



Chapter 7:

Updating protected attributes

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Grounds of discrimination

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

- whether the current definitions of protected attributes in the Anti-Discrimination Act best promote the rights to equality and non-discrimination, and
- whether additional attributes should be introduced.¹

The Anti-Discrimination Act prohibits discrimination on the basis of 16 grounds or ‘attributes,’ most of which have been protected since the Act was introduced. Nine attributes have a definition in the Act.

The current attributes 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.

The Discussion Paper included questions about whether the current attributes and their definitions should be updated, and whether new attributes should be added. Throughout the Review, we were told that additional attributes should be included and that the existing definitions needed to be updated, both in terms of the language used and the definition in the Act.

We recommend updating the terminology and definitions for several existing attributes, and that additional attributes be included in the Anti-Discrimination Act. These are: sex characteristics, irrelevant criminal record, physical features, subjection to domestic or family violence, and homelessness.

¹ Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(c).

Updating current attributes

Nine of the 16 protected attributes are defined in the Anti-Discrimination Act. This section considers whether those definitions remain appropriate, or whether new definitions are needed.

In some instances, we have decided that an attribute does not need a statutory definition and can take its ordinary meaning.

The Commission, courts, and tribunals are required to interpret the Act in a way that is consistent with human rights protected under the Human Rights Act.

In the Discussion Paper we ask about the current definitions for a number of attributes. Submissions and consultations that considered these topics suggested we also examine the current definitions for two attributes not included in the Discussion Paper – religious belief or religious activity, and family responsibilities.

Criteria for updates

In deciding whether attribute names and definitions best promote the rights to equality and non-discrimination, we have had regard to:

- **Contemporary approaches** – whether the attributes and their definitions are consistent with contemporary approaches, including in Australian state and federal anti-discrimination laws.
- **Updating terminology** – whether the names of attributes and their definitions are outdated by contemporary standards and may deter people from engaging with the complaint system.
- **Addressing a gap in protection** – whether the current definitions mean that the law is not protecting some people who experience discrimination, where it cannot be objectively justified.

Disability

The review received 37 responses to the Discussion Paper in relation to the language and scope of the impairment attribute.² We also heard from people with disability and organisations that advocate for or support people with disability through a roundtable,³ and through consultations.⁴

2 Queensland Council of Social Service submission; Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Dr Grazia Catalano submission; Independent Education Union - Queensland and Northern Territory Branch submission; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Queensland Alliance for Mental Health submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Family and Child Commission submission; TASC National Limited submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Name withheld (Sub.154) submission; Queenslanders with Disability Network submission; Royal Australian & New Zealand College of Psychiatrists submission; Queensland Civil and Administrative Tribunal submission.

3 People with disability roundtable, 4 February 2022.

4 See for example: AMPARO Advocacy Inc consultation, 8 September 2021; Kevin Cocks consultation, 28 February 2022.

Consistently over many years, the most common category of complaint that is made to the Commission is on the basis of impairment.⁵

Impairment or disability?

In the Discussion Paper we asked for submissions on whether the name of the current impairment attribute should be replaced with the name 'disability'.

Fifteen submissions supported a change of the attribute to 'disability',⁶ including for the following reasons:

- The social model of disability recognises disability as the result of a physical, social and attitudinal barriers placed in the way of people with disability, whereas 'impairment' is grounded in the biomedical model of health and disability, focusing on the limitations or deficits of a person.⁷
- Negative and stigmatising connotations associated with the term 'impairment'.⁸
- 'Disability' is the term now more commonly used in a variety of sectors, such as education and health.⁹
- It is consistent with terminology used in *the United Nations Convention on the Rights of People with Disability*, and in federal, and other anti-discrimination legislation.¹⁰

There were three submissions in support of retaining the term 'impairment'.¹¹ Australian Discrimination Law Experts Group thought that 'impairment' in discrimination law is more consistent with the social model of disability as it refers to personal characteristics, while discrimination is the 'disabling' process experienced by people with impairments.¹² The Queensland Nurses and Midwives Union also cautioned against the change as it could lead to a narrowing of the scope of people covered by the attribute.¹³ The submissions in relation to retaining the term 'impairment' were not from disability-focused organisations.

In contrast, Queenslanders with Disability Network (QDN) considered that:

Disability is generally considered a more appropriate term than impairment as there have been many negative connotations associated with the term impairment as it is usually used to describe a person's lack of function and is linked to arduous assessments an individual must go through to 'prove' their disability.¹⁴

5 In 2020-21, 46.2% of discrimination complaints were about impairment discrimination. Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 36 'QHRC Annual Report 2020-2021'.

6 Public Advocate (Queensland) submission; Christian Schools Australia submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; TASC National Limited submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia, Name withheld (Sub.135) submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission.

7 Australian Lawyers Alliance submission; Dr Claire E Brolan submission; Vision Australia submission; Queensland Advocacy Incorporated submission; Queenslanders with Disability Network submission; Public Advocate (Qld) submission.

8 Queenslanders with Disability Network submission; Queensland Law Society submission.

9 Queensland Catholic Education Commission submission; TASC National Limited submission.

10 Public Advocate (Queensland) submission; Christian Schools Australia submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; Department of Transport and Main Roads (Qld) submission; Queensland Law Society submission.

11 Name withheld (Sub.026) submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission.

12 Australian Discrimination Law Experts Group submission, 46.

13 Queensland Nurses and Midwives Union submission, 22.

14 Queenslanders with Disability Network submission, 4.

This submission was consistent with the polling we did with people with disability at a roundtable hosted with QDN, where 69% of attendees preferred 'disability,' 12% preferred 'impairment' and 19% had no preference.¹⁵

Kevin Cocks, a former Anti-Discrimination Commissioner, noted that compared with the term 'disability':

Impairment is still about functionality, and how that may or may not have an impact upon you, but this does not cover enough, including neurodivergence. And, it needs a quite simple definition, basically referring to someone with a differently wired brain. So that covers off, autism, people with learning disability, people with intellectual disabilities, people with ADHD, people with audio receptive language disorder. It's really quite diverse and people often have different ways of coping.¹⁶

Some submissions suggested retention of 'impairment' and the addition of 'disability'.¹⁷

Submissions indicated that there needs to be public guidance and education regarding the scope of disability discrimination, to ensure community awareness and understanding of the protections.¹⁸

We have recommended below that the attribute should be retitled as 'disability,' and will continue to refer to the term disability in this section and all other sections of the report. For accuracy, we will refer to 'impairment' when referring to the current sections of the Act.

The Review's position

The Review's position is that:

- The attribute 'impairment' be replaced with 'disability' as a term which is more consistent with contemporary understandings of the attribute, and for consistency with federal and most other state and territory anti-discrimination laws.

Comparative approaches

Scope of the attribute

Most Australian jurisdictions, except for Queensland, Northern Territory, and South Australia, use the term 'disability.' Most definitions of disability or impairment are exhaustive definitions, with the exception of Northern Territory.¹⁹

Apart from Western Australia, in all the state and federal definitions of this attribute there are references in varying terms to:

- total or partial loss of the person's bodily functions. In some cases, there is also reference to a loss of a person's mental functions
- total or partial loss of a part of the body
- the presence in the body of organisms causing or capable of causing disease or illness

15 Queenslanders with Disability Network, people with disability roundtable, 4 February 2022.

16 Kevin Cocks consultation, 28 February 2022.

17 Queensland Council of Unions submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission.

18 Queensland Council of Unions submission; Independent Education Union - Queensland and Northern Territory Branch submission.

19 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of 'impairment'); *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability'); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'disability'); *Equal Opportunity Act 1984* (WA) s 4(1) (definition of 'impairment'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment'); *Discrimination Act 1991* (ACT) s 5AA.

- the malfunction, malformation, or disfigurement of a part of a person's body
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction.

All Australian jurisdictions have a provision within the definition of disability regarding mental health. Most jurisdictions use terms similar to: 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.'²⁰ The Northern Territory instead refers to 'a psychiatric or psychological disease or disorder, whether permanent or temporary.'²¹ Victoria takes a different approach by providing 'mental or psychological disease or disorder' as an illustrative example of 'a malfunction of a part of the body.'²²

The Northern Territory is the only jurisdiction to explicitly refer to a 'physical or intellectual disability.'²³

No jurisdictions refer to addiction, although under NSW laws, there is an express exception to disability discrimination if the disability relates to a person's addiction to a prohibited drug.²⁴

No jurisdictions expressly refer to HIV as a protected attribute, although NSW and ACT both protect against vilification on the basis that a person has, or is thought to have, HIV/AIDS.²⁵

We note that the Queensland Parliament Legal Affairs and Safety Committee has recently recommended that the government ensures anti-vilification protections extend to 'medical status including HIV/AIDS status.'²⁶ This has been supported by the government in principle, pending the outcome of this Review.²⁷ The Committee considered that disability/impairment and HIV/AIDS status were 'very obvious omissions' from protection.²⁸

Future disability

Definitions of disability in federal legislation, NSW, Tasmania, Victoria and the ACT include conditions that may exist in the future, in some cases including, but not limited to, where the person has a genetic predisposition to that disability.²⁹ The ACT also separately protects the attribute of genetic information.³⁰

Is there a gap in protection?

The Review heard about the following gaps in protection that will be covered by this section:

- The current definition includes language that makes it unclear whether people who are neurodiverse are covered.
- People living with HIV or other health conditions do not identify themselves as having a 'disability'.

20 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability' para (g)). See also: *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of 'impairment' para (d)); *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'disability' para (e)); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability' para (f)); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'disability' para (g)); *Equal Opportunity Act 1984* (WA) s 4(1) (definition of 'impairment' para (c)); *Discrimination Act 1991* (ACT) s 5AA(1)(g).

21 *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment' para (j)).

22 *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability' para (d)(i)).

23 *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment' para (h)).

24 *Anti-Discrimination Act 1977* (NSW) s 49PA.

25 *Anti-Discrimination Act 1977* (NSW) Part 4F; *Discrimination Act 1991* (ACT) s 67A.

26 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

27 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

28 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 43.

29 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability' para (j)); *Anti-Discrimination Act 1977* (NSW) s 49A(d); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability'); *Discrimination Act 1991* (ACT) s 5AA(2)(b) and (c).

30 *Discrimination Act 1991* (ACT) s 7(1)(h).

- Future disability and pre-disposition to illness is not covered.
- People experiencing mental health conditions do not identify with the language of disability.
- Reliance on assistance animals other than dogs is not covered.
- The extent of coverage for people who experience addiction is unclear.

The definition of disability

Current approach

The current definition of ‘impairment’ under the Act is expansive, including physical disability, learning difference, mental health conditions, illness and disease, and reliance on an assistance dog, wheelchair or other remedial device.³¹ However, as we explore in the following sections, there may be an opportunity to update the scope of protection and the language used in the definition.

Updating language in the definition

During the roundtable we held with people with disability, 69% of participants thought that the definition in the Act should change and 31% were unsure. Some of the concerns included that the terminology was confusing, and particularly it was unclear about whether it included people with ADHD or people on the autism spectrum. One participant told us that with respect to the current definition which refers to ‘learning more slowly:’

*Oh, I don't know what that means. Whereas intellectual disability, autism, though, you know, I know what those terms mean. So yeah, I definitely think it doesn't sort of resonate or even have much meaning. So I think that does need to change.*³²

Another participant told us that:

*It doesn't necessarily mean that person with autism or a neurodiverse difference has trouble learning compared with everyone else. It's just that they learn at a different rate and through a different route.*³³

We also received the following submissions regarding the language that should be used in defining disability:

- use language that is not inherently deficit based³⁴
- have consistency with federal law³⁵
- remove references to outdated language such as ‘malfunction,’ ‘malformation’ and ‘disfigurement’³⁶
- care needs to be taken to use language inclusive of people with neurodiversity such as being on the autism spectrum, which is often considered a difference rather than a ‘disorder or malfunction’³⁷

31 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment’).

32 People with disability roundtable, 4 February 2022.

33 People with disability roundtable, 4 February 2022.

34 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 3.

35 Queensland Council of Unions submission, 25; Australian Discrimination Law Experts Group, 46.

36 Department of Transport and Main Roads submission, 2.

37 Caxton Legal Centre submission, 22; People with disability roundtable, 4 February 2022.

- ‘bodily’ functions should be changed to ‘body’ functions because ‘bodily’ is often subconsciously inferred to only mean incontinence-related issues.³⁸

People living with HIV and other health conditions

Current approach

The Act currently covers people who have organisms causing disease or illness under the definition of impairment,³⁹ which can include conditions as minor as a common cold, or as serious as a major, chronic illness.

Is disability an appropriate term for a condition or illness?

Submissions on behalf of people living with HIV indicated that the term ‘disability’ was not appropriate, as their status has very little impact on their ability to live day to day life. They recommended express protection be given to people living with HIV or a chronic health condition, either separate to disability, or incorporated into the definition of impairment.⁴⁰

Professor Claire Brolan noted United Nations guidance that people with HIV/AIDS experience discrimination on the grounds of their health status and that health status is an attribute of discrimination in its own right. She points to her knowledge of cases of discriminatory treatment on account of their COVID-19 diagnosis. It is in her view inadequate that protection of health status be ‘tacked on’ or under an impairment provision that uses deficit-based and outdated bio-medical framings of disease and ill health.⁴¹

For similar reasons, submissions were also made for the inclusion of ‘irrelevant medical record’ as a protected attribute.⁴²

Future disability and predisposition to genetic conditions

Current approach

The current definition includes illness, disease or injury that presently exists or no longer exists,⁴³ but unlike the federal Disability Discrimination Act,⁴⁴ does not cover people based on conditions that may exist in the future including because of a genetic predisposition.⁴⁵

Should the Act include predisposition to genetic conditions?

Three submissions recommended, consistent with federal laws, that the definition of disability should include disability that may exist in the future (including because of a genetic predisposition to that disability).⁴⁶ Similar issues were also raised in relation to irrelevant medical record, in this chapter, and in relation to superannuation and insurance exceptions in chapter 8.

38 Fibromyalgia ME/CFS Gold Coast Support Group Inc submission, 11.

39 *Anti-Discrimination Act 1991* (Qld), Dictionary – impairment (e).

40 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Scarlet Alliance, Australian Sex Workers Association submission, 12; Respect Inc and DecrimQLD submission, 32-33.

41 Dr Claire E Brolan submission, 7. Submissions from Queensland Network of Alcohol and Other Drug Agencies Ltd and Fibromyalgia ME/CFS Gold Coast Support Group, Inc also supported protection of ‘health status’.

42 Dr Grazia Catalano submission; Australian Discrimination Law Experts Group submission; Queensland Advocacy Incorporated submission; Community Legal Centres Queensland submission; Royal Australian & New Zealand College of Psychiatrists submission.

43 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment paras (g) and (h)').

44 *Disability Discrimination Act 1992* (Cth).

45 *Disability Discrimination Act 1992* (Cth), s 4(1) (definition of ‘disability’ para (j)).

46 Queensland Council of Unions submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Discrimination Law Experts Group submission.

Mental health conditions

In the Discussion Paper we asked for submissions on whether a separate attribute should be created, or the definition amended, to refer specifically to mental health or psychosocial disability.

Fifteen submissions supported specific reference to mental health or psychosocial disability under the Act.⁴⁷ Many people experiencing mental health issues do not identify with the language of disability.⁴⁸ Queensland Alliance for Mental Health explains:

Psychosocial disability, with its fluctuating/episodic nature and ongoing attempts to achieve personal recovery is distinct from physical and intellectual disability. People living with psychosocial disability also encounter different types of discrimination, based on the enduring stigma attached to mental illness and its propensity to be invisible and not easily quantified. This can be a barrier to seeking help and affect housing and employment opportunities in a way different to people living with physical or intellectual disability.

Moreover, this focus on impairment or disability that underpins the AD Act is diametrically opposed to a wellness and recovery framework. It exacerbates the stigma and does not align with how our sector sees mental illness and the recovery journey.⁴⁹

*Curran v Yourtown & Anor*⁵⁰ was given as an example of the need for a clearer definition of impairment or disability in relation to mental health.⁵¹ In that case, the Queensland Industrial Relations Commission accepted that the complainant had anxiety, but did not consider there was evidence of impairment for the purpose of the Act, stating that she was ‘required to produce expert opinion evidence from a person duly qualified to do so.’⁵²

This is consistent with concerns raised by the Queensland Mental Health Commission (QMHC) that people who are experiencing mental health issues but do not meet diagnostic criteria, or which are only episodic in nature, might not be protected by the current wording of the Act. The QMHC noted that the disability sector is increasingly using the term ‘psychosocial disability’ to describe impacts on daily functioning and recognise the broader social disadvantage and effects of mental illness on people.⁵³

We heard from a person who had experienced workplace discrimination on the basis of mental health, who told us:

*I often see mental illness described as a disability. While I understand the purpose of this, many people with mental illness may not consider themselves as having a disability. Also, those with mental illnesses are more likely to experience different issues and different types of discrimination in comparison to the broader disability community. As such, it may be beneficial to separate these groups out.*⁵⁴

47 Independent Education Union - Queensland and Northern Territory Branch submission; Queensland Alliance for Mental Health submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Name withheld (sub.154) submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; TASC National Limited submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Australian Discrimination Law Experts Group submission; Queensland Family and Child Commission submission; Caxton Legal Centre submission.

48 Queenslanders with Disability Network submission.

49 Queensland Alliance for Mental Health submission, 5.

50 *Curran v Yourtown & Anor* [2019] QIRC 59.

51 Queensland Advocacy Incorporated submission.

52 *Curran v Yourtown & Anor* [2019] QIRC 59 [29].

53 Queensland Mental Health Commission submission, 7.

54 Name withheld (Form.724) survey response.

On the other hand, there were submissions that were supportive of consistent wording with the Disability Discrimination Act, which does not refer to mental health and psychosocial disability, or that a separate attribute could lead to the unintended exclusion of other groups, or was unnecessary.⁵⁵ Concerns regarding unclear coverage could be addressed by a legislative note in the Act and community education.⁵⁶

Assistance animals

In the Discussion Paper we asked whether reliance on a guide, hearing or assistance dog be broadened to assistance animals and whether it should only apply to animals accredited under law such as under the Guide, Hearing and Assistance Dogs Act.⁵⁷ We received 15 submissions on the issue of assistance animals. 14 submissions supported express protection in relation to assistance animals,⁵⁸ and one submission provided potential support.⁵⁹

Current approach

The current definition of ‘impairment’ under the Act includes ‘reliance on a guide, hearing or assistance dog, wheelchair or other remedial device.’⁶⁰

The Act also makes it unlawful to discriminate by:

- refusing to rent accommodation because the person relies on a guide, hearing or assistance dog;
- requiring the person to keep the dog elsewhere; or
- charging extra because the dog lives at the accommodation.⁶¹

A guide, hearing or assistance dog is a dog trained to be used as an aid by a person with vision or hearing impairment or trained to assist a person with a disability to reduce their need for support.⁶²

We note that indirect discrimination already provides protection for people with disability where there is a condition in place that disadvantages people because of reliance on an assistance animal – for example a ‘no animals’ rule at an apartment complex. If a person is told to leave a premises because they have an assistance dog, this would amount to direct discrimination because of the definition of ‘impairment.’

Comparative approaches

The Disability Discrimination Act provides a distinct category of protection for a person who requires adjustments because they have a carer, assistant, assistance animal or disability aid.⁶³

55 Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Legal Aid Queensland submission; Department of Education (Qld) submission.

56 Australian Discrimination Law Experts Group submission; Department of Education (Qld) submission; Queensland Council of Unions submission.

57 *Guide, Hearing and Assistance Dogs Act 2009* (Qld).

58 Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Tenants Queensland submission; Queensland Council for Civil Liberties submission; Department of Education (Qld) submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Vision Australia submission.

59 Christian Schools Australia submission.

60 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment’ para (f)).

61 *Anti-Discrimination Act 1991* (Qld) s 85.

62 See *Anti-Discrimination Act 1991* (Qld) Sch 1 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’) and *Guide, Hearing and Assistance Dogs Act 2009* (Qld) Sch 4 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’).

63 *Disability Discrimination Act 1992* (Cth) s 8.

The protection is subject to exceptions including in relation to the protection of public health, and the health of other animals.⁶⁴

An assistance animal is defined as a dog or other animal:

- accredited under a State or Territory law; or
- accredited by an animal training organisation prescribed by regulation; or
- trained to assist a person with disability to alleviate the effect of the disability and meets standards of hygiene and behaviour that are appropriate for an animal in a public place.⁶⁵

In the ACT, the definition of disability includes reliance on a support person, a disability aid, or an assistance animal.⁶⁶

An assistance animal means one trained to assist a person with disability to alleviate the effect of the disability (including by guiding a person who is blind or vision impaired or alerting a person who is deaf or hearing impaired to sounds).

The assistance animal must satisfy any requirements prescribed by regulation which currently requires that the animal is:

- accredited under a State or Territory law; or
- accredited by an organisation that trains animals to assist a person with disability to alleviate the effect of the disability; or
- trained to assist a person with disability to alleviate the effect of the disability and meets the standards of hygiene and behaviour that are appropriate for an animal in a public place.⁶⁷

South Australia makes a distinction between ‘assistance animals’ and ‘therapeutic animals.’ While assistance animals only refers to dogs,⁶⁸ therapeutic animals are animals certified by a medical practitioner as being required to assist a person as a consequence of the persons disability or otherwise prescribed by regulation.

It is unlawful to treat a person unfavourably because the person possesses or is accompanied by an assistance animal, or to separate a person from their assistance animal.⁶⁹ For therapeutic animals, it is unlawful to refuse or defer an application for accommodation, or give the application late order of precedence, on the ground that the person intends to keep a therapeutic animal, unless such refusal is reasonable.⁷⁰

Is there a gap in protection?

Most submissions supported adopting the Disability Discrimination Act approach which creates a distinct category of discrimination on the basis of adjustments needed for their care, assistance animal or disability aid.⁷¹ Some submissions indicated that because of the federal laws in place, this would create no additional burden on duty-holders, and consistency is beneficial.⁷²

64 *Disability Discrimination Act 1992* (Cth) ss 48, 54A.

65 *Disability Discrimination Act 1992* (Cth) s 9.

66 *Discrimination Act 1991* (ACT) s 5AA(2).

67 *Discrimination Act 1991* (ACT) s 5AA(3); *Discrimination Regulation 2016* (ACT) s 2.

68 That is, dogs accredited under the *Dog and Cat Management Act 1995* (SA), or a class of animal prescribed under regulation, for which there are currently none: *Equal Opportunity Act 1984* (SA) s 5(1) (definition of ‘assistance animal’).

69 *Equal Opportunity Act 1984* (SA) ss 66(e), 88.

70 *Equal Opportunity Act 1984* (SA) s 88A.

71 Vision Australia submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Queensland Advocacy Incorporated submission, Tenants Queensland submission; Legal Aid Queensland submission; Caxton Legal Centre submission.

72 Vision Australia submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Caxton Legal Centre submission.

Tenants Queensland recommended that the approach to ‘trained’ should be that taken in *Jackson v Ocean Blue Queensland*⁷³ where training by an approved trainer or approved training institution was not required, but rather required that the animal perform identifiable physical tasks and behaviour to reduce a person’s need for supports.⁷⁴

Christian Schools Australia, while potentially supportive of change, voiced concerns about whether broadening the range of animals would pose a risk to safety of students and the efficacy of the learning environment in a school setting.⁷⁵

Particular issues were raised in relation to discrimination in the area of accommodation:

- Assistance animals ‘in training’ should be protected, to recognise that part of the training of an assistance animals may be to stay with the person, both inside and outside of their home.⁷⁶
- There should be protections for ‘companion animals’ (excluding holiday accommodation), which can alleviate some functional challenges of some disabilities for vulnerable people who would otherwise live alone. Dealing with this matter separately might reduce the burden on users of assistance animals who find their needs are taken less seriously when pets are inappropriately asserted to be assistance animals.⁷⁷

Addiction

We asked for submissions on whether the law should be clarified in relation to people who experience addiction.

We received 13 submissions on this issue.⁷⁸ Of these, 11 supported more clarity that the protection extends to people experiencing addiction (two of these said that it should be dealt with as a separate attribute),⁷⁹ one supported more clarity one way or the other,⁸⁰ and one expressed the view that addiction was already covered by current protections.⁸¹ Notably, none of the submissions received indicated that addiction should not be protected under the Act.

Queensland Network of Alcohol and Other Drug Agencies Ltd (QNADA) is the peak organisation representing the views of the non-government alcohol and drug sector in Queensland. Their position is that the current definition of ‘impairment’ is inaccurate and stigmatising in its application to people with addiction, and that discrimination is not limited to people who experience problematic use. QNADA’s recommendation is to protect ‘health status’ as an attribute, with specific guidance that this extends to people who use alcohol and other drugs, irrespective of their level of use.⁸²

73 *Jackson v Ocean Blue Queensland Pty Ltd* [2020] QCAT 23.

74 Tenants Queensland submission, 5.

75 Christian Schools Australia submission, 16.

76 Tenants Queensland submission, 4-5.

77 Caxton Legal Centre submission, 22-23. See also Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 11.

78 Queensland Council of Unions submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Name withheld (Sub.026) submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Independent Education Union submission; Queensland Mental Health Commission submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Caxton Legal Centre submission.

79 Aged and Disability Advocacy Australia submission; Name withheld (Sub.026) submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Independent Education Union submission; Queensland Mental Health Commission submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Caxton Legal Centre submission.

80 Queensland Catholic Education Commission submission.

81 Queensland Council of Unions submission.

82 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 4-5.

Three submissions indicated that express protection would remove any residual doubt, and legitimise the legal position of substance abuse as a mental health disorder.⁸³

The Australian Discrimination Law Experts Group suggested that the definition of disability remain consistent with federal law, but the Act include a note to indicate coverage of addictions.⁸⁴

Queensland Positive People and others noted that the tables used to assess work-related impairment for the disability support pension under the Social Security Act⁸⁵ recognise functional impairment as a result of substance use.⁸⁶

The Review's position

The Review's position is that:

- As duty holders must already comply with the broader definition in the Disability Discrimination Act, it will reduce complexity and make it easier to comply to align the definitions to the greatest extent possible. Adopting this definition will expand coverage to disability that may exist in the future (including because of a genetic predisposition to that disability), and update the language to 'learning differently' rather than 'learning more slowly.'
- Without creating inconsistency between the scope of the protection between the state and federal jurisdictions, there are terms such as 'malfunction,' 'malformation' and 'disfigurement' that could be modernised to bring the definition more into alignment with modern terminology.
- The current definition already encompasses disease and illness, including people living with HIV/AIDS. While it is not language that is used by the community to reflect their status, we could not identify a gap in protection that adding 'health status' would resolve, and providing an additional 'health status' attribute could create duplication and confusion as to which conditions fall into each category.
- Similarly, referring specifically, and only, to 'mental or psychological disease or disorder' may have unintended consequences, including narrowing protections for people who do not meet diagnostic criteria.
- Expanding the Act to include assistance animals, rather than just dogs, using a model that aligns with the Disability Discrimination Act, is justified.
- Assistance animals 'in training' will meet threshold requirements for protection under the Act once they have had some training to assist a person with disability to alleviate the effect of the disability and meet the standards of hygiene and behaviour that are appropriate for an animal in a public place.
- Both companion animals and assistance animals in training that are genuinely necessary as an accommodation for a person with disability will continue to be protected under indirect discrimination, as they are under the current Act.
- More clarity that the attribute can extend to protection of people experiencing addiction would be beneficial, and can be achieved by a legislative note.
- While the Review acknowledges concerns regarding clarity and understanding of the attribute as it applies to people with mental illness and psychosocial disability, and

83 Legal Aid Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Australian Discrimination Law Experts Group submission, 46.

84 Australian Discrimination Law Experts Group submission, 46.

85 *Social Security Act 2011* (Cth).

86 *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth), Part 3 Table 6.

people who are living with HIV or other health conditions, this can be addressed by guidance material.

Recommendation 21

- 21.1 The term 'impairment' should be replaced with 'disability'.
 - 21.2 The definition of disability should be aligned with the federal *Disability Discrimination Act 1992* (Cth) but should remove references to outdated or inappropriate language such as 'disfigurement', 'malformation' or 'malfunction'.
 - 21.3 The Act should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.
 - 21.4 To remove any doubt, the Act should confirm that people with addiction are covered by the attribute of disability.
 - 21.5 The Commission should continue to undertake engagement with stakeholders to promote a greater understanding about the scope of the disability attribute and who it protects.
-

Gender identity and gender

In recent decades, community awareness and knowledge about gender and gender identity has increased, scientific research has been made available, legal cases have received attention, and terminology used has generally shifted.

In the Discussion Paper, we asked whether the definition of gender identity should be updated, and whether gender should be made an additional attribute. If gender were to be made an attribute, we asked whether it should be defined, and if so, how.

Soon after the Discussion Paper was published, the Queensland Parliament's Legal Affairs and Safety Committee recommended that anti-vilification protections include gender and/or sex, and gender identity and/or gender expression.⁸⁷ The Queensland Government has given in-principle support to this recommendation pending the outcome of this Review.⁸⁸ The Review's recommendations on this issue may therefore influence which attributes will be covered by future anti-vilification protections provided by the Anti-Discrimination Act.

We recommend redefining gender identity consistently with the *Yogyakarta Principles plus 10*⁸⁹ but have decided that an additional attribute of gender should not be incorporated in the Act.

87 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022) 45, Recommendation 4c and 4e.

88 Queensland Government, Response to Legal Affairs and Safety Committee Inquiry into serious vilification and hate crimes Report No 22 (2022) 2, Recommendation 4.

89 *Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) 17

Gender identity

Current approach

'Gender identity' is defined in the Schedule to the Act as:

gender identity, in relation to a person, means that the person—

(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or

(b) is of indeterminate sex and seeks to live as a member of a particular sex.

The current definition of gender identity takes a binary gender position (that is, only two genders – male and female) which excludes people who identify outside of the gender binary and does not explicitly refer to a person's gender expression.

The second part of the definition erroneously refers to people of 'indeterminate sex'.⁹⁰ We discuss a possible 'sex characteristics' attribute under protecting additional attributes – sex characteristics, below.

We received 35 submissions⁹¹ about the definition of gender identity and heard from trans and gender diverse people through the Have Your Say survey and our initial consultations.⁹² We also received feedback from a community survey that the Review co-designed with Queensland Council for LGBTI Health, the peak health organisation for the LGBTIQ+ community in Queensland (referred to in this section as 'QC community survey').⁹³

Of the submissions received, most supported change⁹⁴ because of limitations and shortcomings of the current definition, which:

- conflates gender identity and sex characteristics, even though intersex is not an identity⁹⁵

90 *Anti-Discrimination Act 1991* (Qld) Dictionary - gender identity (b).

91 Name withheld (Sub.026) submission; PeakCare Queensland Inc submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties 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; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; Intersex Human Rights Australia submission; IWD Brisbane Meanjin submission; Fair Go for Queensland Women submission; Sisters Inside submission; Diversity Queensland Incorporated submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Queensland Alliance for Mental Health submission; Pride in Law submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R Harrison submission; Dr Catherine Carroll submission; Name withheld (Sub.118) submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWHA) submission; Aged and Disability Advocacy Australia submission; FamilyVoice Australia submission; Just.Equal Australia submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Queensland Advocacy Incorporated submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission.

92 Australian Transgender Support Association consultation, 19 August 2021; Trans Health Australia consultation, 1 September 2021; Open Doors consultation, 13 September 2021; Just.Equal Australia consultation, 17 September 2021.

93 Queensland Council for LGBTI Health submission.

94 Queensland Council for LGBTI Health submission; Pride in Law submission; Name withheld (sub.026) submission; Rainbow Families Queensland submission; Legal Aid Queensland submission; Intersex Human Rights Australia submission; Equality Australia submission; Just.Equal Australia submission; Australian Lawyers for Human Rights submission; Caxton Legal Centre submission; PeakCare Queensland Inc submission; Respect Inc and DecrimQLD submission; LGBTI Legal Service Inc submission; Aged and Disability Advocacy submission; Sisters Inside submission; Queensland Alliance for Mental Health submission; Diversity Queensland Incorporated submission; Name withheld (Sub.008) submission; Australian Discrimination Law Experts Group submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWHA) submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

95 Intersex Human Rights Australia submission, 20.

- does not reflect the full spectrum of ways in which people identify, or the terminology that the trans and gender diverse community uses⁹⁶
- uses the term ‘opposite sex’, which excludes people who identify outside the binary gender who should have protection under the Act,⁹⁷ particularly considering the growing numbers of people who identify as non-binary or gender diverse including younger people⁹⁸
- does not incorporate elements of gender-related expression,⁹⁹ such as the way people dress or their mannerisms
- has been problematic – particularly the words ‘seeking to live’ – when interpreted by tribunals, as in the case of *Tafao*.¹⁰⁰

In the QC community survey of 74 community members, 90% of survey participants thought the definition of gender identity should change.¹⁰¹

One person, who identified as non-binary, told us about their experience through our Have Your Say survey. They said they had experienced:

...deliberate misgendering, intrusive questions about “biological sex” and sexual orientation, invalidating “non-traditional” relationships, non-binary erasure (i.e. being forced to choose male or female and gendered titles on forms etc). Like most trans and gender diverse people, these constant microaggressions and inability to have our gender validated is exhausting and contributes to poor mental health outcomes...

*Legislative change is required to clarify that non-binary people are protected from discrimination. While QHRC have informed me that non-binary people are protected from discrimination on the grounds of gender identity when I have made a phone enquiry, the current definition of gender identity in the Act technically excludes non-binary people.*¹⁰²

When we spoke with Open Doors Youth Service, an organisation that supports young people with diverse genders and sexualities, we also heard about the need to protect gender expression more clearly under the Act:

*What we’re seeing is young people who are gender nonconforming, who may identify as a boy but likes to wear dresses and makeup and stuff, they experience a lot of harassment in different places especially navigating public transport or public spaces, accessing public restrooms. They don’t necessarily identify as gender diverse but are absolutely experiencing gender-based violence, and quite regularly, so I think sometimes like having gender expression covered as well will be super helpful.*¹⁰³

96 Name withheld (Sub.026) submission; Diversity Queensland Incorporated submission, 1; Pride in Law submission, 1.

97 Queensland Alliance for Mental Health submission, 3-4.

98 Australian Discrimination Law Experts Group submission; 48; Australian Lawyers for Human Rights submission, 5-6; Legal Aid Queensland submission, 68; Open Doors, consultation, 10 September 2021.

99 Equality Australia submission, 6.

100 Caxton Legal Centre submission, 23. In the original decision, the Tribunal found that a transgender woman was not a woman but was a person of the ‘male gender’ who identifies and seeks to live as a female and is a male because of her biological sex. See *Tafao v State of Queensland & Ors* [2018] QCAT 409 at [175]. This was affirmed on appeal to QCATA.

101 Queensland Council for LGBTI Health submission, 21. Of the 74 survey participants, 22 were from people who identified with a gender different from that assigned at birth.

102 Name withheld (Form.003) survey response.

103 Open Doors Youth Service consultation, 13 September 2021.

Twelve submissions did not agree with changing the definition of gender identity, or expressed reservations¹⁰⁴ for reasons that included:

- A perception that sex-based rights for women and girls would be compromised.¹⁰⁵
- Religious educational institutions may have difficulty operationalising the law if the attribute is broadened in scope, because of the belief systems underpinning some schools or universities.¹⁰⁶

Comparative approaches

The current definition of gender identity reflects the approach of several jurisdictions when the attribute was introduced into state anti-discrimination laws around 20 years ago. Queensland, Western Australia, and New South Wales have retained the original definitions. However, in the intervening years, most equality jurisdictions have adopted a more inclusive gender identity definition.¹⁰⁷

Definition based on Yogyakarta Principles

The *Yogyakarta Principles* are a guide to human rights relating to sexual orientation and gender identity and were produced as the outcome of an international meeting of human rights experts in Yogyakarta, Indonesia in November 2006. The Principles address a broad range of international human rights standards and their application to sexuality and gender identity issues.

In 2017, additional principles were added to the original Principles to reflect developments in international human rights law and practice, and named the *Yogyakarta Principles plus 10*.¹⁰⁸ As well as outlining international best practice on defining concepts relating to sexuality, gender identity, and sex characteristics, these Principles assist with the interpretation of key rights under the *International Covenant on Civil and Political Rights* (ICCPR) including the right to recognition as a person before the law,¹⁰⁹ the right to equality,¹¹⁰ and the right to privacy.¹¹¹

These principles provide authoritative exposition of international human rights law, as required by the Terms of Reference.¹¹²

The Discussion Paper canvassed views about a definition based on the language and definitions in the *Yogyakarta Principles*.

The *Yogyakarta Principles* define gender identity in the following way:¹¹³

104 Queensland Council for Civil Liberties submission; James Cook University submission; R. Harrison submission; Dr Catherine Carol submission; Human Rights Law Alliance submission; Fair Go for Queensland Women submission; IWD Brisbane Meanjin submission; Christian Schools Australia submission; Australian Association of Christian Schools submission; Australian Christian Higher Education Alliance submission; FamilyVoice Australia submission; Name withheld (Sub.118) submission.

105 Fair Go for Queensland Women submission, 2; IWD Brisbane Meanjin submission, 1-2; Dr Catherine Carol submission, 1-2; Name withheld (Sub.118) submission, 18.

106 Christian Schools Australia submission, 16-17; Australian Association of Christian Schools submission, 13; Australian Christian Higher Education Alliance submission, 6.

107 The '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; Northern Territory has announced that it will protect 'gender identity' rather than transsexuality, and review of legislation in Western Australia anticipates reform.

108 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

109 *International Covenant on Civil and Political Rights* Article 16, reflected in s 15(1) *Human Rights Act 2019* (Qld).

110 *International Covenant on Civil and Political Rights* Article 2, reflected in s 15(2)-(5) *Human Rights Act 2019* (Qld).

111 *International Covenant on Civil and Political Rights* Article 17, reflected in s 25 *Human Rights Act 2019* (Qld).

112 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.

113 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Most of the submissions that favoured a change to the definition supported this approach.¹¹⁴ The *Yogyakarta* approach was also canvassed in the QC community survey, with 67% of survey participants supporting *Yogyakarta* definitions.

Stakeholders who expressed reservations about this approach were primarily concerned about whether the language was explicit enough to make it clear that non-binary identities were included.¹¹⁵ However, these reservations were positioned as something to consider, not a withholding of support for the approach.

Alignment with other laws

The definition proposed in the Discussion Paper has recently been incorporated into the Public Health Act¹¹⁶ which prohibits conversion therapy.¹¹⁷ Conversion therapy is a practice that attempts to change or suppress a person's sexual orientation or gender identity.

Adopting this definition of gender identity would align the Queensland Act with discrimination law in Victoria, Tasmania, and the ACT, as well as other Queensland Acts.

Since 2013, the federal Sex Discrimination Act has included gender identity¹¹⁸ which is defined as:

The gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

While stakeholders considered this definition preferable to the current approach in the Anti-Discrimination Act, only two submissions identified this approach as something to consider.¹¹⁹

Other suggestions

Other suggestions for the definition of gender identity included: retaining the status quo,¹²⁰ removing the attribute altogether,¹²¹ defining gender identity to be synonymous with 'biological sex',¹²² or re-naming it 'gender identity beliefs and activities'.¹²³ Each of these options would downplay the significance of discrimination based on gender identity and narrow, rather than broaden, protection for a marginalised group of people.

The Review's position

114 PeakCare Queensland Inc submission, 12; Australian Lawyers Alliance submission, 12; Intersex Human Rights Australia submission, 23; Sisters Inside Inc submission, 10; Australian Discrimination Law Experts Group submission, 48; Diversity Queensland Incorporated submission, 2; Queensland Alliance for Mental Health submission, 4; Pride in Law submission, 2; LGBTI Legal Service Inc Qld submission, 3; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Australian Lawyers for Human Rights submission, 6-7; Just.Equal Australia submission, 2; Respect Inc and DecrimQLD submission, 33; Aged and Disability Advocacy Australia submission, 10; Rainbow Families Queensland submission, 5; Queensland Council for LGBTI Health submission, 9; Equality Australia submission, 5.

115 Queensland Council for LGBTI Health submission 9.

116 *Public Health Act 2005* (Qld).

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

118 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

119 Pride in Law submission, 2; Queensland Law Society submission, 16.

120 Queensland Council for Civil Liberties submission, 13-15; Human Rights Law Alliance submission, 15.

121 FamilyVoice Australia submission, 8; Name withheld (Sub.118) submission, 18.

122 Australian Association of Christian Schools submission, 13; Dr Catherine Carol submission, 1-2.

123 James Cook University submission, 3; R. Harrison submission, 1-2.

The Review's position is that:

- Transgender, non-binary, and gender diverse people in Queensland experience discrimination and require protection under the Act.
- Providing people with protection from discrimination based on their gender identity does not dilute or erode the rights of other people. The attributes of sex and gender identity have coexisted in the Act for 20 years.
- The definition of gender identity requires updating so that it:
 - retains the current definitional aspect of self-identification of gender
 - removes the language of 'opposite sex' to ensure coverage of people with non-binary and gender diverse identities
 - no longer conflates intersex with gender identity
 - incorporates gender expression (including dress, speech etc).¹²⁴
- The definition of gender identity should not be restricted to specific identities (e.g. transgender, non-binary) because terminology is constantly evolving.
- The Act should include a definition that is consistent with the *Public Health Act 2005* (Qld) and the *Births, Deaths and Marriages Registration Act 2003* (Qld) to avoid inconsistent interpretations.
- While the *Yogyakarta* definition is expansive, it does not include words used by the community, such as 'transgender' or 'genderqueer'. However, the Explanatory Notes could assist interpretation by providing this context. Guidance material developed by the Commission would also assist anyone who needs recourse to the Act.

Gender

Current approach

The Act currently protects people from sex discrimination but does not refer to gender.¹²⁵ The attribute of sex is protected but not defined in the Act, and the word 'sex' is included in existing exemption provisions and examples.¹²⁶

In the Discussion Paper we asked whether gender should be included as an attribute in the Act. Of the 24 submissions on this topic,¹²⁷ some indicated support for including gender as an attribute, but most had concerns or reservations, including:

¹²⁴ Consistent with Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), recommendation, gender expression should be incorporated as a ground for vilification, but we see no need for it to be separated from gender identity.

¹²⁵ Only *Anti-Discrimination Act 1998* (Tas) refers to 'gender' rather than 'sex'.

¹²⁶ See for example – single sex schools (s 41), restricting access to places of religious/cultural significance (s 48), reasonable sex discrimination in relation to clubs and their benefits (s 98).

¹²⁷ Name withheld (Sub.026) submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; Fair Go for Queensland Women submission; Diversity Qld Incorporated submission; Christian Schools Australia submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R. Harrison submission; Maternity Choices Australia submission; Name withheld (Sub.118) submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Queensland Council for LGBTI Health submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission.

- How gender would interact with the existing attributes of gender identity and sex is unclear.¹²⁸
- Separating gender from sex may create confusion and uncertainty.¹²⁹
- Different points of view about how gender should be defined abound and if the Act contained both sex and gender as attributes, gender may overtake or subsume sex as an attribute.¹³⁰
- Determining what falls under gender as opposed to sex discrimination may reduce protection for trans and intersex people.¹³¹

Does the attribute of sex already include gender?

As we have noted, sex is not defined in the Act or in the Acts Interpretation Act.¹³² The *Macquarie Dictionary*, often used to interpret words in the absence of a statutory definition, makes a distinction between sex as anatomical and physiological, and gender as ‘socially constructed sexual identity such as male, female, gender queer etc.’¹³³

However, as expressed by the World Health Organisation, sex and gender are hard to separate because they are concepts that ‘interact’ with each other.¹³⁴

On one view, experiences of gender-based discrimination may be covered by the current Act. Section 8 states that discrimination on the basis of an attribute includes discrimination on the basis of a characteristic that a person with the attribute generally has or is often imputed to a person with the attribute, or can include where a person is presumed to have an attribute but does not.

For sex discrimination this might include gendered expectations or stereotypes – such as not giving an employee reception work because they do not conform to stereotypical gender roles, or presumptions about a person’s sex, based on gendered appearance – such as discrimination against a masculine-presenting woman because it is presumed they are a man.¹³⁵

Equality Australia suggests that, rather than creating a ‘gender’ attribute, there may be benefit in clarifying:

that the ground of ‘sex’ includes all forms of discrimination based on gender roles, expectations and stereotypes, or making clear that the definition of ‘sex’ is not limited to or defined by any particular physical sex characteristics but extends to social roles, expectations and stereotypes related to gender.¹³⁶

What have courts and tribunals decided?

The High Court has recognised transgender people and non-binary people in two landmark decisions that challenged traditional male/female gender binary notions based on biological characteristics.

128 Queensland Catholic Education Commission submission, 8.

129 Christian Schools Australia submission, 20.

130 IWD Brisbane Meanjin submission, 1; James Cook University submission, 3; Christian Schools Australia submission, 20; Maternity Choices Australia submission, 9; Name withheld (Sub.118) submission, 4.

131 Equality Australia submission, 6.

132 *Acts Interpretation Act 1954* (Qld) - this Act is used to interpret laws in Queensland.

133 *Macquarie Dictionary* (online at 21 June 2022) ‘sex’ (def 1), ‘gender’ (def 2).

134 World Health Organization, *Gender and health* (Web page, 2022) <<https://www.who.int/health-topics/gender>>.

135 Equality Australia submission, 6.

136 Equality Australia submission, 6.

In *AB v Western Australia*¹³⁷ the High Court decided that two trans men who had undergone double mastectomies and hormone treatment were of the male sex, because they were perceived as men in their day-to-day lives. The Court said there was no need for detailed knowledge of a person's bodily state (including genitalia) to make this determination.

In *Norrie's case*¹³⁸ the High Court determined that the NSW Registrar of Births, Deaths and Marriages had the power to record a person as 'non-specific' rather than male or female and accepted that a person's sex may fall outside the binary.

Prior to the introduction of gender identity as an attribute, a transgender woman who experienced transphobic treatment in a grocery store successfully argued that she had been discriminated against based on her female sex because sex includes characteristics imputed from the person's sex or a person's presumed sex.¹³⁹ However, in a more recent Queensland case about a transgender prisoner, the tribunal at first instance and on appeal did not accept that a trans person became the gender with which they identify in the absence of sex reassignment surgery.¹⁴⁰ This has created doubt as to how tribunals and courts may determine the meaning of sex and gender.

However, this interpretation is likely to be limited to the factual circumstances of the case. In the *Tafao* case, the tribunal member was attempting to identify the appropriate comparator for a woman in a prison where only males were present.

Human rights considerations

The Human Rights Act requires courts to interpret the Anti-Discrimination Act in a way that is compatible with human rights,¹⁴¹ including the right to equality before the law,¹⁴² and the right to privacy.¹⁴³

As the Anti-Discrimination Act is beneficial legislation, statutory interpretation principles require that, if there is ambiguity, it should be resolved in a way most favourable to people for whose benefit the Act is intended – that is, people with protected attributes.¹⁴⁴ A narrow interpretation of 'sex' as meaning only 'biological sex' (such as hormones, chromosomes, and anatomical characteristics) is inconsistent with this principle, and is unlikely to be compatible with human rights.

Interpreting sex in a narrow way also means that:

- Trans and gender diverse people would not be protected from sexist conduct under sex discrimination provisions.
- Refusing a trans woman assistance in crisis accommodation for women operated by a charity would not be unlawful.¹⁴⁵
- Refusing to admit a trans boy into an all-boys school would not be unlawful.¹⁴⁶

137 *AB v Western Australia* (2011) 244 CLR 390; [2011] HCA 42.

138 *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [2014] HCA 11.

139 *M v A and U* [2007] QADT 8; *M v A and U* [2007] QADT 23.

140 See *Tafao v State of Queensland* [2020] QCATA 76 at [43]. The QCAT appeal tribunal found there was indirect discrimination based on misgendering her, but did not identify any error with the initial finding that Ms Tafao's biological sex was male and she identified as female. The Court of Appeal later overturned the Appeal Tribunal's decision that there was indirect discrimination.

141 *Human Rights Act 2019* (Qld) s 48.

142 *Human Rights Act 2019* (Qld) s 15.

143 *Human Rights Act 2019* (Qld) s 25.

144 The principle that anti-discrimination legislation should be interpreted as beneficial to a person who has a protected attribute is a well-established principle of common law, and has been settled by the High Court – See: *IW v City of Perth* [1997] HCA 30; 191 CLR 1, 11 (Brennan CJ and McHugh J), and see 27 (Toohey J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 394 (Dawson and Toohey JJ) and 407 (McHugh J).

145 *Anti-Discrimination Act 1991* s 91.

146 *Anti-Discrimination Act 1991* s 41.

Applying the reasoning from *AB v Western Australia* and *Norrie's case*, and interpreting the Act consistently with the Human Rights Act we consider the current meaning of 'sex' would encompass:

- the sex that a person was assigned at birth, where the person's gender identity aligns (cisgender people)
- the sex with which a person identifies, where a person's gender identity does not align with their sex assigned at birth (trans and gender diverse people).

This interpretation means that there would be no need for an additional gender attribute, which may create unnecessary duplication.

References to males and females in the Act

Equality Australia suggested that we remove existing binary references to sex by changing references from 'males and females' to 'people of a different sex', or people with a particular sex.¹⁴⁷

This would align with changes to the definition of gender identity that we have recommended, and would recognise non-binary people.

Sex/gender recognition and registration reforms

At the time of writing, the Department of Justice and Attorney-General is reviewing sex/gender registration under the Births, Deaths and Marriages Act.¹⁴⁸ The outcomes of that review may directly impact the meaning of the word 'sex' in the Act.

The recommendations of this Review should be considered by the government in light of the outcomes of that review.

The Review's position

The Review's position is that:

- Creating a separate attribute of gender is unnecessary, if our recommendation to expand the gender identity attribute is accepted.
- Adopting a flexible and beneficial understanding of 'sex,' consistent with the Human Rights Act and interpretation by the High Court in *AB* and *Norrie*, would include people assigned a sex at birth as well as people who identify as that sex. Explanatory Notes should clarify this point.
- Adding an additional attribute of gender may create uncertainty and confusion in interpreting the Act by trying to separate intrinsically related concepts (that is, sex and gender).
- Defining attributes of sex or gender is inherently limiting as they are evolving concepts on which there are different views. Allowing these terms to be interpreted by courts or tribunals ensures they can be context-dependent.
- Removing references to male and female in the Act, and replacing them with more neutral language such as 'in relation to sex' or 'a particular sex' would make the Act more consistent overall with the inclusion of non-binary people in the definition of gender identity.
- Depending on the outcome of the Births, Deaths, and Marriages Act reforms, a provision in the Anti-Discrimination Act should provide that all references to 'sex' in the Act means both people who were assigned a sex at birth, and people who have changed their gender/sex marker at a later time.

¹⁴⁷ Gender binary references are currently included in the Act at ss 30 (1)(b), 98, and 111(1)(a).

¹⁴⁸ *Births, Deaths and Marriages Act 2003* (Qld) - Department of Justice and Attorney-General, Review of the Births, Deaths and Marriages (Discussion Paper, March 2018).

Recommendation 22

- 22.1** The definition of gender identity should be based on the definition in the Yogyakarta Principles.
- 22.2** The Act should make reference to sex and/or gender in a way that is complementary with Queensland's birth registration laws.
- 22.3** The Act and its Explanatory Notes should clarify that all references to 'sex', or a 'particular sex' include both people of a sex that was assigned to them at birth, and people whose gender identity aligns with that sex.
-

Sexual orientation

Current approach

The attribute of 'sexuality' is defined under the current Act as:

sexuality means heterosexuality, homosexuality or bisexuality.¹⁴⁹

The definition of sexuality is narrow and does not reflect the ways that people describe various sexualities. In the Discussion Paper we asked whether there should be a new definition of sexuality, and if so, what that definition should be.

Of the 33 submissions we received about the definition of sexuality,¹⁵⁰ most supported updating the definition. Since publication of the Discussion Paper in November 2021, a parliamentary committee inquiring into vilification laws in Queensland has published its final report, which recommended that the Act cover the attribute of 'sexual orientation'.¹⁵¹

Is there a gap in protection?

During the Review, we heard that some aspects of sexuality are not covered by the definition, including for people who experience a lack of romantic or sexual attraction.¹⁵² Asexuality is an emerging way in which people are expressing their identity, but there remains limited social awareness.¹⁵³ Studies have indicated there are strong negative attitudes towards people who are

149 *Anti-Discrimination Act 1991* (Qld) Dictionary - sexuality.

150 Name withheld Sub.026 submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; IWD Meanjin Brisbane submission; Fair Go for Qld Women submission; Diversity Queensland Incorporated submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Pride in Law submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R. Harrison submission; Name withheld (Sub.118) submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWHA) submission; Aged and Disability Advocacy Australia submission; Just.Equal Australia submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Freedom for Faith submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission; Eros Association submission.

151 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022) 45, Recommendation 4.

152 See for example: Open Doors consultation, 13 September 2021; Just.Equal consultation, 17 September 2021; Townsville Community Law consultation, 17 August 2021; Queensland Council for Social Service consultation, 12 October 2021.

153 Amy Antonsen et al 'Ace and aro: Understanding differences in romantic attractions among persons identifying as asexual.' (2020) *Archives of Sexual Behavior*, 1615-1630.

asexual which are worse relative to attitudes towards gay and bisexual people.¹⁵⁴ People may also experience prejudice when presumed to be asexual, such as people with disability.¹⁵⁵

Some stakeholders were concerned that the terminology is outdated, and as a result, people who identify with sexualities outside those presented in the Act as an exhaustive list (heterosexuality, homosexuality or bisexuality) do not feel that the legislation includes or protects them.¹⁵⁶ This may include people who are pansexual, and attracted to people on the basis of personal qualities unrelated to their gender.¹⁵⁷

We heard that marginalised groups who experience discrimination because of stigma, social norms and attitudes, are discouraged from making complaints, even if they may be covered by the current definition.¹⁵⁸

Demonstrating the demand for change, around 75% of the 74 survey respondents to the QC community survey thought that the definition needs to be updated.¹⁵⁹

Sexuality or sexual orientation?

The Australian Discrimination Law Experts Group recommended a change of terminology to 'sexual orientation.'¹⁶⁰ Most submissions referred to 'sexual orientation' rather than 'sexuality,' and this is now the language used by most Australian anti-discrimination jurisdictions, including the federal Sex Discrimination Act, as well as the Australian Bureau of Statistics.¹⁶¹

Renaming the attribute to sexual orientation would also be consistent with the recommendations of the Legal Affairs and Safety Committee regarding the groups who should be afforded anti-vilification protections¹⁶² and would create consistency with the Queensland Public Health Act conversion therapy provisions.¹⁶³

Comparative approaches

Yogyakarta Principles approach

As noted above in the discussion on gender identity, the international *Yogyakarta Principles* provide best practice guidance on terminology contributed by international human rights experts.

A definition of 'sexual orientation' based on these principles has recently been added into the Queensland Public Health Act.¹⁶⁴ The definition provides that:

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.¹⁶⁵

154 Cara MacInnes and Gordon Hodgson, 'Intergroup bias toward "Group X": Evidence of prejudice, dehumanisation, avoidance and discrimination against asexuals.' (2012) *Group Processes & Intergroup Relations*, Issue 6, 725-743.

155 Karen O'Connell, 'Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders,' (2019) *Laws*, 3.

156 See for example: Queensland Council for LGBTI Health submission, 9; Rainbow Families Queensland submission, 5.

157 Survey participant (19), Queensland Council for LGBTI Health submission, 35.

158 Legal Aid Queensland submission, 69.

159 Queensland Council for LGBTI Health submission, 32.

160 Australian Discrimination Law Experts Group submission, 13.

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

162 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 4.

163 *Public Health Act 2005* s 213E.

164 *Public Health Act 2005* (Qld).

165 *Public Health Act 2005* (Qld) s 213E.

This option was canvassed in the Discussion Paper because of the benefits of consistent definitions in Queensland Acts and to align with international best practice. A similar, simplified version of the above has recently been introduced in the Victorian Equal Opportunity Act.¹⁶⁶

Because terminology in this field is evolving, tying the definition to current language would perpetuate the problem.¹⁶⁷

Most stakeholders supported the definition of sexual orientation in the Public Health Act, or a variation of it.¹⁶⁸ Of the survey respondents to the QC community survey, 64% were in favour of this definition, but several survey participants were concerned about potential lack of inclusion of people who are asexual or aromantic.¹⁶⁹ A smaller number of survey participants, and a submission from Diversity Queensland Incorporated¹⁷⁰ suggested that polyamory should be included.¹⁷¹

Suggestions to address any lack of inclusion included:

- adding the words 'or none' to make it clear the definition applies to people who lack attraction¹⁷²
- explaining that sexuality also includes a lack of emotional, affectional, and sexual attraction in a legislative note¹⁷³
- adapting the definition to say that it includes emotional *or* affectional *or* sexual attraction (rather than 'and')¹⁷⁴
- including the words 'any combination thereof' at the beginning of the definition.¹⁷⁵

Two submissions were not in favour of changing the definition to reflect the *Yogyakarta Principles* approach,¹⁷⁶ and four indicated some reservations.¹⁷⁷ These submissions were of the view that:

- The definition in the *Yogyakarta Principles* is 'incomprehensible' and 'vague'.¹⁷⁸
- The word 'sex' is preferred over 'gender' in any definition of sexuality so that it provides recognition for cisgender people who are attracted to other cisgender people.¹⁷⁹
- Sexuality definitions should be tied to adulthood.¹⁸⁰

Submissions from organisations that represent religious education providers said that sexuality should acknowledge traditional beliefs around marriage and sexual morality, and sought

166 *Equal Opportunity Act 2010* (Vic) s 4 - sexual orientation means a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender. We note that this removes the words 'capacity for'.

167 Rainbow Families Queensland submission, 5.

168 Australian Lawyers Alliance submission, 13; Australian Discrimination Law Experts Group, 13; Queensland Council for Civil Liberties submission, 16; Equality Australia submission, 6; Rainbow Families Queensland submission, 5; Diversity Queensland Incorporated submission, 2; PeakCare Queensland Inc submission, 12; Aged and Disability Advocacy Australia submission 10; Just.Equal Australia submission, 3; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission, 7; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13.

169 Queensland Council for LGBTI Health submission, 33-35.

170 Diversity Queensland Incorporated submission, 1. The submission suggested inclusion in lawful sexual activity as a broader definition or in relationship status.

171 Queensland Council for LGBTI Health submission, 34.

172 LGBTI Legal Service Inc submission, 33-34; Survey participants, Queensland Council for LGBTI Health submission, 21.

173 Rainbow Families Queensland submission, 5; LGBTI Legal Service Inc submission, 3.

174 Suggestions provided by several survey participants, Queensland Council for LGBTI Health submission, 33-35.

175 LGBTI Legal Service Inc submission, 33-34; Suggestions provided by several survey participants, Queensland Council for LGBTI Health submission, 33-35.

176 Christian Schools Australia submission, 16; Human Rights Law Alliance submission, 13.

177 Fair Go for Queensland Women submission, 3; R Harrison submission, 2-3; James Cook University submission, 4; Freedom for Faith submission, 6.

178 Christian Schools Australia submission, 16.

179 R Harrison submission, 2-3; James Cook University submission, 4; Freedom for Faith submission, 6.

180 Freedom for Faith submission, 6.

assurances that teaching biblical sexual ethics would not be discriminatory.¹⁸¹ See also our discussion on religious exceptions in chapter 8.

Sex Discrimination Act

Sexual orientation is defined in the federal Sex Discrimination Act as a person's sexual orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex.¹⁸²

While this definition does not refer to 'heterosexuality, homosexuality' or bisexuality, it has the same coverage as the Queensland Anti-Discrimination Act.

Only two submissions approved of this option.¹⁸³

Lawful sexual activity

Prior to 2003, people were protected from discrimination because of any sexual activity that was lawful. This broadly encompassed those who were diverse in their sexual expression, including heterosexual people who were expressing their sexuality in a non-traditional way, such as people who had multiple partners or were polyamorous. However, since 2003 the definition has been confined only to lawful sex workers as described in detail in the following section.¹⁸⁴

An attribute based on 'activity' as opposed to an 'identity' proved to be limited in protecting people from discrimination based on sexual orientation, because the word 'activity' led to interpretation issues when a person was not practicing the activity.¹⁸⁵

One submission on behalf of sex workers suggested that the definition of sexuality should be replaced with a broad definition which includes all of a person's involvement in sexual activity.¹⁸⁶

Others thought that a broad, undefined lawful sexual activity attribute could be reintroduced, in addition to attributes protecting sexual orientation and sex workers.¹⁸⁷ Caxton Legal Centre gave examples of people whose other lawful sexual activity, that is, other than those in the sex/adult industry, has been the basis of discrimination. These examples included women who were asked or forced to leave workplaces after ending consensual sexual relationships with male colleagues, and treatment of people in pre-employment situations where there is sexual content in the public domain.¹⁸⁸

The words 'includes' rather than 'means'

Because the definition in the Anti-Discrimination Act says sexuality *means* heterosexuality, homosexuality and bisexuality it creates an exhaustive list to which nothing else may be added and allows for no other interpretation.

Equality Australia suggested following the approach adopted by the ACT and Tasmania, which have non-exhaustive lists of identities.¹⁸⁹ Because those Acts use the word *includes*, rather than *means*, other analogous (like) identities may be inferred. The list could also be expanded to

181 Australian Association of Christian Schools submission, 13; Australian Christian Higher Education Alliance submission, 16.

182 *Sex Discrimination Act 1984* (Cth) s 4.

183 Pride in Law submission, 3; LGBTI Legal Service Inc submission, 3.

184 Amendments made by the *Discrimination Law Amendment Act 2002* (Qld).

185 *JM v QFG* [1998] QCA 228 – Refusal of fertility treatment to lesbian women was found to be based on their sexual 'inactivity' and therefore not unlawful.

186 Eros Association submission, 3.

187 See for example: Australian Discrimination Law Experts Group submission, 49; Caxton Legal Centre submission, 24.

188 Caxton Legal Centre submission, 24.

189 See: *Discrimination Act 1992* (ACT) and *Anti-Discrimination Act 1998* (Tas), sexuality includes heterosexuality, homosexuality and bisexuality.

more than the three options currently in the Queensland definition and include identities such as pansexuality and asexuality.¹⁹⁰

The Review's position

The Review's position is that:

- The term 'sexual orientation' is more contemporary terminology and would improve consistency with Queensland, federal, and other state and territory legislation.
- A definition that is not tied to specific identities, for example bisexuality, would allow the Act to remain current as terminology changes.
- A broader and more inclusive definition is required to ensure that people who identify outside of heterosexual, homosexual, and bisexual identities are covered by the Act, and to ensure that sexually diverse communities know that they are recognised and protected by the Act.
- While consistency with the federal legislation generally has advantages, adopting the Sex Discrimination Act's definition would not improve protection of people in Queensland.
- Although creating an inclusive rather than non-exhaustive list of identities would allow tribunals and courts to infer analogous identities, it might also leave room for ambiguity and reduce certainty about who is protected by the Act.
- Using the word 'gender', instead of 'sex' in the definition of this attribute would align the Act with the Queensland Public Health Act and not compromise existing protections.
- The *Yogyakarta Principles* provide a best practice approach. To ensure coverage for people who are asexual or aromantic, a legislative note could clarify that sexual orientation includes not having an orientation.
- On the basis of material provided to the Review, we did not identify a gap in protection for people based on their sexual activity which is not already protected by sex, sexuality or relationship status attributes.

Recommendation 23

23.1 The Act should rename the sexuality attribute to sexual orientation, and define it to mean a person's emotional, affectional, or sexual attraction to, or intimate or sexual relations with:

- persons of a different gender; or
- persons of the same gender; or
- persons of more than one gender.

23.2 The section should include a legislative note that explains that sexual orientation includes not having attraction to or intimate or sexual relations with a person.

¹⁹⁰ Name withheld (Sub.008) submission, 1-2.

Sex workers

'Lawful sexual activity' is currently defined in the Act as:

a person's status as a lawfully employed sex worker, whether or not self-employed.¹⁹¹

The law was amended in 2002 to create this narrow definition, which meant that only sex workers were included, not any person engaging in lawful sexual activity.¹⁹²

This definition means that a person's *activities* as a sex worker, as opposed to *being* a sex worker (their status), are not protected by the Act. For example, refusing to provide accommodation because it is to be used for sex work is not covered by the Act,¹⁹³ but telling a person they cannot volunteer at an organisation because they are a sex worker could be.

Because the word 'lawful' is included in the attribute, only sex workers operating within the law are protected. At present, only two forms of sex work are legal – sex work conducted in licensed brothels, and private sex work by a person working alone. However, the majority of sex work occurs outside of these scenarios.¹⁹⁴ The Queensland Government has recently acknowledged that current laws have the effect of criminalising safety strategies used by sex workers, and consider that sex workers should not have to choose between working legally and being safe at work.¹⁹⁵

As a result, the Attorney General has referred to the Queensland Law Reform Commission (QLRC) terms of reference to review and investigate the legislative and regulatory framework necessary to decriminalise the sex work industry. In April 2022 the QLRC released a Consultation Paper outlining issues relevant to this Review, and will deliver its final report to the Attorney-General by 27 November 2022.¹⁹⁶

The types of sex work that are 'lawful' are likely to be the subject of recommendations by the QLRC. However, as we explain below, we do not consider that the lawfulness of the sex work should define whether or not sex workers should be protected by the Act.

In the Discussion Paper we asked whether the name of the attribute lawful sexual activity should be changed, and if so, what it should be. We also asked if a new definition should be included in the Act.

We received 35 submissions on the attribute of lawful sexual activity and its definition.¹⁹⁷

191 *Anti-Discrimination Act 1991* (Qld) Dictionary – lawful sexual activity.

192 *Discrimination Law Amendment Act 2002* (Qld) s 12.

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

194 See Prostitution Licensing Authority (Qld), Annual Report 2020-21 (Report, 2021) 20; Crime and Misconduct Commission, *Regulating Prostitution: A follow-up review of the Prostitution Act 1999* (Report, 2011) xiii.

195 The Honourable Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, 'Considering a safe and regulated sex work industry' (Media statement, 28 August 2021).

196 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022). Chapter 16 addresses discrimination against sex workers.

197 Abigail Corrin submission; Name withheld (Sub.022) submission; Prof John Scott submission; Queensland Council of Social Service submission; Name withheld (Sub.026) submission, PeakCare Queensland Inc submission; Jesse Jones submission; Magenta submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.059) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Touching Base Inc submission; Australian Lawyers Alliance submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Natasha submission; Jenna Love submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Jenny King submission; Queensland Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Sex Work Law Reform Victoria Inc submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Eros Association submission.

None were supportive of preserving the status quo and 23 supported the current attribute being replaced with 'sex work' and 'sex worker'.¹⁹⁸

In this section we also explore the sex worker accommodation exception,¹⁹⁹ because it is relevant to how far protections for sex workers should extend.

Ultimately, we recommend that the attribute of 'sex worker' should replace the attribute 'lawful sexual activity,' and that sex worker should mean being a sex worker and engaging in sex work. We recommend that the sex worker accommodation exception be repealed, if the Queensland Government introduces a legislative framework for regulating sex work.

Is there a gap in protection?

Respect Inc and DecrimQLD,²⁰⁰ told us that 'lawful sexual activity' is an ineffective attribute because:

- protection is limited to a person's status as a sex worker, rather than the practice of performing sex work
- many aspects of sex work are not lawful under current Queensland law
- the scope of the attribute is not clear which results in lengthy debates in tribunals and courts about the attribute
- it is hard to understand and for people to identify that they have protections.²⁰¹

The Respect Inc and DecrimQLD submission was drawn from information they obtained through consultations, workshops and online discussions held by Respect Inc, as well as a survey by DecrimQLD of 204 sex workers on experiences of discrimination and barriers to reporting.²⁰² They told us that a significant proportion of sex workers had experienced discrimination in the areas of goods and services (including provision of health care), accommodation, education, and administration of State laws and programs, but most did not make a complaint because they did not think they were included in the definition of the current attribute, or there was another barrier to making a complaint, such as privacy concerns.²⁰³

The Review also heard directly from 33 people who identified as sex workers through submissions and the Have Your Say survey, as well as a number of organisations that represent sex workers.²⁰⁴ People told us stories of discrimination that they had not complained about for various reasons. They also told us about the impact and consequences of discrimination. For example, one person told us that:

198 Respect Inc and DecrimQLD submission; Name withheld (Sub.022) submission; Prof John Scott submission; Jesse Jones submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.083); Alistair Witt submission; Touching Base Inc submission; Name withheld (Sub.059) submission; Queensland Council for LGBTI Health submission; Legal Aid Queensland submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Scarlet Alliance submission; Magenta submission; Name withheld (Sub.084) submission; Name withheld (Sub.069) submission; Stonewall Medical Centre submission; SIN (South Australia) submission; Name withheld (Sub.089) submission; Jenny King submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Caxton Legal Centre submission.

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

200 Respect Inc is the state-wide sex worker organisation in Queensland that provides a comprehensive health promotion and peer education program for sex workers and DecrimQLD is a committee of sex workers who have joined with Respect Inc to progress the removal of harmful and discriminatory sex work laws and achieve decriminalisation in Queensland.

201 Respect Inc and DecrimQLD submission, 2 and 35.

202 Respect Inc and DecrimQLD submission, 2.

203 Respect Inc and DecrimQLD submission, 5, 7.

204 For example: Eros Association submission; Magenta submission; Scarlet Alliance, Australian Sex Workers Association submission; Sex Workers Outreach Program and Sex Workers Reference Group (NT) submission; Sex Workers Outreach Project Inc NSW submission; SIN (South Australia) submission.

*...if sex workers can be discriminated against when finding employment it makes it harder for us to find jobs and stability outside of the industry...*²⁰⁵

Lawfulness

As we identify above, only a narrow section of the sex work industry is lawful, leaving many sex workers presently unprotected by the attribute. At the same time, we heard that discrimination is occurring for all sex workers, whether or not they are conducting their work in a way that is lawful, and that this discrimination has harmful impacts. This therefore creates a gap in protection.

For example, one person told us they used safety strategies such as sharing a hotel room with a colleague and sending text messages when bookings arrive and leave. As a result, they were acting unlawfully and would not be covered by the Act.²⁰⁶ Another sex worker told us:

*The attribute 'lawful sexual activity' as a euphemism for sex work in the Act, has always been problematic because not all lawful sexual activity is sex work and not all sex work is lawful.*²⁰⁷

Experiences of discrimination and stigma reported to the Review were common throughout the sex work industry.²⁰⁸ Respect Inc and DecrimQLD told us lawfulness is an unhelpful dividing line because 'more marginalised members of the sex worker community, who are likely to experience discrimination at a higher level of frequency or with more extreme outcomes, are not covered.'²⁰⁹

One participant in the survey DecrimQLD conducted said that:

*I did not believe I had grounds for a discrimination complaint because I was not a 'lawful' sex worker.*²¹⁰

Another person who identified as a sex worker told us:

*Lots of the ways in which I work to stay safe, such as sharing a hotel room with another sex worker, are unlawful. Therefore I am not currently covered by anti-discrimination legislation.*²¹¹

The status of being a sex worker

One of the key issues raised about the current attribute is that a person's *activities* as a sex worker, as opposed to *being* a sex worker (their status), are not protected by the Act.

The case of *Dovedeen*²¹² involved a sex worker being denied accommodation at a motel in Moranbah. It was decided in the Court of Appeal, so is the authoritative source for the meaning of the definition of 'lawful sexual activity.' The court found that the protected attribute is confined to a person's 'status' and does not extend to the 'activity' of engaging in sex work.

This means that there is also a gap in protection where the discrimination is experienced because a person is engaging in sex work.

205 Name withheld (Sub.066) submission, 1.

206 Name withheld (Sub.062) submission, 3.

207 Abigail Corrin submission, 1.

208 Dr Zahra Stardust, Carla Treloar, Elena Cama, Jules Kim, *I wouldn't call the cops if I were being bashed to death: Sex work, whore stigma and the criminal legal system* (2021) *International Journal for Crime, Justice and Social Democracy*, 10(2).

209 Respect Inc and DecrimQLD submission, 37.

210 Survey participant, Respect Inc and DecrimQLD submission, 5.

211 Name withheld (Sub.022) submission, 1.

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

People in the adult industry

Sex Work Law Reform Victoria told us that:

... discrimination against the adult and sex industries is not limited to sex workers. Other workers, including brothel operators, escort agency drivers, adult store managers and adult entertainers experience discrimination.²¹³

Taking into account these experiences, Sex Work Law Reform Victoria advocates that a broader group of people connected to the adult and sex industries should be protected.²¹⁴

Comparative approaches

Tasmania prohibits discrimination on the basis of 'lawful sexual activity'²¹⁵ and provides that 'sexual activity includes not engaging in, or refusing to engage in, sexual activity.'²¹⁶

In 2022 amendments, Victoria retained the attribute of 'lawful sexual activity'²¹⁷ but now also protects the attribute of 'profession, occupation or trade.'²¹⁸ 'Lawful sexual activity' means engaging in, not engaging in or refusing to engage in a lawful sexual activity.²¹⁹ The new attribute is not defined. In the Explanatory Memorandum to the Sex Work Decriminalisation Bill, Parliament states that the new attribute of 'profession, trade or occupation' is intended to address discrimination against sex workers and other persons based on their participation in sex work as a profession, trade or occupation, protect sex workers from discrimination in future, and de-stigmatise the sex work industry.²²⁰

The ACT protects the attribute of 'profession, trade, occupation or calling.'²²¹ The attribute is not defined, but the Parliamentary record when amendments to the Act were debated in 1994 indicates that sex work was contemplated as at least a significant reason for inclusion of this attribute.²²²

The Northern Territory has a proposal for reform in 2022 that would protect 'those who engage and have engaged in sex work.'²²³

In NSW, Western Australia, and federally there are no provisions for protecting sex workers from discrimination.

What are the options?

As outlined above, Respect Inc and DecrimQLD propose that instead of a new definition under the current attribute, new attributes of 'sex work' and 'sex worker' are necessary.²²⁴

In relation to the current attribute, the Australian Discrimination Law Experts Group advocated for retaining 'lawful sexual activity' but abolishing the definition, so that people are protected from discrimination when their sexual activity is lawful.²²⁵ Caxton Legal Centre advocated similarly,

213 Sex Work Law Reform Victoria Inc submission, 7.

214 Sex Work Law Reform Victoria Inc submission, 2.

215 *Anti-Discrimination Act 1998* (Tas) s 16(d).

216 *Anti-Discrimination Act 1998* (Tas) s 3.

217 *Equal Opportunity Act 2010* (Vic) s 6(g).

218 *Equal Opportunity Act 2010* (Vic) s 6(la).

219 *Equal Opportunity Act 2010* (Vic) s 4.

220 Explanatory Memorandum, *Sex Work Decriminalisation Bill 2021* (Vic) 9.

221 *Anti-Discrimination Act 1991* (ACT) s 7(1)(p).

222 Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 2 March 1994, 372-379.

223 *Achieving Equality in the Northern Territory*, Northern Territory Government, February 2022, 8.

224 Respect Inc and DecrimQLD submission, 35.

225 Australian Discrimination Law Experts Group submission, 49.

though recommended also explicitly protecting 'sex work'.²²⁶ Aged and Disability Advocacy Australia supported a new definition for the current attribute.²²⁷

Sex Work Law Reform Victoria advocate that the broader attribute of 'profession, trade or occupation' should be included in the Queensland Act, and Eros Association agrees with this position.²²⁸ The Australian Discrimination Law Expert Group advocated for inclusion of 'profession, trade or occupation' if an even broader attribute of 'social origin and social status' was not included.²²⁹

Does the attribute need to be defined?

Submissions and consultations have sent a strong message that both the sex work activity and the status of being a sex worker need to be protected. A clear definition would be helpful and would reduce the likelihood of lengthy legal arguments about the attribute itself.

There are no definitions of 'sex work' in discrimination legislation in Australia.

Some examples from legislation regulating sex work in other Australian jurisdictions are:

- The Victorian Sex Work Act defines 'sex work' as the provision by one person to or for another person of sexual services in return for payment or reward.²³⁰
- The ACT Sex Work Act defines 'commercial sexual services' as sexual services provided for monetary consideration or any other form of consideration or material reward (regardless of whether the consideration or reward is, or is to be, paid or given to the person providing the sexual services or another person).²³¹

In their Consultation Paper, the QLRC have used the following definition of sex work and sex worker:

'Sex work' refers to an adult providing consensual sexual services to another adult in return for payment or reward, and a 'sex worker' is someone who provides sex work within this meaning.²³²

The Review's position

The Review's position is that:

- The current 'lawful sexual activity' creates a gap in protection because the current attribute only protects lawful sex workers, but people who work outside of the regulated and licenced sector are still experiencing discrimination.
- The attribute and its definition should not be limited to a person's status as a sex worker, and should also include the activity of engaging in sex work to create certainty in the law, and to avoid an ongoing gap in protection.
- As the attribute of profession, trade or occupation, could cover almost any worker in any industry, of which most are not marginalised or socially disadvantaged groups, this would be a broad attribute and does not meet our criteria for inclusion of new attributes, and is therefore not preferred.

226 Caxton Legal Centre submission, 24.

227 Aged and Disability Advocacy Australia submission, 10.

228 Eros Association submission, 2.

229 Australian Discrimination Law Experts Group submission, 61. See further discussion on 'social origin and social status' later in this chapter.

230 *Sex Work Act 1994* (Vic) s 3.

231 *Sex Work Act 1992* (ACT) Dictionary.

232 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022), 5.

- In developing a definition for the term ‘sex work’, Queensland Parliament should consider the outcomes of the Queensland Law Reform Commission review to ensure consistency.

Are exceptions needed?

In this section we have considered whether exceptions are needed if the sex worker attribute is changed from the current definition of ‘lawful sexual activity.’

Accommodation for use in connection with sex work

In the Discussion Paper we asked for submissions about whether the sex worker accommodation exception should be retained, changed or removed. We received 39 submissions on this topic, with 37²³³ of them supporting removal of this exception.²³⁴ We did not receive submissions from accommodation providers on this topic.

A submission from Freedom for Faith provided the perspective of a religious accommodation provider and considered that use of accommodation for sex work would be a serious interference with religious convictions.²³⁵

Current approach

The Act currently provides that it is not unlawful for an accommodation provider to discriminate against another person by refusing to supply accommodation, evicting them, or treating them unfavourably in any way in connection with accommodation, if the accommodation provider reasonably believes 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.²³⁶

Accommodation is defined broadly to include business premises, houses, flats, hotels, motels, boarding houses and hostels, caravans, manufactured homes, camping sites, and building or construction sites.²³⁷

A regulatory framework

The terms of reference for the QLRC’s current review of the sex work industry states that the government intends that sex work will be lawful when conducted in accordance with the recommended regulatory framework to ensure better public health and human rights outcomes.

The QLRC’s Consultation Paper on the decriminalisation framework notes that sex work can extend to work at hotels or other commercial premises and to private sex workers working from their own residential premises.²³⁸ These are the circumstances in which the exception is most likely to apply.

233 Name withheld (Sub.008) submission; Abigail Corrin submission; Name withheld (Sub.022) submission; Prof John Scott submission; Public Advocate (Qld) submission; Name withheld (Sub.043) submission; Diversity Queensland Incorporated submission; PeakCare Queensland Inc submission; Magenta submission; Name withheld (Sub.059) submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Touching Base Inc submission; Maurice Blackburn Lawyers submission; Alistair Witt submission; SIN (South Australia) submission; Natasha submission; Jenna Love submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Sienna Charles submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Sex Workers Outreach Project Inc NSW submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Sex Work Law Reform Victoria Inc submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission.

234 The two submissions that did not support removal were: Name withheld (Sub.026) submission; Freedom for Faith submission.

235 Freedom for Faith submission, 6.

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

237 *Anti-Discrimination Act 1991* (Qld) Dictionary - ‘accommodation’.

238 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), 50-51.

The QLRC is currently considering a framework for the planning and regulation of commercial sex work and home-based sex work businesses, including whether there should be separation distances from other kind of land use (e.g., schools, childcare centres, places of worship) and limitations on the numbers of sex workers working from a premises.²³⁹ They will consider and balance the following in recommending a regulatory system:

- the recognition of sex work as legitimate work—one of the aims of decriminalising sex work is to bring sex work businesses into the mainstream of business regulation and to reduce unfair discrimination against sex workers
- the rights and interests of sex workers—limiting the places where sex work business premises can operate may impact on sex workers' safety, freedom of movement and enjoyment of property rights
- the interests of local communities—some people may have concerns about the impact of sex work businesses on local amenity, nearby places of worship or schools, community safety and quiet enjoyment of their homes
- the impact on government and industry—the decriminalisation framework should minimise the resource burden on government and the industry.²⁴⁰

Impact of the exception

Researchers Hobbs and Trotter have commented that the exception forms a 'viable pretext' for unfair treatment sex workers in a broad range of circumstances, and can result in poor treatment, overcharging and eviction, and could result in housing instability and homelessness.²⁴¹

The Respect Inc and DecrimQLD submission told us that they had received the following input from survey participants:

- 'I have been denied housing unless I did sexual favours.'²⁴²
- 'My stay at hotels have been cut short unless I paid more.'²⁴³
- 'The manager of the body corporate threatened to tell the neighbours if I didn't provide sex for free.'²⁴⁴

One submission to the Review also told us:

*Even though all my rent and bills were up to date, I was forced to move home rather than be considered to stay. This type of housing insecurity is unfair. When I compare my situation to friends in the exact same bracket of the rental market I can see that I have been put out, required to move, threatened unfairly and generally experienced less housing security simply because I am doing sex work from home.*²⁴⁵

239 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), chapter 12.

240 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), 134.

241 See Harry Hobbs and Andrew Trotter, 'How far have we really come? Civil and political rights in Queensland' (2013) 25(2) *Bond Law Review* 166, 205–6; Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 75–6, 78.

242 Survey participant (84), Respect Inc and DecrimQLD submission, 47.

243 Survey participant (205), Respect Inc and DecrimQLD submission, 43.

244 Survey participant (205), Respect Inc and DecrimQLD submission, 43.

245 Name withheld (Sub.062) submission, 5.

Purpose of the exception

The provision was introduced in 2012 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. That decision was subsequently overturned by the Court of Appeal.²⁴⁶

Records of parliamentary debate provide an insight into the policy intention at the time to: 'protect businesses from this sort of complaint and give them control over the use that is made of their premises...it will not allow a person to refuse to provide accommodation to someone merely because the other person is a sex worker.'²⁴⁷

Scope and how the exception is being applied

The sex worker accommodation exception may apply if 'the accommodation provider reasonably believes' that the accommodation is being used in connection with sex work.²⁴⁸ This provision is based on the subjective view of the property owner without the need for evidence of an intention to use, or actual use of, the property for sex work. While the belief must be 'reasonable,' in practice the reasonableness or otherwise of the property owner's belief will rarely, if ever, be subjected to scrutiny by the tribunal. Once a person has been evicted, it would be rare for them to make a complaint of discrimination.

Human rights considerations

The Human Rights Act protects and promotes human rights of people in Queensland. Human rights may be subject to reasonable limitations that can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom. In deciding whether rights can be reasonably and justifiably limited, consideration should be given to the factors outlined in the Human Rights Act.²⁴⁹

Under the Human Rights Act, sex workers have a right to privacy and home²⁵⁰ (which includes the right not to have their privacy, family, or home arbitrarily interfered with) which must be balanced with the accommodation providers' property rights²⁵¹ (which includes the right to own property and not be arbitrarily deprived of their property).

Placing the threshold at a 'reasonable belief' may amount to an arbitrary interference with a sex worker's right to privacy, particularly in residential tenancy situations.

When a similar exception was recently repealed in Victoria, the human rights statement of compatibility addressed these potentially competing rights and determined that repeal of the exception would not mean that accommodation provider's property rights are unfairly limited.²⁵²

246 See *GK v Dovedeen Pty Ltd & Anor* [2012] QCATA 128 for the Appeal Tribunal decision, and *Dovedeen Pty Ltd v GK* [2013] QCA 116 for the Court of Appeal decision.

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

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

249 *Human Rights Act 2019* (Qld) s 13.

250 *Human Rights Act 2019* (Qld) s 25.

251 *Human Rights Act 2019* (Qld) s 24.

252 Victoria, Parliamentary Debates, Legislative Assembly, 13 October 2021, 3875.

A number of submissions told us about other ways to protect the rights of property owners, for example:

There are other means by which landlords and businesses can retain control of their premises without prejudicing and stigmatising a particular group. For example, a landlord could insert a clause in a rental contract that says the premises cannot be used to conduct any business. There are also local laws in every jurisdiction which address amenity and noise complaints. These laws apply to everyone, including sex workers.²⁵³

The peace, comfort, and privacy of others, including other residents, guests, and neighbours to accommodation premises must also be considered. It may be that sex work cannot be safely and appropriately undertaken at all kinds of premises, but we have not had submissions directly on this point. However, Legal Aid Queensland told us that:

...removing this exemption does not alter the rights of accommodation providers to maintain standards of cleanliness, noise restrictions, etc to protect their premises and ensure the quiet enjoyment of other customers/tenants.²⁵⁴

Comparative approaches

Queensland is the only jurisdiction in Australia to have this exception in its discrimination law.

The most recent repeal of a similar provision occurred in February 2022 in Victoria.²⁵⁵

Acts done in compliance with other laws

Our proposed change to the scope of the attribute, which would include where a person is doing work as a sex worker, may create conflicting duties in some instances, such as for accommodation providers, financial institutions, or employers in sex work businesses. For example, a motel owner who does not have the approvals for a sex work business to run from all the rooms in the premises might be committing a development offence and could risk being fined, but to tell a person to stop doing sex work there may be discrimination. We have therefore considered whether a further exception may be required to ensure that duty holders can discharge obligations imposed by other laws and also comply with the Anti-Discrimination Act.

Current approach

Where discrimination is necessary to comply with or specifically authorised by another law, a duty holder can arguably be exempt from obligations under the Anti-Discrimination Act because of an exception in the Act. However, this only applies to laws passed before 1991.²⁵⁶

The Queensland Court of Appeal has considered how the Anti-Discrimination Act operates where there appears to be a conflict between a more recent law passed since 1991 and the Anti-Discrimination Act. In reaching its decision, the Queensland Court of Appeal considered established rules about the way courts interpret laws, and determined that if the provisions of an Act are completely inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication.²⁵⁷ If the laws cannot operate concurrently in a sensible way because the duty-holder would then be acting unlawfully in relation to another law, then the more recent law will prevail to the extent it is inconsistent. If the two laws can be reconciled, the duty-holder must comply with both laws.

253 Sex Work Law Reform Victoria Inc submission, 9.

254 Legal Aid Queensland submission, 94.

255 *Decriminalisation of Sex Work Act 2022* (Vic) s 36.

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

257 *State of Queensland v Attrill & Anor* [2012] QCA 299; *Goodwin v Phillips* [1908] HCA 55; (1908) 7 CLR 1; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 585.

In effect, this case means that the courts consider that a duty holder would not be liable for unlawful discrimination under the Anti-Discrimination Act if they are complying with an obligation imposed by a more recent law in instances that the laws cannot sensibly work in parallel.

If the attribute of 'lawful sexual activity' is amended to 'sex worker' in line with our recommendations, a situation could arise where a person is faced with having to comply with two different and conflicting laws that cannot be reconciled.

Comparative approaches

In other jurisdictions that protect sex workers from discrimination, there are general exceptions that mean a duty holder is not unlawfully discriminating if they act in accordance with other legislation.²⁵⁸

For example, in Victoria, a person may discriminate if the discrimination is 'necessary to comply with, or is authorised by, a provision of an Act...'²⁵⁹

The Review's position

The Review's position is that:

- The threshold for the sex worker accommodation exception is too low, because it allows discrimination based on 'reasonable belief' of an accommodation provider and this is leading to unfair treatment and housing instability for sex workers.
- The exception may not be compatible with human rights because it unreasonably limits the right to equality and the right to privacy of sex workers, including the right not to have a person's home arbitrarily interfered with, such as through eviction.
- Once home-based, hotel-based or work from commercial premises is regulated by the new decriminalisation framework being formulated by the QLRC, the system of regulation will balance the rights and interests of property owners, sex workers and the public.
- It is not the intention of the amendments to the attribute to create rights for sex work businesses over and above the rights of any other business owners, so an exception may need to be included to cover these situations.
- Acts done in direct compliance with laws regulating the sex work industry should not amount to discrimination under Queensland anti-discrimination legislation.

Recommendation 24

24.1 The Act should include 'sex worker' as an attribute and the attribute should be defined to mean 'being a sex worker or engaging in sex work.'

24.2 The Queensland Government should consider introducing an exception to permit discrimination on the basis of this attribute when an act is in compliance with a law that regulates the sex work industry.

24.3 Following the outcome of the Queensland Law Reform Commission's review of the regulatory framework for the sex work industry, the Queensland Government should:

- include a definition of sex work in the Act to align with any reforms to the sex work industry
- repeal the sex worker accommodation exception in 106C of the Act.

²⁵⁸ *Anti-Discrimination Act 1998* (Tas) s 24(a); *Anti-Discrimination Act 1992* (NT) s 53; *Equal Opportunity Act 2010* (Vic) s 75.
²⁵⁹ *Equal Opportunity Act 2010* (Vic) s 75.

Immigration status

The Terms of Reference ask us whether an additional attribute of immigration status should be introduced into the Act.

In the Discussion Paper we asked whether immigration status should be added as a stand-alone attribute, or whether sufficient protection could be provided by including immigration status in the definition of race. We received 18 submissions²⁶⁰ and all but two²⁶¹ supported including specific protections for people based on their immigration or migration status.

In this section we also explore the existing citizenship and visa status exception provision, because it is relevant to how far protections for people based on their immigration status should extend.

In the Discussion Paper we asked whether an existing general exception – a provision that allows eligibility provisions requiring a particular citizenship or visa status to be included in state government policies²⁶² – should be retained, removed, or changed. Of the nine submissions received,²⁶³ one recommended retaining the exception.²⁶⁴

We consulted with groups that support migrants, refugees, and people from minority cultural groups,²⁶⁵ as well as government agencies.²⁶⁶ Following the roundtable discussion, some government agencies raised concerns with us about the impact on financial resources and operational issues if the general exception for citizenship and visa eligibility provisions were to be removed.

We have concluded that the most appropriate way to ensure people are protected from discrimination on the basis of their immigration status is to extend the current definition of race, and that two general exceptions, specifically about immigration or migration status, should be available.

Is there a gap in protection?

While race is a protected attribute, the Act gives no indication of whether or not ‘race’ includes a person’s immigration status.

Race is defined in a non-exhaustive list to include: colour, descent or ancestry, ethnicity or ethnic origin, and nationality or national origin. As the definition uses the word ‘includes’ rather than ‘means,’ discrimination on the basis of race may include aspects of a person’s race not mentioned in the definition. Immigration status could possibly be inferred to be another aspect of race.²⁶⁷

260 Queensland Council for Civil Liberties submission; Youth Advocacy Centre Inc submission; Queensland Law Society submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Maurice Blackburn Lawyers submission; Multicultural Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Queensland Transcultural Mental Health submission; Dr Grazia Catalano submission; Department of Education (Qld) submission; Australian Industry Group submission; Australian Discrimination Law Experts Group submission; Name withheld (sub.069) submission; Life Without Barriers submission.

261 Department of Education (Qld) submission; Australian Industry Group submission.

262 *Anti-Discrimination Act 1991* (Qld) s 106B.

263 PeakCare Queensland Inc submission; Australian Discrimination Law Experts Group submission; Scarlet Alliance, Australian Sex Workers Association submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Department of Education (Qld) submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission.

264 Department of Education (Qld) submission.

265 For example: AMPARO Advocacy Inc consultation, 8 September 2021; Queensland Program of Assistance to Survivors of Torture and Trauma, consultation 23 August 2021; Brisbane Bahá’í community consultation, 12 August 2021; Bangladeshi community consultation, 15 August 2021; Islamic Women’s Association of Australia consultation, 16 September 2021; Immigrant Women’s Support Services consultation, 19 August 2021; Queensland African Community Council consultation, 8 September 2021.

266 Government representatives roundtable, 14 February 2022.

267 The Full Court of the Federal Court in *Macabenta v Minister of Immigration and Multicultural Affairs* (1998) 90 FCR 202 at 211 determined that nationality is equivalent to citizenship but different from national origin.

This interpretation is consistent with the approach taken in *Mabo v Queensland (No 1)* in which Deane J made the point in relation to the federal Racial Discrimination Act that race and the phrase ‘national or ethnic origin’ should not be given a ‘pedantic or unduly narrow meaning.’²⁶⁸

In some circumstances, complaints of discrimination because of a person’s immigration status might also be discrimination because of another aspect of race, such as the person’s ethnicity, nationality, or national origin.

Immigration status and citizenship are closely connected with nationality, which has been recognised as a protected status by the United Nations Human Rights Committee.²⁶⁹ The Committee on Economic, Social and Cultural rights has commented that the ground of ‘nationality’ applies to all non-nationals including refugees, asylum seekers, stateless persons, migrant workers, and victims of international trafficking.²⁷⁰

In the matter of *SUPRA*,²⁷¹ the NSW tribunal considered a similar non-exhaustive definition of race and determined that the practice of denying students on international student visas the same access to transport concessions as Australian students was nationality discrimination.

Depending on the circumstances, immigration status might be a characteristic of nationality. Characteristics that a person with an attribute generally has or are imputed to the person with that attribute are covered under the Act.²⁷²

A person who has immigrated to Australia and experienced discrimination because of that status might be protected under the race discrimination provisions, if the discrimination occurred because people of the person’s nationality are generally migrants, or it is often imputed that they are migrants.

However, nationality is unlikely to encompass immigration status in all circumstances. In the United Kingdom, where nationality but not immigration status is protected, this line of argument failed.²⁷³ Nigerian women on domestic worker visas had their passports taken by their employers and suffered exploitative conditions and abuse. However, the court found that the real reason for the discrimination was vulnerability arising from the women’s immigration status, which was not the same as their Nigerian nationality.

The inference that immigration status is already covered by the Act is supported by the current exception – citizenship or visa requirements imposed under State government policies.²⁷⁴ We discuss this further below.

Federal protections

In a number of sections, the Racial Discrimination Act gives protection from discrimination to a person who ‘is or has been an immigrant.’²⁷⁵

Discrimination because of immigration status was raised in relation to the ranking system for university admission, which may disadvantage overseas applicants compared with local students.

268 *Mabo v Queensland* (1988) 166 CLR 186, 230; [1988] HCA 69.

269 *Gueye v France* (196/85) – regarding the different treatment of retired soldiers depending on their nationality; *Adam v Czech Republic* (586/94) – regarding a law compensating Czech citizens who left the country under Communist pressure, which was not made available to a person with Czech parents who held citizenship of Australia; *Karakurt v Austria* (965/00) – where a Turkish citizen residing in Austria could not be a representative on a work council based on not being an Austrian citizen.

270 Committee on Economic, Social and Cultural Rights, *General Comment No. 20* (n 4) 30.

271 *SUPRA v Minister of Transport Services* [2006] NSWADT 83.

272 *Anti-Discrimination Act 1991* (Qld) s 8 (a) and (b).

273 *Taiwo v Olaiye* (and another) and *Onu v Akwivu* (and another) [1] [2016] UKSC 31.

274 *Anti-Discrimination Act 1991* (Qld) s 106B.

275 *Racial Discrimination Act 1975* (Cth) s 5.

However, the court found that because of the way the federal Act is drafted, immigration status can only be argued as direct, but not indirect, discrimination.²⁷⁶

This means that people in Queensland only have partial cover for discrimination on the grounds of immigration status under federal race discrimination law.

Experiences of discrimination

The Review was consistently told that people who are not Australian citizens, particularly if they are or have been refugees or asylum seekers, and people on short-term work visas (457 visas) are a marginalised group.²⁷⁷ This is significant given that around one in three people living in Queensland were born overseas, and 4.3% of the population has migrated from New Zealand.²⁷⁸

Multicultural Australia, which has extensive experience with clients from migrant and refugee backgrounds, told us that people regularly experience discrimination on the grounds of their visa or immigration status, including being:

- asked about their visa status and denied housing or employment, even where the visa category does not restrict them from obtaining accommodation or work
- subjected to exploitative working conditions, discrimination, or harassment on the assumption they won't take any action because of a 'precarious' visa.²⁷⁹

Queensland Transcultural Mental Health told us that immigration status is a 'large driver' of discrimination including when people try to access and navigate basic services – education, work rights, medical, and mental health care.²⁸⁰ They said that while policies exist for free health care for asylum seekers in Queensland, ongoing gaps and exclusions continue to pervade, creating significant inequality.²⁸¹

Another submission pointed to challenges for refugees who have severe to moderate disability, including psychosocial disability. While a range of programs and services is provided by the Queensland health and education departments to meet essential service needs, this does not extend to providing ongoing specialised disability supports. Special programs provided by the Queensland Government for resettlement support do not include specialised disability supports.²⁸²

Immigration Women's Support Service (IWSS) said that international students are struggling to find work since COVID-19, compared with the situation before the pandemic, and they have heard reports of a noticeable shift to employers hiring more permanent residents in roles in hospitality that they used to fill.²⁸³

Submissions received by the Review included these examples of discrimination related to immigration status:

- paying employees less than others because they are on 457 working visas²⁸⁴
- requiring disclosure of immigration status on rental application forms through real estate agencies²⁸⁵

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

277 See for example: Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021; Immigrant Women's Support Services consultation, 19 August 2021.

278 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>.

279 Multicultural Australia submission, 10.

280 Queensland Transcultural Mental Health submission, 11.

281 Queensland Transcultural Mental Health submission, 10.

282 Dr Grazia Catalano submission, 2-3.

283 Immigrant Women Support Services consultation, 19 August 2021.

284 Legal Aid Queensland submission, 79; Maurice Blackburn Lawyers submission, 12.

285 Legal Aid Queensland submission, 79; Maurice Blackburn Lawyers submission, 12.

- refusing bank or financial services because of being a migrant.²⁸⁶

Intersectional experiences

We also heard that discrimination is often caused by the interaction between a person's immigration status and another attribute or attributes.

Women from culturally and linguistically diverse communities who are temporary residents are at increased risk of stigma and marginalisation. To illustrate this point, Legal Aid Queensland provided this de-identified example from their legal practice:

May is from a refugee background. She worked at a small business and the only other person that worked there was the owner. May found out about the job from her neighbour and was introduced to the owner. The owner was an older male from the same community as May. The owner was underpaying her for her work which she was not aware of at the time. Due to her having a young family she needed the income to support her family. The owner offered to help May out by giving her a loan, which she accepted. While May worked with the owner, he would repeatedly make sexual advances towards her and touch her inappropriately. May left her employment as she was in an unsafe situation. May sought legal advice and is bringing a complaint against her former employer.

Legal Aid Queensland commented that if immigration status were recognised as a protected attribute, coupled with the recognition of intersectional discrimination, their client would have a strong complaint of discrimination on the grounds of immigration status and sex, as well as sexual harassment.

Similarly, IWSS told us about the challenges for women with temporary visa statuses who are trying to secure accommodation in a tight rental market. This has led to cases of sexual abuse from landlords, particularly where the person has taken up an informal tenancy arrangement, usually out of desperation.²⁸⁷

Scarlet Alliance noted that sex workers on temporary visas are a 'marginalised group within a marginalised group.' They report that migrant sex workers experience discrimination in relation to accommodation, financial services, and 'high rates of police and immigration harassment, threats and targeting.'²⁸⁸ Respect Inc and DecrimQLD echoed similar concerns that migrant sex workers feel coerced into providing information or testimony about other workers and were having difficulty reporting crimes and receiving support.²⁸⁹

AMPARO Advocacy Inc also told us about the intersectional experiences of their client group, who are people from refugee or migrant backgrounds and who have a disability. We heard that this group experiences serious challenges in navigating systems that are not designed for them, including access to essential services such as mental health.²⁹⁰

286 Maurice Blackburn Lawyers submission, 79.

287 Immigrant Women's Support Services consultation, 19 August 2021.

288 Scarlet Alliance, Australian Sex Workers Association submission, 11.

289 Respect Inc and DecrimQLD submission, 40.

290 AMPARO Advocacy Inc consultation, 8 September 2021.

Comparative approaches

Tasmania and the Northern Territory

Both the Northern Territory and Tasmanian Acts include a definition of race similar to Queensland's non-exhaustive definition, but with the added words, 'and status of being, or having been, an immigrant' (for Tasmania), and 'that a person is or has been an immigrant' (for the Northern Territory).²⁹¹

ACT Discrimination Act approach

The ACT legislation includes a stand-alone attribute of immigration status rather than including it in the definition of race, following a recommendation from the 2015 review of discrimination law by the Law Reform Advisory Council (LRAC) in that state.²⁹² The LRAC's view was this was appropriate to protect to a vulnerable part of the ACT community, and would give effect to the guarantee in the ACT's Human Rights Act of equal and effective protection against discrimination.²⁹³

Immigration status under the ACT legislation, 'includes being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth).'²⁹⁴

Which approach is preferred?

Of the submissions in favour of protections for people on the basis of immigration status, most indicated a preference for immigration status being a stand-alone attribute.²⁹⁵ Legal Aid Queensland preferred the stand-alone ACT approach because they thought it best captured the scope of immigration status to be protected.²⁹⁶

However, others thought that because there is already a detailed definition of race, it would be fitting to expand the categories within race.²⁹⁷

The Review's position

The Review's position is that:

- People who are, or have been, immigrants, migrants, refugees, or asylum seekers experience discrimination in many areas of public life and should be protected by the Act.
- On a broad reading of the existing non-exhaustive definition of race, immigration or migration status is generally covered by the Act. But to avoid any doubt, this should be made clear by adding immigration or migration status to the list of things that race includes in the definition.
- Creating a separate, stand-alone attribute of immigration status is unnecessary if it is already included in the definition of race.
- Defining the terms immigration status or migration status would serve to unnecessarily constrain the scope, and this approach would be consistent with other terms such as 'colour' and 'ancestry' being undefined.

291 *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4.

292 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 84, Recommendation 14.5.

293 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 81.

294 *Discrimination Act 1991* (ACT) Dictionary – immigration status.

295 Youth Advocacy Centre Inc submission, 4; Australian Lawyers Alliance submission, 15; Legal Aid Queensland submission, 15; Aged and Disability Advocacy Australia submission, 11; Queensland Law Society submission, 17; Maurice Blackburn Lawyers submission, 11.

296 Legal Aid Queensland submission, 96.

297 Australian Discrimination Law Experts Group submission, 54-55.

- Interpretation of the Act must be consistent with the Human Rights Act, and consideration of international human rights law commentary would lead to a broad and liberal interpretation of ‘immigration status’ or ‘migration status.’

Are exceptions needed?

Two submissions were concerned about the prospect of immigration status being an attribute, because it may cause inconsistency with other laws and obligations, or create an unreasonable compliance burden.²⁹⁸

In a roundtable with representatives of Queensland state government departments, we heard about financial resourcing and operational issues that might flow from including immigration status in the Act.²⁹⁹ Following the roundtable discussion, two government agencies directly raised concerns of this kind.

Employers

Submissions on behalf of employers raised two concerns about protecting immigration status:

- potential inconsistency between an employer’s obligation not to discriminate and the need to comply with various state and federal migration and other laws
- preferences for hiring Australian citizens because of the additional compliance burden required when hiring non-citizens.

The Australian Industry Group described the challenges for employers complying with the Migration Act,³⁰⁰ and noted other areas where there may be complications for employers³⁰¹ including that:

- The Queensland Labour Hire Licensing Authority identifies the presence of temporary migrant workers in a licence holder’s workplace as a risk factor to be considered in decisions to grant a labour hire licence and for general monitoring purposes.
- There are restrictions on hiring overseas workers if Australian workers can perform the work.³⁰²

Australian Industry Group also considered that:

It is inappropriate and unworkable for immigration status to be considered a protected attribute given the Migration Act’s protections and given employer preferences to employ citizens where possible to avoid significant obligations and risk attached to employing migrant workers on particular types of visas.³⁰³

Stakeholders who supported protection from discrimination on the basis of immigration status nevertheless acknowledged that some situations should fall outside the scope of the protection.³⁰⁴ Such a situation could include a complaint being made against an employer who could not employ a person or allow them to work more than a certain number of hours, because it would be unlawful under migration laws.

298 Australian Industry Group submission, 11-13; Department of Education (Qld) submission, 13.

299 Government representatives roundtable, 14 February 2022.

300 *Migration Act 1958* (Cth).

301 Australian Industry Group submission, 12-13.

302 Australian Industry Group submission, referring to the *Building and Construction Industry (Improving Productivity) Act 2016* which requires that the Building Code include a requirement that “no person is employed to undertake building work unless...the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.”

303 Australian Industry Group submission, 12.

304 Youth Advocacy Centre Inc submission, 4; Queensland Council for Civil Liberties submission, 16-17; Maurice Blackburn Lawyers submission, 11-12.

While some submissions suggested adding a reasonableness condition (like the ACT approach),³⁰⁵ Maurice Blackburn Lawyers suggested that statutory exceptions may need to apply.³⁰⁶ Legal Aid Queensland suggested that the ACT option should be implemented, but without the reasonableness aspect, because reasonableness is already encompassed in the definition of indirect discrimination.³⁰⁷

Education providers

The Queensland Department of Education said that inclusion of immigration status or changes to exceptions would have significant implications for service delivery and resourcing because the existing system is:

...predicated on the application of specific criteria to support government strategic objectives and specific visa class holders through the current citizenship or visa status exemption.³⁰⁸

A key concern was the potential for inconsistency with existing federal legislation that mandates charging of fees to international students (student visa (Subclass 500) holders), which is also reflected in the state education laws.³⁰⁹

Government policies

In 2012 a new general exemption³¹⁰ from the operation of the Act was added to the Anti-Discrimination Act.³¹¹ The provision allows eligibility provisions that require a particular citizenship or visa status to be included in state government policies, and is unique to Queensland.

Government policies that are exempt from the Act include where people are provided with financial or other assistance, services, or support – this may be disability supports, housing, or other essential government services.

While the justification for the new exemption was to ensure ‘effective management of limited public resources’,³¹² it was criticised at the time in submissions to the Legal Affairs and Community Safety Committee as being:

- potentially incompatible with human rights instruments including the ICCPR; and
- sought to target particular nationalities, in particular New Zealand citizens, and families of children with disabilities.³¹³

Rather than representing a shift in policy, the Department of Justice and Attorney-General advised the Committee that policies relating to education, training, housing, disability, mental health, seniors and investment services were already limiting access to services based on citizenship and visa requirements, and the government wanted certainty that this would not amount to discrimination.³¹⁴

305 See for example: Queensland Council for Civil Liberties submission, 16-17, Youth Advocacy Centre Inc submission, 4.

306 Maurice Blackburn Lawyers submission, 11.

307 Legal Aid Queensland submission, 95.

308 Department of Education (Qld) submission, 13.

309 Department of Education (Qld) submission, 13. Referring to *Education Services for Overseas Students Act 2000* (Cth) and *Education General Provisions Act 2006* (Qld).

310 *Anti-Discrimination Act 1991* (Qld) s 106B.

311 Inserted by *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* (Qld).

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

313 Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (Report no. 18, November 2012), 34-44.

314 Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (Report no. 18, November 2012), 44.

Submissions to this Review questioned whether the broad approach of allowing all government policies to contain eligibility provisions based on a particular citizenship or visa status was necessary and compatible with the right to equality protected under the Human Rights Act.³¹⁵

Comparative approaches

Other jurisdictions contain exceptions, but they do not have the same broad scope as the Queensland exception.

The Australian Capital Territory protects people from discrimination on the ground of their immigration status but provides an exception if the discrimination is 'reasonable' having regard to relevant factors.³¹⁶ The only example given of a relevant factor is the 'effect on the person.'³¹⁷

At the federal level, the Age Discrimination Act³¹⁸ provides an exemption for acts done in the administration of the Migration Act, or Immigration (Guardianship of Children) Act,³¹⁹ or associated regulations.³²⁰ The exemption also covers anything done in direct compliance with the Australian Citizenship Act³²¹ or Immigration (Education) Act.³²² The Disability Discrimination Act provides a similar exemption, but it requires that the acts done are permitted or required under the Migration Act (or legislative instruments made under it) for the exemption to apply.³²³

In the Northern Territory and Tasmania, which have broader definitions of race that explicitly cover immigration status, discrimination is permitted where necessary to comply with a law of the state or Commonwealth.³²⁴

Human rights considerations

We have identified potential inconsistency between the obligations of public entities to act compatibly with human rights under the Human Rights Act and the blanket approach of the citizenship or visa requirements exception.

The Human Rights Act protects and promotes human rights of people in Queensland, including that people are equal before the law and have the right to equal and effective protection against discrimination.³²⁵ The Act applies to everyone in Queensland regardless of their immigration or migration status.

Human rights may be subject to reasonable limitations that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. In deciding whether rights can be reasonably and justifiably limited, consideration should be given to the factors outlined in the Human Rights Act.³²⁶

Ensuring that finite state resources are effectively managed is a legitimate purpose to be achieved by government. However, this must be balanced with preserving human rights, including equality rights, for example, of people on temporary visas, who as a group may be vulnerable to marginalisation and exploitation.

315 See for example: PeakCare Queensland Inc submission, 16; Australian Discrimination Law Experts Group submission, 66; Legal Aid Queensland submission, 94; Respect Inc and DecrimQLD submission, 50.

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

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

318 *Age Discrimination Act 2004* (Cth).

319 *Immigration (Guardianship of Children) Act 1946* (Cth).

320 *Age Discrimination Act 2004* (Cth) s 43.

321 *Australian Citizenship Act 2007* (Cth).

322 *Immigration (Education) Act 1971* (Cth).

323 *Disability Discrimination Act 1992* (Cth) s 52.

324 *Anti-Discrimination Act 1998* (Tas) s 24; *Anti-Discrimination Act 1992* (NT) s 53.

325 *Human Rights Act 2019* (Qld) s 15.

326 *Human Rights Act 2019* (Qld) s 13.

Implementing eligibility provisions in government policies could potentially unreasonably limit people's human rights, particularly where the policies relate to accessing essential government services. Under the Human Rights Act, government service providers must consider whether there are less restrictive and reasonably available ways to achieve the balance between the equality rights of visa holders and non-citizens, and the legitimate purpose of preserving government resources for people most in need of assistance.

The Review's position

The Review's position is that:

- Employers and government departments should not have to deal with competing duties under migration laws and anti-discrimination law.
- Any exceptions that permit discrimination on the basis of immigration status, visa or citizenship status, should not be so broad as to allow unfavorable treatment to merely avoid inconvenience.
- Acts done in direct compliance with federal or state laws regarding immigration or citizenship should not amount to discrimination under Queensland anti-discrimination legislation.
- The current citizenship and visa status exception, if retained, should be consistent with obligations of public entities under the Human Rights Act to act and make decisions compatibly with human rights.

Recommendation 25

- 25.1** The Act should add the further terms 'immigration or migration status' to the non-exhaustive definition of race.
- 25.2** A general exception should be included in the Act to permit discrimination on the basis of immigration or migration status when an act is done in direct compliance with a law of the state or Commonwealth regarding the regulation of immigration to Australia, and related matters.
- 25.3** The existing citizenship or visa requirements exception should be retained in the same terms with an additional sub-section that requires that decisions and actions made under it are to be compatible with the Human Rights Act.
-

Religious belief or activity

In the Discussion Paper we asked about whether reform to the definition of existing attributes is needed. The current definitions for religious activity and religious belief are:

religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity.

religious belief means holding or not holding a religious belief.³²⁷

Three submissions said that the definitions required changes,³²⁸ and suggested that:

- The words ‘genuine’³²⁹ or ‘sincerely held’³³⁰ should be added to the religious belief definition.
- The definition of activity should be clear that it extends to observances of religious worship outside of personal, private observances.³³¹
- Religious belief or activity should encompass actions motivated by faith.³³²

At the commencement of the Review, we undertook initial consultations to identify priority issues. This included meeting with representatives from religious bodies and organisations representing religious educational institutions.³³³ During our consultations, we did not identify issues with the definition of religious belief or activity in the Act.

Family, carer and kinship responsibilities

In the Discussion Paper we asked whether any reform to the definitions for existing attributes is needed. We heard from five stakeholders that the definition of family responsibilities needs to be reconsidered.³³⁴

Current approach

Family responsibilities is defined in the Act to mean a person’s responsibilities to care for or support:

- a dependent child of the person; or
- any other member of the person’s immediate family who is in need of care or support.³³⁵

Immediate family is defined through an exhaustive list which is —

- the person’s spouse or former spouse; or
- a child of the person or the person’s spouse or former spouse, including an ex nuptial child, stepchild, adopted child, or past or present foster child of the person or the person’s spouse or former spouse; or

327 *Anti-Discrimination Act 1991* (Qld) Dictionary – religious activity, religious belief.

328 Australian Association of Christian Schools submission, 14; Christian Schools Australia submission, 17-19; Human Rights Law Alliance, 6-7.

329 Christian Schools Australia submission, 17-19; Human Rights Law Alliance, 6-7.

330 Australian Association of Christian Schools submission, 14.

331 Human Rights Law Alliance, 6-7.

332 Christian Schools Australia submission, 17-19.

333 Queensland Churches Together consultations (Christian churches and multifaith representatives), 13 and 16 September 2021; Associated Christian Schools consultation, 8 August 2021; Australian Christian Higher Education Alliance consultation, 21 September 2021; Brisbane Bahá’í Community consultation, 12 August 2021; Queensland Catholic Education consultation, 20 August 2021; Islamic College of Brisbane consultation, 8 August 2021; Islamic Women’s Association of Queensland consultation, 16 September 2021; Sikh Nishkam Society of Australia consultation, 9 August 2021.

334 Queensland Advocacy Incorporated submission, 4; Queensland Nurses and Midwives Union submission, 23-24; Equality Australia submission, 8; Australian Discrimination Law Experts Group submission, 50; Jacqueline King, Council of Unions, Consultation with the Review of the Anti-Discrimination Act, 16 September 2021.

335 *Anti-Discrimination Act 1991* (Qld) Dictionary – family responsibilities.

- a parent, grandparent, grandchild or sibling of the person or the person's spouse or former spouse.³³⁶

'Family responsibilities' are therefore confined to 'care or support' and 'immediate family' confined to children (such as stepchildren, grandchildren, and adopted or foster children); spouse or former spouse (and their children); and parents, grandparents, and siblings of the person or their spouse or former spouse. People caring for someone not included in the definition of 'close relative,' such as an aunt, uncle, or cousin would not be covered by this attribute.

Is there a gap in protection?

Stakeholders raised the following concerns with the current definition:

- People who provide critical care or support for a person with a disability who is not a relative would not be considered 'immediate family.'³³⁷
- This definition represents a narrow concept of family that is out of step with the diversity of contemporary families, cultural practices, and family arrangements, particularly when compared with other Australian discrimination and industrial laws.³³⁸
- Current definitions may exclude people without legal recognition of their relationships, co-parenting arrangements, and chosen or kinship family structures.³³⁹

Comparative approaches

Most Australian jurisdictions contain protections for the equivalent of 'family responsibilities' but there is no consistency in the terms used for this attribute. The terms used include: family responsibilities; responsibilities as a carer; parental status or status as a carer; family responsibility or family status; parental status, parent, family, carer or kinship responsibilities; parenthood; and caring responsibilities.

Definitions in state laws

Definitions in Western Australia, the ACT, and Victoria include caring relationships which are not limited to immediate family. The ACT and Victoria define a carer as a person on whom someone is dependent for voluntary care,³⁴⁰ and Western Australia includes having unpaid responsibility for the care of another person who need not be a dependent.³⁴¹

South Australia expressly recognises responsibilities for Aboriginal peoples and Torres Strait Islander peoples, with a definition that includes responsibilities to care for or support any person to whom that person is held to be related according to Aboriginal kinship rules or Torres Strait Islander kinship rules.³⁴²

336 *Anti-Discrimination Act 1991* (Qld) Dictionary – immediate family.

337 Queensland Advocacy Incorporated submission, 4.

338 Queensland Nurses and Midwives Union submission, 23-24; Equality Australia submission, 8 and 43; Queensland Council of Unions consultation, 20 August 2021.

339 Equality Australia submission, 43; Australian Discrimination Law Experts Group submission, 50.

340 *Discrimination Act 1991* (ACT) Dictionary; *Equal Opportunity Act 2010* (Vic) s4(1).

341 *Equal Opportunity Act 1984* (WA) s 4(1).

342 *Equal Opportunity Act 1984* (SA) s 5(3)(b).

Definitions in federal laws

The Sex Discrimination Act narrowly defines family or carer's responsibilities as responsibilities to care for or support dependent children or immediate family members,³⁴³ and is similar to the Queensland definition.

The federal Fair Work Act protects people from adverse action on the basis of family or carer's responsibilities.³⁴⁴ This prohibited ground is potentially open to a broader interpretation because it is undefined, and therefore should take its ordinary meaning.

Human rights considerations

International human rights law has broadly interpreted what family and caring relationships include,³⁴⁵ extending its meaning beyond a traditional family unit based on biological connections or marriage.³⁴⁶ The Human Rights Act provides for the right to protection of families and children.³⁴⁷ The Explanatory Notes to the Human Rights Bill 2018 state that 'family' is understood broadly and would extend to different cultural understandings of family and small family units with or without children.³⁴⁸

The concept of 'family' and the expectations placed on members of First Nations people and some culturally and linguistically diverse communities in relation to caring responsibilities are beyond the scope of the current definition. This is significant because cultural rights are protected under the Human Rights Act, and Aboriginal and Torres Strait Islander cultural rights are expressly recognised.³⁴⁹ The Human Rights Act refers specifically to the right of Aboriginal and Torres Strait Islander peoples to 'enjoy, maintain, control, protect, and develop their kinship ties.'³⁵⁰

Kinship responsibilities might extend to an obligation placed on a particular person because of their family and cultural connections. The term 'parent' may extend to a cultural parent including those extended family or kin involved in child rearing.³⁵¹ Other responsibilities may arise during Sorry Business, which involves obligations during the period of cultural practices and protocols associated with death.³⁵²

To ensure compatibility with the Human Rights Act, the meaning given to family, carer, or kinship carer may be informed by the language of relevant international instruments:

- *Convention on the Elimination of All Forms of Discrimination against Women* (United Nations)³⁵³
- *Workers with Family Responsibilities Convention* (ILO 156)³⁵⁴

343 Sex Discrimination Act 1984 (Cth) s 4A.

344 Fair Work Act 2009 (Cth) s 351.

345 United Nations Human Rights Committee, General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 32nd sess (8 April 1988). United Nations Human Rights Committee, General comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, 39th sess (27 July 1990). See also *Hendriks v Netherlands* (201/85), *X v Colombia* (1361/05), *Balaguer Santacana v Spain* (417/90), *Hopu and Bessert v France* (549/93).

346 This was recognised by Queensland Civil and Administrative Tribunal in *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 126, 22-28.

347 Human Rights Act 2019 (Qld) s 26(1).

348 Explanatory Notes, Human Rights Bill 2018 (Qld), 22.

349 Human Rights Act 2019 (Qld) s 27 cultural rights – generally, and s 28 – cultural rights – Aboriginal peoples and Torres Strait Islander peoples

350 Human Rights Act 2019 (Qld) s 28(b).

351 Department of Children, Youth Justice and Multicultural Affairs (Qld), *Charter of Rights for parents involved with the child protection system in Queensland*, 11.

352 SNAICC, *Sorry Business*, (Web page, 2022) <<https://www.supportingcarers.snaicc.org.au/connecting-to-culture/sorry-business/>>

353 United Nations General Assembly, International Convention of the Elimination of All Forms of Racial Discrimination, res 2106 (21 December 1965). The Preamble recognises that the traditional caring role of women for children should not be a basis for discrimination and that there should be responsibilities that are shared between men and women.

354 ILO Convention C156 – Workers with Family Responsibilities Convention, 1981 (no 156) – Article 1 refers to members of immediate family who clearly need care or support.

- *Convention on the Rights of the Child* (United Nations)³⁵⁵
- *Convention on the Rights of Persons with Disabilities* (United Nations)³⁵⁶
- *United Nations Declaration on the Rights of Indigenous Peoples*.³⁵⁷

The Review's position

The Review's position is that:

- A narrow definition of family responsibilities that includes only immediate family does not reflect diverse contemporary family structures.
- Aboriginal and Torres Strait Islander communities have the right and cultural responsibility to maintain their kinship ties, and the current definition fails to acknowledge this.
- Situations where a carer is not an immediate family member are not covered by the current definition. This exposes people who care for people with disability and older people to discrimination on that basis.
- Attempting to define family, caring, and kinship relationships is difficult and may unnecessarily constrain the interpretation of those words by tribunals and courts, and may become out of date.
- Most employers in Queensland are required to comply with the Fair Work Act, which contains family or carer's responsibilities as a protected ground.
- The preferred approach is to change the name of the attribute to reflect three distinct but often related responsibilities – family, carer, and kinship.
- The attribute should take its ordinary meaning, but be interpreted compatibly with Human Rights Act.

Recommendation 26

26.1 The current attribute of family responsibilities should be renamed 'family, carer, or kinship responsibilities' and should not be defined.

355 United Nations General Assembly, *Convention on the Rights of the Child*, res 44 (20 November 1989). Article 2(1) recognises that children have rights no matter what kind of family they come from (regardless of their parent or carer's status), and Article 5 confirms that state parties should respect the responsibilities and rights of not only parents, but those extended family or community members provided for by local custom, legal guardians and others responsible for the child.

356 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st sess, UN Doc A/RES/61/106 (13 December 2006). The Preamble sets out a key concept that family is the natural and fundamental group unit in society and people with disabilities and their family members should receive protection and assistance to ensure the full and equal enjoyment of rights for the person with disability. Article 23(5) further states that people with disabilities should be supported to be cared for by immediate family, in the alternative wider family, and failing that within the community in a family setting.

357 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2017), 4. The Preamble recognises the right of Indigenous family and communities to retain shared responsibility for upbringing, training, education and well-being of children.

Protecting additional attributes

Criteria for including new attributes

Since the introduction of the Anti-Discrimination Act over 30 years ago, social structures and community attitudes and expectations have changed.

Discrimination law has the job of protecting all people – and particularly people most at risk of experiencing discrimination – from its harmful effects. In this section we examine whether further attributes should be protected to ensure that the Act remains relevant in today’s society.

In 2002 the list of protected attributes in the Act was expanded to include parental status, family responsibilities, sexuality, and gender identity. Parliament’s reasons for enacting these amendments were ‘to acknowledge the changing nature of social and family relationships in contemporary society.’³⁵⁸

Since then, society’s attitudes have continued to change, with a notable example being the introduction of marriage equality.³⁵⁹ However, no additional attributes have been added to the Act since 2002. Through our consultations, submissions, and responses to the Discussion Paper, we heard the community’s expectations about additional attributes that should be protected by law, as well as attributes that are currently protected in other jurisdictions and how they are defined.

In recommending new attributes, we have considered what is essentially a threshold question. The Act’s effectiveness may be diluted, and it becomes difficult to comply with the law³⁶⁰ if there is a long list of attributes, particularly if they overlap, and lead to complaints on the basis of multiple attributes that cover the same characteristics.

Any lack of clarity about why unfair treatment because of some attributes and not others is prohibited can also undermine the credibility of the law.³⁶¹

Discrimination law in Queensland has aimed to provide a means to protect people from being treated unfairly, denied opportunities, refused access to what was by rights theirs, and from objectionable conduct, as well as providing enforcement provisions. While the Act sought to set a ‘new, normative standard of civilised behaviour’³⁶² it does not protect against all negative attitudes and stigma.

In deciding whether an attribute should be protected by the Act, we have asked:

- Is there a gap in protection?
- Is the proposed attribute of a comparable nature to those already covered under the Act?

Is there a gap in protection?

We have considered whether there is sufficient information to show that people with a particular characteristic require the protection of the Anti-Discrimination Act. In doing this, we have taken into account the frequency and type of discrimination people experience, and the impact it has on their lives.

358 Discrimination Law Amendment Bill 2012

359 Which included amendment of the federal *Marriage Act 1961* (Cth) on 9 December 2017 following a compulsory national plebiscite.

360 Australian Industry Group submission, 12.

361 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law*, (Bloomsbury Publishing, 2017) 160.

362 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3196-3197 (DM Wells, Attorney-General).

Whether people with the particular characteristic are already protected under an existing attribute, or are covered by other legislation, for example an industrial relations law, is also a factor for consideration.

Is the proposed attribute of a comparable nature to the attributes already in the Act?

The grounds of discrimination (such as age, sex, colour etc) protected under the *International Covenant on Economic Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) are provided as a non-exhaustive list, which means that further grounds may be incorporated over time.³⁶³

Protected attributes under these international instruments do not extend to any characteristic of a person, but only those that are comparable to the ones listed.³⁶⁴

We consider that attributes protected under the Anti-Discrimination Act fall into three main categories:

- **Immutable characteristics:** Attributes that relate to immutable characteristics, which are traits that a person cannot change – for example age, race etc.³⁶⁵
- **Characteristics of historically marginalised groups:** Attributes that relate to characteristics of historically marginalised groups or people who regularly experience stigma, prejudice, or vulnerability – for example, sex workers (covered by lawful sexual activity), people with mental health conditions, and people who live with HIV (covered by impairment).
- **Established human rights:** Attributes based on human rights protected under international instruments – for example religious belief or activity, political belief or activity.

The criteria we have adopted have been informed by the commentary of the United Nations Committee on Economic, Social and Cultural Rights Committee. In determining if another ground or ‘status’ should be recognised in addition to the express grounds, this Committee has commented that because the nature of discrimination varies according to context and evolves over time, there needs to be a ‘flexible’ approach, incorporating considerations of whether the group is experiencing discrimination which cannot be reasonably and objectively justified, and whether the group is of a comparable nature and is vulnerable, having suffered or continuing to suffer marginalisation.³⁶⁶

In considering additional attributes for inclusion in the Act we have had regard to the following factors in relation to groups or classes of people with a currently unprotected attribute:

- Is the group experiencing discrimination that cannot be reasonably and objectively justified?
- Is the group of a comparable nature to people represented by the attributes already recognised by the Act?
- Is the group vulnerable, having suffered and continuing to suffer marginalisation?

363 Article 2 of each Covenant states that ‘each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth **or other status.**’ [emphasis added]

364 William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR commentary* (N.P. Engel Publisher, 3rd rev ed, 2019) 774.

365 Another way that this has been framed is whether the person has a characteristic which is ‘either unchangeable or changeable only at unacceptable personal costs.’ – *Egan v Canada* [1995] 2 SCR 513

366 Committee on Economic, Social and Cultural Rights, *General Comment No. 20* (n 4) 27. See also *Egan v Canada*, [1995] 2 SCR 513, 554.

Ensuring the Act remains current

The only way to extend the list of protected attributes under the Anti-Discrimination Act is to amend the law.

While this is the case in all jurisdictions in Australia, some international jurisdictions have a different approach. The South African Act includes a list of prohibited grounds, but can also include any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to the prohibited grounds.³⁶⁷

Queensland's Human Rights Act has a non-exhaustive definition of discrimination that 'includes' the meaning of discrimination under the Anti-Discrimination Act. However, human rights legislation pertains to the relationship between an individual and the State, not between individuals and other individuals or organisations across broad areas of public life covered by the Anti-Discrimination Act, for example work and provision of goods and services in the private sector.³⁶⁸

Non-exhaustive attribute list

Four submissions suggested that a more flexible approach would be to allow tribunals and courts to recognise other attributes if they relate to systemic or historical disadvantage, based on the approach of the ICCPR and ICESCR in allowing grounds of discrimination to be included if comparable to existing grounds (as described above).³⁶⁹ Caxton Legal Centre thought that there would need to be a robust framework for establishing systemic or historical disadvantage before an attribute is included, so that the evolution of the law responds only to the demands of equality, not privilege.³⁷⁰

However, consistent with the ACT Law Reform Commission's decision not to adopt this approach,³⁷¹ we consider that:

- Uncertainty about whether discrimination is lawful or not is a genuine risk if there is a general 'or other status' element to the list of attributes. Ensuring that duty-bearers understand the scope of their responsibilities assists compliance.
- The business community have expressed concerns about the complexity of complying with both federal and state discrimination and industrial laws, each with different coverage.³⁷² If the laws become ambiguous and hard to apply, the level of compliance decreases.
- The Commission and the Act has a role in educating duty-holders and the community about anti-discrimination laws – a degree of certainty about what those rights and responsibilities is needed for the law to be effective.
- Such an open-ended provision could infringe on the fundamental legislative principle which requires that legislation is unambiguous and drafted in a sufficiently clear and precise way.³⁷³
- Tribunals and courts may be reticent to take on what may amount to a law-making function.

While we agree with the premise of needing to 'future-proof' the Act, more appropriate ways to achieve this are available, and are discussed in the following section.

367 *Promotion of Equality and Prevention of Unfair Discrimination Act* [No. 4 of 2000], ch 1 Definitions 1 (xxii).

368 *Human Rights Act 2019* (Qld) Sch 1 Dictionary.

369 Community Legal Centres Queensland submission, 2; Women's Legal Service Qld submission, 3; Queensland Advocacy Incorporated submission, 3; Caxton Legal Centre submission, 28.

370 Caxton Legal Centre submission, 28.

371 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015), 56.

372 Australian Industry Group submission, 12; Small business roundtable, 7 March 2022.

373 *Legislative Standards Act 1992* (Qld) s 4(3)(k).

Recommending additional grounds

One of the current functions of the Commission is:

When requested by the Minister, to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds into the Act.³⁷⁴

While this function provides the capacity to ensure that the list of protected attributes keeps in step with the needs of contemporary society, to the knowledge of the Review, this function has never been used, either by request from the Attorney-General or at the suggestion of the Commission.

In chapter 6 we recommend the expansion of the functions of the Commission including that the Commission's research function be retained and expanded.

Through its engagement and consultation work, the Commission is well placed to identify if and when additional attributes should be protected. To add to this knowledge, data about enquiries and complaints is routinely reviewed and analysed. To ensure the Commission takes a proactive role in monitoring the list of protected attributes, we consider that there would be value in allowing the Commission to recommend additional attributes to the Attorney-General on its own initiative, rather than only by request.

We anticipate that the Commission would need to establish a set of considerations to identify the threshold at which to recommend a new attribute be protected by the Act. This could be informed by the criteria for including new attributes outlined above.

The Review's position

The Review's position is that:

- The Commission's functions should include the capacity to recommend to the Attorney-General that additional grounds of discrimination be included in the Act. This would place the responsibility for identifying when additional attributes should be protected with the Commission, which is best placed to do so.
- This would allow for the Commission to recommend updates to the law without having to wait until the next comprehensive review of the Act.

Recommendation 27

27.1 The Commission's functions should include the ability to recommend to the Attorney-General that additional grounds of discrimination be included in the Act.

27.2 The Commission should establish an internal process to monitor and evaluate information it obtains, including through its education, engagement, and dispute resolution functions, to identify when the threshold for adding a new attribute is met.

Sex characteristics

In the Discussion Paper we asked whether sex characteristics should be included as an additional attribute, whether it should be defined, and if so, how.

Since the Discussion Paper was published, the Legal Affairs and Safety Committee has recommended that anti-vilification protections should extend to include sex characteristics and/or

³⁷⁴ *Anti-Discrimination Act 1991* (Qld) s 253(f).

intersex status,³⁷⁵ and the government has supported this in-principle, pending the outcome of this Review.³⁷⁶ Our recommendations in this section will therefore influence the terminology that will be used to recognise intersex people in relation to protection from both discrimination and vilification.

Current approach

People born with variations in sex characteristics, sometimes known as intersex, are not clearly covered by the Act. While the Act refers to being 'of indeterminate sex' in the definition of gender identity, this term is not used by people who have variations of sex characteristics.

Twenty submissions indicated support for a new attribute, separate from gender identity.³⁷⁷ No stakeholders suggested that people born with variations in sex characteristics were not in need of specific and separate protection, or that the status quo was appropriate.

Is there a gap in protection?

A detailed submission from Intersex Human Rights Australia (IHRA) provided examples of the discrimination experienced by people who have variations in sex characteristics in many areas of life, including health services, accommodation, education, employment and insurance.³⁷⁸

IHRA refers to a survey of people born with atypical sex characteristics which identified that individuals whose variations are more physically evident to strangers are more likely to bear the brunt of social discrimination³⁷⁹ and where a variation is not evident, an individual may avoid disclosure, or medicalise their intersex trait, to prevent risks of discrimination.³⁸⁰

Australia Lawyers Alliance also comment that:

People born with variations of sex characteristics, also called intersex people, experience stigmatisation, discrimination, bullying, body shaming and other forms of discrimination and harm because of their sex characteristics, and also assumptions about their identities.³⁸¹

In our consultations³⁸² we heard from Intersex Peer Support Australia and Queensland Council for LGBTI Health about the issues faced by this group. A strong and consistent theme was negative and sometimes traumatic experiences when accessing health services.

The current definition of gender identity creates a gap in protection by incorrectly conflating trans and gender diverse people and people born with variations of sex characteristics. The words 'of indeterminate sex' used in the gender identity definition are not used by people with variations in sex characteristics, and in 2002 when the gender identity attribute was created there seems to

375 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 45.

376 Queensland Government, Response to Inquiry into serious vilification and hate crimes (Tabled Paper, 2022), Recommendation 4.

377 Intersex Human Rights Australia submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Diversity Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission; Queensland Council for LGBTI Health submission; Queensland Council for Civil Liberties submission; Queensland Law Society submission; R Harrison submission; Name withheld (sub.008) submission; Respect Inc and Decrim QLD submission; Just.Equal Australia submission; Pride in Law submission; Australian Discrimination Law Experts Group submission; LGBTI Legal Service Inc submission; Aged and Disability Advocacy Australia submission; Equality Australia submission; Legal Aid Queensland submission; Australian Lawyers Alliance submission.

378 Intersex Human Rights Australia submission, 12-16.

379 Intersex Human Rights Australia submission, 13. Referring to Tiffany Jones, Bonnie Hart, Morgan Carpenter, Gavi Ansara, William Leonard, and Jayne Lucke, *Intersex: Stories and Statistics from Australia*, (Open Book Publishers, 2016). Summary of findings available: <<https://ihra.org.au/30313/intersex-stories-statistics-australia/>>.

380 Intersex Human Rights Australia submission, 13.

381 Australian Lawyers for Human Rights submission, 4.

382 Intersex Peer Support Australia consultations, 9 September and 16 September 2021; Queensland Council for LGBTI Health consultation, 26 August 2021.

have been insufficient community consultation on this language.³⁸³ The current definition not only uses inappropriate and stigmatising language, but makes it difficult for people to identify if they are protected by the law.

Is the proposed attribute of a comparative nature to those already covered under the Act?

Sex characteristics are either innate (genetic traits) or acquired (for example, through life-preserving medical treatment).³⁸⁴ People with variations in sex characteristics possess an 'immutable characteristic' and they experience disadvantage and stigma because of it. They are an analogous group to those already protected by the Act.

Comparative approaches

Having a variation in sex characteristics is not a gender identity, and most Australian jurisdictions have separated these attributes. The federal Sex Discrimination Act has included 'intersex status' since 2013.³⁸⁵

Since that time, advocates have sought to include a universal sex characteristics attribute,³⁸⁶ which is a position endorsed in the community consensus Darlington Statement.³⁸⁷ Tasmania includes an attribute called 'intersex variations of sex characteristics',³⁸⁸ Victoria and the ACT include 'sex characteristics',³⁸⁹ and the Northern Territory has announced it will protect 'sex characteristics' as an attribute.³⁹⁰

We note that the Legal Affairs and Community Safety Committee recently identified the need to protect people with variations of sex characteristics from vilification. However, the Committee did not decide which was the better term, 'sex characteristics' or 'intersex status'.³⁹¹

Which terminology and definition are preferred?

We recognise that people with variations in sex characteristics have a range of experiences. One participant in a community survey run by QC LGBTI Health described having a variation in sex characteristics:

*It's not an impairment and it's not a gender identity or a sex. It is various conditions that make someone appear to be a mix of genders naturally. They could be XX, XXY's etc. Or they might be like me, hormones gone haywire and now I have low SHBG and high testosterone leading to hirsutism and me looking like a man but being a woman.*³⁹²

The majority of submissions explicitly endorsed the *Yogyakarta Principles plus 10* terminology and approach (reflected in ACT and Victorian legislation).³⁹³ The alternatives noted were: potential

383 Intersex Human Rights Australia submission, 21-22 referring to Queensland parliament records (Hansard).

384 Intersex Human Rights Australia submission, 26.

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

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

387 Intersex Human Rights Australia, *Darlington Statement* (Web Page, 2022) <<https://ihra.org.au/darlington-statement/>>.

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

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

390 Northern Territory Government, *Territory Stories – Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

391 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

392 Survey participant (2), Queensland Council for LGBTI Health submission, 21.

393 Name withheld (sub.008) submission, 2; Intersex Human Rights Australia submission, 26; Rainbow Families Queensland submission, 6; PeakCare Queensland Inc submission, 15; Australian Lawyers Alliance submission, 16; Australian Lawyers for Human Rights submission, 4; Queensland Positive People, HIV/AIDS Legal Centre,

inclusion in the attribute of sex,³⁹⁴ or physical features,³⁹⁵ or emulating the federal approach of intersex status.³⁹⁶

The Preamble to the *Yogyakarta Principles plus 10*³⁹⁷ defines 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.’

Intersex Human Rights Australia recommended the inclusion of ‘sex characteristics’ based on the *Yogyakarta Principles plus 10* terminology and definition, rather than an ‘intersex status’ attribute, for reasons including that sex characteristics:

- operates ‘at a different, finer degree of granularity to the coarser, broader concept of intersex status’
- are not an identity, and this would be made clearer
- are universal.³⁹⁸

The Review’s position

The Review’s position is that:

- Having determined that there is a gap in protection, and that the attribute is comparable to existing grounds, adding an additional and separate ‘sex characteristics’ attribute meets our criteria for including a new attribute.
- The *Yogyakarta Principles plus 10* provides a best practice approach to defining this attribute.

Recommendation 28

28.1 The Act should include a new attribute of sex characteristics, defined consistently with the *Yogyakarta Principles plus 10*.

Criminal record attributes

The Terms of Reference ask us to consider three potential new attributes based on a person’s criminal history:

- spent criminal conviction
- irrelevant criminal record
- expunged homosexual conviction.

and National Association of People with HIV Australia submission, 14; Equality Australia submission, 7; Just.Equal Australia submission, 4; Respect Inc and DecrimQLD submission, 42; Australian Discrimination Law Experts Group submission, 55.

394 Australian Association of Christian Schools submission, 14.

395 Legal Aid Queensland submission, 84.

396 Pride in Law submission, 3; LGBTI Legal Service Inc submission, 9.

397 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

398 Intersex Human Rights Australia submission, 26-28.

The Review received 45 submissions³⁹⁹ on this topic. Overall, there was strong support for adding spent criminal record, irrelevant criminal record, and expunged homosexual conviction as further potential grounds protected by the Act. Two submissions expressed reservations, but did not oppose the inclusion of the attribute if a balanced approach is taken, and reasonable exceptions are available to employers.⁴⁰⁰

In summary, we have determined that the Act should include an attribute of ‘irrelevant criminal record,’ which includes charges, convictions (including spent and expunged homosexual convictions) and infringement notices.

Current approach

People are not protected from discrimination on the grounds of criminal record in Queensland.

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.⁴⁰¹ A complainant cannot refer the matter to a court for determination or seek any financial or other redress.⁴⁰²

Is there a gap in protection?

The submissions highlight that discrimination based on criminal record has adverse impacts on foundational aspects of an individual’s life, and across broad areas of activity including access to goods and services, employment, and accommodation.

One submission told us that:

I have been refused memberships with private associations and non-profit organisations, private clubs, employment positions and volunteer roles. I have also been discriminated against based on a non-existent criminal history which has considerably disadvantaged me in my public life and of which there are currently no protections in Australia. I have also been reconsidered as a volunteer for this organisation due to my criminal history and specifically, the ‘spent’ public nuisance offence.⁴⁰³

399 Youth Advocacy Centre Inc submission; Queensland Law Society submission; Queensland Advocacy Incorporated submission; Caxton Legal Centre submission; Australian Industry Group submission; Just.Equal Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Equality Australia submission; Queensland Positive People, HIV/AIDS Legal Centre, The National Association of People with HIV Australia submission; Community Legal Centres Queensland submission; Queensland Council for Civil Liberties submission; Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Tenants Queensland submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Sisters Inside Inc submission; Clubs Queensland submission; Australian Lawyers Alliance submission; Maurice Blackburn Lawyers submission; Touching Base Inc submission; Shane Cuthbert submission; Pride in Law submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; PeakCare Queensland Inc submission; Hub Community Legal submission; United Nations Association of Australia, Queensland Chapter, submission; Eros Association submission; Sex Work Law Reform Victoria submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Jenny King submission; Name withheld (sub.089) submission; Jenna Love submission; Natasha submission; SIN (South Australia) submission; Alistair Witt submission; Stonewall Medical Clinic submission; Dr Zahra Stardust submission; Name withheld (sub.064) submission; Magenta submission; Prof John Scott submission; Remi submission; Abigail Corrin submission.

400 Australian Industry Group submission; Clubs Queensland submission.

401 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.

402 Australian Human Rights Commission, *The Australian Human Rights Commission’s Complaint Process: for complaints about discrimination in employment (ILO)* (Web page, 2022) <<https://humanrights.gov.au/our-work/complaint-information-service/australian-human-rights-commissions-complaint-process-1>>.

403 Name withheld (sub.065) submission.

Not only does having a criminal record create social and economic disadvantage, but it can lead to reoffending either because the person is unable to gain employment, or they feel hopeless about their future.⁴⁰⁴

Submissions highlighted the impacts of criminal record discrimination on employment opportunities, and in particular the disadvantage to women, young people, Aboriginal and Torres Strait Islander communities, and sex workers, including people who experience discrimination on the basis of combined attributes.⁴⁰⁵

Queensland Positive People and others stated that:

...one-off minor drug possession charges can hinder people's ability to enter the workforce, particularly young people. It can also impact future employment prospects when attempting to seek a higher position with a different organisation.

Employment is important to a lot of people and can provide a better standard of living due to financial and mental health advantages. With access to better financial and social circumstances, young people in particular are less likely to be involved in risk-taking behaviours and engage with support services to resolve issues that may emerge.⁴⁰⁶

We also heard that this form of discrimination impacts a person's wellbeing, and their ability to rehabilitate and reintegrate into society and move forward with their lives.⁴⁰⁷ Some submissions also highlighted that discrimination on the basis of an irrelevant criminal record may mean a person is not able to access safe housing.⁴⁰⁸ Tenants Queensland stated that people are denied tenancies because of a criminal record, despite the particular offence having no bearing on their ability to pay rent or maintain the tenancy.⁴⁰⁹

We received a number of submissions from the perspective of sex workers and the impact of discrimination based on criminal history causing barriers to housing, financial security, qualifications, and employment.⁴¹⁰ This group experiences particular impacts because of the narrow framework for legal sex work in Queensland.⁴¹¹ Scarlet Alliance described the impact of criminal record discrimination as follows:

*Allowing discrimination to continue against people with criminal records is a form of double jeopardy, where people face barriers both whilst incarcerated and then subsequently in areas of public life.*⁴¹²

404 Australian Human Rights Commission, *Discrimination in Employment on Basis of Criminal Record* (Web page, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record#e9>>.

405 See for example: Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 13-14; Sisters Inside Inc submission, 8-9; SIN (South Australia) submission, 4; Jenny King submission, 4.

406 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13-14.

407 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 5-6; TASC National Limited submission, 6; Caxton Legal Centre submission, 25-26; Youth Advocacy Centre Inc submission, 3; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 13-14.

408 Sisters Inside Inc submission, 8-9; Queensland Advocacy Incorporated submission, 10; Scarlet Alliance submission, Australian Sex Workers Association submission, 10; TASC National Limited submission, 6.

409 Tenants Queensland submission, 5.

410 See for example: Respect Inc and DecrimQLD submission; Scarlet Alliance, Australian Sex Workers Association submission, 10; Abigail Corrin submission; Dr Zahra Stardust submission; Jenny King submission.

411 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022). See also Updating current attributes - Sex workers, in this chapter.

412 Scarlet Alliance, Australian Sex Workers Association submission, 11.

Is the proposed attribute of a comparable nature to those already covered by the Act?

As described above, submissions indicated that some people who have a criminal record experience persistent disadvantage and marginalisation in many areas of public life.

The Australian Human Rights Commission (AHRC) have commented that people with a criminal record face significant barriers to participation in the community and that consistent with the right to equality, people should be treated based on their merits rather than stereotypes. The AHRC acknowledges, however, that there must be a careful balancing of rights:

On the one hand former offenders have ‘served their time’ and paid their debt to society. They have the same right to seek employment as any other member of the community. On the other hand, there may be certain circumstances where a person with a particular criminal record poses an unacceptably high risk if he or she is employed in a particular position.⁴¹³

Given that the proposed attribute requires an assessment of relevance (that is, an *irrelevant* criminal record) recency and severity of a person’s criminal history will be relevant to whether or not potentially discriminatory actions, such as refusing to give someone a job, amount to unlawful discrimination.

In the context of implementing international labour law obligations, the Australian Government has included irrelevant criminal record as a protected attribute. The International Labour Convention 111, which is scheduled to the federal Australian Human Rights Commission Act,⁴¹⁴ includes the right to non-discrimination based on a list of non-exhaustive grounds. In 1989, the federal government added additional analogous grounds including ‘criminal record.’⁴¹⁵ In 2019, this was replaced with ‘irrelevant criminal record.’⁴¹⁶

In addition, the European Court of Human Rights has also determined that criminal record may be a ground of discrimination under the non-exhaustive list of grounds covered by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which is based on the rights in the *International Covenant on Civil and Political Rights*.⁴¹⁷

We consider that people with criminal records are a comparable group to people with existing attributes because:

- People with criminal records, spent convictions, and expunged homosexual convictions are groups that experience social disadvantage in many areas of public life.
- A criminal conviction is something that cannot be changed after it is on a person’s record, even if the person goes on to rehabilitate their life and become a contributing member of the community.
- The federal government has acknowledged that irrelevant criminal record is an analogous ground to expressly protected rights under international human rights obligations.

Comparative approaches

Three different approaches to protecting people from discrimination based on their criminal record have been adopted in Australian jurisdictions:

413 Australian Human Rights Commission, *Discrimination in Employment on Basis of Criminal Record* (Web page, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record#e9>>.

414 *Australian Human Rights Commission Act 1986* (Cth).

415 *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) s 4 – No longer in force.

416 *Human Rights and Equal Opportunity Commission Regulations 2019* (Cth) s 6.

417 *Thlimmenos v Greece* [2000] ECHR 162.

- only protecting people from discrimination based on a spent conviction, as in Western Australia or Victoria⁴¹⁸
- protecting people from discrimination based on irrelevant criminal records, as in the ACT,⁴¹⁹ Northern Territory,⁴²⁰ Tasmania,⁴²¹ and the Commonwealth⁴²²
- separately protecting people from discrimination based on expunged homosexual conviction and spent convictions, as in Victoria.⁴²³

Spent convictions

A spent criminal conviction provision means that the need to disclose the offence has passed.⁴²⁴ In Queensland this is called the ‘rehabilitation period’ which is usually five 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.⁴²⁵

The narrow approach reflected in Western Australian laws is to only cover discrimination on the ground of a person’s spent convictions. Victoria, which only recently introduced a spent conviction scheme, only protects people from discrimination based on their spent convictions.⁴²⁶

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 in which the discrimination happens is not relevant to the offence.

In practice, basing an attribute on a spent convictions scheme set out in other legislation may be complex and potentially challenging for people with a criminal record or duty holders to navigate. To avoid discriminating, it is important to be able to easily ascertain whether a person is covered by the attribute or not.

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) in Queensland.⁴²⁷ In Victoria, people have been protected from discrimination on the ground of an expunged homosexual conviction since 2015.

Submissions on this topic told us that:

- Including this attribute would recognise that it is unjust to permit discrimination against a person based on a conviction that was only instituted against them due to historical prejudice.⁴²⁸
- Including this attribute would strengthen protections against discrimination under the expungement scheme.⁴²⁹

418 *Equal Opportunity Act 2010* (Vic), s 6(pb).

419 *Discrimination Act 1991* (ACT) s 7(1)(k).

420 *Anti-Discrimination Act 1992* (NT) s 19(p).

421 *Anti-Discrimination Act 1998* (Tas) s 16(r).

422 *Human Rights and Equal Opportunity Commission Regulations 2019* (Cth) s 6.

423 *Equal Opportunity Act 2010* (Vic), s 6(pa).

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

425 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5.

426 *Spent Convictions Act 2021* (Vic) s 28 amended the *Equal Opportunity Act 2010* (Vic) to include a new attribute.

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

428 Legal Aid Queensland submission, 74; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13.

429 Just.Equal Australia submission, 3.

- Prior convictions remain a burden on individuals and their families through continued fears of the convictions being found.⁴³⁰

Of the 74 survey respondents to a survey conducted by Queensland Council for LGBTI Health for this Review, 84% considered there to be a need to protect people from discrimination on the basis of expunged homosexual conviction,⁴³¹ particularly for older members of the community.⁴³² One person told us that:

*People live with the fear of past convictions. Sometimes overt protections can increase trust, improve confidence and reduce self-discrimination or people choosing not to act/engage due to past shame.*⁴³³

In 2016, the Queensland Law Reform Commission (QLRC) was asked to recommend how Queensland could expunge criminal convictions for historical homosexual offences from a person's criminal history.⁴³⁴ In that review, the QLRC considered whether the Anti-Discrimination Act should be amended to prohibit discrimination on the basis of expunged conviction. Although all submissions referenced supported the change, the QLRC did not recommend including this attribute because they considered it would already be covered by existing attributes.⁴³⁵

Irrelevant criminal record

Irrelevant criminal record is a protected attribute in Tasmania,⁴³⁶ Northern Territory,⁴³⁷ and the ACT.⁴³⁸ Each of these state and territory laws closely aligns in wording and effect, with the major differences being:

- Tasmania and Northern Territory have the wording 'records relating to arrest or interrogation' while ACT limits the application to an 'offence, or an alleged offence.'
- ACT includes 'infringement notices for the alleged offence.' This is not protected in Northern Territory or Tasmania.
- Tasmania does not include spent records.
- Northern Territory refers to spent convictions and expunged homosexual convictions within the meaning of irrelevant criminal record.

To ensure the scope of the attribute is clear, the state and territory jurisdictions have created detailed definitions of the attribute.

For example, the definition in the ACT states that an irrelevant criminal record means a record relating to an offence, or an alleged offence, if —

- the person has been charged with the offence but—
 - a proceeding for the alleged offence is not finalised; or
 - the charge has lapsed, been withdrawn or discharged, or struck out; or
- the person has been acquitted of the alleged offence; or

430 Queensland Council for LGBTI Health submission, 12.

431 Queensland Council for LGBTI Health submission, 40.

432 Survey participants (16, 17), QC LGBTI Health submission, 42.

433 Survey participant (14), QC LGBTI Health submission, 41.

434 Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences*, (Report No 74, 2016).

435 Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences*, (Report No 74, 2016), 7.21-7.25.

436 *Anti-Discrimination Act 1998* (Tas) s 3.

437 *Anti-Discrimination Act 1992* (NT) s 4.

438 *Anti-Discrimination Act 1991* (ACT) Dictionary.

- the person has had a conviction for the alleged offence quashed or set aside; or
- the person has been served with an infringement notice for the alleged offence; or
- the person has a conviction for the offence, but the circumstances of the offence are not directly relevant to the situation in which discrimination arises; or
- the person has a spent conviction or an extinguished conviction, within the meaning of the Spent Convictions Act,⁴³⁹ for the offence.

Criminal record or irrelevant criminal record?

While the Australian Industry Group did not support the expansion of the Act generally to include further attributes, it commented that the Federal Government's 2019 amendment to the Australian Human Rights Commission Regulation which changed the protected grounds from a 'criminal record' to 'irrelevant criminal record', strikes the right balance by providing:

clarity to employers by establishing it is now unlawful for an employer to discriminate against a job applicant on the basis of their criminal record if the applicant has an 'irrelevant criminal record,' rather than previously demonstrating that the applicant's criminal record was irrelevant to the inherent requirements of the job.⁴⁴⁰

The issue of inherent requirements was also raised by Clubs Queensland. While not opposed to introducing new attributes, Clubs Queensland considered it imperative that clubs can continue to meet their obligations under other legislative instruments when employees are working around gaming machines or large amounts of money. Clubs may need to reject applications of prospective employees or dismiss current employees because of a relevant criminal conviction.⁴⁴¹

Australian Discrimination Law Experts Group identified a specific issue with the name of the attribute being 'irrelevant criminal record' in circumstances where a person is imputed to have a criminal record but does not have such a record.⁴⁴² In such a case, the relevance factor in 'irrelevant criminal record' may lead to convoluted arguments.⁴⁴³ One way to resolve this is to add a specific reference to being discriminated against on the basis of imputation of a criminal record.⁴⁴⁴

Are there any potential risks?

Some submissions emphasised that, if this attribute is introduced, there need to be guarantees that protections from harm for children, older people, and people with a disability, would still be firmly in place.⁴⁴⁵

Currently, the risk management process for vetting workers to ensure they do not pose a risk to vulnerable people relies on checking criminal histories. In Queensland, the current risk management process involves the Working with Children Check (Blue Card) and Disability Worker Screening Systems (Yellow Card).⁴⁴⁶ Any criminal convictions that these schemes identify would be likely to be considered relevant criminal history, and therefore these circumstances would not be protected by the attribute.

439 *Spent Convictions Act 2000* (ACT).

440 Australian Industry Group submission, 12.

441 Clubs Queensland submission, 77.

442 Australian Discrimination Law Experts Group submission, 52-53.

443 Section 8 of the Act says that discrimination includes characteristics imputed to a person with an attribute, or an attribute that a person is presumed to have.

444 Australian Discrimination Law Experts Group submission, 53.

445 Queensland Council for Civil Liberties submission, 17; Respect Inc and DecrimQLD submission, 39; United Nations Association of Australia, Queensland Chapter, 1; Name withheld (Sub.026) submission, 9; PeakCare Queensland Inc submission, 13; Sisters Inside Inc submission, 8-9.

446 *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Disability Services Act 2006* (Qld) pt 5.

Sisters Inside thought that Blue Card screening would not be affected, were the attribute to be introduced, because its primary function is to identify what prior convictions are or are not relevant.⁴⁴⁷ Other submissions suggested providing an additional exception to specifically protect vulnerable people, like the approaches taken in the Northern Territory, Tasmania, and the ACT.⁴⁴⁸

Are specific exceptions needed?

Both Tasmania and the Northern Territory have exceptions in relation to irrelevant criminal record. Tasmania allows for an exception specifically in relation to children, and the Northern Territory allows for the exception in relation to vulnerable persons.⁴⁴⁹

A 'vulnerable person' in the Northern Territory Act is defined to include children, aged persons, and persons with a physical or intellectual disability or mental illness. The exception applies in the area of work if the work principally involves the care, instruction or supervision of vulnerable people. This is qualified by the statement that it applies when 'reasonably necessary to protect the physical, psychological, or emotional wellbeing of those vulnerable persons...'⁴⁵⁰

However, the Australian Discrimination Law Experts Group considers there is no need for these exceptions if the approach of either Northern Territory, Tasmania, or the ACT is taken⁴⁵¹ because these jurisdictions limit the attribute to only where it is not directly relevant to the circumstances.⁴⁵² A key factor for relevance is likely to be the potential impact on vulnerable persons.

The Queensland Act currently has two general exceptions that apply in circumstances where actions are taken to protect vulnerable people:

- A person may create genuine occupational requirements for a position,⁴⁵³ which could include holding a Blue Card or a Yellow Card.
- A person may do an act that is reasonably necessary to protect the health and safety of people at a place of work.⁴⁵⁴

In summary, the combination of including a 'relevance' factor, and the existing genuine occupational requirements and workplace health and safety exceptions mean that an additional, specific exception for vulnerable persons is likely to be redundant.

The Review's position

The Review's position is that:

- There is a gap in protection, people with criminal records experience marginalisation, and irrelevant criminal record has been included as a protected ground for discrimination at the federal level. The attribute meets our criteria for inclusion as a new attribute.
- Relevance of the criminal record is a key component of the attribute to ensure that there is a reasonable balance between the rights of the individual with a criminal record, and the need for reasonable decisions to be made in work, in the administration of State laws and programs, and other areas.

447 Sisters Inside Inc submission, 8-9.

448 Queensland Council of Unions submission, 32; and TASC National limited submission, 7-8.

449 *Anti-Discrimination Act 1998* (Tas) s 50; *Anti-Discrimination Act 1992* (NT) s 37.

450 *Anti-Discrimination Act 1992* (NT) s 27.

451 Australian Discrimination Law Experts Group, 52-54.

452 *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4 cl (b)(ix); and *Discrimination Act 1991* (ACT) Dictionary.

453 *Anti-Discrimination Act 1991* (Qld) s 25.

454 *Anti-Discrimination Act 1991* (Qld) s 108.

- The attribute should be clearly defined so that the coverage is confined. The definition in the ACT legislation is appropriate, but to avoid complexity the Act should also add a specific reference to being discriminated against on the basis of imputation of a criminal record.
- There appears to be no justification for separate attributes to protect people from discrimination on the grounds of spent convictions or expunged homosexual convictions, as the definition of irrelevant criminal record can include these in the same way the Northern Territory definition does.
- As identified by the QLRC, while there may be some protection under the existing attribute of sexuality if a person were discriminated against because of a past homosexual conviction, to remove any doubt there is benefit in specifically referencing the expungement scheme within the definition of irrelevant criminal record. Reference to expunged homosexual convictions in the Act may address stigma and fear experienced by people who were unjustly treated in the past.

Recommendation 29

29.1 The Act should include a new attribute of irrelevant criminal record and it should be defined as in the *Discrimination Act 1991* (ACT) Dictionary definition. The definition should expressly include:

- convictions under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*
 - spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and
 - the imputation of a record relating to arrest, interrogation or criminal proceedings of any sort.
-

Physical features

The Review received 17 submissions⁴⁵⁵ related to physical features. Of those, 15 submissions⁴⁵⁶ supported the introduction of this attribute.

What are physical features?

Physical features may include characteristics of a person such as height, weight, size, birth marks, or other bodily characteristics or features.

⁴⁵⁵ Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; Daniel Lowry submission; PeakCare Queensland Inc submission; Name withheld (Sub.065) submission; Maurice Blackburn submission; Australian Lawyers Alliance submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Queensland Transcultural Mental Health submission; Australian Discrimination Legal Experts Group submission.

⁴⁵⁶ Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; Daniel Lowry submission; PeakCare Queensland Inc submission; Name withheld (Sub.065) submission; Maurice Blackburn submission; Australian Lawyers Alliance submission; Queensland Catholic Education Commission submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Australian Discrimination Legal Experts Group submission.

In Victoria, case law has broadly interpreted bodily characteristics to include having a loud voice,⁴⁵⁷ being tattooed,⁴⁵⁸ or having facial hair.⁴⁵⁹

However, interpretation of this attribute by the tribunals and courts has identified some limits to what is considered a bodily characteristic, with one tribunal decision noting that the particular characteristic should be 'out of the ordinary' or 'unusual' because otherwise no meaningful comparison can occur.⁴⁶⁰ In another matter, body odour was considered not to be a physical feature.⁴⁶¹

Current approach

Queensland law does not protect people from discrimination on the ground of their 'physical features.'

To a certain extent, people are protected from discrimination based on their physical features if the characteristic is related to an existing attribute,⁴⁶² such as race, sex, religious belief or activity, or impairment. For example, in the case of *Taniela v Australian Christian College*⁴⁶³ a Cook Island student's enrolment was discontinued because he did not cut his hair to satisfy the school's uniform policy. The student grew his hair as part of his culture, and the discontinuance of enrolment amounted to discrimination on the basis of race.

Is there a gap in protection?

The Review heard that people experience unfair treatment because of their physical features in areas such as employment, clubs, and goods and services. A Have Your Say survey participant told us that:

*I have a lazy right eye, born with it, so my right eye doesn't look straight ahead, and has got more noticeable as I've got older, so I cop so much about, the list is endless... I try not to be bothered about it, but after so many years of being harassed about it, it does get to you... Until it's taken seriously, and real action is taken when a complaint is made and you don't end up being seen as a trouble maker nothing will change.*⁴⁶⁴

Submissions provided hypothetical examples of where the attribute might apply. For example, it may prevent a fast-food company from hiring only people with a certain 'look' – that is, a specific height, weight, and build⁴⁶⁵ – or prevent an employee being removed from reception duties after experiencing hair loss.⁴⁶⁶

Caxton Legal Centre considered that physical features discrimination is particularly relevant to women who continue to be held to arbitrary standards in many environments.⁴⁶⁷

457 *Ruddell v DHS* [2001] VCAT 1510.

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

459 *Kuyken v Chief Commissioner of Police* [2015] VSC 204.

460 *Sagris v Chubb Security Australia Pty Ltd; Morros v Chubb Security Pty Ltd* [2008] VCAT 2334.

461 *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

462 *Anti-Discrimination Act 1991* (Qld) s 8(a).

463 *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249.

464 Name withheld (Form.570) survey response.

465 Maurice Blackburn Lawyers submission, 11.

466 Legal Aid Queensland submission, 82-83.

467 Caxton Legal Centre submission, 25-26.

Weight-related stigma has been considered by health researchers to be highly prevalent and has harmful impacts by worsening health outcomes.⁴⁶⁸ One submission commented that weight can be linked to social disadvantage, which may limit access to nutritional food and health care.⁴⁶⁹ Weight gain can be out of a person's control, such as when a person is taking medication, or is unable to exercise because of a disability or historic trauma.⁴⁷⁰ It is not certain whether weight on its own may be considered an impairment, and therefore already covered by an existing attribute. Adding the attribute of physical features would clarify this.⁴⁷¹

During initial consultations we heard from someone who told us about her experiences seeking work as a person of higher weight as a result of an auto-immune condition:

*Obviously, there are standards in most industries which are there for health and safety reasons. I'm not disputing those, I'm disputing where it has no basis on your ability, where it has, nothing to affect your capability at the job, it's just that somebody else has a prejudice or doesn't want doesn't like it so, you know, they kind of go oh well, we don't want to hire someone who looks like that.*⁴⁷²

Two individual submissions referred to experiences of being excluded from clubs, bars, and restaurants on the basis of being heavily tattooed.⁴⁷³ One of these submissions contains information gathered from a survey of 74 people with tattoos.⁴⁷⁴ Most people reported being refused entry to places based on dress code rules that require people to cover their tattoos. People with face and neck tattoos may not have a way to cover them up.

This theme was reflected in information obtained through our online survey, where one person told us that for many years, they have been denied entry to venues. They said:

*This has honestly been the most embarrassing thing being refused entry in public for what is a life choice of mine...*⁴⁷⁵

Submissions also mentioned that people with tattoos and piercings experience unfair treatment in relation to employment.⁴⁷⁶

During consultations we heard that this attribute may contribute to discrimination in combination with other attributes so that people face stigma about how they look, including people with variations of sex characteristics. We were told that the more evident the intersex trait is, the more likely somebody is to experience stigma and discrimination.⁴⁷⁷

While there is overlap with other attributes, there may be a gap in protection when discrimination is occurring based on physical features that are not a characteristic of an existing attribute.⁴⁷⁸ This attribute might also be argued in combination with other attributes, such as race or sex.

468 AJ Tomiyama, D Carr, EM Granberg et al, 'How and why weight stigma drives the obesity 'epidemic' and harms health' (2018) 16(1) BMC Med, 123.

469 Daniel Lowry submission, 4.

470 Micah Projects, consultation, 12 August 2021.

471 See *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

472 Intersex Peer Support Australia consultation (Eileen Harlow), 16 September 2021.

473 Daniel Lowry submission, 1; Name withheld (Sub.065) submission, 6.

474 Daniel Lowry submission, 20-34.

475 David (Form.716) survey response.

476 Name withheld (Sub.008) submission, 3; Daniel Lowry submission, 7.

477 Intersex Human Rights Australia and Intersex Peer Support Australia consultation, 9 September 2021.

478 See for example: Queensland Catholic Education Commission submission, 8; Legal Aid Queensland submission, 82-83; and Queensland Council for Civil Liberties submission, 18.

Are there any potential risks?

Unreasonably broad scope

The Queensland Council for Civil Liberties doubted whether the inclusion of a physical features attribute could be justified, because it can be distinguished from the nature of other attributes, such as disability, which have been clearly linked to social disadvantage.⁴⁷⁹

The New South Wales Law Reform Commission concluded that physical features were too broad and should not be a protected attribute, because it was not curing an underlying social problem, particularly where appearance is a matter of choice.⁴⁸⁰

This echoes the analysis of researchers Dr Alice Taylor and Joshua Taylor who, in their commentary on discrimination based on tattoos, beards and hairstyles, stated that:

While there are understandable reasons to prohibit discrimination on the basis of a range of physical features including weight and facial difference, the 'catch-all' category of physical features reflects a failure of the legislature and the courts to engage in the underlying reasons why discrimination should be unlawful.⁴⁸¹

The authors refer to a 'tension between immutability and choice,' and were of the view that there is a clear rationale for protecting people from discrimination where features are immutable, unusual, or challenging to change. But there is a less clear rationale for chosen characteristics based on a desire for free expression.⁴⁸² Another difficulty noted with the attribute of physical features is that there is not a clear or obvious link to a broader group identity which makes it challenging to identify the disadvantage gaps that exist.⁴⁸³

Health and safety and genuine occupational requirements

Two submissions supported the inclusion of this attribute, but considered that there was a need to create specific exceptions related to occupational requirements, and health and safety.⁴⁸⁴ For example, advertising a role for an actor with a particular physical feature,⁴⁸⁵ which would reflect the approach taken in the ACT Discrimination Act. In considering the potential scope of an exception, one submission suggested that people with tattoos that could be considered offensive should not be protected, but broader exceptions should be avoided.⁴⁸⁶

Exceptions in the Queensland Act currently permit employers to make decisions to ensure a person can meet the genuine occupational requirements of a role, and to protect public health and the health and safety of people at a place of work.⁴⁸⁷

The Queensland Catholic Education Commission raised concerns about schools being able to set dress codes and standards for both staff and students.⁴⁸⁸ While the scope of the attribute would

479 Queensland Council for Civil Liberties submission, 18.

480 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [5.228] – [5.231].

481 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 469.

482 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 475.

483 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 478-9.

484 Maurice Blackburn Lawyers submission, 12; Caxton Legal Centre submission, 25-26; see also *Anti-Discrimination Act 1991* (Qld) s 25; *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (Cth).

485 Caxton Legal Centre submission, 25-26; Maurice Blackburn Lawyers submission, 11.

486 Daniel Lowry submission, 17.

487 *Anti-Discrimination Act 1991* (Qld) ss 25, 107, 108.

488 Queensland Catholic Education Commission submission, 8.

not include the clothing a person wears, it may include more permanent changes to the body including tattoos and piercings.

In arriving at the view that physical features should not be a protected attribute, the NSW Law Reform Commission considered that an employer should be able to make reasonable decisions regarding personal appearance.⁴⁸⁹

Comparative approaches

Both Victoria⁴⁹⁰ and the ACT⁴⁹¹ include physical features as a protected attribute in their discrimination laws. This protects people from discrimination because of characteristics such as height, weight, size, or other bodily characteristics such as birth marks.⁴⁹²

Neither definition clearly differentiates between intentional modifications to a person's body and features that cannot be changed.

In Victoria, the physical features attribute has been interpreted to include things done to a body by choice, such as tattoos⁴⁹³ although this was not the original intention.⁴⁹⁴

In recommending physical features as an attribute, the ACT Law Reform Commission considered that protecting people from discrimination based on physical features, including chosen features, such as tattoos, piercings, or hair styles supported equality before the law and freedom of expression.⁴⁹⁵ However, Taylor and Taylor consider that this is an 'unsustainable justification'.⁴⁹⁶

Is the proposed attribute of a comparable nature to those already covered by the Act?

We have considered whether people are experiencing unjustifiable discrimination on the basis of their physical features and whether the attribute is comparable to those already covered by the Act. This is not an easy question to answer, because the extent of stigma and marginalisation depends on the particular physical feature concerned.

In Victoria, physical features have been interpreted broadly, and encompasses characteristics that a person has from birth (for example, birth marks), characteristics that emerge or are acquired later in life (for example, weight, scars, burns) and those that are the result of deliberate altering of the physical appearance (for example, piercings, tattoos).

Some physical features such as height or weight are comparable to existing attributes that are inherent or only changeable with great difficulty; but other features that an individual has a degree of choice over, could be subject to change (for example, hair styles), and therefore fall into a different category.

The Review heard that physical features can lead to unjustifiable discrimination, and that some people are vulnerable to continued marginalisation because of their physical features. For example, people of higher weight may experience stigma and marginalisation, and their weight may be linked to a health condition and may not be easy to change.

489 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [5.231].

490 *Equal Opportunity Act 2010* (Vic) s 6(j).

491 *Discrimination Act 1991* (ACT) s7(m).

492 *Discrimination Act 1991* (ACT) Part 12 Dictionary; *Equal Opportunity Act 2010* (Vic) s 4.

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

494 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1251.

495 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final report, 18 March 2015) 82-83.

496 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 476.

Chosen alterations of a person's physical appearance can include tattoos, piercings, implants, or cosmetic procedures done for non-medical reasons, and other types of body modifications such as tongue splitting. It is difficult to identify broader structural or historical disadvantage suffered by people based on their tattoos, hair styles, or other cosmetic characteristics, other than when it is a manifestation of an existing attribute such as race.⁴⁹⁷

There may be sound reasons to justify discrimination in some circumstances, such as where a person has a tattoo representing a hate group, or an obscene or vilifying tattoo. It is difficult for the law to set an appropriate boundary on what may cause offence in a particular setting. In some work and educational environments, it may be too difficult to establish reasonable standards for employees and students, if a person can make a discrimination complaint on the basis of any bodily characteristic including cosmetic changes to their body. Clubs may reasonably wish to exclude persons with gang affiliated tattoos because of safety concerns.

The Review's position

The Review's position is that:

- The addition of physical features as an attribute may address a gap in coverage for people who experience discrimination based on their physical features if this is not also directly linked to existing attributes, for example race or religion.
- An overly broad definition of physical features might allow for unmeritorious complaints that could dilute the effectiveness of the Act.
- The definition of physical features should be confined to physical features based on the characteristics that are present from birth or acquired, other than through chosen cosmetic alterations – this would include scars or burn marks, but not tattoos, implants, or piercings.
- Existing attributes will continue to provide protection for many aspects of physical appearance. People who experience discrimination because of cultural or religious tattoos or piercings will still be covered under the race and religious belief or activity attributes. Disability discrimination will continue to provide protection in many circumstances, such as where a person has distinct facial or bodily features because of a disability.
- To remove any doubt about the continued protection of people under the Act from discrimination on the basis of alterations to physical appearance for cultural or religious reasons, the provision should be clearly drafted to reflect this position, and it should be explained in explanatory notes.
- Because of the narrower scope of the proposed attribute, no exceptions specific to physical features are required. Current exceptions in the Act permit employers to make decisions based on genuine occupational requirements, public health, and workplace health and safety, and indirect discrimination contains a reasonableness component, so that any additional specific exceptions related to physical features would be unnecessary duplications.

497 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 479.

Recommendation 30

30.1 The Act should include a new attribute of physical features. Physical features should be defined to mean weight, size, height, birth marks, scars, and bodily characteristics other than chosen alterations to a person's physical appearance such as cosmetic procedures, tattoos, piercings, hair styles, and other modifications, unless they are characteristics of other attributes.

Being subject to domestic or family violence

In the Discussion Paper we asked whether being subject to domestic or family violence should be included as an additional attribute, whether it should be defined, and if so how.

To address the complex and difficult domestic and family violence issues faced by our society, a variety of strategies are undoubtedly required.⁴⁹⁸ This section will address whether people who have experienced or are experiencing domestic violence should be protected from discrimination by the Act. We will use the terms victim and survivor in this section and acknowledge that some people prefer one term or the other.

We received 24⁴⁹⁹ submissions in response to this issue and 22⁵⁰⁰ of them were in support of introducing 'being subject to domestic or family violence' as an attribute.

Two submissions indicated that if this attribute were to be included, the definition should be gender neutral.⁵⁰¹ Our consultation with Basic Rights Queensland also gave support to inclusion.⁵⁰²

Current approach

The Act currently provides some protection to victims and survivors of domestic or family violence. For example, a person who has developed a mental health condition as a result of domestic or family violence may be protected under the Act. However, this protection is only available to a subset of victim-survivors who fit within current attributes, such as impairment.

498 *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, Final report, Special Taskforce on Domestic and Family Violence in Queensland (2015) 11.

499 Queensland Council of Social Services submission, 4; Sisters Inside Inc submission, 8; Name withheld (Sub.008) submission, 2; Fibromyalgia/CFS Gold Coast Support Group submission, 13; Independent Education Union - Queensland and Northern Territory Branch submission, 1; PeakCare Queensland Inc submission, 14; One in Three Campaign submission, 17; Australian Lawyers Alliance submission, 16; Women's Legal Service Qld submission, 2; Australian Discrimination Law Experts Group submission, 56; Tenants Queensland submission, 6; Queensland Council of Unions, 33; Queensland Council for Civil Liberties submission, 19; Community Legal Centres Queensland submission, 2; Equality Australia submission, 43; Legal Aid Queensland submission, 84; Aged and Disability Advocacy Australia submission, 11; Respect Inc and DecrimQLD submission, 11; Caxton Legal Centre submission, 26; Queensland Advocacy Incorporated submission, 10; Queensland Law Society submission, 15; Queensland Department of Education submission, 13; Life Without Barriers submission, 1; Name withheld (Sub.026) submission, 10.

500 Queensland Council of Social Services submission, 4; Sisters Inside Inc submission, 8; Name withheld (Sub.008) submission, 2; Fibromyalgia/CFS Gold Coast Support Group submission, 13; Independent Education Union - Queensland and Northern Territory Branch submission, 1; PeakCare Queensland Inc submission, 14; Australian Lawyers Alliance submission, 16; Women's Legal Service Qld submission, 2; Australian Discrimination Law Experts Group submission, 56; Tenants Queensland submission, 6; Queensland Council of Unions, 33; Queensland Council for Civil Liberties submission, 19; Community Legal Centres Queensland submission, 2; Equality Australia submission, 43; Legal Aid Queensland submission, 84; Aged and Disability Advocacy Australia submission, 11; Respect Inc and DecrimQLD submission, 11; Caxton Legal Centre submission, 26; Queensland Advocacy Incorporated submission, 10; Queensland Law Society submission, 15; Queensland Department of Education submission, 13; Life Without Barriers submission, 1.

501 One in Three campaign submission, 17; Legal Aid Queensland submission, 84.

502 Basic Rights Queensland consultation, 15 September 2021.

The case of *Wright v Callvm Vacheron Wallace Bishop*⁵⁰³ illustrates the limits of relying on existing attributes. In that case, the applicant called her employer to report that she was not able to work one day after suffering an incident of domestic violence. The applicant was dismissed soon after, with the reason given being that she had ‘too many personal problems.’ The Tribunal did not accept the applicant’s argument ‘that being a victim of domestic violence is a characteristic that women generally have’ and so the applicant’s case of discrimination on the basis of sex failed.

Is there a gap in protection?

Examples of unfair treatment

Women’s Legal Service Queensland, who work extensively with victim-survivors of domestic violence, provided examples of the discrimination they are aware is being experienced by women who are, or have been, victims of domestic or family violence in workplaces and education settings. They told us:

...the other party put tracking and ‘stalking’ technology on a client’s computer and telephone that was also used for working-from-home arrangements during COVID – when she told her employer, she was disciplined, and performance managed by her employer...⁵⁰⁴

They also told us that:

a client [who] was trying to hide her address from school enrolment forms for safety from the other party and [the] school said they couldn’t accept the enrolment of the child because she would not provide her address.⁵⁰⁵

Last year a similar decision made by the Department of Education was overturned by Queensland Civil and Administrative Tribunal (QCAT), which considered several human rights under the Human Rights Act. The case involved a woman and her children who had moved in an attempt to escape domestic violence, and subsequently applied to homeschool one of her children. She did not want to disclose her address and the Department refused her application on that basis. The woman applied to QCAT for a review. QCAT decided that the woman was not required to disclose her address in order to be granted home education registration.⁵⁰⁶

Tenants Queensland gave the following examples of domestic or family violence discrimination experienced by their clients:

- tenants receiving poor references from real estate agents because of domestic violence-related noise or damage to property
- lessors and real estate agents refusing requests by tenants to make reasonable adjustments to the property, such as affixing security devices
- tenants being given notices to remedy breaches that allege interference with reasonable peace and comfort of neighbours as a result of domestic violence incidents.⁵⁰⁷

The Queensland Council of Unions gave the following example:

An aspiring leader seeking release from her classroom role was not provided with the release as a successful applicant for an acting promotional position in another school and setting, despite the employer being aware of her [domestic or family violence situation] as it

503 *Wright v Callvm Vacheron Wallace Bishop and Anor* [2018] QIRC 7.

504 Women’s Legal Service Qld submission, 3.

505 Women’s Legal Service Qld submission, 3.

506 *SF v Department of Education* [2021] QCAT 10.

507 Tenants Queensland submission, 6.

was viewed by management ‘that she would be better off sorting herself out’ prior to taking on a leadership role.⁵⁰⁸

Industrial protections

Existing industrial laws that apply in Queensland provide employees experiencing domestic or family violence with the right to request unpaid leave and flexible work arrangements.⁵⁰⁹ Rights to paid leave in those circumstances are protected for Queensland public servants.⁵¹⁰

Importantly, industrial laws only relate to the provision of leave in the workplace setting, and not to other issues that arise at work, such as not being given a promotion because of a perception that the domestic violence impedes performance. They also do not apply to the other areas of activity under the Act, such as education, accommodation and State laws and programs.

Is the proposed attribute of a comparative nature to those already covered under the Act?

The Justice Project, an initiative of the Law Council of Australia, points out that family violence has been a recent focus of federal, state, and territory governments, and significant policy, law reform, and funding measures have been put in place to address these issues.⁵¹¹

Gender-based violence, including domestic and family violence, has been recognised by international human rights law as a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on an equal basis with men.⁵¹²

Victim-survivors of domestic violence are a social group that is vulnerable, have suffered, and continue to suffer marginalisation. This group can be seen as comparable in nature to other groups already protected under the Act.

Comparative approach

Following a recommendation by the ACT Law Reform Commission, the attribute of ‘subjection to domestic violence’ is now protected in the ACT,⁵¹³ making it the only jurisdiction in Australia to do so. There is no definition of ‘domestic violence’ in that legislation.

The Northern Territory government has published a report⁵¹⁴ indicating that it will include this attribute in the 2022 amendments to the Anti-Discrimination Act.⁵¹⁵

New Zealand has protection on the basis of this attribute, but only in the work area.⁵¹⁶

Previous reviews and recommendations

In 2013 during the Consolidation of Commonwealth Anti-Discrimination Laws process, the Legal and Constitutional Affairs Committee recommended inclusion of this attribute, and took the view that despite the regulatory impacts of introducing ‘domestic violence’ as a protected attribute being unknown, the social cost of domestic violence on victims and families, especially children, outweighs any additional regulatory burden; and that there are benefits of providing protection

508 Queensland Council of Unions submission, 34.

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

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

511 The Justice Project final report, Part 1 (August 2018), *People who Experience Family Violence*, 15.

512 Committee on the Elimination of Discrimination against Women, General recommendation No 19, 11th session (1992) [1].

513 *Anti-Discrimination Act 1991* (ACT) s7(x).

514 Northern Territory Government, *Territory Stories - Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

515 *Anti-Discrimination Act 1992* (NT).

516 *Human Rights Act 1993* (NZ) s 62A.

from discrimination and thereby enabling victims of domestic violence to achieve financial independence and secure a better future for themselves and their families.⁵¹⁷

At about that time, the Australian Law Reform Commission recommended that the Australian Human Rights Commission should examine the possible basis upon which the status as an actual or perceived victim of family violence could be included as a protected attribute under Commonwealth anti-discrimination law.⁵¹⁸

Misidentified ‘perpetrators’ of violence

Sisters Inside told us that many of the women they support have experienced domestic and family violence as both the ‘victim’ and the ‘perpetrator’ interchangeably, and that protecting people on the basis of ‘subjection to domestic violence’ does not reflect criminalised and imprisoned women’s experience of domestic violence-related discrimination, particularly Aboriginal and Torres Strait Islander women.⁵¹⁹ The Women’s Safety and Justice Taskforce has also commented on similar issues.⁵²⁰

We understand that there can be domestic violence orders in place involving multiple family members, and that a person can be both the ‘aggrieved’ and the ‘respondent’ to an order instigated by the police or by the individuals involved. This has particular relevance in family law proceedings. However, discrimination legislation is a different context. We were unable to identify a situation in which a person would not have protection of a new ‘subjection to domestic violence’ attribute simply because they also have a domestic violence order against them.

Does the attribute need to be defined?

Tenants Queensland propose the definition of ‘domestic violence’ should be linked to that in the Domestic and Family Violence Protection Act.⁵²¹ ‘Domestic violence’ in that legislation means behaviour in an intimate personal relationship, family relationship, or informal care relationship that is:

- physically or sexually abusive, or
- emotionally or psychologically abusive, or
- economically abusive, or
- threatening, or
- coercive, or
- in any other way controls or dominates and causes the person to fear for their safety or wellbeing or that of someone else.⁵²²

Two submissions commented on the need to have gender neutral language in any definition.⁵²³

Equality Australia suggested that the definition should recognise a broad range of circumstances in which domestic and family violence can occur, including from people who live with or are related to another person and are not necessarily intimate partners or legally recognised as

517 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, 2013) [7.28].

518 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (Report 117, 2012) Recommendation 16-8.

519 Sisters Inside Inc submission, 8.

520 Women’s Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland* (Report 1, 2021) volume 1, 21.

521 *Domestic and Family Violence Protection Act 2012* (Qld).

522 *Domestic and Family Violence Protection Act 2012* (Qld) ss 8, 13.

523 Legal Aid Queensland submission, 84; One in Three Campaign submission, 17.

members of a family, such as members of a household, flatmates, or people formerly in those relationships.⁵²⁴ This definition is arguably broader than that contained in the Domestic and Family Violence Protection Act.

The Review's position

The Review's position is that:

- People who have experienced domestic or family violence are subject to unfair treatment in areas that are protected under the Act, including work and accommodation.
- A gap in protection exists for people who have experienced domestic or family violence, and the attribute is of a comparable nature to those already covered by the Act.
- The definition of 'domestic and family violence' should align with the definition in the *Domestic and Family Violence Protection Act 2012* (Qld) to give consistency with the primary legislation.

Recommendation 31

31.1 The Act should include a new attribute of 'subjection to domestic or family violence', and it should be defined as in section 8 of the *Domestic and Family Violence Protection Act 2012* (Qld).

Homelessness

In the Discussion Paper we asked whether 'accommodation status' should be included as an additional attribute, whether it should be defined, and if so, how.

We received submissions that framed this issue in three different ways – 'socio-economic status and/or social origin,' 'accommodation status,' and 'homelessness.' These categories were on a continuum from most confined category to very broad, with 'homelessness' the narrowest framing and 'socio-economic status and/or social origin' the broadest.

We received 20⁵²⁵ submissions in relation to this topic, 18 of which supported inclusion of at least one of the framings of this attribute.⁵²⁶

Four submissions proposed that either 'socio-economic status' or 'social origin' should be protected.⁵²⁷ Community Legal Centres Queensland and Suncoast Community Legal Centre supported the Ten Point Plan,⁵²⁸ which also advocates for this approach.

524 Equality Australia submission, 43.

525 Queensland Council of Social Services submission; Life Without Barriers submission; Australian Discrimination Law Experts Group submission; Caxton Legal Centre submission; Community Legal Centres Queensland submission; Suncoast Community Legal Service Inc submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Sisters Inside Inc submission; Tenants Queensland submission; Women's Legal Service Qld submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Legal Aid Queensland submission; Youth Advocacy Centre Inc submission; Department of Education (Qld) submission; Name withheld (Sub.026) submission.

526 Those that did not support inclusion were: Name withheld (Sub.026) submission; Department of Education (Qld) submission.

527 Queensland Council of Social Service submission; Australian Discrimination Law Experts Group submission; Caxton Legal Centre submission and Life Without Barriers submission.

528 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/>>.

Ten submissions supported the approach that was outlined in the Discussion Paper of ‘accommodation status.’⁵²⁹ Two submissions supported ‘homelessness’ being the protected attribute.⁵³⁰

Current approach

There is no protection in the Act from discrimination for people because of their socio-economic or accommodation status, or on the basis of experiencing homelessness.

Comparative approach

No Australian jurisdiction protects people on the basis of being homeless, although the ACT does include homelessness in its definition of accommodation status. In addition, international case law has confirmed that it is protected under the *International Covenant on Civil and Political Rights* as an ‘other status.’⁵³¹

No Australian jurisdiction protects people under discrimination laws because of their ‘socio-economic status’ and/or ‘social origin.’ However, in the federal jurisdiction, the Fair Work Act gives protection from employers taking adverse action on the basis of social origin.⁵³²

Australian Capital Territory

‘Accommodation status’ is protected and defined as:

Accommodation status includes being –

- a) a tenant; and
- b) an occupant within the meaning of the *Residential Tenancies Act 1997*; and
- c) in receipt of, or waiting to receive, housing assistance within the meaning of the *Housing Assistance Act 2007*; and
- d) homeless.⁵³³

Being ‘homeless’ is not defined.

There is an exception in relation to this attribute in relation to the provision of accommodation, as follows:

...does not make it unlawful for a person to discriminate on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors.⁵³⁴

International

In the general ambit of socio-economic status, New Zealand includes ‘employment status’ as a prohibited ground of discrimination.⁵³⁵

529 PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Tenants Queensland submission; Sisters Inside Inc submission; Women’s Legal Service Qld submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Respect Inc and DecrimQLD submission and Queensland Law Society submission.

530 Legal Aid Queensland submission; Youth Advocacy Centre Inc submission.

531 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) [18].

532 *Fair Work Act 2009* (Cth) s 351(1).

533 *Discrimination Act 1991* (ACT) Dictionary - accommodation status.

534 *Discrimination Act 1991* (ACT) s 26(2).

535 *Human Rights Act 1993* (NZ) s 21(k).

The provinces in Canada provide varying degrees of protection in this area, with some including the attribute of ‘source of income’ and others including ‘social condition.’

Recommendations of past reviews

The Gardner Review recommended that ‘homelessness’ be included as a protected attribute in Victoria, however this recommendation was not incorporated into the legislation.⁵³⁶ The report did not recommend any definitions or exceptions or refer to any submissions that commented on the issue of terminology around this attribute.

The Northern Territory government has recently published a report⁵³⁷ indicating that it will include ‘accommodation status’ and ‘socio-economic status’ as protected attributes in 2022 amendments to the Anti-Discrimination Act.⁵³⁸

Is there a gap in protection?

Of the submissions we received that addressed this topic, none contained specific case examples of discrimination because of socio-economic status, accommodation status, or homelessness.

Tenants Queensland said they are aware of people being discriminated against because they have no fixed address or security of tenure, including ‘couch surfing’ or residing in a hostel or refuge.⁵³⁹ The Youth Advocacy Centre works with young people who are homeless, and shared an observation that:

Particularly with respect to education, there is a need to ensure that children are not being suspended or excluded because they are struggling with uniform or homework requirements...⁵⁴⁰

The Gardner Review relied on submissions that included examples of unfair treatment towards people who were experiencing homelessness.⁵⁴¹ The Public Interest Law Clearing House Homeless Persons Legal Clinic consulted 183 homeless people in Victoria and found that 69% of them said that they experienced unfair treatment in the provision of accommodation, and 58% had reported experiencing discrimination in goods and services.⁵⁴² The final report included extensive commentary on the relationship between homelessness, disadvantage, and discrimination.⁵⁴³

The Australian Human Rights Commission has reported on homelessness and human rights issues, and identified examples from areas including employment:

‘I went to a job interview, and the lady was really nice to me and she asked me...if I was living at home, and I said no, and from there on she wasn’t nice to me...people just think that if you don’t live at home, that must have been your fault. You’ve done something wrong.’⁵⁴⁴

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

537 Northern Territory Government, *Territory Stories - Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

538 *Anti-Discrimination Act 1992* (NT).

539 Tenants Queensland submission, 7.

540 Youth Advocacy Centre Inc submission, 4.

541 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 26.

542 Public Interest Law Clearing House Homeless Persons’ Legal Clinic, *Discrimination on the grounds of homelessness or social status: Report to the Department of Justice* (Report, 2007) 12-14.

543 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) [5.81] – [5.107].

544 Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (Report, 2008) [6.6].

Research by Tamara Walsh and Monica Taylor has highlighted the impact of ‘move-on powers’⁵⁴⁵ on the homeless population in Queensland, and the fact that this group does not have recourse through discrimination laws to challenge what was seen as unfair treatment.⁵⁴⁶

Is the proposed attribute of a comparable nature to those already in the Act?

The United Nations Human Rights Committee (UNHRC) has indicated that they consider homelessness an area in which people can experience discrimination. In 2009, the United Nations Human Rights Council observed that Australia should increase its efforts to ensure that social, economic, and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the Covenant.⁵⁴⁷

The Australian Institute of Health and Welfare indicates that ‘people experiencing homelessness and at risk of homelessness are among Australia’s most socially and economically disadvantaged.’⁵⁴⁸

People who are homeless are a social group that is vulnerable⁵⁴⁹ and have suffered and continue to suffer marginalisation, and so can be seen as comparable in nature to other groups already protected under the Act.

Should this attribute be defined?

While submissions were supportive of the ‘accommodation status’ protection and definition given in the ACT legislation, we did not receive any submissions that provided a definition of ‘homelessness.’

The Supported Accommodation Assistance Act defines a person as being homeless ‘if, and only if, he or she has inadequate access to safe and secure housing.’⁵⁵⁰

The *Macquarie Dictionary* definition is simply ‘having no home.’

We consider that the dictionary meaning is broad enough to include people who are living in temporary situations such as hostels or refuges, or couch surfing.

Are exceptions needed?

When ‘accommodation status’ was included in the ACT, an exception in the provision of accommodation was introduced as outlined above, with the following comments in the Explanatory Notes:

The aim of this exception is to recognise that there may be situations where a person’s accommodation status is a relevant consideration in offering a person accommodation under a lease. For example, an agent might look into a person’s rental history as part of an assessment about the suitability of a prospective tenant for a particular offer of accommodation in a rental house.

The exception will allow people to take into account this kind of distinction between individuals on the basis of circumstances where it is reasonable. For instance, it is unlikely to be reasonable to refuse[d] accommodation to a person only because they

545 *Police Powers and Responsibilities Act 2000* (Qld) s 48 gives power to police officers to issue a direction for a person to leave a public place.

546 Tamara Walsh and Monica Taylor, ‘You’re Not Welcome Here: Police Move-On Powers and Discrimination Law’ (2007). 30(1) *University of New South Wales Law Journal*, 151-173.

547 United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee on Australia*, 95th session, UN doc CCPR/C/AUS/CO/5 (7 May 2009), [18].

548 Australian Institute of Health and Welfare, *Specialist homelessness services 2019-20 annual report* (Report, 2020) 4.

549 See for example M Johnstone et al, ‘Discrimination and well-being amongst the homeless: the role of multiple group membership’ (2015). *Frontiers in Psychology*, 6:739.

550 *Supported Accommodation Assistance Act 1994* (Cth) s 4(1).

became homeless for a period, or because their previous accommodation was in public housing premises.⁵⁵¹

The Queensland Council for Civil Liberties explicitly endorsed retaining the exception if the ACT definition of the attribute was recommended for inclusion.⁵⁵² It was unclear whether other submissions that supported the ACT definition were also supportive of the exception.

Should there be a broader 'social origin' attribute?

Caxton Legal Centre told us that discrimination on the basis of social origin should be protected, and gave broad comments such as 'many children from poorer homes struggled to find a quiet place to work let alone access support from a parent with the time and capacity to take on the role of a home-teacher.'⁵⁵³

Research by Philip Lynch and Bella Stagoll examines the discrimination faced by people who are homeless, unemployed, or recipients of social security payments in Victoria, based on experiences and consultations of the Homeless Persons' Legal Clinic.⁵⁵⁴ They give a number of examples of discrimination in provision of accommodation and goods and services and support inclusion of the attribute of 'social status' to address these issues.

We acknowledge that many people with low socio-economic status, or who have a particular social origin, are vulnerable to discrimination. In chapter 2 we explore the relationship between disadvantage and discrimination and how this affects a person's health, wellbeing, and social inclusion. In the evidence we have gathered for this Review there is sufficient basis to legislatively protect from discrimination those who are homeless. At this stage there is insufficient material for us to recommend the inclusion of social origin or socio-economic status as protected attributes.

In these circumstances, we have decided to prioritise protection from discrimination for people who are homeless.

Earlier in this chapter, we recommend that the Commission's current function be expanded to allow it to recommend to the Attorney-General the inclusion of new attributes when a threshold has been reached. This is one area in which further work needs to be done to establish whether or not a compelling basis exists for the introduction of accommodation status or social origin as protected attributes. As the Discussion Paper did not ask about the broader social origin attribute, we have not consulted with key stakeholders including business, industry and government.

Review position

The Review's position is that:

- People who are homeless are subject to unfair treatment in areas protected under the Act, including accommodation, education and employment, goods and services and state laws and programs.
- Adding the attribute of homelessness would fill a gap in protection for a sector of people experiencing marginalisation.
- The potential attributes of 'accommodation status' and 'social status and/or social origin' are broader than is necessary to protect people who are homeless.

551 ACT Legislative Assembly, *Discrimination Amendment Bill 2016 (ACT) Explanatory Statement*, 13.

552 Queensland Council for Civil Liberties submission, 19.

553 Caxton Legal Centre submission, 26.

554 Philip Lynch and Stella Bagoll, 'Promoting Equality: Homelessness and Discrimination', [2002] *Deakin Law Review*, 15.

- Further consideration would need to be given as to whether the threshold for inclusion of ‘social origin’ or ‘social status’ as a new attribute has been met, and whether there is a need for any exceptions.
- There is no need to define ‘homelessness’ and the word should take its ordinary meaning.

Recommendation 32

32.1 The Act should include a new attribute of ‘homelessness’, and it should not be defined.

Employment activity

Protection from discrimination on the basis of employment activity refers to the situation where a worker is penalised for making a reasonable request or communicating a concern about employment entitlements.

We received eight submissions⁵⁵⁵ on this topic, and of those, six submissions⁵⁵⁶ supported the inclusion of a new attribute of ‘employment activity.’

Current approach

The Act currently includes protection from discrimination because of trade union activity. ‘Employment activity’ may overlap with trade union activity, but would apply in circumstances where a person is trying to enforce their workplace rights, or may not be a member of a union.

Adverse action against an employee exercising a ‘workplace right’ such as a right to take annual or personal leave is unlawful under the Fair Work Act, which protects most workers in Australia.⁵⁵⁷ It is also unlawful under the Industrial Relations Act, which protects public sector workers in Queensland.⁵⁵⁸

Comparative approach

Victoria is the only state that specifically protects ‘employment activity,’ which supplements their attribute of ‘industrial activity.’ This attribute was included in 2007 soon after WorkChoices came into effect.

Is there a gap in protection?

The Queensland Nurses and Midwives Union told us that there is a potential gap in the coverage of general protections and adverse action law. Employment activity discrimination is a significant issue for their members when ‘raising concerns about their rightful entitlements including requests to be paid for working overtime and through meal breaks or wearing personal protective equipment to perform their duties.’⁵⁵⁹ It is not clear to us how such examples would fall outside of the current industrial laws.

⁵⁵⁵ Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Vision Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Name withheld (Sub.026) submission; James Cook University submission.

⁵⁵⁶ Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Vision Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission.

⁵⁵⁷ *Fair Work Act 2009* (Cth), ss 340, 341(1).

⁵⁵⁸ *Industrial Relations Act 2016* (Qld) ss 282-288.

⁵⁵⁹ Queensland Nurses and Midwives Union submission, 26.

The Queensland Council of Unions told us that ‘the jurisdiction of the Fair Work Act before the Federal Circuit Court or Federal Court is difficult to access and cost prohibitive.’⁵⁶⁰

None of the other submissions gave examples of situations where a person suffered unfavourable treatment because of making a reasonable request or communicating a concern about employment entitlements that are not protected under current industrial laws or by ‘trade union activity’ as a protected attribute in Queensland.

Is the proposed attribute of a comparable nature to those already covered under the Act?

We acknowledge that there is a power differential between workers and employers and that this potential attribute could be seen as akin to ‘trade union activity.’

The Review’s position

The Review’s position is that:

- On the basis of our consultations, submissions, and research, the Review has not identified a significant gap in the existing protections either under the Anti-Discrimination Act or state and federal industrial laws.
- While the Fair Work Act leads to a costs jurisdiction, few matters proceed to the Federal Court, and employees can access the free dispute resolution service offered by the Fair Work Commission. State public servants can use the Queensland Industrial Relations Commission which is a no costs jurisdiction.
- There is no compelling reason to introduce a new attribute of employment activity.

Irrelevant medical record

The Terms of Reference ask us to consider adding the additional attribute of irrelevant medical record.

In the Discussion Paper, we asked whether there is a need for the Act to cover discrimination on the grounds of irrelevant medical record. The Review received 18 submissions on this topic, of which 17⁵⁶¹ supported the introduction of this attribute. One submission suggested that ‘genetic discrimination’ should be separately protected.⁵⁶²

Current approach

The Queensland Act does not contain a separate ‘irrelevant medical record’ attribute, but existing attributes already provide protection.

Under the Act, discrimination is prohibited on the ground of impairment, which includes an attribute that a person had in the past.⁵⁶³

560 Queensland Council of Unions submission, 28.

561 Queensland Council for Social Service submission; Name withheld (Sub.026) submission; Intersex Human Rights Australia submission; Dr Grazia Catalano submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Australian Lawyers Alliance submission; Women’s Legal Service submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

562 Intersex Human Rights Australia submission.

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

Complaints by people in Queensland can be taken to the Australian Human Rights Commission on the ground of medical record in the area of employment but, as with criminal record, an investigation with non-binding recommendations is the only outcome available.⁵⁶⁴

Comparative approaches

Northern Territory and Tasmania⁵⁶⁵ include irrelevant medical record as a protected attribute, while ACT⁵⁶⁶ limits this attribute to include only discrimination based on genetic information.

Is there a gap in protection?

We received submissions that suggest discrimination is occurring because of a person's:

- history of claiming worker's compensation
- genetic characteristics and predispositions to a medical condition
- medical records
- mental health status or history
- sex characteristics
- gender identity.

Most of the circumstances described were about unfair treatment at work or in obtaining insurance.

One submission suggested that people may be dismissed from work after disclosing an irrelevant mental health report.⁵⁶⁷ Being required to disclose a medical record can be stigmatising and create additional psychological barriers for individuals.⁵⁶⁸ We heard that employers sometimes rely on irrelevant records that do not relate to the current capacity and ability of the potential employee.⁵⁶⁹

Trends towards greater availability of genetic screening means that a higher proportion of the population is likely to have identified genetic risks or predispositions to medical conditions, and this may lead to increased risk of unfair treatment. For example, people with variations of sex characteristics have reported that they pay increased insurance premiums for life insurance cover.⁵⁷⁰

Unnecessary duplication

After reviewing all the issues raised in submissions, we have formed the view that the current attributes in the Act provide sufficient protection, except for people with variations of sex characteristics. This will be remedied by including sex characteristics as an additional attribute, as recommended in this chapter.

If a transgender person is discriminated against because of their records being in a different sex, or a previous name, this will be covered by gender identity discrimination. We have also recommended an update to the gender identity definition in this chapter.

We have considered the issue of genetic predisposition to existing conditions in two areas of this report including in this chapter and in chapter 8. By suggesting updates to the definition of

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

565 *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(p).

566 *Discrimination Act 1991* (ACT) s 7(k).

567 Queensland Nurses and Midwives Union submission, 24-25.

568 Women's Legal Service Qld submission, 3-4; Caxton Legal Centre submission, 25; Queensland Advocacy Incorporated submission, 10; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 4.

569 Queensland Council of Unions submission, 29-30.

570 Intersex Human Rights Australia submission, 24-25.

disability and exceptions applying to insurance providers, we address these concerns without the need for an additional attribute.

Discrimination based on worker's compensation history

The Act protects a person from being asked for unnecessary information on which discrimination might be based. This does not apply if the information is needed to comply with legal obligations or because it was reasonably required for a purpose that did not involve discrimination.⁵⁷¹ A specific example is included in the Act to demonstrate how this might work in practice:

Example— An employer would contravene the Act by asking applicants for all jobs whether they have any impairments, but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

During the recruitment stage an employer can make a written request to a job applicant to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job.⁵⁷²

However, using information about an applicant obtained in the recruitment process must be done in compliance with the Anti-Discrimination Act. An applicant who has been wrongly rejected from consideration because of misuse of medical information disclosed may have grounds to bring a complaint of impairment discrimination.⁵⁷³

Is the proposed attribute of a comparable nature to those already covered by the Act?

Given that we have not identified a gap in protection, we have not given full consideration to whether the attribute is comparable to others. On an initial view, as the proposed attribute of irrelevant medical record is about records that relate closely to attributes including impairment (disability), gender identity, and sex characteristics, it is likely to be comparable to the existing attributes.

The Review's position

The Review's position is that:

- We have been unable to identify any gaps in protection that are not addressed through recommendations to create a new sex characteristics attribute and updates to the definitions of impairment and gender identity.
- Concerns about unfair use of information obtained in a request to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job are not grounds to create a new attribute, as sufficient coverage currently exists.
- The Act should not be amended to create a new attribute of 'irrelevant medial record.'

Medical choice

We received a large volume of submissions and survey responses about concerns relating to management of the COVID-19 pandemic, including:

- mandatory wearing of masks
- vaccination requirements to enter venues and to travel

⁵⁷¹ *Anti-Discrimination Act 1991* (Qld) s 124.

⁵⁷² *Workers Compensation and Rehabilitation Act 2003* (Qld) ss 571B- 571C.

⁵⁷³ Queensland Human Rights Commission, *Medical information and recruitment* (Web page, 2022) <<https://www.qhrc.qld.gov.au/your-responsibilities/for-employers/recruitment/medical-information-and-recruitment>>

- vaccination requirements on employees in particular sectors.

We received over 900 responses to our online survey and 12 submissions⁵⁷⁴ on this topic. They were broadly suggesting that a new attribute of ‘medical choices’ should be introduced. Submissions used other terms to describe this concept, including ‘medical treatment’, or ‘medical status.’ All these terms are directed at encompassing any choice made by an individual to either receive or decline medical treatment or vaccinations.⁵⁷⁵ Some also suggested that protections should extend to the choice of wearing a face mask or not.⁵⁷⁶

The Medical Insurance Group of Australia’s submission highlighted the importance of retaining the existing exceptions in the Act for public health and workplace health and safety, especially in the context of the ongoing pandemic, and asked us to have regard to the burden on health care providers during this time.⁵⁷⁷

The timing of our submissions process coincided with strict restrictions on unvaccinated and unmasked people entering cafes, health settings, and other places, and imposing mandatory vaccination requirements for some workers.⁵⁷⁸ Many of these extraordinary measures have now reduced or ceased, although some workplace vaccination requirements are still in place.⁵⁷⁹

Many of the submissions we received indicated that people experienced high levels of distress because of these issues, including poor mental health, financial stress, and negative impact on relationships. Participants in public consultations across Queensland shared their views about similar concerns.⁵⁸⁰

Current approach

In a small number of cases, mandatory requirements for vaccination and mask-wearing may already be unlawful discrimination under the current Act, if certain circumstances are met.

Inflexible application of rules that require everyone to be vaccinated could amount to indirect discrimination, in certain circumstances. For example, if a person has experienced an anaphylactic reaction from a first dose of COVID-19 vaccine and obtained a medical opinion that a second dose would be unsafe or detrimental, to make no exception to the rules may be discrimination on the ground of impairment.

As vaccines have not yet been made available to children aged five and under, it is likely to be indirect age discrimination to not make an exception for an infant.

Reasonableness and exceptions

Indirect discrimination may be reasonable in some circumstances⁵⁸¹ which means that discrimination may be lawful in certain situations. For example, in aged care or high-risk clinical settings it might be necessary to discriminate to ensure that an infectious disease does not spread and result in loss of life. Where an employee complained of discrimination after refusing

574 The People’s Revolution submission; Name withheld (Sub.009) submission; Name withheld (Sub.010) submission; Name withheld (Sub.012) submission; Marianne Wickham submission; Name withheld (Sub.014) submission; Name withheld (Sub.015) submission; Name withheld (Sub.016) submission; Name withheld (Sub.017) submission; Name withheld (Sub.018) submission; Dr Conny Turni submission; Name withheld (Sub.105) submission.

575 Name withheld (Sub.105) submission, 3.

576 The People’s Revolution submission, 3.

577 Medical Insurance Group Australia submission, 3.

578 During a public emergency, the Chief Health Officer can issue a Public Health Direction under the *Public Health Act 2005* s 362B to assist in containing or responding to the spread of COVID-19.

579 Queensland Health, *Chief Health Officer Public Health Directions* (Web page, 2022) <<https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers>>.

580 The Review held four public consultations in regional Queensland during November and December 2021 – in Rockhampton, Townsville, Yarrabah, and Cairns.

581 *Anti-Discrimination Act 1991* (Qld) s 11. See also discussion on Indirect discrimination – reasonableness in chapter 4.

to be vaccinated for personal reasons (including that there is insufficient evidence about the effectiveness of vaccines) the NSW Tribunal observed that compliance with a public health order was reasonable.⁵⁸²

In addition, health and safety exceptions may apply in these situations, where it is reasonable and necessary to take protective steps.⁵⁸³ The Act also allows employers to impose 'genuine occupational requirements' for a position, which may include a requirement to be vaccinated to safely perform a certain job.⁵⁸⁴

Complaints made about discrimination on the ground of vaccination status may not succeed because the respondent can often successfully argue that a health and safety exception applies. For example, in NSW it was found that it was reasonable for TAFE to rely on the equivalent public health exception in relation to a policy requiring vaccinations for staff.⁵⁸⁵

Is there a gap in protection?

While some people will be protected from discrimination on the grounds of impairment, age, or religious belief or activity, those who make a personal choice not to wear a mask or to be vaccinated are not covered by the existing attributes. This leaves a gap in protection.

Is the proposed attribute of a comparable nature to the attributes already in the Act?

The proposed attribute of 'medical choice' is not comparable to other attributes in the Act. Medical choice is not an immutable characteristic like race or age, as demonstrated by the word 'choice.' We have also been unable to identify that people who have chosen not to be vaccinated, or to not wear a mask on the basis of their personal beliefs are a historically vulnerable or marginalised group.

One submission said that people experiencing 'medical choice discrimination' are a 'large group' in need of protection, particularly as some attributes represent smaller sections of the population - for example pregnancy or lawful sexual activity.⁵⁸⁶ However, the size of the group is not a primary consideration for the Review.

Experiences of temporary hardship from COVID-19 restrictions are not analogous to ongoing stigma and social disadvantage experienced over a lifetime by other groups with protected attributes.

Human rights considerations

Requiring people to be vaccinated to access goods and services or employment limits human rights, including the right to freedom of thought, conscience, religion or belief; the right not to be subjected to medical treatment without consent; the right to privacy; and the right to equality.⁵⁸⁷

However, it is lawful to limit rights under the Human Rights Act if those limitations can be justified in a free and democratic society based on human dignity, equality and freedom.⁵⁸⁸ Discriminatory treatment may be necessary to meet the legitimate aim of ensuring the health and wellbeing of the community and to uphold the right to life, particularly in high-risk settings.

582 *Filla v Independent Community Living Australia* [2022] NSWCATAD 108.

583 *Anti-Discrimination Act 1991* (Qld) s 107 and s 108.

584 *Anti-Discrimination Act 1991* (Qld) s 25.

585 *Petek v TAFE NSW* [2022] NSWCATAD 105.

586 Name withheld (Sub.105) submission, 2.

587 *Human Rights Act 2019* (Qld) ss 20, 17, 25, 15.

588 *Human Rights Act 2019* (Qld) s 13.

Considerations in deciding to limit human rights in the context of a pandemic would have included that vaccination programs are a key preventative healthcare measure that have been shown to save lives,⁵⁸⁹ while also saving spending on public health in the long term.⁵⁹⁰

Courts and tribunals in jurisdictions around the world have determined, in the vast majority of cases, that promoting public health or the health of workers can justify limits on the rights of individuals who have not been vaccinated.⁵⁹¹

The Review's position

The Review's position is that:

- While there may be a gap in protection under the Act for people who make medical decisions based on personal beliefs, the proposed attribute of medical choice is not comparable to other attributes in the Act because this group is not a historically vulnerable or marginalised group.
- The Act sufficiently protects groups who have an existing attribute where blanket rules or requirements indirectly discriminate against people, such as on the basis of a person's disability.
- An attribute that protects people because they choose not to have a vaccination would have limited benefit for the affected group in practice because health and safety exceptions would often apply. These exceptions must remain in the Act. Repealing or limiting health and safety exceptions would create an unfeasible situation for employers and businesses that are required to comply with both workplace health and safety laws and discrimination laws, while also owing a duty of care to customers, employees, and the public.
- Adding the attribute of medical choice could undermine public health now and in the future, resulting in social and economic costs to the government and the broader community.
- 'Medical choice' or another analogous term should not be a protected attribute under the Anti-Discrimination Act.

589 UNICEF, *Immunization* (Web page, 2022) <<https://www.unicef.org/immunization>>. Global childhood immunisations are estimated to prevent 2-3 million deaths annually. 23 million deaths were prevented by measles vaccinations in 18 years between 2000 and 2018.

590 Fangjun Zhou F, Abigail Shefer, Jay Wenger et al, 'Economic evaluation of the routine childhood immunization program in the United States, 2009' Vol 133 iss 4 *Pediatrics*. (2014), 577–85; Suresh Mehendra Raj, Abrar Ahmad Chughtai, Anurag Sharma et al, 'Cost-benefit analysis of a national influenza vaccination program in preventing hospitalisation costs in Australian adults aged 50-64 years old' *Vaccine* 37 (40) (September 2019), 5979-5985; David E Bloom, Daniel Cadarette and Maddalena Ferranna, 'The Societal Value of Vaccination in the Age of COVID-19' 111(6) *American Journal of Public Health* (June 2021), 1049-1054.

591 See for example cases on a range of requirements to be vaccinated, including for COVID-19: *Kassam v Hazzard*; *Henry v Hazzard* [2021] NSWSC 1320; *Kassam v Hazzard*; *Henry v Hazzard* [2021] NSWCA 299; (2021) 396 ALR 302; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064; *NZDOS V Minister for COVID-19 Response* [2022] NZHC 716; *Vavříčka v The Czech Republic* (European Court of Human Rights, Grand Chamber, Applications nos. 47621/13 and 5 others, 8 April 2021); *Kimber v Sapphire Coast Community Aged Care* [2021] FWCFB 6015.