

Part D:

Coverage of the Act

Grounds of discrimination

The Terms of Reference for this Review ask us to consider whether there is a need for any reform in relation to the grounds of discrimination under the Anti-Discrimination Act. There are two aspects to consider:

- whether the current definitions given to protected attributes best promote the rights to equality and non-discrimination, and
- whether additional attributes should be introduced including (but not limited to) spent criminal conviction or irrelevant criminal record; expunged homosexual conviction; irrelevant medical record; immigration status; employment activity; and physical features.

Discrimination is currently prohibited on the basis of 16 grounds or 'attributes'. These are:

- sex
- relationship status
- pregnancy
- parental status
- breastfeeding
- age
- race
- impairment
- religious belief or religious activity
- political belief or activity
- trade union activity
- lawful sexual activity
- gender identity
- sexuality
- family responsibilities
- association with, or relation to, a person identified on the basis of any of these attributes.

Many of these attributes have been protected since the introduction of the Anti-Discrimination Act. During consultations and in submissions received, we have heard that additional attributes should be considered and that others may need to be modernised. Appendix B contains a table comparing protected attributes in each jurisdiction in Australia.

One challenge facing equality legislation is to ensure the list of attributes remains relevant and protects people who are most at risk. The attributes currently protected reflect either inherent characteristics of a person (such as age, race, sexuality) or inherent rights (such as religious belief or activity, political belief or activity, trade union activity).

However, these dynamics can shift significantly over time in response to changes in society, politics, media, or the development of technology. In addition, terminology to define who is included in these groups changes rapidly.

The commentary in this section focuses on current definitions of attributes, specific attributes that we have been asked to consider in the Review, and additional attributes that have been suggested in consultations.

We are seeking feedback on the need to include additional attributes and, especially, direct evidence of the need for their inclusion.

Current attributes

Impairment

This section considers the attribute of impairment with respect to:

- terminology
- scope of the current attribute
- discrimination because of having an assistance animal.

The word ‘impairment’ was used in the 1991 Act, and was said to be the community’s preferred term then. The term ‘disability’ may reflect greater alignment with modern terminology, is more frequently used and understood, and would be consistent with international instruments, such as the *Convention on the Rights of Persons with Disabilities*.²²⁸

Some academic commentators have suggested that the term ‘disability’ is preferred because it references the ‘social model of disability’, which sees disability as socially constructed. This model recognises the economic, environmental, and cultural barriers to participate on an equal basis experienced by people who are viewed by others as having some form of impairment.²²⁹

²²⁸ *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006).

²²⁹ Michael Oliver and Colin Barnes, *The New Politics of Disablement* (Palgrave Macmillan, 2nd ed, 2012).

Scope of attribute

The current definition of impairment under the Act is expansive [See Appendix C for definition]. However, there may be benefit in including a separate attribute of ‘mental health condition’ or ‘psychosocial disability’ or making the definition clearer to emphasise that these forms of impairment are protected.²³⁰

Further clarity may be needed about whether the attribute is intended to cover people who experience addiction to substances, such as alcohol and other drugs. Given that the definition of impairment includes:

‘a condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour’

people who experience addiction may arguably be covered by the law. The issue has not been considered by a court or tribunal in Queensland, but has been considered by the federal jurisdiction,²³¹ in New South Wales²³² and the Northern Territory,²³³ and decided cases have indicated that it may be arguable. If coverage of addictions is the intention, it may be beneficial to clarify that in the definition.

Assistance animals

Some people with disability experience ongoing discrimination because of having an assistance animal. The definition of ‘impairment’ partly covers this situation by including in the definition ‘reliance on a guide, hearing or assistance dog, wheelchair or other remedial device’. However, both this definition and a separate section²³⁴ which expressly prohibits discrimination in relation to guide, hearing or assistance dogs in the accommodation area, are limited to dogs only, rather than all kinds of assistance animals.

There are two potential reform options.

Consistent with federal law, the Act could be amended to specifically prohibit discrimination because the person with a disability requires adjustments for the person’s carer, assistance

²³⁰ For example, section 4(1)(d) *Equal Opportunity Act 2010* (Vic) clarifies that a malfunction of the body includes a mental or psychological disease or disorder.

²³¹ *Marsden v HREOC* [2000] FCA 1619 – found that opioid addiction may be covered under disability.

²³² *Hubbard v Roads and Traffic Authority of NSW* [2010] NSWADT 99; *Carr v Botany Bay Council* [2003] NSWADT.

²³³ *Eccles v North One Pty Ltd, Doyle, Nikkie Beach One Pty Ltd & Bakaric* [2021] NTCAT 13 – the tribunal found that the issue of whether addiction is an impairment is not settled, but this may be ‘arguable’.

²³⁴ *Anti-discrimination Act 1991* (Qld) s 85.

animal, or disability aid.²³⁵ As businesses and organisations are already required comply with the federal legislation, this may not create any further regulatory burden.

Alternatively, the Australian Capital Territory definition of disability, which includes reliance on a support person, or a disability aid, or an assistance *animal*, could be adopted.²³⁶

In these two jurisdictions, an ‘assistance animal’ is required to be accredited under law or by an organisation or meet certain thresholds of hygiene and behaviour.

Discussion question 25:

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

Gender identity

The current definition of gender identity incorporates a gender binary position, and states that gender identity ‘means’ a person who seeks to live as a member of the ‘opposite sex’.²³⁷ [See Appendix C for definition]

This definition excludes people who identify outside of the gender binary and does not incorporate a person’s gender expression. Following law reform, many equality jurisdictions now have a more inclusive gender identity definition.²³⁸

²³⁵ *Disability Discrimination Act 1992* (Cth) ss 8 and 9.

²³⁶ *Discrimination Act 1991* (ACT) s 5AA(2)(d) and (3).

²³⁷ *Anti-discrimination Act 1991* (Qld) sch 1 Dictionary (definition of gender identity (a)).

²³⁸ ‘Gender identity’ definition has been updated and separated from intersex status/sex characteristics in Victoria, Tasmania, Australian Capital Territory and South Australia; the Commonwealth introduced a broader definition and separate intersex status protections in 2013; and current reviews of legislation in Western Australia and Northern Territory anticipate potential reforms.

In addition, the current definition for gender identity conflates trans and gender diverse people and people born with variations of sex characteristics.²³⁹ We discuss this further in the ‘Additional attributes’ section.

The recently amended *Public Health Act 2005* (Qld)²⁴⁰ provides an inclusive definition of gender identity, drawing on terminology settled in the *Yogyakarta Principles*²⁴¹:

- (1) *Gender identity*, of a person, is the person’s internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth.
- (2) Without limiting subsection (1), the *gender identity*, of a person, includes—
 - (a) the person’s personal sense of the body; and
 - (b) if freely chosen—modification of the person’s bodily appearance or functions by medical, surgical or other means; and
 - (c) other expressions of the person’s gender, including name, dress, speech and behaviour.

Discussion question 26:

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

Sexuality

The definition of sexuality is also narrow, and no longer reflects the range of ways people describe their sexuality in today’s society. Sexuality is defined under the current Act as meaning ‘heterosexuality, homosexuality or bisexuality’. [See Appendix C for definition] This sexuality definition is now also inconsistent with the broader definition under the Queensland *Public Health Act 2005*, section 213E which states:

Sexual orientation, of a person, means the person’s capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender.

Discussion question 27:

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

²³⁹ *Anti-discrimination Act 1991* (Qld) sch 1 Dictionary (definition of gender identity (b)).

²⁴⁰ *Public Health Act 2005* (Qld) s 213G.

²⁴¹ A set of principles on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics.

Lawful sexual activity

The current definition of lawful sexual activity is narrow and means a person's *status* as a lawfully employed sex worker, whether or not self-employed. [See Appendix C for definition]

A person's *activities* as a sex worker, as opposed to *being* a sex worker, are not protected by the Act. For example, refusing to provide accommodation because it is to be used for sex work,²⁴² is not covered by the Act, but telling a person they cannot volunteer at an organisation because they are a sex worker would be. In practice, it can be challenging to differentiate a person's activities from their status as a sex worker.

Inclusion of the term 'lawful' means that only sex workers operating within the law are currently protected. However, the reality for most sex workers is that, due to a range of complex issues they face, they generally operate outside the law.²⁴³ A 2009 evaluation of sex work laws by the Queensland Government found the laws are not working as they do not allow for people to work outside of brothels in small groups, which sex workers do for safety reasons.²⁴⁴

The Queensland Law Reform Commission is currently considering the legislative and regulatory framework to ensure 'economic, health and safety protections for sex workers' in a manner compatible with the *Human Rights Act 2019*.²⁴⁵

In Victoria and Tasmania, the attribute of lawful sexual activity is less restrictive. It refers to all sexual activity (not only as a sex worker) and includes 'engaging in, not engaging in or refusing to engage in' lawful sexual activity.²⁴⁶ This creates greater protections for sex workers.

Discussion question 28:

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

²⁴² *Dovedeen Pty Ltd v GK* [2013] QCA 116.

²⁴³ Prostitution Licensing Authority (Qld), *2018–2019 Annual Report* (Report 2019) 4.

²⁴⁴ Anne Edwards, *Selling Sex, Regulating Prostitution in Queensland* (Prostitution Licensing Authority, 2009).

²⁴⁵ Queensland Law Reform Commission, *Sex Work Industry Review* (Web Page, 27 August 2021) <<https://www.qirc.qld.gov.au/current-reviews>>.

²⁴⁶ *Anti-Discrimination Act 1998* (Tas) s 3, *Equal Opportunity Act 2010* (Vic) s 4(1). See *Cassidy v Leader Associated Newspapers Pty Ltd* [2002] VCAT1656.

Other current attributes

Responses are encouraged in relation to any attributes, not limited to those discussed above.

Discussion question 29:

- Does the terminology used to describe any existing attributes need to be changed?
- For attributes that have a legislative definition in the Act, do those definitions need to change?
- For attributes that do not have a legislative definition, should a definition be introduced?
- Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?

Specific attributes

This section will discuss the specific additional attributes as required by the Terms of Reference.

Criminal history

Criminal history check results can be a barrier to securing stable employment and housing, obtaining licences, or gaining admission to a profession. On the other hand, it might be appropriate to exclude people from employment if they cannot meet the requirements of a job, particularly if a person's past offending indicates a significant risk to the employer or others.

Criminal records are kept by the Queensland Police Service for all offenders (arrests, court appearances, convictions) including information about charges that have been dismissed. A person's criminal history remains permanently on record, even where a criminal conviction is not recorded by the court.²⁴⁷

²⁴⁷ Caxton Legal Centre Inc, *Effect of Criminal Convictions: Criminal Records* (Web Page, 8 January 2019) <<https://queenslandlawhandbook.org.au>>.

In Australian jurisdictions that have protected attributes relating to criminal history, two approaches exist:

- spent conviction in Western Australia
- irrelevant criminal record in the Australian Capital Territory, Northern Territory, Tasmania, and the Commonwealth.

Victoria has included a different, more specific attribute of ‘expunged homosexual conviction’.

Spent conviction

A spent criminal conviction provision means that the need to disclose the offence has passed.²⁴⁸ In Queensland this is called the ‘rehabilitation period’ which is usually 5 to 10 years for more minor crimes (where a sentence of imprisonment was 2½ years or less). Under current protections, a person need not disclose the fact that they were charged with an offence if the charge was dropped, dismissed, or they were acquitted.²⁴⁹

The narrow approach reflected in Western Australian laws is to only cover discrimination on the ground of a person’s spent convictions. This approach means that only criminal convictions that are outside the rehabilitation of offences scheme are covered. In other words, people who are still in the rehabilitation period, or have more serious offences, would not be protected from discrimination, even if the circumstances are not relevant to the offence.

Irrelevant criminal record

The irrelevant criminal record provisions go beyond spent convictions to include arrest, interrogation, and criminal convictions. However, this only includes a situation in which charges have lapsed, been withdrawn, a person has been acquitted, or where a conviction is *irrelevant* – and where the circumstances of the offence are not directly relevant to the situation in which the discrimination arises.

Example: A person was denied a motor vehicle sales licence after a criminal incident involving ‘road rage’. The conviction was not directly relevant and this was found to be discrimination.²⁵⁰

At present, a person in Queensland may complain to the Australian Human Rights Commission (AHRC) about discrimination on the ground of irrelevant criminal record, but AHRC only has the power to investigate and make non-enforceable recommendations.²⁵¹

²⁴⁸ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

²⁴⁹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s5.

²⁵⁰ *Complainant 201908 v Commissioner for Fair Trading (Discrimination)* [2020] ACAT 24.

²⁵¹ International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b). See, for example *AN v ANZ Banking Group Limited* [2015] AusHRC 93.

Another issue for consideration is whether the protections should extend to all areas of activity, or only work. During consultations, we heard that some real estate agents are seeking information on criminal record during the application process. Other situations in which a person may be asked about their criminal record include licensing applications and child safety.

Expunged homosexual conviction

Until 1991, people were criminalised for homosexuality in Queensland. Since 2017, people have been able to apply to have their historical convictions expunged (removed).²⁵² In Victoria, people have been protected from discrimination on the ground of an expunged homosexual conviction since 2015.

Discussion question 30:

- Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?
- How should any further attribute(s) be framed? Should they apply to all areas?
- What are some examples of how people who have had interactions with law enforcement experience discrimination, including by whom and in what settings?
- How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?

Irrelevant medical record

Discrimination on the ground of irrelevant medical record is prohibited in Tasmania and the Northern Territory. The term 'irrelevant' is not defined.

Example: Saskia was refused travel insurance because information provided by her doctor to the insurer contained the results of tests for a genetic predisposition for breast cancer.²⁵³

Complaints by people in Queensland can be taken to AHRC on the basis of medical record in the area of employment but, as with criminal record, an investigation with non-binding recommendations is the only outcome available.²⁵⁴

²⁵² *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld).

²⁵³ Equal Opportunity Tasmania, *Irrelevant Medical Record Discrimination: Your health. Your private business.*

²⁵⁴ International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b).

Currently under the Queensland Act, discrimination is prohibited on the ground of impairment, which includes an attribute that a person had in the past.²⁵⁵ A failed federal Bill²⁵⁶ included a 'medical history' ground with the intention to "...cover discrimination on the basis of highly sensitive medical information that does not constitute a disability (eg relationship counselling)."²⁵⁷

Discussion question 31:

- Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?

Immigration status

See also [State laws and programs exemptions – citizenship/visa status](#) on page 123.

The existing attribute of race does not specifically cover immigration status, but in some cases might be implied by the words 'nationality or national origin' included in the definition of race.²⁵⁸ Given that around 1 in 3 people living in Queensland were born overseas, and 4.3% of the population have immigrated from New Zealand, this attribute is worth examining.²⁵⁹ Access to services may be patchy and inconsistent for some people who are on temporary visas including asylum seekers.

Discrimination because of immigration status has been raised in relation to the ranking system for university admission, which may disadvantage overseas applicants over local students. However, the court has found that because of the way the federal Act is drafted, immigration status can only be argued on the basis of direct, but not indirect discrimination. This means that people in Queensland only have partial cover for discrimination on the grounds of immigration status.²⁶⁰

²⁵⁵ *Anti-Discrimination Act 1991* (Qld) s 8(d).

²⁵⁶ Human Rights and Anti-Discrimination Bill 2012 (Cth).

²⁵⁷ Exposure Draft Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 24.

²⁵⁸ *Anti-Discrimination Act 1991* (Qld) sch 1 Dictionary (definition of 'race').

²⁵⁹ Australian Bureau of Statistics, *2016 Census QuickStats* (Web Page, 26 October 2021) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/3>.

²⁶⁰ *Jin v The University of Queensland* [2015] FCCA 2982 [38]–[42].

Tasmania and the Northern Territory prohibit immigration status because it is part of the definition of 'race', and the ACT includes it as a separate attribute.

Discussion question 32:

- Is there a need for the Act to cover discrimination on the grounds of immigration status? If so, should it stand alone or be added as another aspect of 'race'?

Employment activity

Discrimination on the ground of employment activity is covered in Victoria and the ACT. This differs from the current attribute of trade union activity, as it is triggered by an employee of their own volition making a reasonable request or communicating a concern regarding their employment entitlements.

The attribute was established in Victoria following fears about the WorkChoices regime and how it might adversely impact employees.²⁶¹ Discrimination on the basis of employment activity is a common ground of complaint in Victoria, being the fifth most complained about.²⁶²

The Commission notes that adverse action against an employer exercising a 'workplace right' such as a right to take annual or personal leave is already unlawful under the Fair Work Act, which applies to all employees outside the public sector.²⁶³

Discussion question 33:

- Is there a need for the Act to cover discrimination on the grounds of employment activity?
- Is this an unnecessary duplication of protections under the Fair Work Act?

²⁶¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 April 2007, 1143 (R Hulls, Attorney-General).

²⁶² Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019).

²⁶³ *Fair Work Act 2009* (Cth) section 340 and 341(1); *Mahajan v Burgess Rawson & Associates Pty Ltd* [2017] FCCA 1560.

Physical features

Physical features provisions protect people from discrimination because of such characteristics as height, weight, size, or other bodily characteristics such as birth marks. There is some uncertainty about whether weight on its own may be considered an impairment under the current Queensland Act, and adding physical features as an attribute would remedy this.²⁶⁴

In Victoria, the physical features attribute has been interpreted to include things done to a body by choice, such as tattoos²⁶⁵ and piercings, although this was not the original intention.²⁶⁶

In another Victorian case, having a loud voice was successfully argued as falling under the attribute of physical features.²⁶⁷ Complaints have been relatively uncommon in Victoria²⁶⁸ and occur mostly in the context of work. However, some research suggests that children and young people experience discrimination on the basis of physical appearance.²⁶⁹

Discussion question 34:

- Is there a need for the Act to cover discrimination on the grounds of physical features?

²⁶⁴ See *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT1365.

²⁶⁵ *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849.

²⁶⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Wade).

²⁶⁷ *Ruddell v DHS* [2001] VCAT 1510.

²⁶⁸ Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019) 10: 39 complaints, in contrast 595 were made on the basis of disability.

²⁶⁹ 'Teenagers' experiences of discrimination' *Growing Up in Australia: The Longitudinal Study of Australian Children*, Snapshot Series, Issue 1, March 2021.

Additional attributes

This section will provide commentary on four extra potential attributes: gender, sex characteristics, being subject to domestic violence, and accommodation status.

Gender

While gender is now generally considered a separate concept from gender identity, sex, and sex characteristics, gender is not currently a protected attribute.

Community and scientific understanding of sex and gender has substantially advanced since the Act was introduced in 1991. The Australian Guidelines on Sex and Gender²⁷⁰ recognise that gender and sex are conceptually different, but used interchangeably in legislation. The guidelines state that:

- Gender is considered to be a person's personal and social identity, that refers to the way a person feels, presents and is recognized by the community, and may be reflected in outwards social markers, name, outward appearance, mannerisms and dress.
- Some people may identify as a different gender to their birth sex and some people may identify as neither exclusively male nor female.

This delineation is also expressed in the ABS guidance from 2020.²⁷¹

The attribute of sex is not defined in the Queensland Act. Gender, rather than sex, is a protected attribute in Tasmania, but most jurisdictions refer only to sex discrimination.²⁷²

To ensure the broadest possible coverage, consideration could be given to retaining the attribute of sex and adding gender.

Discussion question 35:

- Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?

²⁷⁰ Australian Government, *Guidelines on the Recognition of Sex and Gender* (November 2015) [13]–[15].

²⁷¹ Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (Web Page, 14 January 2021) <www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>.

²⁷² *Anti-Discrimination Act 1998* (Tas) s 16(e).

Sex characteristics

People born with variations of sex characteristics (sometimes known as intersex) are not clearly covered by the Act. The definition of gender identity may have been intended to include this group by referring to ‘people of indeterminate sex who seek to live as a particular sex.’ However, people who have variations of sex characteristics are not a ‘third’ sex, and this definition is inaccurate and stigmatising.

As noted in the discussion under ‘gender identity’ attribute, having a variation of sex characteristics is not a gender identity. Most Australian jurisdictions have separated these attributes, for example the federal legislation has included ‘intersex status’ since 2013.²⁷³

Since that time, advocates have sought the inclusion of a universal sex characteristics attribute²⁷⁴ which is a position endorsed in the community consensus Darlington Statement.²⁷⁵ Tasmania includes an attribute called ‘intersex variations of sex characteristics’,²⁷⁶ and Victoria and ACT include ‘sex characteristics’.²⁷⁷

The Preamble to the *Yogyakarta Principles plus 10* define sex characteristics as ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.’

Discussion question 36:

- Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?

²⁷³ *Sex Discrimination Act 1984* (Cth) s 5C.

²⁷⁴ Intersex Human Rights Australia, *Discrimination* (Web Page, 24 February 2021) <<https://ihra.org.au/discrimination/>>.

²⁷⁵ Intersex Human Rights Australia, *Darlington Statement* (Web Page, 1 November 2019) <<https://ihra.org.au/darlington-statement/>>.

²⁷⁶ *Anti-Discrimination Act 1998* (Tas) s 16(eb).

²⁷⁷ *Equal Opportunity Act 2010* (Vic) s 6(oa).

Being subject to domestic or family violence

As well as providing protection from discrimination for victims of domestic or family violence (particularly in the areas of work and accommodation) this attribute may complement other strategies to address the serious impacts of this violence on people subjected to it.²⁷⁸

Retaining stable work can be vital when a person is experiencing domestic or family violence, particularly if they are subject to financial abuse. Including the attribute may also complement recent reforms to tenancy laws which improve safety and housing security for people subjected to domestic and family violence.²⁷⁹

Industrial laws also provide employees experiencing domestic and family violence the right to request unpaid leave and flexible work arrangements.²⁸⁰ Rights to paid leave are protected for Queensland public servants.²⁸¹ However, there may be areas other than work, such as goods and services and accommodation, where people are experiencing unfair treatment because they are or have been subjected to domestic or family violence.

The attribute of 'subjection to domestic violence' is protected in the ACT.

Discussion question 37:

- Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?

²⁷⁸ Queensland Government, *Domestic and Family Violence Prevention Strategy 2016–2026* – In particular the Early Intervention Strategy: Queensland's workplaces and workforce challenge attitudes contributing to violence and effectively support workers.

²⁷⁹ *Housing Legislation Amendment Act 2021* (Qld).

²⁸⁰ *Fair Work Act 2009* (Cth) ss 65(1A)(f) and 106A-E.

²⁸¹ *Industrial Relations Act 2016* (Qld) ss 52-54.

Accommodation status

Accommodation status is a protected attribute in the Australian Capital Territory. Protecting this attribute has been previously recommended in Victoria,²⁸² and the Northern Territory²⁸³ has sought submissions on its inclusion. International case law has confirmed that homelessness is protected by the ICCPR as an 'other status'.²⁸⁴

The purpose of including this attribute would be to protect people from discrimination when they have no fixed address or secure accommodation – for example, if a person who is experiencing homelessness is refused entry to a café or is told by a hospital that they are unable to receive treatment without a bed to convalesce after surgery.

Discussion question 38:

- Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?

Other additional attributes

Discussion question 39:

- Should any additional attributes be included in the Act?
 - If so, what evidence can you provide for why these attributes should be protected?
 - How should they be defined?
 - How would inclusion of the attribute promote the rights to equality and non-discrimination?

²⁸² Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 98.

²⁸³ Department of the Attorney-General and Justice (NT), *Modernisation of the Anti-Discrimination Act* (Discussion Paper, September 2017) 13.

²⁸⁴ United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) para 18.

Exemptions

The Terms of Reference ask us to consider the exemptions and other legislative barriers that apply to the prohibition on discrimination, and to consider whether there is a need for any reform to enhance and update the Act.²⁸⁵

Exemptions are provisions that allow discrimination in some circumstances. There are no exemptions for sexual harassment.

Exemptions for discrimination can be either:

- a) general exemptions that apply across all areas of the Act, or
- specific exemptions applying to certain areas of activity in which discrimination is unlawful.

A person or organisation responding to a complaint of discrimination who wishes to rely on an exemption must prove that an exemption applies.²⁸⁶

Tribunal exemptions

In addition to the general and specific exemptions, a person can apply to a tribunal for a temporary exemption from the operation of specific provisions of the Act. An exemption granted by a tribunal provides a complete defence to discrimination and can operate for up to five years.

Examples of exemptions granted by a tribunal include allowing health clubs to operate exclusively for women, and to restrict accommodation in a residential unit complex to single people.²⁸⁷

²⁸⁵ Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).

²⁸⁶ *Anti-Discrimination Act 1991* (Qld) s 206.

²⁸⁷ *Anti-Discrimination Act 1991* (Qld) s 113.

What is the purpose of exemptions?

The purpose of exemptions is to recognise that treating someone differently may be justified in some circumstances because of other considerations.²⁸⁸

Some exemptions provide positive or protective measures. For example:

- the exemption for welfare measures that benefit members of a group of people with an attribute for whose welfare the Act was designed²⁸⁹
- the exemption for equal opportunity measures²⁹⁰
- the exemption that allows age-based benefits and concessions²⁹¹
- the exemption that allows restrictions on access to sites of cultural or religious significance.²⁹²

Other policy considerations reflect the need to separate public and private life.²⁹³ This is evident in exemptions that allow discriminatory decisions about who provides domestic services in a person's home and childcare for a person's children at the person's home.²⁹⁴

What are the questions to consider?

While exemptions are needed, we will consider whether the scope of each exemption remains reasonable and necessary.

We may also consider whether exemptions should be narrowed to apply to only specific areas of activity, or to particular attributes, or broadened to respond to contemporary issues not previously anticipated.

Information about some of the statutory exemptions is provided for consideration, including those where issues were identified during our initial consultations. However, these should not confine responses and we welcome submissions relating to any exemption.

The application of exemptions can be complex, particularly where organisations are required to comply with both state and Commonwealth laws. In our consultations, the Review was told that this complexity reduces the effectiveness of the Act because it is hard to understand and communicate. We therefore include a question about how to simplify this area of law.

²⁸⁸ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 164.

²⁸⁹ *Anti-Discrimination Act 1991* (Qld) s 104.

²⁹⁰ *Anti-Discrimination Act 1991* (Qld) s 105.

²⁹¹ *Anti-Discrimination Act 1991* (Qld) s 49.

²⁹² *Anti-Discrimination Act 1991* (Qld) s 48.

²⁹³ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.

²⁹⁴ *Anti-Discrimination Act 1991* (Qld) ss 26 and 27.

General exemptions

General exemptions apply to all areas of discrimination under the Act. This contrasts with specific exemptions that apply only to particular areas, such as work or in the supply of goods or services.

Sport

See also [Areas of activity – Sport](#) on page 127.

Currently, participation in a competitive sporting activity may be restricted to either males or females²⁹⁵ if the restriction is reasonable based on a range of considerations.²⁹⁶ Participation may also be restricted on the basis of gender identity (which includes intersex status)²⁹⁷ if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity.²⁹⁸

State and federal anti-discrimination laws across Australia include similar exemptions, which are generally qualified to only apply to ‘competitive sporting activity’.²⁹⁹

There are two issues for consideration:

- whether ‘competitive sporting activity’ should be defined
- whether ‘strength, stamina or physique’ remains the appropriate test.

Competitive sporting activity

The term ‘competitive sporting activity’ is not defined in the Act. However section 111 provides guidance on what it does *not* include – coaching, umpiring, or administration.³⁰⁰

When sport is ‘social’ in nature, it is unclear whether this would constitute a ‘competitive’ activity. In schools, while it is likely that physical education classes are not ‘competitive’, it is unclear whether intra-school and inter-school sports would be.

²⁹⁵ *Anti-Discrimination Act 1991* (Qld) s 111(2) is only applicable to people 12 years and above.

²⁹⁶ *Ibid* s 111(1) given the strength, stamina or physique requirements of the activity; or to people who can effectively compete; or to people of a particular age or age group; or to people with a specific or general impairment.

²⁹⁷ As noted in Attributes, above, the current definition of ‘gender identity’ incorporates people ‘of indeterminate sex’, but the Review notes this is not wording used by people with variations of sex characteristics.

²⁹⁸ *Anti-Discrimination Act 1991* (Qld) s 111(3).

²⁹⁹ The words ‘competitive sporting activity’ appear in all but New South Wales and under the *Disability Discrimination Act 1992* (Cth).

³⁰⁰ *Anti-Discrimination Act 1991* (Qld) s 4.

‘Competitive sporting activity’ could be defined to specify the situations in which the exemption would apply. In addition, narrowing the scope to only include elite sporting competitions could encourage diversity and inclusion in community, grassroots sporting activities.

Strength, stamina, or physique

Cases from Australian jurisdictions have considered sport participation restrictions based on strength, stamina or physique. For example, a Victorian case found that the exemption applied to girls who wished to play in an under 15s AFL team but not to girls who wished to play in under 14s, because the relative differences between the strength, stamina, and physique of boys and girls at that age was not shown to be sufficiently significant to participating in an AFL competition.³⁰¹

Determining whether a restriction is ‘reasonable’ is complicated. Since every sport is different with respect to the importance of strength, stamina and physique an individual assessment needs to be made in relation to each sport. Where a sport relies on other factors such as balance or hand-eye coordination, then the exemption may not apply. As lawn bowls does not require significant strength, stamina and physique, but rather concentration and skill, in one case the exemption has been found not to apply.³⁰²

While untested by courts, similar reasoning may apply on the basis of gender identity (which may include intersex status under the current definition) depending on the particular sport and the circumstances of the participants. For example, a transgender woman may be restricted or excluded from competing in the women’s category.

International sporting bodies have until recently restricted the participation of transgender and intersex participants based on testosterone,³⁰³ which is generally associated with greater strength, muscle mass, and endurance. However, this approach had been criticised by some courts and academics given that other non-physical factors, such as skill, determination, training, genetics, nutrition, hardiness, and access to resources can be relevant to sporting ability.³⁰⁴ Using this approach in a community sport setting may also not be appropriate.³⁰⁵

³⁰¹ *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158 (17 February 2004) [19]–[20].

³⁰² *South v Royal Victorian Bowls Association* [2001] VCAT 207.

³⁰³ For example, International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).

³⁰⁴ *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (Interim Arbitral Award) (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 154 [532]; Ross Tucker and Malcolm Collins, ‘What makes champions? A review of the relative contribution of genes and training to sporting success’ (2012) 46 *British Journal of Sports Medicine* 555, 560; Michael Sheard and Jim Goldby, ‘Personality hardiness differentiates elite-level sport performers’ (2010) 8(2) *International Journal of Sport and Exercise Psychology* 160, 166.

³⁰⁵ ACT Human Rights Commission, *Everyone Can Play: Guidelines for Local Clubs on Best Practice for Inclusion of Transgender and Intersex Participants*, 2017, 9.

In 2021 the International Olympic Committee (IOC) released a new framework for the participation of transgender and intersex athletes in Olympic sports that reconsiders disproportionate advantage on the updated understanding that ‘performance is not proportional to your in-built testosterone’.³⁰⁶ The framework requires that people should be able to compete in the category that best aligns with their self-identified gender, and that:

Eligibility criteria should be established and implemented fairly and in a manner that does not systemically exclude athletes from competition based on their gender identity, physical appearance and/or sex variations.³⁰⁷

The IOC further acknowledges that athletes should not be under pressure to submit to invasive tests or experience pressure to undergo medical interventions to meet eligibility criteria, which have in the past led to serious harm.³⁰⁸

Consideration should be given to whether the law strikes the right balance between achieving fairness while promoting inclusion in sport and preventing harm to trans, gender diverse and intersex people, in light of these changes at the highest levels.

Discussion question 40:

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

³⁰⁶ Alex Azzi, ‘Explainer: How will the IOC’s framework impact transgender athletes?’ *NBC Sports* (Webpage, 17 November 2021) <<https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>>.

³⁰⁷ International Olympic Committee, *IOC Framework of Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, principle 3.1.

³⁰⁸ Alex Azzi, ‘Explainer: How will the IOC’s framework impact transgender athletes?’ *NBC Sports* (Webpage, 17 November 2021) <<https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>>.

Religious bodies

See also: Work exemptions – Genuine occupational requirement - Religious schools and other bodies.

The right to freedom of thought, conscience, religion, and belief – which includes the right to practice religion through worship, practice, or teaching – is protected under international human rights instruments,³⁰⁹ by the *Human Rights Act 2019*,³¹⁰ and in a more restricted way by the Australian Constitution.³¹¹

Ordination, training and selection of religious leaders

The Anti-Discrimination Act recognises religious rights by prohibiting discrimination on the ground of religious belief or activity³¹² and by exempting religious bodies from the Act with respect to:

- the ordination or appointment of priests, ministers of religion or members of a religious order
- the training or education of people seeking to be ordained or appointed as priests, ministers of religion or members of a religious order
- selecting or appointing people to perform functions or participate in any religious observance or practice.

The Review considers there are strong justifications to retain these protections. However, consideration could be given to whether there is a need to extend the exemptions with respect to ordination, training and selection of leaders to lay representatives who have an important spiritual role within a faith but where the position falls outside of the role of priest, minister or member of a religious order.

Discrimination based on religious doctrine and religious sensitivities

International human rights law has recognised that freedom of religion must co-exist with other fundamental rights and freedoms, including the right to equality before the law and non-discrimination.³¹³

³⁰⁹ *International Covenant on Civil and Political Rights*, art 18.

³¹⁰ *Human Rights Act 2019* (Qld) s 20.

³¹¹ *Commonwealth of Australia Constitution Act (The Constitution)* (Cth) s 116.

³¹² *Anti-Discrimination Act 1991* (Qld) s 7(i).

³¹³ Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 115.

All Australian equality jurisdictions attempt to balance equal opportunity laws with the protection of other rights and freedoms, including religious beliefs, but there is significant variance in the approaches.

In Queensland, a body established for religious purposes may discriminate on the basis of any attribute, except in the areas of work and education, provided the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion.³¹⁴

Discussion question 41:

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

Religious service providers

Many faith-based service providers supply services to the whole community, not only to their own community, including essential services (such as aged care and hospitals). A point of tension may arise when there is a conflict between the doctrines of the religion and sensitivities of people of the religion, and the need to ensure all people are provided with services without discrimination.

Consideration should be given to the extent to which religious bodies should be permitted to rely on religious exemptions when receiving public funds to provide essential services such as aged care. In 2013, the Sex Discrimination Act religious body exemptions were narrowed so that they no longer apply to conduct connected with Commonwealth-funded aged care services. This amendment was intended to promote equal access to the right to health.³¹⁵

³¹⁴ *Anti-Discrimination Act 1991* (Qld) s 109.

³¹⁵ Supplementary Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 4.

A 2016 report by the South Australian Law Reform Institute³¹⁶ recommended that the religious exemption in the South Australian legislation be changed to clarify that it does not extend to discrimination in the provision of services to the general public, such as health and education,³¹⁷ or at a minimum to list specific services to be removed from the scope of the exemption, which should include education, health, housing, and adoption services.³¹⁸ A Bill was released in 2020 for public comment.³¹⁹

Discussion question 42:

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

Religious accommodation providers

Religious bodies can also rely on other specific exemptions, including an exemption in the accommodation area that permits discrimination where:

- the accommodation is under the direct control of a body established for religious purposes
- the discrimination is in accordance with the doctrine of the religion, and
- is necessary to avoid offending the religious sensitivities of people of the religion.

The broad definition of accommodation includes business premises, house or flat, boarding house or hostel, caravan, caravan site, camp site, manufactured home, and building or construction site.³²⁰

Discussion question 43:

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

³¹⁶ South Australian Law Reform Institute, *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status* (Report, June 2016).

³¹⁷ Ibid 11. Noting that education has already been removed from the scope of the exemption in Queensland since 2002.

³¹⁸ Ibid 12.

³¹⁹ Equal Opportunity (Religious Bodies) Amendment Bill 2020 (SA).

³²⁰ *Anti-Discrimination Act 1991* (Qld) ss 90 and sch Dictionary (definition of 'accommodation').

Work exemptions

Genuine occupational requirement – religious schools and other bodies

See also: General exemptions – Religious bodies.

A limited exemption applies to work for an educational institution under the direction or control of a body established for religious purposes, or other work for a body established for religious purposes, if the work genuinely and necessarily involves adhering to and communicating the body's religious beliefs.³²¹

If it is a genuine occupational requirement that a person act in a way consistent with the employer's religious beliefs in the course of, or in connection with the work, the employer may discriminate in a way that is not unreasonable if the person openly acts in a way that is contrary to the employer's religious beliefs.

Whether the discrimination is unreasonable will depend on factors such as whether the employment action is disproportionate to the behaviour, and the consequences for both parties. This exemption does not allow discrimination on the basis of age, race, or impairment, and does not allow an employer to seek information on which discrimination might be based, such as asking questions about a person's relationship status, whether they have children or intend to have children, their gender identity or sexuality.

The Act was amended in 2002 to include the exemption in order to allow religious schools to continue to dismiss or refuse to hire teachers, principals, and other school staff on the basis of their sexuality, after the areas of 'work' and 'education' were removed from the scope of the general religious bodies exemption (section 109(2)) as described above. The Premier at the time described the purpose behind the provision as follows:

If the person was gay and that person openly acted in a way that was not consistent with the religious view, then the church has the right to discriminate against that person. That is what it means. This is what the churches asked us for.³²²

The Australian Capital Territory³²³ has narrower exemptions relating to religious school employment. In Tasmania, religious educational institutions cannot discriminate on any ground except for religious belief, affiliation, or activity in the area of employment.³²⁴ This means a

³²¹ *Anti-Discrimination Act 1991* (Qld) ss 25(2)-(8).

³²² Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 2002, 5010 (P Beattie).

³²³ The religious bodies exemption in the Australian Capital Territory does not apply to a 'defined act' which includes employment in educational institutions – see *Discrimination Act 1991* (ACT) s 32(2).

³²⁴ Tasmania only permits discrimination on the grounds of *religious belief or affiliation* in relation to employment, or in religious schools, rather than in relation other attributes – see *Anti-Discrimination Act 1998* (Tas) s 51. Gender discrimination is permitted where 'required by the doctrines of the religion of the institution' – s 27.

religious school can hire and retain staff of their same faith, but cannot discriminate against staff on other grounds, such as relationship status, gender identity, or sexuality. Victoria is currently considering this approach.³²⁵

In New Zealand human rights legislation, differential treatment is permitted in relation to teachers in a 'private school' with respect to 'religious or ethical beliefs' only.³²⁶

The South Australian approach differs again by allowing adverse employment decisions to be made on the grounds of sexual orientation, gender identity, or intersex status, but only if the institution provides a written policy position to the applicants, employees, prospective employees, and any person who requests it.³²⁷ This was the approach recommended by the federal Religious Freedom Review.³²⁸

Discussion question 44:

- Should the religious educational institutions and other bodies exemption³²⁹ be retained, changed, or repealed?
- If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

Working with children

A work exemption unique to Queensland³³⁰ permits people who are sex workers (lawful sexual activity attribute), or who are transgender or intersex (gender identity attribute)³³¹ to be discriminated against in relation to employment that involves the care or instruction of minors. The exemption applies where it is 'reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person's actions'.

³²⁵ Equal Opportunity (Religious Exceptions) Amendment Bill 2021 had passed the lower house at the time of publication of this paper..

³²⁶ *Human Rights Act 1993* (NZ) s 28(2).

³²⁷ *Equal Opportunity Act 1984* (SA) s 34(3).

³²⁸ Expert Panel, *Religious Freedom Review* (Report, May 2018) 2, Recommendation 5.

³²⁹ *Anti-Discrimination Act 1991* (Qld) s 25(2)-(5).

³³⁰ *Anti-Discrimination Act 1991* (Qld) s 28.

³³¹ As noted in Attributes above, the current definition of 'gender identity' incorporates people with an 'indeterminate sex', but the Commission notes this is not wording that is used by people with variations of sex characteristics.

No other jurisdiction specifically permits discrimination against sex workers, transgender, or intersex people in this way.

A working with children risk management and screening process – the ‘blue card system’ – has existed in Queensland since 2001.³³² It aims to create safe environments for children when participating in activities or receiving services. Blue card checks involve screening, ongoing monitoring, and risk management. As the current exemption applies only where it is reasonably necessary, having regard to all the relevant circumstances of the case, including the persons’ actions the exemption appears to be redundant given the rigorous blue card screening processes that are already take place when people work with minors.

The provisions appear to perpetuate an offensive stereotype that sex workers, transgender, or intersex people pose inherent risks to children, which is not aligned with contemporary community attitudes.

Discussion question 45:

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

³³² *Working with children (Risk management and screening) Act 2000* (Qld).

Goods and services exemptions

See also [Areas of activity – Goods and services](#) from page 125 for commentary on a non-profit exception.

Assisted reproductive technology services

The Act permits service providers offering assisted reproductive technology services (artificial insemination and IVF) to discriminate on the grounds of sexuality and relationship status. The exemption was inserted in 2002 when relationship status and sexuality were added to the protected attributes in the Act, so clinicians could continue to refuse access based on 'clinical and ethical standards'³³³. Since then however, social attitudes have changed. This is reflected in marriage equality laws.

The Review is not aware of any current clinical or ethical standards that prevent offering fertility treatment to people based on their sexuality or relationship status. The largest fertility service provider in Queensland, Queensland Fertility Group, actively advertises to and provides services for same sex couples and single parents.³³⁴

Discussion question 46:

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

³³³ Explanatory notes, Discrimination Law Amendment Bill 2002 (Qld) 15.

³³⁴ Queensland Fertility Group, 'Options for single women' *Queensland Fertility Group* (Web page, 23 November 2021) <<https://www.qfg.com.au/trying-to-conceive/options-for-single-women>>; Queensland Fertility Group, 'Same sex IVF', *Queensland Fertility Group* (Web page, 23 November 2021) <<https://www.qfg.com.au/trying-to-conceive/same-sex-ivf>>.

Accommodation exemptions

Use of accommodation by sex workers

See also – [Grounds of discrimination – current attributes – lawful sexual activity](#) on page 98.

An exemption under the Act (section 106C) allows discrimination where accommodation may be used by a sex worker in connection with work. The Act was amended in 2012 to allow an accommodation provider to refuse to supply accommodation, evict, or treat a person unfavourably in any way in connection with accommodation, if they ‘reasonably believe the other person is using, or intends to use, the accommodation in connection with that person’s or another person’s work as a sex worker’.³³⁵

The provision was introduced in response to a finding of the Appeal Tribunal of QCAT that a motel operator had contravened the Act by refusing accommodation to a sex worker.³³⁶ That decision was ultimately overturned in the Court of Appeal of the Supreme Court of Queensland.³³⁷ The stated goal of the amendment according to the introducing member was to:

...protect businesses from this sort of complaint and give them control over the use that is made of their premises.³³⁸

As the threshold is based on ‘reasonable belief’, this will not require any actual evidence that the person is using the property for sex work. Because of the broad definition of accommodation, the exemption will not only apply to use of hotels or motels but all types of accommodation including business premises.³³⁹

Discussion question 47:

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

³³⁵ *Anti-Discrimination Act 1991* (Qld) s 106C.

³³⁶ *GK v Dovedeen Pty Ltd and Anor* [2012] QCATA 128.

³³⁷ *Dovedeen Pty Ltd v GK* [2013] QCA 116

³³⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).

³³⁹ Accommodation is broadly defined to include business premises, residential properties, hotel or motel, boarding house or hostel, caravan park or manufactured home site, camping sites and building or construction sites; *Anti-Discrimination Act 1991* (Qld) sch Dictionary.

State laws and programs exemptions

The administration of State laws and programs area in the Anti-Discrimination Act contains no specific exemptions. However, prisoners (whose discrimination cases will mostly fall under this area of activity) are also subject to additional provisions under the *Corrective Services Act 2006*.

Prisoners

As noted in Part C, prisoners' rights to access the discrimination complaints process are limited by legislative barriers introduced in corrections legislation in 2008.³⁴⁰ The changes made in 2008 (the 'CSA modifications') also modify the tests for direct and indirect discrimination for complaints by prisoners against prisons and service providers in prisons and community corrections.

Direct discrimination under the Act does not usually have a 'reasonableness' aspect. CSA modifications provide for a defence of reasonableness to both direct and indirect discrimination based on a comprehensive list of factors, including security and good order, cost, resources and operational burden, disruption, dignity of the offender, and prejudice to others.³⁴¹ Compensatory orders are only available for prisoners where 'bad faith' on the part of the respondent can be proven.³⁴²

The stated purpose of the CSA modifications is to maintain a balance between the financial and other constraints to which protected defendants are subject in their treatment of offenders, and the need to continue to respect offenders' dignity.³⁴³

These provisions add an extra layer of complexity and make it significantly more challenging for prisoners to make a complaint than the general population, and consideration should be given to whether the right balance is achieved.

Discussion question 48:

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

³⁴⁰ *Corrective Services Act 2006* (Qld) pt 12A.

³⁴¹ *Corrective Services Act 2006* (Qld) s 319G.

³⁴² *Corrective Services Act 2006* (Qld) s 319I.

³⁴³ *Corrective Services Act 2006* (Qld) s 319B.

Citizenship / visa status

The general exemption at section 106B that allows citizenship or visa requirements to be imposed under state government policies effectively only applies in the area on the administration of state laws and programs.

Currently, it is not unlawful to include a particular citizenship or visa status (a 'prescribed eligibility provision') as criteria to access government financial assistance, services, or other support.

When this exemption was introduced into the Act in 2012, a stated justification was:

Public resources are finite. Limits must often be placed on who is eligible for government funded assistance.³⁴⁴

In contrast, the Australian Capital Territory protects people from discrimination on the grounds of their visa status, but provides an exemption if the discrimination is 'reasonable' having regard to relevant factors.³⁴⁵ See also [Specific attributes – Immigration status](#) on page 102.

Discussion question 49:

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

Superannuation and insurance exemptions

The Act currently contains broad exemptions to discrimination in the areas of superannuation and insurance with respect to impairment and age. These exemptions, which are common across equality jurisdictions, are based on proof of actual or statistical data, or where no such data exists, where it is 'generally reasonable'.

The exemption has been successfully argued in other equality jurisdictions to defend an exclusion clause for people living with HIV/AIDS³⁴⁶ and to deny travel insurance on the grounds

³⁴⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).

³⁴⁵ *Discrimination Act 1991* (ACT) s 57P.

³⁴⁶ *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; [2001] FMCA 15.

of mental illness.³⁴⁷ In Queensland, an age discrimination case in relation to insurance resolved by consent for \$7,000.00 but without admission of fault.³⁴⁸

Research has identified that people experience increased premiums, excessive restrictions on policies, and rejection of cover once a mental health issue has been disclosed.³⁴⁹ While blanket exclusions from many travel and life insurance services have lifted following several inquiries and reports,³⁵⁰ a recent report indicates that that barriers to equitable access and discrimination are still regularly experienced.³⁵¹

Discussion question 50:

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

Other exemptions

Given the breadth of the exemption provisions in the Act, this Discussion Paper has not attempted to cover all of them in detail. However, we seek submissions on any other relevant matters relating to exemptions.

Discussion question 51:

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

³⁴⁷ *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936.

³⁴⁸ *Metcalf v Cerberus Special Risks Pty Ltd* [2018] QCAT 175.

³⁴⁹ Mental Health Council of Australia and beyondblue, *Mental Health Discrimination and Insurance: A Survey of Consumer Experiences* (2011) <<https://www.beyondblue.org.au/about-us/about-our-work/discrimination-in-insurance>>.

³⁵⁰ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019); Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019); Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Life Insurance Industry* (Inquiry Report, March 2018); Productivity Commission (Cth), *Mental Health* (Inquiry Report, June 2020).

³⁵¹ Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021) <<https://piac.asn.au/project-highlight/mental-health-and-insurance>>.

Areas of activity

Goods and services

Non-profit service providers

Currently, many non-profit associations do not need to comply with the Act when delivering goods and services. While the Act indicates specifically that the provisions relating to the supply of goods or services apply ‘whether or not for reward or profit’, broad exclusions weaken this intent.

The Act excludes from the operation of section 46 an association that –

- is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
- does not carry out its purposes for the purpose of making a profit.

While some jurisdictions have different ‘voluntary bodies’ exemptions,³⁵² only Tasmania and Queensland permit discrimination by all entities that do not ‘carry out their purposes for the purpose of making a profit’.

Although not framed as an exemption, but an exclusion from the operation of the section for certain associations, the section operates as a complete defence in relation to all attributes in the area of goods and services.³⁵³

Non-profit services have been confirmed to include private hospitals³⁵⁴, sporting bodies³⁵⁵ and hospitality venues run by clubs,³⁵⁶ and are likely to also encompass aged care, social services, disability services, and art or cultural societies. The non-profit exception applies regardless of the assets and income of the relevant body. Instead, the relevant considerations are the purpose set out in the constitution or rules of the association, and the way in which income derived by the association is dealt with.³⁵⁷

³⁵² The ‘voluntary body’ exemptions in other equality jurisdictions allow for discrimination with respect to admission to membership and benefits, facilities and services received as members, but not when services are being provided to the public. See also Club membership and affairs on the following page.

³⁵³ *Anti-Discrimination Act 1991* (Qld) s 46(2).

³⁵⁴ *Haycox v The Uniting Church in Australia Property Trust (Q) trading as the Wesley Hospital* [2005] QADT 35.

³⁵⁵ *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.

³⁵⁶ *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.

³⁵⁷ *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471 [34].

Discussion question 52:

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

Club memberships and affairs

Club membership and affairs area covers discrimination against prospective and current members.³⁵⁸

A definition of club is given in the Dictionary Schedule of the Act, and requires that the club be established for a particular purpose (such as social, literary, cultural, sporting etc) and 'carry out its purposes for the purpose of making a profit'. The effect is that only clubs that carry on their purposes for the purpose of making a profit are required to comply with the Act in the area of club membership and affairs.

Clubs that are not likely to be subject to the provisions relating to discrimination in club membership and affairs include bowls clubs, sporting clubs, surf life-saving clubs, and RSL clubs. However, there may be overlap between the areas of club membership and affairs and goods and services, which is discussed in the section above.

As the Act only covers areas of public life, this narrow definition of a club may have been intended to prevent an unreasonable intrusion into private affairs. For example, it may not be reasonable to extend the scope of the area to a social book club run from a person's private home.

Nonetheless, the narrow definition has permitted discrimination in a wide range of circumstances, including when basketballers of African descent were allegedly excluded from participation in a competition because of their race.³⁵⁹ Despite making profits and holding substantial assets, the respondent basketball associations were exempt because their constitutions did not cite profit-making as their purpose, and their revenue was used for the 'sporting purposes' under which they were established.

³⁵⁸ *Anti-Discrimination Act 1991 (Qld)* ss 94 and 95.

³⁵⁹ *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.

Rather than a non-profit test, several jurisdictions including the Commonwealth, Victoria, Western Australia, Northern Territory, and Tasmania define clubs based on the number of members and whether the club holds a liquor licence or not.³⁶⁰

Another approach has been adopted in federal disability law which defines ‘club’ as:

club means an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association.³⁶¹

This approach would mean that small, less well-resourced clubs that do not provide and maintain facilities are exempt, but larger affluent clubs would be bound by the Act. As clubs must already comply with the federal laws, this may not increase the regulatory burden but rather reduce complexity.

Discussion question 53:

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

Sport

See also – [General exemptions – sport](#) on page 111.

Discrimination in sport is currently dealt with by a number of areas, depending on whether the person is a player, worker, official, member, patron, or in another capacity. Consideration could be given to introducing a specific ‘sport’ area of activity to recognise the importance of people feeling safe and included while playing, coaching, umpiring, and administering sports. Currently, sport is only mentioned under the Act as an exemption.

The ‘What’s the Score?’ survey published by the Australian Human Rights Commission commented that sports prove

‘...an excellent vehicle for establishing norms of behaviour that can be emulated by the rest of society, particularly by young people. Sport offers opportunities to break down

³⁶⁰ For example, see *Sex Discrimination Act 1984* (Cth) s 4.

³⁶¹ *Disability Discrimination Act 1992* (Cth) s 4.

barriers and encourage participation in a way that other areas of society may struggle to match.’

Two Australian jurisdictions have a separate area of activity for sport.³⁶² Should a separate area be introduced in the Queensland Act, some overlap with the areas of club membership, work, and good and services would be expected.

‘Sporting activities’ in Victoria includes a wide range of activities, including activities not traditionally thought of as ‘sport’, such as chess and debating.³⁶³ Some examples of sport discrimination can include:

- refusing to allow a person to play sport because of their sexuality or gender identity
- refusing to select a person in a sporting team because of their race
- excluding a person from a sporting activity because of their disability.

Discussion question 54:

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

Other areas of activity

The Review has not identified any additional areas of activity apart from Sport that should be considered for inclusion in the Act.

Discussion question 55:

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

³⁶² *Disability Discrimination Act 1992* (Cth) s 28 covers discrimination in the area of sporting activity which also includes administration or coaching activity. *Equal Opportunity Act 2010* (Vic) s 71 provides for a specific sport area which covers refusing or failing to select a person in a sporting team and excluding a person from participation.

³⁶³ *Equal Opportunity Act* (Vic) s 70; *Robertson v Australian Ice Hockey Federation* [1998] VADT 112.