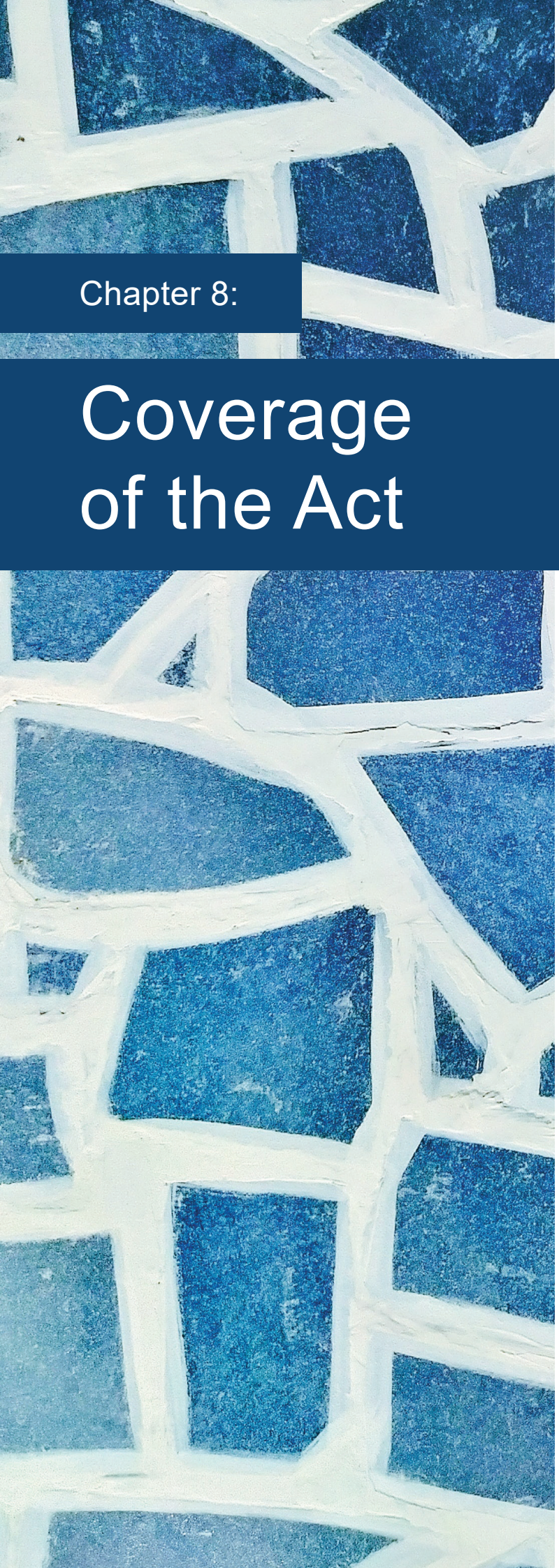

Chapter 8:

Coverage of the Act

Contents

Areas of activity

The Terms of Reference ask us to consider the areas of activity in which discrimination is prohibited.[1]

The current areas of activity are work, education, goods and services, accommodation, disposition of land, club membership and affairs, superannuation, insurance, administration of state laws and programs, and local government.

We have considered whether there is a need for any reform to the areas of activity in which discrimination is prohibited, and whether discrimination should also be unlawful in other areas of public life.

Discrimination law in Queensland applies to conduct in public rather than private spheres with the notable exceptions of sexual harassment, which is unlawful everywhere,[2] and vilification, which relates to public acts.[3]

The Act includes defined areas of activity which makes it clear 'where' discrimination is unlawful, and the areas of activity are fairly consistent across Australian jurisdictions with little change over time.

The Review received few submissions regarding the areas of activity, and no obvious gaps in protection were identified during the consultation phase.

Activities 'other than in private'

Previous reviews of discrimination laws have recommended reforms to ensure that all forms of unfair treatment that happen other than in private are covered. This would, in effect, remove the need for the Act to define areas of activity in which the Act applies.

An exposure draft Bill proposed to consolidate Commonwealth legislation included a provision which rendered all discriminatory conduct unlawful within 'any area of public life', which would have been a departure from the established approach.[4] The ACT Law Reform Advisory Council recommended that the law cover discrimination in all areas of life with an exception for private conduct.[5] Neither of these recommendations were incorporated into law.

We received two submissions that suggested similar approaches by either:

- listing areas of activity in a single provision and including coverage of 'any activity that is not in private'[6]
- following the approach in the Racial Discrimination Act which includes the words 'in the political, economic, social, cultural or any other field of public life.'[7]

Throughout our consultations and research, we did not identify gaps in protection that are created by the current coverage of areas of activity defined by the Act.

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(d).
2 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.
3 *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A.
4 Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 22(1) – this Bill did not pass into law.
5 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) Recommendation 6.1, 12, 55.
6 Australian Discrimination Law Experts Group submission, 60-61.
7 LGBTI Legal Service Inc submission, 5, referring to *Racial Discrimination Act 1975* (Cth) s 9.

The Review's position

The Review considers that:

- As the law already sets out the key areas of public life in which discrimination occurs, and as no gaps in protection were identified, there is no justification for altering the areas of activity in the Act.
- Changing the law to refer to activity 'other than in private' or 'in any field of public life' may introduce ambiguity into the law and make it harder for duty holders to comply.
- Determining what is public as opposed to private conduct may prove contentious and create an unnecessary distraction from the central issues to be determined by tribunals and courts.

Exceptions and exemptions

The Terms of Reference ask us to consider whether there is a need for any reform to:

- enhance and update the Act[8]
- exemptions and other legislative barriers that apply to the prohibition on discrimination[9]
- ensure the compatibility of the Act with the Human Rights Act.[10]

'Exemptions' in the current Act are provisions that, in certain circumstances, permit discrimination that would otherwise be unlawful. Exemptions are available for each of the areas of activity in the Act, (except for Administration of State laws and programs and Local government areas), and General exemptions apply to all areas of activity.

The purpose of exemptions is to acknowledge that treating a person differently may be justified in some circumstances because of other considerations.[11] Some exemptions provide positive or protective measures. For example:

- allowing age-based benefits and concessions[12]
- allowing restrictions on access to sites of cultural or religious significance.[13]

Some exemptions reinforce the prohibition on discrimination in public areas of activity, rather than private areas of activity, [14] such as in a person's home. This is demonstrated by exemptions that allow discriminatory decisions about who provides domestic services in a person's home and childcare for a person's children at the person's home.[15]

If a person or organisation seeks to rely on an exemption, they must raise the issue and prove the exemption applies.[16]

Throughout this chapter, we consider whether the coverage of the Act, as determined by the areas of activity and the exemptions that apply, achieves the right balance between providing protection from discrimination and allowing for differential treatment for a genuine reason, where it is reasonable, necessary, and proportionate.

During our initial consultations, we identified particular exemptions and areas of activity where reform may be required to meet current community needs and expectations, and to ensure the Act is compatible with human rights obligations under the *Human Rights Act 2019* (Qld).

Terminology

Most state discrimination Acts use the word 'exception' for provisions that allow discrimination in certain circumstances, and use the word 'exemption' for temporary exemptions from the operation of specific provisions that may be granted by a tribunal.[17]

8 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.
9 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).
10 Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(a).
11 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 164.
12 *Anti-Discrimination Act 1991* (Qld) s 49.
13 *Anti-Discrimination Act 1991* (Qld) s 48.
14 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.
15 *Anti-Discrimination Act 1991* (Qld) ss 26–27.
16 *Anti-Discrimination Act 1991* (Qld) s 206.
17 *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1998* (Tas), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 2010* (Vic), *Equal Opportunity Act 1984* (WA).

However, the Queensland Act conflates these two distinct operations of the Act by referring to both as 'exemptions.'

The dictionary meaning of 'exception' includes 'an instance or case not conforming to the general rule.'[18] This accurately reflects what 'exemption' currently means under the Act. For example, an 'exemption' is available in relation to decisions made when a person hires someone to care for their children at home.[19]

The dictionary meaning of 'exempt' includes 'freeing [a person] from an obligation or liability to which others are subject.'[20] This implies that an action is taken to grant release from an obligation, which is more closely aligned with the process of obtaining an exemption from a Tribunal.[21]

Australian Discrimination Law Experts Group proposed that the term 'defences' be used instead of exemptions,[22] and the person relying on the defence be required to prove that it applies, on the balance of probabilities. This suggests an approach in which discrimination is presumed to have occurred unless a defence is available.

Christian Schools Australia proposed a change of terminology in relation to provisions involving religious bodies. In their view, the word 'exemption' is 'inherently fraught' and is a 'poor mechanism to balance human rights'. They suggest changing the terminology to 'balancing provisions' to reflect the view that exceptions are about balancing competing interests.[23]

The Review's position

The Review considers that:

- Using the same word for two distinct operations of the Act creates confusion in the community and among duty holders.
- The term 'defence' is a legal term that implies an adversarial process involving duty holders and people who make a complaint under the Act.
- The term 'balancing provisions' does not accurately describe the substance of those provisions, which is that discrimination that would otherwise be unlawful is allowed in certain circumstances determined by the Act.
- Adopting either 'defences' or 'balancing provisions' would make the Act inconsistent with other Australian jurisdictions.
- 'Exceptions' is the most accurate term for provisions in the Act that allow discrimination in certain circumstances.
- 'Exemptions' continues to be an accurate term for the process of applying to the tribunal for release from the operation of specified provisions of the Act for a set time.

Recommendation 33

33.1 The Act should use the term 'exceptions' for provisions that allow discrimination in certain circumstances and use the term 'exemptions' for applications to the tribunal for an exemption from the operation of specific provisions for a fixed period.

18 *Macquarie Dictionary* (online at 20 June 2022) 'exception' (def 3).
19 *Anti-Discrimination Act 1991* (Qld) s 27.
20 *Macquarie Dictionary* (online at 20 June 2022) 'exempt' (def 1).
21 Under section 113 of the Act, the tribunal may grant an exemption to a person from the operation of a specified provision of the Act.
22 Australian Discrimination Law Experts Group submission, 14.
23 Christian Schools Australia submission, 20.

In this report, we use the words ‘exceptions’ to discrimination, rather than ‘exemptions’ as in the current Act.

Updating the exceptions

Considerations that apply

We consider that some exceptions should remain in the Anti-Discrimination Act, some should be amended, and some should be repealed entirely. In coming to this position, we have examined the current exceptions to see whether each one is still necessary; the scope is reasonable and proportionate, as required by the Human Rights Act; and whether the scope should be restricted to particular areas of activity or particular attributes.

Based on information obtained by the Review from sources including submissions, consultations, and previous reports, we have taken the following into account:

- the purpose of exceptions and whether that purpose remains relevant and significant
- how exceptions are being applied, and the nature and impact of discrimination that is being allowed because of them
- whether the exception perpetuates disadvantage or stigma against particular groups based on irrelevant assumptions or stereotypes
- approaches to exceptions in other jurisdictions
- ways to make the law simpler and easier for duty holders to comply, particularly if there is overlap between state and Commonwealth laws.

The recently introduced Human Rights Act provides a framework for balancing human rights with any proposed limitation on those rights. Human rights are not absolute and may be subject to reasonable limits that can be justified in a free and democratic society based on human dignity, equality, and freedom. The Human Rights Act sets out relevant factors for assessing whether a limitation is reasonable and justifiable.[24]

In examining human rights compatibility, we consider whether each current exception promotes or limits the rights protected by the Human Rights Act, and whether the exception is a reasonable and proportionate limitation on rights that helps to achieve a legitimate purpose.

The Review has not undertaken an exhaustive human rights analysis of current and potential exception provisions. Any future amendment to the Act will require a Statement of Compatibility, which provides a mechanism for a comprehensive assessment of whether the provisions of the Bill are compatible with human rights. However, the obligation on public entities, which includes the Commission, to act and make decisions compatibly with human rights has informed our work at every stage.

While some provisions we deal with in this section are not framed as an exception in the current Act, the effect of these sections means that they operate like an exception to discrimination.[25]

24 *Human Rights Act 2019* (Qld) s 13(2).

25 For example, s 46(2) confines references to a person who supplies goods or services to those that carry out their purposes for the purpose of making a profit, which has the same effect as an exception although it is not listed in Subdivision 2 where other exceptions to discrimination in the goods and services area are included.

Non-profit suppliers of goods and services

Current approach

Many non-profit organisations do not need to comply with the Act when supplying goods or services. While the Act provides that discrimination in the supply of goods or services is expressly covered by the Act 'whether or not for reward or profit', a broad exclusion dilutes this statement.

The Act has an exclusion for goods or services when provided by an association that –

- is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
- does not carry out its purposes for the purpose of making a profit.[26]

Non-profit services have been interpreted by the tribunal to include private hospitals,[27] sporting bodies,[28] and hospitality venues run by clubs,[29] and are likely to include aged care, social services, disability services, and art or cultural societies.

The non-profit exclusion applies regardless of the assets and income of the relevant body. The determinative factor is the purpose as set out in the constitution or rules of the association, and the way in which the association derives income.[30] In these circumstances, the non-profit exclusion operates as a complete defence to discrimination in relation to all attributes in the area of goods and services.

An overlap between the non-profit goods and services exclusion and the definition of a club, is addressed in the following section on clubs.

The Discussion Paper sought submissions about whether the area of goods and services should continue to exclude all non-profit associations. 17 submissions discussed this issue.[31] Of these submissions, most supported a change to this approach, and two[32] thought the Act should remain unchanged.

This topic was also explored with peak bodies representing a range of non-profit service providers during our initial consultation phase.[33]

Fair access and social inclusion

Stakeholders that supported a change to the Act to ensure that non-profit organisations are included in the goods and services area told us that:

26 *Anti-Discrimination Act 1991* (Qld) s 46(2).
27 *Haycox v The Uniting Church in Australia Property Trust (Q) trading as the Wesley Hospital* [2005] QADT 35.
28 *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.
29 *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.
30 *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471 [34].
31 Clubs Queensland submission; Joint Churches submission; Legal Aid Queensland submission; Queensland Council of Social Service submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Youth Advocacy Centre Inc submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Name withheld (Sub.008) submission; Queensland Rugby League submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Australian Lawyers Alliance submission; Clubs Queensland submission; Maternity Choices Australia submission; Australian Association of Christian Schools submission.
32 Clubs Queensland submission, 4; Joint Churches submission, 16.
33 Queensland Council of Social Services consultation, 12 October 2021. 98 participants from a range of non-profit organisations attended a workshop co-hosted with the Review Team.

- Fair access and engagement with community organisations is vital to achieve social inclusion[34] e.g., people with disability may rely on a non-profit RSL for their social life.[35]
- Many people rely on goods and services providers for their most basic needs,[36] and the exclusion of many non-profits from the Act is particularly unfair for people who are vulnerable or disadvantaged,[37] or from regional or remote areas where there are fewer choices.[38]
- It is unreasonable that non-profit organisations have responsibilities under Anti-Discrimination law to their employees but not to their clients,[39] particularly when contracted to provide public services on behalf of the State.[40]
- This situation creates a misalignment with the Human Rights Act in which public entities[41] are required to act compatibly with human rights, including the right to non-discrimination protected in section 15 of that Act.[42]

Discrimination allowed because of the exclusion

Community legal services told us that the non-profit exclusion creates an additional layer of complexity for their clients.[43] We heard that for this reason, an otherwise meritorious complaint sometimes fails.[44] One person told us that he brought a complaint in Queensland, but it was unable to proceed because of the non-profit exclusion. When he lodged the same complaint with the Australian Human Rights Commission under the federal Sex Discrimination Act the complaint resolved with a formal apology. He commented that:

> *My case demonstrates that the federal Sex Discrimination Act - which contains no exemptions for not-for-profit organisations - was effective at stopping gender-based discrimination when the Queensland ADA was not able to prevent discrimination. These exemptions cause real harm to real Queenslanders. They are outdated and serve no useful purpose - they need to go.*[45]

Whether an entity carries out its business for the purpose of making a profit or not has been the source of some contention.[46] Complications at the tribunal stage can arise because it is often difficult for the person making a complaint, as well as the Commission, to identify whether the entity is non-profit, particularly where a non-profit organisation is acting as an agent for a State or private entity, or where a single organisation has both profit and commercial divisions.[47]

34 Caxton Legal Centre submission, 31.
35 Queensland Advocacy Incorporated submission, 9.
36 Australian Lawyers Alliance submission, 19.
37 Queensland Council for Social Services submission, 6 – referring to sex workers, prisoners, LGBTIQ+ community members, and people with a history of mental illness; Vision Australia submission, 7 – referring to people with disability who rely on many non-profit organisations.
38 Maternity Choices submission, 1, 9 – noting that maternity services are organised by 'catchment' and there are limited alternatives available.
39 Youth Advocacy Centre submission, 4.
40 Youth Advocacy Centre submission, 4.
41 A public entity under the *Human Rights Act 2019* s 9(h) includes an entity whose functions are or include functions of a public nature when it is performing the functions for the State or a public entity (such as a contractor).
42 Legal Aid Queensland submission, 100; Youth Advocacy Centre submission, 4.
43 Legal Aid Queensland submission, 99-100.
44 Legal Aid Queensland submission, 99.
45 Name withheld (Sub.008) submission, 5-6.
46 For example, *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66, a complaint about wheelchair access became about whether the Polo Club was non-profit.
47 Legal Aid Queensland submission, 99.

While people in Queensland can make their complaint to the Australian Human Rights Commission to avoid some of these issues, if they lodge in Queensland prior to seeking advice, they may be barred by federal statue from changing jurisdiction.[48]

Community reliance on non-profit organisations

In Queensland, large numbers of services are provided by the non-profit sector, including aged care, private hospitals, disability services and social services.

When QUT Business School examined Australian Charities and Not-for-profits Commission data in 2014, it found that Queensland has the greatest percentage of large charities in Australia. In 2014, there were over 10,000 charities operating in Queensland, with most (65.4%) operating with an annual revenue of less than $250,000.[49] Those with revenue between $250,000 to $999,000 made up 15.9%, and the remaining 18.6%, (amounting to 2,019 entities), were large charities with over $1million in revenue.

The most common charitable purposes of these entities were 'advancement of religion', 'relief of poverty, sickness or the needs of the aged', 'advancement of education', and 'other purposes beneficial to the community'. Most bodies were carrying out religious activities, education, community development, culture and the arts, health services, social services, and aged care.[50]

In 2005, the Queensland Anti-Discrimination Tribunal decided a case regarding access to services and treatment at The Wesley Hospital by a person with obesity and a mental health condition. The Wesley Hospital was found to be an association established for social or community services. The Tribunal determined that whether or not the Wesley Hospital makes a profit is irrelevant to whether the hospital 'carries out its purposes for the purpose of making a profit' and dismissed the matter.[51]

Ensuring the continuing work of non-profit organisations

Overall, there was strong support for changing the scope of the Act to include non-profit organisations when they are providing goods or services to the public on a commercial basis, or when providing goods or services on behalf of the State.

Of the material gathered by the Review, we did not identify strong opposition to the concept that non-profit organisations should be included in the goods and services area of the Act, particularly because stakeholders were aware of their obligations under federal laws which are broader.

During a consultation with Queensland Council of Social Service, the peak body for social services in Queensland, 49% of participants representing non-profit organisations thought the exclusion of non-profits from the operation of the Act should change; 11% of participants thought the status quo should be maintained; and 36% of participants thought it depends on the service and/or the relevant attribute.[52] Many participants at the consultation were not aware that non-profit service providers were treated any differently under the Act.[53]

Similar views were expressed in a survey of Queensland Rugby League's key stakeholders – 60% were unaware that non-profit organisations were excluded from the Act; 56% thought it should be

48 Legal Aid Queensland submission, 99.
49 Prof Myles McGregor-Lowndes and Marie Crittal, 'The State of Queensland Charities – An examination of the first Annual Information Statements of charities operating in Queensland', *QUT Business School,* ACPNS Working Paper no. 65, iii.
50 Prof Myles McGregor-Lowndes and Marie Crittal, 'The State of Queensland Charities – An examination of the first Annual Information Statements of charities operating in Queensland', *QUT Business School,* ACPNS Working Paper no. 65, 40-41.
51 *Haycox v Uniting Church in Australia Property Trust (Q) t/as the Wesley Hospital* [2005] QADT 35.
52 Queensland Council of Social Service consultation, 12 October 2021.
53 Queensland Council of Social Service submission, 5-6.

reviewed as there should be no lawful forms of discrimination; and 13% thought the exemption currently afforded to non-profit organisations should remain.[54]

The Joint Churches submission, which represents the views of 11 churches in Queensland, thought the status quo should be maintained, noting that beneficial services, such as op shops, often depend on the support of volunteers and operate on very limited budgets.[55]

Clubs Queensland, which represents the interests of many non-profit clubs in Queensland, submitted that the current exception should remain, but in the alternative, there could be a way of ensuring an exclusion for smaller, non-profit clubs.[56] Clubs Queensland was most concerned about an unfair burden on smaller clubs with a turnover of less than $500,000.[57]

Options for reform

Submissions suggested the following reform options:

- repeal the exclusion entirely, meaning that all non-profit goods and services providers are included in the Act[58]
- repeal the exclusion and create a voluntary body exemption in its place.[59]
- continue to exclude non-profit goods and services providers from the Act where they have a turnover of less than $500,000.[60]

Comparative approaches

While some jurisdictions have different 'voluntary bodies' exemptions,[61] only Queensland permits discrimination by all entities that do not 'carry out their purposes for the purpose of making a profit'.

The federal Racial Discrimination Act and the Disability Discrimination Act cover profit and non-profit services, and the Disability Discrimination Act additionally states that goods, services, and facilities include those that are 'for payment or not'.[62] However, the Sex Discrimination Act and Age Discrimination Act contain a voluntary body exemption that applies when people are admitted as members of a voluntary body or when services are provided to members of the body, but does not apply to services provided to the general public.[63]

Under the Sex Discrimination Act, a voluntary body is defined as an association, whether incorporated or unincorporated, the activities of which are not engaged in for the purpose of making a profit. It does not include a club (see also the following section), registered organisation, government body, or financial association.[64]

The Age Discrimination Act definition is similar,[65] to ensure the legislation 'does not cut across the valuable contribution made by voluntary bodies throughout Australia.'[66] Had the Religious

54 Queensland Rugby League submission, 6. 124 survey respondents answered and 19 skipped the question, and respondents were able to select all that apply.
55 Joint Churches submission, 65.
56 Clubs Queensland submission, 2.
57 Clubs Queensland submission, 2. This figure comes from the definition of a small club under the Registered and Licenced Clubs Award 2020.
58 Australian Discrimination Law Experts Group submission, 69.
59 Equality Australia submission, 21; Queensland Council for Civil Liberties submission, 25.
60 Clubs Queensland submission, 2.
61 The 'voluntary body' exceptions in other equality jurisdictions allow for discrimination with respect to admission to membership and benefits, facilities and services received as members, but not when services are being provided to the public. See also clubs in this section.
62 *Disability Discrimination Act* (Cth) s 24.
63 *Sex Discrimination Act 1984* (Cth) s 39.
64 *Sex Discrimination Act 1984* (Cth) s 39.
65 *Age Discrimination Act 2004* (Cth) s 36.
66 Explanatory Memorandum, Age Discrimination Bill 2003 (Cth) 24.

Discrimination Bill 2022 passed into law, it would have included a voluntary body exemption because of the need to protect the right to freedom of association under the *International Covenant on Civil and Political Rights,* which protects the 'freedom to choose who not to associate with, provided that choice does not have a publicly discriminatory effect'.[67]

Importantly, the federal voluntary bodies exemptions can only be relied on by non-profit organisations in relationships with their members and not relationships with non-members.[68]

Adopting this approach in Queensland would mean, for example, while a Catholic bible study group could be permitted to refuse membership or services to non-Catholics,[69] an op shop run by the Catholic Church would be subject to the Act when selling items to the general public.

Human rights considerations

Small voluntary-run bodies with few resources or facilities, and particularly those operated from private homes or conducted for the purposes of worship in community, are not drawn unreasonably into the operation of the Anti-Discrimination Act, and have considered the relevant rights protected under the *Human Rights Act 2019* (Qld):

- freedom of association[70]
- freedom of conscience, thought and belief[71]
- right to privacy.[72]

These rights must be weighed against protections for equality and non-discrimination, which may be unjustifiably limited under the current approach.[73] Including all voluntary bodies in the scope of goods and services when dealing with their members would protect the right to equality but may unreasonably limit other rights including the right to association, privacy and the right to freedom of thought, conscience, and belief.

By restricting the exclusion to the provision of goods or services to members, a voluntary body exclusion is intentionally targeted to ensure the purpose of promoting freedom of association and other key rights is achieved, without creating an unreasonable limitation on the right to equality.

The Review's position

The Review considers that:

- Excluding non-profit service providers from the operation of the Act is creating an unfair barrier to accessing the Act, particularly considering the extent to which essential goods and services are provided by non-profit organisations.
- The current exception is likely to have a disproportionate effect on people who rely heavily on non-profit services including older people, people with disability, people experiencing socio-economic disadvantage, and people in remote or regional areas who have more limited options.

67 Explanatory Memorandum, Religious Discrimination Bill 2022 (Cth) 23-24.
68 *Gardner v All Australian Netball Association Ltd* (2003) 197 ALR 28 – where a netball association had imposed an interim ban preventing pregnant women from competing. Because only state and territory netball associations were members, it was determined that a pregnant netballer was receiving services as a player, and was not a 'member', and so the exemption did not apply.
69 Explanatory Memorandum, Religious Discrimination Bill 2022 (Cth) 24.
70 *Human Rights Act 2019* (Qld) s 22(2).
71 *Human Rights Act 2019* (Qld) s 20.
72 *Human Rights Act 2019* (Qld) s 25.
73 *Human Rights Act 2019* (Qld) s 15.

- To improve consistency with the federal laws, and to ensure compatibility with the Human Rights Act, it is necessary to create a similar voluntary body exclusion.

Recommendation 34

34.1 The Act should not include the provision that excludes from the operation of the Act those associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or other similar lawful purposes which do not carry out their purposes for the purpose of making a profit.

34.2 The Act should include a voluntary body exception based on the exception in the *Sex Discrimination Act 1984* (Cth) s 39, which is defined in s 4 of that Act.

Clubs

The Act prohibits discrimination in the area of club membership and affairs, and protects both prospective and current club members from discrimination.[74]

'Club' under the Act means an association established for a particular purpose, such as social, literary, cultural, political, sporting, recreational, community service, or similar purpose, but only where the association carries out their activities for the purposes of making a profit.[75] Non-profit clubs are excluded from the Act's area of club membership and affairs.

Clubs that are not likely to be covered by the definition of 'club' include bowls clubs, sporting clubs, surf lifesaving clubs, and RSL clubs.

In the Discussion Paper, we sought submissions about whether the definition of club should change. Eight submissions[76] addressed this issue, and all of them supported change to the definition.

There can be an overlap between the areas of club membership and affairs and the area of goods and services, which we discuss above.

Importance of clubs

The Review was told that clubs serve and strengthen the community. Clubs Queensland, the peak industry body for all registered and licenced clubs in Queensland, describe clubs as important 'hubs of social interaction and engagement' where members have 'shared values and a sense of belonging that strengthens the social fabric and promotes strong community cohesion.'[77]

Clubs Queensland said that it is important to their member clubs that they continue to be safe spaces where the values of equality and non-discrimination are practiced and promoted.[78]

74 *Anti-Discrimination Act 1991* (Qld) ss 94–95.
75 *Anti-Discrimination Act 1991* (Qld) Dictionary (definition of 'club').
76 Clubs Queensland submission; Australian Lawyers Alliance submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission; Queensland Rugby League submission; Name withheld (Sub.026) submission.
77 Clubs Queensland submission, 1.
78 Clubs Queensland submission, 1.

Preserving clubs for particular groups

Several stakeholders stressed the importance of ensuring that clubs can continue to operate for the benefit of particular groups. For example, the Indian Cultural & Sports Club celebrates Indian culture, dance, music, sports and festivals, and the Moreton Club was founded as a club for women.[79]

The Queensland Council for Civil Liberties suggested that in reconsidering the definition of a club the law should ensure it continues to support freedom of association.[80]

The Act contains exceptions for discrimination in club membership and affairs for clubs established for minority cultures and disadvantaged people[81] and to allow for clubs segregated by sex.[82] However, unlike other jurisdictions with a broader meaning of clubs, Queensland does not have specific exceptions that allow for clubs to operate for the benefit of a certain age group (unless it is a 'disadvantaged' group), or for clubs based on political affiliation.[83]

Discrimination allowed because of the exception

The narrow definition of 'club' may have been intended to prevent an unreasonable intrusion into private affairs or free association, which are protected under the Human Rights Act.[84] For example, it may not be reasonable to extend the reach of the Act to a social book club run from a person's private home.

Nonetheless, the narrow definition has permitted discrimination in a wide range of circumstances, including when basketballers of African descent were allegedly excluded from participation in a competition because of their race. Despite making profits and holding substantial assets, the respondent basketball associations were exempt because their constitutions did not cite profit-making as their purpose, and their revenue was used for the 'sporting purposes' under which they were established. [85]

Queensland Rugby League noted that there was limited stakeholder awareness (15%) that only for-profit 'clubs' were included in the definition in the Act with survey participants commenting that:

- 'There should be no exemptions across the board.'
- 'We would not look to discriminate in any way but may not be able to help some groups because of a lack of funds.'
- 'Education is needed at the forefront behind reducing incidents of discrimination.'[86]

The Australian Discrimination Law Experts Group commented that there appears to be no valid rationale for allowing most clubs in Queensland to operate outside the law, particularly because non-profit clubs have other relevant exceptions that they can rely on where necessary.[87] This view was shared by other stakeholders who supported change to the exclusion of non-profit associations from the goods and services area.[88]

79 Clubs Queensland submission, 4; Caxton Legal Centre submission, 31; Name withheld (Sub.026) submission, 12.
80 Queensland Council for Civil Liberties submission, 25.
81 *Anti-Discrimination Act 1991* (Qld) s 97.
82 *Anti-Discrimination Act 1991* (Qld) s 98.
83 Clubs Queensland submission; 4–5.
84 *Human Rights Act 2019* s 22(2), 25.
85 *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.
86 Queensland Rugby League submission, 7.
87 Australian Discrimination Law Experts Group submission, 70.
88 Legal Aid Queensland submission, 100; Caxton Legal Centre submission, 31; Australian Lawyers Alliance submission, 19.

Comparative approaches

Rather than a non-profit test, which excludes most clubs from the operation of the Act, other Australian jurisdictions define clubs based on factors that include the number of members, whether the club provides and maintains facilities, and whether the club holds a liquor licence or not.[89] Small, less well-resourced clubs that do not provide and maintain facilities or sell liquor are not within the scope of a 'club', but larger, well-resourced clubs are covered.

Federal approach

In the Non-profit suppliers of goods and services section in this chapter, we recommend that a voluntary body exception consistent with federal laws be introduced into the Act. This would apply where organisations provide goods or services to members but not to the general public. In the federal jurisdictions with voluntary body exemptions, the law clarifies that voluntary bodies do not include clubs.[90]

Several submissions referred to or recommended adopting the definition of club from other jurisdictions, including the federal Sex Discrimination Act.[91]

The Sex Discrimination Act defines a club as one with less than 30 members; which provides and maintains its facilities, in whole or in part, from the funds of the association; and sells or supplies liquor for consumption on its premises.[92] A surf lifesaving club that operates a restaurant, bar, and pokies would not be allowed to discriminate against female patrons who are having dinner and a drink.

The Disability Discrimination Act provides a different definition of a club that does not refer to the number of members or the holding of a liquor licence. Instead, an association meets the definition of a club under the Disability Discrimination Act if it provides and maintains its facilities, in whole or in part, from the funds of the association, regardless of the number of members.[93] Providing or maintaining facilities is an indicator that the club has more of a public, rather than private character.

Adopting this approach would include clubs that have public premises but do not hold liquor licences, such as smaller sporting clubs. However, a knitting club that meets at local cafes would not fall under the scope of a 'club', and not have duties under the Act to members or prospective members.

Several jurisdictions are moving towards an approach more aligned with the Disability Discrimination Act. The Northern Territory's Discussion Paper released in 2017 explored whether the test of holding a liquor licence or not remained an appropriate and relevant one, considering modern society's use and expectations of clubs and associations.[94] The Northern Territory has subsequently confirmed that it will broaden the scope of clubs to 'remove the ability for clubs without a liquor licence to discriminate against individuals.'[95] The federal Religious Discrimination Bill 2022 was drafted to include an approach consistent with the Disability Discrimination Act,[96] and a recent Exposure Draft in the ACT has presented the same approach.[97]

89 For example, see *Sex Discrimination Act 1984* (Cth) s 4.
90 For example – *Sex Discrimination Act 1984* (Cth) s 4; *Disability Discrimination Act 1992* (Cth) s 4.
91 Clubs Queensland submission, 3–4; Queensland Council for Civil Liberties submission, 25; Australian Lawyers Alliance submission,19.
92 *Sex Discrimination Act 1984* (Cth) s 4.
93 *Disability Discrimination Act 1992* (Cth) s 4.
94 Department of the Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017), 18.
95 Northern Territory Government, *Territory Stories – Achieving Equality in the Northern Territory* (Tabled Paper, February 2022), 8.
96 Religious Discrimination Bill 2022 (Cth) cl 5. Noting that the Bill did not ultimately pass.
97 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 22.

Remove non-profit definition of a club

Some submissions told us that exclusions for non-profit clubs and associations should be entirely removed.[98] This would require compliance with the Anti-Discrimination Act regardless of the size and resources of the club.

Human rights considerations

As explored in the previous section on non-profit suppliers of goods and services, Anti-Discrimination laws have generally sought to exclude from the operation of the Act activities that have a private, rather than public character. Under the Queensland Human Rights Act, a person has the right to privacy, and to not have their privacy, family or home arbitrarily interfered with.[99] The Anti-Discrimination Act should also not unreasonably limit freedom of association,[100] by supporting the right of people to meet peacefully for a common purpose through community clubs.

We have also taken account of the need to preserve the capacity for groups to enjoy their culture or faith together in community, which is necessary to safeguard cultural rights[101] and freedom of thought, conscience, religion and belief.[102] These rights must be appropriately balanced with the right to non-discrimination.[103]

Our recommendations will enhance the right to equality while safeguarding other rights.

The Review's position

The Review considers that:

- The scope of the current definition of a 'club' is narrow compared with the approach taken by other Australian jurisdictions.
- The law will be simplified for duty holders if the definition of a club is consistent with federal disability discrimination law, and will provide better protection from discrimination in these settings.
- No justification was presented to the Review that convinced us that selling alcohol is a relevant or appropriate threshold requirement to determine whether a club has a sufficient public character to be bound by the Act. The definition of club in the Disability Discrimination Act is preferable to the Sex Discrimination Act definition.
- Other jurisdictions that have broader meanings of club and have further specific exceptions, such as clubs for political purposes or for particular age groups. It may be necessary to consider whether the exceptions permitting specialist clubs are sufficient.

98 Legal Aid Queensland submission, 100; Australian Discrimination Law Experts Group submission, 70.
99 *Human Rights Act 2019* (Qld) s 25.
100 *Human Rights Act 2019* (Qld) s 22(2).
101 *Human Rights Act 2019* (Qld) s 27–28.
102 *Human Rights Act 2019* (Qld) s 20.
103 *Human Rights Act 2019* (Qld) s 15.

Recommendation 35

35.1 The Act should define a 'club' as per the definition in the *Disability Discrimination Act 1992* (Cth) s 4.

35.2 The Queensland Government should consider if any additional exceptions in the area of Club membership and affairs are required, for example on the basis of age or political affiliation.

Sport

In the Discussion Paper we asked for submissions on three issues:

- whether the General exception for sport in section 111 should be retained, amended, or repealed
- whether the words 'competitive sporting activity' in the exception should be defined
- whether 'strength, stamina, or physique' remain the appropriate requirements for an exception to be reasonable.

We received 19 submissions[104] with a diverse range of perspectives on the issue, and the sport exception was also discussed in several consultations.[105]

While we invited engagement from sporting organisations, we received limited response from bodies that represent the interests of organised sport on this issue. This has limited our ability to incorporate this perspective.

The Queensland Council for LGBTI Health (QC) considered that more consultation is needed with LGBTIQ+ communities on this topic.[106]

Current approach

Currently, participation in a competitive sporting activity may be restricted to either males or females[107] if the restriction is reasonable based on a range of considerations.[108] Participation may also be restricted on the basis of gender identity[109] if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity.[110]

Australia's state and federal Anti-Discrimination laws include similar exceptions that are generally qualified to only apply to 'competitive sporting activity'.[111]

104 Caxton Legal Centre submission; Equality Australia submission; Queensland Council for LGBTI Health submission; Intersex Human Rights Australia submission; Pride in Law submission; Queensland Council for Catholic Education submission; Australian Association of Christian Schools submission; Pride in Law submission; Legal Aid Queensland submission; Fair go for Queensland women submission; Christian Schools Australia submission; Department of Education (Qld) submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Name withheld (Sub.118) submission; Dr Catherine Carol submission; Name withheld (Sub.026) submission; Maurice Blackburn Lawyers submission; Australian Lawyers for Human Rights submission.

105 Pride in Sport consultation, 30 August 2021; Save Women's Sport consultation, 14 August 2021; Coalition for Biological Reality consultation, 30 August 2021; Australian Transgender Support Association Queensland consultation, 18 August 2021; Just.Equal Australia consultation, 17 September 2021.

106 Queensland Council for LGBTI Health submission, 11.

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

108 *Anti-Discrimination Act 1991* (Qld) s 111(1) gives the strength, stamina or physique requirements of the activity; or to people who can effectively compete; or to people of a particular age or age group; or to people with a specific or general impairment.

109 As noted in chapter 7, the current definition of 'gender identity' incorporates people 'of indeterminate sex', but the Review notes this is not wording used by people with variations of sex characteristics.

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

111 The words 'competitive sporting activity' appear in legislation but New South Wales and under the *Disability Discrimination Act 1992* (Cth).

Inclusion in sport

Inclusion of trans and gender diverse people

Several submissions were concerned that the current exception has the effect of excluding trans and gender diverse people from engaging in sport,[112] and observed that people were being excluded at a 'social' level where the exception is not likely to apply.[113]

Others felt that there was a double standard at play in that some natural sporting advantages are celebrated, but not when it comes to trans and gender diverse athletes.[114]

Perspectives on the sport exception were shared in an LGBTIQ+ community survey of 74 participants conducted by Queensland Council for LGBTI Health, in which we were told by one participant that:

> *Trans people are forced to compete with their assigned gender at birth, which may prevent them from participating at all for personal reasons. In low stakes community games, this sort of regulation is completely unnecessary.*[115]

Another survey participant told us that:

> *Sport is full of natural advantages and it's not fair for people to be excluded…*[116]

Some submissions referred to the experiences of non-binary people in sport, and that it is unclear how the exception may apply to them.[117] In guidance material, Sport Australia (SportAus) and the Australian Human Rights Commission have recommended the following approach:

- creating gender-neutral teams
- allowing participants to elect which team they wish to join based on their gender identity
- allocating a number of gender non-specific positions in mixed competitions (for example, 40% women; 40% men; 20% non-specific) instead of a designated men/boys to women/girls ratio
- considering ways that the rules of a particular sport can be universally redesigned to accommodate non-binary players.[118]

The exception provisions use binary gendered language and refer to 'males or females.' We have recommended that protection of the Act should extend to non-binary people and as a consequence several areas of the Act that use binary language will require amendment. We consider this in chapter 7 – gender identity and gender.

Inclusion of intersex people

Intersex Human Rights Australia (IHRA) highlighted challenges faced by people with variations of sex characteristics when they access sporting activities, which can cause them to avoid

112 Equality Australia submission, 45; Caxton Legal Centre submission, 28.
113 Caxton Legal Centre submission, 28.
114 Caxton Legal Centre submission, 28.
115 Survey participant (10), Queensland Council for LGBTI Health submission, 65.
116 Survey participant (11), Queensland Council for LGBTI Health submission, 65.
117 Pride in Sport submission, 2; Equality Australia submission, 8, 44; Legal Aid Queensland submission, 88.
118 Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport* (June 2019), 37.

participation in sports because of experiences of body shaming, and the suggestion that their bodies are too masculine or too feminine.[119]

While intersex men have never been excluded by international sports' bodies, some women with innate variations of sex characteristics have been excluded from participating in their birth-observed sex category with other women. IHRA considers that generalised exceptions applying to intersex individuals for sport are unreasonable, unnecessary, and disproportionate.[120]

IHRA's submission, which was endorsed by Australian Lawyers for Human Rights (ALHR) and others, sought assurances that intersex people will not be unnecessarily included in the sport exception if a new 'sex characteristics' attribute is created.[121] No submissions proposed that people should be restricted from competing in sports based on their sex characteristics.

We note that in the ACT and Victoria, the equivalent sport exception does not apply to intersex people, but the federal Sex Discrimination Act does. ALHR observed that inclusion of female athletes with hyperandrogenism at the elite level since 2015 has not led to any evidence of detriment to women's sport.[122]

Competitive sporting activity

The term 'competitive sporting activity' is not defined in the Act, but the Act provides guidance on what it does *not* include – namely coaching, umpiring, or administration.[123]

When sport is 'social' in nature, it is unclear whether this could constitute a 'competitive' activity.

Some stakeholders thought there should be a clear delineation between competitive and social sport.[124] The Review heard that 'having fun should be open to everyone' and that a different approach for grassroots sport may be appropriate to support a least restrictive, and more inclusive, approach.[125] Maurice Blackburn Lawyers suggested a different approach should be adopted for school sport, amateur, and recreational clubs, where sport is focussed on health and teamwork.[126]

Legal Aid Queensland considered that the term 'competitive' could be more clearly defined, such as by clarifying that competitive sporting activity only extends to elite sporting competitions.[127] However, this may be challenging in practice as sporting bodies and their participants may have varied and different ideas about what constitutes 'competitive'.[128] Some would think a local club that plays for a trophy is 'social' sport, whereas others might think it is highly 'competitive'. Without input from sporting bodies, we would not wish to make a decision about where to draw the line between social and competitive sporting activities.

In schools, physical education classes are unlikely to be considered 'competitive', but it is unclear whether intra-school or inter-school sports would be. The Australian Association of Christian Schools thought it was important for their members to maintain the ability to set standards for intra and inter-school sport.[129] The Queensland Catholic Education Commission expressed that

119 Intersex Human Rights Australia submission, 28.
120 Intersex Human Rights Australia submission, 28.
121 Intersex Human Rights Australia submission, 32-33; Australian Lawyers for Human Rights submission, 11–12; Just. Equal Australia submission, 4.
122 Australian Lawyers for Human Rights submission, 11.
123 *Anti-Discrimination Act 1991* (Qld) s 4.
124 See for example: Legal Aid Queensland submission, 88; Survey participant (15), Queensland Council for LGBTI Legal Service Inc submission, 66; Just.Equal Australia consultation, 17 September 2021.
125 See for example: Equality Australia submission, 45; Pride in Sport consultation, 30 August 2021; Just.Equal Australia consultation, 17 September 2021.
126 Maurice Blackburn Lawyers submission, 13-14.
127 Legal Aid Queensland submission, 88.
128 Pride in Sport consultation, 30 August 2021.
129 Australian Association of Christian Schools submission, 15.

they, 'would support a clearer definition of competitive sport and that any exemptions reflect contemporary research and understanding.'[130]

Strength, stamina, and physique

Most jurisdictions contain the words 'strength, stamina and physique' in the sport exception when determining whether participation should be restricted to people over 12 years of age on the basis of sex or gender identity.

Australian cases have considered sport participation restrictions or exclusions based on strength, stamina, or physique. A Victorian case found that the exception did apply to girls who wished to play in an under 15s AFL team but not to girls who wished to play in under 14s, because the relative differences between the strength, stamina, and physique of boys and girls at the younger age was not shown to be sufficiently significant to participate in AFL competition.[131]

Determining whether a restriction is 'reasonable' is complex. Since sports differ with respect to the importance of strength, stamina, and physique, an individual assessment needs to be made in relation to each sport. Where a sport relies on other factors such as balance or hand-eye coordination, the exception may not apply. As lawn bowls does not generally require significant strength, stamina, or physique – but rather concentration and skill – the exception was found to not apply to a 19-year-old female student who wished to play in what had been an all-male competition.[132]

While untested by courts, similar reasoning may apply on the basis of gender identity, depending on the particular sport and the circumstances of the participants.

Some stakeholders felt that strength, stamina, and physique as a standard is inherently unfair and unnecessary.[133]

Several submissions indicated that the current exceptions should remain because:

- Having provisions consistent with the federal Sex Discrimination Act and other states and territories is important[134]
- The exceptions allow a flexible approach that appropriately balances competing rights.[135]
- The exceptions allow determination on a case-by-case basis, depending on the nature of the activity involved.[136]
- The exceptions are required because there may be a continuing need to address differences in physiology for trans people who have been through male puberty (noting that this is not all trans people) where relevant to a sporting activity.[137]

Submissions differed on whether there was evidence to indicate an advantage of people who have gone through male puberty. While some submissions cited unfairness with regard to a perceived competitive edge and concerns about safety for women and girls in sport based on existing evidence,[138] others thought that there was not yet enough sound evidence to determine

130 Queensland Catholic Education Commission submission, 9.
131 *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158 (17 February 2004) [19]–[20].
132 *South v Royal Victorian Bowls. Association* [*2001*] VCAT 207.
133 Equality Australia submission, 44; Queensland Council for LGBTI Health submission, 64; Australian Transgender Support Association Queensland consultation, 19 August 2021.
134 Pride in Law submission, 3.
135 Pride in Law submission, 3.
136 Legal Aid Queensland submission, 88; Department of Education (Qld) submission, 15.
137 See for example: Queensland Council for Civil Liberties submission, 20.
138 Fair go for Queensland women submission, 5; Christian Schools Australia submission, 21; Name withheld (Sub.118) submission, 5; Dr Catherine Carol submission, 1; Save Women's Sport consultation, 14 August 2021; Name withheld (Sub.026) submission, 11.

the extent to which physical characteristics and hormones were a definitive measure for identifying advantage in sports, [139] particularly because there are considerable variations between sports, and relevant factors such as the extent of physical contact between players.

One participant in the survey published by Queensland Council for LGBTI Health in their submission commented about the inherent limitations in data currently available:

> In the case where levels of hormones are measured to determine "normal range" equivalency for a trans-athlete to compete in their affirmed gender category, those "normal range" levels need to be tested across populations from all racial groups across the world. At present discrimination is present because those levels are mostly tested on white bodies from western cultures. The impact of hormone therapy does more to negatively impact the body and therefore performance than any advantage from the person's sex assigned at birth.[140]

International Olympic Committee framework

International sporting bodies have until recently restricted the participation of transgender and intersex participants based on testosterone,[141] which is generally associated with greater strength, muscle mass, and endurance. However, this approach had been criticised by some courts and academics, as other non-physical factors, such as skill, determination, training, genetics, nutrition, hardiness, and access to resources can be relevant to sporting ability.[142] In 2021 the International Olympic Committee (IOC) released a new framework for the participation of transgender and intersex athletes in Olympic sports that reconsiders disproportionate advantage on the updated understanding that 'performance is not proportional to your in-built testosterone'.[143] The framework requires that people should be able to compete in the category that best aligns with their self-identified gender, and that:

> Eligibility criteria should be established and implemented fairly and in a manner that does not systemically exclude athletes from competition based on their gender identity, physical appearance and/or sex variations.[144]

While Australian Lawyers Alliance and Australian Lawyers for Human Rights indicated some support for the IOC framework,[145] Pride in Law pointed to recent criticism of the framework, including that it focuses only on human rights but not scientific and medical issues, and leaves uncertainty when it comes to practical implementation.[146]

139 Survey participant (16), Queensland Council for LGBTI Health submission, 68.
140 Survey participant (1), Queensland Council for LGBTI Health submission, 65.
141 For example, International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).
142 *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (Interim Arbitral Award) (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 154 [532]; Ross Tucker and Malcolm Collins, 'What makes champions? A review of the relative contribution of genes and training to sporting success' (2012) 46 *British Journal of Sports Medicine* 555, 560; Michael Sheard and Jim Goldby, 'Personality hardiness differentiates elite-level sport performers' (2010) 8(2) *International Journal of Sport and Exercise Psychology* 160,166.
143 Alex Azzi, 'Explainer: How will the IOC's framework impact transgender athletes?' *NBC Sports* (Webpage, 17 November 2021) <https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>.
144 International Olympic Committee, *IOC Framework of Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations,* principle 3.1.
145 Australian Lawyers Alliance submission, 17; Australian Lawyers for Human Rights submission, 11.
146 Pride in Law submission, referring to Fabio Pigozzi et al, 'Joint position statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC framework on fairness, inclusion and non-discrimination based on gender identity and sex variations' (2022) 8(1) *British Medical Journal Open Sport & Exercise Medicine* 1.

Comparative approaches

Every Australian state and territory jurisdiction contains a sport exception relating to competitive sporting activities,[147] and the federal sex and disability legislation contains these exceptions.[148] In almost every jurisdiction, the test is whether the restriction or exclusion is reasonable based on 'strength, stamina and physique' relevant to the activity. Whereas Queensland refers to 'restricting' participation, other jurisdictions refer to 'excluding' people from participation.[149]

However, jurisdictions vary as to which attributes may be restricted or excluded, and not every jurisdiction restricts or excludes people on the basis of gender identity.[150] The federal Sex Discrimination Act, which also applies to trans, gender diverse, and intersex people who play sport in Queensland, has exceptions that apply on the basis of sex, gender identity, and intersex status for children over 12 years of age.[151]

Another point of difference in Australian legislation is that the Victorian sport exception provides a list of factors to determine 'reasonableness' which takes into account the nature and purpose of the activity, and the alternative opportunities provided to players.[152] Whether or not the exclusion is reasonable must have regard to:

- the nature and purpose of the activity; and
- the consequences of the exclusion or restriction for people of the excluded or restricted sex; and
- whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.[153]

Options for reform

Suggestions to improve the law included:

- repeal the section altogether[154]
- narrow the exception to apply only to sex (or gender) but not gender identity[155]
- expand the exception so that it applies to people under 12 years of age based on sex assigned at birth[156]
- define what 'competitive' means[157]
- provide further guidance to determine reasonableness, to incorporate consideration of the impact on the person being excluded.[158]

147 In New South Wales it is confined to 'organised sporting competitions' - *Anti-Discrimination Act 1977* (NSW) s 22(2).
148 *Sex Discrimination Act 1984* (Cth) s 42; *Disability Discrimination Act 1991* (Cth) – noting that s 28 has exemptions specific to disability and refers to 'sporting activity'.
149 *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1984* (WA) s 35.
150 We note that there is no exception based on gender identity in South Australia, Tasmania or ACT.
151 *Sex Discrimination Act 1984* (Cth) s 42.
152 We note that the Queensland exception uses the word 'restriction', not 'exclusion'.
153 *Victorian Equal Opportunity Act 2010* (Vic) s 72.
154 Caxton Legal Centre submission, 28 – noting that if retained it should be substantially narrowed to require an evidence-based approach; Equality Australia submission, 44; Australian Transgender Association of Queensland consultation, 18 August 2021.
155 Equality Australia submission, 44; Just.Equal Australia consultation, 17 September 2021.
156 Christian Schools Australia submission, 21, referring to a Private Member's bill introduced in February 2022 – Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022.
157 Legal Aid Queensland submission, 88.
158 Equality Australia submission, 44; Maurice Blackburn Lawyers submission, 13–14.

Human rights considerations

Under Queensland's Human Rights Act, there is no human right to participate in sport. However, the human rights that may be limited by this exception include:

- equality before the law – based on sex and gender identity
- right to privacy.[159]

Human rights may be subject to reasonable limitations[160] to meet legitimate purposes, such as to ensure the fairness of sporting activities and the safety of players. In relation to this exception, a restriction on the right to equality may be justified because there is significant variation in the relevance and importance of strength, stamina, and physique between sports, and decisions may need to continue to be made on a case-by-case basis.

Scientific research about the relevance of strength, stamina, and physique to particular sporting activities is a relatively new and emerging field. Further research regarding trans and gender diverse people in sport is a developing discipline.[161]

The existing provision allows for a considered approach because it:

- uses the words 'restrict participation' rather than 'exclude'
- does not apply to non-competitive sport
- does not apply to children under 12
- applies only where strength, stamina, or physique are relevant.

Conversely, it would be incompatible with human rights to broaden the exception to all ages, as this would result in young children being unfairly restricted from participating in sport when there is no evidence of physiological differences under the age of 12.

The Review's position

The Review considers that:

- As a similar provision that restricts or excludes people from sports based on their gender identity remains in the Sex Discrimination Act and in most Australian jurisdictions, repeal of the exception would be likely to create complexity for holding sporting competitions where competitors come from different states and territories.
- Defining what is 'competitive' may be too difficult and would require significant consultation outside the scope and resources of this Review.
- Determining what is 'reasonable' when restricting participation in sport should be a proportionate decision that properly considers context, risks, and impacts, and participants, schools, and sporting bodies may benefit from further clarity on this.
- Intersex people should be able to play or compete in their birth-observed sex category and should not be included in the sport exception if 'sex characteristics' is included as an attribute in the Act.

159 *Human Rights Act 2019* (Qld) ss 15, 25.
160 *Human Rights Act 2019* (Qld) s 13.
161 See for example: University of Melbourne, Austin Health, *Trans Health Research: Life Without Barriers* (Web page, 2022) <https://www.transresearch.org.au/ongoingresearch?fs=e&s=cl> – This world-first study will follow people over the first 12 months of gender affirming hormones to monitor muscle strength, fitness and power (based at the specialised elite sports facility at Victoria University in Footscray). Monitoring includes exercise testing, blood and muscle sample collections, and body composition scans over 1 year.

- Inclusion for people who identify outside the gender binary can be improved by slightly changing the wording of the provision.
- Human rights considerations weigh in favour of not changing the approach, but the provision should be monitored to ensure that the exception remains relevant, evidence-based, and necessary in future.

Recommendation 36

36.1 The Act should retain a sport exception in the same form as the current version.

36.2 The exception should change the wording that refers to restricting participation 'to either males or females' to neutral language such as 'on the basis of sex'.

36.3 The exception should explain that in determining what is a 'reasonable' restriction, a person must have regard to:

- the nature and purpose of the activity; and
- the consequences of the restriction for people of the restricted sex or gender identity; and
- whether there are other opportunities for people of the restricted sex or gender identity to participate in the activity.

Religious bodies

The Anti-Discrimination Act prohibits discrimination on the ground of religious belief or religious activity.

The right to freedom of thought, conscience, religion and belief is protected under international human rights instruments, the Human Rights Act, and in a more restricted way by the Australian Constitution. This protection is acknowledged in the Act primarily through exceptions (called 'exemptions') for religious bodies.

In chapter 7, we discuss current protections from discrimination on the ground of religious belief or religious activity.

General exceptions from discrimination currently contained in the Act mean that it does not apply to religious bodies in certain circumstances. Religious bodies can lawfully discriminate so that their members can practice their religious beliefs including in the ordination, training, and selection of people for involved in religious observance or practice.[162]

Exceptions provided in relation to specific areas of the Act mean that it is not unlawful for religious bodies to discriminate if the exception applies:

- when providing services and accommodation, if the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion[163]
- in the employment relationship with employees of an educational institution or body established for religious purposes, if the discrimination is reasonable and it is a genuine

162 *Anti-Discrimination Act 1991* (Qld) s 109(1)(a)–(c).
163 *Anti-Discrimination Act 1991* (Qld) ss 90, 109(1)(d).

occupational requirement that employees act in a way that is consistent with the employer's religious beliefs[164]

- when restricting access to sites of cultural or religious significance or in selling sites of cultural or religious significance[165]
- when excluding applicants for enrolment at an educational institution set up wholly or mainly for students of a particular sex or religion who are not of that sex or religion (education area).[166]

In the Discussion Paper we asked whether the scope of exceptions for religious bodies should change. We also asked specific questions about how exceptions should apply to certain areas and attributes.

Forty-four submissions responded to these issues.[167] We also conducted consultations with representatives from combined Christian churches and other faith groups, including the Sikh and Muslim communities.[168]

A common theme across many submissions was that the current exceptions are complicated and difficult to apply. Different views were expressed about how the existing exceptions could be simplified, with some suggesting that exceptions be narrowed or removed entirely to better balance the right to freedom of religion with other rights. Others suggested it was necessary to broaden the exceptions to recognise the contributions that religious organisations make to the community and to better protect the right to religious freedom.

Human rights considerations

This section commences with human rights considerations, then moves on to consider material provided to the Review.

In examining the human rights compatibility of exceptions for religious bodies, we consider whether:

- each current exception promotes or limits the rights protected by the Human Rights Act

164 *Anti-Discrimination Act 1991* (Qld) s 25. Note – This exemption does not allow discrimination on the basis of age, race, or impairment, and does not allow an employer to seek information on which discrimination might be based.
165 *Anti-Discrimination Act 1991* (Qld) ss 48, 80.
166 *Anti-Discrimination Act 1991* (Qld) s 41.
167 Name withheld (Sub 008) submission; Name withheld (Sub.026) submission; Intersex Human Rights Australia submission; Public Advocate (Qld) submission; Scripture Union Queensland submission; Joint Churches submission; Rainbow Families Queensland submission; Diversity Queensland Incorporated submission; Independent Education Union – Queensland and Northern Territory Branch submission; Australian Christian Lobby submission; PeakCare Queensland Inc submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Associated Christian Schools submission; Queensland Alliance for Mental Health submission; Pride in Law submission; Dr Nicky Jones submission; LGBTI Legal Service Inc submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; Independent Schools Queensland submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; FamilyVoice Australia submission; Just.Equal Australia submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Freedom for Faith submission; Australian Association of Christian Schools submission; Adjunct Assoc Prof Mark Fowler submission.
168 Queensland Churches Together consultations (Christian churches and multi-faith 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.

- any international human rights standards apply to specific rights
- the exception is a proportionate limitation on rights to achieve a legitimate purpose
- in balancing rights, any associated limitation on rights can be justified in a free and democratic society based on human dignity, equality, and freedom.[169]

Points of tension can arise between the doctrines of the religion, sensitivities of people of the religion, and the need to ensure all people are protected from discrimination when they are provided with services, education, or are employed by a body established for religious purposes. In seeking to weigh up these elements, we must consider the specific human rights protected by the Human Rights Act, including:

- freedom of thought, conscience, religion and belief [170]
- recognition and equality before the law (the right to equality and non-discrimination).[171]

Other rights that may be relevant when considering limits on access to services provided by religious bodies include the rights of children, the right to privacy for employees, and the right to receive health services.[172]

How best to respect, protect, and fulfil these rights, or if necessary, to proportionately limit them, is central to our conclusions about the present exceptions for religious bodies.

When determining the circumstances in which religious bodies should be permitted to engage in conduct that would otherwise be unlawful, any resulting gap in protections should be identified.

Right to freedom of religion – nature and scope

The *International Covenant on Civil and Political Rights* (ICCPR) was frequently referred to in submissions and includes:

- the right to adopt a religion of one's choice and worship individually or in community
- freedom to manifest religion or beliefs
- respect for parent's choices as guardians of their children to ensure religious and moral education.[173]

Submissions cited other international legal instruments and cases regarding these rights,[174] although not all rights raised in submissions are contained in Queensland's Human Rights Act.[175] While we have considered this material, the Terms of Reference specifically ask us to consider compatibility with the Human Rights Act, so this will form the focus of our consideration.

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169 *Human Rights Act 2019* (Qld) s 13(1) and relevant international law.
170 *Human Rights Act 2019* (Qld) s 20.
171 *Human Rights Act 2019* (Qld) s 15(3).
172 These include freedom of association and peaceful assembly (s 22), freedom of expression (s 21), right to privacy (s 25), right to education (s 36), and right to access health services (s 37). The rights of children and family in s 26 is informed by the *Convention on the Rights of the Child* which recognises children as rights holders of the right to freedom of religion or belief and the rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child. Also relevant is that the best interests of the child are taken as a primary consideration in all actions concerning children.
173 United Nations General Assembly, *International Covenant on Civil and Political Rights,* res 2200A (XXI) (16 December 1966), art 18. ('*International Covenant on Civil and Political Rights*').
174 *Human Rights Act 2019* (Qld) s 48(3) states that international law and the judgments of foreign and international courts relevant to a human right may be considered in interpreting rights. However, the High Court has warned the application of foreign judgments to interpret domestic human rights legislation should be consulted with discrimination and care, including because they arise within a different constitutional framework: *Momcilovic v R* (2011) 245 CLR 1, 213 [554], 215 [561] (Crennan and Kiefel JJ).
175 For example: United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* res 2200A (XXI) (16 December 1966) art 13(3)–(4), regarding choice and establishment of religious schools is not specifically adopted by the Human Rights Act. The right to education has been incorporated in *Human Rights Act 2019* (Qld) s 36.

The ICCPR distinguishes freedom of thought, conscience, religion and belief from freedom to manifest religion or belief. The freedom to hold a religion is absolute, whereas the freedom to manifest a belief may be limited.

The communal nature of the right to religious freedom has been recognised in international law as imposing a duty on the State to protect the autonomy of the church, and that religious institutional authority is indispensable for pluralism in a democratic society and is at the heart of the protection.[176]

The United Nations Human Rights Committee has provided guidance on the scope of the right, noting that it includes:

> Acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and freedom to prepare and distribute religious texts or publications[177]

Some submissions suggested the unique nature of the right to freedom of religion means it needs to be strictly interpreted and protected in all of the areas in which the Act applies.[178] We were told that this is because the individual, communal, private, and public aspects of religious freedom touch all areas of public and private life.

Submissions suggested that international human rights require that:

- Only specific aspects of the freedom to manifest religion may be limited, and only when such limitations are 'necessary' as that is the term used in the ICCPR.
- The term 'necessary' must be interpreted with reference to the United Nations' *Siracusa Principles*, which provide guidance on how to permissibly limit rights, and suggest that 'in applying a limitation, a state shall use no more restrictive means than are required'.[179]
- The liberty of parents and guardians to ensure the religious education of their children in conformity with their own beliefs cannot be restricted.
- A test of 'reasonable and proportionate' – as used in some jurisdictions – does not align with the test of 'necessity'.
- Case law from the United Nations and European Court of Human Rights emphasises strong protections for employment decisions made by faith-based schools, which must be able to control their leadership, staff, and volunteers in order to offer students a holistic religious education in accordance with applicable religious convictions.[180]

176 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93 *Australian Law Journal* 752, 756 – particularly footnote 38 citing *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [86]; *Delgado v Colombia* (1990) 195/1985, UN Doc CCPR/C/39/D/195/1985.

177 Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)* 48th sess (27 September 1993) UN Doc CCPR/C/21/ Rev. 1/Add. 4, [4].

178 See for example: FamilyVoice Australia submission, 3; Joint Churches submission, 8; Adjunct Associate Professor Mark Fowler submission, 25; Human Rights Law Alliance submission, 6–:7.

179 United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (28 September 1984) E/CN.4/1985/4 Part I A [11] (Siracusa Principles). Recommendation 2 of the Religious Freedom Review was that state and territory governments should have regard to these principles when drafting laws that limit freedom of religion: Expert Panel into Religious Freedom, *Religious Freedom Review* (Report, 18 May 2018).

180 See for example: Family Voice Australia submission, 3, 6; Joint Churches submission, 8-9; Adjunct Associate Professor Mark Fowler submission, 4-5, 12-14, 25-26; Australian Christian Higher Education Alliance submission, 17; Human Rights Law Alliance submission, 6-7.

When may freedom of religion be limited?

The ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental freedoms of others.[181]

The United Nations Human Rights Committee has confirmed that the ICCPR:

- does not permit any limitations whatsoever on the right to freedom of thought and conscience or freedom to have or adopt a belief; but
- freedom to manifest religion or belief can be limited where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others including to protect the right to equality and non-discrimination of others.[182]

In considering the tension between the right to manifest religious belief and the right to equality, the Special Rapporteur has concluded that there is no hierarchy of rights, and the focus should be on ensuring all rights are protected, including through reasonable accommodation.

In its recent report into the now lapsed Religious Discrimination Bills, the Australian Parliament's Joint Committee on Human Rights (the PJCHR), commented that:

> Of course, the right to freedom of religion must be balanced against other fundamental human rights. A human rights-based framework stresses the principles of universality, equality and freedom and where rights conflict it is important to ensure that all human rights are protected as far as possible.[183]

Submissions from religious bodies suggested that the appropriate threshold of 'necessity' for limiting freedom of religion under international law is a higher standard than the general limitations clause in the Human Rights Act[184] and the standard of reasonableness applied for permissible limitations on the right to equality under the ICCPR.[185]

The PJCHR cited case law from the European Court of Human Rights that demonstrates the Court has considered the 'necessity' of a measure as part of the assessment as to whether a limitation of a right is proportionate.[186] Nonetheless the Committee recommended that exceptions within the Religious Discrimination Bill 2022 explicitly include the concept of necessity. This was to ensure better alignment with international human rights law where 'reasonableness' and 'necessity' were important considerations in assessing limitations on rights to freedom of religion and equality.[187]

Hijkelmeijer and Maquire, academics who specialise in constitutional, human rights, and international law, have observed that in applying the test of 'necessity' the European Court of

181 *International Covenant on Civil and Political Rights* art 18(3).
182 Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, 48th sess (27 September 1993) UN Doc CCPR/C/21/ Rev. 1/Add. The right to equality is specified in articles 2, 3, and 26.
183 Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), x (Chair's Foreword).
184 *Human Rights Act 2019* (Qld) s 13.
185 See for example Joint Churches submission, 8; Australian Association of Christian Schools submission, 20-21; Joint Churches submission, 8-9; Adjunct Associate Professor Mark Fowler submission, 13-14, 25-26; Human Rights Law Alliance submission, 6.
186 Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), [2.64], [3.66] including citing *Black and Morgan v Wilkinson* Court of Appeal of England and Wales [2013] EWCA Civ 820; *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber) Application No. 56030/07 (2014) [123], [125]; *Staatkundig Gereformeerde Partji v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113].
187 Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), [3.67].

Human Rights has particularly considered the 'specific mission' assigned to an employee as a 'relevant consideration in determining whether they should be subject to a heightened duty of loyalty' and the nature of the post occupied is an important element to be taken into account when assessing proportionality. Therefore, an exception would be a disproportionate limitation on rights if it allowed any employee to be dismissed on the basis of their sexual orientation, no matter how far removed the nature of their work is from the mission of the religious organisation.[188]

Considering what is necessary is part of the test of proportionality required by the Human Rights Act.[189] Yet, consistent with the approach of the PJCHR we have particularly considered whether limitations on freedom of religion are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others including to protect the right to equality and non-discrimination of others.

Is a limitation on religious freedom necessary to protect others from harm?

In considering the tension between rights to manifest religious belief and the right to equality, the Special Rapporteur[190] has concluded there is no hierarchy of rights, and the focus should be on ensuring all rights should be protected, including through reasonable accommodation.[191] In particular, the Special Rapporteur has clarified that using the right to religious freedom to justify or perpetuate discrimination against women or the LGBTQ+ community in the provision of goods and services in the public sphere is 'injurious' and 'not permissible'.[192]

Recent analysis by the Special Rapporteur considered that religious organisations are entitled to autonomy in the administration of their affairs, but not to the extent that they may discriminate against 'non-ecclesiastical employees' on the grounds of religious belief, sexual orientation or gender identity.[193]

The comments of the Special Rapporteur also provide helpful guidance:

> When these rights ultimately clash, every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation.[194]

After careful consideration of the human rights standards and information provided to the Review, it is necessary to reframe exceptions for service provision and employment by religious bodies to ensure that the impact of any limitation on the rights of employees, service users, and others is proportionate to the valid purpose of upholding religious freedoms.

188 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93 *Australian Law Journal* 752, 758-759.

189 Explanatory Notes, Human Rights Bill 2018, 17 – in explaining the assessment of 'whether there are any less restrictive and reasonably available ways to achieve the purpose' in s 13(2)(d), the explanatory note states that 'in proportionality analysis this element is sometimes called necessity'. See also: Explanatory Statement, Human Rights Bill 2003 (ACT) on which s 13 of the Queensland Act is based.

190 An expert who works for the United Nations to promote rights and examine, monitor, and report on relevant issues and challenges.

191 Explanatory Notes, Religious Discrimination Bill 2021 (Cth) 14 - which says that 'these principles reflect the well-established and foundational principle of international human rights law that all rights must be treated with equal importance, and no right should be prioritised at the expense of any other. These principles clarify the relationship between human rights and recognise that all rights are interconnected and interdependent, and that there is no hierarchy of rights at international law.'

192 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Human Rights Council, (28 February 2018) UN Doc A/HRC/37/49 [39]-[40].

193 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*: *Gender-based violence and discrimination in the name of religion or belief*, (28 February 2018) UN Doc A/HRC/43/48 [47]-[48].

194 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, (28 February 2018) UN Doc A/HRC/37/49 [47].

Ordination, training, and selection for religious observance and practice

Current approach

The Act currently provides an exception to the ordination or appointment of priests, ministers of religion or members of a religious order, as well as the training or education of people seeking to be ordained or appointed to such positions. The exception also extends to selecting or appointing people to perform functions or participate in any religious observance or practice.[195]

In the Discussion Paper we asked if consideration should be given to extending the existing exception for ordination, training, and selection to lay representatives who have an important spiritual role within a faith. Six submissions commented on this topic in detail,[196] and gave general support for ensuring, at a minimum, the exception is retained in its current form.

Expanding scope to other spiritual roles

Freedom for Faith commented that it is very common for churches and other groups to have lay ministers who serve in key spiritual areas of church life, and the Act should not prevent these bodies from making appointments to such positions in accordance with their religious commitments.[197] Scripture Union Queensland suggested an exception should cover the employment for religious professions or vocations, rather than listing specific occupations.[198] Similarly, Australian Christian Higher Education Alliance suggested this protection should extend 'to all staff who are required to uphold the publicly expressed beliefs of the institution'.[199] Exceptions for employment in religious organisations are considered further below.

No submissions suggested that lay people should not be recognised under the training and ordination provisions.

Comparative approaches

All jurisdictions contain an exception that enable religious bodies to discriminate in relation to the ordination, training, and appointment of ministers of religion.[200]

The *Human Rights Act 1993* (NZ)[201] provides an exception for employment discrimination based on religious or ethical belief where the sole or principal duties of the position are, or are substantially the same as, those of recognised spiritual leaders (eg pastor) or otherwise involve the propagation of that belief.

The Review's position

The Review considers that:

- The exception should be expanded to include ordination, training, and selection of lay people because this would better reflect the right to freedom of religion by ensuring that all people who play an important spiritual role within a religious body can be ordained, trained, and selected according to the religious values and practices.

195 *Anti-Discrimination Act 1991* (Qld) s 109(1)(a)–(c).
196 Pride in Law submission, 3; Queensland Council for Civil Liberties submission, 23; Australian Lawyers for Human Rights submission, 12; Freedom for Faith submission, 3; Australian Christian Higher Education Alliance submission, 16; Scripture Union submission, 22.
197 Freedom for Faith submission, 3
198 Scripture Union Queensland submission, 22
199 Australian Christian Higher Education Alliance submission, 16.
200 *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 1984* s 50 and s 85ZM.
201 *Human Rights Act 1993* (NZ) s 28(2)(b)(i).

Recommendation 37

37.1 The Act should retain an exception from discrimination for the ordination, training, and selection of religious leaders and this be broadened to include lay people who have a role which is the same as, or is similar to, the role of a priest, minister of religion, or member of a religious order, or where the person otherwise has a role that involves the propagation of that faith.

Provision of services and accommodation by religious bodies

In the Discussion Paper we asked whether religious bodies should be permitted to discriminate when providing services on behalf of the State, such as aged care, child and adoption services, social services, accommodation, and health services.

Current approach

The Act permits discrimination in the provision of services by bodies established for religious purposes on the basis of any attribute, except in the areas of work and education, provided the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion.[202]

Another exception allows for discrimination in the accommodation area where:

- the accommodation is under the direction or control of a body established for religious purposes
- the discrimination is in accordance with the doctrine of the religion, and
- is necessary to avoid offending the religious sensitivities of people of the religion.[203]

The broad definition of accommodation includes business premises, a house or flat, boarding house or hostel, caravan, caravan site, camp site, manufactured home, and building or construction sites.[204]

Complex tests

Submissions suggested that the present exceptions are overly complex.[205] The Australian Association of Christian Schools recommended replacing the genuine occupational requirements exception in the work area with a general limitations clause, an approach discussed further below.[206] A submission from a number of Christian Churches suggested that relevant exceptions should depend on only one of the following criteria being satisfied, not both as is currently the case:

- in accordance with the doctrine of the religion, and
- necessary to avoid offending the religious sensitivities of people of the religion.[207]

Similar criteria are used in discrimination law in other Australian jurisdictions, but many require only one of these tests to be satisfied.[208] The test of avoiding injury or offence to the religious

202 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).
203 *Anti-Discrimination Act 1991* (Qld) s 90.
204 *Anti-Discrimination Act 1991* (Qld) ss 90 and sch Dictionary (definition of 'accommodation').
205 See for example: Freedom for Faith submission, 4; Joint Churches submission, 16.
206 Australian Association of Christian Schools submission, 21.
207 Joint Churches submission, 15 referring s 109(1)(d) and s 90(b).
208 As discussed in Liam Elphick, 'Sexual orientation and 'gay wedding cake' cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 151, 159-160.

sensitivities of adherents to a religion has been described as 'vague',[209] 'problematic', [210] and providing little guidance to either religious schools or their potential employees. [211] It is also considered difficult to apply in situations where religious adherents do not have a single, cohesive position on a particular issue.[212]

Discrimination when receiving goods and services

During the Review, we heard from groups representing some communities that:

- Religious exceptions are being used to justify unfair treatment or interference with the private lives of people, including in the area of goods and services.[213]
- Disadvantaged members of the community often rely on subsidised services available to the public that are provided by bodies established for religious purposes to obtain essential care and support in areas such as healthcare, aged care, education, and social services .[214]
- In some parts of Queensland, there is limited choice for essential services, other than through religious organisations.[215]
- Religious exceptions reinforce structural prejudices and discrimination experienced by LGBTQ+ communities.[216]
- Sex workers experience discrimination or conditional support when accessing services provided by religious bodies.[217]

One person who completed a community survey published by Queensland Council for LGBTI Health in their submission said that:

> *Many older people who are LBGTQIA+ find aged care a challenging place because it is primarily provided by religious organisations. I've never been willing to work in private religious schools because of the requirement to make "lifestyle declarations" which would force me to deny the existence of my family.* [218]

Similar issues were raised with the Expert Panel for the Religious Freedom Review, where submissions and consultations highlighted the stress on LGBTQ+ communities in having to hide or 'edit' themselves depending on the context.[219]

209 Caroline Evans, *Legal Aspects of the Protection of Religious Freedom in Australia,* 2009, 40.
210 Liam Elphick, 'Sexual orientation and "gay wedding cake" cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 151, 160.
211 Caroline Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 53.
212 For example: *Christian Youth Camps v Cobaw Community Health Service Ltd* [2014] VSCA 75 at [522] "The question as to when a religion requires that a person behave in a certain way is a vast and contentious one. Religions vary widely in the degree to which they prescribe certain behaviours' (per Redlich JA). See also *OV v Wesley Mission* [2010] NSWCA 155 and *OW v Members of the Board of the Wesley Mission Council* [201] NSWADT 293, which contrasted the belief of a particular Wesley Mission with the beliefs of the overarching Uniting Church.
213 Diversity Queensland Inc submission, 4; Dr Nicky Jones submission, 2; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 14; Equality Australia submission, 16; Respect Inc and DecrimQLD Submission, 44.
214 Legal Aid Queensland Submission, 90; TASC National Ltd submission, 13.
215 Name withheld (Sub.008) submission, 4; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 15.
216 Queensland Alliance for Mental Health submission, 4-5
217 Scarlet Alliance, Australian Sex Workers Association submission, 13.
218 Survey participant (20), Queensland Council for LGBTI Health submission, 62.
219 Expert Panel, *Religious Freedom Review* (Report, May 2018), 1.216; 1.400

Research has been conducted on the harm that discrimination against LGBTQ+ people can cause, including when accessing health care and social services.[220] This is in the context of increased outsourcing of Commonwealth and State welfare services to religious bodies, including unemployment services and early intervention services to families and children in recent decades.[221]

Community attitudes have shifted considerably in the last 30 years, as shown by the majority support for equal marriage in the 2016 postal survey.[222] A more recent community attitudes survey found that three-quarters of people do not support religiously affiliated service providers discriminating against LGBTQ+ people in their employment relationship or as recipients of services.[223]

However, Freedom for Faith and the Human Rights Law Alliance said that, in their view, there was insufficient evidence to show that religious bodies are discriminating against people,[224] and considered that the only time this may arise is in relation to adoption and fostering services where religious groups have a strong belief that a 'traditional man/woman marriage' is the best context for child raising.[225]

Commercial and public services

Some submissions suggested that the exception should only apply if the service provider receives government funding, or the service is commercial in nature.[226]

These submissions said that public funds should not be used to support discriminatory practices, and religious bodies should not be able to discriminate when they offer services on the open market.[227] Aged and Disability Advocacy Australia considered that services provided on behalf of the State should support and prioritise the needs of the person who is receiving the service over the religious sensitivities of the institution that provides the service.[228]

However, Equality Australia was concerned about linking the exception to the receipt of public funds because of the difficulty for a complainant to ascertain if a service is government funded and from which level of government. Equality Australia favoured a 'reasonable and proportionate' test in which relevant factors might include sources of funding.[229] Similarly, Just.Equal Australia supported a test that any 'discrimination is reasonable and proportionate in the circumstances' rather than differentiating services according to public funding.[230]

Some submissions argued that the existing exceptions should be expanded to better support the services routinely provided by religious bodies that benefit the community, and that religious bodies should not be forced to act counter to their beliefs.[231] The Australian Christian Lobby

220 See for example: Adam O Hill et al, 'Private lives 3: The health and wellbeing of LGBTIQ people in Australia' (Report, Australian Research Centre in Sex, Health and Society, La Trobe University, 2020); Gabi Rosenstreich, 'LGBTI People Mental Health and Suicide' (Briefing paper, revised 2nd edition, National LGBTI Health Alliance, 2013); Ilan Meyer and David M Frost D, 'Minority Stress and the Health of Sexual Minorities' in Charlotte J Patterson and Anthony R D'Augelli (eds.), *Handbook of Psychology and Sexual Orientation* (Oxford University Press, 2013) 252–266.

221 Dougal Ezzy et al, 'LGBTQ+ non-discrimination and religious freedom in the context of government-funded faith based education, social welfare, health care, and aged care' (2022) *Journal of Sociology,* 1-21.

222 Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Arrangements for the postal survey,* (Report, 2018).

223 Nicola McNeil et al, 'Australian Survey of Social Attitudes, 2020' (Survey, Australian Consortium for Social and Political Research Inc, 2021).

224 Human Rights Law Alliance submission, 9; Freedom for Faith submission, 4-5.

225 Freedom for Faith submission, 4-5.

226 See for example: Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 3; Dr Nicky Jones submission, 2; Legal Aid Queensland submission, 89; Caxton Legal Centre submission, 29-30.

227 Legal Aid Queensland submission, 90.

228 Aged and Disability Advocacy Australia submission, 12.

229 Equality Australia submission, 19.

230 Just.Equal Australia submission, 9.

231 See for example: Australian Christian Higher Education Alliance submission, 8 and 17; Scripture Union Queensland submission, 1; Joint Churches submission, 15; Human Rights Law Alliance submission, 9; FamilyVoice Australia

supported freedom for Christian organisations to conduct their affairs fully in accordance with their doctrines, tenets, and beliefs.[232]

Comparative approaches

While all Australian jurisdictions contain exceptions for religious bodies that provide goods and services to the public, the exceptions vary widely in scope, including the applicable attributes and areas.

In 2013, the exceptions for religious bodies in the Commonwealth Sex Discrimination Act were narrowed so that they no longer applied to conduct connected with Commonwealth-funded aged care services. This amendment was intended to promote equal access to health services.[233]

Amendments to the Victorian Equal Opportunity Act make government funding a consideration in some exceptions for religious bodies.[234]

Victorian law permits religious bodies to discriminate on the basis of some attributes, but the action must be reasonable and proportionate in the circumstances and:

- conform with the doctrines or beliefs of the religion, or
- be reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.[235]

The ACT Government recently released an exposure draft Discrimination Amendment Bill 2022. The Bill proposes to amend religious bodies' exceptions to make discrimination lawful in relation to employment of a person if:

- the discrimination is on the ground of religious conviction; and
- conformity with the doctrines, tenets or principles of the religion is a genuine occupational qualification for the position; and
- the discrimination is reasonable, proportionate, and justifiable in the circumstances.[236]

This exception will not apply to discrimination in relation to the employment of a person at an educational institution, or to a religious body whose sole or main purpose is a commercial purpose.[237]

Guidance material accompanying the exposure draft suggests the requirement for an action or practice to be reasonable, proportionate, and justifiable in the circumstances will 'ensure that different human rights are considered when a religious body relies on this exception.'[238]

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submission, 4; Australian Association of Christian Schools submission, 16.

232 Australian Christian Lobby submission, 5.

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

234 From 14 December 2022, when providing goods or services funded by the Victorian Government, religious bodies will only be able to discriminate based on a person's religious belief. They will not be able to discriminate based on other personal characteristics. See *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) cl 12, including a new s 82A.

235 *Equal Opportunity Act 2010* (Vic) s 82. The relevant attributes being: religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status, or gender identity. This exception applies outside of employment and decisions about school students,

236 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 15–19.

237 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 16.

238 Australian Capital Territory Government, *Public Exposure Draft: Discrimination Amendment Bill 2022* (Web page, 2022), 2 <https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5616/5413/0668/Fact_Sheet_-_Exposure_Draft_Discrimination_Amendment_Bill_2022.pdf>.

The Review's position

The Review considers that:

- Religious bodies provide essential services throughout Queensland, and many promote inclusion and equality in doing so.
- Under the Act's current exceptions, people with protected attributes can be discriminated against in a way that may leave them deprived of essential services.
- People in areas where resources and services are scarce, such as remote and regional areas of Queensland, may be at higher risk of discrimination related to application of the religious bodies' exceptions.
- It is necessary to limit religious freedom to protect the fundamental rights and freedoms of others, and to the extent that religious exceptions may be disproportionately limiting the rights to equality, privacy, health services and other protected rights, exceptions in the Act are not currently striking the right balance.
- Where religious bodies offer services to the public, recipients of those services should not be required to conform with the body's religious doctrines and beliefs, or be required to avoid injury to religious sensitivities in order to receive services without discrimination.
- Exceptions for religious bodies should include a test of reasonableness and proportionality in order to achieve a balance between upholding religious freedoms and protecting the right to equality and non-discrimination.
- Relevant considerations of what is reasonable and proportionate depend on the particular case. Whether the service is of a public nature is one such relevant consideration, however, a test based on 'public funding' may introduce unnecessary complexity.

Recommendation 38

38.1 A general religious bodies exception and religious accommodation exception should be retained, but should only apply to the attribute of religious belief or activity where the conduct by an organisation or related entity established for religious purposes ('religious organisation') is:

- to conform to the religious doctrines, tenets or beliefs of the body; and
- reasonable and proportionate in all the circumstances.

38.2 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion
- whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
- if the religious organisation operates in a commercial manner when engaging in the conduct
- the reasonable availability of alternative services
- whether the services are essential services
- the rights and interests of the person receiving, or proposed to receive, goods and services or accommodation.

Work in religious educational institutions and other organisations

In the Discussion Paper we asked if the exception applying to the area of work for religious educational institutions and other bodies established for religious purposes should be retained, changed, or repealed. If retained, we sought submissions on whether further attributes should be removed from the scope.

Current approach

The Act currently permits discrimination in relation to employment in an educational institution under the direction or control of a body established for religious purposes, or other work for a body established for religious purposes, if the work genuinely and necessarily involves adhering to and communicating the body's religious beliefs.[239]

Where it is a genuine occupational requirement for an employee to act in a way consistent with the employer's religious beliefs, the employer may discriminate in a way that is not unreasonable, if the person 'openly acts' in a way that is contrary to those beliefs.

Whether the discrimination is unreasonable depends on all the circumstances of the case including factors such as whether the action taken by the employer is disproportionate to the behaviour, and the consequences for both the person and the employer. This exemption does not apply to discrimination on the basis of age, race, or impairment, and does not allow an employer to seek information on which discrimination might be based.

Comparative approaches

Most jurisdictions in Australia have exceptions that make it lawful for religious bodies or educational institutions to discriminate in the area of work where the discrimination is necessary to conform with doctrines, beliefs, or principles of the religion, or is necessary to avoid injury to religious sensitivities of the adherents of the particular religion. Some jurisdictions confine the relevant exception to specific attributes.[240]

State and territory exceptions

The Tasmanian Act permits discrimination in employment on the basis of religious belief or affiliation or religious activity, only if the participation of the person in the teaching, observance, or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

A religious educational institution may discriminate against an employee on the ground of religious belief or affiliation or religious activity, if the discrimination enables the educational institution to be conducted in accordance with its tenets, beliefs, teachings, principles, or practices.[241] The South Australian Law Reform Institute recommended following the Tasmanian approach,[242] which accords with the European Union approach.[243]

Recent changes in Victoria mean that religious bodies and schools are only permitted to discriminate in employment decisions (or decisions about school students) on the basis of

239 *Anti-Discrimination Act 1991* (Qld) ss 25(2)–(8).
240 See for example: *Anti-Discrimination Act 1992* (NT) s 37A – the exception is limited to religious belief or activity and sexuality.
241 *Anti-Discrimination Act 1998* (Tas) s 51.
242 South Australian Law Reform Institute, '*Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation, and Intersex Status* (Report, June 2016).
243 European Communities. *Council Directive 2000/78/EC* of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, Art 4(2).

religious belief or activity in limited circumstances, if the discrimination is reasonable and proportionate.[244]

As outlined above, the proposed ACT changes would add the test of 'reasonable, proportionate and justifiable' to religious exceptions that apply to workplaces.

Other submissions received by the Review recommended the Queensland Act adopt exceptions consistent with the provisions of the lapsed federal Religious Discrimination Bill 2022, section 38 of the Sex Discrimination Act, or the recommendations of the Religious Freedom review.[245]

Federal exceptions

The federal Sex Discrimination Act[246], which also applies to schools in Queensland, contains provisions whereby it is not unlawful for a religious school to discriminate against employees and contract workers, where this is done in good faith, to avoid injury to the religious susceptibilities of adherents of that religion.[247] The Australian Christian Lobby suggests, 'this rightly recognises that when a religious school exercises its rights to religious freedom it is prima facie not unlawfully discriminating'.[248] However, this exception has been contentious because it does not require a process of balancing rights,[249] and may be the subject of review by the Australian Law Reform Commission.[250]

In 2018, the Religious Freedom Review recommended that the Sex Discrimination Act be amended to provide that religious schools can discriminate in relation to employment in certain situations, including if the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.[251] The lapsed Religious Discrimination Bill 2022 would have adopted this approach.[252]

'Don't ask, don't tell' approach

Several submissions[253] considered that the current exception unreasonably limits the rights of teachers and other employees, particularly women and LGBTQ+ workers. A specific concern was that the current Act requires employees to hide or suppress who they are in the workplace. Hiding or suppressing sexuality and gender identity has been linked to psychological harm and can lead to ongoing mental health issues and suicidal ideation.[254] Submissions suggested that the

244 *Equal Opportunity Act 2010* (Vic) ss 81–83A. Religious bodies and schools can now only discriminate against employees (and potential employees) based on the person's religious belief or activity and only where: conformity with religious beliefs is an inherent requirement of the job and the other person cannot meet that inherent requirement because of their religious belief or activity.

245 See for example: Family Voice submission, 6; Christian Schools Australia submission, 12, 22; Scripture Union submission, 4, 24; Adjunct Associate Professor Mark Fowler submission, 26–27.

246 *Sex Discrimination Act 1984* (Cth) s 38

247 On the basis of their: sex, sexual orientation, gender identity, marital or relationship status or pregnancy – where the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

248 Australian Christian Lobby submission, 5–6.

249 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93 *Australian Law Journal* 752, 760.

250 *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation,* presently 'on hold' < https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-Anti-Discrimination-legislation/>

251 Religious Freedom Review, *Report of the Expert Panel* (18 May 2018), Recommendation 5. See also Recommendation 7 in relation to discrimination of students. Recommendations 6 and 8 of that Review also recommended that jurisdictions should abolish any exceptions to Anti-Discrimination laws that provide for discrimination by religious schools on the basis of race, disability, pregnancy, or intersex status.

252 Clause 7. See also clause 8 in relation to religious hospitals, religious aged care facilities, religious accommodation provider or religious disability service provider; and clause 40 (exception relating to accommodation and facilities).

253 See for example: Intersex Human Rights Australia submission, 34; Dr Nicky Jones submission, 2; Independent Education Union submission, 2–3.

254 Timothy W Jones et al, *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia,* 2018 < https://www.hrlc.org.au/reports/preventing-harm>, 38–41.

protection of religious beliefs should not come at the cost of employees' mental health.[255] It was noted that being LGBTQ+ and holding a religious belief are not mutually exclusive.[256]

The LGBTI Legal Service said that they are aware that 'many LGBTQIA+ teachers and employees fear termination as it has often been the case that their identity or connection with their LGBTQIA+ status is inconsistent with certain religious beliefs or practices'.[257]

Rainbow Families Queensland, which represents LGBTQ+ parents and their children, acknowledges that many religious schools and other organisations are becoming more inclusive places for LGBTQ+ staff, but that teachers in some schools feel they need to remain in the closet to remain employed. This can become an untenable situation where a teacher becomes pregnant because it:

> … can become impossible to continue to hide one's gender identity or sexuality and who their family is. Remaining in the closet can lead to huge stress and anxiety and contribute to feelings of shame and ostracism for the parents and their child.[258]

Pride in Law note that 'more and more, people are encouraged to bring their whole selves to work'. Yet, 'teachers face disciplinary action and adverse employment decisions for simply being who they are in the workplace'.[259]

A respondent to the Have Your Say survey who identified as an LGBTIQ+ teacher in a private school and living in a regional area told us that:

> *I worked for a Christian school linked to a church that was (still is) anti-LGBTIQ. So much discrimination! I resigned, lost the community. So much trauma! Multiple therapy sessions. I have a wonderful rainbow community now and have some friends I've confided in.*[260]

The impact of the exception is also experienced outside of the LGBTQ+ community. Aside from age, race, or 'impairment', the exception applies to all other protected attributes including sex, relationship status, and family responsibilities.

Independent Education Union told us that in their experience with members in religious schools they have:

> … encountered examples where the exemption has a disproportionate effect on women. An unmarried pregnant woman may be accused of acting "openly" in a way contrary to the employer's religious beliefs, due to an obvious pregnancy, while there is no consequence for the father of the child as he has not acted "openly" given he does not carry the pregnancy.[261]

Some submissions suggested that this exception should only apply to the protected attribute of religious belief or activity and be narrowed further to apply only to specific positions.[262]

255 Rainbow Families Queensland submission, 6; Queensland Alliance for Mental Health submission, 4–5.
256 Rainbow Families Queensland submission, 6.
257 LGBTI Legal Service Inc submission, 6.
258 Rainbow Families Queensland submission, 6–7
259 Pride in Law submission, 4.
260 Name withheld (Form.733) survey response.
261 Independent Education Union – Queensland and Northern Territory Branch submission, 3.
262 Just.Equal Australia Submission, 8; Australian Discrimination Law Experts Group, 15; Equality Australia submission, 19.

Ensuring faith-based schools can maintain ethos

Independent Schools Queensland considered that schools should be able to operate in accordance with their religious doctrines to ensure integrity of choice and diversity in education.[263] Several submissions considered that changes to exceptions might undermine the capacity of schools to operate in a manner consistent with their ethos or religious convictions.[264]

Some of the submissions on behalf of religious organisations advocated for the Act to be amended to better protect the establishment and operation of religious organisations and schools. They said that it is essential to the goal of these organisations that they provide spiritual support to employees, students, and staff to ensure that all employees' beliefs align with that of the organisation.[265] This has been described as the process of faith being 'caught not taught'.[266] A spiritual education involves more than teaching content in classes and includes the overall environment that supports teaching and learning. It was said that it is necessary for staff to model the religious convictions of the faith community and uphold, or at least not undermine, the religious ethos of the school.[267]

Some submissions proposed that an organisation be permitted to develop an institutional ethos by applying a preference for staff who share their faith across the employee cohort wherever possible.[268] It was suggested that only applying exceptions for designated roles within an organisation would create division and imply that some roles are more important, holy, or spiritual.[269] Australian Association of Christian Schools told us that:

> Our schools exclusively employ Christian staff to maintain the religious character and ethos of the school and to ensure that students receive an authentic Christian education. Authenticity is the key concept here, it is not enough for our staff to uphold or submit to the beliefs of the school, they must also have a personal faith which is consistent with the beliefs of the school… Faith is an inherent requirement of any position at our schools because they are established as Christian communities where parents entrust their children to mentors with an expectation of adherence to, and instruction in, the biblical moral code. [270]

A representative of the Islamic College of Brisbane told us that:

> I think as far as religious freedom is concerned, my understanding is that as long as the people of faith are allowed to teach what's within their faith, you know, they should not be discriminating against people in employment, proactively because of their sexual identity or gender identity, but they should be allowed to teach what they want to teach within the realm of their faith.[271]

Commenting on the suggested approach of the Religious Freedom Review in permitting discrimination if there is a publicly available policy,[272] the Australian Discrimination Law Experts Group considered that this would be contrary to a primary aim of discrimination law which is to reduce stigma in society and that:

263 Independent Schools Queensland submission, 3.
264 Australian Christian Higher Education Alliance submission, 4; Human Rights Law Alliance, 9; Associated Christian Schools submission, 1–2.
265 Australian Association of Christian Schools submission, 20; FamilyVoice Australia submission, 6; Associated Christian Schools submission, 1–2; Scripture Union Queensland submission, 2.
266 Adjunct Associate Professor Mark Fowler submission, 3, 21.
267 Expert Panel on Religious Freedom, *Religious Freedom Review* (Report, May 2018) 56 [1.210].
268 Adjunct Associate Professor Mark Fowler submission, 21. See also Christian Schools Australia submission, 6.
269 Australian Christian Higher Education Alliance submission, 9.
270 Australian Association of Christian Schools submission, 17.
271 Islamic College of Brisbane (Ali Kadri) consultation, 5 August 2021.
272 Expert Panel, *Religious Freedom Review* (Report, May 2018), 2, Recommendation 5.

explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harm that individuals will face as a consequence of a religious educational organisation or other religious bodies' refusal to employ persons on the basis of an attribute. [273]

It cannot be assumed that circumstances of a staff member's private life will remain static. On starting work at a school, a person may be able to comply with a policy that requires married staff to be in a heterosexual marriage. Subsequently, they may not be able to continue to comply with the policy if they become divorced, re-partner, or later identify as gay, transgender, or gender diverse.

The Review's position

The Review considers that:

- Protections in international human rights law recognise the importance of protecting religious beliefs and freedoms which includes 'respect for the liberty of parents' to educate their children in accordance with their religious beliefs.
- Religious organisations make a significant contribution to the community, including as faith leaders, employers, and educators, and many promote inclusion and equality.
- It is necessary to limit religious freedom as recommended to uphold the rights to privacy and non-discrimination of staff in religious bodies.
- Allowing discrimination on religious grounds where the organisation has a publicly available policy outlining its position may have the unintended consequence of entrenching discriminatory views while minimising the opportunity for policy review. This approach assumes that people's sexuality and gender identity are fixed, whereas people may come out at all stages of their lives, and other circumstances may also change such as a person may separate, divorce, become pregnant or re-partner.
- Provisions based on current or proposed general exceptions in Tasmania, Victoria, and the ACT allow more consistent protection of religious beliefs and activity in the areas of employment, education, and service provision.
- Include a criterion based on reasonableness and proportionality for an exception for religious bodies incorporates the element of balance that is required to ensure that religious freedoms are upheld while protecting rights to equality and discrimination.
- Relevant considerations of what is reasonable and proportionate depend on the particular case and should include balancing factors to allow the balancing of religious freedoms, the right to equality and other protected rights.

Recommendation 39

39.1 The current genuine occupational requirements exceptions relating to work in educational institutions or other bodies established for religious purposes (s 25 (2)-(8)) should be repealed, along with a legislative note in s 25(1) which indicates that discrimination on the basis of religion will always be a 'genuine occupational requirement' at a religious school.

39.2 A new exception should be created to allow discrimination on the ground of religious belief or religious activity in relation to work for an organisation or related entity established for religious purposes ('religious organisation') if reasonable and proportionate in the circumstances and the participation of the person in the teaching, observance or practice

273 Australian Discrimination Law Experts Group submission, 64–65.

of a particular religion is a genuine occupational requirement. This should not provide an exception from unnecessary questions that may be asked for a discriminatory purpose.

39.3 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents to that religion
- the proximity between the person's actions and the religious organisation's proclamatory mission
- whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
- whether the religious organisation operates in a commercial manner when engaging in the conduct
- the reasonable availability of alternative employment
- the rights and interests of the employee.

39.4 The Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution.

Students in religious educational institutions

While not specifically addressed in the Discussion Paper, some submissions expressed support for the present exceptions that permit single sex and religious schools to discriminate against students on the basis of sex or religion at the time of enrolment.[274]

Some suggested that the exception relating to students should be expanded, including by adopting the approach of the federal Sex Discrimination Act.[275]

Most faith-based schools in Australia provide an environment that is free from discrimination, and some have established best practice in supporting students with diverse sexualities or gender identities.

Submissions refer to recent media reports which have raised concerns about a minority of faith-based schools across Australia that seek to impose contractual arrangements on parents and/or school staff that may be contrary to discrimination law, including through changes that may alter the terms of enrolment for existing students.[276] This discussion has focused on the harmful impacts of discrimination on parents, teachers, and their communities, and particularly on LGBTQ+ people.

The Review heard that these policies may lead to exclusion and psychological harm.[277]

274 See for example: Queensland Catholic Education Commission submission, 9; Just.Equal Australia submission, 5.
275 See for example: Human Rights Law Alliance submission, 4; Freedom for Faith submission, 4. The *Sex Discrimination Act 1984* (Cth) s 38(3) provides an exemption for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
276 Australian Lawyers for Human Rights submission, 13; Equality Australia submission, 17–18; Australian Discrimination Law Experts Group submission, 64.
277 Rainbow Families Queensland submission, 6.

One person told us that:

> *I once had a teacher denounce my sexuality at length in class and there was nothing I could do to protect myself….*[278]

Current approach

As set out above, the Act provides a general exception for bodies established for religious purposes, but it does not apply in the education area.[279] Instead, the Act contains a specific exception in the education area to allow an educational authority to operate an educational institution wholly or mainly for students of a particular sex or religion.[280]

This exception allows a school or other educational institution to lawfully exclude applicants who are not of the particular sex or religion. For example, an Islamic school may offer enrolment to only Muslim students.

This exception only applies at the time of applying to enrol and the education area of the Act lists ways in which an educational authority must not discriminate in relation to a student after enrolment.[281] This means, for example, that if a person is no longer of the particular sex or religion during their education, they cannot be disciplined or expelled because of the change in the nature of their attribute.

Submissions confirmed a general understanding that the exception for institutions wholly or mainly for students of a particular sex or religion applies to prospective students only. The Human Rights Law Alliance advocated that this exception be expanded beyond the enrolment stage based on the Sex Discrimination Act, because it is 'necessary for religious schools to be able to continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children'.[282]

The Australian Discrimination Law Experts Group along with other submissions described the existing exception as 'the preferred international human rights law approach' and 'a best practice approach in Australia'.[283]

This exception is confined to 'the particular religion' as opposed to a religious belief generally. The provision does not use the words of the protected attribute of 'religious belief or religious activity'. It applies where a school operates wholly or mainly for students of a particular religion**,** to permit the school to exclude applicants who are not of that particular religion**.** This means that as long as an applicant is of the particular religion, their other attributes such as gender identity or sexuality are not relevant to the exception.

The Review's position

The Review considers that:

- The current approach effectively protects students after enrolment, without unreasonably restricting the operation of religious and single sex schools.
- We consider that it should be made clearer that the section 41 exception for religion only applies in relation to a person's 'religion' (not 'religious belief or activity') and that it only applies on enrolment.

278 Survey participant (17), Queensland Council for LGBTI Health submission, 62.
279 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).
280 *Anti-Discrimination Act 1991* (Qld) s 41.
281 *Anti-Discrimination Act 1991* (Qld) s 39.
282 Human Rights Law Alliance Submission, 4.
283 Australian Discrimination Law Experts Group submission, 63; Australian Lawyers for Human Rights submission,13; Just. Equal Australia submission, 5 – describes the provision as 'best practice' at 5.

Recommendation 40

40.1 The exception allowing discrimination on enrolment on the basis of sex or religion should be retained with the addition of a legislative note to clarify that this section applies to students enrolling for the first time, and is on the basis of 'religion' not 'religious belief or activity'.

Superannuation and insurance

The Act currently contains broad exceptions to discrimination in the areas of superannuation and insurance with respect to impairment and age. These exceptions, which are common across jurisdictions, are based on proof of actuarial or statistical data, or where no such data exists, where it is reasonable having regard to the 'any other relevant factors.'[284]

In the Discussion Paper we asked whether exceptions that permit discrimination in the areas of superannuation and insurance with respect to impairment and age should be retained or changed.

We received 19 submissions on this topic.[285] Of those:

- 10 submissions supported changes to the exceptions or that they be repealed.[286]
- Eight submissions urged that the Act should not extend exceptions to apply to sex workers.[287]
- One submission indicated the exceptions should be retained.[288]

The Review received no submissions on this topic from insurance or superannuation providers. To inform ourselves of relevant considerations, we identified and considered submissions made on behalf of the insurance industry to a previous inquiry regarding this issue.[289]

Current approach

The Act currently contains broad exceptions to discrimination in the areas of superannuation and insurance that apply to impairment and age.[290] These exceptions apply where:

- discrimination is based on reasonable actuarial, statistical, or other data from a source on which it is reasonable for the person to rely, and the discrimination is reasonable having regard to the data and any other relevant factors; or
- no reasonable actuarial, statistical, or other data exists, and the discrimination is 'reasonable having regard to any other relevant factors.'[291]

284 *Anti-Discrimination Act 1991* (Qld) s 61–63 (superannuation) s 74–75 (insurance).
285 Public Advocate (Qld) submission; Queensland Network of Alcohol and other Drugs Agencies submission; Queensland Alliance for Mental Health submission; Australian Discrimination Law Experts Group 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; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc. and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Remi submission; Professor John Scott submission; Intersex Human Rights Australia submission; PeakCare Queensland Inc submission; Name withheld (Sub.061) submission; Name withheld (Sub.064) submission; Magenta submission.
286 Public Advocate (Qld) submission; Queensland Network of Alcohol and other Drugs Agencies submission; Queensland Alliance for Mental Health submission; Australian Discrimination Law Experts Group submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Intersex Human Rights Australia submission; PeakCare Queensland Inc submission.
287 See for example: Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission.
288 Queensland Council for Civil Liberties submission, 24–25.
289 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992,* vol 1 (Inquiry Report, 30 April 2004).
290 Ch 2 divs 5–6. Under s 59 the Act also permits discrimination by superannuation funds on the grounds of sex or relationship status, where permitted by the *Sex Discrimination Act 1984* (Cth).
291 *Anti-Discrimination Act 1991* (Qld) ch 2 divs 5–6.

This means that it is not unlawful in Queensland to discriminate on the grounds of age or impairment if it is reasonable to do so, whether or not actuarial, statistical – or in fact any reliable data – is available to prove the discrimination is necessary in order to reduce risk to the insurer or superannuation fund. Aside from actuarial or statistical data, other relevant data sources or 'factors' might include medical opinions, opinions from professional groups, actuarial advice or opinion, information about the consumer, or practices of other insurers in the industry.[292]

The Queensland Anti-Discrimination Tribunal[293] provided an opinion about the refusal of a life insurance policy needed to cover a loan to a person based on a history of depression. The Tribunal found that the actuarial and statistical data relied on by the insurer was insufficient because it was not Australian data (and there was no explanation why it was not local information) and evidence from a qualified psychiatrist could be applied to any person with the same condition. The Tribunal found that there was not enough information to know whether the person presented 'an unacceptable risk.'[294]

Similar exceptions that exist in other jurisdictions have been argued successfully to defend an exclusion clause in mortgage protection insurance for a person living with HIV[295] and to deny travel insurance on the ground of mental illness.[296]

Comparative approaches

All states and territories have similar exceptions, which apply to a variety of attributes depending on the jurisdiction.[297] Exceptions apply to age and disability (or 'impairment') in all jurisdictions.[298]

The federal Disability Discrimination Act and Age Discrimination Acts contain similar exceptions to Queensland.[299] This legislation also allows the Australian Human Rights Commission to seek a copy of the relevant actuarial or statistical data, and it is an offence to fail to comply.[300]

Tasmania permits discrimination in relation to insurance and superannuation where it is:

- based on actuarial, statistical, or other data from a reliable source; and
- reasonable having regard to such data and any other relevant factors.[301]

Unlike Queensland, in Tasmania the exception does not apply where there is an absence of actuarial or statistical data, which may impose a higher level of accountability for insurance and superannuation companies.

The Sex Discrimination Act only permits sex discrimination when providing insurance based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and requires that a provider gives the client a document containing the data or makes it available for inspection at the client's request.[302]

An Exposure draft of the Discrimination Amendment Bill 2022 (ACT)[303] suggests an even narrower approach that allows discrimination only where it is based on actuarial or statistical data on which

292 Australian Human Rights Commission, *Disability: Guidelines for Providers of Insurance and Superannuation*, (Web page, 31 December 2005) [4.7.] <https://humanrights.gov.au/our-work/disability-rights/publications/disability-guidelines-providers-insurance-and->.
293 This Tribunal predates the current tribunals, operating from 1992 to 2009.
294 *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.
295 *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; [2001] FMCA 15.
296 *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936.
297 The exceptions in the Northern Territory apply to all attributes: *Anti-Discrimination Act* (NT) s 49.
298 See for example: *Equal Opportunity Act* (WA) ss 66T, 66ZR.
299 *Disability Discrimination Act 1992* (Cth) s 46; *Age Discrimination Act* (Cth) s 37.
300 *Disability Discrimination Act 1992* (Cth) s 107; *Age Discrimination Act* (Cth) s 37(4)–(5).
301 *Anti-Discrimination Act 1998* (Tas) s 30, 33, 34 and 44.
302 *Sex Discrimination Act 1984* (Cth) s 41.
303 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 7.

it is reasonable to rely, and the discrimination is 'reasonable, proportionate and justifiable in the circumstances.' Under a new draft provision, the service provider must give the consumer a document containing the data or make it available for inspection.

Discrimination allowed because of the exception

Our research found that people are experiencing increased premiums, excessive restrictions on policies, and rejection of cover once a mental health issue has been disclosed.[304] While blanket exclusions from many travel and life insurance services have lifted following inquiries and reports in a number of jurisdictions,[305] a recent report indicates that barriers to equitable access and discrimination are still regularly experienced.[306]

We also heard that discrimination may be occurring based on a predisposition to a disease. Intersex Human Rights Australia identified a study of 174 Australian consumers with genetic traits that predispose them to cancer who found that they had difficulties obtaining insurance despite most having no medical history or symptoms, even after risk-reduction strategies.[307]

Submissions from organisations representing people with psychosocial disability,[308] intersex people,[309] and people living with HIV[310] recount experiences of unfair and unreasonable treatment in the area of insurance. The submissions told us that:

- Insurance companies continue to discriminate on the basis of a history of mental illness, regardless of recency, relevance, or severity, even if that illness has negligible or no discernible effect on risk.[311]
- The insurance industry has acknowledged the difficulty in identifying risks based on mental illness because of issues including the subjective nature of diagnosis, challenges in understanding the severity, appropriate treatment options, and prospects of recovery.[312]
- People living with HIV are either immediately refused coverage or face higher premiums.[313]
- People with variations of sex characteristics report paying higher insurance premiums, as some intersex variations are associated with higher risks of gonadal cancer.[314]
- This may be a disincentive to seeking medical help because of fear of needing to disclose a diagnosed condition to an insurer.[315]

304 Mental Health Council of Australia and beyondblue, *Mental Health Discrimination and Insurance: A Survey of Consumer Experiences* (2011) <https://www. beyondblue.org.au/about-us/about-our-work/discrimination-in-insurance>.
305 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019); Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019); Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Life Insurance Industry* (Inquiry Report, March 2018); Productivity Commission (Cth), *Mental Health* (Inquiry Report, June 2020).
306 Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021) <https://piac.asn.au/project-highlight/mental-health-and-insurance>.
307 Intersex Human Rights Australia submission, 24, referring to Jane Tiller et al. 'Genetic Discrimination by Australian Insurance Companies: A Survey of Consumer Experiences' (2020) *European Journal of Human Genetics* 28 (1).
308 See for example: Queensland Advocacy Incorporated submission, 9; Queensland Alliance for Mental Health submission, 6.
309 Intersex Human Rights Australia submission, 24.
310 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16.
311 Public Advocate (Qld) submission, 5; Queensland Alliance for Mental Health submission, 6; Caxton Legal Centre submission, 30–31; Queensland Advocacy Incorporated submission, 9.
312 Legal Aid Queensland submission, 77 – referring to Actuaries Institute, *Mental Health and Insurance Green Pape*r (Report, October 2017) 2.
313 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16.
314 Intersex Human Rights Australia submission, 24.
315 Queensland Alliance for Mental Health submission, 6; Caxton Legal Centre submission, 30–31; Queensland Advocacy Incorporated submission, 9.

- Potentially, a person who has failed to address a mental health condition may have a cheaper premium than a person who has been treated and whose condition is well managed.[316]
- Trends towards greater availability of genetic testing means that a higher proportion of the population are likely to have identified risks, and discrimination on these grounds can deter people from undergoing this beneficial testing.[317]
- When a customer seeks evidence of risk, they are often denied requests for actuarial data, so there is no way to verify if the decisions are based on historical outcomes for conditions or based on modern, advanced treatment options.[318]

We also heard concerns that the Commission does not have the power to obtain a copy of actuarial or statistical data, which means it is only at the Tribunal stage that his information can be scrutinised.[319]

In 2019 the Victorian Commission released an investigation report on practices in relation to mental health in the travel insurance industry, which identified that several insurers included a blanket mental health exclusion.[320] The investigation found that, over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.

Submissions on behalf of sex workers indicated that this group experiences significant barriers to accessing superannuation, income protection, or other insurances, and are charged high premiums.[321] While there are currently no Queensland exceptions on the basis of lawful sexual activity, these submissions were concerned that further exceptions may be added.

Impact on the insurance and superannuation industries

One submission maintained that risk assessments are a reality of insurance and superannuation decisions and raised concerns about the flow-on effects from any change in approach, with the potential to increase premiums overall.[322] This submission suggested an alternative might be to give the Commission powers to investigate on its own motion.

The Explanatory Memorandum for the Disability Discrimination Act which explains that the exception is in place to recognise that superannuation and insurance are provided on the basis of a risk assessment, and in many cases, it is likely that persons with disability might receive payments sooner than those without disability.[323]

Some commentary suggests that market efficiency may be assisted by a high level of access to information including statistics based on social and medical indicators.[324] When the Disability Discrimination Act was reviewed by the Productivity Commission,[325] both the Insurance Council of Australia (ICA) and the Investment and Financial Services Association (IFSA) explained that

316 Caxton Legal Centre submission, 30–31.
317 Intersex Human Rights Australia submission, 24.
318 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16; Legal Aid Queensland submission, 77–78; Caxton Legal Centre submission, 30–31.
319 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16; Caxton Legal Centre submission, 31.
320 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019).
321 See for example: Respect Inc and DecrimQLD submission, 50–51.
322 Queensland Council for Civil Liberties submission, 24–25.
323 Explanatory Memorandum, Disability Discrimination Bill 1992, 17.
324 Dean Carrigan and Penny Holloway, 'Recent Cases and Developments in Discrimination and Privacy', *Allens Arthur Robinson* (Web page, 7 April 2004), 3. <https://data.allens.com.au/pubs/pdf/insur/ins7apr04.pdf>
325 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992,* vol 1 (Inquiry Report, 30 April 2004), Rec 12.1, 56.

changes to the exception under the Disability Discrimination Act would lead to unjustifiable hardship for the industry and increase costs to all consumers.[326] The ICA also said that the exemption can be justified because insurance providers were already at a disadvantage because customers do not reveal all aspects of their health status. IFSA also commented that there is limited actuarial and statistical data in the small Australian market to rely upon, and a flexible approach that allows for other relevant information to be considered was necessary for practical reasons.[327]

The Productivity Commission ultimately recommended that while the exception in the Disability Discrimination Act should remain, consideration of 'other relevant factors' should not be based on stereotypical assumptions about disability and unfounded assumptions about risks related to disability. This was consistent with IFSA's submission that agreed it was problematic to use a formulaic approach, and inappropriate to rely on stereotypes.[328] IFSA suggested that clarification about what other factors might include could be qualified to read, 'factors relevant to the nature and extent of the cover'.

Options for reform

Two submissions thought that the exceptions should be repealed[329] and two suggested the only exceptions should be by application for a tribunal exemption, which would require public disclosure of the risk assessment on which the insurance decisions are made.[330]

Legal Aid Queensland acknowledged a need for insurers and superannuation providers to adjust products they offer to levels of need and risk, but questioned whether it was ever reasonable to permit discrimination in the absence of relevant actuarial or statistical data.[331]

Rather than suggesting repeal of the exceptions for insurance and superannuation, the Australian Discrimination Law Expert Group considered that the provisions should be more limited and based on the Tasmanian approach.[332] They also recommend that new provisions, or a legislative note, should incorporate the following guidance to interrogate the veracity of the data, namely that the data:

- must be contemporarily relevant
- must state that the condition of the person seeking insurance is an unacceptable risk
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas, together with an explanation for why there is no Australian data upon which to rely.[333]

326 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992,* vol 1 (Inquiry Report, 30 April 2004), 328–329.
327 Investment and Financial Services Association (IFSA), Submission in response to the Productivity Commission Issues Paper and Review of Disability Discrimination Act 1992, 5 June 2003, 26.
328 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992,* vol 1 (Inquiry Report, 30 April 2004), 336.
329 Queensland Advocacy Incorporated submission, 9; PeakCare Queensland Inc submission, 50.
330 Caxton Legal Centre submission, 31; Queensland Advocacy Incorporated submission, 9.
331 Legal Aid Queensland submission, 95.
332 Australian Discrimination Law Experts Group submission, 66–67, referring to *Disability Discrimination Act 1992* (Cth) s 46(1)(f) and *Anti-Discrimination Act 1998* (Tas) s 34.
333 Australian Discrimination Law Experts Group submission, 66-67. These points are drawn from the following cases: *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30]; *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 [17]; *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.

Human rights considerations

The insurance and superannuation exceptions limit human rights protected under the Human Rights Act including:

- equality before the law[334]
- right to health services without discrimination.[335]

Human rights may be subject to reasonable limitations.[336] Some limitation of rights may be necessary to ensure that insurance and superannuation providers can continue to operate their businesses effectively, and to prevent increased costs to consumers across the market.

While it may be necessary to permit insurance providers to make reasonable decisions based on risk, we question whether the provisions are necessary and proportionate in circumstances where they permit 'reasonable' discrimination in the absence of actuarial and statistical data. An approach that places less restrictions on the right to equality has been outlined below.

The Review's position

The Review considers that:

- The insurance and superannuation exceptions are having a disproportionate and adverse impact on older people, people with disability, people with mental health conditions, and people predisposed to genetic conditions.
- Insurance and superannuation providers need to make reasonable decisions based on risk in order to avoid increased costs and premiums for all consumers.
- Insurance and superannuation providers operate on a national basis and an approach that is inconsistent with the federal age and disability discrimination legislation (as well as that of most other states and territories) is not desirable.
- Consistent with the recommendations of the Productivity Commission in 2004, there are advantages in including specific factors to determine what is 'reasonable', and to make it clearer that the evidence relied upon must be relevant, contemporary, and not based on assumptions or stereotypes.
- Determinations of courts and guidance material developed by the Australian Human Rights Commission[337] is instructive in identifying what 'relevant factors' should include.
- Ensuring that there is a power to compel access to actuarial, statistical, or other information relied on by the provider for use at the conciliation stage will assist early resolution of complaints.
- The exceptions should not be broadened to allow for discrimination on the basis of additional attributes, including sex workers.

334 *Human Rights Act 2019* (Qld) s 15(3).
335 *Human Rights Act 2019* (Qld) s 37(1).
336 *Human Rights Act 2019* (Qld) s 13(1).
337 Australian Human Rights Commission, *Disability: Guidelines for Providers of Insurance and Superannuation*, (Web page, 31 December 2005) [4.7.]

Recommendation 41

41.1 The insurance and superannuation exceptions should be included in the Act in relation to age and disability, and be updated to include a non-exhaustive list of factors which provide guidance on whether it is reasonable to rely on actuarial or statistical data or other relevant factors.

41.2 These factors may include whether the data source:

- is up to date
- is relevant to the type and terms or conditions of the policy
- indicates that the person poses an 'unacceptable risk'
- is a reasonable source
- is from an Australian data source, or if from overseas, how it is applicable in the local context.

41.3 The provisions should also require that, on request, the data on which the service provider is relying is provided to a consumer within a reasonable timeframe.

41.4 The Act should provide the Commission the power to compel an insurance or superannuation provider to disclose the source of actuarial or statistical data on which discrimination was based.

Prisoners

See also: chapter 5 – complaints by prisoners.

Changes made in 2008 to the Corrective Services Act (the 'Corrective Services Act modifications') modify the tests for direct and indirect discrimination for complaints by prisoners against prisons, service providers in prisons (protected defendants), and community corrections.[338] The stated purpose of these changes is to maintain a balance between respecting the dignity of prisoners and the financial and other constraints to which protected defendants are subject.[339]

In the Discussion Paper we asked whether the Corrective Services Act modifications should be retained, changed, or repealed. We received 11 submissions, all suggesting review or repeal of these provisions.[340] Submissions indicated that the Corrective Services Act modifications deter complaints about genuine issues and reduce the effectiveness of the Act to deal with systemic issues in prison.[341]

During a consultation with the Review, Queensland Corrective Services indicated that while they did not wish to comment on substantive government policy issues, they observed that any changes to the complaint model may have an operational impact.[342]

338 *Corrective Services Act 2006* (Qld) pt 12A.
339 *Corrective Services Act 2006* (Qld) s 319B.
340 Sisters Inside Inc submission; Youth Advocacy Centre submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Community Legal Centres Queensland submission; Queensland Advocacy Incorporated submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc submission; Queensland Law Society submission.
341 See for example: Caxton Legal Centre submission; Legal Aid Queensland submission.
342 Queensland Corrective Services consultation, 24 February 2022.

Current approach

For all discrimination laws across Australia, the meaning of direct discrimination does not incorporate an aspect of 'reasonableness', which is a usual consideration in relation to complaints about indirect discrimination. See also: chapter 4 – defining discrimination.

The Corrective Services Act modifications add a reasonableness aspect to complaints of direct discrimination by prisoners. Where discrimination relates to less favourable treatment of a prisoner with an attribute compared to a prisoner without the attribute, it is not discrimination if a protected defendant can prove the treatment was reasonable. In deciding the reasonableness question, the tribunal must consider factors that include security and good order, costs, administrative and operational burden, disruption, budget, resources, availability of alternatives, the prisoner's dignity, and unfair prejudice to other prisoners.[343]

If a protected defendant imposes or proposes to impose a term with which a prisoner with an attribute cannot comply, but a higher proportion of prisoners can comply, it may be indirect discrimination. Consistent with indirect discrimination provisions generally, if the term is reasonable, then it is not discrimination. Under the Corrective Services Act modifications the same list of reasonableness factors noted above, such as security and good order, must also be considered by the tribunal.[344]

The Corrective Services Act modifications also changed the outcomes available to prisoners through the discrimination complaint process. Compensatory orders are only available for prisoners where 'bad faith' on the part of the respondent can be proved.[345] This represents a departure from the established position in discrimination law that a person's motive for discriminating is irrelevant.[346] If compensation is awarded, the payment of money cannot be directed to the prisoner, but must go to a victim trust fund.[347]

Barriers to complaining

In chapter 5, we explore the difficulties prisoners who wish to make a discrimination complaint face. The prison population includes disproportionate representation of First Nations people and people with disability. There are low literacy rates and challenges caused by a paper-based process in a prison environment, as well as the additional internal complaints processes required for prisoners. Submissions made to us about the Corrective Services Act modifications indicate that changes to the test for discrimination and adding the requirement to prove 'bad faith' are creating yet more barriers to complaining.[348]

Reasonableness

The Australian Discrimination Law Experts Group stated that the list of factors to determine reasonableness reduces flexibility in interpretation and unreasonably constrains courts and tribunals when making decisions.[349] Three submissions were concerned that tribunals and courts would accept a justification of security and good order at face value without exploring whether sufficient evidence for this claim is present.[350]

343 *Corrective Services Act 2006* (Qld) s 319G.
344 *Corrective Services Act 2006* (Qld) s 319H.
345 *Corrective Services Act 2006* (Qld) s 319I.
346 *Anti-Discrimination Act 1991* (Qld) s 10(3).
347 *Corrective Services Act 2006* (Qld) s 319I and Part 12B.
348 Caxton Legal Centre submission,16; Legal Aid Queensland submission, 21-22; Sisters Inside Inc submission, 10–11.
349 Australian Discrimination Law Experts Group submission; 66.
350 Australian Discrimination Law Experts Group submission, 66; Legal Aid Queensland submission, 21-22; Caxton Legal Centre submission, 16 – referring to the original decision of *Tafao v State of Queensland* [2018] QCAT 409 at [91] where it was found that using female pronouns for a prisoner would compromise the good order and security of the facility in an overcrowded male prison.

Sisters Inside commented that security and good order is hard to challenge because information is not publicly available and 'determination is largely inscrutable'.[351]

Submissions also felt that resource constraints should not be a factor that is allowed to justify unfavourable treatment of people who are in the care of the State.[352]

Compensation

Sisters Inside considered that it is punitive and unfair to set such a high bar as 'bad faith' for the threshold to award compensation.[353] Caxton Legal Centre indicated the Corrective Services Act modifications discourage prisoners from pursuing complaints, which reduces the incentive for prisons to build a culture that respects the human rights of prisoners.[354]

Human rights considerations

We determined under chapter 5 that mandating an internal complaints process for prisoners is likely to limit human rights in a way that is not reasonable and proportionate as required by the Human Rights Act. The reasoning in that section is also relevant to the Corrective Services Act modifications we explore in this section.

Since 2008 two key developments have increased prisoners' human rights protections in Queensland: the passing of the Human Rights Act, and the ratification of the *Optional Protocol to the Convention against Torture* (OPCAT), which is a human rights treaty aimed at preventing mistreatment of people in places of detention.

The Corrective Services Act modifications limit key rights recognised by the Human Rights Act, and particularly the rights to:

- equality before the law[355]
- humane treatment when deprived of liberty.[356]

The Corrective Services Act modifications limit equality before the law for people who are in custody compared with the general population. A separate and more challenging legal test for discrimination applies to them, and limited capacity for compensation is available.

We consider that these provisions may unreasonably limit the right to humane treatment when deprived of liberty. Humane treatment includes ensuring that a person's rights should only be curtailed to the extent necessary due to the confinement.[357]

Human rights may only be subject to reasonable limits that can be 'demonstrably justified in a free and democratic society'.[358] Determining whether a limitation on rights is reasonable and justified involves considering various factors to strike the right balance between protecting human rights and achieving a lawful and legitimate purpose.[359]

While resourcing constraints and security concerns can make prison environments challenging to maintain for the State, this must be weighed against serious limitations on the right of prisoners to be free from discrimination. Although the reasonableness factors set out in the Corrective Services Act modifications do acknowledge the rights and dignity of prisoners, this seems to be

351 Sisters Inside submission, 9.
352 Sisters Inside submission, 10; Australian Discrimination Law Experts Group submission, 65.
353 Sisters Inside submission, 10.
354 Caxton Legal Centre submission,16.
355 *Human Rights Act 2019* (Qld) s 15.
356 *Human Rights Act 2019* (Qld) s 30.
357 Explanatory Notes, Human Rights Bill 2018 (Qld) 25.
358 *Human Rights Act 2019* (Qld) s 13(1)
359 *Human Rights Act 2019* (Qld) s 13(2).

overshadowed by resourcing, costs, security, and other factors. This creates a tension with the Human Rights Act which provides a balanced approach to weighing up human rights against the need to achieve a legitimate purpose.[360]

The Review's position

The Review considers that:

- As we have recommended new tests for direct and indirect discrimination,[361] retaining the Corrective Services Act modifications which set out modified versions of the current legal definitions would further entrench reduced protections against discrimination for prisoners compared with the general population.
- On balance, the Corrective Services Act modifications may be incompatible with the Human Rights Act.
- The Corrective Services Act modifications unnecessarily import the concept of reasonableness into direct discrimination and constrain the considerations of tribunals and courts when deciding whether discrimination has occurred.
- The requirement to prove 'bad faith' in order to receive compensation is too high a bar when added to the challenges of proving discrimination that complainants face, and discrimination is no less harmful if it was done in 'good' faith.
- Prisoners experience barriers to making discrimination complaints and the Corrective Services Act modifications compound this effect and discourage complaints by prisoners. This in turn limits the opportunities for prisons and service providers to identify trends and issues to be addressed and to promote good practice.

Recommendation 42

42.1 Sections 319G, 319H and 319I of the *Corrective Services Act 2006* (Qld), which alter the tests for direct and indirect discrimination and create restrictions on compensation orders, should be repealed.

Work with children

An exception for discrimination in the work area that is unique to Queensland permits discrimination on the basis of gender identity or lawful sexual activity in relation to employment that involves the care or instruction of minors.[362] The exception applies where it is 'reasonably necessary to protect the physical, psychological or emotional wellbeing of minors, having regard to all the relevant circumstances of the case, including the person's actions.'

A working with children risk management and screening process – the 'blue card system' – has existed in Queensland since 2001 and aims to ensure safe environments for children when participating in activities or receiving services. Blue card checks involve screening, ongoing monitoring, and risk management. As the current exception applies only where it is reasonably necessary, having regard to all the relevant circumstances of the case, including the person's actions, the exception appears to be redundant given the rigorous blue card screening processes that are already required for people who work with children.

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360 *Human Rights Act* (Qld) s 13(2)(a)–(g).
361 Chapter 4 of this Review report – Refining key concepts.
362 *Anti-Discrimination Act 1991* (Qld) s 28.

In the Discussion Paper we noted that:

- No other jurisdiction specifically permits discrimination against sex workers, transgender, or intersex people[363] in this way.
- The exception perpetuates harmful stereotypes about risks posed to children by people with the named attributes.

We asked whether there were any reasons why the working with children exception should not be repealed. The Review received 48 submissions to the Discussion Paper about this topic, [364] and concerns about this issue were also raised in consultations[365] and in our Have your Say online survey responses.

One submission on behalf of Christian schools suggested that the exception be partly retained because they do not support removing the exception in relation to sex workers to the extent this would present on a working with children check.[366]

Submissions from a broad range of community organisations, legal services, and organisations representing LGBTIQ+ people and sex workers argued the exception should be entirely removed because:

- The blue card system objectively considers whether a person poses a risk to children.[367]
- The provision sends a harmful message that trans and gender diverse people, intersex people, and sex workers should not be permitted to work with children, which is against community standards and is not based on evidence.[368]
- This exception does not exist in any other Australian jurisdiction, which is an indication that it is redundant and unnecessary.[369]
- The exception is unlikely to be used because all people who work with children are required to go through the blue card check and hold a blue card. If an employer took steps to protect

363 See also: chapter 7 – gender identity and sex characteristics. The Review understands that people who have variations of sex characteristics do not use the term 'indeterminate sex' or consider that the Act protects them from discrimination under the 'gender identity' attribute, and neither the definition of the attribute as it refers to indeterminate sex, nor the work with children exception have been tested in a tribunal or court.

364 Name withheld (Sub.008) submission; Intersex Human Rights Australia submission; Rainbow Families Queensland submission; Just.Equal Australia submission; Queensland Law Society submission; Aged and Disability Advocacy Australia submission; Queensland Council for Civil Liberties submission; Australian Discrimination Law Experts Group submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Equality Australia submission; Pride in Law submission; Diversity Queensland Incorporated submission; Caxton Legal Centre submission; Legal Aid Queensland submission; LawRight submission; Maurice Blackburn Lawyers submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission; LGBTI Legal Service Inc submission; Queensland Council for LGBTI Health submission; Abigail Corrin submission; Name withheld (Sub.022) submission; Remi submission; Name withheld (Sub.043) submission; Respect Inc and DecrimQLD submission; Scarlet Alliance, Australian Sex Workers Association submission; Sex Workers Outreach Project Inc NSW submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Sienna Charles submission; Magenta submission; Name withheld (Sub.062) submission; Name withheld (Sub.089) submission; Name withheld (Sub.084) submission; Natasha submission; SIN (South Australia) submission; Alistair Witt submission; Stonewall Medical Centre submission; Touching Base Inc. submission, Dr Zahra Stardust submission; Name withheld (Sub.069) submission; Prof John Scott submission; Name withheld (Sub.026) submission; Australian Association of Christian Schools submission; Community Legal Centres Queensland submission; Department of Education (Qld) submission; Name withheld (Sub.066) submission.

365 See for example: Just.Equal Australia consultation, 17 September 2021; Australian Transgender Support Association Queensland consultation, 19 August 2021; Respect Inc consultation, 12 August 2021.

366 Australian Association of Christian Schools submission, 22.

367 See for example: Dr Zahra Stardust submission, 3; Abigail Corrin submission, 1; LawRight submission, 4; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission, 15.

368 See for example: Rainbow Families Queensland submission, 7; Intersex Human Rights Australia submission, 36; Queensland Council for LGBTI Health submission, 11; Just.Equal Australia submission, 9–10; Pride in Law submission, 4.

369 See for example: Equality Australia submission, 21–22; Just.Equal Australia submission, 9–10; Scarlet Alliance, Australian Sex Workers Association submission, 22–23.

children, this would be considered reasonable for the purposes of indirect discrimination,[370] or a health and safety exception may apply.[371]

- The exception is likely to be incompatible with a person's right to privacy[372] and reputation, and right to equality before the law[373] protected under the *Human Rights Act 2019*[374] and in potential contravention of the International Labour Organisation (ILO) *Convention 111 – Discrimination (Employment and Occupation) Convention*, 1958, which requires equality of opportunity and treatment in employment.[375]

Many stakeholders felt that the provision was offensive and stigmatising, and has serious, negative impacts on the lives of people by:

- preventing people from affected communities obtaining work and volunteer positions[376]
- generating anxiety and fear about losing employment and career opportunities, which in turn negatively affects mental health in communities that already have higher rates of mental health issues than the general community[377]
- reducing the ability of sex workers to find alternative employment and leave the adult industry, should they wish to do so.[378]

A participant in the Respect Inc and DecrimQLD's community survey published in their submission expressed that:

> *I would like to study social work or being a teacher's aid but I know I cannot do that at the same time as being a sex worker because I would be excluded from employment because of my sex worker status.*[379]

The impact on trans and gender diverse people was expressed by a participant in a community survey of LGBTIQ+ people published in the Queensland Council for LGBTI Health submission, who said that:

> *To disqualify trans and gender diverse people from working with children is to deny them a significant portion of the workforce, one which some trans folks may be passionate about. It may also result in the further ostracization of individuals from their cisgender peers, creating additional room for dysphoria and the myriad of problems that come as a result of said dysphoria.*[380]

Two submissions said that the government should issue a formal apology to the affected communities.[381]

370 Equality Australia submission, 21–22.
371 *Human Rights Act 2019 (Qld)* s 107–108
372 *Human Rights Act 2019 (Qld)* s 25.
373 *Human Rights Act 2019 (Qld)* s 15.
374 Respect Inc and DecrimQLD submission, 45–46, 53.
375 Australian Lawyers for Human Right submission, 17.
376 Name withheld (Sub.008) submission; Sienna Charles submission, 5–6; Name withheld (Sub.062) submission, 3.
377 Rainbow Families Queensland submission, 44; Queensland Council for LGBTI Health submission, 11.
378 Scarlet Alliance, Australian Sex Workers Association submission, 13–14; Sienna Charles submission, 5–6.
379 Survey participant (35), Respect Inc and DecrimQLD submission, 35.
380 Survey participant (6), Queensland Council for LGBTI Health submission, 69.
381 Intersex Human Rights Australia submission,36; Australian Lawyers for Human Rights submission, 17.

Human rights considerations

The exception for work with children limits human rights protected by the Human Rights Act including the:

- right to equality before the law[382]
- right to privacy and reputatio.[383]

Human rights may be subject to reasonable limitations.[384] Safeguarding the right of children to receive the protection that they need (because they are children), and that is in their best interests,[385] is a legitimate purpose to be achieved. However, we do not consider the working with children exception is necessary to protect children's rights, when the existing mechanism of the blue card system is in place. It is incorrect and offensive to suggest that people are a risk to children solely because of their gender identity, intersex status, or because they are or have been a sex worker.

The Review's position

The Review considers that:

- there is no justification to retain the current section 28 because it:
  - is redundant
  - is offensive and stigmatising
  - may not be compatible with the Human Rights Act.

Recommendation 43

43.1 That the Act should repeal the 'work with children' exception which allows discrimination on the basis of lawful sexuality activity or gender identity in the area of work.

Assisted reproductive technology

The current Act permits assisted reproductive technology service providers to discriminate on the grounds of sexuality and relationship status.[386] The exception was inserted in 2002 when relationship status and sexuality were added to the protected attributes in the Act, and allowed clinicians to lawfully refuse services based on 'clinical and ethical standards.'[387]

Since then, society's attitudes have changed as shown by the passing of marriage equality laws. The largest fertility service provider in Queensland actively advertises to and provides services for same-sex couples and single parents.[388]

In the Discussion Paper, we asked whether there were any reasons why the Act should not apply to providing assisted reproductive technology services (such as artificial insemination, IVF, and

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382 *Human Rights Act 2019* (Qld) s 15(3).
383 *Human Rights Act 2019* (Qld) s 25.
384 *Human Rights Act 2019* (Qld) s 13.
385 *Human Rights Act 2019* (Qld) s 26 (2).
386 *Anti-Discrimination Act 1991* (Qld) s 45A.
387 Explanatory notes, Discrimination Law Amendment Bill 2002 (Qld) 15.
388 Queensland Fertility Group, 'Options for single women' *Queensland Fertility Group* (Web page, 23 November 2021) <https://www.qfg.com.au/trying-to-conceive/options-for-single-women>; Queensland Fertility Group, 'Same sex IVF', *Queensland Fertility Group* (Web page, 23 November 2021) <https://www.qfg.com.au/trying-to-conceive/same-sex-ivf>.

other treatment). We received 18 submissions on this topic, and all said that the provision should be removed, [389] because:

- Assisted reproductive services, like other health services, should be available to anyone who needs them regardless of their relationship status or sexual orientation.[390]
- The exception implies that single parents and non-heterosexual couples are not worthy of assistance to become parents and perhaps should not become parents at all, which is contrary to all research in this area,[391] and inconsistent with the introduction of marriage equality.[392]
- Fertility service providers in Queensland do not exclude people based on their sexuality or relationship status and some target their services to the LGBTQ+ community,[393] which shows that the law is not reflecting practice.

The Queensland Council for LGBTI Health sought community views about access to assisted reproductive technology services, [394] and one survey participant described a discriminatory comment when accessing these services:

> *My wife was told she needed a good man.*[395]

However, because of the current exception this type of discrimination may not be unlawful.

Inconsistency with federal laws

Submissions highlighted that service providers are currently required to comply with the federal Sex Discrimination Act,[396] which has protected people from sexual orientation discrimination since 2013.[397]

Three submissions considered that, based on their understanding of existing case law,[398] the exception may not stand up to a challenge based on section 109 of the *Australian Constitution*, which says that, 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

In *McBain v Victoria*, the Federal Court found that an exception in the now repealed *Infertility Treatment Act 1995* (Vic), which permitted refusal of infertility treatment because of marital status, was inconsistent with the Sex Discrimination Act, and therefore inoperative under section 109 of the *Constitution*.[399]

389 Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; LGBTI Legal Service Inc submission; Equality Australia submission; Just.Equal Australia submission; Diversity Queensland Incorporated submission; Rainbow Families Queensland submission; Maurice Blackburn Lawyers submission; Australian Lawyers for Human Rights submission; Pride in Law submission; Legal Aid Queensland submission; Queensland Law Society submission; Queensland Council for LGBTI Health submission; Intersex Human Rights Australia submission; Australian Discrimination Law Experts group submission; Public Advocate (Qld) submission; Queensland Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission.
390 See for example: LGBTI Legal Service Inc submission, 7; Just.Equal Australia submission, 10.
391 See for example: Rainbow Families Queensland submission, 2 and 7–8; Australian Lawyers for Human Rights submission, 18; Diversity Queensland submission, 5.
392 Pride in Law submission, 4.
393 See for example: Rainbow Families Queensland submission, 7; Legal Aid Queensland submission, 93; Queensland Law Society submission, 19.
394 Queensland Council for LGBTI Health submission, 70–71.
395 Survey participant (6), Queensland Council for LGBTI Health submission, 71.
396 *Sex Discrimination Act 1984* (Cth) s 22.
397 Equality Australia submission, 22; Queensland Law Society submission, 19.
398 Maurice Blackburn Lawyers submission, 16; Australian Discrimination Law Experts Group submission, 65; Equality Australia submission, 22; Queensland Law Society submission; 19. These cases are *Pearce v SA* [1996] SASC 6233, *McBain v State of Victoria* [2000] FCA 1009, and *EHT18 v Melbourne IVF* (2018) 263 FCR.
399 *McBain v Victoria* (2000) 99 FCR 116.

Human rights considerations

The assisted reproductive technology services exception limits human rights protected by the Human Rights Act including the:

- right to equality before the law[400]
- right to access health services without discrimination[401]
- right to protection of families (the fundamental group unit of society) and children.[402]

While human rights may be subject to reasonable limitations,[403] the Review did not identify any justification for such a significant limitation on human rights, and we consider the provision may be incompatible with the Human Rights Act.

The Review's position

The Review considers that:

- there is no justification to retain the assisted reproductive technology services provision because it:
  - is redundant
  - does not meet current community standards
  - may be invalid under the *Constitution*
  - may be incompatible with the Human Rights Act.

Recommendation 44

44.1 The Act should repeal the assisted reproductive technology provision which allows discrimination on the basis of sexuality or relationship status in the area of goods and services.

Tribunal exemptions

In addition to general exceptions and exceptions that are specific to some of the areas of activity where discrimination is unlawful, a person may apply to the tribunal for a temporary exemption from the operation of specific provisions of the Act for a period of up to five years. For work-related matters, the tribunal is the Queensland Industrial Relations Commission, and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal.

If granted by the tribunal, an exemption provides a complete defence to discrimination for the duration of the exemption.[404]

Examples of exemptions granted by a tribunal may include allowing a health and fitness club to operate exclusively for women, restricting accommodation in a residential unit complex to single people and allowing a regional council to recruit Aboriginal or Torres Strait Islander candidates to an identified traineeship position.

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400 *Human Rights Act 2019* (Qld) s 15(3).
401 *Human Rights Act 2019* (Qld) s 37(1).
402 *Human Rights Act 2019* (Qld) s 26. As we discuss in further detail in chapter 7 – family, carer and kinship responsibilities, international human rights law has broadly interpreted the concept of 'family'.
403 *Human Rights Act 2019* (Qld) s 13.
404 *Anti-Discrimination Act 1991* (Qld) s 113.

Some submissions identified issues with the current process for applying for a tribunal exemption, including that:

- The Commission could have a more active role in consultation with relevant groups affected by the exemption.[405]
- The tribunal exemption process is too onerous, costly, and lengthy.[406]
- Longer periods for exemptions (beyond the current 5 year maximum) or permanent exemptions should be available.[407]

The Australian Industry Group suggested that there be an alternative process for organisations to verify that planned affirmative measures are lawful, which would be to vest the Commission with powers to certify such measures, instead of through an application to the tribunal.[408]

During the initial consultation phase, the process of seeking Tribunal exemptions was not identified as a priority issue that the Review should consider. The Review makes the general observation that further guidance materials could be provided to encourage private and non-government organisations to rely on affirmative measures in low-risk cases.

405 LGBTI Legal Service Inc submission, 7–8; Rainbow Families Queensland submission, 3–4.
406 Australian Industry Group submission, 11; Aboriginal and Torres Strait Islander Legal Service submission, 7.
407 Urban Development Institute of Australia submission, 2 – endorsed by Associated Residential Parks Queensland submission, 1.
408 Australian Industry Group submission, 11.