Industrial Relations Bill 2016 (Qld)

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

Queensland Industrial Relations Bill 2016

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission in relation to the *Industrial Relations Bill 2016* (the Bill).

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 objectives, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQs 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 based on the extensive experience of LAQ lawyers in the day to day application of the law in courts and tribunals. We believe 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.

Legal Aid Queensland's Anti-Discrimination and Employment Law Practice

LAQ has had a discrimination advice and representation program within its Civil Justice Services team for over a decade. The practice assists people who have been discriminated against because of any protected attribute in any covered area of public life, as well as people who have experienced sexual harassment. Advice is provided in relation to both State and Federal Anti- Discrimination laws.

In January 2014, having received Australian Government funding to expand its civil practice, LAQ began offering advice and casework assistance in employment law. This program was substantially reduced with the loss of that funding in mid-2014. Since the contraction of that program, LAQ has maintained a small employment law program which focuses providing advice and representation to employees under the Commonwealth *Fair Work Act* 2009 in accordance with LAQ's funding guidelines.

LAQ provides advice in employment law to clients:

a. regarding Unfair Dismissal and General Protections disputes;
b. who are low and middle (up to $80,000pa) income earners in mainly non-unionised workforces including labour hire workplaces predominantly from the following industries:
    - Retail;
    - Aged care;

- Food service and hospitality;
- Labouring.

c. who are generally experiencing a complex range of intersecting legal and social problems;
d. who are often grappling with making a choice between multiple jurisdictions in which to bring an action.

The clients who are granted legal aid for representation in employment law are often workers who have been dismissed for reasons which include a discriminatory reason. We represent clients in the:

a. Australian Human Rights Commission (AHRC);
b. Anti-Discrimination Commission Queensland (ADCQ);
c. Fair Work Commission (Unfair Dismissal and General Protections matters);
d. Federal Circuit Court and Federal Court; and
e. Queensland Civil and Administrative Tribunal (QCAT).

1. Unfair Dismissal, General Protections and Bullying

LAQ supports the review of the State's Industrial Relations laws and recommends the adoption of protections aligned with those afforded to private sector employees and employers under the *Fair Work Act 2009* (FW Act) including introduction of a general protections and an anti-bullying jurisdiction in Queensland.

Bullying

LAQ considers that all workers in Queensland should have access to legal protection in relation to workplace bullying. The anti-bullying jurisdiction of the Fair Work Commission (FWC) only covers those employed in constitutional corporations. Queensland workers employed by the Queensland Government, local government, sole traders and partnerships, not-for-profit organisations and voluntary organisations cannot make an application to the FWC for an order to stop bullying.

LAQ considers that the anti-bullying provisions in the Bill appropriately provide protection from bullying for those Queensland workers not covered by the anti-bulling jurisdiction of the FWC.

Unfair dismissal

LAQ supports the introduction of an unfair dismissal regime which mirrors that available to those employees covered by the FW Act.

General Protections

LAQ supports the introduction a general protections jurisdiction into the state industrial system similar to the system that exists under the FW Act. Additionally, LAQ supports the introduction of a prohibition on an employer from taking adverse action against an employee or prospective employee because they are a victim of domestic violence. However, given that the provisions only provide protection for Queensland Government and Local Government employees, LAQ is concerned the legislation does not go far enough to protect victims of domestic violence in Queensland.

LAQ submits that consideration should be given to also introducing 'victim of domestic violence' as a protected attribute under the *Anti-Discrimination Act 1991 (Qld)* (AD Act). This amendment would ensure that all Queenslanders were protected from discrimination on the basis of status as a victim of domestic violence.

LAQ has experience in representing clients in the federal general protections jurisdiction. In most cases general protections applications are first lodged in the FWC and if not resolved at conciliation the applicant must lodge proceedings in the Federal Court or Federal Circuit Court or, with the consent of the other party, have the matter arbitrated within the FWC. In LAQ's experience employees in the federal jurisdiction are often forced to lodge applications in the Federal Circuit Court or Federal Court in the federal jurisdiction. This requirement is a deterrent to meritorious claims being brought due to the complexity and cost of such proceedings. LAQ supports the decision to provide the commission with jurisdiction to conciliate and determine general protections applications.

Submission

LAQ submits that consideration should be given to also introducing 'victim of domestic violence' as a protected attribute under the *Anti-Discrimination Act 1991 (Qld)*.

Time limit in unfair dismissal and general protections dismissal disputes

LAQ supports consistency in the time limit for which applications for unfair dismissal and general protections dismissal applications must be made under the Bill and the FW Act.

However, there is inconsistency in the Bill in relation to how the commission will deal with applications made outside of the 21 day time limit.

Section 310 of the Bill concerns the 21 day time limit for making an application in a general protections dismissal dispute providing:

> *(1) An application relating to dismissal must be made within—*
>
> *(a) 21 days after the dismissal took effect; or*
>
> *(b) if the commission allows a further period under subsection (2)—the further period.*
>
> *(2) The commission may allow a further period if the commission is satisfied there are exceptional circumstances, taking into account—*
>
> *(a) the reason for the delay; and*
>
> *(b) any action taken by the person to dispute the dismissal; and*
>
> *(c) prejudice to the employer (including prejudice caused by the delay); and*
>
> *(d) the merits of the application; and*
>
> *(e) fairness as between the person and other persons in a similar position.*
>
> *(3) An application relating to a contravention of this part (other than dismissal) must be made within 6 years after the contravention occurs*

Section 317(1) and (2) of the Bill concerns the 21 day time limit for making an application in an unfair dismissal matter. It provides:

> *(1) If it is claimed that an employee has been unfairly dismissed, an application for reinstatement may be made to the commission for the dismissal to be dealt with under this part.*
>
> *(2) The application must be made within—*
>
> > *(a) 21 days after the dismissal takes effect; or*
> >
> > *(b) if the commission allows a further period on an application made at any time—the further period.*

Section 317 does not set out criteria that the commission must take into account when considering whether to allow a further period for accepting an application for unfair dismissal.

Submission

LAQ submits that to provide clarity for employees and employers section 317 should be redrafted to include a provision identical to that in section 310(2).

Multiple actions regarding dismissal

LAQ recommends the introduction of provisions preventing multiple applications regarding dismissal being made similar to those provisions in sections 725 to 733 of the FW Act. LAQ regularly provides jurisdictional advice to national system employees whose dismissal may give rise to a claim of unfair dismissal, adverse action and unlawful discrimination. The FW Act prevents an employee in such a situation from making more than one application about their dismissal.

The Bill as currently drafted does not appear to prevent an employee from bringing an unfair dismissal claim, an adverse action claim, and a discrimination complaint to the Anti-Discrimination Commission Queensland (ADCQ) or Australian Human Rights Commission (AHRC) at the same time about the same factual circumstances.

Section 456 of the Bill gives the commission power to stay or dismiss an application or complaint if the act or omission which is the subject of the application is being, or has been dealt with by the commission in another proceeding. If an employee brings an unfair dismissal and adverse action claim about the same dismissal the commission may stay or dismiss one of the applications.

Sections 153 and 154 of the AD Act currently limit the circumstances in which a worker who has been dismissed can lodge a complaint with the ADCQ and also apply for industrial relief in relation to the same dismissal circumstances. Industrial relief is defined in the AD Act to mean relief under the *Industrial Relations Act 1999,* chapter 3. This definition is amended by the Bill to instead mean relief under the *Industrial Relations Act 2016,* chapter 8, part 2.

When read together these sections mean that a worker can make an application for unfair dismissal and a complaint under the AD Act about their dismissal provided they lodge the application for unfair dismissal first.

Under the Bill it would also be open for a complainant to lodge a general protections application in the commission and a discrimination complaint in the ADCQ or AHRC. There are provisions in the AD Act for the ADCQ to reject a complaint if the Commissioner reasonably considers the act or omission the subject of the

complaint may be or has been effectively or conveniently dealt with by another entity. However, a decision may be made by the ADCQ to accept a complaint even though a general protections application has been commenced because each jurisdiction deals with discrimination based on separate and different criteria.

Under the *Australian Human Rights Commission Act* 1986 (Cth) the AHRC can terminate a complaint where the President is satisfied that some other remedy in relation to the subject matter of the complaint is reasonably available to the complainant. Termination does not prevent a complainant commencing proceedings for discrimination in the Federal Circuit Court or Federal Court.

Unlike the FW Act, under the Bill there are no provisions limiting the jurisdictions in which applications or complaints can be lodged. Potentially, under the Bill a worker will be able to commence proceedings for unfair dismissal, general protections and a complaint under the AD Act or federal anti-discrimination legislation about their dismissal. The ability to commence multiple applications about the same subject matter will not be cost effective and does not assist in the administration of justice.

Submission

LAQ submits that consideration should be given to introducing provisions preventing multiple applications regarding dismissal being made similar to those provisions in sections 725 to 733 of the FW Act.

2. Anti-Discrimination

LAQ believes that further consideration should be given to the recommendation that the Queensland Industrial Relations Commission (the Commission) have an exclusive jurisdiction for work place/employment related anti-discrimination matters and that further consideration be given to the likely/potential impact of introducing a further jurisdiction to the Commission in an already procedurally complex area of law.

We refer to the report of the Industrial Relations Legislative Reform Reference Group "A review of the industrial relations framework in Queensland" presented to the Minister on 23 December 2015. We note that recommendation 58 of the report is *that the Queensland Industrial Relations Commission have exclusive jurisdiction for workplace/employment related anti-discrimination matters.* The reasons given for this recommendation in the report are:

- *The QIRC have expertise in employment and workplace issues;*
- *The jurisdiction for workplace/ employment related anti-discrimination matters should be wholly transferred from QCAT to the QIRC to prevent jurisdiction shopping.*
- *Recommendation 44 of the report is to provide 'general protections' to employees and employers against discrimination. To have some work/employment related discrimination matters heard in QCAT and others heard in the QIRC would lead to confusion about the appropriate jurisdiction.*
- *Consolidating all work/employment related discrimination matters into the QIRC will reduce red tape, improve the administration of the law and provide greater clarity to affected parties about their rights and avenues of redress.*

LAQ considers that providing the Commission with exclusive jurisdiction for workplace/employment related anti-discrimination matters will not prevent jurisdiction shopping, reduce red tape, improve the administration of the law or provide greater clarity to affected parties about their rights and avenues of redress.

The reasons for this view are:

- LAQ is concerned about the development of another body of jurisprudence in an already complex area of law.
- The Commission does not have experience in anti-discrimination law.
- The purpose of the AD Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity. It is artificial to separate the area of work from other areas of public life and have discrimination in the workplace dealt with in a separate jurisdiction.
- Jurisdiction shopping is not remedied by transferring jurisdiction for work-related discrimination matters from QCAT to the Commission. It would appear that there is no limit on the applications that can be lodged taking into account section 153 and 154 of the AD Act and section 456 of the Bill. An applicant can lodge multiple applications in relation to the same factual circumstances.
- The Bill does not provide greater clarity to affected parties about their rights or avenue of redress instead it introduces another jurisdiction.
- The introduction of another jurisdiction is more likely to cause confusion, particularly for National System Employees who would not otherwise have matters heard in the Commission.

Legal argument to establish that an adverse action has been taken for a discriminatory reason under the general protection provisions requires satisfying different criteria to the criteria required to be satisfied to establish or prove direct or indirect discrimination under the AD Act.

The wording of section 351 of the FW Act has been directly imported into section 295 of the Bill except that the attributes in section 295 of the Bill are the same as those in the AD Act rather than section 351 of the FW Act.

Cameron FM, in the case of *Hodkinson v Commonwealth* [2011] FMCA 171, gave a clear summary of the distinction to be drawn between the application of general protections under the FW Act and discrimination as provided for in the various state and federal anti-discrimination acts. In particular he stated:

> *140. Although s 351 is headed "Discrimination" this heading is not to be taken as part of the Act: s 13(3) of the* Acts Interpretation Act 1901 (Cth). *The section does not prohibit "discrimination" as such but, rather, identifies conduct which is generally considered to be discriminatory. It is by demonstrating the occurrence of adverse action and the fact that it was motivated for a reason prohibited by s 351(1), such as a person's disability, that a contravention is proved. The criteria found in s 351(1) rely in no way on the* Disability Discrimination Act.
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> *141. Further, s 351 does not employ the word "discrimination" other than as a term by which to identify other Acts which provide exceptions to the operation of s 351(1). The absence of that word from the list of prohibited reasons for adverse action found in s 351(1) means that there is no grammatical link between that subsection and ss 5 and 6 of the* Disability Discrimination Act. *There is, therefore, no term in s 351(1) whose proper construction may be understood by reference to what is contained in ss 5 and 6 of the* Disability Discrimination Act.
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> *142. Additionally, the fact that s 351(1)'s operation is limited by reference to exceptions derived from anti-discrimination legislation provides no basis to conclude that other features of those Acts should also influence the operation of s 351. Section 351(2) is dependent upon s 351(1) and is concerned with limiting s 351(1)'s scope, not with expanding it. Consequently, the fact that certain conduct mentioned in the* Disability Discrimination Act *is expressly excluded from the reach of s 351(1) does*

> *not, in the circumstances, suggest that conduct mentioned in the* Disability Discrimination Act *which is not so excluded is to be included in the proscriptions in s 351(1) other than to the extent that the subsection's express terms already prohibit it. That is to say, s 351(2)'s exclusion of certain conduct from the operation of s 351(1) by reference to, amongst others, the* Disability Discrimination Act, *is insufficient to incorporate into s 351(1) conduct referred to in those Acts which is not excepted by s 351(2).*
>
> *143. For these reasons, conduct which contravenes the* Disability Discrimination Act *does not, by reason of that contravention, also contravene the FWA.*

Case law concerning the application of the general protection provisions regarding discrimination under the FW Act have held that the definitions of attributes contained in the state and federal anti-discrimination acts are not imported into the FW Act.

For example, Cameron FM in *Hodkinson v Commonwealth* held:

> *144. The applicant's allegation of disability discrimination also raises the question of the proper interpretation of the word "disability" where it appears in s 351(1). If a term is used in different statutes in different contexts, then the definition of that term in one statute is unlikely to assist in interpreting that term in the other: M Collins & Son Pty Ltd v Bankstown Municipal Council (1958) 3 LGRA 216 at 220 per Sugerman J. However, if the two statutes deal with related concepts then a definition in one may assist in the interpretation of the other although it will not fix the meaning of the term in the second statute: R v Scott (1990) 20 NSWLR 72 at 77 per Gleeson CJ.*
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> *145. Disability is defined in s 4 of the* Disability Discrimination Act *in the terms quoted above at [15]. That definition appears to reflect the particular objects of the* Disability Discrimination Act. *By contrast, nothing about the way the word "disability" is used in s 351(1) suggests that it should be understood other than according to its ordinary meaning or that it should have the extended meaning*

Submission

LAQ submits that the proposition that the Commission hearing all work related discrimination matters will reduce confusion does not take into account the distinct jurisprudence that has already developed in relation to general protections and anti-discrimination law. LAQ reiterates its submission that the development of another body of jurisprudence will further complicate an already complex and technical area of law.

LAQ notes that while the Commission does have expertise under the existing industrial relations laws it does not have expertise in relation to anti-discrimination laws. The Bill provides that where matters under the AD Act are referred to QCAT, QCAT is required to be constituted by a legally qualified member. The Bill does not provide that where complaint made under the AD Act is referred to the Commission the Commission is to be constituted by a legally qualified commissioner.

If legislation is enacted which requires the referral of work-related discrimination matters to the Commission LAQ submits a specialist discrimination division of the Commission be established which has expertise and experience in relation to State and Commonwealth anti-discrimination laws and that all Commissioners who hear anti-discrimination matters should be legally qualified.

Other comments

LAQ notes that section 1099 of the Bill amends Chapter 7, part 2, division 1A of the AD Act. Section 1099 of the Bill sets out the functions of QCAT and the Commission. The provisions relating to QCAT and the Commission are identical except that the amended section 174A(a)(i) provides:

(i) To make orders under section 144 before the complaints are referred to the tribunal.

Whereas, section 174B(a)(i) provides:

(i) To make orders before the complaints are referred to the tribunal.

LAQ considers that the powers and functions of QCAT and the Commission when hearing matters under the AD Act should be identical. LAQ submits that these sections should contain the same wording and the words "under section 144" should be added to section 174B(a)(i).