



Court and Civil Legislation Amendment Bill 2017

Anti-Discrimination Commission Queensland

**Submission to the Queensland Parliament
Legal Affairs and Community Safety Committee**

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Introduction

1. The Anti-Discrimination Commission Queensland (the Commission) 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 (QCAT) for hearing and determination. Work-related complaints made from 1 March 2017 may be referred to the Queensland Industrial Relations Commission.
3. This submission on the Court and Civil Legislation Amendment Bill 2017 focuses on the proposed amendments to the *Queensland Civil and Administrative Tribunal Act 2009* and to the *Anti-Discrimination Act 1991*.

The Commission's complaint process

4. The Queensland *Anti-Discrimination Act 1991* was enacted in recognition of international human rights instruments, and to extend Commonwealth human rights legislation. One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unlawful discrimination and other objectionable conduct. The Act provides a mechanism for seeking redress and adjudication of alleged breaches of the human rights that are protected by the legislation.
5. The first step in remedying a breach of the Act¹ is for a complaint to be made to the Commission. If a complaint is accepted, the Commission's function is to try to resolve the complaint through conciliation. The parties will, in most cases, be directed to participate in a conciliation conference, where a conciliator will facilitate a discussion of the dispute

¹ Including reprisals under the *Public Interest Disclosure Act 2010*.

and provide information about the law and possible outcomes. If a complaint is not resolved through conciliation, it may be referred to a tribunal to be heard and decided.

6. Where a complaint is resolved through conciliation, the Commission is required to record the terms of the agreement in writing, have the parties sign the agreement, and then file the signed agreement with the tribunal.² Once filed, the agreement is enforceable as if it was an order of the tribunal. Until now, all conciliation agreements have been filed with the Queensland Civil and Administrative Tribunal (QCAT).³
7. Where complaints are resolved after referral to the tribunal, the parties are required to record the agreement in writing, sign the agreement, and file the agreement with the tribunal.⁴
8. The relevant provisions of the *Anti-Discrimination Act 1991* are set out below:

164 Resolution by conciliation

- (1) If the complaint is resolved by conciliation, the commissioner must record the terms of the agreement and have the document signed by the complainant and the respondent.
- (2) The commissioner must provide a copy of the document to each party and file the document with the tribunal.
- (3) The agreement is then enforceable as if it were an order of the tribunal.

189 Resolution before tribunal order

- (1) If the complainant and the respondent resolve the complaint before it has been determined by the tribunal, they must record the terms of the agreement in a document signed by the complainant and the respondent and file the document with the tribunal.
- (2) The tribunal must provide a copy of the document to each party.
- (3) The agreement is then enforceable as if it were an order of the tribunal.

² *Anti-Discrimination Act 1991*, section 164.

³ Conciliation agreements for work-related complaints accepted after 1 March 2017 will be filed with the Queensland Industrial Relations Commission.

⁴ *Anti-Discrimination Act 1991*, section 189.

Amendments to the *Queensland Civil and Administrative Tribunal Act 2009*

9. Clause 217 of the Bill would replace sections 131 and 132 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) with new sections 131 and 132, about enforcing final decisions.
10. Currently, a person who wants to enforce a final decision of QCAT needs to obtain a certified copy of the decision from QCAT and file it in a court with an affidavit about the amount outstanding (for a monetary decision) or the noncompliance with the order (for a non-monetary order). The new sections 131 and 132 would provide that a final decision may be enforced by filing a copy of the decision in the registry of the relevant court. On filing a copy of the final decision, the decision is taken to be an order of the relevant court.
11. The Justice and Other Legislation Amendment Bill 2014 (the 2014 Bill) included proposed replacement sections 131 and 132 of the QCAT Act, which would have removed the court filing process. The 2014 Bill was referred to the Legal Affairs and Community Safety Committee, however the Bill lapsed when parliament was dissolved on 6 January 2015, before the Committee was required to report.
12. The Commission made a submission on the 2014 Bill, supporting the proposal to assist in the enforcement of orders made by QCAT, and recommending a amendment to ensure that 'final decision' included an agreement filed with QCAT under the *Anti-Discrimination Act 1991*, section 164 or section 189.
13. In mid-2016 the Department of Justice and Attorney-General consulted the Commission about the recommendation. The department advised it agreed a clarifying amendment needed to be made to ensure agreements filed with QCAT under the *Anti-Discrimination Act 1991* are treated in the same way as final decisions of QCAT, however the department's preferred approach was for the amendment to be located in the *Anti-Discrimination Act 1991*, not the QCAT Act.

14. The requisite provision to ensure agreements filed with QCAT under the *Anti-Discrimination Act 1991* are covered by the new enforcement process has not been included in the current Bill.
15. Human rights principles require there to be a remedy for breaches of human rights. The remedy itself is a human right. This is reflected in the international human rights instruments that underpin the *Anti-Discrimination Act 1991* as set out in the preamble. If there is not a clear process for enforcing agreements made in resolution of complaints under the *Anti-Discrimination Act 1991*, the remedy, and hence the human right, may be rendered nugatory.
16. The number of complaints conciliated at the Commission since July 2010 are set out in the table below.

Period	No. of complaints conciliated
2015-2016	202
2014-2015	184
2013-2014	257
2012-2013	212
2011-2012	241
2010-2011	246

Nearly all of the complaints conciliated at the Commission will have resulted in agreements being filed at QCAT. The Commission is not aware of how many complaints settled at QCAT will have resulted in agreements being filed.

17. In order to make it clear that the process for enforcing QCAT decisions includes agreements filed with QCAT under the *Anti-Discrimination Act 1991*, the Commission recommends an amendment to that effect to the definition of 'final decision' in section 129 of the QCAT Act.

18. Since the department's advice in mid-2016 about its preferred approach to a clarifying amendment, the *Anti-Discrimination Act 1991* has been amended so that QCAT will no longer have jurisdiction to deal with unresolved work-related complaints. The references to 'tribunal' in sections 164 and 189 of the *Anti-Discrimination Act 1991* now means QIRC for work-related complaints, and QCAT for all other complaints.
19. The Commission considers the clarifying amendment should be made to the QCAT Act for the following reasons:
 - (a) there are now two tribunals that have jurisdiction to deal with complaints;
 - (b) the QIRC has its own process for enforcing its decisions and orders;
 - (c) it will be simpler for users, including court registry staff, for the process of enforcing QCAT orders to be self-contained within the QCAT Act.
20. Another issue for consideration is inconsistency between the functions conferred on QCAT under the *Anti-Discrimination Act 1991*, and the enforcement of QCAT decisions. Division 4 of chapter 2 of the QCAT Act (sections 129 to 132) provides for the enforcement of QCAT decisions in courts of competent jurisdiction. Although QCAT has been held to be a court,⁵ QCAT does not enforce its own decisions.
21. However, as a consequence of amendments included in the *Industrial Relations Act 2016*, section 174A(a)(iii) of the *Anti-Discrimination Act 1991* gives QCAT the function of enforcing agreements for resolution of complaints by conciliation, in relation to complaints referred, or to be referred, to QCAT.
22. Section 174A(a)(iii) of the *Anti-Discrimination Act 1991* should be amended so that it is consistent with the requirement for QCAT to file

⁵ See *Owen v Menzies* [2013] Qd R 327; also, section 164 of the QCAT Act that provides that QCAT is a court of record.

agreements made before referral, and with the practice of QCAT in relation to enforcement of its decisions and orders.

Amendments to the *Anti-Discrimination Act 1991*

23. Clause 10 of the Bill would amend the examples of sexual harassment in section 119 of the *Anti-Discrimination Act 1991*. Section 119 is divided into paragraphs rather than subsections. The examples currently refer to the paragraphs of section 119 as ‘subsections’. The amendment will correct the references in the examples to ‘paragraphs’.
24. Clause 10 of the Bill is an editorial amendment, and is supported by the Commission.

Conclusion

25. The Commission recommends the following amendments to the Bill:
 - (a) Add a clause to amend section 129 of the *Queensland Civil and Administrative Tribunal Act 2009* to make it clear that a ‘final decision’ includes an agreement filed with QCAT under sections 164 or 189 of the *Anti-Discrimination Act 1991*; and
 - (b) Add a clause to amend section 174A of the *Anti-Discrimination Act 1991* by:
 - (i) in paragraph (a), deleting the words ‘that are referred, or to be referred, to QCAT under this Act’
 - (ii) in paragraph (a)(iii), delete the word ‘enforce’ and substitute it with the word ‘file’.