

Industrial Relations Bill 2016

Anti-Discrimination Commission Queensland

**Submission to the Queensland Parliament
Finance and Administration Committee**

Table of Contents

Introduction	3
Background.....	3
ADCQ objectives.....	4
About this submission	7
Substantive issues	8
Objects	8
Constitution of the tribunal.....	9
Power to stay or dismiss a complaint.....	11
Definitions of ‘industrial matter’, ‘industrial dispute’ and ‘industrial cause’	13
Conferences	14
Power to dismiss trivial, misconceived etc. complaint.....	15
Interim orders to protect a complainant’s interest	15
Power to direct production of information and documents	16
Hearings to be public.....	17
Non-publication orders.....	17
Written reasons	18
Inconsistency	19
Drafting issues	19
Definition of ‘work-related matters’	20
Functions and powers of the QCAT and the QIRC.....	22
Definitions of tribunal and relevant tribunal Act.....	24
Definition of discrimination.....	25
Definition of ‘immediate family’	26
Starting proceedings.....	27
Costs	27
Schedule.....	29

Introduction

1. The Anti-Discrimination Commission Queensland (ADCQ) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of reprisal under the *Public Interest Disclosure Act 2010*. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.
3. This submission on the Industrial Relations Bill 2016 focuses on the provisions affecting the jurisdiction under the *Anti-Discrimination Act 1991*.

Background

4. The Industrial Relations Bill 2016 stems from the review of Queensland's industrial relations jurisdiction conducted in 2015 by a reference group comprised of stakeholder representatives and chaired by Jim McGowan AM. The report of the review, *A review of the industrial framework in Queensland*, dated December 2015, was released in March 2016. The report made 68 recommendations for reform of Queensland's industrial relations regime. The recommendations have been accepted by government, and all of the legislative recommendations are provided for in the Bill. The Bill provides for a new Industrial Relations Act (IR Act), replacing the current *Industrial Relations Act 1999*.
5. Recommendations that impact on the *Anti-Discrimination Act* jurisdiction include:

Recommendation 32 - That employees covered by the Act be given access to a similar anti-bullying jurisdiction through the Queensland

Industrial Relations Commission as that provided through the Fair Work Commission.

Recommendation 44 – That the Act provide for a consolidated mechanism in relation to proceedings dealing with ‘general protections’ matters including where the outcome is dismissal, and for ‘adverse action’ which does not lead to the dismissal of an employee.

Recommendation 58 – That the Queensland Industrial Relations Commission have exclusive jurisdiction for workplace/employment related anti-discrimination matters.

6. The most significant change for the *Anti-Discrimination Act* jurisdiction is moving the forum for hearing some complaints and exemption applications dealt with under the *Anti-Discrimination Act*, from the Queensland Civil and Administrative Tribunal (QCAT) to the Queensland Industrial Relations Commission (QIRC).
7. This proposal did not form part of the terms of reference or any of the issues papers for the review of the industrial relations jurisdiction, and it was not raised in any of the written submissions published on the review's website.
8. The ADCQ was not consulted about the proposal during the review process or before the report was released. After release of the report, the ADCQ provided feedback to the Office of Industrial Relations outlining concerns about the proposal and identifying issues to be clarified if the recommendation were to be implemented. The ADCQ urged for broader consultation before adopting and implementing the recommendation.

ADCQ objectives

9. The objective of the *Anti-Discrimination Act 1991* is to provide equality of opportunity for everyone by protecting them from unfair discrimination and other types of objectionable conduct. The ADCQ considers the best means of achieving this objective requires:
 - strong contemporary discrimination and human rights laws, with appropriate remedies for breaches of those laws;

- clear, fair and accessible complaint handling and adjudication processes;
 - adjudication bodies that have appropriate experience, training, and professional development of members who are well versed in contemporary discrimination and human rights jurisprudence and principles; and
 - the development of a consistent and robust body of case law that is the equivalent of other jurisdictions in Australia and internationally.
10. The ADCQ's primary concern about the QIRC dealing with work-related anti-discrimination matters is that there will be two adjudicative forums for matters dealt with under the *Anti-Discrimination Act*. All Australian States and Territories have their own anti-discrimination or equal opportunity legislation, and Queensland will be the only jurisdiction with two forums for dealing with matters under its anti-discrimination legislation.¹
11. The *Anti-Discrimination Act* is currently the key legislation providing human rights protections in Queensland.² In a speech earlier this year, the President of the Queensland Court of Appeal said that from a jurisprudential perspective, QCAT's decisions in the anti-discrimination area are especially significant in developing Queensland's human rights discourse.³
12. With two forums there is potential for:
- divergent jurisprudence in Queensland's key human rights legislation; and

¹ The Thomson Reuters *Workers Compensation Report* 1072, 11 July 2016 reported that the proposed expansion of the South Australian Employment Tribunal may include the employment-related functions of the Equal Opportunity Tribunal.

² Legal Affairs and Community Safety Committee, Queensland Parliament, *Inquiry into a possible Human Rights Act for Queensland* (2016) 7.

³ The Honourable Justice Margaret McMurdo AC, 'Lessons learnt from appeals' (Speech delivered at the QCAT Conference, Brisbane, 19 May 2016).

- confusion for parties, for example where there are different processes and rules in the two forums.
13. Confusion for participants may be minimised if there is an alignment of the processes, procedures, and rules of the two forums.
 14. Reducing the risk of the development of divergent jurisprudence is more difficult. Essential will be comprehensive and on-going professional development in discrimination law for the QIRC commissioners and the QCAT members, as well as collaboration and collegiate peer learning opportunities between the decision-makers. If this does not occur and divergent jurisprudence does develop, rectification and realignment of case law will require appeals to be taken to the Court of Appeal. This is not a desirable outcome for parties with limited resources, or for achieving the objectives of the *Anti-Discrimination Act*.
 15. The ADCQ will do all it can to build a strong collaborative relationship with the QIRC, and to facilitate a similar relationship between the QIRC and the QCAT decision-makers responsible for dealing with *Anti-Discrimination Act* matters. It is essential for the Queensland human rights and anti-discrimination jurisdiction that there is a coherent and consistent body of law developed under the *Anti-Discrimination Act*, even though there will be two non-aligned forums dealing with matters under the *Anti-Discrimination Act*.
 16. The ADCQ's preferred system is for there to be one adjudicative forum for matters under the *Anti-Discrimination Act*. The ADCQ is not adverse to the QIRC having responsibility for hearing all *Anti-Discrimination Act* matters, not just those related to work. The majority of complaints are related to work, so this would not result in a major increase in workload for the QIRC.

About this submission

17. The ADCQ was consulted about the draft amendments to the *Anti-Discrimination Act* in the Bill with only a short timeframe, and did not see the entire Bill until it was introduced and referred to the Committee. Some of the ADCQ's concerns raised during consultation remain, and having considered the Bill as a whole, some further issues have been identified.
18. The first part of this submission identifies substantive issues for the efficient and proper exercise by the QIRC of the *Anti-Discrimination Act* jurisdiction, and makes recommendations for amendment.
19. The ADCQ considers the issues about powers and other matters not currently in the Bill, are not appropriate for the rules. Rules that are authorised under clause 551 of the Bill include rules regulating the practice and procedure to be followed and used for the exercise of jurisdiction conferred on the QIRC under the *Anti-Discrimination Act*. The rules would be subordinate legislation (clause 551(4)). Most of the issues identified by the ADCQ relate to powers and functions rather than practice and procedure. They are important matters for the operation of the Act, and not appropriate for subordinate legislation. They modify or add to subject matter that would be provided for in the Act. Providing for the substantive matters in the rules would be contrary to the fundamental legislative principles and the *Legislative Standards Act 1992*.⁴
20. To ensure all necessary powers are in place when the QIRC takes on the functions under the *Anti-Discrimination Act*, the ADCQ suggests further amendments need to be made to the *Anti-Discrimination Act* and enacted before commencement of the new IR Act. This could be done in another Bill.

⁴ *Legislative Standards Act 1992*, section 4. See also: Office of the Queensland Parliamentary Counsel, 'The institution of Parliament – subordinate legislation' in *Principles of good legislation: OQPC guide to FLPs*, 2014; Department of the Premier and Cabinet, *The Queensland Legislation Handbook* (5th ed, 2014).

21. The second part of this submission identifies drafting issues, and makes recommendations for amendment. The ADCQ considers the drafting recommendations are important for clarity and understanding of the new system.

Substantive issues

22. This part of the submission discusses provisions that are needed to enable an equivalent range of functions and powers in relation to proceedings in the QIRC as there are in the QCAT under the *Anti-Discrimination Act*.

Objects

23. The main purpose of the new IR Act is to provide a framework for cooperative industrial relations that is fair and balanced, and that supports the delivery of high quality services, economic prosperity and social justice for Queenslanders (clause 3 of the Bill). The QIRC will be required to perform its functions in a way that is consistent with the objects of the new IR Act, and avoids unnecessary technicalities and facilitates the fair and practical conduct of proceedings under the Act (clause 447(2)).
24. It was noted in Issues paper 5 that there is an increasing reliance of the doctrine of precedent in relation to the judicial functions associated with settling disputes and determining arbitrations, and that accountability of tribunals includes predictability and consistency in decision making.⁵
25. The QCAT Act includes in its objects, promoting the quality and consistency of decisions, and requires the QCAT to ensure like cases are treated alike.⁶

⁵ Industrial Relations Legislative Reform Reference Group, Queensland Parliament, *Review of Industrial Relations Laws and Tribunals – Queensland Issues paper 5* [2015].

⁶ *Queensland Civil and Administrative Tribunal Act 2009*, sections 3 and 4.

26. These objects are consistent with the doctrine of precedent and the development of clear jurisprudence, and should be included in the objects of the new IR Act and how the QIRC performs its functions.
27. There should also be express provision for the QIRC to perform its functions under the *Anti-Discrimination Act* having regard to and consistent with the objects of the *Anti-Discrimination Act*.

Recommendation 1

Amend the Bill to include the object of promoting the quality and consistency of decisions, and amend clause 447(2) to require the QIRC to ensure like cases are treated alike, and to perform its functions under the *Anti-Discrimination Act*, having regard to and consistently with the objects of the *Anti-Discrimination Act*.

Constitution of the tribunal

28. Before the QCAT, the Anti-Discrimination Tribunal had functions and powers under the *Anti-Discrimination Act*. There was a president and members, and all were required to be legal practitioners of at least 5 years standing. The registrar was also required to be a legal practitioner of at least 5 years standing. The president and members were all sessional, and nearly all of them were practicing barristers.⁷ The Act provided that the tribunal was to be constituted by one member for the purpose of conducting a hearing. With QCAT, the requirement for the constitution of the tribunal for the purpose of a hearing was changed to one 'legally qualified member'.
29. Currently, the constitution of the tribunal for a hearing (other than an opinion) applies to all hearing, not just to the hearings in relation to complaints. Clause 1100 of the Bill would amend the existing provision (section 176) so that the requirement for a legally qualified member to constitute the tribunal applies **only** to hearings by QCAT in relation to complaints

⁷ Many former members are now judges of various courts, including the Supreme Court, Family Court and Federal Court of Australia.

30. This would mean that:
- commissioners who are not legally qualified can hear and determine complaints in the QIRC;
 - only legally qualified members can hear and determine complaints in the QCAT; and
 - commissioners and members who are not legally qualified can hear and decide applications for exemptions, applications for interim orders, and applications for review of a decision of the Commissioner that a complainant has lost interest, in both the QCAT and the QIRC.
31. Hearing members are required to deal with a range of complex issues in anti-discrimination matters. These include: identifying a comparator (for direct discrimination); identifying a term (for indirect discrimination); assessing ability to comply with a term and applying the proportionality test; considering reasonableness of a term; determining what is victimisation; determining what constitutes sexual harassment; determining whether a public act incites hatred etc.; and considering the exemptions for discrimination such as genuine occupational requirements of a position.
32. Complaints that are referred to the tribunal usually involve complex issues of law and/or facts, and more so in complaints that proceed to a final hearing. The complexity of the law has been recognised by various QCAT members, exemplified in the following comments:
- ‘The *Anti-Discrimination Act* is a difficult beast to master.’⁸
 - ‘The application of the [*Anti-Discrimination Act*] is difficult to understand, even for lawyers who are not familiar with the area ...’⁹

⁸ *Rintoul v State of Queensland* [2014] QCAT 102 at [14], Senior Member Stilgoe OAM.

⁹ *Alexander v State of Queensland & Anor* [2016] QCAT 142 at [44], Member Guthrie.

- ‘... there is a degree of complexity associated with Anti-Discrimination claims, which require legal knowledge to interpret the statute.’¹⁰
33. The ADCQ considers the processes of the QCAT and the QIRC for *Anti-Discrimination Act* proceedings should, as far as possible, be the same. Standards should be at least equivalent to the current standards. As explained previously in this submission, discrimination law is complex. There should be no diminution of the qualification of the adjudicators hearing any of the matters that come before the tribunal, whether that is the QCAT or the QIRC. There is no justification for not requiring the commissioners who hear *Anti-Discrimination Act* matters to be legally qualified, especially as some existing commissioners are legally qualified.
34. There should be no change to the current requirement for the constitution of the tribunal, as provided for in section 176 of the Act.

Recommendation 2

Delete clause 1100 of the Bill.

Power to stay or dismiss a complaint

35. The powers set out in chapter 11, part 2, subdivision 3 include the power to stay or dismiss a complaint where the act or omission the subject of the complaint is being, or has been, dealt with by the QIRC in another proceeding (clause 456). This provision is similar to section 140 of the *Anti-Discrimination Act*, which enables the Commissioner to reject a complaint if the act or omission the subject of the complaint has been adequately dealt with by another entity.
36. The ADCQ is concerned that because of the variety of jurisdictions of the QIRC, complaints may be improperly or unfairly summarily dismissed under this provision. In many instances, each jurisdiction will involve different issues to be considered or different remedies or

¹⁰ *Stone & Spelta v Brisbane City Council* [2016] QCAT 213 at [13], Member Ann Fitzpatrick.

outcomes. It is not uncommon for a person subjected to discrimination or sexual harassment to make a claim for worker's compensation before making a complaint to the ADCQ. If the workers' compensation claim has been heard in the QIRC, under clause 456 the complaint under the *Anti-Discrimination Act* may be dismissed. The legal issues in the workers' compensation claim usually differ to those in complaints under the *Anti-Discrimination Act*. The outcome of a workers compensation claim is different to the range of orders that can be made under the *Anti-Discrimination Act*, for example, orders not to commit further contravention, damages for hurt and humiliation, orders to do certain things, apologies, implement programs, and declaring an agreement void.¹¹

37. Bullying based on an attribute (e.g. race, sexuality, sex) may constitute unlawful discrimination. A person subjected to the bullying might make an application to have the bullying stopped, and then make a complaint under the *Anti-Discrimination Act* to seek compensation.
38. The ADCQ accepts that a provision preventing 'double-dipping' is desirable, particularly in relation to adverse action claims and complaints of discrimination. The provision should, however, include criteria for the exercise of the discretion to dismiss an application or complaint. The power to dismiss should only be exercised where the legal issues and available remedies/outcomes are substantially the same as those in the earlier proceeding.

Recommendation 3

Clause 456 should be amended to provide that the power to dismiss a complaint or an application is confined to proceedings involving substantially the same legal issues and remedies or outcomes.

¹¹ *Anti-Discrimination Act 1991*, section 209.

Definitions of 'industrial matter', 'industrial dispute' and 'industrial cause'

39. Because of the proposed definitions of 'industrial matter', 'industrial dispute' and 'industrial cause', some of the powers in chapter 11 of the Bill would only apply to a limited range of complaints under the *Anti-Discrimination Act*. This may be an unintended omission.
40. The definition of 'industrial matter' is set out in Schedule 1 to the new IR Act. At item 26 it includes 'discrimination in employment'. The definition of 'discrimination' includes discrimination that would contravene the *Anti-Discrimination Act*.
41. 'Industrial matter' is included in the definitions of 'industrial dispute' and 'industrial cause'.
42. Discrimination in work (under the *Anti-Discrimination Act*) is much broader than 'discrimination in employment' under the Bill. In the Bill, employment is confined by the definitions of 'employee' and 'employer'. 'Discrimination in employment' (which is included in the definition of industrial matter) is a subset of discrimination in work.
43. Because of the definitions of 'industrial matter', 'industrial dispute' and 'industrial cause', some of the powers in chapter 11 will only apply to complaints that include discrimination in employment, that is, complaints by State and local government employees alleging discrimination. The powers would not apply to the range of other complaints (e.g. sexual harassment, victimisation, vilification), and complaints made by other workers.
44. The QIRC needs the full complement of powers to case manage and hear all referred complaints. Powers such as to give directions (clause 535), to hear and decide in the absence of a party (clause 539(g)) only apply to 'industrial causes', which do not include all referred complaints and exemption applications.

45. Options to remedy this include expanding the definition of ‘industrial cause’, or providing express powers for the exercise of jurisdiction under the *Anti-Discrimination Act*.

Recommendation 4

Ensure all necessary powers are provided for the exercise of jurisdiction under the *Anti-Discrimination Act*.

Conferences

46. An important component of resolving complaints under the *Anti-Discrimination Act* is conciliation, at both the ADCQ and tribunal phases. Alternative dispute resolution at QCAT includes mediation and compulsory conferences, both of which are provided for in the QCAT Act. The QCAT processes for complaints under the *Anti-Discrimination Act* include a compulsory conference conducted by a legally qualified member. The purposes of compulsory conferences at the QCAT include identifying issues and making directions in preparation for hearing.
47. The Bill includes provisions that require the QIRC to hold a conference before it hears an unfair dismissal application (clause 318), and enables the QIRC to facilitate negotiations if the parties to an industrial cause agree (clause 469), and to conciliate an industrial dispute if the parties agree (clause 470). Because of the limited definitions of ‘industrial cause’ and ‘industrial dispute’, clauses 469 and 470 would apply to a complaint of discrimination only where the parties are an employee and employer within the meaning of the Bill.
48. Conferences for complaints under the *Anti-Discrimination Act* should also be provided for in the Bill. This could best be achieved by further amending the *Anti-Discrimination Act* to restore the conference provisions that existed before QCAT, namely, sections 180, 182, 183 and 188. The conference and other provisions were removed from the *Anti-Discrimination Act* because they were conferred in the substantive

provisions of the QCAT Act. These and other provisions referred to below are set out in the schedule to this submission.

Recommendation 5

Make provision in the Bill for the QIRC to conduct conferences in complaints referred under the *Anti-Discrimination Act 1991*.

Power to dismiss trivial, misconceived etc. complaint

49. Before QCAT, the Anti-Discrimination Tribunal had power to dismiss a complaint that was misconceived, lacking in substance, frivolous, trivial or vexatious – see section 215A in the schedule to this submission. The provision was repealed because there was a similar generic provision in the QCAT Act.
50. Clause 541(b) of the Bill enables the QIRC to dismiss an industrial cause if the cause is trivial, or further proceedings are not necessary or desirable in the public interest. Because of the limited definition of ‘industrial cause’, this power would not apply to most, if not all, complaints referred to the QIRC.
51. A power to dismiss complaints should be provided for by reinstating section 215A to the *Anti-Discrimination Act*.

Recommendation 6

Amend the *Anti-Discrimination Act 1991* by restoring section 215A to give the QIRC power to dismiss misconceived etc. complaints.

Interim orders to protect a complainant’s interest

52. The functions of the tribunal include the power to make, before a complaint is referred, interim orders to protect a complainant’s interests. Before QCAT, the Anti-Discrimination Tribunal had the same power to make interim orders after a complaint had been referred. This was provided for in section 190 of the *Anti-Discrimination Act*. Section 190 was repealed because the QCAT Act includes a similar injunctive power.

53. The only injunctive powers in the Bill relate to compliance with an industrial instrument (clauses 473 and 474).
54. The power to make interim orders to protect a complainant's interests is very important. A complaint can be rendered futile if acts are allowed to happen that are prejudicial to an order the tribunal may make if the complaint is upheld, or to a successful resolution through conciliation. QIRC needs to have this power in relation to referred complaints, and the appropriate way to provide for it is to restore section 190 of the *Anti-Discrimination Act*.

Recommendation 7

Amend the *Anti-Discrimination Act 1991* by restoring section 190 to give the QIRC power to make interim orders to protect a complainant's interests after a complaint has been referred to the QIRC.

Power to direct production of information and documents

55. The QCAT has power to direct a party to produce a document or provide information, and to obtain a document or thing from a third party.¹² The Bill would enable the QIRC to require a person employed by the State to provide information (clause 535), and in an industrial cause, to make orders or directions about discovery (clause 536) and obtain expert evidence based on facts or figures (clause 540). These provisions of the Bill would have little, if any, application to referred complaints. Most complaints would not fall within the definition of 'industrial cause'.
56. Before QCAT, section 181 of the *Anti-Discrimination Act* gave the tribunal power to obtain documents and information from third parties as well as parties to the complaint. Section 181 was repealed because the QCAT Act provided similar powers in its generic provisions.

¹² *Queensland Civil and Administrative Tribunal Act 2009*, sections 62 and 63 respectively.

57. The power to obtain information and documents should be given to QIRC in relation to referred complaints. This could be achieved by restoring section 181 to the *Anti-Discrimination Act*.

Recommendation 8

Amend the *Anti-Discrimination Act 1991* by restoring section 181 to give the QIRC power to obtain information and documents in relation to referred complaints.

Hearings to be public

58. At the QCAT, hearings are required to be held in public, except in certain circumstances.¹³ There does not appear to be any requirement in the Bill for the QIRC hearings to be held in public.
59. It is a fundamental principle of the administration of justice that court proceedings are conducted in public.¹⁴ The principle of open justice is applicable to the important role the QIRC will have in Queensland's key human rights legislation. The Bill should be amended to provide that hearings are to be held in public, with exceptions such as those set out in section 90 of the QCAT Act.

Recommendation 9

Amend the Bill to provide that hearings are to be held in public except in certain circumstances.

Non-publication orders

60. The general rule that publication of proceedings should be unrestricted may be departed from if publication would damage some public interest for the protection of which Parliament has made some statutory derogation from the rule.¹⁵

¹³ *Queensland Civil and Administrative Tribunal Act 2009*, section 90.

¹⁴ See for example *J v L & A Services Pty Ltd* (1995) 2 Qd R 10.

¹⁵ *GCE v Anti-Discrimination Commissioner* [2006] QSC 058, [35] – Mackenzie J referring to an exception referred to by Lord Diplock in *Attorney-General v Leveller Magazine Ltd* (1979) AC 440, 450.

61. The tribunal has the power to make an order prohibiting the disclosure of a person's identity where the tribunal considers it is necessary to protect the work security, privacy, or any human right of the person.¹⁶ The Commissioner also has a like power to give a direction, before referral of a complaint, prohibiting the disclosure of a person's identity.¹⁷
62. The QCAT has power to make orders prohibiting the publication of documents, evidence and identifying material (section 66 of the QCAT Act). The section stipulates the circumstances in which a non-publication order can be made. The QIRC should also have this power.

Recommendation 10

Amend the Bill to give the QIRC the power to make non-disclosure orders, modelled on section 66 of the QCAT Act.

Written reasons

63. There is no requirement for the QIRC to provide written reasons. QCAT is required to provide written reasons for a decision on the request of a party.¹⁸
64. In the interests of consistency between the QCAT and the QIRC, the QIRC should be required to provide written reasons for decisions relating to proceedings under the *Anti-Discrimination Act*, if requested by a party to the proceedings.

Recommendation 11

Amend the Bill to require the QIRC to provide written reasons for decisions relating to proceedings under the *Anti-Discrimination Act*, if requested by a party to the proceedings.

¹⁶ *Anti-Discrimination Act 1991*, section 191.

¹⁷ *Anti-Discrimination Act 1991*, section 145.

¹⁸ *Queensland Civil and Administrative Tribunal Act*, section 122.

Inconsistency

65. The *Anti-Discrimination Act* will provide for the functions of the QIRC in relation to the *Anti-Discrimination Act* jurisdiction, as well as some of the powers and processes for the jurisdiction. Other powers and processes will be provided for in the new IR Act and rules. There is potential for some overlap and inconsistency.
66. The potential overlap and inconsistency also exists with the QCAT. The QCAT Act provides that where there is inconsistency in such matters between the QCAT Act and an enabling Act (such as the *Anti-Discrimination Act*) the provisions of the enabling Act prevail.¹⁹
67. There needs to be a similar provision in the Bill to address potential confusion. It should be included in chapter 11 Industrial tribunals and registry, part 5 Proceedings, division 6 Proceedings under *the Anti-Discrimination Act 1991*, where there is currently provision in relation to inconsistency between schedule 2 costs (for *Anti-Discrimination Act* proceedings) and other provisions of the IR Act (clause 548).

Recommendation 12

Provide for the functions, powers and process provisions of the *Anti-Discrimination Act* to prevail to the extent of any inconsistency with provisions of *Industrial Relations Act*.

Drafting issues

68. The object of the amendments to the *Anti-Discrimination Act* in the Bill is to give existing tribunal functions to the QIRC, but only where the subject matter is related to work. The functions of the tribunal are:
- to hear and determine complaints referred by the ADCQ;
 - to grant exemptions from the Act;
 - to provide opinions about the application of the Act;

¹⁹ *Queensland Civil and Administrative Tribunal Act 2009*, sections 6 and 7.

- to review decisions of the Commissioner that a complainant has lost interest in continuing with a complaint.

Definition of 'work-related matters'

69. Under the *Anti-Discrimination Act*, unlawful discrimination includes discrimination in the work and work-related areas. The terms 'employer' and 'employee' are not used, and the prohibitions are generally directed to 'a person' in relation to work or a worker. For example, section 15(1)(f) provides that a person must not discriminate by treating a worker unfavourably in any way in connection with work.

70. The term 'worker' takes its meaning from the definition of 'work', which is defined in the Schedule as follows:

work includes —

- (a) work in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment); and
- (b) work under a contract for services; and
- (c) work remunerated in whole or in part on a commission basis; and
- (d) work under a statutory appointment; and
- (e) work under a work experience arrangement within the meaning of the *Education (Work Experience) Act 1996*, section 4; and
- (ea) work under a vocational placement; and
- (f) work on a voluntary or unpaid basis; and
- (g) work by a person with an impairment in a sheltered workshop, whether on a paid basis (including a token remuneration or allowance) or an unpaid basis; and
- (h) work under a guidance program, an apprenticeship training program or other occupational training or retraining program.

71. The areas and attributes under the *Anti-Discrimination Act* are only relevant to discrimination. The Act provides for other contraventions that might also occur in 'work'. These include:

- sexual harassment (sections 118 to 120)
- victimisation (section 129 to 131)
- vilification (section 124A)

- unlawful requests for information (section 124)
 - requesting or encouraging a contravention (sections 122 & 123)
 - discriminatory advertising (section 127).
72. The ADCQ also deals with complaints of reprisal under the *Public Interest Disclosure Act 2010*. All of the complaints of reprisal that have been referred to the tribunal relate to work.
73. The amendments to the *Anti-Discrimination Act* identify the jurisdiction to be given to the QIRC jurisdiction by use of the term ‘work-related matter’. The Bill would amend the schedule to the *Anti-Discrimination Act* to include a definition of work-related matter as follows:
- work-related matter** means a complaint or other matter relating to, or including, work or the work-related area.
74. This definition conflates:
- ‘matter’ in the sense of subject matter;
 - ‘matter’ in the legal sense of an action or proceeding; and
 - the area of ‘work-related’ in the sense of unlawful discrimination.
75. It is important that the QIRC’s jurisdiction for Anti-Discrimination matters is not confined to discrimination under the Act, but also other contraventions provided for by the Act. The Act allows a complaint to contain more than one contravention,²⁰ and it is very common that complaints related to work include more than one contravention. For example, a complaint of sexual harassment at work might also include allegations of sex discrimination and/or victimisation for complaining about the sexual harassment or sex discrimination. It is important that the QIRC is not limited to allegations of discrimination in complaints, as this may lead to the adjudication of a complaint (such as that described above) being split between the QIRC and the QCAT.
76. In view of the definition of ‘work’ in the *Anti-Discrimination Act*, the ADCQ considers the definition of ‘work-related matter’ in the Bill is

²⁰ *Anti-Discrimination Act 1991*, section 135.

superfluous. The definition does not read well in many of the provisions where it is used – see for example clause 1102, new section 193A(3)(c). It may also be interpreted as being confined to discrimination. For these reasons, the ADCQ recommends removal of the definition of ‘work-related matter’ in clause 1106 of the Bill. Alternatively, the definition should be amended to ‘any subject matter involving or related to work’.

Recommendation 13

Remove the definition of ‘work-related’ matter from clause 1106 of the Bill. In the alternative, change the definition to ‘any subject matter involving or related to work’.

Functions and powers of the QCAT and the QIRC

77. Clauses 1099 of the Bill would replace section 174A of the *Anti-Discrimination Act* with new sections 174A and 174B outlining the functions of the QCAT and the QIRC respectively. The ADCQ is concerned that the drafting of these provisions does not properly reflect the functions of the tribunal, with potential adverse consequences. The following comments apply to both new sections.
78. The functions set out in paragraph (a)(i) to (iv) are identified in (a) by ‘complaints about contraventions of this Act that are referred or to be referred to ...’. The ADCQ currently has the function of dealing with complaints of reprisal, which is a contravention of the *Public Interest Disclosure Act 2010* (PID Act). Complaints of reprisal that are not resolved through conciliation are referred to the tribunal for hearing and determination. As currently drafted, complaints of reprisal under the PID Act, and complaints of contravention of other Acts that the ADCQ may be given jurisdiction to deal with, are not covered.
79. Further, section 144 of the *Anti-Discrimination Act* enables a complainant, or the Commissioner, to apply to the tribunal before a complaint is referred, for an interim order to protect the complainant’s interests. It is an injunctive power to preserve the status quo pending

conciliation or hearing. Applications under section 144 are commonly made at the same time, or soon after, a complaint is lodged with the ADCQ. The complaint may not be referred to the tribunal – it may be resolved, withdrawn, or the complainant may not require referral. Therefore, that the complaint is referred or to be referred is an inappropriate restriction on the function under section 144.

Recommendation 14

Amend sections 174A(a) and 174B(a) in clause 1099 by deleting the words ‘about contraventions of this Act that are referred, or to be referred, to QCAT’.

Recommendation 15

For consistency and to avoid possible confusion about the function relating to applications under section 144 of the *Anti-Discrimination Act*, amend sections 174A(a)(i) and 174B(a)(i) so that they are the same.

80. The function set out in paragraph (a)(iii) is ‘to enforce agreements for resolution of the complaints by conciliation’.
81. The function of the ADCQ is to try to resolve complaints through conciliation. If the parties reach an agreement at the ADCQ, the Commissioner is required to record the terms of the agreement in writing, and file the signed agreement with the tribunal. The agreement is then enforceable as an order of the tribunal.²¹
82. Likewise at the tribunal phase, if the parties resolve the complaint before it is determined, they must record the terms of the agreement in a document, and file the signed document with the tribunal. The agreement is then enforceable as an order of the tribunal.²²
83. QCAT does not currently have the function of enforcing its own orders. Orders of the QCAT are enforced through a court, and the process is

²¹ *Anti-Discrimination Act 1991*, section 164.

²² *Anti-Discrimination Act 1991*, section 189.

currently provided for in sections 131 and 132 of the QCAT Act.²³ In essence, an order of the QCAT is enforced by filing a certified copy of the order, together with an affidavit, in the relevant court in which it is to be enforced.

84. Paragraphs (a)(iii) would give both the QCAT and the QIRC the function to enforce agreements reached at the tribunal stage. The function may not extend to agreements reached at the ADCQ as complaints resolved at the ADCQ are not 'referred or to be referred'. To avoid confusion, paragraphs (a)(iii) should be removed.

Recommendation 16

Delete sub-sections 174A(a)(iii) and 174B(a)(iii) in clause 1099.

Definitions of tribunal and relevant tribunal Act

85. The Bill would introduce a new definition of 'tribunal' as follows:

tribunal means –

- (a) in relation to a work-related matter – the industrial relations commission; or
- (b) in relation to any other matter – QCAT.

86. As outlined above (in relation to the definition of 'work-related matter'), this definition conflates 'matter' in the sense of subject matter, and 'matter' in the legal sense of an action.

87. It also doesn't take account of mixed complaints or exemption applications – mixed being those that include both work-related subject matter and subject matter that is not related to work. The provisions for transfer of complaints and exemption applications between the QIRC and the QCAT reflect the policy that both forums can deal with mixed complaints and exemption applications.

²³ The Justice and Other Legislation Amendment Bill 2014 (which lapsed) proposed to amend sections 131 and 132 of the QCAT Act to streamline the process for enforcing a final order in a court. The ADCQ made a submission to the Legal Affairs and Community Safety Committee suggesting an amendment to the Bill to ensure that agreements filed with the tribunal under the *Anti-Discrimination Act* were included in the process.

88. The proposed definitions of ‘tribunal’ and ‘relevant tribunal Act’ do not accord with the scheme of the Act as amended by the Bill. The definition of tribunal should simply provide that ‘tribunal’ means the industrial relations commission or the QCAT, as the case requires. The definition of ‘relevant tribunal Act’ should likewise provide that ‘relevant tribunal Act’ means the IR Act or the QCAT Act, as the case requires.

Recommendation 17

In clause 1106, change the definition of tribunal to:

the industrial relations commission or the QCAT, as the case requires

and change the definition of relevant tribunal Act to:

the IR Act or the QCAT Act, as the case requires.

Definition of discrimination

89. Discrimination would be defined in the new IR Act as:

discrimination means discrimination –

- (a) that would contravene the *Anti-Discrimination Act 1991*; or
- (b) on the basis of sexual preference; or
- (c) on the basis of family responsibilities.

90. Sexual preference is not defined in the Bill. It is not apparent why it is included in the definition. Discrimination on the basis of sexuality is prohibited under the *Anti-Discrimination Act*, where sexuality is defined to mean heterosexuality, homosexuality or bisexuality.

91. If ‘sexual preference’ is intended to mean something other than ‘sexuality’ as it is defined in the *Anti-Discrimination Act*, then a definition of it should be included in the Bill. If it does not have a different meaning, its inclusion in the definition of discrimination is unnecessary.

Recommendation 18

Define the meaning of ‘sexual preference’. Alternatively, delete paragraph (b) from the definition of ‘discrimination’.

92. Discrimination on the basis of family responsibilities is also prohibited under the *Anti-Discrimination Act*. A definition of family responsibilities in the Bill adopts the definition of family responsibilities in the *Anti-Discrimination Act*. Both definitions refer to 'immediate family'.
93. The definitions of 'immediate family' differ in that the definition in the Bill does not specify:
- a former spouse;
 - a child etc. of a former spouse; and
 - a present foster child.
94. Other ramifications of the definition of 'immediate family' are discussed below. ADCQ considers the definition of 'immediate family' in the Bill should be consistent with the *Anti-Discrimination Act* definition. If that were the case, then inclusion of family responsibilities in the definition of discrimination would be unnecessary, as discrimination on the basis of family responsibilities is prohibited under the *Anti-Discrimination Act*.

Recommendation 19

If the definition of 'immediate family' is amended to be consistent with the *Anti-Discrimination Act* definition, then paragraph (c) of the definition of discrimination should be deleted.

Definition of 'immediate family'

95. Although the definition of 'immediate family' in the Bill is expressed as inclusive, the family members listed do not include a former spouse, the child etc. of a former spouse, or a present foster child. This is likely to be interpreted by employers and employees as excluding those family members, particularly as the definition does not align with the *Anti-Discrimination Act* definition.
96. The definition of 'immediate family' in the Bill impacts the Queensland Employment Standards in relation to:
- carer's leave (clauses 42, 43 and 44); and

- bereavement leave (clauses 47 and 48).

97. In modern families close relationships are often maintained with former spouses, and/or the children, parents etc. of former spouses. Discrimination on the basis of these family responsibilities is prohibited under the *Anti-Discrimination Act*. It should follow that carer's and bereavement leave entitlements should also extend to these family relationships.

Recommendation 20

Amend the definition of 'immediate family' so that it is the same as the definition in the *Anti-Discrimination Act*.

Starting proceedings

98. Starting proceedings in the QIRC is provided for in clause 527. The provision does not contemplate the starting of proceedings by referral. Referral in the QCAT is specifically provided for in section 34 of the QCAT Act. A similar provision should be included in the Bill.

Recommendation 21

Amend clause 527 to provide for referral of complaints by the Commissioner under the *Anti-Discrimination Act*.

Costs

99. Specific costs provisions for anti-discrimination matters are set out in Schedule 2 of the Bill. These provisions mirror the costs provisions in the QCAT Act.
100. The ADCQ considers the processes and procedures for anti-discrimination matters in the QCAT and the QIRC should be aligned as far as possible. The ADCQ is concerned, however, that sections 10 and 11 of Schedule 2, 'staying proceedings pending payment of costs' and 'security for costs' have the potential to adversely impact a party's access to justice.

101. The mere fact that the stay of proceedings and security for costs provisions are in the QCAT Act does not warrant their inclusion in the costs provisions for the QIRC. The QCAT provisions are generic to all of that tribunal's jurisdictions, whereas the Schedule 2 costs provisions apply only to matters under the *Anti-Discrimination Act*. The stay of proceedings and security for costs provisions were not part of the *Anti-Discrimination Act* before QCAT, and they appear not to have been used or applied in the *Anti-Discrimination Act* jurisdiction of QCAT.

Recommendation 22

Amend Schedule 2 by removing sections 10 and 11 in relation to stay of proceedings and security for costs.

Schedule

Provisions of the *Anti-Discrimination Act* that should be restored

180 Tribunal powers prior to a hearing (conference)

- (1) Before it hears a complaint, the tribunal may order a person to—
 - (a) confer with a member of the tribunal for any purpose related to a proceeding; or
 - (b) make a written submission;
 at such place, and within such reasonable period or on such reasonable day and at such time, as is specified in the order.
- (2) The tribunal may enforce the order by filing a copy of it with a court of competent jurisdiction.
- (3) The order is then enforceable as if it were an order of the court.

181 Tribunal powers prior to a hearing (information and documents)

- (1) Before it hears a complaint, the tribunal may order a person in writing to—
 - (a) give a specified document, or documents of a specified class, to the tribunal; or
 - (b) give to the tribunal in writing signed by the person, or, in the case of a body corporate, by an officer of the body corporate, the specified information;
 at such place, and within such reasonable period or on such reasonable day and at such time, as is specified in the order.
- (2) If documents are given to the tribunal, the tribunal—
 - (a) may take possession of, and may copy or take extracts from, the documents; and
 - (b) may retain possession of the documents for such period as is reasonably necessary; and
 - (c) during the period, must allow a person who, if the documents were not in the possession of the tribunal, would be entitled to inspect any of them, to inspect that document at all reasonable times.
- (3) The tribunal may enforce the order by filing a copy of it with a court of competent jurisdiction.
- (4) The order is then enforceable as if it were an order of the court.
- (5) A person is not required to give information or a document if the person objects on the ground of legal professional privilege that the person would be entitled to claim if—
 - (a) the person were a witness in a prosecution for an offence in the Supreme Court; and
 - (b) the person were required to give the information or document in the prosecution.

182 Attendance at conference

- (1) If a complainant, without reasonable excuse, does not comply with an order to attend a conference, the tribunal may dismiss the complaint and order the complainant to pay costs to the respondent.
- (2) If a respondent, without reasonable excuse, does not comply with an order to attend a conference, the tribunal may order the respondent to pay costs to the complainant.
- (3) A party may enforce an order as to costs by filing a copy of it with a court of competent jurisdiction.
- (4) The order is then enforceable as if it were an order of the court.

183 Conference to be held in private

A conference must be held in private unless the tribunal directs otherwise.

188 Tribunal to refer complaint for conciliation

If the tribunal considers, either before or during a hearing, that a complaint could be resolved by conciliation, the tribunal may—

- (a) attempt to conciliate the complaint; or
- (b) refer the complaint to the commissioner or the registrar for an attempt at conciliation.

190 Interim orders protecting complainant's interests (tribunal)

- (1) When a complaint has been referred to the tribunal, the complainant may apply to the tribunal for an order prohibiting a person from doing an act that might prejudice an order that the tribunal might make after a hearing.
- (2) A party may apply to the tribunal for an order varying or revoking an order made under subsection (1).
- (3) A party may enforce an order made under this section by filing a copy of it with a court of competent jurisdiction.
- (4) The order is then enforceable as if it were an order of the court.
- (5) The tribunal may apply the rules of the Supreme Court (with any necessary changes) in relation to an application made under this section.

215A Tribunal may dismiss frivolous and other complaints

- (1) If, at any stage of a proceeding, the tribunal is satisfied that a complaint is frivolous, trivial, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be further considered, it may dismiss the complaint.
- (2) The tribunal may act under subsection (1) on its own initiative or on the application of a party to the proceeding.