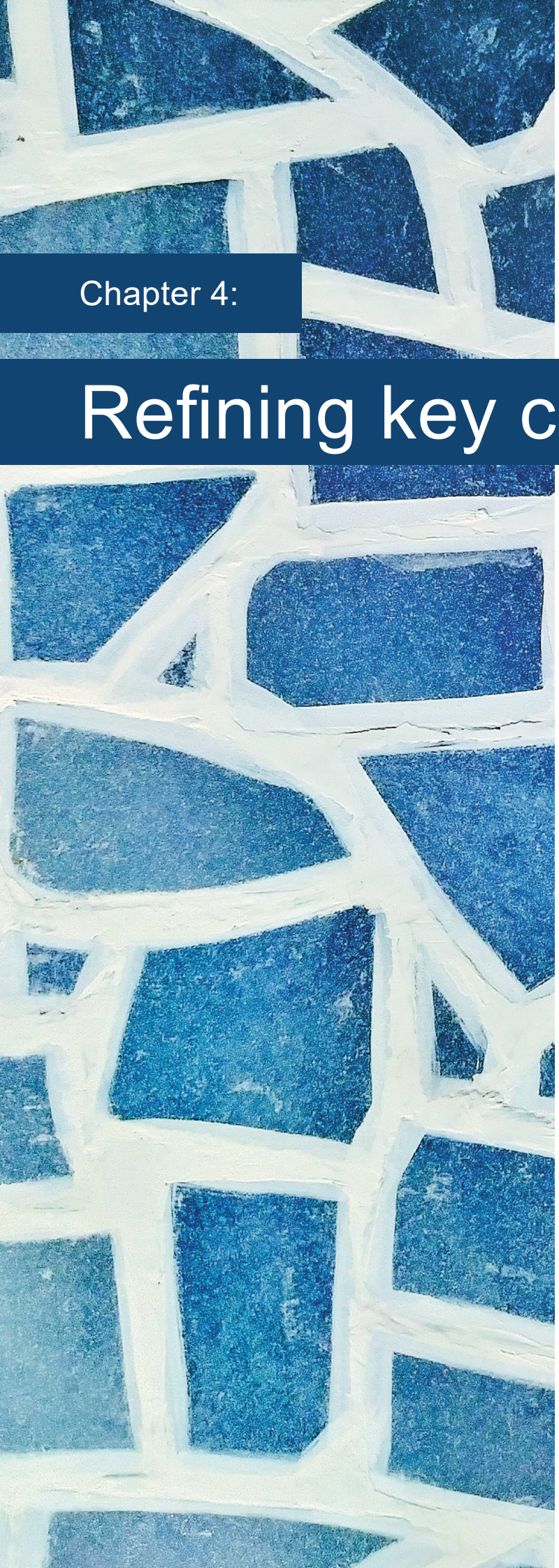

Chapter 4:

Refining key concepts

Contents

Defining discrimination

The Terms of Reference for this Review[1] ask us to consider:

- whether there is a need to amend the definition of discrimination
- whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination or whether there are other contemporary responses that would be appropriate.

Our approach in this section has considered reforms to enhance and update the Act, including by considering Australian and international best practice approaches. We have also considered how the objectives of the Act can be best achieved.[2]

For the Act to be effective, the definition of discrimination should be easy to understand. It should avoid unnecessary technicalities that dilute the effectiveness of the law and increase the time and resources expended by complaint parties, the Commission, and tribunals. Although the area of discrimination law is technically complex, we have recommended an approach that simplifies the core definitions and makes the Act more accessible.

Types of discrimination

Current approach

In all Australian jurisdictions, including Queensland, there are two types of discrimination – direct and indirect.[3]

Direct and indirect discrimination can arise from the same set of facts. For example, a school policy that bans all headwear except for the approved school hat may be indirectly discriminatory, but the application of the policy (telling a person to stop wearing a Sikh turban) is directly discriminatory.

While the Act refers to types of discrimination, it does not explicitly state whether conduct can amount to both direct and indirect discrimination, leaving the matter in doubt.[4]

Comparative approach

Australian Capital Territory

The Australian Capital Territory (ACT) has maintained separate concepts of direct and indirect discrimination but clarified that conduct can be both direct and indirect by including the words 'when a person discriminates either directly or indirectly or both…'.[5] This clarification was recommended by a review of Australian Capital Territory discrimination laws.[6]

International jurisdictions – unified test

Some international approaches have adopted a single, unified test.[7] This option was considered in the 2011 review of Commonwealth discrimination laws, which considered whether having two different types of discrimination was artificial and has created unnecessary complexity.[8]

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e) and (i).
2 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.
3 *Anti-Discrimination Act 1991* (Qld) ss 10, 11.
4 *Anti-Discrimination Act 1991* (Qld) s 9.
5 *Discrimination Act 1991* (ACT) s 8.
6 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 31.
7 For example – Canada, South Africa, United States of America, and New Zealand have done so.
8 Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 13.

Retaining the concepts, making it clearer

In the Discussion Paper, we asked whether there should be a unified test for both direct and indirect discrimination. We also discussed this question during our consultations, including in a roundtable for legal practitioners.[9]

Twenty-eight submissions addressed this topic. A broad range of legal and community stakeholders supported replicating the approach of the ACT.[10] Two submissions did not support taking this approach.[11]

The Queensland Law Society commented that 'direct and indirect are part of a continuum and may occur together' and should not be mutually exclusive concepts.[12] The Queensland Catholic Education Commission agreed that the Act should clarify that direct and indirect discrimination are not mutually exclusive, and in instances where both are evident, they should be able to be dealt with at the same time.[13] The Queensland Civil and Administrative Tribunal commented that if it was intended that claims may arise in both direct and indirect discrimination based on the same facts, then the legislation should clarify this 'so that the point does not need to be litigated' in the Tribunal.[14]

One stakeholder considered that the concepts of direct and indirect might become conflated and that the ACT wording might lead some people to believe that they need to demonstrate both forms of discrimination.[15] Another submission also considered that taking this step might be premature given that most other jurisdictions have not made this clarification.[16]

With respect to combining direct and indirect discrimination into a single definition, most submissions were not in favour of such an approach, however a small number of submissions indicated support for such a change.[17]

The Queensland Law Society commented that some of their members thought a unified test would benefit practitioners and their clients on both sides of the complaint.[18] The Public Advocate (Qld) was in favour because having two separate tests may be 'confusing and arbitrary'.[19] PeakCare Queensland Inc and Multicultural Australia could also see some see merit in considering a unified approach as a way to address systemic discrimination.[20]

9 Legal practitioners' roundtable, 10 February 2022.
10 Youth Advocacy Centre Inc submission; Public Advocate (Qld) submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Queensland Law Society submission; Name withheld (Sub.135) submission; Respect Inc and DecrimQLD submission; Legal Aid Queensland submission; Queensland Catholic Education Commission submission; Queensland Council of Social Service submission; Rainbow Families Queensland submission; Queensland Council for Civil Liberties submission; Christian Schools Australia submission; Australian Industry Group submission; Associated Christian Schools submission; Caxton Legal Centre submission; PeakCare Queensland Inc submission; Vision Australia submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Equality Australia submission; Australian Lawyers Alliance submission; Department of Education (Qld) submission; Queensland Civil and Administrative Tribunal submission; Australian Association of Christian Schools submission; Jenny King submission.
11 Christian Schools Australia submission; Australian Industry Group submission.
12 Queensland Law Society submission, 2.
13 Queensland Catholic Education Commission submission, 3.
14 Queensland Civil and Administrative Tribunal submission, 16.
15 Australian Industry Group submission, 3.
16 Christian Schools Australia submission, 8.
17 Queensland Law Society submission; Public Advocate (Qld) submission; PeakCare Queensland Inc. submission; Multicultural Australia submission; Australian Discrimination Law Experts Group submission.
18 Queensland Law Society submission, 3; Vision Australia submission, 3-4;
19 Public Advocate (Qld) submission, 2.
20 Multicultural Australia submission, 6; PeakCare Queensland Inc submission, 4.

Of those that did not support the change, most stakeholders raised the following concerns:

- that a major departure from other Australian jurisdictions would lead to inconsistency[21]
- that it may be unnecessary[22] and could create even more confusion,[23] particularly if it means discarding decades of Australian jurisprudence[24]
- that it may be impractical to find a single test to achieve an appropriate explanation of both concepts[25]
- that retaining separate tests has a strong educative value, particularly because indirect discrimination is not well understood.[26]

The Review's position

The Review considers that:

- direct and indirect discrimination should remain distinct and separate concepts
- clarifying that both concepts may apply to the same set of facts is beneficial, to remove any doubt on the matter
- including the two concepts in a single provision will simplify the drafting and aid understanding
- drafting should avoid conflating the two concepts, to make it clear that 'direct' or 'indirect' or both 'direct and indirect' may be argued, and any potential confusion may be mitigated by clear explanatory notes.

Direct discrimination

Current approach

Direct discrimination under the Act is where a person treats a person with an attribute less favourably than another person without the attribute in circumstances that are the same or not materially different.[27] This approach requires comparison between the treatment of a person because of a protected attribute, and treatment that is or would be afforded to a real or hypothetical person – the 'comparator'.[28]

In the Discussion Paper we asked for submissions on whether the test for direct discrimination should remain unchanged, whether an 'unfavourable treatment' or another approach be adopted, and received 45 submissions on this question.[29] The vast majority recommended changes to

21 See for example: Australian Association of Christian Schools submission, 8; Legal Aid Queensland submission 10; Australian Lawyers Alliance submission, 7.
22 Caxton Legal Centre submission 4.
23 Legal Aid Queensland submission, 10.
24 Equality Australia submission, 12.
25 Aged and Disability Advocacy Australia submission, 3.
26 Queensland Catholic Education Commission submission 4; Department of Education (Qld) submission, 3.
27 *Anti-Discrimination Act 1991* (Qld) s 10.
28 This is the situation in Queensland, Western Australia, New South Wales, Tasmania, South Australia, and the Northern Territory.
29 Youth Advocacy Centre Inc submission; Queensland Law Society submission; Caxton Legal Centre submission; Queensland Nurses and Midwives Union submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated submission; LGBTI Legal Service Inc submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia (NAPWHA) submission; Respect Inc and DecrimQLD submission; Name withheld (sub.069) submission; Queensland Catholic Education Commission submission; Australian Discrimination Law Experts Group submission; Australian Industry Group submission; Queensland Council of Social Service submission; Queensland Council of Unions submission; Aged and Disability Advocacy Australia submission; Rainbow Families Queensland submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc; Name withheld (sub.135) submission; Life Without Barriers submission; Women's Legal Service submission;

the current approach. Similar views were echoed in consultations with stakeholders.[30] Only three submissions suggested that we maintain the status quo.[31] Another submission commented generally that modification of legal tests could lead to 'unfair obligations and unfair burdens' on Queensland health carers.[32]

Reflecting the views of many stakeholders that the current Act is not meeting its objectives, one member of the Australian Discrimination Law Experts Group told us:

> *We have defined it so tightly that we've forgotten that it's about behaviour that is either motivated by prejudice or had a prejudicial effect… We have this law because people are discriminated against because of prejudiced attitudes… we forget that that's the underlying issue.*[33]

Challenges created by the comparator

The primary issue identified with the current direct discrimination test by submissions to this Review, and by previous Australian inquiries regarding discrimination laws,[34] is the element of proving the comparator.

Some of the concerns we identified about the comparator include:

- The current test is technical, uncertain, hard to understand and apply for parties, the Commission, courts, and tribunals. [35]
- This is particularly so when it comes to complex factual scenarios[36] and when argued in combination with 'characteristics' of attributes.[37]
- Constructing a hypothetical comparator is artificial, contrived, and creates barriers to accessing justice particularly for unrepresented parties.[38]
- Placing emphasis on identifying a comparator takes the focus away from the subject of the complaint – whether there was unfair treatment because of an attribute.[39]

Australian Lawyers Alliance submission; Christian Schools Australia submission; Associated Christian Schools submission; Multicultural Australia submission; Equality Australia submission; Vision Australia submission; Department of Education (Qld) submission; Community Legal Centre Queensland submission; Human Rights Law Alliance submission; Name withheld (sub.026) submission; Assoc Prof Dominique Allen submission; Joint Churches submission; Dr Nicky Jones submission; Australian Psychological Society submission; Jenny King submission; Maternity Choices Australia submission; Scarlett Alliance submission; Australian Association of Christian Schools submission; Queensland Disability Network submission; Queensland Civil and Administrative Tribunal submission; Royal Australian and New Zealand College of Psychiatrists submission; Medical Insurance Group Australia submission.

30 For example: Aboriginal and Torres Strait Islander Women's Legal Service North Queensland consultation, 15 September 2021; Townsville Community Law consultation, 17 August 2021; Kevin Cocks consultation, 28 February 2022.

31 Australian Industry Group submission, 3; Australian Associated Christian Schools submission, 6-7; Christian Schools Australia submission, 8.

32 Medical Insurance Group Australia submission, 3.

33 Australian Discrimination Law Experts Group (Robin Banks), Consultation with the Review of the Anti-Discrimination Act, Consultation, 14 September 2021.

34 See for example: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999), 82; ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 33–34; Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 85; Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011), 13.

35 See for example: Youth Advocacy Centre Inc submission, 2; Caxton Legal Centre submission, 3; Equality Australia submission, 9-10.

36 Legal Aid Queensland submission, 8.

37 Queensland Civil and Administrative Tribunal submission, 15-16.

38 See for example: Respect Inc and DecrimQLD submission, 14; Life without Barriers submission, 1.

39 See for example: Queensland Law Society submission, 3; Assoc Prof Dominique Allen submission, 2; Women's Legal Service submission, 3.

- Because of unconscious biases, fair comparisons can never be made about matters involving historical disadvantage e.g. First Nations peoples and people with cognitive disability.[40]
- The current test makes it unfeasible to argue discrimination complaints based on combined attributes.[41]
- It leads to protracted and costly legal proceedings, draining the resources of the tribunals.[42]

The Alliance of Queensland Lawyers and Advocates referred to this example to illustrate how the comparator approach is causing challenges:

> A Māori man might have moko (a cultural tattoo) on his face, but some other people who are not Māori also have face tattoos. If a Māori man is asked to leave a restaurant because of his tattoo, clearly you should compare the treatment of him to someone who is not Māori. But if he brings a complaint under the current law, he might have to deal with a lengthy argument about whether that other non-Māori person (the comparator) also had a tattoo on their face and if so, would that other person have been treated the same way.[43]

Specific concerns were raised about how the requirement to identify a hypothetical comparator disadvantages people with disability,[44] and people of faith.[45]

Disability discrimination

For people whose behaviours form part of their disability, the challenge of constructing a real or hypothetical comparator can be insurmountable. Where the manifestation of an attribute is the reason for discrimination, cases heard before tribunals and courts have often been unsuccessful, with a finding that a hypothetical person would have been treated in the same way.[46] This has become a complex and controversial area of discrimination law that some stakeholders consider has significantly reduced the effectiveness of the Act for people with disability.

Queensland Advocacy Incorporated commented that removing the comparator would address an 'artificial separation of disability and its characteristics which has been ingrained in the law since *Purvis*', and 'fails to appreciate the complex and interactive nature of disability as understood by the social model.'[47]

The Department of Education already adopts the unfavourable treatment test in relation to students, and 'acknowledges that constructing a hypothetical comparator when multiple overlapping factors may be involved is problematic' because it distracts from the intention of the law.[48] This view was also shared by the Queensland Catholic Education Commission

40 See for example: Caxton Legal Centre submission, 2, Aged and Disability Advocacy Australia submission, 2.
41 See for example: Legal Aid Queensland submission, 7; LGBTI Legal Service Inc submission, 8; Queensland Advocacy Incorporated submission, 18; Queensland Positive People submission, 7, Australian Discrimination Law Experts Group submission, 20. See also – Discrimination on combined grounds, in this chapter.
42 See for example: Queensland Nurses and Midwives Union submission, 8; Queensland Civil and Administrative Tribunal submission, 15-16.
43 Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
44 See for example: Aged and Disability Advocacy Australia submission, 2; Public Advocate (Qld) submission, 1; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia (NAPWHA) submission, 7; Queensland Advocacy Incorporated submission, 15-16.
45 Human Rights Law Alliance submission, 14.
46 This is a line of reasoning based on the High Court case of *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62. But this case was distinguished in Queensland by *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100 because of the different provisions in the Queensland Act (including section 8) and the irrelevance of the reasoning in *Purvis* to subject matter unrelated to 'behaviour'.
47 Queensland Advocacy Incorporated submission, 16.
48 Department of Education (Qld) submission, 3.

because of the 'complexity and highly individualised nature of the manifestation of the impact of disability'.[49]

Religious discrimination

Human Rights Law Alliance considered that the need to construct a hypothetical comparator can be 'particularly destructive of religious freedom rights' because 'religious activities… are unlikely to be included in a hypothetical comparator', rendering the Act 'largely useless' at present for religious complainants.[50]

Concerns with changing the comparator

A minority of submissions seeking to maintain the current approach were concerned that changing the definition would involve unfairly lowering the threshold required to prove discrimination. We explore these points below.

Fairness and objectivity

Some submissions put forward a view that retaining the comparator test is important to maintaining an objective approach.[51]

Cases decided in Victoria after their Act was changed from the 'less favourable' to the 'unfavourable' approach have indicated that the unfavourable treatment test remains an objective one.[52]

Consistency

Two submissions raised concerns that changing the approach may create confusion or inconsistency for employers and organisations by departing from the approach of most other jurisdictions.[53]

While most jurisdictions retain the comparator test, consistency is not assured, because three definitions for direct discrimination are operating in Australia and there is further inconsistency between individual federal Act definitions.[54] This has led the Australian Human Rights Commission to recently recommended simplifying the law by removing the existing comparator test in the federal sex, disability, and age discrimination laws.[55] The Review notes that the Western Australian review of their equality legislation is also considering the same change.[56]

A fundamental element

While most of their members were in favour of removing the comparator and simplifying the test, the Queensland Law Society noted that some of their members thought it was 'fundamental to determining whether discrimination occurred' because it allows for the consideration of different

49 Queensland Catholic Education Commission submission, 3.
50 Human Rights Law Alliance submission, 14.
51 Australian Industry Group submission, 3; Australian Associated Christian Schools submission, 6-7.
52 *Aitken v The State of Victoria Department of Education & Early Childhood Development* [2012] VCAT 1547, 156; *Wilson v Western Health (Human Rights)* [2014] VCAT 771; *Perera v Warehouse Solutions Pty Ltd (Human Rights)* [2017] VCAT 1267.
53 Australian Industry Group submission, 3; Christian Schools Australia submission, 8.
54 Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, November 2021) 31 (see table). Note - the Racial Discrimination Act already takes a different approach from the sex, age and disability laws.
55 Australian Human Rights Commission, *Free and Equal – A reform agenda for federal discrimination laws* (December 2021) 279 – 283.
56 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 137-140.

treatment.[57] This view was shared by a practitioner who attended the Review's roundtable for legal practitioners, and commented:

> Anti-discrimination laws aren't just about treating someone badly… it's about whether or not you can establish that the reason why that person was targeted or subjected to a detriment was because of a particular attribute they have… it's very useful to show the nexus to the attribute.[58]

On the other hand, the Queensland Catholic Education Commission supported a simplified, unfavourable treatment approach because:

> In practical terms, the comparative exercise often necessitates consideration of the unfavourable treatment approach. It requires consideration of two issues: was the relevant student treated unfavourably and, if so, was the reason a protected characteristic?[59]

Comparison still a helpful tool

Some submissions expressed a view that even if the comparator is removed from the test for discrimination, the comparative analysis is likely to remain a feature of many cases. However, it would shift from being a mandatory element for the complainant to prove in every case to a discretionary tool to identify the reason for the treatment.[60]

For example, one submission commented that:

> Whilst a comparator may be helpful evidentially, sometimes it makes more sense to go straight to the "reason why" without tribunals tying themselves in knots attempting to identify an appropriate comparator. The real question should be "why was the complainant treated unfavourably"? Was it because of an attribute?"[61]

Comparative approaches

Of the submissions that advocated for changing the test for direct discrimination, three approaches were suggested:

- Unfavourable treatment approach (ACT, Victoria)
- Racial Discrimination Act approach (section 9 RDA)
- Equality Act 2010 (UK) approach (UK approach)

Unfavourable treatment approach

The Australian Capital Territory and Victoria have moved away from a differential treatment test towards a test of 'unfavourable treatment'. By removing the comparator as an essential element, considerations by a decision-maker about the comparator become part of their analysis only when it is a useful exercise, rather than an element that must be established to a particular standard.

The word 'unfavourable' seems to invite a comparison of treatment afforded to a person with and a person without the relevant attribute.[62] Nonetheless, the Australian Capital Territory Administrative Appeals Tribunal has articulated the difference:

57 Queensland Law Society submission, 2.
58 Legal practitioners' roundtable, 10 February 2022.
59 Queensland Catholic Education Commission submission, 3.
60 Australian Discrimination Law Experts Group submission, 20.
61 Name withheld (Sub.135) submission, 5-6.
62 The *Macquarie Dictionary* meaning of unfavourable includes 'disadvantageous' and 'adverse'; and the *Oxford Dictionary* meaning of unfavourable includes 'likely to lead to an adverse outcome.'

> While the term 'disadvantage' might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent... The primary meaning of 'advantage' does not import comparison; the same dictionary gives it as 'any state, circumstance, opportunity or means specially favourable to success, interest, or any desired end'. The Discrimination Act is therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.[63]

This reasoning has been confirmed by Victorian cases since that Act was amended to the 'unfavourable' approach.[64] For instance, a man was banned from all council buildings because of behaviour that was a manifestation of his mental health and cognitive disabilities. The tribunal found that this was discrimination, and confirmed that, while analysis may be informed by consideration of the treatment afforded to others, the 'unfavourable' approach only requires 'an analysis of the impact of the treatment on the person complaining of it.'[65]

An evaluation of the operation of this test in Victoria over 10 years found that there had been a positive and purposeful change in the approach of parties, tribunals, and courts, and that most stakeholders believed it to be simpler, cleaner, and more accessible, with fewer distractions from the main issues. Both complainant and respondent lawyers commented that it was easier to provide advice, with one respondent lawyer commenting that the comparator test was 'tricky for everyone, not just applicants.' [66]

The unfavourable treatment option was generally the preferred approach of those stakeholders that were in favour of a change to the definition. While some submissions stated a first preference for the Racial Discrimination Act approach (explored in the following section) almost all indicated support for the unfavourable treatment approach in the alternative.[67]

The reasons offered in support of this approach include that it:

- is operating well in Victoria because simplifying the law has led to more certain and predictable outcomes for both complainants and respondents[68]
- is an approach that produces more accessible and less technical case law[69]
- places the focus on the key issues – the unfair treatment and reasons for it[70]
- improves the capacity of the law to respond to disadvantage[71]
- reflects the approach of the *International Covenant on Civil and Political Rights* which frames discrimination in terms of impact on the affected group.[72]

63 *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, 22.
64 *Kukyen v Chief Commissioner of Police* [2015] VSC 204.
65 Slattery v Manningham City Council (Human Rights) [2013] VCAT 1869.
66 Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 480-484.
67 See for example: Caxton Legal Centre submission, 3; Public Advocate (Qld) submission, 3; Life without Barriers submission, 2; Multicultural Australia submission, 7.
68 Caxton Legal Centre submission, 3; Legal Aid Queensland submission, 8. See also Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2021) 44(2) *Melbourne University Law Review* 485.
69 Legal Aid Queensland submission, 8.
70 Assoc Prof Dominique Allen submission 2; Women's Legal Service submission 3; Vision Australia submission 2.
71 Queensland Council for Civil Liberties submission, 2.
72 Caxton Legal Centre submission, 3. See also *International Covenant on Civil and Political Rights* art 2(2) and United Nations Human Rights Committee, *General Comment No.18: Non-discrimination*, 37th sess (10 November 1989) 7.

Racial Discrimination Act approach

Some stakeholders in submissions and consultations[73] advocated for a definition of direct discrimination based on the following wording in the federal Racial Discrimination Act:

> Distinction, exclusion, restriction or preference… which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[74]

An amended version of the above test, incorporating factors protecting the right to freedom of religion, was also recommended by Christian Schools Australia.[75]

The test for discrimination in the Racial Discrimination Act is derived from the *International Convention on the Elimination of All Forms of Racial Discrimination*. In support of this approach, Caxton Legal Centre[76] referred to two cases decided under this provision: the landmark class action case of *Wotton v State of Queensland*,[77] and the successful underpayment of wages case, *Baird v Queensland*.[78] These two cases confirm that while neither an actual nor hypothetical comparator is needed, comparative analysis may nonetheless be part of the analysis of the words 'on an equal footing'.[79] However, the court in *Wotton* found that it did not need to be 'constrained by the complex comparator structure' found in other anti-discrimination laws.[80]

But there may be limitations to this approach because:

- no other jurisdiction in Australia applies this definition of discrimination to all attributes
- the only available jurisprudence would be based on racial discrimination, removing the opportunity to rely on existing case law relevant to other attributes
- there is no obvious benefit in this option over the unfavourable treatment approach
- the drafting would be complex, and this may dilute its educative role.

UK Equality Act approach

Queensland Civil and Administrative Tribunal's submission refers to the definition of discrimination in the United Kingdom's *Equality Act 2010*.[81]

Like Queensland's current law, the UK definition includes the words 'less favourably'[82] and another section clarifies that 'on a comparison of cases…there must be no material difference between the circumstances relating to each case'.[83] In interpreting these provisions, the courts have

73 See for example: Caxton Legal Centre submission, 5; Multicultural Australia submission 7; Community Legal Centres Queensland consultation, 6 October 2021. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
74 *Racial Discrimination Act 1975* (Cth) s 9.
75 Christian Schools Australia submission, 8. The drafted suggested was adopted from Prof Patrick Parkinson, and Prof Nicholas Aroney, Submission on the Consolidation of Commonwealth Anti-discrimination laws (2011), January 2012.
76 Caxton Legal Centre submission, 3.
77 *Wotton v State of Queensland (No 5)* [2016] FCA 1547 (*Wotton*)
78 *Baird v Queensland* [2006] FCAFC 162 (*Baird*)
79 *Wotton* at 539; *Baird* at 63.
80 *Wotton* at 540. However, the Review understands that a recent case may have thrown into doubt whether there is a need for a comparator. See Alan Zheng, 'Comparators and Comparison in the Racial Discrimination Act' (2022), *Australian Public Law* (Web page) <https://www.auspublaw.org/blog/2022/03/campbell-v-northern-territory-the-lingering-uncertainty-over-comparators-and-comparisons-in-the-racial-discrimination-act>.
81 Queensland Civil and Administrative Tribunal submission, 6.
82 *Equality Act 2010* (UK) s 13.
83 *Equality Act 2010* (UK) s 23.

determined that it is not necessary to identify a comparator with precision, except when it is helpful to do so to identify the reasons for the differential treatment.[84]

The Review notes that more recent protections added for pregnancy and maternity attributes in the 2010 Act have shifted towards the 'unfavourable treatment' and away from the 'less favourable treatment' approach in the previous *Sex Discrimination Act 1975* (UK).[85]

However, retaining the words 'less favourably' and continuing to refer to comparators may not have the intended effect of simplifying the law. While UK case law has reduced the focus on the comparator, this may not be immediately apparent, particularly to non-lawyers. The Review has also not been able to identify any additional benefit that could be derived from the UK approach over that of the ACT and Victoria.

The Review's position

The Review considers that:

- The current approach is complex, technical and should be simplified, and in particular the requirement to establish a comparator should be removed.
- The inclusion of a comparator makes it unfeasible to argue discrimination based on combined grounds.
- Given the limitations identified with other potential approaches, the unfavourable treatment approach is preferred.
- The unfavourable treatment approach has not compromised objectivity or fairness in Victoria or the ACT.
- The unfavourable treatment approach has proven to be a simpler and more effective legal test which places focus on the key issues – unfair treatment and the reasons for it.
- There are likely to be real benefits for parties, the Commission, and the tribunals in creating a flexible approach that allows for comparison where necessary, but not where it is an unhelpful distraction from the more important question of why the treatment occurred.

Substantial reason

The Act currently provides that if there are two or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is 'a substantial reason' for the treatment.[86]

Five submissions suggested that the evidential burden on complainants should be reduced by making it only necessary that the protected attribute(s) was 'one of the reasons' rather than a 'substantial reason'.[87] However, one submission recommended retaining it, in the context of recognising discrimination on the ground of combined attributes.[88]

Requiring courts to untangle multiple causes of discrimination can be a challenge as 'discrimination can rarely be ascribed to a single 'reason or ground'.[89]

84 *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; *Law Society and Ors v Bahl* [2003] IRLR 640.
85 *Equality Act 2010* (UK) ss 17 - 18.
86 *Anti-Discrimination Act 1991* s10(4).
87 Queensland Nurses and Midwives Union submission; Community Legal Centres Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Service submission; Dr Nicky Jones submission.
88 Christian Schools Australia submission.
89 *IW v City of Perth* (1997) 191 CLR 1, 63; [1997] HCA 30 (Kirby J).

‘One of the reasons’

With the exception of Queensland, Victoria, and South Australia, federal and state discrimination laws in Australia only require the attribute to be ‘one of the reasons.’ Overall, many jurisdictions are moving away from requiring the attribute to be ‘a substantial reason’ for discrimination.

The recent Religious Discrimination Bill[90] also contained this wording and the Explanatory Memorandum noted that, ‘it would be very difficult for a complainant to prove that a discriminatory reason was the dominant or a substantial reason for the conduct’, and that the provisions are intended to ‘avoid situations in which a person is able to avoid liability for otherwise discriminatory conduct where they can prove that there were additional motivations for their conduct and the person’s religious belief or activity was only a secondary motivation.’[91]

The Review’s position

The Review considers that:

- Removing an unnecessarily technical barrier of needing to prove discrimination is ‘a substantial reason’ would simplify and improve the law.
- Consistency between Queensland and federal laws assists employers and businesses to apply the same standards in order to comply with both jurisdictions.
- Reference to ‘a substantial reason’ should be replaced with ‘one of the reasons’, based on the wording of the federal Acts.

Indirect discrimination

Indirect discrimination recognises that sometimes treating all people the same may unfairly or disproportionately disadvantage some groups of people over others.

For example, while a minimum height requirement for all workers seems a neutral standard, it may disadvantage women and people of some races. If the requirement is not needed to perform the work effectively, the discrimination will be unlawful because the requirement is unreasonable, there being no genuine occupational reason to justify it.

Indirect discrimination can be harder to recognise and define. However, indirect discrimination is an important feature of anti-discrimination laws because it has the potential to address systemic or structural barriers.

In our Discussion Paper, we asked whether the test for indirect discrimination should change, and if a ‘disadvantage’ approach should be adopted. We received 36 submissions that addressed indirect discrimination,[92] with broad support among stakeholders to shift away from the current approach. Only three submissions suggested the current provisions be preserved.[93]

---

90 Religious Discrimination Bill 2022 (Cth) cl 17. Note: this Bill did not pass into law.

91 Revised Explanatory Memorandum, Religious Discrimination Bill 2022 [271].

92 Name withheld (sub.026) submission; Public Advocate (Qld) submission; Medical Insurance Group Australia submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Christian Schools Australia submission; Life without Barriers submission; Associated Christian Schools submission; Name withheld (sub.060) submission; Dr Nicky Jones submission; Australian Lawyers Alliance submission; Vision Australia submission; Human Rights Law Alliance submission; Australian Discrimination Law Experts Group submission; Suncoast Community Legal Centre submission; Multicultural Australia submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Queensland Council of Unions submission; Rita Jabri Markwell submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Australian Association of Christian Schools submission; Department of Transport and Main Roads (Qld) submission; Queensland Civil and Administrative Tribunal submission.

93 Australian Industry Group submission; Australian Association of Christian Schools submission; Medical Insurance Group Australia submission.

Current approach

Across Australian jurisdictions, indirect discrimination is generally expressed as imposing a requirement, condition, or practice (called 'a term' in the Queensland Act) that is not reasonable. However, in some states the person must establish their inability to comply with the term, with or without a proportionality test (that is, a higher proportion can comply). In other jurisdictions, the test is whether the term creates a disadvantage to a person with the attribute.[94]

In Queensland, indirect discrimination is unlawful when an unreasonable requirement is imposed that a person cannot comply with because of their attribute, and more people without the attribute can comply with the requirement.[95]

Key issues with the current provisions

Some of the reasons in support of changing the approach to indirect discrimination submitted were:

- The way that the indirect discrimination provisions are currently drafted is too complex and causes confusion for complaint parties.[96]
- The complexity and impracticality of the test for indirect discrimination is a barrier to justice, particularly for groups who are most disadvantaged.[97]
- In practice, some 'terms' put people with the attribute at a disadvantage rather than being something they 'cannot comply with'.[98]
- The need to present statistical evidence to determine the comparator pool in order to meet the proportionality requirement of the test creates practical challenges for parties and imposes unnecessary costs.[99]
- Statistical information is difficult to obtain and establish (and is virtually unprocurable for some attributes).[100]

Summing up the problems with the current indirect discrimination provisions, the Australian Discrimination Law Experts Group (ADLEG) commented that:

> The definition tends to divert energy away into marginal questions such as the degree of disproportionate impact that must be proved, and whether it is substantial, and what is required for the claimant to prove non-compliance with the requirement.[101]

Inability to comply with a term

The current law in Queensland requires identification of a term or practice with which a person must comply, and why they are 'not able to comply'.

94 Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act 1991* Discussion Paper, November 2021) 34 Comparative experiences table.
95 *Anti-Discrimination Act 1991* (Qld) s 11.
96 Queensland Law Society submission, 3; Australian Lawyers Alliance submission, 7.
97 Legal Aid Queensland submission, 10.
98 Name withheld (Sub.135) submission, 9.
99 Australian Discrimination Law Experts Group consultation, 14 September 2021.
100 See for example: Legal Aid Queensland submission, 9 – e.g. with respect to cultural issues challenges having to obtain evidence of elders, anthropologists, or other experts; Human Rights Law Alliance submission, 14 – e.g. having to demonstrate evidence of proportion of adherence amongst religious people to particular doctrines; Vision Australia submission, 2 – e.g. challenges having to identify a comparative pool of people who are not blind or with low vision.
101 Australian Discrimination Law Experts Group submission, 20.

Although courts and tribunals have not interpreted an ability to comply in a literal way,[102] few complaints ever proceed to a hearing. The indirect discrimination provision is hard to explain and understand, and can be problematic when the words 'is not able to comply' are interpreted literally.

In their submission, the Department of Education explained that they already consider indirect discrimination 'in the context of disadvantaging a person with an attribute' rather than identifying what the term is and whether the person can comply or not. The Department told us that the current test of 'is not able to comply' can lead to issues with literal interpretation, and provided the following example:

> While a student who is assigned male sex at birth, but whose gender identity is female could use a male toilet, expecting a transgender student to go to a toilet based on their birth sex is considered unfair. The literal interpretation of 'can and cannot comply' does not reflect the true impact of complying, disadvantaging the individual, and in turn, exacerbating the discrimination it seeks to prevent.[103]

Another education stakeholder, the Queensland Catholic Education Commission, agreed that the 'disadvantage' approach is easier to understand, interpret, and apply.[104]

Disproportionate impact

Currently, the complainant must identify the relevant pool of people who do not have the attribute and who are able to comply with the term that is imposed or proposed to be imposed. We heard that addressing this requirement is oppressive and difficult and presents a significant evidentiary burden.

Like the challenges with the hypothetical comparator in direct discrimination, compiling the technical evidence needed to establish the 'higher proportion of people' requirement is difficult and time-consuming. Identifying the appropriate membership of the pool is easier for a sex discrimination claim,[105] but might require complex statistical evidence where it relates to race or disability.[106] This process shifts the focus away from the detrimental treatment experienced. In some cases the statistical evidence needed is unavailable to the complainant without orders being made by the tribunal.

The Queensland Mental Health Commission considered that the requirement to establish the evidence necessary to meet the current test was particularly challenging for people with a mental illness because:

> Mental illness occurs on a spectrum from mild to severe and can be episodic in nature. Mental ill-health affects individuals in different ways in different circumstances.[107]

The Human Rights Law Alliance submission pointed to the challenges for establishing indirect discrimination based on religious belief:

> The test requires a very large amount of evidence to be adduced by the complainant on the nature of their religious belief and the comparative statistical situation of adherents to particular doctrines adhered to by the complainant. This is much more complex to establish than merely age, race or disability.[108]

102 For example, while a person of Sikh faith *could* technically take off their turban, they cannot do so in practice - *Mandla v Dowell Lee* [1983] ICR 385; [1982] UKHL 7.
103 Department of Education (Qld) submission, 3.
104 Queensland Catholic Education Commission submission, 3.
105 *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56.
106 Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 47.
107 Queensland Mental Health Commission submission, 3.
108 Human Rights Law Alliance submission, 12.

Concerns with changing the law

Only three submissions preferred maintaining the status quo in relation to indirect discrimination. Australian Industry Group considered that the current threshold was appropriate and proportionate to ensure that businesses could manage operations 'consistently, efficiently and with transparency.'[109] Two submissions thought that a shift to the disadvantage approach might lower the bar too far, or that objectivity may be compromised,[110] and one commented generally on the impact on health service providers if the tests for discrimination are modified.[111]

An evaluation of the first 10 years of the operation of an updated legal test in Victoria did not observe a sudden lowering of the threshold, and in fact indicated that to date there has not been much impact, in part because few indirect discrimination claims are heard.[112]

As we discuss in the following section, the Queensland Act is currently not consistent with federal laws – as there is a different standard applied under the Sex Discrimination Act and Age Discrimination Act that organisations operating in Queensland already need to comply with.[113]

Comparative approaches

Disadvantage test

The most common alternative approach to indirect discrimination adopted in Australia involves considering whether an unreasonable requirement, condition, or practice has, or is likely to have the effect of unreasonably disadvantaging the person. [114]

The disadvantage test does not require consideration of whether a person is able or is unable to comply, or who might be the appropriate comparator pool of people without the attribute who can comply. Instead, it focuses on the following key aspects:

- Has a condition, requirement, or practice been imposed, or is there a proposal to impose a condition, requirement, or practice?
- Does it have, or is it likely to have, the effect of disadvantage because of an attribute(s)?
- Is the condition, requirement, or practice reasonable?

Term, condition, requirement, practice

There are variations across jurisdictions in the words used to describe what is being imposed, including: term, condition, requirement, or practice.

In Queensland, indirect discrimination uses the word 'term', the meaning of which includes a 'condition, requirement or practice, whether or not written'.[115]

Courts have applied a liberal approach to identifying the requirement or condition and have commented that the words should be given a 'generous construction'[116] and a 'broad rather than

109 Australian Industry Group submission, 4.
110 Australian Association of Christian Schools submission, 7; AI Group submission, 4.
111 Medical Insurance Group Australia submission, 3.
112 Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) Melbourne University Law Review 459, 485-487.
113 *Sex Discrimination Act 1984* (Cth) s 5 and 7B; *Age Discrimination Act 2004* (Cth) s 15.
114 In Victoria, Tasmania, the Australian Capital Territory, and under the federal *Age Discrimination Act 2004* (Cth) s 15 and the *Sex Discrimination Act 1984* (Cth) s 7B.
115 *Anti-Discrimination Act 1991* (Qld) s 11(4).
116 *Waters v Public Transport Corporation* (1992) 173 CLR 349 [393]–[394]; [1991] HCA 49.

technical meaning',[117] which should 'cover any form of qualification or prerequisite'.[118] However, it is necessary to formulate the requirement or condition with some precision.[119]

Victorian cases have continued to apply this liberal approach following the update of the indirect discrimination provisions in 2010. For example, a requirement or condition was found to include the imposition of significant extra work, which caused disadvantage to a person with diabetes because he did not have the opportunity to take meal breaks and needed to work exceedingly long hours to the detriment of his health.[120]

Meaning of disadvantage

The word 'disadvantage' is not defined by the legislation in any jurisdiction. However, the courts have stated that it should be interpreted using a 'common sense and practical approach' which takes into account the extent to which a measure diminishes a person's 'right to dignity and self-worth'.[121]

Disadvantage – to the group or the person?

An important difference between the ACT legislation and other jurisdictions is that the ACT Act only requires the disadvantage to be in relation to 'the person' with the attribute/s rather than 'persons with the attribute'.[122]

Framing the disadvantage test around 'persons with the attribute' requires proof that the whole attribute group is affected, not just an individual with the attribute. This requirement introduces an additional layer of complexity about how an attribute group as a whole experiences disadvantage that courts and tribunals may feel compelled to explore.[123] For example, not everyone with a disability (even people with the same condition) has the same experience of disadvantage, or requires the same adjustments to meet their needs.

This issue was highlighted in the Victorian case of *Petrou,* in which the tribunal commented:

> … use of the plural 'persons' is important. The form of words is 'the effect of disadvantaging persons with an attribute' … I take the fact that this section is not cast in individual terms but is instead cast in terms of identifying a group of persons with an attribute who are or are likely to be disadvantaged by the requirement, to be an essential feature of the claim of indirect discrimination.[124]

In that case, it meant that the complainant was faced with the difficult task of proving that a requirement imposed by an aged care facility not to use bed poles (which the complainant used to assist with mobility) was a disadvantage not only to her but to 'persons with multiple sclerosis' generally.

Other alternative approaches

The Queensland Civil and Administrative Tribunal's submission suggested the addition of the words 'in practice' to the existing indirect discrimination test so that it would read:

> with which a person with an attribute does not or is not, in practice, able to comply…

117 *State of New South Wales v Amery* (2006) 230 CLR 174 [63]–[64]; [2006] HCA 14.
118 *Waters v Public Transport Corporation* (1992) 173 CLR 349 [393], [406]-[407]; [1991] HCA 49.
119 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 [10]; [1989] HCA 56.
120 *Ferris v Department of Justice and Regulation (Human Rights)* [2017] VCAT 1771.
121 *Petrou v Bupa Aged Care Australia Ltd* [2017] VCAT 1706 [78].
122 Discrimination Act 1991 (ACT) s 8.
123 See for example: Legal Aid Queensland, submission, 10; Caxton Legal Centre, submission, 4; Equality Australia submission, 10-11.
124 *Petrou v Bupa Aged Care Australia Ltd* [2017] VCAT 1706 [102-103]

This addition may create a clearer definition and assist with determinations under the Act.[125] While there may be some benefit in clarifying the 'is not able to comply' aspect, this could also be adequately addressed through the disadvantage approach.

We also received a submission that suggested the American 'disparate impact' approach. This approach states that any practice, policy, or rule that does not expressly discriminate against any protected class of people – but which has a disparate impact on the protected class of people – is unlawful if no objective justification for it can be shown to exist.[126]

Caution should be exercised if adopting an approach from international jurisprudence that is reasonably similar to Australian formulations of indirect discrimination. Precedents already established in Australian case law could be shelved, and inconsistency between Queensland and federal laws created.

The Review's position

The Review considers that:

- The test for indirect discrimination should not include a requirement to show that a person is not able to comply with a term, thereby eliminating the problem of literal interpretation.
- The prohibitively difficult requirement to establish the comparator pool (the higher proportion of people without the attribute who can comply) should be removed.
- The focus of the test for indirect discrimination should be on the complainant and not the group of persons with the same attribute.
- The test for indirect discrimination should recognise that people may experience indirect discrimination on combined grounds (see Discrimination on combined grounds below in this chapter).
- The ACT test for indirect discrimination is the preferred model because it frames the disadvantage test around the person with the attribute, rather than the whole group, and allows for an approach that considers combined grounds.
- Adopting the ACT approach will also improve consistency between Queensland and federal sex and age discrimination laws.
- Any updated legal test should require objective consideration of the impact on the complainant rather than be based on a subjective test. In any future amendment to the Act, the Explanatory Notes should be sufficiently detailed to avoid confusion about the legal test for indirect discrimination.

Reasonableness

All Australian jurisdictions, including those that have adopted the 'disadvantage approach', incorporate an element of reasonableness in the test for indirect discrimination. This means that even if a condition or requirement causes disadvantage, if the respondent can prove that it is reasonable, it will not be unlawful discrimination.

In determining reasonableness, courts in Australia have determined that a respondent does not need to show that it was 'necessary' to discriminate. Rather, they need to show that they were more than 'inconvenienced'. The criteria must be objective and require the court to weigh the

125 Queensland Civil and Administrative Tribunal submission, 21-22.
126 Queensland Council for Civil Liberties submission, 2.

nature and extent of the discriminatory effect on the complainant against the reasons provided by the respondent.[127]

Current approach

The Act currently contains a non-exhaustive list of factors to provide guidance on whether a term is reasonable. They are:

- the consequences of failure to comply with the term; and
- the cost of alternative terms; and
- the financial circumstances of the person who imposes, or proposes to impose, the term.[128]

Some stakeholders maintained that retaining the 'reasonableness' aspect of the test is vital.[129] However, some submissions raised concerns with the current reasonableness factors because of their focus being primarily on financial terms rather than equity principles.[130]

A participant in our roundtable with people with disability told us that:

> *My main concern is that the defendants typically do this cost benefit analysis, where they assume we are equal with people who are able bodied…The equity principle is typically missing in these types of cost benefits analysis. And because we're still such a minority, we'll never win in this cost benefit analysis, because usually it comes down to money. And also social norms about what's reasonable.*[131]

Alternative approaches

Human rights approach

Two submissions advocated changing from a 'reasonableness' test to a 'proportionality' test based on the principles of the *Human Rights Act 2019* (Qld). [132] It was said that this would be less affected by subjective views because of the requirement for logical and systematic analysis inherent in that approach.[133] The Queensland Civil and Administrative Tribunal noted that in any case, their decision-makers are required to interpret reasonableness in a way that is compatible with human rights through consideration of the proportionality test in the Human Rights Act.[134]

Sex Discrimination Act and ACT approach

Another suggestion[135] was to incorporate the reasonableness factors under the Sex Discrimination Act (which is similar to the ACT Act) that include:

- the nature and extent of disadvantage
- the feasibility of overcoming the disadvantage, and

127 *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *JM v QFG & GK* [2000] 1 Qd R 373.
128 *Anti-Discrimination Act 1991* (Qld) s 11(2).
129 See for example: Associated Christian Schools submission 2; Legal practitioners' roundtable, 10 February 2022.
130 Name withheld (Sub.135) submission 10; Queensland Advocacy Incorporated submission 11; Life without Barriers submission 1; Rita Jabri Markwell submission 2.
131 People with disability roundtable, 4 February 2022.
132 *Human Rights Act 2019* (Qld) s 13.
133 See for example: Queensland Advocacy Incorporated submission, 11; Name withheld (Sub.135) submission, 10.
134 Queensland Civil and Administrative Tribunal submission, 21.
135 Australian Discrimination Law Experts Group submission, 6 and 20.

- whether the disadvantage is disproportionate to the result sought by the respondent. [136]

In this test, financial circumstances are not mentioned specifically, but could be implied by the feasibility factor.

Victorian approach

The Victorian model provides a comprehensive list of factors and incorporates an element of proportionality balanced with cost and feasibility factors. The list also includes whether alternatives could be taken.[137]

Associate Professor Dominique Allen described this test as containing 'clear guidance about what constitutes reasonableness' and based on her evaluation of the Victorian Equal Opportunity Act considers that it has 'proved to be useful for lawyers, their clients, the Victorian Equal Opportunity and Human Rights Commission and the tribunal.'[138]

The Review's position

The Review considers that:

- Retaining the objective element of reasonableness is critical for a fair and balanced outcome.
- Given that few matters proceed to tribunal hearing, a proportionality test based on the Human Rights Act might be too onerous and complex for respondents to understand and apply. The bar for all duty holders (including individuals, private enterprise, public sector, and non-profit organisations) would be raised to the level expected of public entities under the Human Rights Act when acting and making decisions compatibly with human rights.
- The non-exhaustive list of factors to determine reasonableness should be expanded and updated, with the preferred model being the Victorian approach.

Discrimination on combined grounds

Currently, the Anti-Discrimination Act is based on separate and distinct grounds of discrimination (attributes), and the definitions of discrimination presume that discrimination occurs because of an attribute.[139]

Across the course of the Review, we were told that the 'single attribute' approach does not adequately protect people who experience discrimination because of multiple attributes, and this creates a gap in protection for people who are at heightened risk of discrimination.[140] This issue was repeatedly identified by numerous stakeholders.[141]

In the Discussion Paper, we asked whether there is a need to protect people from discrimination because of the effect of a combination of attributes, and if so, how this should be framed in the Act.

We asked stakeholders about these issues throughout our consultation process, including in our engagements with non-government organisations that provide support to people who experience

136 *Sex Discrimination Act 1984* (Cth) s 7B. Similar factors are incorporated into the *Discrimination Act 1991* (ACT) s 8(5), noting that the ACT Act refers to either 'overcoming' *or* 'mitigating' the disadvantage.
137 This ensures consistency with section 13(d) *Human Rights Act 2019* that requires consideration of whether there are any less restrictive and reasonably available ways to achieve a legitimate purpose.
138 Assoc Prof Dominique Allen submission, 2.
139 See for example *Anti-Discrimination Act 1991* (Qld) s 8, 10, 11.
140 Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 19 and 42-43.
141 For example: Caxton Legal Centre consultation, 11 August 2021; Immigrant Women's Support Service consultation, 19 August 2021; Youth Advocacy Centre Inc consultation, 3 September 2021.

discrimination because of combined grounds.[142] This topic was explored in our roundtables with children and young people, people with disability, and our roundtable with legal practitioners.

We discuss the unique nature and impact of discrimination because of combined grounds in chapter 2.

Should combined grounds be recognised in the Act?

Of the 130 submissions that respond to the Discussion Paper, 45 addressed this issue. Of those, 38 supported recognition of discrimination on combined grounds,[143] and four did not support this.[144] Two submissions referred to this topic but did not provide a view.

Three themes emerged from our analysis of submissions and consultations that supported recognition of combined grounds discrimination:

- **Disconnect between the law and people's experience** – recognition of combined grounds discrimination would better reflect the reality of people's experiences, which are different for people who experience discrimination because of multiple, rather than a single attribute.
- **Proving combined grounds discrimination can be more difficult** – people who have experienced combined grounds discrimination can find it more difficult to prove discrimination, which can put them at a disadvantage when bringing a complaint.
- **Addressing a gap in protection** – changing the law to explicitly recognise discrimination on combined grounds would ensure that people with multiple attributes know they are protected by the law and close a gap in protection.

Disconnect between the law and real life

While the law focuses on separate and distinct 'grounds' of discrimination, in reality the reason for discrimination can be because of attributes that are multiple and overlapping.[145] Many submissions explained this disconnect between the legal framework and how people actually experience discrimination in practice.

Providing their experience of discrimination, one person who made a submission through our online Have Your Say survey told the Review:

142 For example: 2Sprits consultation, 13 Sep 2021; AMPARO Advocacy Inc consultation, 8 September 2021; Aboriginal and Torres Strait Islander Women's Legal Service North Queensland consultation, 15 September 2021, Queensland Indigenous Family Violence Legal Service consultation, 25 Aug 2021; Open Doors consultation, 13 September 2021.

143 Queensland Council of Social Service submission; Public Advocate (Qld) submission, Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drugs Ltd submission; Life Without Barriers submission; Pride In Law submission; Dr Nicky Jones submission; Name withheld (Sub.069) submission; LGBTI Legal Service Inc submission; Vision Australia submission; Women's Legal Service Qld submission, Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Queensland Council of Unions submission; Ethnic Communities Council of Queensland submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Community Legal Centers Queensland submission; Queensland Catholic Education Commission submission; Queensland Positive People submission, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission, Respect Inc and DecrimQLD submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Multicultural Queensland Advisory Council submission; Department of Education (Qld) submission, Queenslanders with Disability Network submission.

144 Name withheld (sub.026) submission; Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Human Rights Law Alliance submission.

145 Australian Discrimination Law Experts Group submission, 25.

As a person from a mixed-race background, I have experienced discrimination based on my perceived racial difference. I am also a female, so I have experienced harassment in a male-dominated world.

I have learned to build a thick skin and not bite back when I feel racially discriminated. However, it makes me feel very sad and frustrated that my perceived racial difference due to the colour of my skin and shape of my eyes means I get treated differently. And then it's just very frustrating as a female that I can't be an "equal" in the world and/or where I'll be treated like a piece of meat just because of my gender. It's so prevalent and happens almost daily…[146]

Some submissions said that the current approach does not consider the compounding factors for why a person is exposed to discrimination[147] and is a reductive, 'single axis' approach.[148] We were told that recognising combined grounds discrimination in the Act, and changing its language, would better reflect the reality of people who have experienced multi-faceted discrimination.[149]

We also heard that people who have combined attributes would be better protected if the law explicitly recognised them, because they would more readily identify as being included by the Act. This may assist in making the legislation more accessible.[150]

The submissions we received reflect the three ways in which combined grounds discrimination can be conceptualised:

- **Sequential multiple discrimination** – when a person suffers discrimination on different grounds on separate occasions. For example, a woman with a disability might experience discrimination once because of her gender and on another occasion because of her disability. This type of discrimination is the easiest to deal with because each incident can be assessed separately.
- **Additive multiple discrimination** – when a person suffers discrimination on the same occasion but on two grounds. For example, a gay woman is harassed because she is a woman and gay. This type of discrimination is additive because each of the grounds can be identified independently.
- **Intersectional discrimination** – when two or multiple grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination.[151]

When considering these against coverage of the current Act, sequential multiple discrimination is covered, additive multiple discrimination is covered in a limited way given that a complaint can be made on the basis of more than one attribute, and intersectional discrimination is not covered.

146 Name withheld (Form.411) survey response.
147 LGBTI Legal Service Inc submission; Queensland Council of Unions submission.
148 Queensland Nurses and Midwives Union submission, 10.
149 See for example: Queensland Council of Social Service submission; Public Advocate (Qld) submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; LGBTI Legal Service Inc submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Legal Aid Queensland submission; Queensland Council for LGBTI Health submission.
150 Public Advocate Queensland, submission, 3.
151 Council of Europe, 'Intersectionality and Multiple Discrimination', *Gender Matters* (Web Page, 2022) <https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination>.

Proving discrimination can be more difficult

Some stakeholders observed that it can be difficult to ascribe conduct that is alleged to have contravened the Anti-Discrimination Act to one single attribute, and therefore can make it difficult to prove.[152]

Discrimination may also occur based on the way in which the attributes intersect. However, framing a complaint in these terms can present more challenges than relying on a single attribute.[153] We were told that in these cases, often the legal advice provided to a prospective complainant is to choose the attribute that is the clearest.[154] When the complainant chooses one attribute, their claim may ultimately fail because it was the combined effect of the attributes that led to the discrimination.

For example, in the matter of *Given v State of Queensland (Queensland Police Service)*[155] the applicant, Marissa Given, was an Aboriginal woman suffering from post-traumatic stress disorder and a degenerative spinal condition. In 2016, she was arrested at her home and taken to the Brisbane Watch House. While in custody, Marissa was placed in a padded violent detention cell and forcibly changed into a suicide smock. As a result of her handling by officers of the Queensland Police Service, Marissa developed further injuries in her neck and thoracic spine, and her symptoms of PTSD returned.

It was submitted that Marissa was subject to unlawful discrimination because of her race and disability. However, creating a hypothetical comparator was extremely challenging and made it difficult to take into account Marissa's unique circumstances and attributes. Ultimately, the tribunal found that neither direct nor indirect discrimination could be established.

In reflecting on this case, Caxton Legal Centre considered that it exemplifies the 'failures of the Anti-Discrimination Act' because the applicant's multiple attributes made a fair comparison impossible.[156] This submission and case study exemplifies the view that First Nations people face specific barriers to establishing discrimination on the basis of combined grounds.

Addressing a gap in protection

Material received by the Review strongly suggests that people who experience discrimination on combined grounds are not being protected by the Act.

Our assessment of the information provided to the Review through consultations and submissions suggests that the greater number of attributes a person has, and the greater the intersection between those attributes, the less likely that person is to be adequately protected by the Act. This included being less likely to bring a complaint, and to be successful in proving discrimination.

Changing the law to explicitly recognise the lived reality of people's experience would address a gap in protection and ensure that people with multiple attributes know they are protected by the law.

Queensland Law Society also provided the view that express recognition in the Act may assist a respondent in being able to more comprehensively respond to a claim.[157]

152 Tenants Queensland submission, 3; Queensland Council of Unions submission, 6; Equality Australia submission, 29.
153 Life Without Barriers submission, 1.
154 Queensland Council of Social Service submission, 2; Queensland Law Society submission, 6.
155 *Given v State of Queensland* (Queensland Police Service) [2019] QCAT 16.
156 Caxton Legal Centre submission, 3.
157 Queensland Law Society submission, 6.

Astrid's* story

During our roundtable with children and young people, Astrid told us about the discrimination they have experienced in their life.

"So I'm someone who is disadvantaged in sort of a variety of ways, although I am white-passing (and that is a privilege) I am Indigenous, I've had a care and out of home care experience, I come from a background of trauma and abuse, I'm queer, I'm gender diverse, and I'm mentally ill, and have a disability. And I think kind of what you're talking about [discrimination] – it's cumulative. And it has an ongoing effect. And, and I think it just layers on top of each other. You know, it's something that you carry with you all the time.

And when there's multiple sort of ways of being ostracized.. there's no way to sort of compartmentalise and go, 'I'm just not going to deal with that today'. And you put it to the side or whatever - it feeds into every part of your life.

And it brings so much like fatigue, and exhaustion and frustration that even if you're presented with the opportunity of, 'Hey, do you want to try and get some justice? Do you want to speak up about your discrimination?' You don't have the energy and you don't have the resources to do that.

And I think that is a huge and very detrimental impact is even if the resources are available, you don't have the strength to do that once you've been oppressed in so many different ways."

Astrid also told us about the challenges in making a complaint to the Commission. They said that:

"You're kind of stuck in survival mode most of the time, like, the last thing you're thinking of, is, hmm, like, I'm going to go through this really lengthy process to report discrimination like and, and even if you do have, like, the emotional and physical space to, you know, make those reports. It's still like I you know, I struggle with stuff like paperwork, like executive dysfunction, etc. And it's just so difficult to actually even know find what number to call to do that."

** Not their real name*

Concerns raised with this approach

Four submissions raised concerns with expressly recognising discrimination on combined grounds.[158]

The most frequently cited concern raised in these submissions was that the concept of combined grounds (also known as intersectionality) is a contestable ideological concept or perspective.[159]

The Australian Christian Higher Education Alliance considered that this approach could increase societal division through creating hierarchical group identity structures.[160]

Unlike the Queensland Law Society, the Human Rights Law Alliance suggested that allowing combined grounds complaints would complicate the claim and make it more 'difficult, complex and costly for complainants.'[161] We note that there would be no obligation for a complainant to rely on combined grounds and could therefore make their complaint on the basis of a single attribute if they chose.

A further concern was that measuring the influence of cumulative effects of potential discrimination requires an imprecise form of measurement which results in inaccurate assumptions, when compared to dealing with claims of a clear, single, protected attribute.[162]

United Nations treaties and their commentary have recognised intersectionality in the context of international human rights law, including multiple and intersecting forms of discrimination.[163]

Preventing discrimination on combined grounds

One or more grounds

The review of the ACT Discrimination Act recommended that their Act be amended so that it protects people against discrimination because of an attribute, or a combination of protected attributes.[164] As a result, the ACT Discrimination Act was amended to introduce the words 'one or more protected attributes'.

Of the submissions received by the Review that favoured legislative amendments for combined grounds discrimination, six submissions to the Review supported the ACT approach.[165]

However, the ACT Discrimination Act does not expressly refer to a 'combination of protected attributes.' This raises a question about whether the cumulative impact of combined grounds discrimination is recognised by the ACT law.

The 'one or more' grounds approach has been interpreted broadly in international jurisdictions. For example, in South Africa the words 'one or more grounds'[166] has been interpreted to include discrimination based on combined grounds. A recent case exploring intersectionality involved the

158 Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Human Rights Law Alliance submission.
159 See for example: Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Human Rights Law Alliance submission.
160 Australian Christian High Education Alliance submission, 6.
161 Human Rights Law Alliance submission, 13.
162 Australian Christian Higher Education Alliance submission, 6.
163 See for example: United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2 (19 October 2010) [18]; United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20 (2 July 2009) [27].
164 *Discrimination Act 1991* (ACT) ss 8(2) and 8(3).
165 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Multicultural Queensland Advisory Council submission.
166 *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 'Bill of Rights', s 9.3.

treatment of Black women who make up the overwhelming majority of domestic workers, but who were being excluded from a statutory definition of 'employee' for workplace injury and death.[167] The case was successfully argued on the combined grounds of gender and race.

However, there is no current case law under these provisions in the ACT. Therefore, whether a combination of attributes will be recognised by the tribunal or court is uncertain.

Combined grounds

The words 'combined grounds' are used in the Canadian legislation. This is a broader approach as it takes into account the effect of a combination of grounds, which accounts for the cumulative rather than the purely additive impact.

The Canadian Human Rights Act clarifies that:

> For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.[168]

Of the submissions that favored legislative amendments for combined grounds discrimination, eight submissions supported this approach.[169]

Submissions in favour of the Canadian approach indicated that they preferred this drafting as it gave room to expressly recognise the combined effect of discrimination on multiple attributes. This would allow a complainant the flexibility to state their claim on the basis of one or more grounds, or because of the combination of grounds.

Therefore, ensuring the language of the Canadian Human Rights legislation's clarifying provisions is also incorporated into the meaning of direct and indirect discrimination in the Queensland Act, should address any limitations with the ACT approach.

The Review's position

The Review considers that:

- The Act should expressly protect people who experience discrimination on the basis of the combined effect of attributes.
- The Canadian approach is preferred to ensure the legislation captures the diversity of experience within combined grounds discrimination.
- A person should be entitled to make a claim on the basis that the discrimination was caused by one or more attributes, or on the basis of the cumulative impact of the combination of two or more attributes.
- Discrimination on combined grounds should be incorporated into the meaning of direct and indirect discrimination, and the language of the entire Act should be updated to remove the implication that discrimination is on the basis of a single attribute.
- Notwithstanding these changes, discrimination on combined grounds may continue to be a challenge for discrimination law in individual complaints because the barriers to accessing the complaints process and proving claims may continue to exist.

---

167 *Mahlangu v Minister of Labour* [2020] ZACC 24 (Constitutional Court).
168 *Canadian Human Rights Act*, RSC 1985, c H-6, pt I, 3.1.
169 Pride in Law submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Name withheld (sub.135) submission; Caxton Legal Service submission; Queensland Advocacy incorporated submission; Queensland Law Society submission.

Recommendation 3

3.1 The Act should adopt the approach of the Discrimination Act 1991 (ACT) by creating a legislative provision entitled 'meaning of discrimination' which:

- explains that discrimination occurs when a person discriminates either directly or indirectly, or both directly and indirectly, against another person
- defines direct discrimination
- defines indirect discrimination

3.2 The definition of direct and indirect discrimination should expressly provide that discrimination can occur on the basis of one or more attributes, or because of the effect of a combination of attributes, and the Act should not use the singular language of 'an attribute'.

3.3 Direct discrimination should be defined to mean where a person treats, or proposes to treat, another person unfavourably because of one or more attributes, or because of the effect of a combination of attributes.

3.4 The Act should clarify that the protected attribute or combination of attributes need only be one of the reasons, rather than a substantial reason, for the treatment.

3.5 The definition of indirect discrimination should include the following aspects:

- a person imposes a condition, requirement, or practice
- which has or is likely to have the effect of disadvantaging the other person
- because the person has one or more protected attributes, or because of the effect of a combination of attributes, and
- the condition, requirement, or practice is not reasonable.

3.6 The Act should incorporate a non-exhaustive list of factors to determine reasonableness based on the Equal Opportunity Act 2010 (Vic).

Affirmative measures

To work towards achieving substantive equality, anti-discrimination laws have long endorsed taking proactive steps to address disadvantage through measures such as affirmative action, and policies and programs to support target groups.

Special measures and affirmative actions aim to 'correct or compensate for past or present discrimination, or to prevent discrimination from recurring in the future'.[170]

Examples of these measures can include:

- employment programs for people aged over 50
- initiatives to support women in male-dominated professions
- travel concessions for pensioners
- accommodation reserved for people who are experiencing domestic violence.

170 Julie O'Brien, 'Affirmative Action, Special Measures and the Sex Discrimination Act' (2004) 27(3) *University of New South Wales Law Journal* 840.

The Review received 22 submissions about updating the approach to special or affirmative measures,[171] and of those, all but two submissions[172] were in favour of reframing these measures in the Act.

Language

There is no consistent approach to the use of terminology in this area of law, or between the words used by business, government, or the public to describe these measures.

We understand the term 'affirmative measures' is most commonly used with respect to employment,[173] whereas 'special measures' is more often used in relation to government programs and services that are intended to be for the benefit of a particular group.[174]

The Committee on the Elimination of Racial Discrimination (CERD) has observed that some States use the words 'affirmative measures', 'affirmative action', or 'positive action' to mean 'special measures'.[175]

We recognise that the word 'special' in the term 'special measures' relates to measures to be implemented that are 'exceptional, out of the ordinary or unusual',[176] and not to any deficiency in a particular group. However, the terminology could have paternalistic connotations. Disability activists have long pointed out that people have human needs, not 'special' needs.

Because of this, we have concluded that a change in language away from 'special measures' to 'affirmative measures' is beneficial.

While 'affirmative measures' may be preferable language, we will refer to 'special measures' as needed below, given this is the language used by CERD and in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[177] and of many federal and state anti-discrimination laws.[178]

For clarity, affirmative measures should not be confused with specific rights that exist independently in Queensland law, such as the right to belong to and enjoy one's culture, religion, and language.[179]

171 Name withheld (sub.026) submission; Assoc Prof Dominque Allen submission; Rainbow Families Queensland submission; Office of the Special Commissioner, Equity and Diversity (Qld); PeakCare Queensland Inc submission; One in Three Campaign submission; LGBTI Legal Service Inc submission; Vision Australia submission; Women's Legal Service submission; Urban Development Institute of Queensland submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Foundation for Aboriginal and Islander Research Action submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Aboriginal and Torres Strait Islander Legal Service submission. We also received confidential officer-level feedback from a government department.

172 James Cook University submission; Name withheld (sub.026) submission.

173 For example, the Australian Public Service Commission has used affirmative measures as a preferred term since 2013, for example see: Australian Public Service Commission, 'Affirmative measure for recruiting people with disability: guide for agencies.' (Web page) <https://www.apsc.gov.au/working-aps/diversity-and-inclusion/disability/affirmative-measure-recruiting-people-disability-guide-agencies>

174 For example, limiting the right of local government areas to hold liquor licences: *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536; health services run for the benefit of Aboriginal and Torres Strait Islander people: *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89.

175 United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention of the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) [12].

176 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at [42]-[44].

177 United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women,* (18 December 1979). Article 4 states that temporary special measures aimed at accelerating de facto equality before men and women shall not be considered discrimination.

178 See for example: *Disability Discrimination Act 1992* (Cth) s 45; *Sex Discrimination Act 1984* (Cth) s 7D; Racial Discrimination Act 1975 (Cth) s 8; *Equal Opportunity Act 2010* (Vic) s 12.

179 See CERD, General recommendation 32 [15]; *Human Rights Act 2019* sections 27-28.

Current approach

The Anti-Discrimination Act currently has two general exceptions to discrimination that fall into the category of affirmative measures:

- Welfare measures[180] – where an act is done for the welfare of the members of a group of people with a protected attribute.
- Equal opportunity measures[181] – where an act is done to promote equal opportunity for a group of people with a protected attribute.

An alternative approach

Defining affirmative measures

In 2010, the Victorian Act was updated to clarify that taking 'special measures' to promote or realise substantive equality are 'an expression of equality, rather than an exception to it.'[182]

The Victorian Act contains safeguards to ensure a certain threshold is met and to prevent misuse of the provision, by requiring that the special measure is:

- undertaken in good faith to promote or realise substantive equality for members of a group with a particular attribute
- reasonably likely to achieve this purpose
- a proportionate means of achieving the purpose
- justified because the members of the group have a particular need for advancement or assistance.[183]

Submissions to the Queensland Review expressed strong support for combining welfare and equal opportunity measures into a single provision and adopting the approach taken by the Victorian Equal Opportunity Act.[184] No other alternatives were proposed by stakeholders.

An exception, or an element of discrimination?

Cases decided under the special measures provision in the *Racial Discrimination Act 1975* (Cth) have determined that special measures are not, properly considered, exceptions to discrimination, but rather 'integral to its meaning'.[185]

The Australian Capital Territory Law Reform Advisory Council in 2015 recommended that special measures should not be seen as exceptions to discriminatory conduct, but rather as positive measures to promote equality.[186]

In the Discussion Paper, we sought submissions on whether the Act should reframe these measures from being exceptions to discrimination to an essential element of the legislative framework with the goal of achieving substantive equality.

180 *Anti-Discrimination Act 1991* (Qld) s 104.
181 *Anti-Discrimination Act 1991* (Qld) s 105.
182 Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).
183 *Equal Opportunity Act 2010* (Vic) s 12.
184 See for example: Australian Discrimination Law Experts Group submission, 39; Queensland Council of Unions submission 17-18; Legal Aid Queensland submission, 58; Caxton Legal Centre submission, 17; Queensland Law Society submission, 11; Rainbow Families Queensland submission, 3.
185 Gageler J in *Maloney v The Queen* (2013) 252 CLR 168 at 292 [327].
186 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 125.

Associate Professor Dominique Allen commented that framing welfare and equal opportunity measures as exceptions does not fit with the purpose of the law to 'redress historic inequality'. She noted that the law must be 'positive and proactive' in order to:

> …encourage employers and goods and service providers to comply from the outset, rather than once a person has experienced discrimination, and to identify policies and practices that contribute to inequality.[187]

Affirmative measures are a key mechanism by which organisations can work towards eliminating discrimination to the greatest extent possible. This approach to affirmative measures may also support the transition to a positive duty approach generally.[188]

Making it clear and simple

Accessibility

Some submissions wanted to encourage the use of special measures by businesses and community organisations, and to this end advised that the legislation and processes should not be overly onerous, costly, or inflexible.[189] One submission suggested modernising and updating the examples provided in the Act, which they considered outdated.[190]

In the case where a board of management wants to pass a resolution to reserve places for women, in circumstances where women are underrepresented, minimising procedural impediments to allow such affirmative measures to be put in place will mean that they are used more often.

The interaction with exemption applications

Currently, where a person wishes to rely on a welfare measure or equal opportunity measure exemption, they must prove that it applies, if a complaint is made. However, a person may apply to the tribunal for an exemption from the operation of specified provisions of the Act for up to five years. Such applications are often made as a form of insurance against a complaint, but may be refused because the general exceptions provisions are arguable, or they directly apply.[191] We are aware of a common misunderstanding that a formal tribunal exemption is required.[192]

The Office of the Special Commissioner, Equity and Diversity, was in favour of making the laws clearer and easier to access. In her experience, while many employers are ready and willing to implement these measures, having them expressed as exceptions to discrimination creates confusion and implies that employers need to 'seek approval' before utilising them.[193]

The Queensland Council of Unions approved of a change in approach to support efforts to address discriminatory practices in a way that makes it clear that exemption applications are not required.[194] In Victoria, the practice of applying for exemptions in cases that are clearly special measures has continued. Many of these applications have been dismissed as not

187 Assoc Prof Dominique Allen submission, 3-4.
188 PeakCare Queensland Inc submission, 9.
189 Australian Industry Group submission, 11; Aboriginal and Torres Strait Islander Legal Service submission, 11
190 One in Three Campaign submission, 16-17.
191 See for example: *Re: Anglo Coal (Grosvenor Management) Pty Ltd & Ors* [2016] QCAT 160 (23 February 2016). For a full list of exemption application outcomes, see Queensland Human Rights Commission, 'Exemption application decisions', (Web page) <https://www.qhrc.qld.gov.au/resources/legal-information/exemptions/exemption-application-decisions#content>.
192 For instance, a recent Investigation Arista report considered whether the Queensland Police Service could have sought an exemption from the Tribunal to ensure the lawfulness of measures to address gender inequity, but the report did not identify or discuss the applicability of the equal opportunity measures exception in the Act. Crime and Corruption Commission (Qld), *Investigation Arista – a report concerning an investigation into the Queensland Police Service's 50-50 gender equity recruitment strategy* (Report, 12 May 2021) [56].
193 Office of the Special Commissioner submission, 2.
194 Queensland Council of Unions submission, 17-18.

being necessary because the measure or action is a special measure.[195] A small number of organisations and employers may continue to seek approval even when affirmative measures are clearly applicable. See also: chapter 8 for a discussion on Tribunal exemptions.

Human rights considerations

Human Rights Act

In recommending changes in Victoria, the Gardner Review noted the inconsistency between special measures in the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the narrower approach in the Victorian anti-discrimination legislation.[196]

In Queensland, the same considerations apply. The right to recognition and equality before the law under the *Human Rights Act 2019* contains an internal limitation that says:

> Measures taken for the purpose of assisting or advancing person or groups of persons disadvantaged because of discrimination do not constitute discrimination.[197]

The Queensland Law Society welcomed the opportunity to create better alignment with the Human Rights Act and to reflect the terminology of international human rights law generally.[198]

Race convention obligations

We have considered the implications of any change to the current approach to affirmative measures on Aboriginal and Torres Strait Islander communities.

During our community consultations, First Nations people told us that special measures may undermine their self-determination, and this can have a detrimental effect.[199] This concern was also raised in two submissions made on behalf of Aboriginal peoples and Torres Strait Islander peoples, who strongly urged us to consider making a new regime that would be consistent with the *Convention on Elimination of all Forms of Racial Discrimination* (CERD).[200]

In summary, these stakeholders told us that these kinds of special measures should be temporary, taken only in partnership with community, managed locally, tailored to the community, and subject to continuous monitoring and objective measurement of effectiveness of the measures in meeting clear goals. The CERD requires that, when warranted, states should take special measures to ensure the adequate development and protection of certain racial groups for the purpose of guaranteeing full and equal enjoyment of rights and freedoms. The article has an important caveat that:

> These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.[201]

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) recommended extreme caution in suggesting changes to define special measures as positive measures. The basis of their

195 See commentary and examples: Victorian Equal Opportunity and Human Rights Commission, 'Special measures', Victorian Discrimination Law (Wiki, 30 August 2019) <http://austlii.community/foswiki/VicDiscrimLRes/Specialmeasures>.
196 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 33.
197 *Human Rights Act 2019* (Qld) s 15(5).
198 Queensland Law Society submission, 11.
199 Public consultation, Yarrabah, 2 December 2021.
200 Foundation for Aboriginal and Islander Research Action submission; Aboriginal and Torres Strait Islander Legal Service submission.
201 United Nations General Assembly, *International Convention of the Elimination of All Forms of Racial Discrimination*, res 2106 (21 December 1965), art 2(2).

concern was that definitional changes could lead to misapplication or misuse, or the maintenance of separate rights for different racial groups, or entrenched and outdated measures.[202]

The Australian Discrimination Law Experts Group (ADLEG) urged that an assessment of special measures should include the views of the affected groups to avoid paternalistic measures that 'undermine the agency of members of that group.'[203]

The Foundation for Aboriginal and Islander Research Action (FAIRA) provided a detailed submission contending that there should be no ambiguity or doubt about whether a law is a special measure, or on the other hand racially discriminatory.[204] FAIRA recommended that there be specific criteria included to establish whether a program or policy is a genuine special measure, including that they be temporary, established with free prior and informed consent, accountable to the people, appropriate for the situation, and subject to monitoring.[205] These criteria are similar in substance to the requirements on State parties under CERD as expressed in General recommendation 32,[206] but incorporate the higher bar of 'free, prior and informed consent' from the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[207]

The issue of alcohol management plans (AMPs), particularly in the absence of genuine consultation, is a divisive issue for Aboriginal and Torres Strait Islander peoples and was the subject of a High Court challenge.[208] In that matter, the court determined that special measures in the Racial Discrimination Act[209] did not import a requirement from CERD or UNDRIP for consultation or free, prior, and informed consent. Hunyor considers that such measures in the absence of proper consultation are paternalistic, and rather than conferring additional benefits these are measures that limit rights of disadvantaged groups on the assumption it is 'good for them'.[210]

Creating 'identified' positions for the employment of Aboriginal and Torres Strait Islander people falls into the category of affirmative measures for which there is no need for such intense scrutiny, and to do so would be counter-productive by discouraging their use.

A considered approach

Our analysis of submissions and academic research[211] indicates there needs to be a careful and considered approach to the definition of affirmative measures. Legislative drafting must avoid entrenching disadvantage for marginalised racial groups, and in particular, First Nations peoples.

To meet international law obligations on race discrimination, the Act needs to provide a clear delineation between general affirmative measures, and the type of special measures implemented by government with respect to minority racial groups.

202 Aboriginal and Torres Strait Islander Legal Service submission, 4-5.
203 Australian Discrimination Law Expert Group submission, 39.
204 Foundation for Aboriginal and Islander Research Action submission, 4.
205 Foundation for Aboriginal and Islander Research Action submission submission, 6, and Attachment C – 10 'Principles to be applied to the Northern Territory Intervention.'
206 United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention of the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009).
207 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2017), art 19.
208 *Maloney v The Queen* (2013) 252 CLR 168.
209 *Racial Discrimination Act 1975* (Cth) s 8.
210 Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', (2009) 14(2) *Australian Journal of Human Rights,* 63.
211 Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', (2009) 14(2) *Australian Journal of Human Rights,* 39-70.

A careful and considered approach is needed for the following reasons:

- Affirmative measures should be strongly encouraged in the work, accommodation, and goods and services sectors, with few onerous requirements for implementation in order to support proactive efforts to eliminate discrimination to the greatest extent possible; but
- Where a proposed measure involves programs, policies, and plans that are purported to be for the benefit of minority racial groups, and in particular First Nations peoples, a greater degree of consultation and scrutiny is required.

In the time available, we have not had the opportunity to adequately consult with First Nations people on this issue. However, based on the material we have received, we have developed an option for consideration. This will require further input from First Nations people.

The Review's position

The Review considers that:

- There are sound reasons to adopt the terminology 'affirmative measures' instead of the current 'equal opportunity' and 'welfare measures', and there is no benefit in retaining two separate sections.
- The Act should clarify that affirmative measures are a key concept in the shift towards substantive equality, and to be consistent with the *Human Rights Act 2019,* affirmative measures should be incorporated into the meaning of discrimination.
- Drafting of the affirmative measures provision needs to ensure the Queensland Government recognises its obligations under international law when implementing plans, policies, or programs for minority racial groups, with particular regard to CERD article 2(2) and General recommendation 32.

Recommendation 4

4.1 The Act should include a new provision called affirmative measures, contained within the part of the Act that explains the meaning of discrimination rather than in general exceptions, defined as per section 12 of the Equal Opportunity Act 2010 (Vic). The Act should include contemporary examples to demonstrate how affirmative measures may apply in practice.

4.2 The Act should impose a different and higher standard for measures that apply to government plans, policies, or programs in relation to minority racial groups, requiring that they are reasonable and proportionate to the scope and impact of the measures on the affected group. The Act should confirm that such measures be designed and implemented after prior consultation with affected communities, and with the active participation of the communities.

4.3 Prior to the enactment of legislation, the Queensland Government should ensure that Aboriginal and Torres Strait Islander peoples are genuinely consulted about this proposed approach.

Reasonable accommodations

The Terms of Reference ask us to consider:

- whether there is a need for any reform regarding the definitions in the Anti-Discrimination Act, including unjustifiable hardship[212]
- whether a more positive approach is required to eliminate discrimination[213]
- whether the Act should contain protections that exist in other Australian discrimination laws.[214]

Throughout the Review, we asked stakeholders if the Act is effective in ensuring that reasonable accommodations are made when appropriate to avoid and eliminate discrimination, or whether the law needs to change.

In the Discussion Paper, we invited responses to questions about how reasonable accommodations (and unjustifiable hardship) should be referred to and framed in the Act, and whether the current obligations should be reframed to a positive obligation to make adjustments. We received 35 submissions on these subjects.[215]

We also held focused consultations about these topics during our initial consultations and roundtables, including with people with disability, government agencies, and small business and industry.[216] We heard from 62 people with disability through our online Have your Say survey.

We recommend that a standalone positive duty to make reasonable accommodations be introduced. While no longer framed as exceptions to discrimination, we recommend that the concept of unjustifiable hardship be retained as a factor to determine whether accommodations are reasonable.

The terms 'reasonable adjustments' and 'reasonable accommodation' are often used interchangeably. While both are appropriate, we prefer the term reasonable accommodation because it is the wording of the *Convention on the Rights of Persons with Disabilities*,[217] and reflects an intention to ensure that people with disability enjoy their rights on an equal basis with others.

212 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).
213 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(b).
214 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).
215 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Medical Insurance Group Australia submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Joint Churches submission; Rainbow Families Queensland submission; PeakCare Queensland Inc; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Human Rights Law Alliance submission; Women's Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission; Rita Jabri Markwell submission; Chamber of Commerce and Industry Queensland submission.
216 People with disability roundtable, 4 February 2022; Small business roundtable, 7 March 2022; Government representatives roundtable, 14 February 2022.
217 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* 61st sess, UN Doc A/RES/61/106 (13 December 2006).

Current approach

'Reasonable accommodations' refers to making suitable provisions or adjustments to accommodate a person's attributes to avoid discrimination and achieve substantive equality. The provision of accessible toilets is an example of reasonable accommodation for a person with disability.

During our roundtable with people with disability, we were told about a situation of a person having no access to toilets at her workplace, and needing to go home twice a day for this reason. Even though the access issue could have been reasonably easily fixed, because her employer failed to address the issue in a reasonable timeframe, she had to stop working there altogether.[218]

The Act implicitly provides for 'reasonable accommodations' in the current definition of indirect discrimination. Indirect discrimination occurs if a term is imposed, which a person cannot comply with because of their attribute, and the term is not reasonable.[219]

However, where a person with disability requires 'special services or facilities' and the supply of those facilities would impose 'unjustifiable hardship', the Act provides for exceptions that allow for people with disability to be subject to discrimination in the areas of work, education, goods and services, accommodation, and clubs.[220]

The term 'unjustifiable hardship' also appears in the current Act in relation to:

- an exception to workplace discrimination on the basis of 'impairment', where the circumstances of a person's 'impairment' causes unjustifiable hardship for an employer, depending on the impairment and the nature of the work;[221] and
- an exception to discrimination on the basis of sex, where the supply of separate sleeping accommodation for men and women working together would cause unjustifiable hardship to the employer.[222]

Positive duty to make reasonable accommodations

In the Discussion Paper, we asked for submissions on whether the Act should adopt a positive duty to make 'reasonable accommodations', for which attributes and areas, and using what factors to assess the 'reasonableness' of accommodations.

Of the 33 submissions that responded to this question, 29 were in favour of a positive duty in some form.[223] Of the submissions that expressed concerns about a positive duty, stakeholders noted the challenges for smaller, not-for-profit organisations with limited resources to meet the duty, and potential inconsistencies with obligations in other contexts, such as in health settings or

218 People with disability roundtable, 4 February 2022.
219 *Anti-Discrimination Act 1991* (Qld) s 11.
220 *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.
221 *Anti-Discrimination Act 1991* (Qld) s 36.
222 *Anti-Discrimination Act 1991* (Qld) s 30.
223 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Rainbow Families Queensland submission; PeakCare Queensland Inc; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Human Rights Law Alliance submission; Women's Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission.

with Fair Work laws.[224] As we discuss below, these concerns may be addressed by ensuring the duty is subject to appropriate limitations.

Comparative approaches

How the duty is framed

Under the federal Disability Discrimination Act, direct discrimination occurs if a person 'does not make, or proposes not to make, reasonable adjustments' that has the effect that the person 'because of the disability, [is] treated less favourably than a person without the disability would be treated in circumstances that are not materially different.'[225]

In *Sklavos v Australasian College of Dermatologists*,[226] the court held that the reason for not making the adjustment must still be 'because of' the person's disability for direct discrimination to occur. For example, in order to succeed under federal law, an employee must show that the employer's reason not to provide a screen reader was because the employee is blind.

To address this, the Australian Human Rights Commission has recommended that the Australian Government amend federal legislation by creating a new standalone provision that provides for a positive duty to make reasonable adjustments unless doing so would involve unjustifiable hardship.[227]

Both Victorian and Northern Territory anti-discrimination legislation create a standalone positive duty to make reasonable adjustments.

In Victoria, the duty is specifically and separately provided for in relation to particular areas of discrimination. For example, an employer has a duty to make reasonable adjustments for employees with disabilities who require adjustments to perform the genuine and reasonable requirements of their employment.[228] In education, the duty is for educational authorities to make reasonable adjustments for a person with disability so that they can participate in or derive substantial benefit from an educational program.[229]

Practitioners in Victoria have noted that the introduction of positive duties in the Equal Opportunity Act was one of that Act's strengths.[230]

The Northern Territory provides a generalised duty that requires duty-holders to accommodate a special need a person has because of an attribute, and failure to accommodate includes making inadequate or inappropriate provision to accommodate the need, and where a person unreasonably fails to provide for that need. [231]

224 Joint Churches submission, 3; James Cook University submission, 1; Australian Industry Group submission, 4; Medical Insurance Group Australia submission, 3.
225 *Disability Discrimination Act 1992* (Cth) s 5(2). See also the definition of indirect discrimination in section 6(2) of the *Disability Discrimination Act 1992* (Cth) which provides indirect discrimination occurs if a person can only comply with a requirement or condition if reasonable adjustments are given, and the failure to make reasonable adjustments has the effect of disadvantaging a person with disability.
226 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.
227 Australian Human Rights Commission, 'Information concerning Australia's compliance with the Convention on the Rights of Persons with Disabilities', Submission to the UN Committee on the Rights of Persons with Disabilities, 25 July 2019.
228 *Equal Opportunity Act 2010* (Vic) s 20. See also sections 22A (in relation to contract workers with disability) and 33 (in relation to partners in a firm with disability).
229 *Equal Opportunity Act 2010* (Vic) s 40.
230 Legal Aid Queensland submission, 23 citing Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 488.
231 *Anti-Discrimination Act 1992* (NT) s 24.

Attributes and areas of protection

Under the Disability Discrimination Act, a duty to make reasonable adjustments is owed to people with disability in all areas.[232] No other federal anti-discrimination laws provide for reasonable adjustments.

In Victoria, the duty only relates to people with disability in relation to employment, education, and the provision of goods and services.[233]

In the Northern Territory, the duty extends to all attributes and all areas.[234]

Reasonableness of the accommodation

In Australia, an assessment of 'reasonableness' under a positive duty involves consideration of whether the accommodation causes 'unjustifiable hardship', or at least consideration of the same or similar factors.

Federal law

Under federal disability discrimination law, an adjustment is a reasonable adjustment unless it would impose an unjustifiable hardship.[235] The definition of 'unjustifiable hardship' takes account of:

- the nature of the benefit or detriment to any person concerned
- the effect of the disability of any person concerned
- the financial circumstances of, and the estimated amount of expenditure required by, the person required to make the accommodation
- the availability of financial and other assistance to the person required to make the accommodation
- any relevant action plans given to the Commission under that Act.[236]

Disability standards provide further guidance on what constitutes a reasonable adjustment. Breach of a disability standard is unlawful, while acting in accordance with a disability standard is a defence to unlawful discrimination.[237] There are disability standards in relation to access to premises, education, and public transport.[238]

The Disability Discrimination Act retains general exceptions to discrimination if avoiding the discrimination would impose an unjustifiable hardship on the discriminator, based on the same factors already described.[239]

Victoria

In Victoria, whether an adjustment is reasonable requires consideration of all relevant facts and circumstances, including consideration of a non-exhaustive list of factors, which vary slightly depending on the area of discrimination. The factors common to all areas are the:

- person's circumstances, including the nature of the disability
- nature of the adjustment

232 *Disability Discrimination Act 1992* (Cth) ss 5(2) and 6(2).
233 *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.
234 *Anti-Discrimination Act 1992* (NT) s 24.
235 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'reasonable adjustment').
236 *Disability Discrimination Act 1992* (Cth) s 11.
237 *Disability Discrimination Act 1992* (Cth) ss 31-34.
238 *Disability (Access to Premises – Buildings) Standards* 2010 (Cth); *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth).
239 *Disability Discrimination Act 1992* (Cth) ss 21B, 29A.

- financial circumstances of the person required to provide the adjustment – except in education
- effect on the workplace / educational authority / service provider in making the adjustment, including financial impact, the number of people who will benefit or be disadvantaged by the adjustment
- consequences for that person in making the adjustment
- consequences for the person with disability if the adjustment is not made
- relevant action plans under the *Disability Discrimination Act 1992* (Cth) and the *Disability Act 2006* (Vic).[240]

For employment matters, additional relevant factors include the nature of the employee's role, the size and nature of the organisation, and impacts on efficiency.[241]

For education matters, additional consideration must be given to the educational impact on the student if the adjustment is made, and the effect on the educational authority, staff, other students, and any other person.[242]

For each area in which there is a positive duty, there is also a separate exception to discrimination if it is not reasonable to make adjustments.[243]

Northern Territory

In the Northern Territory, assessing whether there has been an unreasonable failure to provide for a special need depends on all the relevant circumstances, including the:

- nature of the special need
- cost of accommodating the special need and the number of people who would benefit or be disadvantaged
- financial circumstances of the person
- disruption that accommodating the special need may cause
- nature of any benefit or detriment to all persons concerned.[244]

There is an additional general exception to discrimination where it is unreasonable to require a person to supply special services or facilities, which provides the same list of factors to consider.[245]

Queensland

Under the current Act, where a person does not supply required special services or facilities, it is an exception to discrimination if the supply of those special services or facilities would impose unjustifiable hardship.[246]

The factors relevant to determining unjustifiable hardship are very similar to those considered under Northern Territory legislation.[247]

240 *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.
241 *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33.
242 *Equal Opportunity Act 2010* (Vic) s 40.
243 *Equal Opportunity Act 2010* (Vic) s 23 (employees); s 34 (person or partner); s 41 (education); s 46 (goods and services).
244 *Anti-Discrimination Act 1992* (NT) s 24(3).
245 *Anti-Discrimination Act 1992* (NT) s 58.
246 *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.
247 *Anti-Discrimination Act 1992* (NT) s 24(3).

A positive stand-alone duty

Rather than an implied obligation as it exists under the current Act, an express positive duty to make reasonable accommodations would improve clarity and give greater certainty regarding rights and obligations of the parties.[248] Referring to 'reasonable adjustments' or 'reasonable accommodations', rather than 'special services and facilities', is consistent with the language of the Disability Discrimination Act, and is a term better understood by the community and could assist with raising awareness.[249]

Fourteen submissions supported a standalone duty, such as that found in the Victorian legislation.[250] This would mean that failure to provide reasonable accommodations, in and of itself, would provide the basis for a complaint of unlawful discrimination.[251] Framing the duty in this way also supports a proactive rather than reactive approach to addressing substantive inequality.[252] It encourages early intervention to avoid discrimination rather than waiting for discrimination occur, saving the emotional and financial cost on the individual to make a complaint. In contrast, the current Act, through its 'unjustifiable hardship' exemptions, appears to support a person's refusal to make accommodations.[253]

Two submissions suggested adopting the model in the Disability Discrimination Act, which incorporates the duty under current definitions of direct and indirect discrimination.[254] However, other submissions noted potential problems arising from that approach, referring to the case of *Sklavos v Australasian College of Dermatologists*[255] discussed above.[256]

During one of our roundtable consultations, we heard from people with disability about the importance of creating positive obligations to make reasonable accommodations.[257] Reflecting on their experiences of discrimination, one person said that:

> *You know, because it keeps happening time and time again, throughout your life has that like, make you feel over time, not just one occasion. But you know, that cumulative effect of it continually happening worn out, probably makes me feel a little bit like a second class citizen. They don't seem to care that disabled people can't get in there. So yeah, doesn't feel good. But when I find a place that does allow access, I'm like, going there all the time and saying thank you for you know, you know, it's great.*[258]

When we spoke with peak bodies representing small businesses in Queensland, we heard that there was a willingness to address barriers to inclusion:

248 Legal Aid Queensland submission, 12; Name withheld (Sub.135) submission, 13-14.
249 Legal Aid Queensland submission, 12.
250 Assoc Prof Dominique Allen submission; Rainbow Families Queensland submission; Vision Australia submission; Queensland Council for Civil Liberties submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Name withheld (Sub.135) submission; Queensland Advocacy Incorporated submission; Queensland Council of Unions submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission, Department of Education (Qld) submission; Queenslanders with Disability Network submission.
251 Australian Discrimination Law Experts Group submission, 21.
252 Aged and Disability Advocacy Australia submission, 3-4.
253 Maurice Blackburn Lawyers submission, 5.
254 Marice Blackburn Lawyers submission; Human Rights Law Alliance submission.
255 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.
256 Queensland Advocacy Incorporated submission,13; Australian Discrimination Law Experts Group submission, 21.
257 People with disability roundtable, 3 February 2022.
258 People with disability roundtable, 3 February 2022.

> *We actively remove those barriers and try and create access. So, we don't get to see a lot of complaints from the small business or social enterprise perspective about having to make those changes, we actually hear the opposite from our social enterprises saying we need to be more accepting, more inclusive, make those changes quickly.*[259]

We heard that in some industries there is some room for improvement in creating accessibility for people with disabilities, but that:

> *Our members have asked us to provide them with more and more education about how they could do that better. So any legislative or or structural support or pressure to expedite that would be great.*[260]

In what contexts should the duty apply?

Attributes

Eleven submissions supported the introduction of a positive duty in relation to all attributes.[261] Fifteen submissions particularly referred to a positive obligation in relation to disability, or only in relation to disability.[262] Some submissions supported the duty in relation to other attributes such as religion, domestic violence, older persons, pregnancy, and family responsibilities.[263]

Under indirect discrimination, the implicit obligation to make reasonable accommodations extends to all attributes and areas. However, under the current Act, an express obligation, if any, only exists in relation to impairment discrimination in certain areas via the 'unjustifiable hardship' exception where special services or facilities are required. It is also framed in the negative, as opposed to a positive obligation.

A positive duty in relation to disability is required by the *Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD defines discrimination as including the 'denial of reasonable accommodation', and specifically provides that '[i]n order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.[264]

Areas

The current requirement to provide 'special services and facilities' exists in relation to work, education, goods and services, accommodation, and clubs.[265]

---

259 Small business roundtable, 7 March 2022.
260 Small business roundtable, 7 March 2022.
261 Rainbow Families Queensland submission; Australian Discrimination Law Experts group submission; Queensland Catholic Education Commission submission; Equality Australia submission, Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre In submission.
262 Public Advocate (Queensland) submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Christian Schools Australia submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission.
263 Legal Aid Queensland submission; Community Legal Centres Queensland submission; Women's Legal Service Qld submission; Department of Education (Qld) submission; Human Rights Law Alliance submission; Assoc Prof Dominique Allen submission; Queensland Council of Unions submission.
264 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* 61st sess, UN Doc A/RES/61/106 (13 December 2006) Articles 2 and 5(3).
265 *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.

Nine submissions recommended that the duty apply to all areas, and that this was necessary in order 'to achieve substantive equality'.[266] Some submissions noted certain areas for protection such as employment,[267] and education.[268]

What accommodations are required?

To ensure it is effective, it is important that any positive duty is clearly expressed.

A number of submissions endorsed the Victorian model, which imposes the duty to make reasonable adjustments and determines reasonableness specific to each area of activity.[269]

The Australian Discrimination Law Experts Group (ADLEG) recommended wording based on both the Northern Territory and federal approaches.[270]

Two submissions proposed a model that any refusal to accommodate disability should be unlawful, unless strictly necessary.[271] Caxton Legal Centre instead preferred an approach that would require reasonable accommodations to be made unless refusal to do so 'is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[272]

Submissions also made the following suggestions in relation to this issue:

- An accommodation is reasonable if it is needed to ensure a person with disability does not experience discrimination and it does not impose unjustifiable hardship at the time of the alleged discrimination.[273]
- The relevant time for assessing unjustifiable hardship should be at the time of the discriminatory conduct, not at a later time. This draws in issues for consideration such as whether the person required to make the accommodations had information about the nature of the disability and the type of adjustment required, and had adequate time to put the accommodation in place.[274]
- An accommodation that was determined without giving significant weight to the view of the person with disability is not a reasonable adjustment.[275]
- There needs to be consistency with federal disability standards and obligations under other laws, such as industrial laws.[276]

---

266 Vision Australia submission; Queensland Council for Civil Liberties submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Rainbow Families Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Australian Discrimination Law Experts Group submission.

267 Human Rights Law Alliance submission; Queensland Council of Unions submission; Respect Inc and DecrimQLD submission; Australian Industry Group submission; Queenslanders with Disability Network submission; Assoc Prof Dominique Allen submission.

268 Assoc Prof Dominique Allen submission; Vision Australia submission; Rainbow Families Queensland submission.

269 Youth Advocacy Centre Inc submission; Legal Aid Queensland submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

270 Australian Discrimination Law Experts Group submission, 21-24.

271 Queensland Advocacy Incorporated submission, 13; Rita Jabri Markwell submission, 3-4 (in the context of disability discrimination in education). See also Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.

272 Caxton Legal Centre submission, 5. See also Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.

273 Australian Discrimination Law Experts Group submission, 24.

274 Australian Discrimination Law Experts Group submission, 24; Name withheld (Sub.135) submission, 14. See also Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 489 – 490.

275 Australian Discrimination Law Experts Group submission, 23.

276 Christian Schools Australia submission, 9; Queensland Council of Unions submission, 40.

- Where government is the service provider or provides public funding to the service provider for the activity, there may be a greater expectation that the accommodation will be made, particularly where the main barrier is cost. This also models best practice and sets cultural norms.[277]

One submission gave the following example of where accommodations given did not achieve their purpose:

> *In education for example my daughter is dyslexic so extra time was granted for tests/exams etc [sic] but it didn't really help her. She could have better educational success if her assessments were verbal. Trying to fit people into boxes and generic criteria doesn't always work.*[278]

The Convention on the Rights of Persons with Disabilities defines 'reasonable accommodation' to mean 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'[279]

The Committee on the Rights of Persons with Disabilities explains this definition by breaking it down into two parts:

- First, that 'reasonable accommodation' is necessary and appropriate to achieve the objective of equality. In this context, 'reasonable' means that the accommodation is relevant, appropriate, and effective for the person with disability. This implies that the accommodation is developed in dialogue with the person with disability concerned.
- Second, that the accommodation does not impose 'a disproportionate or undue burden' on the duty bearer, setting a limit to the duty.[280]

What factors should be used to determine reasonableness?

Factors used in Victoria for assessing reasonableness received support from stakeholders.[281]

One factor absent from the Victorian criteria for assessing reasonableness, but within the factors for assessing whether a term imposed under 'indirect discrimination' is reasonable, is whether the disadvantage to the person subject to discrimination 'is proportionate to the result sought by the person who imposes or proposes to impose' the term.[282] This reflects the approach endorsed by Caxton Legal Centre previously referred to.[283]

As already indicated, the factors for assessing reasonableness are the same, or similar to, the factors for assessing unjustifiable hardship.[284]

277 Youth Advocacy Centre submission, 3.
278 Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 12.
279 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities,* 61st sess, UN Doc A/RES/61/106 (13 December 2006) Art 2.
280 United Nations Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and non-discrimination, UN Doc CRPD/C/GC/6 (26 April 2018) [25]-[26].
281 Youth Advocacy Centre submission; Legal Aid Queensland submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.
282 *Equal Opportunity Act 2010* (Vic) s 9(3)(b).
283 Caxton Legal Centre submission, 5.
284 See also Legal Aid Queensland submission, 13-14.

Some submissions supported the current criteria for assessing unjustifiable hardship[285] or recommended that the financial circumstances of the person required to make the accommodation be a primary or only consideration.[286] The Chamber of Commerce and Industry Queensland suggested that the size of the business in terms of profitability and employee numbers should be considered.[287] Consistent with this approach, some submissions suggested that large businesses, corporations, and governments should only be able to argue unjustifiable hardship in narrow circumstances.[288]

In contrast, some stakeholders told us that too much weight is given to the cost and effort of providing special services or facilities, and not enough to the impacts on the person requiring the services or facilities and the broader social benefits of inclusion.[289] We were also told that concepts of 'unreasonable' and 'unjustifiable' are often skewed in favour of able-bodied people's norms, which can be prejudicial to people with disability.[290]

During a roundtable session with people with disability one person told the Review:

> *My issue with this particular point is that the language is very vague, and what's reasonable to one person isn't necessarily reasonable to another. And it depends on your point of view. And so and I think legally it needs to be more set out, so that everybody understands what it means.*[291]

We also received submissions that suggested:

- The criteria should be consistent with Commonwealth disability discrimination laws and other relevant standards.[292]
- There should be an obligation to make efforts to identify and secure funding to assist with any financial costs of making accommodations, as is the case under federal law.[293]
- There should be an obligation to demonstrate what consideration was given to alternative adjustments short of unjustifiable hardship that would reduce the discriminatory effect of current arrangements.[294]

The Review's position

The Review considers that:

- There should be a positive standalone duty to make reasonable accommodations for a person's disability in all areas.
- The aim of substantive equality for people with disability would be best supported by a requirement to provide reasonable accommodation across all areas of activity under the Act.
- The duty should not extend to other attributes aside from disability, but simplifying indirect discrimination as recommended by the Review will assist in strengthening rights to reasonable accommodation for all attributes and areas.

285 Australian Industry Group submission, 4; Queensland Catholic Education Commission submission, 4.
286 Joint Churches submission, 17; Equality Australia submission, 28; Queensland Council for Civil Liberties submission, 3.
287 Chamber of Commerce and Industry Queensland submission, 12.
288 Vision Australia submission 3; Youth Advocacy Centre submission, 3.
289 Queensland Advocacy Incorporated, 14; Caxton Legal Centre, 5; Australian Discrimination Law Experts Group submission, 24; Community Legal Centres Queensland submission, 2; Legal Aid Queensland submission, 13.
290 Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 11-12; Caxton Legal Centre, 5.
291 Small business roundtable, 7 March 2022.
292 Department of Education (Qld) submission, 4; Queensland Advocacy Incorporated submission, 14; Christian Schools Australia submission, 9.
293 Australian Discrimination Law Experts Group submission, 24.
294 Australian Discrimination Law Experts Group submission, 24. This is found in the criteria for assessing indirect discrimination at section 9(3)(e) of the Equal Opportunity Act 2010 (Vic).

- To ensure the positive duty does not extend to accommodations that impose 'a disproportionate or undue burden' or an 'unjustifiable hardship' on the duty bearer, the duty should be subject to limits.
- While the financial circumstances of the person required to supply reasonable accommodations is an important factor for assessing whether an accommodation is reasonable, proportionate regard must also be given to the impact on the person who requires the accommodation, and broader consideration of the benefits and disadvantages of the accommodation on other people.
- Inclusive factors for assessing whether an accommodation is reasonable should be adopted that, while not significantly departing from the current test for 'unjustifiable hardship', strike a better balance between these competing interests.
- Creating a non-exhaustive list would mean that any other matters, such as intersection with federal disability standards, or efforts taken to secure financial assistance to make the reasonable accommodation, could be considered in appropriate cases.

Unjustifiable hardship

The Terms of Reference requires the Review to consider key definitions in the Act, including the definition of unjustifiable hardship.[295]

Under the current Act, the exception of 'unjustifiable hardship' applies in relation to the supply of special services or facilities that are required for a person with an 'impairment' in the areas of work, education, goods and services, accommodation, and clubs.[296]

Because of the conclusions we form above, we ultimately consider that the term 'unjustifiable hardship' no longer needs to be retained in the Act.

Comparative approaches

Unjustifiable hardship is a general exception to discrimination under the federal Disability Discrimination Act if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.[297] The failure to make reasonable adjustments appears in the definitions of both direct and indirect discrimination.[298]

While there is no reference to 'unjustifiable hardship' in the Victorian Act, factors that reflect similar considerations are embedded in the definition of 'indirect discrimination', when assessing whether a requirement, condition, or practice imposed is reasonable.[299] However, for each positive duty to make reasonable accommodations, there is an express exception to discrimination in that area if it is not reasonable to make adjustments.[300]

The Northern Territory does not have a provision in relation to indirect discrimination but has a positive duty to accommodate special needs in relation to any attribute. Whether the duty has been breached is assessed by reference to a list of factors similar to those in Queensland for assessing unjustifiable hardship in the supply of special services or facilities.[301] In addition, the

295 Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).
296 See *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, and 100. Two further specific exceptions (s 36 and s 30) in the work area also include the term 'unjustifiable hardship', but the Review received no submissions on these sections.
297 *Disability Discrimination Act 1992* (Cth) ss 21B, 29A.
298 *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2).
299 *Equal Opportunity Act 2010* (Vic) s 9(3).
300 *Equal Opportunity Act 2010* (Vic) s 23 (employees); s 34 (person or partner); s 41 (education); s 46 (goods and services)
301 *Anti-Discrimination Act 1992* (NT) s 24.

legislation contains a general exception to discrimination where the supply special services or facilities is required but it is unreasonable to do so, referring to the same list of factors.[302]

Should unjustifiable hardship be retained?

Fourteen[303] out of 23 submissions received on this issue thought that the unjustifiable hardship exception should be retained. A further four indicated that if the exception were to be retained, it needed to be narrowed in its application.[304]

We heard from members of the Chamber of Commerce and Industry through a survey in February 2022 on this topic,[305] and 75% of survey respondents thought that unjustifiable hardship should be retained in the Act, with one person commenting from a small business perspective that:

> *If a person is unable to perform tasks consistent with the duties required in any workplace, with regard to their own and the safety of others or the overall productivity of a business they should not hold that position. In particular small business cannot afford extra staff under current climates to provide supervision of staff who cannot work to either physical/mental standards within a workplace.*[306]

Australian Discrimination Law Experts Group and Legal Aid Queensland, while supportive of retaining the unjustifiable hardship exceptions, acknowledge that having both might be unnecessary.[307]

Two submissions were against retaining the exceptions, noting that they 'can be used to justify inaccessibility or processes which could ordinarily be viewed as discriminatory.'[308]

The exception of 'unjustifiable hardship' as it applies under the current Act to the supply of special services or facilities will be incorporated under recommendations that there be a positive duty to make reasonable accommodations, subject to a list of inclusive criteria for assessing 'reasonableness'.

The recommended criteria include factors currently listed within the definition of unjustifiable hardship under the Act.[309] This will have the practical effect of having the 'unjustifiable hardship' exception apply to the positive duty to make reasonable accommodations for people with disability in all areas, which replaces provisions that refer to 'special services or facilities.'

Viewed this way, the exception of 'unjustifiable hardship' will be extended to indirect discrimination for all attributes and areas, under recommendations that reasonableness be assessed by reference to a similar set of expanded and inclusive criteria. See also: Indirect discrimination in this chapter.

---

302 *Anti-Discrimination Act 1992* (NT) s 58.
303 Name withheld (Sub.026) submission; Joint Churches submission; Christian Schools Australia submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Catholic Education Commission submission; James Cook University submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Department of Education (Qld) submission; Chamber of Commerce and Industry Queensland.
304 Rita Jabri Markwell submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Community Legal Centers Queensland submission; Equality Australia submission.
305 Chamber of Commerce and Industry submission, 11-13.
306 Chamber of Commerce and Industry submission, 12.
307 Australia Discrimination Law Experts Group submission, 24; Legal Aid Queensland submission, 13-14.
308 Queenslanders with Disability Network submission, 5. See also Youth Advocacy Centre submission.
309 *Anti-Discrimination Act 1991* (Qld) s 5.

The Review's position

The Review considers that:

- Consistent with the approach of Victoria and the Northern Territory, the Act does not need to refer to the term 'unjustifiable hardship', but it is important to retain this concept to achieve a balanced outcome.
- In effect, the concept of unjustifiable hardship will be retained by referencing the factors that currently define unjustifiable hardship in the definition of 'reasonableness' in the positive duty to make reasonable accommodations in disability discrimination, and in the recommended expanded list of considerations for 'reasonableness' in indirect discrimination.

Recommendation 5

5.1 The Act should replace unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodations for a person with disability which applies to all areas of activity in which the Act operates.

5.2 A non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the Act, including:

- the person's circumstances, including the nature of the disability
- the nature of the accommodation
- the consequences for the person with a disability if the accommodation is not made
- the financial circumstances of the person required to provide the accommodation
- the consequences for the person required to provide the accommodation, including any financial impact
- the consequences for other people affected by the accommodation, including numbers of people advantaged or disadvantaged
- balancing the consequences of providing the accommodation against the disadvantage that would be imposed upon the person with disability and others if the accommodation is not made.

Sexual harassment

The Terms of Reference for the Review ask us to consider:

- whether there is a need to amend the definition of sexual harassment in the Anti-Discrimination Act[310]
- implementing the recommendations from the *Respect@Work: Sexual Harassment National Inquiry Report*,[311] including options for legislating for a positive duty to eliminate sexual harassment.[312]

We asked stakeholders if the Anti-Discrimination Act is effective in responding to sexual harassment and whether the law needs to change and were told that sexual harassment is still occurring and the harm caused can be devastating. In chapter 2 we describe some of the experiences of sexual harassment we heard about, and the impacts on individuals and the community.

We identified that more needs to be done to proactively prevent sexual harassment. In chapter 6 we recommend the introduction of a positive duty to take reasonable and proportionate measures to eliminate discrimination and sexual harassment.

This section focuses on the current Queensland definition of sexual harassment and whether it should change, and any additional provisions that are needed to address sex discrimination. We have kept the recommendations made by the Respect@Work report as a constant reference point.

In the Discussion Paper, we asked whether additional words should be added to the definition of sexual harassment to ensure it covers all conduct that should be prohibited. We also asked whether additional, specific contraventions of the law should be added. We received 28 submissions in response to these questions.[313] In response to our Have Your Say survey, 27 people shared their personal experiences of sexual harassment, and 8 talked about sex discrimination. We also discussed these topics in consultations with stakeholders.[314]

After in-depth consultations, consideration of submissions and legal research, we have concluded that the current sexual harassment laws in Queensland are working well, and substantially cover the situations that Respect@Work sought to address in the federal jurisdiction. For this reason, we recommend that the sexual harassment provisions of the Act remain unchanged, and that education and awareness about the law and its coverage is increased.

310 Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).
311 Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).
312 Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Qld), Terms of Reference 5.
313 Caxton Legal Centre submission; Queensland Law Society submission; Queensland Council of Unions submission; Office of the Special Commissioner, Equity and Diversity (Qld), submission; Maurice Blackburn Lawyers submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Australian Discrimination Law Experts Group submission; Maternity Choices Australia submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission; SIN (South Australia) submission; Sienna Charles submission; Alistair Witt submission; Jenny King submission; Name withheld (sub.059) submission; Name withheld (sub.064) submission; Name withheld (sub.026) submission; Youth Advocacy Centre Inc submission; Department of Education (Qld) submission; Dr Zahra Stardust submission; Chamber of Commerce and Industry submission; Australian Industry Group submission; Christian Schools Australia submission; James Cook University submission; Equality Australia submission.
314 For example: Women's Legal Service Queensland consultation, 10 September 2021; YWCA Australia consultation, 26 August 2021; Young peoples' roundtable, 17 February 2022.

Effectiveness of the law

A common view expressed in submissions and consultations was that Queensland's sexual harassment provisions are working well and are even the best in Australia.[315]

Some stakeholders considered that the Commission's relatively low sexual harassment complaint numbers are less to do with the legislation and more to do with the stigma and negative consequences from complaining, as well as poor experiences with previous complaints.[316] Women's Legal Service Queensland drew our attention to the issue of women being reluctant to identify themselves as 'victims' of sexual violence because of the social stigma and attitudes attached to this label. [317]

These issues were evident in a confidential submission to our Have your Say survey from a young woman from a culturally and linguistically diverse background. In this case, the negative experience of complaining had a silencing effect. She told the Review that:

> *A senior manager in the [redacted workplace] made sexual comments on multiple occasions when I was a young graduate. His comments – including calling me a slut in front of my supervisor – were heard by others but no action was taken. When I told a more senior female staff member, she dismissed my concerns and basically encouraged me to let it go as the senior manager was going through a divorce. I never raised it again. Based on my experience, I would not speak up if I, or others, experienced sexual harassment.*[318]

We were told that these issues were reflective of structural and cultural gender inequality.[319]

Current approach

The current test for sexual harassment under the Queensland Act is simple and broadly defined. A complainant is required to prove that some form of unwelcome sexual conduct towards them occurred, and that the conduct was done either:

- with the intention of offending, humiliating, or intimidating the complainant; or
- in circumstances where a reasonable person would have anticipated the possibility that the complainant would be offended, humiliated, or intimidated.[320]

Sexual harassment is unlawful regardless of where it happens, which is different from other jurisdictions in which sexual harassment is only unlawful when it occurs in proscribed 'areas'.

Even though sexual harassment is unlawful in all contexts and settings, the Commission receives most complaints about sexual harassment in work. Over 80% of sexual harassment complaints made to the Queensland Human Rights Commission in 2020-21 involved the workplace.[321]

315 See for example: Caxton Legal Centre submission, 7; Queensland Law Society Submission, 4.
316 Caxton Legal Centre submission, 7.
317 Women's Legal Service Queensland, Consultation with the Review of the Anti-Discrimination Act, 10 September 2021.
318 Name withheld (Form.60) survey response.
319 Caxton Legal Centre submission, 7-8.
320 *Anti-Discrimination Act* 1991 ss 118–120.
321 Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 36.

Relational aspect

The current law in Queensland contains a 'relational aspect'. This means that for conduct to amount to sexual harassment, it must be directed towards the person. The Act uses the words 'in relation to the other person', or 'relating to the other person'. There is generally a requirement that the conduct be either done with the person in mind or have a connection with the person.[322]

The requirement to prove the relational aspect is difficult in highly sexualised work environments. Cases in which the relational aspect couldn't be proved include a work Christmas party for which a topless waitress was engaged,[323] and a work area in which posters that could be considered to sexualise women were displayed.[324]

These situations usually amount to sex discrimination. However, we considered whether changing the definition of sexual harassment to clearly include 'toxic' environments was needed.

In the Discussion Paper we asked whether the definition of sexual harassment should more clearly cover situations in which a person is exposed to conduct that would amount to sexual harassment, but where it is not directly in relation to them. Below we examine the advantages and disadvantages of expanding the sexual harassment provisions.

Benefits of extending scope of provision

The Australian Capital Territory legislation specifies that sexual harassment may be 'to, or in the presence of' the person.'[325]

Several submissions supported changing the Act to incorporate this approach because of the weight it would lend to effectively addressing toxic work environments.[326]

The Office of the Special Commissioner, Equity and Diversity, commented that:

> an important step to addressing a legislative gap, being the preventing of, and responding to, sexualized work environments, conduct may not be readily identifiable as directed towards a person but is instead a systemic workplace cultural problem.[327]

The Queensland Council of Unions and Maurice Blackburn Lawyers had both supported people experiencing sexism and sexual harassment in workplaces, and provided these real examples in which the conduct was not specifically directed at the person:

- sexual remarks made behind a person's back [328]
- situations in which gender is objectified through advertisements, stock imaging, and marketing strategies, including calendars or posters in common areas of workplaces.[329]

While many Queensland Law Society members were concerned about such experiences, particularly in male-dominated environments, some practitioners felt that there is no need for legislative change, because the Queensland case authorities (while small in number) already recognise these behaviours as sex discrimination.[330]

322 *Streeter v Telstra Corporation Limited* [2007] AIRC 679.
323 *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40.
324 *Perry v State of Queensland & Ors* [2006] QADT 46.
325 *Discrimination Act 1991* (ACT) s 58 (2).
326 See for example: Queensland Nurses and Midwives Union submission, 14; Australian Lawyers Alliance submission, 9; Office of the Special Commissioner, 2; Maternity Choices Australia submission, 3; Aged and Disability Advocacy Australia submission, 4.
327 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 1.
328 Queensland Council of Unions submission, 11.
329 Maurice Blackburn submission, 4.
330 Queensland Law Society submission, 4-5.

Risks to extending scope of provision

Given that we identified the sexual harassment laws are already operating well, many stakeholders were hesitant about changing the definition of sexual harassment as there may be unintended adverse consequences.

The Review has identified two key risks with adding the words 'in the presence of the person':

- potential for literal interpretation of the word 'presence'
- overreach into areas of private life.

Literal interpretation of the word 'presence'

One submission identified concerns with the way that the ACT Discrimination Act has been interpreted. In *De Domenico v Marshall*,[331] the Supreme Court interpreted the provision narrowly to mean that a statement of a sexual nature could not amount to sexual harassment unless the person the statement was about was present at the time.

Another concern with the ACT Act relates to determining illegality of sexual harassment in the context of technology and social media.[332] Sexual harassment often occurs through emails, texts, and phone apps, and so if the word 'presence' is taken to be a physical, rather than virtual presence, the provision is limited.

Legal Aid Queensland didn't think that this hurdle was insurmountable but suggested that careful drafting of any new Queensland provisions would be required to avoid the same complications, including by clarifying it is not a requirement of the test.[333]

Unreasonable intrusion into private life

While many submissions acknowledged the importance of addressing underlying cultures that allow or encourage sexual harassment, several had serious reservations about extending the law because it may lead to an unreasonable intrusion into people's private lives or undermine genuine sexual harassment claims. [334]

Because the law applies everywhere, rather than being confined to areas of activity, it could lead to over-sanitisation of spaces in which people gather, and potentially operate to the detriment of young people, LGBTIQ+ people, people experiencing homelessness, and sex workers.[335] The Queensland Law Society provided an example:

> If a group of people were engaging in a sexually explicit discussion in a pub and a person sitting nearby was offended by the discussion, they could seek redress in the Queensland Human Rights Commission. In this scenario, it would be reasonable to expect that the "victim" can simply walk away if they find the discussion offensive, unlike, for example in a workplace. The extended definition should be designed to assist people who do not have a simple option of walking away (e.g. because they need to remain in school or work etc.)[336]

331 *De Domenico v Marshall* [2001] ACTSC 52.
332 Legal Aid Queensland submission, 22.
333 Legal Aid Queensland submission, 21-23.
334 PeakCare Queensland Inc submission, 6.
335 Caxton Legal Centre submission, 9; Legal Aid Queensland submission, 23-24; Respect Inc and DecrimQLD submission, 20.
336 Queensland Law Society submission, 4.

Other submissions raised concerns that such a broad scope may unreasonably restrict the right to freedom of expression and freedom of thought, conscience, religion and belief.[337] To this, we would add that the right to privacy and the right to free association may also be unreasonably limited outside of work and other formal settings if the provision was too broad.[338]

The Queensland Council for Civil Liberties did not support any changes and preferred that sexual harassment occurring in the presence of others be addressed through the introduction of a positive duty.[339]

A different bar for private vs public settings

One solution may be to limit the extent of protection from sexual harassment 'in the presence' of a person to the particular areas of activity, e.g. work.[340]

While it may be possible to have a higher threshold test for sexual harassment that occurs in areas of public life, this could create confusion and dilute what has been identified as a strength in Queensland's approach – that it is prohibited, regardless of where it happens.

A complaint which alleged that conduct took place in both public and private settings would require careful dissection. This situation could happen where the conduct was between people who work together, but some of the alleged conduct occurred outside of work, such as in a group chat or social occasion outside of work hours and not connected to work.[341]

The Review's position

The Review considers that:

- The current definition of sexual harassment is effective and operates well, and currently covers circumstances including a toxic workplace environment.
- Changing the definition to remove the relational aspect may cause unjustifiable limitations on rights to privacy, association, and expression.
- Addressing the relational issue by limiting the areas of operation may undermine what has been identified as a strength in Queensland's sexual harassment provisions.
- The risks involved in changing the sexual harassment provisions outweigh the benefits.
- Community education about the existing sexual harassment provisions is required to ensure they are effective and well understood.
- Introducing a positive duty to eliminate discrimination and sexual harassment, as recommended by this report, provides an additional mechanism to address this issue.

Addressing underlying culture

Sexual harassment thrives in environments where there is a culture of acceptance of inappropriate behaviour, particularly where an employer has failed to take reasonable steps to address the behaviour.

The Respect@Work report recommended introducing two new contraventions into the Sex Discrimination Act in addition to the existing sexual harassment and sex discrimination protections.

337 Legal Aid Queensland submission, 23-24.
338 These rights are protected by the *Human Rights Act 2019* ss 25 and s 22.
339 Queensland Council for Civil Liberties submission, 5.
340 Legal Aid Queensland submission, 23-25.
341 Caxton Legal Centre submission, 8-9.

They are:

- sex-based harassment
- creating an intimidating, hostile, humiliating or offensive environment on the basis of sex ('hostile environments')

These proposed additional contraventions are directed at addressing underlying cultures of sexist and sexualised behaviour that permeates some workplaces. A sex-based harassment provision would only capture conduct that is currently unlawful under the direct sex discrimination provisions (such as sexist comments). The addition of a specific hostile environment provision may cover conduct that is currently dealt with as indirect sex discrimination (such as requiring a person to put up with an environment that disadvantages them because of their sex).

The following sections of this report discuss each of the new contraventions proposed by the Respect@Work report. We have concluded that the type of conduct they intend to cover is already prohibited under the Queensland Anti-Discrimination Act. Introducing new and overlapping contraventions risks making the law hard to understand or may undermine existing protections.

We recommend there be no change to the existing sexual harassment provisions, but rather a greater focus on education about the existing law to spread the message that such conduct is not acceptable.

Sex-based harassment

Sex-based harassment has been defined as behaviour that 'derogates, demeans or humiliates an individual based on that individual's sex,' and encompasses a range of behaviours including gender harassment, unwanted sexual attention, and sexual coercion. Sex-based harassment can be experienced by people other than women if understood broadly to extend to 'maintaining traditional gender structures', such as when men are harassed for traditionally feminine characteristics.[342]

Federal protections

The Respect@Work report considers that while sex-based harassment is already covered as a form of sex discrimination, this aspect of the law is not well understood.[343] The report's recommendation to prohibit sex-based harassment was recently implemented into law.[344]

The Sex Discrimination Act now prohibits harassment 'on the ground of sex' where:

- a person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and
- the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[345]

The Explanatory Memorandum for the Bill indicates there was a deliberate decision to include the words 'seriously demeaning' to prevent 'capturing mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold.'[346]

342 Legal Aid Queensland submission, 24 – referring to a number of contemporary sources on the meaning of sex or gender-based harassment.
343 Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces (*Report, 2020), 457-458.
344 Recent changes to the law were made in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) s 28AA.
345 *Sex Discrimination Act 1984* (Cth) ss 28AA (1)(a) and (b).
346 Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, [10].

Support for prohibiting sex-based harassment

In the Discussion Paper, we asked whether an additional contravention of sex-based harassment should be introduced.

Submissions from a range of stakeholders expressed general support for this approach,[347] including on the basis that not all harassment of women relates to their sexuality, but is 'simply misogynist, or anti-woman put downs'.[348]

Concerns about prohibiting sex-based harassment

'Seriously demeaning' conduct

Of those submissions that supported the introduction of a separate contravention for sex-based harassment, three raised concerns about replicating the approach in the Sex Discrimination Act,[349] which they considered to be too narrow. One submission commented that in a modern workforce, no-one should have to put up with conduct that is demeaning, even where it falls short of 'seriously' demeaning. [350]

The Queensland Council of Unions was concerned that the federal law 'narrows existing case law where sexist behaviour and treatment has been found to be unlawful.'[351]

On the other hand, three submissions felt that alignment and consistency with the federal laws was important to avoid complexity and confusion.[352]

Risks of narrowing the law

Some stakeholders who represent complainants had reservations.[353] While ultimately supportive of the introduction of a 'gender-based harassment' provision, Legal Aid Queensland recommended caution because of the complexity in statutory interpretation, and confusion for complainants about which provisions best apply to their complaints.[354]

Complaints that would be likely to be captured by sex-based harassment are covered by the current provisions and would be accepted by the Commission under the current laws. For instance, a complaint in which a person was subjected to harassing words and conduct because of their sex would be likely to be accepted as direct sex discrimination.

If sex-based harassment provisions were introduced, a complaint may overlap with sexual harassment if the words or conduct are also of a sexual nature. This could result in a complainant arguing three contraventions for the same conduct: sex discrimination, sex-based harassment, and sexual harassment.

A new specific provision may override an established general prohibition against direct and indirect discrimination and sexual harassment.[355] Having an additional provision that addresses the same kind of conduct that is already prohibited through the sex discrimination and sexual harassment provisions could lead to the misunderstanding or misinterpretation that only conduct that is 'seriously

347 See for example: Australian Discrimination Law Expert Group submission, 9; Queensland Law Society submission, 5; Queensland Nurses and Midwives Union submission, 14; Queensland Council of Unions submission, 12, Maternity Choices Australia submission, 1; Chamber of Commerce and Industry submission, 4.
348 Australian Discrimination Law Experts Group submission, 28.
349 Queensland Council of Unions submission, 11-12; Queensland Nurses and Midwives Union submission, 14-15.
350 Australian Discrimination Law Experts Group submission, 28
351 Queensland Council of Unions submission, 11-12.
352 Australian Industry Group submission, 7; James Cook University submission, 4; Christian Schools Australia submission, 10.
353 Caxton Legal Centre submission, 9; Legal Aid Queensland submission, 25.
354 Legal Aid Queensland submission, 25.
355 The Review notes that there is a general statutory interpretation principle that provides for a later specific provision to override an earlier general provision - *Goodwin v Phillips* (1908) 7 CLR 1 at 14; *Commissioner of Police v Eaton* (2013) 252 CLR 1 at 19 [46], 32 [92]).

demeaning' is unlawful. Incorporating a specific provision against sex-based harassment may also inadvertently suggest that seriously demeaning conduct is unlawful in relation to sex, but not other attributes. This would defeat the intended educative purpose of the provision.

Educating workplaces

Participants in our small business roundtable shared mixed views about whether an additional contravention would improve the educative function of the law. Some participants were concerned that the intrusion of an additional contravention to contend with might erode workplace relationships. In creating education campaigns or explanatory material, members raised the particular challenges of low formal education and literacy levels in traditionally male-dominated industries and recommended that guidance material and training must be simple, clear, 'short and sweet'.[356]

Other kinds of harassment

The view that the Act should cover protection from harassment based on attributes other that sex was put forward in submissions received by the Review.[357] These submissions questioned the rationale for having only one attribute (sex) protected from harassment, when people who experience race, disability, age, and sexuality harassment, for example, might be equally deserving of protection from harassment. We note that similar issues have been considered by the Legal Affairs and Safety Committee in relation to an inquiry into hate crimes and vilification.[358]

Human rights considerations

Extending protection against harassment only on the attribute of sex and/or gender may serve to embed inequality in the Anti-Discrimination Act. Queensland's Human Rights Act provides that every person has the right to equality and freedom from discrimination, and that this right may only be limited in a proportionate way to meet a legitimate purpose.[359] We have not heard that sex-based harassment is more serious or prevalent than other kinds of harassment, such that it justifies a more favourable approach than harassment because of other attributes.

The Review's position

The Review considers that:

- Insufficient reasons exist to justify a new prohibition against sex-based harassment.
- The new section 28AA of the Sex Discrimination Act (Cth) may not have much utility as the bar is so high that a complainant would be more likely to rely on sexual harassment or discrimination.
- As s28AA is untested, waiting to see how the provision is used and applied may be instructive.
- Removing the word 'seriously' from a similar Queensland provision would create inconsistency with the federal Sex Discrimination Act and would mean that employers have to comply with two different standards.
- New specific legislative provisions may override general discrimination and sexual harassment protections that have been working well.

356 Small business roundtable, 7 March 2022.
357 See for example: Equality Australia submission, 12-15 and 30; Caxton Legal Centre submission, 9.
358 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, Inquiry into serious vilification and hate crimes (2022) 45. The Committee commented that the civil test for vilification should be changed to reflect a focus that vilification has on the victim.
359 *Human Rights Act 2019* (Qld) ss 15, 13.

- Protecting only one attribute (sex) could cause incompatibility with the Human Rights Act.
- Future reviews of the Act could re-evaluate any benefit from incorporating the same (or similar) provisions in the Queensland Act.
- Simplifying the tests for direct and indirect discrimination is a better way to improve the educative function of the law.
- Training and guidance materials that are concise, easy to understand, and tailored to particular industries should be developed.

Hostile environments

Respect@Work considered that a hostile environment is one in which a person is made to feel uncomfortable or excluded by the workplace environment. Factors that may indicate such an environment include:

- display of obscene or pornographic materials
- general sexual banter or innuendo and offensive jokes.[360]

Respect@Work referred to a case in which two women who worked as cleaners (the only women on a construction site) were exposed to posters of naked women around the worksite. After complaining to male co-workers about the sexually explicit posters, there was a general increase in the number of posters displayed and their content was more explicit and degrading. The women also became aware that the male toilets contained offensive graffiti about the women personally. As a result of these events, both women left their jobs. This was found to be sexual harassment.[361]

The Committee on the Elimination of Discrimination against Women has referred to negative health and safety problems and loss of opportunity that can result from a 'hostile working environment.'[362]

In response to our Have your say survey, an Aboriginal woman who identifies as LGBTIQ+ told us that:

> *I work in a male dominated field and often have males believe that I cannot do what they do because I'm female, I also get cat called / wolf whistles often, have mainly males yell derogatory remarks at me… I also feel I need to show my engagement ring in subtle ways to remind the opposite sex that I am not a single person. It feels as though there is no one to back you up and that if you do make a complaint, you'll either lose your job or the person you tell will ask what you are doing to stop the behaviour.*[363]

In the Discussion Paper we asked whether the Anti-Discrimination Act should expressly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

360 Respect@Work report, 458-459.
361 *Horne v Press Clough Joint Venture* (1994) EOC 92-556; (1994) EOC 92-591.
362 Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 11th sess (1992) [18].
363 Name withheld (Form.059) survey response.

While the term 'hostile work environment' has mostly been used to refer to situations where a workplace is permeated by sexualised behaviour that is hostile to women, stakeholders considered that it might extend to situations in which other minority groups, such as LGBTIQ+ people and First Nations peoples, are subjected to constant racist, homophobic, or transphobic comments, 'jokes', and banter.[364]

An express prohibition on hostile environments

While acknowledging the existing case law in this area, Respect@Work noted that it was limited.[365] To clarify the law, the Respect@Work report recommended that the federal Sex Discrimination Act be amended to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.[366]

The effect of this change would be to do away with the requirement for the conduct to be directed towards a particular person.

As an alternative, the Respect@Work report suggested that this issue could be addressed by non-legislative measures, such as good practice, guidance, and education materials.[367]

The federal Attorney-General is currently consulting on incorporating the hostile work environment provision into the federal Sex Discrimination Act.[368]

Support for prohibiting hostile environments

Submissions received by the Review supported a prohibition on creating or facilitating a hostile environment,[369] with one submission suggesting that the word 'maintaining' might be more appropriate.[370] Two submissions expressed support for coverage to be extended beyond the workplace to all areas of activity.[371]

Concerns about prohibiting hostile environments

Overlap with existing provisions

The Australian Industry Group opposed adding an additional contravention because the existing sexual harassment provisions already extend to hostile work environments, and it might:

> …narrow existing common law definitions of sexual harassment by carving out aspects of the working environment as separate to the statutory definition of harassment itself. This may limit the nature of relief sought by applicants and limit the application of employer policies designed to prevent and respond to sexual harassment in its broader meaning.[372]

In most cases, sexual or sexist behaviour is directed at or is about a particular person and will amount to unlawful sexual harassment and/or direct sex discrimination. In the recent case of *Golding v Sippel and the Laundry Chute Pty Ltd*,[373] the Queensland Industrial Relations Commission found that inappropriate touching, massage requests, explicit text messages, and demands for sex were both sexual harassment and direct sex discrimination because they would not have happened to a man.

364 Caxton Legal Centre submission, 9
365 Respect@Work report, 460.
366 Respect@Work report, Recommendation 16(c).
367 Respect@Work report, 460.
368 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022).
369 See for example: Office of the Special Commissioner submission, 3; Legal Aid Queensland submission, 26; Peak Care submission, 6; Australian Lawyers Alliance submission, 8; Chamber of Commerce and Industry submission, 5.
370 Queensland Law Society submission, 5.
371 Maternity Choices Australia, 3; Legal Aid Queensland submission, 26.
372 Australian Industry Group submission, 8.
373 *Golding v Sippel and the Laundry Chute Pty Ltd* [2021] ICQ 14

Case law has established that a person may be affected by a hostile work environment even if they are not the direct target of the behaviour:

> ...the presence in a workplace of sexually offensive material which is not directed to any particular employee may still constitute sexual harassment where a hostile or demeaning atmosphere becomes a feature of the workplace environment.[374]

While not always using these words, conduct that appears to fit the description of a 'hostile environment' has also been found to be sexual harassment and/or sex discrimination in Queensland case law.

In one case, an office worker could not help but hear numerous office telephone calls and conversations in which foul and sexually derogatory comments about women featured. The tribunal found that this was sexual harassment.[375] In another matter, the complainant's boss talked about his sex life two or three times a week, discussed a bedroom photo of his ex-wife, and simulated orgasms. As it was a small workplace, the complainant could not escape hearing the conversations. This was also found to be sexual harassment.[376]

Submissions to the Review did not clearly identify examples of matters that were falling outside the scope of current provisions. The Review has considered the cases mentioned by Respect@Work and the Attorney-General's Department's Consultation Paper[377] and has not identified obvious gaps in Queensland's coverage of sexual harassment.

Who is responsible?

Determining responsibility for a hostile work environment is not straight forward, especially when the underlying workplace culture has developed over years. The complexity is compounded by the reality that a negative culture may be as much about failing to call out, or take action on, harmful behaviour when it happens, as it is about the prevalence of the behaviour. The law is generally better at responding to actions or conduct, rather than a failure to act or delays in taking action.

While expressing general support for the provision, the Queensland Nurses and Midwives Union urged consideration of the potential liability of bystanders who witness conduct but don't take any action.[378]

This issue was highlighted recently by the Attorney-General's Department in consultations on whether to introduce a new contravention in the federal Sex Discrimination Act.[379]

We consider inaction on sexual harassment could be for reasons such a person wanting to just get on and not draw attention to themselves, or not wishing to jeopardise their job.

Other kinds of hostile environments

Some stakeholders thought that the addition of a hostile work environment contravention may be too narrow and should apply to a broader range of attributes than sex, and could include sexuality, gender identity, sexuality, and race.[380]

374 *G v R and Dept of Health* [1993] HREOCA 20, 1993.
375 *Rutherford v Wilson* [2001] QADT 7.
376 *Foran v Bloom* [2007] QADT 31.
377 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022).
378 Queensland Nurses and Midwives Union, 15.
379 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022) 3.
380 Caxton Legal Centre submission, 9; Aged and Disability Advocacy Australia submission, 4; Multicultural Queensland Advisory Council submission, 4-5; Maurice Blackburn Lawyers submission, 4.

Caxton Legal Centre gave an example of a client who had to put up with racist 'jokes', songs, and offensive comments about Aboriginal and Torres Strait Islander people on an almost daily basis, and commented that:

> Whilst this sort of conduct offends almost everyone, which is apparently its appeal to some of the people who engage in it, it is humiliating, distressing and unsafe for people with those attributes who are also being required to work productively in its presence.[381]

As with sex-based harassment, the Review has not heard any compelling reasons to create a new provision that applies only to sex and not other attributes. Exclusion of other attributes may also risk inconsistency with section 15 of the *Human Rights Act 2019.*

The Review's position

The Review considers that:

- Work environments that are intimidating, hostile, humiliating, or offensive for people because of their sex can be destructive to the wellbeing of workers and may reduce workplace productivity and efficiency.
- We did not identify a significant gap in protection that would be addressed by creating a new contravention of creating or facilitating a hostile environment.
- A gap in understanding about the scope of sexual harassment and sex-based harassment could be addressed through education.
- Determining responsibility for 'creation' of an environment is not straight forward, and bystanders with limited control over the workplace may become liable.
- A specific provision for hostile work environments may inadvertently override the general prohibitions against sex discrimination and sexual harassment.
- Protecting only one attribute (sex) in hostile work environments could cause incompatibility with the Queensland Human Rights Act.
- Cultural change may be better achieved through improving the tests for direct and indirect discrimination, introducing a positive duty on employers, and including an example in the Act under indirect discrimination to demonstrate that the Act covers hostile work environments.

381 Caxton Legal Centre submission, 9.

Sex worker experiences

Survey responses and submissions made by and on behalf of sex workers highlighted that the Act does not explicitly recognise that sexual harassment can and does happen to sex workers,[382] whether they are working, or outside of work.

One submission stated that it is:

> *Essential to include sex workers in the sections 119 to 120 clarifying that sex workers can experience sexual harassment. We are either regarded as being raped continuously on the job or consenting to rape during the job, and this is inaccurate and harmful. Sex workers, as any other individual, have the right to withdraw their consent explicitly during sex.*[383]

The Review is not aware of any Queensland cases on this point, but if a sex worker were to bring a sexual harassment complaint to the Commission, there would be no impediment to accepting it, provided it met the threshold test.

Research about sex worker experiences of sexual assault is limited, but the studies we identified indicate that sex workers likely experience more sexual harassment including serious sexual violence than other professions and occupations, with many incidents going unreported.[384] The Committee on the Elimination of Discrimination against Women has commented that sex workers are vulnerable to violence because of their status and need equal protection of the laws against rape and other forms of violence.[385]

While sex workers are covered by the existing protections, many may not know about their right to make a complaint, including rape and sexual assault, which are extreme forms of sexual harassment.

The options suggested by submissions to address this issue are to:

- add sex worker examples to the Act and to guidance material produced by the Commission[386]
- include reference to sex workers in section 119 of the Act (meaning of sexual harassment)[387]
- include 'sex worker' in the 'Meaning of relevant circumstances' section 120 of the Act that relates to circumstances relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.[388]

382 See for example: Respect Inc and DecrimQLD submission, 20-21; SIN SA submission, 5; Sienna Charles submission, 2, 6; Name withheld (sub.059) submission, 1.
383 Name withheld (sub.059) submission, 1.
384 Dr Antonia Quadara, 'Sex workers and sexual assault in Australia – Prevalence, risk and safety' (2008) Iss 8, *Australian Institute of Family Studies: Australian Centre for the Study of Sexual Assault.*
385 Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 11th sess (1992) [15].
386 See for example: Alistair Witt submission, 2; Name withheld (sub.064) submission, 5; Dr Zahra Stardust submission, 64.
387 See for example: Respect Inc and DecrimQLD submission, 20-21; Abigail Corrin submission, 2; Name withheld (sub.064) submission, 5.
388 See for example Name withheld (sub.059) submission, 1. *Anti-Discrimination Act 1991* (Qld) s 120.

The Review's position

The Review considers that:

- Sex workers have the right to be protected from unwelcome sexual conduct like any other person, and we consider they are currently protected by the sexual harassment provisions in the Act.
- Adding 'lawful sexual activity' or 'sex workers' to section 120 of the Act (Meaning of relevant circumstances) may be counter-productive, and suggest that whether someone is a sex worker is a relevant factor in whether a reasonable person should have anticipated the possibility that the sex worker would be offended, humiliated or intimidated. This may have the unintended consequence of perpetuating a repugnant myth that sex workers cannot be victims of sexual violence.
- No legislative changes need to be made in response to sex workers' experiences of sexual harassment, but there may be benefit in creating specific guidance material for sex workers to inform them of existing rights.

Recommendation 6

6.1 The current test for sexual harassment should be retained.

6.2 The Act should not introduce new prohibitions against sex-based harassment or creating an intimidating, hostile, humiliating or offensive environment on the basis of sex. An example of indirect discrimination should be included to demonstrate that creating or facilitating an environment where people with particular attributes are disadvantaged is a form of indirect discrimination.

6.3 The Commission should undertake engagement with stakeholders to promote a greater understanding about the protections in the Act that prohibit sexual harassment and develop targeted resources for particular industries and groups, including for sex workers.
