



## Discussion Paper: questions at a glance

These discussion questions have been taken from the Discussion Paper published in November 2021 as part of our Review of Queensland's *Anti-Discrimination Act 1991*.

Submissions to the Review will close on 1 March 2022. The Discussion Paper and information on how to make a submission can be found on the Queensland Human Rights Commission website at [www.qhrc.qld.gov.au/law-reform/have-your-say](http://www.qhrc.qld.gov.au/law-reform/have-your-say).

### Key concepts

#### Meaning of discrimination

##### **DISCUSSION QUESTION 1:**

- Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

#### Direct discrimination

##### **DISCUSSION QUESTION 2:**

- Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?
- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

#### Indirect discrimination

##### **DISCUSSION QUESTION 3:**

- Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?
- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

##### **DISCUSSION QUESTION 4:**

- Do you support a unified test for both direct and indirect discrimination? Why or why not?

#### Special services or facilities

##### **DISCUSSION QUESTION 5:**

- Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? If so, in which areas?
- Should the factors relevant to determining unjustifiable hardship be redefined, and if so how?
- How can the compliance costs for business and organisations be appropriately considered and weighed?

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## Reframing to a positive obligation

### DISCUSSION QUESTION 6:

- Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'?
- If you consider that this approach should be adopted:
- Should this be a standalone duty?
- What factors should be considered when assessing 'reasonableness' of accommodations?
- Should it apply to disability discrimination, other specific attributes, or all attributes?
- Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?
- How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?

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## Discrimination on combined grounds

### DISCUSSION QUESTION 7:

- Is there a need to protect people from discrimination because of the effect of a combination of attributes?
- If so, how should this be framed in the Act?
- Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds?
- What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?

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## Burden of proof

### DISCUSSION QUESTION 8:

- Should the onus of proof shift at any point in the process?
- If yes, what is the appropriate approach?

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## Meaning of sexual harassment

### DISCUSSION QUESTION 9:

- Should the additional words 'in the presence of a person' be added to the legal meaning of sexual harassment in the Act? What are the implications of this outside of a work setting?
  - Should a further contravention of sex-based harassment be introduced? If so, should that be applied to all areas of activity under the Act?
  - Should the Act explicitly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex? If so, should that apply to all areas of activity under the Act?
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## Dispute resolution

### Two-stage enforcement model

#### DISCUSSION QUESTION 10:

- Should the Act include a direct right of access to the tribunals?
- Should a complaint or respondent be entitled to lodge their complaint directly with a tribunal?
- Should a person be entitled to apply directly to the Supreme Court where circumstances raise matters of significant public interest matters? If so:
- Should it be confined to certain matters?
- What remedies should be available to the complainant?
- Who would have standing to bring the complaint?
- What are the risks and benefits of any direct rights of access?
- What circumstances could these amendments apply to? Please provide examples that may justify this approach.
- How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims?

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### Terminology

#### DISCUSSION QUESTION 11:

- Should the 'complaint-based' terminology be changed?
- If so, what should it be replaced with?

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### Written complaints

#### DISCUSSION QUESTION 12:

- Should non-written requests for complaints be permitted, for example by video or audio?
- Alternatively, should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing?
- How would this impact on respondents?
- How can the right balance be achieved between ensuring certainty for the respondent about the contents of the complaint while addressing the barriers to access?

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### Efficiency and flexibility

#### DISCUSSION QUESTION 13:

- How can the law be adapted to allow a more flexible approach to resolving complaints?
  - Should the current provisions that require set notification and conference timeframes be retained, changed or repealed?
  - Should all complaints proceed through the same conciliation model, or should early intervention be an option?
  - What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?
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Time limits	<p><b>DISCUSSION QUESTION 14:</b></p> <ul style="list-style-type: none"> <li>• Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased and if so, by how long?</li> <li>• Should there be special provisions that apply to children or people with impaired decision-making capacity?</li> <li>• Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?</li> <li>• Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?</li> </ul>
Representative complaints	<p><b>DISCUSSION QUESTION 15:</b></p> <ul style="list-style-type: none"> <li>• Are there any changes that would improve the accessibility and utility of representative complaints?</li> <li>• What factors influence the capacity for affected people to assert their rights as a representative complaint?</li> </ul>
Organisation complaints	<p><b>DISCUSSION QUESTION 16:</b></p> <ul style="list-style-type: none"> <li>• Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?</li> <li>• Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?</li> </ul>
Complaints by prisoners	<p><b>DISCUSSION QUESTION 17:</b></p> <ul style="list-style-type: none"> <li>• Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?</li> <li>• Do the current provisions strike the right balance in ensuring access to justice while encouraging early resolution?</li> <li>• Should any internal complaint requirements for prisoners be retained, and if so, how can they be simplified to overcome practical concerns?</li> </ul>
Other dispute resolution issues	<p><b>DISCUSSION QUESTION 18:</b></p> <ul style="list-style-type: none"> <li>• Are there any aspects of the complaint (dispute resolution) process that should be considered by the Review?</li> <li>• If so, what are the issues and your suggestions for reform?</li> </ul>

## Eliminating discrimination

Objectives of the Act	<p><b>DISCUSSION QUESTION 19:</b></p> <ul style="list-style-type: none"> <li>• What should be the overarching purposes of the Anti-Discrimination Act?</li> <li>• Should an objects clause be introduced?</li> <li>• If so, what are the key aspects that it should contain?</li> <li>• If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?</li> </ul>
Special measures	<p><b>DISCUSSION QUESTION 20:</b></p> <ul style="list-style-type: none"> <li>• Should welfare measures and equal opportunity measures be retained or changed? Is there any benefit to collapsing these provisions into a single special measures provision?</li> <li>• Should special measures provisions continue to be an exemption to discrimination, or incorporated into the meaning of discrimination?</li> </ul>

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## Positive duties

### DISCUSSION QUESTION 21:

- Do you support the introduction of a positive duty in the Anti-Discrimination Act?
- Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?
- Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?
- Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?
- What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?
- What matters should be considered in determining whether a measure is reasonable and proportionate?

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## Regulatory approach and the role of the Commission

### DISCUSSION QUESTION 22:

- Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?
- If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role?
- What should be the core components of the regulatory model, and what mechanisms and powers should it include?
- What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation?
- If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion?

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## Role of the tribunals

### DISCUSSION QUESTION 23:

- Should there be a specialist list for the tribunals?
  - If so, what would the appropriate qualifications be for a tribunal decision-maker?
  - Should a uniform set of procedural rules be developed to apply across both tribunals?
  - Should the tribunals be required to publish all decisions/substantive decisions?
  - Could data sharing be permitted and encouraged between Commission and tribunals to form a better overall picture?
  - On what basis should the Commission be permitted to intervene in proceedings under the Anti-Discrimination Act. Should leave of the court or tribunal be required? Why or why not?
  - What other issues relating to the functions, processes, power and outcomes of the Tribunals should be considered by the Review?
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## Non-legislative measures

### DISCUSSION QUESTION 24:

- What non-legislative measures are required to ensure protections under the law are available to everyone?

## Grounds of discrimination

### Current attribute - impairment

#### DISCUSSION QUESTION 25:

- Should the attribute of impairment be replaced with disability?
- Should a separate attribute be created, or the definition amended to refer specifically to mental health or psychosocial disability?
- Should the law be clarified about whether it is intended to cover people who experience addiction?
- Should reliance on a guide, hearing or assistance dog be broadened to be reliance on an assistance animal? Should it only apply to animals accredited under law? How would this approach work with the Guide, Hearing and Assistance Dogs Act 2009?

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### Current attribute – gender identity

#### DISCUSSION QUESTION 26:

- Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

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### Current attribute – sexuality

#### DISCUSSION QUESTION 27:

- Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

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### Current attribute – lawful sexual activity

#### DISCUSSION QUESTION 28:

- Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be?

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### Specific attributes

#### DISCUSSION QUESTION 29:

- Does the terminology used to describe any existing attributes need to be changed?
  - For attributes that have a legislative definition in the Act, do those definitions need to change?
  - For attributes that do not have a legislative definition, should a definition be introduced?
  - Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?
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Additional attributes	<p><b>DISCUSSION QUESTION 30:</b></p> <ul style="list-style-type: none"> <li>• Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?</li> <li>• How should any further attribute(s) be framed? Should they apply to all areas?</li> <li>• What are some examples of how people who have had interactions with law enforcement experience discrimination, including by whom and in what settings?</li> <li>• How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?</li> </ul> <p><b>DISCUSSION QUESTION 31:</b></p> <ul style="list-style-type: none"> <li>• Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?</li> </ul> <p><b>DISCUSSION QUESTION 32:</b></p> <ul style="list-style-type: none"> <li>• Is there a need for the Act to cover discrimination on the grounds of immigration status? If so, should it stand alone or be added as another aspect of 'race'?</li> </ul> <p><b>DISCUSSION QUESTION 33:</b></p> <ul style="list-style-type: none"> <li>• Is there a need for the Act to cover discrimination on the grounds of employment activity?</li> <li>• Is this an unnecessary duplication of protections under the Fair Work Act?</li> </ul> <p><b>DISCUSSION QUESTION 34:</b></p> <ul style="list-style-type: none"> <li>• Is there a need for the Act to cover discrimination on the grounds of physical features?</li> </ul>
Gender	<p><b>DISCUSSION QUESTION 35:</b></p> <ul style="list-style-type: none"> <li>• Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?</li> </ul>
Sex characteristics	<p><b>DISCUSSION QUESTION 36:</b></p> <ul style="list-style-type: none"> <li>• Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?</li> </ul>
Subjection to domestic violence	<p><b>DISCUSSION QUESTION 37:</b></p> <ul style="list-style-type: none"> <li>• Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?</li> </ul>
Accommodation status	<p><b>DISCUSSION QUESTION 38:</b></p> <ul style="list-style-type: none"> <li>• Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?</li> </ul>
Other additional attributes	<p><b>DISCUSSION QUESTION 39:</b></p> <ul style="list-style-type: none"> <li>• Should any additional attributes, including those highlighted above, be included in the Act?</li> <li>• If so, what evidence can you provide for why these attributes should be protected?</li> <li>• How should they be defined?</li> <li>• How would inclusion of the attribute promote the rights to equality and non-discrimination?</li> </ul>

# Exemptions

## General

### exemptions - sport

#### DISCUSSION QUESTION 40:

- Should the sport exemption be retained, amended, or repealed?
- Should competitive sporting activity be more clearly defined?
- Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?

## General

### exemptions - religious bodies

#### DISCUSSION QUESTION 41:

- Should the scope of the religious bodies' exemption be retained or changed?
- In what areas should exemptions for religious bodies apply, and in relation to which attributes?

#### DISCUSSION QUESTION 42:

- Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?

#### DISCUSSION QUESTION 43:

- Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises?

## Work exemptions – religious educational institutions

#### DISCUSSION QUESTION 44:

- Should the religious educational institutions and other bodies exemption be retained, changed, or repealed?
- If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

## Work exemptions – working with children

#### DISCUSSION QUESTION 45:

- Are there reasons why the work with children exemption should not be repealed?

## Goods and services exemption – assisted reproductive technology

#### DISCUSSION QUESTION 46:

- Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

## Accommodation exemption – sex workers

#### DISCUSSION QUESTION 47:

- Should the sex worker accommodation exemption be retained, changed or repealed?

## State laws and programs – prisoners

#### DISCUSSION QUESTION 48:

- Should the Corrective Services Act modifications be retained, changed or repealed?



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State laws and programs – citizenship and visa status

**DISCUSSION QUESTION 49:**

- Should the citizenship/visa status exemption be retained, changed, or repealed?
- Are there certain groups in Queensland that are being unreasonably disadvantaged by this exemption?

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Superannuation and insurance

**DISCUSSION QUESTION 50:**

- Should the insurance and superannuation exemptions be retained or changed?

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Other exemptions

**DISCUSSION QUESTION 51:**

- Should any other exemptions be changed or repealed? What evidence justifies the continued need for these exemptions?
- Should further exemptions be created? What evidence justifies the need for further exemptions?

## Areas of activity

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Goods and services

**DISCUSSION QUESTION 52:**

- Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed?
- Should any goods and services providers be exempt from discrimination, and if so, what should the appropriate threshold be?

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Club memberships and affairs

**DISCUSSION QUESTION 53:**

- How should the Act define a ‘club’?
- How would this interact with a potential further ‘sport’ area of activity?

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Sport

**DISCUSSION QUESTION 54:**

- Should a separate area of activity for sport be created?
- What are examples of where the sport area would cover situations not already covered in other areas?
- What exemptions should apply (if any) to sport if, it were to become a new protected area of activity?

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Other areas of activity

**DISCUSSION QUESTION 55:**

- Are any additional areas of activity required? Should any be repealed?
- Should the scope of any of the areas of activity be further refined?

## Human rights analysis

**DISCUSSION QUESTION 56:**

- Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate?
- Where rights are being limited to meet a legitimate purpose, are there any less restrictive and reasonably available ways to achieve that purpose?

