex is inserted into the AD Act, it should be expanded beyond work and work-related areas.
3. There appears to be insufficient justification for the prohibition on subjecting a person to a work environment that is hostile on the basis of sex. Accordingly, this prohibition should not be inserted into the AD Act at this time. If it to remain in the Bill, then we recommended amending new section 124E(2)(c) so it provides a person “maintains, rather than “creates” a work environment that would be offensive, humiliating or intimidating.
4. QLS broadly supports the introduction of a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and other prohibited conduct as far possible. However:
 - a. It should be expanded beyond the workplace.
 - b. Section 131J should be amended to include other matters such as the likelihood of harassment or discrimination occurring.
 - c. Amendment is needed to provide appropriate avenues to seek remedies for non-compliance.
 - d. The QRHC should provide guidance and support to duty holders.
5. There is insufficient justification for limiting the extended period of time within which to make a complaint to complaints about an alleged contravention on the basis of sex that is a work-related matter. If the timeframe is to be extended, it is reasonable for it to apply to all matters.
6. New section 176A aligns these provisions with section 529 of the *Industrial Relations Act 2016*. However, as this will have the effect of limiting the right to legal representation, this amendment should be reconsidered.
7. Additional resourcing is needed for the QHRC, the Queensland Civil and Administrative Tribunal (**QCAT**) and the Queensland Industrial Relations Commission (**QIRC**).
8. The Society does not support clause 70. It should be removed from the Bill.

Expanding and updating protected attributes

QLS welcomes the expansion of protected attributes in the AD Act. However, members of QLS’s HRPLC recommend that the Bill be amended to accommodate intersectionality by recognising that discrimination and vilification may occur based on a confluence of protected attributes giving rise to varied and unique experiences of disadvantage.

For instance, section 124C sets out the reasonable person test in the context of a complaint based on hateful, reviling, seriously contemptuous, or seriously ridiculing conduct. On its current drafting, the protected attributes of the reasonable person does not recognise the ways in which a combined of protected attributes interact to produce a unique experience of vilification.

New prohibitions of harassment on the basis of sex and subjecting a person to a work environment that is hostile on the basis of sex

Sex based harassment

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The Bill amends chapter 3 of the AD Act to include new a prohibition of harassment on the basis of sex. While similar provisions have been inserted into the *Sex Discrimination Act 1984* (Cth) (**SD Act**), we note:

1. As set out in the Explanatory Note, the prohibition only applies in relation to work or work-related areas.
2. Pursuant to new section 120(1)(c)(i), the conduct must have the *intention* of offending, humiliating or intimidating the other person. This is consistent with the meaning of “sexual harassment” in the section 119(e) of the AD Act.

The Explanatory Note refers to these reforms being recommendations of the Respect@Work report. However, the Building Belonging report, which considered the recommendations from the Respect@Work report in the context Queensland’s anti-discrimination framework, found there was insufficient justification for this new prohibition against sex-based harassment and that such a provision may be problematic for a number of reasons including that:

- new specific legislative provisions may override general discrimination and sexual harassment protections that have been working well;
- protecting only one attribute (sex) could cause incompatibility with the *Human Rights Act 2019*; and
- simplifying the tests for direct and indirect discrimination is a better way to improve the educative function of the law.²

While QLS has previously expressed support for a prohibition on sex and gender-based harassment, this prohibition should only be inserted into the legislation once the issues identified by the Building Belonging report are addressed; this would include progression of the other proposed reforms. At this time, consideration should also be given to extending the prohibition beyond work and work-related areas.

Hostile work environments

The Bill amends chapter 4 of the AD Act to introduce a new prohibition on subjecting another person to a work environment that is hostile on the ground of sex.

This amendment does not appear to be supported by the Building Belonging report on the basis that:

1. this conduct is typically found to be sexual harassment and as such, there does not appear to be a gap in the law that would require this prohibition,
2. if this conduct is not found to be sexual harassment, it might be difficult to determine responsibility.
3. Exclusion of other attributes may also risk inconsistency with section 15 of the *Human Rights Act 2019*.
4. This prohibition may create confusion as to the application of sex discrimination and sexual harassment.³

For these reasons, QLS does not express support for this amendment at this time.

As to the drafting of new section 124E, we recommended amending new section 124E(2)(c) so it provides a person “maintains, rather than “creates” a work environment that would be offensive, humiliating or intimidating.

² See pages 137 and 138

³ See page 141.

Amendments to vilification provisions

We refer to our comments above in respect of the amendments to protected attributes.

Positive duty

The Bill amends the AD Act to introduce a new positive duty in section 131I that requires duty holders (as defined in section 5 of the *Work Health and Safety Act 2011* (**WHS Act**)) to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct as far as possible.

QLS broadly supports the introduction of a positive duty, noting this will provide an important edifying function which has been recommended by a number of inquiries and reviews.

Operation of positive duties in the workplace

While there is an existing, similar, positive duty under the WHS Act, we do not consider this duty is currently being discharged in a way that adequately deals with the causes and impacts of discrimination and sexual harassment in the workplace (and does not extend beyond the workplace context). Further, we do not consider that a breach of this duty which involves sexual harassment or discrimination is readily investigated or pursued by the workplace/duty holders, regulators or other enforcement bodies in all cases and in a manner consistent with obligations under the WHS laws. There is often a focus by these bodies on acts or omissions in the workplace that cause physical injuries, whereas discrimination and sexual harassment more often result in psychiatric or psychological injuries.

As has been noted other stakeholders, the introduction of positive duties could play a dual role of prevention and protection of those who experience discrimination. Positive obligations may also assist to stop discrimination even where there has been a successful claim, given the difficulty in enforcing agreements reached between complainants and respondents.

Expanding the duty beyond work related areas

The Building Belonging report recommended the duty should apply to anyone who has a legal obligation under the AD Act, and for all attributes and areas covered by the AD Act (recommendation 15.2). This is supported by QLS and we call for the Bill to be amended so the duty is expanded.

New section 131J Deciding whether measure is reasonable and proportionate

This new provision outlines the matters that must be considered when deciding whether a measure taken by a person to comply with the duty under section 131I(3) is reasonable and proportionate. However, the matters are limited to the duty holder's circumstances and do not take into account what risks are present in the workplace or other factors relevant to the individual or group on individuals to whom the duty is owed.

The section should be amended to include other matters such as the likelihood of harassment or discrimination occurring.

Enforcement and remedies

QLS submits that further consideration ought to be given to reframing the positive duty (particularly new sections 173I – 173N) as an enforceable obligation which would allow a person to take active steps to seek a remedy if the duties are breached. In our view, the proposed provisions fall short of

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codifying an appropriate remedy in circumstances where an undertaking, compliance notice and/or order are not complied with.

Need for guidance and support

Appropriate guidance and support should be delivered by the QHRC to ensure duty holders understand the positive duty and how to comply with it. New section 173Q permits the QHRC to issue guidelines. These should be developed and published well in advance of the commencement of the positive duty provisions to allow duty-holders time adapt their systems, policies and structures etc.'

Timeframe for complaints

Clause 29 of the Bill amends section 138 of the AD Act, which provides the time limit for making complaints, to provide that a person is entitled to make a complaint about an alleged contravention on the basis of sex that is a work-related matter, within the complaint period of two years after an alleged contravention. The existing complaint period of one year after an alleged contravention is retained for other types of contraventions on the AD Act unless extended by the commissioner.

The justification for this amendment is based on the findings of the Australian Human Rights Commission in the Respect@Work report; for example, at page 494 it noted:

These submissions argued that the current six-month timeframe fails to recognise the complex reasons for an applicant's delay in making a complaint immediately after an alleged incident of sexual harassment, which can include the impact of the harassment on their mental state, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation."

In view of our members, these circumstances will also often be present in respect of discrimination based on other attributes. Further, we query the period that will apply if a claim is based on the sex of the person and another protected attribute.

While not all of our members support a longer time period (noting the commissioner can grant an extension of time), the Building Belonging report recommended a suite of changes to assist someone to make a complaint and we urge that these be progressed. These reforms should also be accompanied by increased funding for the legal assistance sector to assist people to provide legal advice and assist a person to make a complaint.

Investigation and enforcement powers

QLS broadly supports the change to the QHRC's investigative powers in new section 173B

We have not had the opportunity to review these new provisions in detail, however, we query the reasonableness of action being taken by the QHRC where there is only a *likely* contravention. Related to this, we would like to see further detail about how reports on contraventions, and especially likely contraventions, will be published.

Representative complaints

QLS supports the amendments to:

1. allow a registered employee union to make a representative complaint about an alleged contravention that is a work-related matter;
2. preclude an unregistered employee or employer union from bringing a complaint as an agent.

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New section 176A aligns these provisions with section 529 of the *Industrial Relations Act 2016*. However, the effect of this is that parties' rights to legal representation will be curtailed like they are under that act. This is contrary to the purpose of these amendments, which is to enable people to pursue claims when they may not have the capacity to do so themselves and without assistance. Amendments which limit the right to legal representation should be reconsidered as they create access to justice issues.

Insertion of an aggravating sentencing factor in the Penalties and Sentences Act 1992

QLS does not support clause 70.

Clause 70 seeks to amend section 9 of the *Penalties and Sentences Act 1992 (PSA)* so that a court, when determining the appropriate sentence for an offender convicted of an offence involving violence against, or that resulted in physical harm to, a person in their workplace, must treat as an aggravating factor the fact that the offence occurred in the performance of the functions of the victim's office or employment, or because of the performance of those functions or employment.

The Society submits that the fact that the victim of a convicted offence was offended against in the course of their employment, and any consequences of that, are circumstances that are routinely taken into account in the determination of penalty by the courts. The circumstances of such offences are already considered as aggravating features of an offender's conduct.

Accordingly, variations to sentencing based on the occupational attributes of the victim are better left to judicial discretion than provided for beyond that already enshrined in the penalties and sentences legislative framework.

Resourcing for the QHRC, QCAT and QIRC

This Bill will increase the workload of the QHRC, QCAT and QIRC. These bodies must be provided with the additional resources required to perform this additional work.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully

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Rebecca Fogerty
President