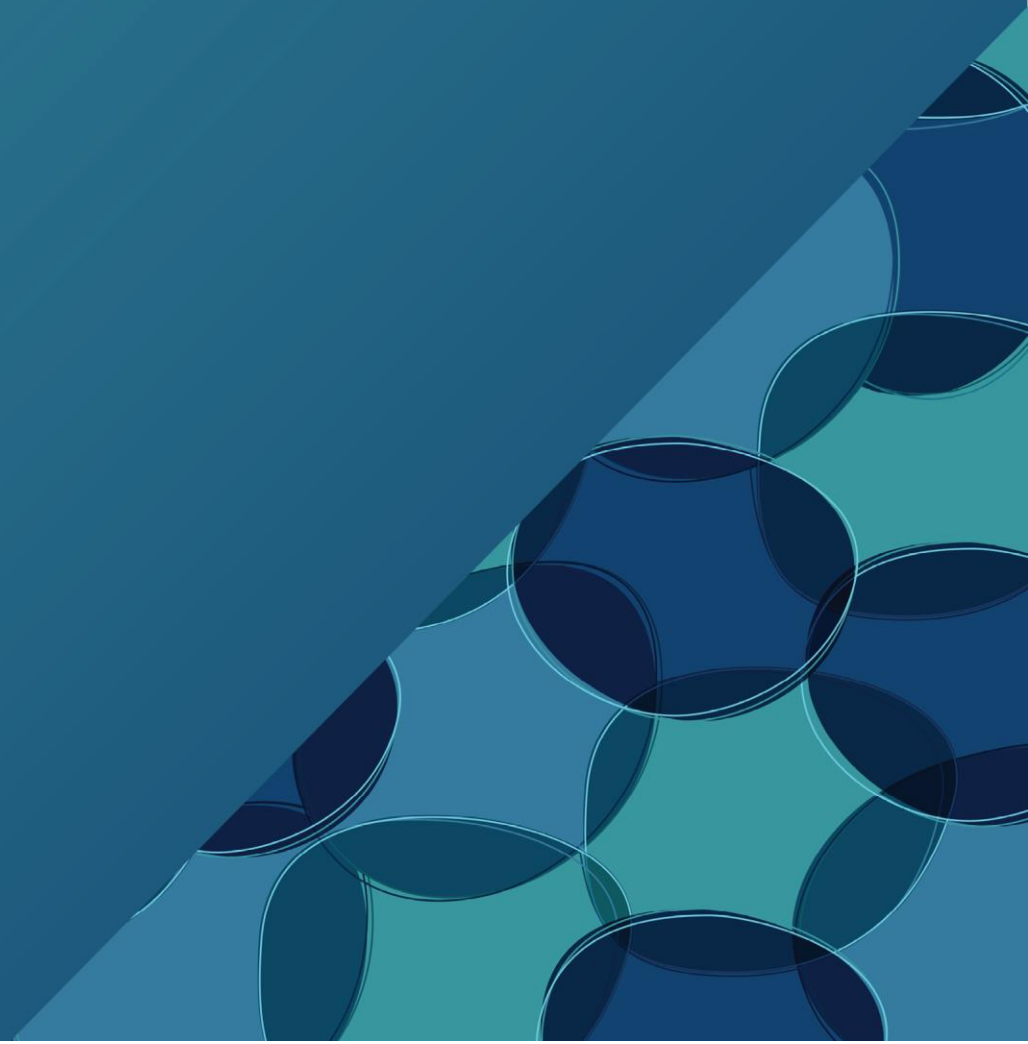
Queensland Human Rights Commission

Review of Queensland's Anti-Discrimination Act:

Discussion Paper

November 2021



Call for submissions

The Queensland Human Rights Commission has released this Discussion Paper to assist people and organisations to prepare submissions that will inform the Review of the Anti-Discrimination Act. We look forward to your views.

The closing date for submissions is 1 March 2022.

You can provide your response to this Discussion Paper via:

Email: adareview@qhrc.qld.gov.au

Post: City East Post Shop
PO Box 15565
City East QLD 4002

For your submission to be considered, it must be accompanied by a submission consent form. The consent form will ask you to tell us whether you would like your submission to be confidential or public. You can access it on our website at https://www.qhrc.qld.gov.au/law-reform/documents.

A factsheet to guide you on how to incorporate case studies into your submission is also available on our website at https://www.qhrc.qld.gov.au/law-reform/documents.

The content of this Discussion Paper is current as of 23 November 2021.

Key dates

Terms of Reference provided	5 May 2021
Discussion Paper released	30 November 2021
Submissions due	1 March 2022
Final report to Attorney-General	30 June 2022

Contents

Commissioner's foreword

In May 2021, the Attorney-General asked the Queensland Human Rights Commission to undertake a review of the *Anti-Discrimination Act 1991*. After 30 years of operation, now is a good time to examine whether changes are required to ensure that the Act is – to use of the language of the Preamble – protecting fragile freedoms and reflecting the aspirations and needs of contemporary society.

We know that discrimination is harmful. It impacts people's health, wellbeing, and their sense of belonging in all areas of life. It can also have visible and invisible social and economic impacts on our families, communities, and society. Strong communities and social cohesion are always important and, as Australia's recent experience in responding to COVID-19 has demonstrated, are critical at times of crisis.

The terms of reference for this Review are broad and ask us to undertake a holistic re-consideration of our discrimination law in Queensland. One of the critical questions this Review must address is whether our anti-discrimination law protects and promotes equality to the greatest extent possible.

A central message that emerged through our work to date is that the current system lacks a preventative focus. This can mean that the current law is not having a meaningful impact on the lives of the many people in our community who experience discrimination, including systemic discrimination and inequality.

This discussion paper is an important step in our review. It explores some of the themes and issues to emerge from our consultations, submissions and research so far, and includes questions on which we are seeking your input. These include the potential for reorienting the system from a reactive approach that relies on individuals to come forward, to one that better supports and guides all of us to create a culture of belonging. We hope your submissions will provide the necessary depth and rigour to ensure our final recommendations are effective.

I write this foreword from regional Queensland where, as part of this Review, we are conducting a series of community conversations to talk with people about their local experiences, ideas and suggestions for change. As these conversations unfold, I sense an increased awareness of discrimination and its impacts in our community.

I also sense cautious optimism for discrimination laws to play a central role in further consolidating and protecting equality and belonging in our communities. The Anti-Discrimination Act has served us well for 30 years. But now it's time to build on what we've learned.

Together, all of us can play a role in achieving an equal Queensland where everyone belongs.

Scott McDougall
Commissioner

Navigating this Discussion Paper

Purpose

The purpose of the Discussion Paper is to generate responses to questions that we have identified through consultations and research.

This paper is structured in the following parts:

- **Part A** sets out the Terms of Reference, our approach and methodology.
- **Part B** details themes and issues we have identified so far.
- **Part C** outlines options to reorientate the legislative framework towards building a preventative culture, enhancing access to justice, and addressing systemic discrimination. It includes questions about potential structural reforms.
- **Part D** considers the coverage of the law, including the current grounds for discrimination, exemptions that apply, and areas of activity. It includes questions about where the Anti-Discrimination Act should apply.
- **Part E** considers the compatibility of the Anti-Discrimination Act with human rights.

This Discussion Paper does not make interim recommendations or canvass the entire range of issues that may be relevant to the Review. It is not intended to outline an evidence base for potential reforms, but to provide the context for discussion of key issues facing the Review.

It is also not intended as an exhaustive exploration of current law. In weighing options for the most effective approach to discrimination law, we have identified some comparative approaches in other jurisdictions and recent reports that cover similar ground.

We invite submissions on any issue relevant to the Terms of Reference, which do not need to be confined to questions posed by this Discussion Paper.

We also actively encourage people to share their personal accounts and value the contribution of these experiences.

Glossary

Anti-Discrimination Act	*Anti-Discrimination Act 1991* (Qld)
the Commission	Queensland Human Rights Commission, including its predecessor, the Anti-Discrimination Commission Queensland.
discrimination	We use the term 'discrimination' in the general sense to refer to all of the conduct prohibited by the Act (except vilification and serious vilification) unless indicated otherwise.
equality legislation	All anti-discrimination and equal opportunity legislation currently enacted at either the state or federal level.
exemptions	We use term 'exemption' to describe any of the following, unless the context indicates otherwise: **special exemptions** – exemptions for discrimination that apply specifically to an area in Part 4 of the Act. **general exemption** – exemptions in Part 5 of the Act (other than tribunal exemptions) that apply to discrimination in any of the areas in Part 4. **exception** – provisions that exclude conduct or circumstances from a prohibition under the Act. **defence** – provisions that contain defences that are specific to a prohibition, and in some cases an excuse.
First Nations	The words 'First Nations' and 'Aboriginal and Torres Strait Islander' are used interchangeably in this report to refer to the Aboriginal peoples and Torres Strait Islander peoples of Australia. We understand that some Aboriginal peoples and Torres Strait Islander peoples are not comfortable with some of these words. Only respect is meant when these words are used.
Gardner Review	An Equality Act for a Fairer Victoria, Equal Opportunity Review Final Report (June 2008) conducted by Julian Gardner.
Human Rights Act	*Human Rights Act 2019* (Qld)
human rights agencies	We use the term 'human rights agencies' to describe state and federal anti-discrimination, human rights, and equal opportunities agencies – our equivalents in other states of Australia and the Australian Human Rights Commission.

intersectional discrimination	We use ‘intersectional discrimination’ and ‘discrimination on combined grounds’ interchangeably to mean situations where people experience discrimination because of the cumulative effect of having more than one protected attribute.
QCAT	the Queensland Civil and Administrative Tribunal
QIRC	the Queensland Industrial Relations Commission
the Reference Group	the Reference Group established by the Commission to represent stakeholder streams required to be consulted during the Review.
respondent	a person who is alleged to have breached the Anti-Discrimination Act in a complaint accepted by the Commission .
Respect@Work	Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).
the Review	the Queensland Human Rights Commission’s review of the *Anti-Discrimination Act 1991.*
systemic discrimination	For the purpose of this Discussion Paper, systemic discrimination can include legal rules, polices, practices and attitudes, or structures entrenched in organisations or broader community, which are often seemingly neutral but create, perpetuate, or reinforce a pattern of relative disadvantages for some groups, and can be the result of multiple barriers across multiple systems.
Tribunal exemption	We use this term to refer to exemptions that may be granted by a tribunal under section 113 of the Act. A person may apply to a relevant tribunal for an exemption from the operation of a specified provision of the Act for a period of up to five years.

Part A:
About the Review

What we have been asked to do

The scope of the Review

The Queensland Human Rights Commission (the Commission) has been asked to review the *Anti-Discrimination Act 1991* and consider whether there is a need for any reform to enhance and update the legislation to best protect and promote equality and non-discrimination and the realisation of human rights.

The Review was requested by the by the Attorney-General and is enabled by the Commission's statutory functions.[1]

The Terms of Reference for this Review ask us to consider whether there is a need for any reform, and if so, the scope of the reform regarding:

a) the compatibility of the Anti-Discrimination Act with the *Human Rights Act 2019* (Qld)

b) the preamble and preliminary provisions, including whether a more positive approach is required to eliminate discrimination and other objectionable conduct prohibited in the Anti-Discrimination Act.

c) the attributes of discrimination, including:

   i. whether the current definitions given to protected attributes best promote the rights to equality and non-discrimination; and

   ii. whether additional attributes of discrimination should be introduced

d) the areas of activity in which discrimination is prohibited

e) the definitions in the Anti-Discrimination Act (other than vilification), including discrimination, unjustifiable hardship, genuine occupational requirements, sexual harassment, and victimisation

f) whether the Anti-Discrimination Act should contain a positive duty on organisations to eliminate discrimination and other objectionable conduct prohibited by the Anti-Discrimination Act, similar to the duty contained in section 15 of the *Equal Opportunity Act 2010* (Vic)

g) whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws

h) exemptions and other legislative barriers that apply to the prohibition on discrimination

i) whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination, or whether there are other contemporary responses that would be appropriate

[1] *Human Rights Act 2019* (Qld) s 61(b); *Anti-Discrimination Act 1991* (Qld) s 235(k).

j) whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the Anti-Discrimination Act, to the greatest possible extent

k) the functions, processes, powers and outcomes of the Queensland Civil and Administrative Tribunal (QCAT) and the Queensland Industrial Relations Commission (QIRC) under the Anti-Discrimination Act

l) ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination

m) options for more tailored approaches towards, or alternatives to existing frameworks for, dispute resolution that enable systemic discrimination to be addressed as well as discrimination complaints that raise public interest issues

n) any other matters the Commission considers relevant to the review.

We are also asked to include options for legislating for a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation as far as possible. This follows recommendations made by the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report* (2020).

Given that the Queensland Parliament Legal Affairs and Safety Committee[2] is currently conducting an Inquiry into Serious Vilification and Hate Crimes, the Terms of Reference directed us not to review vilification or relevant provisions.[3]

[2] Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into Serious Vilification and Hate Crimes*. The committee is to report to the Legislative Assembly by 31 January 2022.
[3] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 4.

Our approach

The Commission is an independent statutory authority established under the Anti-Discrimination Act with functions under the Anti-Discrimination Act and the Human Rights Act.

The current role of the Commission includes resolving complaints, promoting human rights and non-discrimination, and providing education.

To conduct the Review we have:

- established an external Reference Group
- established a Review Team within the Commission
- developed principles to guide and inform decision-making
- outlined a clear methodology for undertaking the task, which includes consulting as broadly as possible.

Reference Group

The role of the Reference Group includes providing advice and feedback on our approach and methodology, identifying relevant issues, and encouraging and supporting participation in the Review by a wide range of stakeholders and community members and stakeholders.

The Reference Group is Chaired by Commissioner Scott McDougall, and the members are:

- Chamber of Commerce and Industry Queensland: Stephen Tait, Chief Executive Officer
- Community Legal Centres Queensland: Rosslyn Monro, Director
- Multicultural Australia: Christine Castley, Chief Executive Officer
- Queensland Churches Together: David Baker, General Secretary
- Queensland Council for LGBTI Health: Rebecca Reynolds, Chief Executive
- Queensland Council of Social Service: Aimee McVeigh, Chief Executive Officer
- Queensland Law Society: Elizabeth Shearer, President
- Queensland Unions: Jacqueline King, Assistant General Secretary
- Queenslanders with Disability Network: Michelle Moss, Director of Policy and Strategic Engagement

Guiding principles

The methodology of the Review is based on the following principles:

Comprehensive and consultative – the Commission aims to consult as widely as possible on issues within the Terms of Reference. We will take measures to ensure that a broad range of people and organisations, including stakeholder groups identified by the Terms of Reference, are actively invited to contribute to the Review. The Commission is committed to listening to all views, experiences, and suggestions for change.

Transparent and inclusive – the Commission is committed to providing a transparent process throughout the Review and encourages public scrutiny and input. We encourage diverse views and will consider all perspectives. We will adopt a community-wide perspective to promoting equality, and non-discrimination and the realisation of human rights.

Evidence based – the Commission's findings and recommendations will be based on rigorous analysis of information gathered by the Review, including through submissions, responses to the Discussion Paper, public consultations and community engagement, and relevant legal and policy analysis.

Independent – as an independent statutory authority, the Commission is committed to independence, and will conduct the Review consistent with its statutory obligations and vision, purpose, and values.[4]

[4] As reflected in the Queensland Human Rights Commission *Strategic Plan 2020–2024*.

Methodology

The Review is gathering information through submissions, consultations, and research. A schedule of our key activities is published on the Commission's website.

Submissions

We have established an open submission process and invited people to share their experiences, views, and ideas on what needs to change to improve Queensland's discrimination law. Our submission process opened in August 2021 and will close on 1 March 2022.

We have published a guided online submission form that aims to provide an accessible way for people to share their views and ideas. People can make a submission by sharing their contribution online, as a written submission, audio or video content, image or artwork, or verbally. Submissions can be made anonymously, which means that people can choose not to provide their name or any details.

So far, we have received over 100 submissions, including from people with disability, LGBTIQ+ people, people of cultural and linguistically diverse backgrounds, and from First Nations people. In the days before releasing this Discussion Paper, we also received over 300 submissions raising concerns about vaccination requirements and other public health measures in relation to COVID-19.

This Discussion Paper is an important part in our process as it provides an opportunity to raise key questions the Review must answer. We hope to receive as many responses to this paper as possible.

Consultations

The Review conducted a series of over 70 stakeholder consultations in the initial phase, which ran between August and November 2021. A list of stakeholders who participated is available at Appendix A.

We will conduct further consultations between December 2021 and March 2022, including a series of 'Community Conversations' across Queensland and 'Review Roundtables' that will focus on particular issues and topics.

As part of the consultation process, we invited organisations that would like to participate in a consultation with us to register their interest. This has provided an opportunity for direct involvement for a broad range of organisations.

Part B:
Does the law need to change?

Overview

During the initial phase of the Review, we asked stakeholders if the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the legislation needs to change.[5]

The consistent theme that emerged through our initial consultations, research, and submissions is that the current system lacks a preventative focus.

The legislation is geared toward addressing discrimination by resolving individual complaints made about conduct that has already occurred. Given the barriers to accessing the complaints process, particularly for marginalised or disadvantaged groups, stakeholders have told us that there is a need for change.

We heard that:

- People and communities continue to experience discrimination in Queensland, even though it is unlawful.
- Discrimination is harmful, and has wide-reaching impacts on people, their communities, and our society.
- The current legislative approach relies on a complaint-based model. While this can be effective for some people in resolving individual complaints, many people do not want to make a complaint, or experience barriers to accessing the process. This makes enforcement of protections less accessible than they should be.
- While the Anti-Discrimination Act has played an important role in responding to discrimination over the last 30 years, there is room to build on what we have learned about eliminating, and responding to, all forms of discrimination.
- Discrimination and sexual harassment cannot be addressed only through legislation. Awareness, education, and support are critical measures to ensure the law is meaningful in practice.

These issues and themes are explored below.

[5] The Terms of Reference ask us to consider whether there is a need for any reform to enhance and update the *Anti-Discrimination Act 1991* (Qld) to best protect and promote equality and non-discrimination and the realisation of human rights.

Experiences of discrimination

The Anti-Discrimination Act has been fundamental in shaping community expectations. Since the legislation was introduced, there has been increased recognition that overt discrimination is unacceptable and unlawful.

However, we have identified that a substantial amount of discrimination still occurs, particularly more complex forms of discrimination that is endured by people who experience social disadvantage. Rather than being contained to isolated incidents involving individuals, their experiences were linked to broader systems and culture.

We also heard that the Anti-Discrimination Act may not be having a real impact on the daily lives of people the legislation seeks to protect, because it has limited capacity to create meaningful systemic change.

Organisations that provide services to people at risk of discrimination because of their attributes such as race, age, sexuality, religion, or social status, told us discrimination is often normalised and can therefore become invisible. This means that some people may not identify as having experienced discrimination, even though they experience its adverse impacts.

The Review also heard anecdotal information that while blatant forms of discrimination have declined since the introduction of the Anti-Discrimination Act, more subtle and less visible forms of discrimination are commonly experienced by some groups, and these are often linked to attitudes, biases, and stigma.

We also heard that discrimination law has limited capacity to fully recognise the experiences of people who have more than one protected attribute – for example, a First Nations woman with disability who is pregnant, or a gay man from a culturally and linguistically diverse background. These experiences are often compounded and can have an impact on how a person is treated across their lifetime. Intersectional disadvantage also affects a person's sense of belonging, which can have deleterious impacts.

What is systemic discrimination?

The Review was told that discrimination can be deeper, wider, and more structurally embedded than what is currently unlawful. This is often referred to as 'systemic discrimination'. This term can mean different things in different contexts, and is also referred to as 'structural discrimination' or 'institutional discrimination'.[6]

Drawing on common components of relevant definitions,[7] systemic discrimination can include:

a) legal rules, policies, practices, attitudes, or structures entrenched in organisations or broader community

b) which are often seemingly neutral

c) but create, perpetuate, or reinforce a pattern of relative disadvantages for some groups; and

d) can be the result of multiple barriers across multiple systems.

In some situations, historical disadvantage or social marginalisation gives rise to, or contributes to, systemic discrimination. These same factors may also operate as barriers or deterrents to accessing protections available under anti-discrimination laws through making and pursuing a complaint. Eliminating systemic discrimination as far as possible can therefore be viewed as a vehicle for achieving substantive equality.

This conversation is connected to ideas about formal and substantive equality. Formal equality refers to the concept that all people should be treated the same. It encourages neutrality and asserts that people should be judged on the basis of merit and not their characteristics.[8] While formal equality is simple to understand and apply, it does not actively address the causes of inequality and can perpetuate structural disadvantages. Same treatment does not necessarily create an equal outcome.

Substantive equality focuses on ensuring that people have quality opportunities in a real sense,[9] and focuses on outcomes.[10] Rather than evaluating whether or not two people were

[6] Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level – Policy Study* (October 2020).
[7] Canadian Human Rights Commission, *Protecting their rights: a systemic review of women's rights in correctional centres for federally sentenced women* (2003); Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level* (Policy Study, October 2020); Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 38.
[8] Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 461–462.
[9] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 22.
[10] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 266, referring to S Fredman, 'Equality as a Proactive Duty' (2012) 60 *American Journal of Comparative Law* 12.

treated in the same way, substantive equality requires correcting or equalising a person's position to move towards equal outcomes. In essence, this requires addressing social inequalities at their cause.

A simple way to summarise these concepts is that if the same groups are always 'winning', and the same groups are always coming last, this is indicative of inequality.[11]

This reflects a problem increasingly articulated by academic and evidence-based research – while we continue to learn more about the nature of discrimination, relevant legislation is primarily aimed at achieving formal equality and is failing to address discrimination on a systemic level.[12]

Given that the Terms of Reference ask us to consider whether there is a need for any reform to best protect and promote equality,[13] including whether a more positive approach is required to eliminate discrimination,[14] these questions must be considered by the Review.

[11] Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 461–462.
[12] Ibid.
[13] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.
[14] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(b).

What is intersectional discrimination?

The term 'intersectional discrimination' refers to the experience of multiple forms of intersecting discrimination, for example on the basis of gender, race, disability or sexuality. The concept of 'intersectionality' recognises that discrimination such as racism and sexism combine, overlap or intersect.[15]

The Review was told that people who experience discrimination because of a cumulative effect of having more than one protected attribute are at greater risk of experiencing discrimination, but also find it harder to bring and prove a claim. We heard that the current law may not sufficiently recognise or protect people who experience intersectionality,[16] including ensuring recognition of the compounding impact multiple attributes can have.

These concerns are reflected in academic literature, which has identified intersectionality as one of the cultural and systemic drivers of discrimination and sexual harassment.[17] While anti-discrimination legislation is structured around discrete protected grounds or characteristics, this does not always translate to the way discrimination is experienced.[18]

In discussing this issue, one organisation told the Commission:

> So, you know, people do feel discriminated against, but they don't really know why. Which part of me is being discriminated, for example, by the fact I've got a mental illness, or I'm Indigenous, or I'm gay, or I'm not allowed a voice. It's that combination of things. And you have to get so specific and legal, that it's a very big deterrent. One of the issues we're grappling with is intersectionality, and how you do justice to someone who has been discriminated against.[19]

An intersectional approach is also conceptually linked to the experience of systemic discrimination. Given that people who live with multiple grounds of disadvantage may often experience discrimination on the basis of overlapping and compounding grounds, discrimination is often subtle rather than overt, and can be multi-layered, systemic, and embedded in institutional cultures.[20]

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[15] *Merriam-Webster Dictionary*, (Online at 23 November 2021) 'Intersectionality'.
[16] The term 'intersectionality' was created by American critical race theorist, Professor Kimberlé Crenshaw, to explain how people experience discrimination and inequality differently based on divergent but intersecting categories. See K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.
[17] Beth Goldblatt 'Intersectionality in International Anti-discrimination Law: Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights* 47.
[18] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An empirical critique of the legal framework', (2020) 43(3) *UNSW Law Journal* 773.
[19] Review consultation, 12 August 2021, Karyn Walsh, Micah Projects.
[20] Ontario Human Rights Commission, 'An intersectional approach to discrimination: Addressing multiple grounds in human rights claims', (Web Page, 23 November 2021) <http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims/introduction-intersectional-approach#fn14>

Discrimination is harmful

The impacts of discrimination can be profound and devastating at both an individual and societal level. Discrimination and sexual harassment often have a negative impact on people's mental health and wellbeing. It can lead to social exclusion, which is associated with factors including not being and feeling safe, being unable to access services, low self-esteem and confidence, poor physical health indicators, and few social supports.

Discrimination can be pervasive and occur across a range of areas in which a person participates in public life, including:

- health care and public health settings
- social services and supports, including housing
- interactions with police and the criminal justice system
- employment settings
- in everyday participation in society.

Discrimination and sexual harassment can create barriers to people seeking and receiving services, including health services,[21] and can have an impact on economic security and opportunities for professional advancement.

For example, in making a submission to the Review about what makes it hard for people who have experienced discrimination, sexual harassment, and/or other unfair treatment, a woman from a culturally and linguistically diverse background responded:

> Power/level, age and gender imbalances. [It's] career limiting to speak up. No guarantee of resolution, humiliating to bring up and likely would still need to be in contact with the offender due to the nature of the work.[22]

Impacts can be immediate, but also reverberate across a person's lifetime. They may also be felt and experienced differently by different groups of people, for example by First Nations people, people from culturally and linguistically diverse backgrounds, people with disability, from the LGBTIQ+ community, sex workers, people experiencing homelessness, people who are HIV positive, women, children and older people, and people who have had interactions with the criminal justice system.

[21] Queensland Mental Health Commission, *Changing attitudes, changing lives: Options to reduce stigma and discrimination for people experiencing problematic alcohol and other drug use* (2018) 5 <https://www.qmhc.qld.gov.au/sites/default/files/downloads/changing_attitudes_changing_lives_options_to_reduce_stigma_and_discrimination_for_people_experiencing_problematic_alcohol_and_other_drug_use.pdf>.
[22] Review submission SUB.FORM.60, 24 October 2021, name withheld.

While the overwhelming experience of discrimination appears to be negative, not all people have the same experience. Some people are able to find strength and resilience through the process. For example, one First Nations woman who identifies as part of the LGBTIQ+ community wrote in her submission:

> For me, it has made me more determined to show I'm able to do whatever I put my mind to.[23]

In addition to direct impacts, the Review was told that bringing as well as defending a complaint of discrimination or sexual harassment can have negative impacts for both complainants and individual respondents. That process can be challenging and can amplify the initial harm.

For individual respondents, protracted delays can mean they feel as though they do not have the chance to defend the allegations at an early stage. This can have particular impacts in work settings, if the complainant and respondent have an ongoing work relationship.

Some literature, including reviews conducted by federal and state jurisdictions, have attempted to assess the downstream economic impacts of discrimination and sexual harassment on the individual, industry, and the community.[24] While difficult to comprehensively capture in a single study, these studies have confirmed the significant and widespread economic costs of discrimination and sexual harassment.

[23] Review submission SUB.FORM.59, 23 October 2021, name withheld.
[24] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), Appendix 7; Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, March 2019); C Willness, P Steel and K Lee, 'A meta-analysis of the antecedents and consequences of workplace sexual harassment', (2007) 60(1) *Personnel Psychology* 127-162.

Limitations of a reactive system

The current legislation relies on complaints to remedy harm and to deter discrimination and sexual harassment.

When this conduct has occurred, a person may make a complaint and attempt to resolve the complaint through the conciliation process, which might include financial and non-financial outcomes such as an apology, training for the respondent, or policy review. If requested, their matter may proceed to a tribunal or court for final determination, or to a court if there is an appeal. Outcomes at the tribunal stage are almost exclusively financial.

While complaints have played an important role in achieving outcomes for individuals, one of the clearest messages received through the initial consultations was that the current approach lacks a preventative focus. That is, the law is limited in its capacity to stop discrimination happening in the first place. Linked to this issue, we heard that the individual complaints model is limited in its capacity to achieve broader systemic outcomes. This section discusses some key components of these issues.

Barriers to bringing a complaint

The Review was told that people face a range of barriers in making a complaint to the Commission about discrimination or sexual harassment.

Some people may not realise they are experiencing discrimination or sexual harassment because it has been normalised by them, the workplace, or the community. Even if they do feel discriminated against, they may not be aware that the law protects them against this conduct, or that they have a right to bring a complaint.

This can have a disproportionate impact on some groups of people, including First Nations people, older people, and children. One organisation that provides legal services to First Nations women told the Review:

> So just again, not knowing that they are being discriminated against or not knowing that there is actually legislation that prevents it, and a pathway to complain and remedies that can be sought is a huge barrier.[25]

Another organisation told us that:

> I think there some definite complexities in relation to the Anti-Discrimination Act that are certainly onerous, and at times barriers for our clients in bringing complaints.[26]

[25] Review consultation, 25 August 2021, Natasha Priestly, Queensland Indigenous Family Violence Service.
[26] Review consultation, 15 September 2021, Terri Kempton, Basic Rights Queensland.

Agencies and organisations that support children told the Review that complaint processes are generally oriented towards an adult response, and children face specific barriers to the complaints process. These issues are compounded for children navigating other challenges including out-of-home care and interactions with the youth justice system. Overall, these organisations felt that placing the onus on a child to assert a right under the Act creates a clear barrier for children. There was a sense that the Anti-Discrimination Act was therefore only conceptually for children.

Similar issues were identified by organisations that support older people and people with disability.

People who are aware of the process may be deterred by the length and complexity of the process. Complaints can take a lot of time and energy to resolve, and there are often delays.[27] The complaints process places a psychological burden on both the people who make complaints and people who respond to complaints. It can be stressful and require the people involved to have to recall, retell, and relive painful experiences.

The Review also heard that, for some people, the outcomes often do not justify the burden involved, particularly when considered against competing demands and the time and investment of resources required. We were told that many people who experience discrimination are often also experiencing other challenges with higher priority, including housing and food security, or raising children as a single parent. Where basic needs, such as food and housing, are not being met, enforcement and realisation of rights is unlikely to be prioritised.

Some people fear that making a complaint will have negative repercussions, or they may not want to make a complaint because they are fearful of government authorities. This was raised by people whose communities have experienced a traumatic legacy in their involvement with authorities, including people from newly settled communities who have experienced persecution in their country of origin and who may not speak English, as well as First Nations people. One community leader told the Review:

> There are psychological barriers for anything to do with government or being trouble, especially [for people] coming from South African apartheid, for example. It's hard to trust departments and officials. It takes a long time before you get to a level beyond all the government advice. So, I can imagine some people coming from that don't complaint because of the distrust of government.[28]

[27] We also note that, at the time of writing, the Commission's website indicates that the Commission is currently receiving a high volume of enquiries and complaints. As a result, there may be a delay of up to six months before the Commission can assess a complaint.
[28] Review consultation, 20 August 2021, Habib Jamal, Islamic Council of Queensland.

There may also be cultural or social factors that mean a person is less likely to complain about discrimination because of shame and stigma. Even the word 'complaint' can carry negative assumptions and connotations. For example, one organisation said that:

> When you say the word complain to people… the word complaint is very big for them. They are afraid that if they complain, if they're young persons, their parent will say, it's you – why are you complaining? Second thing is, they are afraid that they're going to lose their job. The third thing would be, they're afraid that they will not get a good reference for the next job… Where I come from complaining is a big thing, because that's how we grew up. People who grew up here may feel comfortable, so that would be an intergenerational issue as well.[29]

There are also other specific barriers to making a complaint. The law requires complaints to be in writing, however paper-based processes can be challenging for many people including First Nations people, people from non-English speaking backgrounds, and people with low literacy.

Structural power differentials that operate between a person experiencing discrimination and the individual or organisation who responds to the complaint was also identified as a barrier to the complaints process. We heard that this is particularly prohibitive for people subject to statutory interventions, including for people experiencing mental health conditions and are subject to involuntary treatment, parents whose children are in out-of-home care, and people who are subject to guardianship orders.

Access to affordable or free legal advice is a critical factor in whether or not people have equitable access to the complaints process, and also in the outcomes they achieve. Although the Commission's conciliation process is a low-cost jurisdiction, many people will not have access to free legal representation and legal costs are prohibitive.

When discussing the reasons for not engaging in the complaints process, many organisations told us that, for a lot of their clients, the complaints process is just not an option. We heard that for many people making a complaint is just not worth it, given the processes involved, and the likely outcomes. And yet, the most marginalised communities, who are most at risk of discrimination and who have the lowest resources, are the least likely to make a complaint.

Enforcement of the law relies entirely on individual people who feel they have experienced unfair treatment to make and prove their complaint.[30] Illustrating this issue, one stakeholder told the Review that:

> I think it's very difficult to put the onus on the person who feels discriminated, to put their case by themselves. … people will probably struggle, or wouldn't think it's worth it.[31]

[29] Review consultation, 23 August 2021, Suan Muan Thang, Queensland Program of Assistance to Survivors of Torture and trauma (QPASTT).
[30] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 57.
[31] Review consultation, 12 August 2021, Karyn Walsh, Micah Projects.

Need for a preventative approach

Given the barriers to accessing the complaints process, many stakeholders considered that additional mechanisms are required to alleviate the burden on individuals to address discrimination through making complaints. Achieving compliance with the Act through making complaints is reactive.

There was strong support from stakeholders for the Commission to have a more positive role in eliminating discrimination and sexual harassment to the greatest extent possible. Taking a preventative approach requires a mix of actions ranging from educative measures, complaint and compensatory processes, legal protections, and regulatory approaches to enforcement.

The Terms of Reference specifically ask us to consider whether the Anti-Discrimination Act should be changed to include a positive duty on organisations to eliminate discrimination and sexual harassment, which would require them to take active steps to prevent this conduct. We are also required to consider whether the current functions and powers of the Commission are sufficient to address systemic discrimination.

Legislative improvements

Some of our initial consultations and research identified weaknesses in the current legislation. Many stakeholders who provide legal or non-legal supports to people who experience discrimination or sexual harassment referred to challenges for complainants proving matters to the requisite standard.

Some of the challenges identified include: the complex tests and high threshold to establish direct or indirect discrimination, the allocation of the burden of proof for elements of those tests, and difficulties proving discrimination on multiple, combined grounds.

We also heard support for introducing interpretative provisions – for example, an objects clause to clearly identify the purpose of the legislation, and as a means of aiding construction of substantive terms within the legislation.

We were also told that the Anti-Discrimination Act is overly complex and needs to be simplified so that it can be better understood and accessed. The Anti-Discrimination Act prohibits sexual harassment and provides a means to redress unfair discrimination and vilification in public life and applies to all people in Queensland. However, the Act is technical and complex. Any capacity to simplify the law and improve consistency was also strongly supported by bodies that represent respondent groups.

Compatibility with human rights

In addition to potential legislative improvements, we have been asked to consider whether the Anti-Discrimination Act is compatible with the Human Rights Act.

Since the introduction of the Human Rights Act which came into effect in 2020, all legislation must be assessed for compatibility with the Human Rights Act. This Review therefore provides a timely opportunity to undertake this process.

In undertaking the assessment, we will need to identify provisions within the legislation that engage or limit human rights, assess their compatibility with human rights, and determine whether any limitation on a human right imposed by the provision is reasonable and demonstrably justifiable.

We start this assessment process in this Discussion Paper, where we identify provisions of the Anti-Discrimination Act that engage human rights.

Education, awareness, and support

We also heard about ways to tackle discrimination that complement the law, but do not require legislative change.

Stakeholders told the Review that education and awareness are critical to addressing the underlying causes of discrimination, and are required across sectors to improve overall understanding of the Anti-Discrimination Act.

A further key message was that resourcing of individual and systemic advocacy and legal support that allows people effective access to protections in the Act is imperative to bring the law to life in practice.

We also heard about a range of complex social issues that cannot be addressed solely through this Review. These demonstrate the interconnection between anti-discrimination laws and broader social policy.

This relationship was important given that the Review identified that stakeholders consider the legislation as a form of essential architecture underpinning and informing broader social attitudes.

This is not only true for rights, but also exemptions. We heard that some exemptions may have a ‘chilling effect’ which can deter people from making complaints. Sometimes this was based on incomplete information. For example, if a person had experienced an unsuccessful complaint because of an exemption that only applied in the area of goods and services, they may be deterred from making a complaint about workplace discrimination.

Across our initial consultations and the range of stakeholders, there was cautious optimism for the capacity of Queensland’s discrimination laws to play a central role in further consolidating and protecting equality and belonging in our communities.

Part C:
Options for reform

Key concepts

The Terms of Reference for this Review ask us to consider the definition of discrimination.

Meaning of discrimination

In Part B we identified a gap between community expectations and understandings of what discrimination means including how it is felt and experienced, and the extent of the protections provided by the Act. Perhaps because inequality is hard to define, the tests for discrimination have become complex and challenging to interpret.

Direct or indirect?

All Australian jurisdictions include tests for direct and indirect discrimination. The distinction between direct and indirect can be conceptually challenging, and this is particularly so for people involved in a complaint who are not legally represented.

Despite the High Court providing authority that direct and indirect discrimination are mutually exclusive,[32] tribunals have found that conduct has amounted to both direct and indirect discrimination.[33]

To address this issue, the legislation in the Australian Capital Territory has clarified that conduct can be both direct and indirect, by using the words 'when a person discriminates either directly or indirectly, or *both*, against someone else' and then separately defining the two concepts.[34]

Discussion question 1:

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

[32] *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49 (disability discrimination under *Equal Opportunity Act 1984* (Vic)); *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56 (treatment that is facially neutral would not fall within direct discrimination under *Anti-Discrimination Act 1977* (NSW)); *Australian Medical Council v Wilson* [1996] FCA 1618 (under *Racial Discrimination Act 1975* (Cth)); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78; [1997] FCA 1311 (under *Sex Discrimination Act 1984* (Cth)).
[33] For example, *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (under appeal).
[34] *Discrimination Act 1991* (ACT) s 8. This was an intentional clarification following a review of Australian Capital Territory discrimination laws. See ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) (Final Report, 2015) 31. This approach was also incorporated into the Exposure Draft of the federal Human Rights and Anti-Discrimination Bill 2012 (which ultimately failed).

Direct discrimination

The Terms of Reference ask us to consider 'whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination, or whether there are other contemporary responses that would be appropriate'.

Direct discrimination under the Act is where a person treats a person with an attribute less favourably than another person without the attribute in circumstances that are the same or not materially different.[35]

Given that Parliament's intention for the Anti-Discrimination Act was to incorporate protections contained in international human rights instruments in state law,[36] consideration of commentary by the United Nations Human Rights Committee is instructive. In interpreting the right to equality and non-discrimination,[37] the Human Rights Committee defines 'discrimination' as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[38]

This definition emphasises the impact of treatment rather than focusing on the differential nature of it.

[35] *Anti-Discrimination Act 1991* (Qld) s 10.
[36] The Preamble to the Act states that Parliament recognises and supports Australia's ratification of human rights instruments which have been incorporated into federal legislation, but that there is a need to extend the law, apply it consistently throughout the state, and ensure that the law is enforceable.
[37] *International Covenant on Civil and Political Rights*, art 2(2).
[38] United Nations Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989) 7.

Comparative experience

The different variations of direct discrimination are defined as follows:

Direct discrimination	Jurisdictions
Less favourable treatment compared to a person without the attribute in the same or similar circumstances	Queensland Western Australia New South Wales South Australia Commonwealth: *Age Discrimination Act 2004* *Disability Discrimination Act 1992* *Sex Discrimination Act 1984*
Less favourable treatment than a person without the attribute	Tasmania Northern Territory
Unfavourable treatment because of an attribute	Victoria Australian Capital Territory

Less favourable treatment test

The current test for direct discrimination in Queensland as well as most Australian jurisdictions is based on less favourable, or differential, treatment, sometimes called the 'comparative model'.

This approach requires comparison between the treatment of a person because of a prohibited attribute, and treatment that is or would be afforded to a real or hypothetical person – the 'comparator'.[39]

In most jurisdictions, the comparator must be a person in the same or similar circumstances who does not have the protected attribute of the person who makes the complaint.[40] While there are occasionally actual comparators, for example where an older person is not given a

[39] This is the case in Queensland, Western Australia, New South Wales, Tasmania, South Australia and the Northern Territory

[40] Consideration of the 'same or similar circumstances' is required in Queensland, South Australia, Western Australia, New South Wales, and under the *Age Discrimination Act 2004* (Cth), Disability *Discrimination Act 1992* (Cth), and *Sex Discrimination Act 1984* (Cth).

promotion in favour of their younger colleague, in the majority of cases the comparator must be entirely constructed – this is called a 'hypothetical' comparator.

A hypothetical comparator can be difficult to construct and may produce a contrived and convoluted result. It requires courts and tribunals to:

> engage in the artificial exercise of deciding how the respondent would have treated a hypothetical person without the complainant's relevant attribute had such a person been in the same circumstances.[41]

This can take the focus away from the impact of discrimination on the affected person.

For people whose behaviours form part of their disability, the challenge of constructing a real or hypothetical comparator can be insurmountable. Where the manifestation of an attribute is the reason for discrimination, cases heard before tribunals and courts have often been unsuccessful, with a finding that a hypothetical person would have been treated the same.[42] This has become a complex and controversial area of discrimination law that some stakeholders consider has significantly reduced the effectiveness of the Act for people with disability.

Discrimination because of cumulative or intersectional disadvantage is also difficult to establish where a comparative approach is required, for example, where a person is discriminated against specifically because they are an older person with a disability – that is the combined effect of both attributes. Considering this specific issue, the Canadian Supreme Court has determined that strict reliance on a comparator should be rejected to accommodate an intersectional approach.[43]

For more on intersectionality see Part B and 'Discrimination on combined grounds' in this section.

Unfavourable treatment test

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

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[41] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 95.
[42] This is a line of reasoning based on the High Court case of *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62. But this case was distinguished in Queensland by *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100 because of the different provisions in the Queensland Act (including section 8) and the irrelevance of the reasoning in *Purvis* to subject matter unrelated to 'behaviour'.
[43] *Withler v Canada* [2011] 1 SCR 396, 58.

The word 'unfavourable' may seem to invite a comparison of treatment afforded to a person with and a person without the relevant attribute.[44] However, the Australian Capital Territory Administrative Appeals Tribunal has articulated the difference:

> While the term 'disadvantage' might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent... The primary meaning of 'advantage' does not import comparison; the same dictionary gives it as 'any state, circumstance, opportunity or means specially favourable to success, interest, or any desired end'. The Discrimination Act is therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.[45]

This approach has been confirmed by Victorian cases since the Act was amended to the 'unfavourable' approach.[46] For example, a man was banned from all council buildings because of behaviour that was a manifestation of his mental health and cognitive disabilities. The tribunal found that this was discrimination, and confirmed that, while analysis may be informed by consideration of the treatment afforded to others, the 'unfavourable' approach only requires 'an analysis of the impact of the treatment on the person complaining of it.'[47]

Discussion question 2:

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

[44] The *Macquarie Dictionary* meaning of unfavourable includes 'disadvantageous' and 'adverse; and the *Oxford Dictionary* meaning of unfavourable includes 'likely to lead to an adverse outcome'.
[45] *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, 22.
[46] *Kukyen v Chief Commissioner of Police* [2015] VSC 204.
[47] *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.

Indirect discrimination

Indirect discrimination happens when an unreasonable requirement is imposed that a person cannot comply with because of their attribute, and more people without the attribute can comply with the requirement.[48]

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

Comparative experiences

Across Australian jurisdictions, indirect discrimination is generally expressed as imposing a requirement, condition, or practice (or term) that is not reasonable. Where jurisdictions differ is that in some states, the person must establish their inability to comply with the term, with or without a proportionality test. In other jurisdictions, the test is whether the term creates a disadvantage to a person with the attribute.

The different variations are:

Indirect discrimination	Jurisdictions
Disadvantage persons with an attribute	Victoria Australian Capital Territory Commonwealth: Age Discrimination Act and Sex Discrimination Act
Disadvantage persons with an attribute more than people without the attribute	Tasmania
Inability to comply & higher proportion of people without the attribute can comply	Queensland South Australia Western Australia New South Wales
Inability to comply & disadvantages persons with the attribute	Commonwealth: Disability Discrimination Act and Racial Discrimination Act
Does not contain indirect, but includes failure to refuse or accommodate a special need	Northern Territory

[48] *Anti-Discrimination Act 1991* (Qld) s 11.

Inability to comply with a term

The current Act requires identification of a 'term' that a person must comply with and consideration of whether the person *can comply*.

This provision has been given a liberal and practical interpretation by courts. For example, while a person of Sikh faith *could* technically take off their turban, they cannot do so in practice.[49]. Usually, a respondent will not be able to successfully argue that because a person is 'coping', they are 'able to comply'.[50]

Although courts and tribunals have interpreted an ability to comply in a practical way, few complaints ever proceed to a hearing. The indirect discrimination provision is hard to explain and interpret for a non-lawyer, and it is problematic when the words 'cannot comply' are literally interpreted.

The current requirement for a complainant to identify the relevant pool of people who do not have the attribute and who are able to comply is onerous and difficult and presents a significant evidentiary burden. When introducing changes to the Sex Discrimination Act designed to shift away from this approach, the then federal Attorney-General commented that the provisions on indirect discrimination 'have proven complicated and difficult to apply in practice and which have been criticised for being overly technical, legalistic and complex'.[51]

Similar to the challenges with the hypothetical comparator, compiling the technical evidence needed to establish the 'higher proportion of people' requirement is difficult and time-consuming. Identifying the appropriate membership of the pool is easier for a sex discrimination claim,[52] but might require complex statistical evidence where it relates to race or disability.[53] It can also take focus away from the detrimental treatment. In some cases the statistical evidence will be unavailable to the complainant without orders being made by the tribunal.

[49] *Mandla v Dowell Lee* [1983] ICR 385; [1982] UKHL 7.
[50] *Hurst v State of Queensland* [2006] FCAFC 100.
[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2460 (Michael Lavarch, Attorney-General).

[52] *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56.
[53] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 47.

Disadvantaging persons with an attribute

The alternative approach adopted by Victoria, the Australian Capital Territory, and under certain Commonwealth legislation (the *Age Discrimination Act 2004* (Cth) and the *Sex Discrimination Act 1984* (Cth)) involves considering whether a requirement, condition, or practice has, or is likely to have, the effect of unreasonably *disadvantaging persons with an attribute.* This does not require consideration of whether a person can or cannot comply, or who might be the appropriate comparative pool of people without the attribute.

The difference of this approach is best demonstrated by an example:

> A factory makes all employees start at 6am. This might seem to treat everyone equally, but it could disadvantage employees needing to care for children, who are usually women. If it is not a reasonable requirement, this will be indirect discrimination.[54]

For the example, under the current provisions of the Anti-Discrimination Act, a person who could not start work at 6am because of family responsibilities would have to prove that more employees who do not have family responsibilities are able to start at 6am, and that the term is not reasonable. This requires complex and detailed analysis when compared with a relatively simple test of whether this *unreasonably disadvantages* the workers who are parents.

Discussion question 3:

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

Unified test

While all Australian jurisdictions retain separate and distinct direct and indirect discrimination tests, some international approaches have adopted a single, unified test.[55]

This option was considered in the 2011 review of Commonwealth discrimination laws, which considered whether having two different categories was artificial, and has created unnecessary complication.[56]

[54] Victorian Equal Opportunity and Human Rights Commission, *Discrimination* (Web Page) Different kinds of discrimination: Indirect discrimination <www.humanrights.vic.gov.au/for-individuals/dictionary/>.
[55] Canada, South Africa, United States of America, and New Zealand.
[56] Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 13.

For example, in South Africa discrimination means:

> 'any act or omission, including a policy, law, rule, practice, condition or situation which **directly** or **indirectly** –
> imposes burdens, obligations or disadvantage on; or
> withholds benefits opportunities or advantages from any person on one or more of the prohibited grounds.'[57]

A unified approach has been adopted in Canada since the late 1990s where a policy or practice is invalid if it disadvantages a protected group, whether directly or indirectly, unless the treatment falls within a defence (like an exemption). Some case law indicates this was because of the complexity of maintaining the distinction and because 'conventional analysis may serve to legitimise systemic discrimination'.[58] Given the issues identified in Part B that indicate that the current law may not be adequately addressing systemic discrimination, the unified approach deserves consideration.

Adopting a unified approach would be a significant departure from the scheme operating in Australian jurisdictions. As Australian jurisprudence could not be adopted in Queensland, such a significant change would necessarily require new jurisprudence to provide guidance on interpretation of the law.

However, the international case law, especially from Canada, could be instructive. One benefit may be reducing complexity for unrepresented parties who often find it hard to determine whether to argue direct or indirect discrimination.

Discussion question 4:

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

[57] *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 1(viii) (emphasis added).
[58] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, [50]–[53].

Unjustifiable hardship and reasonable accommodations

The Terms of Reference require the Review to consider key definitions in the Act, including the definition of unjustifiable hardship.[59] The term appears in the following contexts:

- An exemption to workplace impairment discrimination where the circumstances of a person's impairment causes unjustifiable hardship for an employer, depending on the impairment and the nature of the work.[60]
- An exemption where the supply of separate sleeping accommodation for men and women working together would cause unjustifiable hardship to the employer.[61]
- Special services and facilities exemption in the areas of accommodation,[62] goods and services, work, education, and clubs.[63] The exemption allows for impairment discrimination if a person 'would require special services or facilities, the provision of which would impose an unjustifiable hardship'.

Special services or facilities

The Act sets out an illustrative list of factors that might contribute to unjustifiable hardship where special services or facilities are required. These include:

- the nature of the special services
- costs
- financial circumstances of the person required to supply them
- disruption
- benefit or detriment to all people concerned.

The Act gives an example of unjustifiable hardship where making the workplace accessible for a person in a wheelchair would be very expensive or impose another significant hardship.[64]

In the education setting the special services or facilities exemption has permitted discrimination against children in both state and private schools. For example, this has been successfully

[59] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).
[60] *Anti-Discrimination Act 1991* (Qld) s 36. The Review has noted that only in relation to the area of work, unjustifiable hardship may be argued even in the absence of the need to provide special services and facilities
[61] *Anti-Discrimination Act 1991* (Qld) s 30.
[62] *Anti-Discrimination Act 1991* (Qld) s 92.
[63] *Anti-Discrimination Act 1991* (Qld) ss 51, 35, 44, 100.
[64] *Anti-Discrimination Act 1991* (Qld) s 5. Unjustifiable hardship in the context of work accommodation is similarly provided for by s 30(2). Unjustifiable hardship in the context of employment under s 36 is undefined.

argued by a state school that excluded a student in a wheelchair from attending an excursion,[65] and a private school that refused to enrol a student with development delays.[66]

In other cases, it was unsuccessfully argued by a body corporate that failed to make adjustments to common property,[67] and by a government department that refused to allow an employee to continue in their role while they needed to take breaks for dialysis.[68]

Another consideration is whether the 'relevant circumstances' for determining unjustifiable hardship strike the right balance between the rights of people with disability and the competing interests of employers, schools, accommodation providers and others, having regard to the overarching goal of promoting equality and inclusion.

Currently, unjustifiable hardship is framed as a 'cost-benefit analysis', which does not expressly take into account the circumstances and impacts on the person who requires the special services or facilities. This may mean that some people with disability may be more disadvantaged than others. For example, where a screen reader may cost $5–10,000 to accommodate a blind employee, adjustments for a wheelchair user may be in the hundreds of thousands of dollars.[69]

On the other hand, there may be genuine concerns about affordability for some adjustments, especially for small and medium sized businesses.

Similar provisions exist in all Australian equality jurisdictions, but there is considerable variation in how they are constructed.

Discussion question 5:

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

[65] *I v O'Rourke* [2001] QADT 1.
[66] *K v N School* [1997] QADT 1.
[67] *C v A* [2005] QADT 14.
[68] *Vale v State of Queensland* [2019] QCAT 290.
[69] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 151–152.

Reframing to a positive obligation

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

The special services and facilities exemptions outlined above imply an obligation to supply 'special services or facilities', or in other words to make 'reasonable accommodations', for a person with impairment, unless it would impose unjustifiable hardship.

The Act also implicitly provides for 'reasonable accommodations' in the definition of indirect discrimination, where discrimination occurs if a term imposed is not reasonable.[70]

As currently drafted, an obligation to make reasonable accommodations is difficult to understand and is not easily enforced. An express positive duty may provide clarity and greater certainty regarding obligations and entitlements for all parties.

In response to concerns raised by the High Court decision in *Purvis*, an obligation to make reasonable adjustments was incorporated into the definition of direct discrimination in the *Disability Discrimination Act 1992* (Cth).[71] It is then a defence to discrimination if avoiding discrimination would cause unjustifiable hardship.[72]

Under Commonwealth law, direct discrimination occurs if a person does not make, or proposes not to make, reasonable adjustments that has the effect on the person with disability of being treated less favourably. However, the intent of the provision has been negated by *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, in which it was held that a discriminator's reasons for not making reasonable adjustments must still be 'because of' the person's disability for direct discrimination to occur. For example, in order to succeed, an employee must show that the employer's reason not to provide a screen reader was because the employee is blind.

In Victorian legislation, the Act includes a stand-alone obligation to provide reasonable adjustments for people with disability, separate to definitions of direct or indirect discrimination, in the areas of employment (sections 20, 22A, 33), education (s 40), and provision of services (s 45). There is also an obligation to provide reasonable adjustments in relation to workers who are parents or carers. The term or defence of unjustifiable hardship is not used.

[70] *Anti-Discrimination Act 1991* (Qld) s 11.
[71] *Disability Discrimination Act 1992* (Cth) s 5(2).
[72] *Disability Discrimination Act 1992* (Cth) ss 21B and 29A.

This creates a positive obligation, rather than existing as an arguable exemption as is currently the situation in Queensland.

Another variation in the Victorian approach is that factors determining reasonableness are specific to each area of activity. For example, factors that must be considered in the education area include the person's circumstances, the nature of the adjustment, the effect on the person when making the adjustment, the effect on others, and any other consequences.[73]

This approach appears to allow flexibility in determining whether an adjustment is reasonable. The specific obligation to make reasonable adjustments, and corresponding exceptions, only appear in the areas of employment, education, and goods and services.[74]

Reasonable accommodations beyond disability

The requirement to make reasonable accommodations is most commonly thought of in relation to discrimination against people with disability.[75] Affirmative actions are often required to create an equal outcome for people with disability. However, the same reasoning could apply to discrimination on the basis of other attributes. Victoria's Gardner Review recommended that an express requirement to make reasonable adjustments be limited to discrimination on the basis of impairment and parental or carer status. This approach was thought to be fairer on employers and service providers, provided clearer and more effective obligations, and allowed for targeting of resources. However, this did not mean the requirement could not be expanded to other attributes at a later stage.[76]

Another issue to consider is whether a requirement to make reasonable accommodations should only apply to specific areas of activity, or to all areas of activity.

Both Northern Territory (s 24 *Anti-Discrimination Act 1992* (NT)) and Canadian anti-discrimination laws provide for reasonable accommodation for all attributes in all areas, for which there is the defence of unjustifiable hardship.

[73] *Equal Opportunity Act 2010* (Vic) s 40(3).
[74] There is another exception based on unreasonableness in the area of accommodation (*Equal Opportunity Act 2010* (Vic) s 58).
[75] This aligns with Article 5 of the *Convention on the Rights of Persons with Disabilities* which obliges State Parties to ensure 'reasonable accommodation' is provided to promote equality and eliminate discrimination.
[76] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 92 [5.68]–[5.71].

Discussion question 6:

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

Discrimination on combined grounds

As discussed in Part B, the law is currently based on separate and distinct grounds of discrimination (attributes). The Review has identified this may not adequately protect people who experience intersectional discrimination, where people experience discrimination because of the cumulative or combined effect of having more than one protected attribute.

This appears to be because people who experience intersectional discrimination find it harder to meet the requirement of a discrimination complaint to be ‘on a ground’, and if they do, it may be more difficult for them to establish their complaint to the relevant threshold to be accepted.

While there is nothing to prevent a person from alleging discrimination on the basis of more than one attribute, the current legislation does not address the cumulative nature of disadvantage. A hypothetical example might be where a young man of colour says he has been followed by a shopkeeper while buying groceries. However, in bringing a complaint it may be hard to argue it was because of his age, his race, or his sex alone, but rather because of a confluence of his personal characteristics.

To address this issue, following a similar legislative review of their equivalent legislation, the Australian Capital Territory introduced the words 'one or more protected attributes'[77] as recommended by the ACT Law Reform Advisory Council's report.[78]

In South Africa the words 'one or more grounds'[79] has been interpreted to include discrimination based on combined grounds. A recent case exploring intersectionality involved the treatment of Black women who make up the overwhelming majority of domestic workers, but were being excluded from a statutory definition of 'employee' for workplace injury and death.[80] The case was successfully argued on the combined grounds of gender and race.

The words 'combined grounds' are used in United Kingdom and Canadian legislation. The Canadian Human Rights Act confirms that:

> For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.[81]

We consider other legislative mechanisms that may ensure the law can better protect people who experience intersectional discrimination in our discussion of the Objectives of the Act.

Discussion question 7:

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

[77] *Discrimination Act 1991* (ACT) ss 8(2) and 8(3).
[78] ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 33–34.
[79] *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 'Bill of Rights', s 9.3.
[80] *Mahlangu v Minister of Labour* [2020] ZACC 24 (Constitutional Court).
[81] *Canadian Human Rights Act*, RSC 1985, c H-6, pt I, 3.1.

Burden of proof

The Terms of Reference ask us to consider protections, processes and enforcement mechanisms in other Australian discrimination laws. This discussion will consider whether the allocation of the burden of proof is the most fair and balanced approach.

In Queensland, the complainant generally has the burden of proving a complaint of discrimination,[82] , except that respondents are required to prove reasonableness for indirect discrimination,[83] or that an exemption applies in the circumstances.[84] In each of these instances, the standard of proof is 'on the balance of probabilities'. However, the 2017 prohibitions on employment discrimination against people in regional communities by large resource projects require a *presumption* of discrimination, unless the respondent can prove otherwise.[85]

Many complainants have found it challenging to discharge the burden of proof, particularly when it comes to race discrimination, where courts have often been reluctant to draw inferences of racism.[86] For example, where a complainant claims that race discrimination was the reason they did not get a job, the respondent need only point to 'merit', which relies on only knowledge that the respondent holds.[87]

Comparative experience

There are a number of different models that could be considered with respect to the allocation of the burden of proof.

International approaches

In the United Kingdom,[88] European Union,[89] and Canada[90] the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. To successfully defend a claim in these jurisdictions, the respondent must prove, on the balance of probabilities, that they did not act unlawfully. If that explanation is inadequate or unsatisfactory,

[82] *Anti-Discrimination Act 1991* (Qld) s 204.
[83] *Anti-Discrimination Act 1991* (Qld) s 205.
[84] *Anti-Discrimination Act 1991* (Qld) s 206.
[85] *Anti-Discrimination Act 1991* (Qld) ss 131E and 131F.
[86] Loretta de Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 309, 332.
[87] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 578; Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 15.
[88] *Equality Act 2010* (UK) s 136.
[89] *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, 31.
[90] *Ontario Human Rights Commission v Simpson-Sears Limited* [1985] 2 SCR 536, 28.

the court or tribunal must find that discrimination occurred. The shifting burden of proof is described in the Explanatory Notes to the United Kingdom's *Equality Act 2010*:

> …the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act…[91]

The Commonwealth contemplated following the United Kingdom approach in the draft Human Rights and Anti-Discrimination Bill 2012 (Cth).[92] The Exposure Draft Explanatory Notes to the Bill explain how this would have worked in practice:

> Under this rule, the complainant must provide evidence from which the court could decide, in the absence of any other explanation, that the alleged reason is the reason the respondent engaged in the conduct. Once the complainant has discharged this burden, the reason for the conduct will be presumed unless proven otherwise by the respondent.
> The respondent bears the burden of establishing defences (including that conduct is a special measure to achieve equality, that it is justifiable or covered by another exception or exemption...[93]

In this approach much of the burden still remains on the complainant, who must prove:

- they have a relevant attribute, and their complaint falls in an area of activity
- unfavourable/less favourable treatment occurred
- the causal nexus – there is a link between their attribute and the treatment.[94]

The respondent would then need to prove there was another, non-discriminatory reason for the treatment, that it was reasonable to discriminate (if it was an indirect case), or that an exemption applies.

A more complex variation of this approach is shown in United States case law. Here the complainant must establish a prima facie case, then the respondent must provide evidence which could support a finding that there was a legitimate and non-discriminatory reason for their actions, and then the onus shifts back to the complainant to show that the respondent's reason is a pretext for discrimination.[95]

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[91] Explanatory Notes, *Equal Opportunity Act 2010* (UK) s 136 'Burden of proof' 443.
[92] This Bill did not ultimately pass.
[93] Exposure Draft Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 4.
[94] This was the approach included in the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth).
[95] *McDonnell Douglas Corporation v Green*, 411 US 792 (1973).

In response to recommendations from a legislative review, the Australian Capital Territory changed its laws in 2016 to amend the burden of proof. However, because of the way the provision is constructed,[96] in practice this has resulted in the complainant retaining the primary burden of proof, defeating the original policy intention.[97]

Australian industrial laws

Since 1904, an employer responding to industrial claims has been subject to a shifting burden of proof when defending a claim of dismissal on the basis of trade union activity.

This approach is now reflected in the Fair Work Act[98] in relation to all general protections well beyond the scope of industrial action. There is significant overlap with the jurisdiction of the Anti-Discrimination Act since discrimination is a form of unlawful 'adverse action' and many of the protected 'grounds' (or attributes) are the same or similar[99].

Under the Fair Work Act general protection laws, with which most employers (except for state government) must comply in Queensland, the employee or prospective employee need only establish that adverse action was taken and that they had one of the relevant attributes. It is then presumed that the adverse action was taken because of the attribute, unless the employer can prove otherwise.[100]

This approach, sometimes called a rebuttable presumption, merely requires a person to establish that they possess the relevant attribute, and then it is assumed that the employer acted unlawfully, unless they are able to prove otherwise.[101]

[96] *Human Rights Commission Act 2005* (ACT) s 53CA has a rebuttable presumption that discrimination has occurred once the complainant has established a prima facie case and presents evidence that would enable the tribunal to decide in the absence of any other explanation that the treatment is linked to the attribute.
[97] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 119–120.
[98] *Fair Work Act 2009* (Cth) s 361.
[99] The *Fair Work Act 2009* (Cth) s 351 prohibits adverse action on the following grounds, many of which are also protected attributes under the Anti-Discrimination Act – race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
[100] *Fair Work Act 2009* (Cth) s 361(1).
[101] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; [2012] HCA 32.

Replicating the Fair Work Act approach would mark a departure from the approach of equality jurisdictions in Australia and overseas. The advantage to this approach is that it promotes consistency between state and federal laws and would simplify the law for employers. However, it should be considered whether this places too great a burden on employers, and particularly small to medium businesses. The Anti-Discrimination Act contains situations outside of the work area, and careful consideration would be required as to whether this is the appropriate standard for all areas of activity under the Act.

Discussion question 8:

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

Meaning of sexual harassment

The Terms of Reference for the Review ask us to consider the recommendations from the *Respect@Work: Sexual Harassment National Inquiry Report*[102] and, in particular, to include options for legislating for a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible.

The *Respect@Work* report found that sexual harassment in the workplace is prevalent and increasing,[103] with 33% of people having experienced harassment in the last 5 years. It also found that women and young workers are at the greatest risk. However, despite the high occurrence of sexual harassment, few complaints are received compared with discrimination and human rights complaints.[104]

Queensland has broad protections against sexual harassment by prohibiting it in all circumstances, both public and private. Nonetheless, over 80% of sexual harassment complaints made to the Queensland Human Rights Commission last year were about harassment occurring in the workplace.[105] Most other jurisdictions confine sexual harassment to areas of activity, much like discrimination.

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[102] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).
[103] Ibid 98. The rates of sexual harassment reported by survey respondents has increased significantly from 21% in 2012, but this may be the effect of increased community awareness.
[104] Queensland Human Rights Commission, *Annual Snapshot 2020-21*: 7.4% of accepted complaints in 2020-21, compared with discrimination at 49.1% and human rights at 25.5%.
[105] Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) *36.*

As outlined in Part D, there are no exemptions to sexual harassment. The Act simply states, 'A person must not sexually harass another person' [106].

Relational aspect

The current approach in Queensland contains what is called a 'relational aspect'. That is, conduct to amount to sexual harassment, it must be directed towards a person. The Act uses the words 'in relation to the other person', or 'relating to the other person'.

There is generally a requirement that the conduct must be either done with that person in mind or have a connection with that person.[107]

The requirement to prove the relational aspect can pose issues where the complainant has been required to work in a highly sexualised environment. Some case examples include where a work Christmas party employed a topless waitress,[108] or where posters that could be considered to sexualise women were present in the work area. [109]

While such situations will usually amount to sex discrimination, extending the scope of sexual harassment to clearly incorporate these 'toxic' environments might clarify the law and have an educational aspect.

One option to fill this gap is seen in the Australian Capital Territory legislation which clarifies that sexual harassment may be 'to, or in the presence of' the person.'[110]

Addressing underlying culture

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

Respect@Work noted that the case law regarding indirect sex discrimination may not be readily understood and suggested prohibiting both:

- 'sex-based harassment', as a separate contravention,[111] and
- the act of 'creating an intimidating, hostile, humiliating or offensive environment on the basis of sex'.[112]

[106] *Anti-Discrimination Act 1991* (Qld) s 118.
[107] *Streeter v Telstra Corporation Limited* [2007] AIRC 679.
[108] *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40.
[109] *Perry v State of Queensland & Ors* [2006] QADT 46.
[110] *Discrimination Act 1991* (ACT) s 58(2).
[111] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 458.
[112] Ibid 460.

However, these recommendations should be considered in the context that sexual harassment in Queensland includes *all* settings, public and private, and these expectations of conduct might be unreasonable outside of formal environments such as workplaces and schools.

Discussion question 9:

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

Dispute resolution

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

a) whether the Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws

b) legislative barriers that apply to the prohibition on discrimination

c) ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination

d) options for more tailored approaches towards, or alternative existing frameworks for, dispute resolution that enable systemic discrimination to be addressed, as well as discrimination complaints that raise public interest issues.

This section focuses on enforcement of the Act through the dispute resolution process.

Two-stage enforcement model

One means of achieving the purpose of the Act is to allow a complaint to be made against the person who unlawfully discriminated. Dispute resolution (or 'conciliation') is how the Commission attempts to resolve complaints. The aim of conciliation is to 'challenge discrimination by an informal and consensual process involving negotiation and agreement wherever possible.'[113]

Conciliation is compulsory and there is no right of direct access to courts or tribunals for an alleged breach of anti-discrimination legislation. This is consistent with other jurisdictions within Australia, except for in Victoria.[114]

A complaint is assessed by the Commission to check that it sets out reasonably sufficient details to indicate an alleged contravention of the Act.[115] If accepted, the matter proceeds through compulsory conciliation.[116] If the matter does not resolve at the conciliation conference, the complainant may elect to have their complaint referred to the relevant tribunal.[117] Around

[113] Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 363.
[114] *Equal Opportunity Act 2010* (Vic) s 122.
[115] *Anti-Discrimination Act 1991* (Qld) s 136.
[116] *Anti-Discrimination Act 1991* (Qld) pt 1 div 1.
[117] *Anti-Discrimination Act 1991* (Qld) ss 164A and 165.

one in three accepted complaints is referred to a tribunal. A very small proportion of complaints before a tribunal proceed to a hearing, decision, and published outcome.[118]

The process of conciliation by the Commission followed by the option for referral to a tribunal has been referred to as the 'two-stage enforcement model'.[119] The two-stage enforcement model creates a gatekeeping role for the Commission that is common among Australian human rights agencies, with the exception of Victoria. In Victoria a person may elect to complain to the Victorian Commission or proceed directly to the relevant tribunal. In the United Kingdom an application is made directly in the county court or employment tribunal and the Commission does not have a dispute resolution role[120]

Some academic commentators have identified limitations in the two-stage enforcement model, because the process can take a long time if early resolution is not achieved, and because of the lack of transparency and public exposure in the first stage (conciliation).[121]

Previous reviews of discrimination laws have also questioned the fairness and appropriateness of this process.[122] As extremely few complaints result in a tribunal decision, there is a 'limited opportunity for the community to learn about the rights and obligations created by anti-discrimination laws'.[123]

Most parties benefit from early resolution through the specialised conciliation process at the Commission. However, for complaints that are systemic in nature, or where the desired outcome is a declaration that a particular policy or practice is discriminatory, there may be limited benefit to parties being engaged for a protracted period in early resolution. This may also have a chilling effect for complainants who would otherwise seek to bring a complaint to raise public interest issues. This is particularly the case where the tribunal runs a separate conference process prior to setting the matter down for hearing, which means that two conciliation processes are required before a matter can be heard.

[118] In 2020 calendar year, the Review identified 26 decisions that had been published by the tribunals, many of which were about procedural matters.
[119] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 58.
[120] *Equality Act 2010* (UK) ss 114 and 120.
[121] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 58–65.

Public policy reasons behind the two-stage enforcement process include to:

a) encourage informal resolution which may also have an educative function for the parties involved

b) avoid an influx of vexatious or misconceived claims which create too much of a burden on respondents,[124] and

c) protect the privacy of the parties[125]

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This is particularly the case where the tribunal runs a separate conference process prior to setting the matter down for hearing, which means that two conciliation processes are required before a matter can be heard.

Another issue when considering whether there should be a direct right of access to the tribunals is the capacity of the tribunals to manage a potential increase in claims if complainants gain direct access.

[124] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 71.
[125] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30,1993) 6.15.
[126] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30,1993) 6.52–6.56; Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 70–73.
[127] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 64.

Injunctive relief in matters of public interest

Under the current Act, a complainant or the Commissioner may apply to the tribunal for an order prohibiting a person from doing an act that might prejudice the investigation or conciliation of the complaint, or an order that a tribunal might make after a hearing.[128]

Where a matter raises a significant public interest issue, and where the circumstances require urgent determination, it may be appropriate to allow a person to apply to the Supreme Court when legislative criteria are satisfied.

Allowing the Supreme Court to determine matters under the Anti-Discrimination Act would ensure quick and determinative resolution of matters of public interest. It would also establish precedent, and therefore achieve systemic outcomes.

Under the current Act, when seeking injunctive relief from a tribunal, the tribunal may provide prohibitory relief – that is, they can stop a party from taking a particular action. If a direct right of access was allowed to the Supreme Court, consideration could be given to whether the remedies should be extended to both mandatory and prohibitory injunctive relief. That means that the Supreme Court may be able to make an order requiring a party to do something, or to stop them doing something.

Risks associated with this potential action could include that the parties enter a costs jurisdiction at an early stage.

In New Zealand the equality legislation allows for the tribunal to refer a case back to conciliation before the Commission where they consider that an attempt at resolution has not been made, *unless* the conciliation process will not be constructive, will not be in the public interest, or will undermine the urgent or interim nature of the proceedings.[129] A similar approach could be adopted under the Anti-Discrimination Act.

[128] *Anti-Discrimination Act 1991* (Qld) s 144.
[129] *Human Rights Act 1993* (NZ) s 92D.

Discussion question 10:

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

Terminology

The Queensland law uses the terms ‘complaint’, ‘conciliation’, ‘complainant’ and ‘respondent’. This reflects the approach taken in all Australian jurisdictions except Victoria.

Following 2010 reforms in Victoria, terminology shifted to ‘bring a dispute’ and ‘dispute resolution’,[130] although the Victorian Commission still uses the terms complaint and conciliation interchangeably with dispute resolution.[131]

As discussed in Part B, being classed as a ‘complainant’ may have negative connotations and may be culturally inappropriate, particularly for people who come from communities where there is stigma around the act of complaining, or when people come from countries where it is unsafe to complain to the government.

A respondent may also feel that they are unfairly required to defend themselves against allegations of serious conduct, such as racism or sexism. The ‘complainant’ and ‘respondent’ terminology can set up an adversarial environment from the outset, and this may create a perception that the Commission takes the side of the complainant, which can be counter-productive to resolving the complaint. The term ‘conciliation conference’ may also imply a formal and intimidating process, particularly for unrepresented parties.

Less legalistic terms such as ‘dispute resolution’, ‘dispute parties’ and ‘conflict resolution’ are common in alternative dispute resolution settings, including statutory dispute resolution services.

Discussion question 11:

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

[130] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 65–67 and 134, Recommendation 83. This wording change reflected a shift in focus to no longer dealing with ‘complaints’ but assisting in resolving discrimination issues.
[131] Victorian Equal Opportunity and Human Rights Commission, ‘Make a complaint’, (Web page) <https://makeacomplaint.humanrights.vic.gov.au>.

Written complaints

Under the Anti-Discrimination Act, complaints must be made in writing.[132]

A written complaint forms the legal basis for the Commission to accept the complaint and notify the respondents of the substance of the complaint.[133] To ensure procedural fairness, respondents should be able to understand what allegations are contained in the complaint and the reason the complaint has been accepted.

However, the requirement for a written complaint may create a deterrent or significant barrier for many people to access the complaints process. This may have a disproportionate impact on people who speak a language other than English, people with low literacy, and Aboriginal and Torres Strait Islander peoples.[134] These groups may be under-represented in the Commission's complaints data.

Under the Human Rights Act,[135] the Commission can provide 'reasonable help' to a complainant where satisfied that the complainant needs help to put the complaint in writing.

Discussion question 12:

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

[132] *Anti-Discrimination Act 1991* (Qld) s136.
[133] *Anti-Discrimination Act 1991* (Qld) s143(1) the Commission must notify the respondent in writing of the substance of the complaint if the complaint is accepted.
[134] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 14.
[135] *Human Rights Act 2019* (Qld) s 67.

Efficiency and flexibility

Of all Australian human rights agencies, Queensland appears to have the most onerous procedural requirements for parties to a complaint. This includes set timeframes for notifying parties about a complaint, which must be done within 28 days, and for arranging a conciliation conference, which must be conducted within 4 to 6 weeks of the notification.[136] This sets up a resource-intensive 'one-size fits all approach' which also fails to respond to urgency and priority.

The Act requires the Commission to attempt conciliation if the Commissioner believes it 'may be resolved' through conciliation.[137] This wording anticipates a situation where the Commission may decide a complaint will be likely to not resolve that way, implying that a conciliation conference should not always take place.[138] However, this is inconsistent with other sections.[139]

These provisions were changed in 2002 in an attempt to enhance the efficiency of the complaint resolution process[140] but arguably this had the opposite effect by limiting the Commission's capacity to tailor the process to the needs of the parties and the nature of the dispute.

The Gardner review of Victoria's equality legislation recommended that dispute resolution should adopt approaches that are tailored to the individual dispute. On some occasions the parties may be better served by an informal phone conversation or a shuttle negotiation (otherwise known as 'early intervention'), particularly if a swift resolution to preserve relationships in education or employment is the desired outcome.[141] This flexible approach is now used in Victoria and was based on the New Zealand legislation.

The *Human Rights Act 2019* (Qld) has recently allowed the Commission more discretion in dispute resolution service delivery[142] with indications of early success. More human rights complaints have been resolved by the process of early intervention than through formal conciliation conferencing in the second year of operation of that Act.

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[136] In 1991, the only requirement was to 'promptly' notify the respondent of the substance of the complaint in writing – *Anti-Discrimination Act (No 85) 1991* s 141(2).
[137] *Anti-Discrimination Act 1991* (Qld) s158.
[138] *Anti-Discrimination Act 1991* (Qld) s158.
[139] *Anti-Discrimination Act 1991* (Qld) s143(2)(g) requires that a conciliation conference date is provided on notification, and section 164A allows for referral of a complaint after a conciliation conference has been held. In contrast, *Anti-Discrimination Act* (NSW) allows discretion under section 91A about whether conciliation is attempted, allows for separate or joint discussions and section 93C allows the Anti-Discrimination Board to form an opinion that the nature of the complaint is such that it should be directly referred to the Tribunal.
[140] Explanatory Notes, Discrimination Law Amendment Bill 2002 (Qld) 5–7. These Explanatory Notes raised concerns that the process had become 'unnecessarily protracted and, accordingly, expensive and frustrating for parties' and was no longer meeting its objective of being a 'cheap and speedy process'.
[141] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 65 Recommendation 16.
[142] *Human Rights Act 2019* (Qld) s 79.

Timeliness is vital for procedural fairness and to promote early resolution; but balancing this consideration with the need for flexible responses can be frustrated by legislative mandates. The Victorian approach has been to set reasonable overall closure targets without the need for mandated timeframes, and has a goal of finalising complaints within 6 months on average.[143]

Discussion question 13:

- How can the law be adapted to allow a more flexible approach to resolving complaints?
- Should the current provisions that require set notification and conference timeframes be retained, changed or repealed?
- Should all complaints proceed through the same conciliation model, or should early intervention be an option?
- What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?

Time limits

Legislative timeframe

In most Australian jurisdictions, a discrimination complaint must be made within 1 year. Northern Territory legislation and federal age, race, and disability laws have a 6-month time limit,[144] whereas discrimination complaints in the Australian Capital Territory and complaints under the federal legislation vary between 6 months and 2 years depending on the protected attribute.[145]

The *Respect@Work* report includes detailed discussion about the particular impacts of a 12-month timeframe for people who have experienced sex discrimination at work.[146]

[143] Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019) – 76% were finalised in 2018–19 in 6 months.
[144] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).
[145] The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill amends the *Australian Human Rights Commission Act 1986* section 46PH(1). This means that sexual harassment, sex, sexuality, gender identity and intersex status discrimination have a 2 year but all other matters are subject to a 6-month timeframe.
[146] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).493.

The 1-year timeframe under the Queensland Act[147] is much shorter than the limitations for personal injury (3 years), tort or contract (6 years), or the general protections breaches under the *Fair Work Act 2009* (6 years).[148] However, complaints to the Queensland Ombudsman have a time limit of one year.[149]

Currently no explicit dispensation for children or people with impaired decision-making capacity exists in the Act, but their circumstances would be a relevant consideration in a complaint made out of time.[150]

Process

The Commission has a discretion to accept an out of time complaint, if the complainant 'shows good cause'.[151] If the Commission exercises this discretion and accepts a complaint, but it is not resolved through conciliation, the complainant may request that the matter be referred to the relevant tribunal. However, at this point, the complainant faces an additional hurdle. The tribunal may deal with a complaint more than 1 year after the alleged contravention, if it 'considers that, on the balance of fairness between the parties, it would be reasonable to do so'.[152] This means that the out of time issue may be considered twice – once by the Commission and again by the tribunal.

If the Commission does not accept an out of time complaint (because the complainant has not shown 'good cause') the complainant may seek a judicial review of that decision before the Supreme Court. Such a review is a formal court proceeding, and likely to be intimidating for unrepresented parties. In Victoria, the Australian Capital Territory, South Australia, and under federal Acts, a complainant may pursue an appeal against a refusal to accept an out of time complaint in the relevant court or tribunal that would usually hear the discrimination complaint, but in some jurisdictions risk the matter being summarily dismissed.

The Victorian jurisdiction provides that a complainant may proceed directly to the tribunal without first lodging a complaint with the Victorian Equal Opportunity and Human Rights Commission, but the tribunal may summarily dismiss the complaint if it occurred more than 12 months prior to the application [Schedule 1 *Victorian Civil and Administrative Tribunal Act 1998*].

[147] *Anti-Discrimination Act 1991* (Qld) s 138.
[148] *Fair Work Act 2009* (Cth) s 544.
[149] *Ombudsman Act 2001* (Qld) s 20(1)(c); *Information Privacy Act 2009* (Qld) s 168(f).
[150] *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147; [2002] QCA 177.
[151] *Anti-Discrimination Act 1991* (Qld) s 138; *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147; [2002] QCA 177 [22].
[152] *Anti-Discrimination Act 1991* (Qld) s 175.

Discussion question 14:

- Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?
- Should there be special provisions that apply to children or people with impaired decision-making capacity?
- Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?
- Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?

Representative complaints

If a complaint alleges that a number of people were subjected to the alleged discrimination or other contravention by the respondent, the Commissioner must determine whether to deal with a complaint as a representative complaint. The tribunal may subsequently make its own determination

A set of detailed criteria for determining whether a complaint is a representative complaint apply at both the Commission and tribunal stages. The Commissioner or tribunal must be satisfied that:

- the complainant is a member of a class of people, the members of which have been affected, or are reasonably likely to be affected, by the respondent's conduct; and
- the complainant has been affected by the respondent's conduct; and
- the class is so numerous that joinder of all of its members is impracticable; and
- there are questions of law or fact common to all members of the class; and
- the material allegations in the complaint are the same, similar or related to the material allegations in relation to the other members of the class; and
- the respondent has acted on grounds apparently applying to the class as a whole.

or alternatively, if satisfied that:

- the complaint is made in good faith as a representative complaint; and
- the justice of the case demands that the matter be dealt with by means of a representative complaint.[153]

[153] *Anti-Discrimination Act 1991* (Qld) ss 146-152, 194-200.

To make a representative complaint, the individual complainants must be eligible to make the complaint, either as an affected individual, an agent of an individual, or a 'relevant entity' in relation to a vilification matter.

Each complainant to a representative complaint must choose whether to proceed as a party to the representative complaint or make an individual complaint.

The value of a representative complaint appears to be:

- The interests of other people who have been affected, or are likely to be affected by the alleged contravention, will be served without them having to be named, and their consent is not required. Such people would have to be a member of the class of people taking the action.
- It allows for efficient use of resources, rather than dealing with many individual complaints based on the same facts.
- People in the class of people being represented might be entitled to compensation ordered by the tribunal, even though they are not a party.

In practice, these provisions have been rarely used. For example, in one case brough to the tribunal in 1999, the complaints alleged that the respondents contravened the Act in relation to a number of people who were wheelchair users in the Cairns area, and that the tribunal should deal with the matter as a representative complaint. The tribunal declined on the basis that the criteria were not met as the class of complainants could not be ascertained with sufficient particularity.[154]

Conceptually, representative complaints could be considered as a way of addressing systemic discrimination given the outcomes apply to more than one person. However, this appears to have limited value in practice.

Discussion question 15:

- Are there any changes that would improve the accessibility and utility of representative complaints?
- What factors influence the capacity for affected people to assert their rights as a representative complaint?

[154] See the case of *Harris v Transit Australia Pty Ltd* [2000] QADT 6.

Organisation complaints

Under the current law, a complaint must be made by the person who experienced discrimination, or by someone who has been authorised by the person or by the Commissioner to make the complaint on their behalf.[155]

An organisation (called a 'relevant entity' in the Act) can make a complaint but only in relation to vilification,[156] where the organisation has a primary purpose to promote the interests or welfare of persons of a particular race, religion, sexuality, or gender identity, and the Commission is satisfied that:

- The complaint is made in good faith.
- The allegation is about conduct that has affected, or is likely to affect, people whose interests and welfare is a primary purpose of the organisation to promote.
- It is in the interests of justice to accept the complaint.[157]

The provisions for relevant entity complaints were added in 2002 and the policy reasons for the amendment include that: 'people within an affected group may be reluctant to make a complaint for fear of being singled out for victimisation'.[158] The same reasoning may apply to discrimination.

One argument against permitting organisations to bring discrimination complaints is that such organisations may advocate for positions that are not in the best interests of individuals within the group of persons they purport to represent. However, a requirement that organisations have permission before they can make a complaint may minimise this concern.[159]

Representative body complaints

In Victoria, a representative body may make an application on behalf of a named person or persons, if the Commission or tribunal is satisfied that:

- Each person is entitled to bring a dispute and has consented to the making of the application.
- The representative body has sufficient interest in the application, meaning that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to

[155] *Anti-Discrimination Act 1991* (Qld) s 134.
[156] *Anti-Discrimination Act 1991* (Qld) s 124A.
[157] *Anti-Discrimination Act 1991* (Qld) s 134(3)-(5).
[158] Explanatory Note, Discrimination Law Amendment Bill 2002 16.
[159] The Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 190, 6.13.4.

adversely affect, the interests of the body or the interests or welfare of the persons it represents.
- If the organisation represents more than one person, the alleged contravention arises out of the same conduct.[160]

New South Wales has similar representative body provisions to Victoria. [161]

Trade union complaints

Tasmanian legislation allows a trade union to complain where a member was the subject of alleged discrimination, or an organisation against which the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied that a majority of members of that organisation are likely to consent.[162]

Western Australia also allows trade unions to make a complaint for their members.[163]

The Australian Human Rights Commission can accept complaints from representative bodies and corporate or trade unions on behalf of one or more 'aggrieved persons'.[164] However, if the matter is not resolved at conciliation, these bodies cannot commence action in court on behalf of the aggrieved person.[165]

Discussion question 16:

- Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?
- Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?

[160] *Equal Opportunity Act 2010* (Vic) ss 114 and 124.
[161] *Anti-Discrimination Act 1977* (NSW) ss 87A and 87C.
[162] *Anti-Discrimination Act 1998* (Tas) s 60.
[163] *Equal Opportunity Act 1984* (WA) s 83(1)(c).
[164] *Australian Human Rights Commission Act 1986* (Cth) s 46P.
[165] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1) provides that only the person 'affected' can make an application to the courts.

Complaints by prisoners

Following a 2007 Supreme Court appeal decision[166] that found Queensland Corrective Services' failure to provide fresh halal meat in prison was unlawful discrimination, the government introduced a series of preconditions that must be met before a prisoner is entitled to make a discrimination or sexual harassment complaint against correctional service staff, service providers in prisons, and community corrections.[167]

The internal complaint process, which takes up to five months to complete, requires the prisoner to write to the General Manager of the prison about the alleged contravention, and wait four months for a response.[168] Then, if the prisoner is still detained and there has been no response or the response is unsatisfactory, they are then required to make a written complaint to an Official Visitor about the allegations, and wait another month.[169] The stated purpose of the changes was to require prisoners to make 'reasonable use of all of the internal mechanisms available'.[170]

The provisions have resulted in significant practical challenges, because:

a) No exceptions are available for urgent situations where a delay of up to 5 months is inappropriate.

b) Prisoners do not generally retain a copy of their written internal complaint, and if they are unable to refer to the original complaint, the second complaint to the Official Visitor (and then the third complaint to the Commission) may contain new or different facts and allegations.

c) If the complaint contains several allegations, the prisoner may comply with the internal complaint requirements for one or two allegations, but not for all allegations. This becomes administratively challenging and resource-intensive for complaint parties, the Commission, and the tribunal. The prisoner may need to re-start the internal process and additional conferences scheduled for similar matters.

d) No exceptions are available to the Act's 12-month time limit on making a complaint for prisoners, even though up to 5 months will have elapsed through the mandatory internal process.

e) The problems are exacerbated because of the nature of the cohort involved – many prisoners are Aboriginal or Torres Strait Islanders, many have low literacy, many

[166] *State of Queensland v Mahommed* [2007] QS 18. By the time of the hearing of this complaint, all Muslim prisoners in Queensland prisons were being provided with halal food and it has been observed in *Ali v State of Queensland* [2013] QCAT 319 that halal diets are now generally available in Queensland correctional centres.
[167] *Corrective Services Act 2006* (Qld) pt 12A 'Discrimination complaints'.
[168] *Corrective Services Act 2006* (Qld) s 319E.
[169] *Corrective Services Act 2006* (Qld) s 319F.
[170] Explanatory Notes, Corrective Services and Other Legislation Amendment Bill 2008 (Qld), 2.

struggle with the convoluted written process, and proving compliance is challenging in a prison environment where paperwork regularly is often misplaced or misfiled.[171]

In its *Women in Prison Report*, the Commission recommended these provisions be repealed as they are a significant hurdle for prisoners, and inhibit and delay the independent oversight of such complaints.[172]

Effective and early resolution of complaints could support better management of the prison population, reduce the risks of corruption, and support the human rights of prisoners.

Discussion question 17:

- Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?
- Do the current provisions strike the right balance in ensuring access to justice while encouraging early resolution?
- Should any internal complaint requirements for prisoners be retained, and if so, how can they be simplified to overcome practical concerns?

Other issues

The Commission welcomes feedback on any other issues about complaint processes.

Discussion question 18:

- Are there any aspects of the complaint (dispute resolution) process that should be considered by the Review?
- If so, what are the issues and your suggestions for reform?

[171] Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 49.
[172] Ibid.

Eliminating discrimination

The Terms of Reference ask us to consider whether a more positive approach is required to eliminate discrimination and sexual harassment.

This section outlines options we have identified that may enhance the capacity of the Anti-Discrimination Act to eliminate discrimination. These could provide additional mechanisms to supplement the complaint-based model.

Objectives of the Act

Is there benefit to an objects clause?

The Anti-Discrimination Act currently contains a preamble and a purpose provision, but not a clause outlining the objectives of the Act.

An objects clause is a provision, usually located at the beginning of a piece of legislation, that outlines the intended purposes of the legislation. These provisions underpin the entire Act and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation'.[173]

They also provide an explicit starting point for the interpretation of legislation. An objects clause may assist courts and others to interpret legislation. This is recognised by the *Acts Interpretation Act 1954* (Qld) which requires that, in interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred.[174]

In discussing effective communication in legislation, the *Queensland Legislation Handbook* identifies devices that can simply, accurately, and unambiguously state the intention of the legislation; assist to organise, orient, and explain legislation; and help establish its context, relevance, and meaning.[175]

[173] D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, LexisNexis Butterworths, 2006) 154.
[174] *Acts Interpretation Act 1954* (Qld) s 14A.
[175] See Department of the Premier and Cabinet (Qld), *The Queensland Legislation Handbook: Governing Queensland* (State of Queensland, 2019).

Current preamble and purpose

The Anti-Discrimination Act currently contains a preamble that outlines Parliament's reasons for enacting the legislation when it was introduced in 1991.

The preamble confirms Parliament's support of the Commonwealth's ratification of international instruments that recognise the need to protect and respect the principles of dignity and equality for everyone. The second reading speech of the Anti-Discrimination Bill also noted that the 'principles of dignity and equality for everyone are the foundations of the Bill.'[176]

A list of international human rights instruments is included, however some of these are now out of date.[177]

The preamble also states that Parliament considers that:

- everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination
- the protection of fragile freedoms is best affected by legislation that reflects the aspirations and needs of contemporary society
- the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.

The preamble and second reading speech provide indicators of what the intentions of the legislators were at the time it was introduced. As part of the Review, we have been asked to consider whether that purpose should remain the same, or change.

The Act also includes a purpose provision that states that one of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.[178] This purpose is to be achieved by prohibiting discrimination, and providing for enforcement through a complaints process.[179]

[176] Queensland Parliament, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193 (DM Wells, Attorney-General.
[177] The *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled People* have now been replaced by the *Convention on the Rights of Persons with Disability*.
[178] *Anti-Discrimination Act 1991* (Qld) s 6(1).
[179] *Anti-Discrimination Act 1991* (Qld) s 6(2).

Comparative experiences

Equality legislation in Western Australia, the Australian Capital Territory, Northern Territory, and Victoria all contain objects clauses. Of those jurisdictions, the relevant clauses refer to the following objectives:

- eliminating discrimination and sexual harassment to the greatest extent possible[180]
- promoting and protecting human rights[181]
- recognising the causes of discrimination[182]
- identifying and eliminating systemic causes of discrimination[183]
- progressing the aim of substantive equality[184]
- recognising that discrimination can cause social and economic disadvantage.[185]

What should the objectives be?

If an objects clause were to be introduced, it would lay the foundation for the way the Act seeks to eliminate discrimination and provide outcomes for affected people. This would affect the interpretation of the legislation and guide the Commission's functions and allocation of resources.

Having regard to the issues identified in Part B, and drawing on the provisions included in other jurisdictions, the objectives of the Act may include:

- eliminating discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
- to further promote and protect the right to equality set out in the Human Rights Act
- to encourage identification and elimination of systemic causes of discrimination
- to recognise the cumulative effect of discrimination based on a combination of attributes
- to promote and facilitate the progressive realisation of equality, as far as reasonably practicable
- to progress the aim of substantive equality.

It would also be important for the preliminary provisions and/or those establishing the functions of the Commission to confirm that the objectives of the Act are to be achieved by the Commission taking a proactive role in eliminating discrimination.

[180] *Equal Opportunity Act 1984* (WA) s 3; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 3; *Equal Opportunity Act 2010* (Vic) s 3.
[181] *Discrimination Act 1991* (ACT) s 4, *Equal Opportunity Act 2010* (Vic) s 3.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.

Discussion question 19:

- What should be the overarching purposes of the Anti-Discrimination Act?
- Should an objects clause be introduced?
- If so, what are the key aspects that it should contain?
- If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?

Systemic discrimination

In Part B we identified that a complaints-based system, while important, is not sufficient to address systemic discrimination and to eliminate discrimination to the greatest extent possible.

Systemic discrimination is difficult to address because of the following issues:

Identification: Systemic discrimination is often invisible, and only becomes evident after analysing the experiences of, or unequal outcomes for, a group of people.

Complexity: The complex and hidden nature of systemic discrimination is a barrier to public awareness and understanding.

Proof/liability: Systemic discrimination may be difficult to prove when the experience of only one individual is in evidence. Definitions of unlawful direct or indirect discrimination may be inadequate for issues of systemic discrimination, or may not be attributable to a particular respondent.

Outcomes/remedies: For many people who make a complaint, the focus is on compensation for the detriment they have suffered, rather than remedies that produce broader change for more people. Outcomes agreed through the conciliation process do not make findings of unlawful treatment, are often subject to confidentiality, and if all tribunal decisions are not published, this limits public awareness, understanding, and practice to address systemic discrimination. Whether awards of damages have a deterrent effect, or a broader impact on systemic discrimination, is difficult to measure.

Special measures

Special measures in Australian equality jurisdictions are provisions that permit actions to be taken for the benefit of people with protected attributes and have been considered by past reviews of equality legislation to be essential to achieving substantive equality.[186]

An example of a special measure includes where:

> A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.[187]

In the current Act, there are two exemptions to discrimination that fall into the category of 'special measures':

- Welfare measures188 – where an act is done for the welfare of the members of a group of people with a protected attribute.
- Equal opportunity measures189 – where an act is done to promote equal opportunity for a group of people with a protected attribute.

However, the Australian Capital Territory Law Reform Advisory Council in 2015 recommended that special measures should not be seen as *exemptions* to discriminatory conduct but rather as a *positive measure* to promote equality.[190] The Victorian Gardner review also noted the inconsistency between special measures in the Charter of Human Rights and in the narrower approach in the Victorian anti-discrimination legislation.[191]

Similarly, in Queensland, the right to recognition and equality before the law contains an internal limitation as follows:

> Measures taken for the purpose of assisting or advancing person or groups of persons disadvantaged because of discrimination do not constitute discrimination.[192]

[186] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 34–35; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 24, 122–126.
[187] *Equal Opportunity Act 2010* (Vic) s 12(1).
[188] *Anti-Discrimination Act 1991* (Qld) s 104.
[189] *Anti-Discrimination Act 1991* (Qld) s 105.
[190] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 125.
[191] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 33.
[192] *Human Rights Act 2019* (Qld) s 15(5).

To closer align the approach to special measures in the Human Rights Act with the Anti-Discrimination Act, while distinguishing them from exemptions, one option would be to incorporate special measures into the meaning of discrimination, currently under ch 2 pt 2 of the Act.[193] In Victoria, special measures appear under 'Part 2 – What is discrimination?' rather than under general exemptions.

This would reframe special measures from being a defence to discrimination to an essential element of the legislative framework with the goal of achieving substantive equality. If a positive duty is implemented, this approach may provide reassurance that equal opportunity measures used to prevent discrimination to the greatest extent possible are lawful.

If special measures are elevated to a key concept under the Act, it may be necessary to closely examine the proposed definition to ensure that it is not open to misuse. The special measures provision in Victoria takes an approach aligned more closely with a human rights proportionality assessment by requiring the measure is:

- Undertaken in good faith to promote or realise substantive equality for members of a group with a particular attribute
- Reasonably likely to achieve this purpose
- A proportionate means of achieving the purpose
- Justified because the members of the group have a particular need for advancement or assistance.[194]

Discussion question 20:

- Should welfare measures and equal opportunity measures be retained or changed? Is there any benefit to collapsing these provisions into a single special measures provision?
- Should special measures provisions continue to be an exemption to discrimination, or incorporated into the meaning of discrimination?

[193] *Anti-Discrimination Act 1991* (Qld) ss 7 and 8.
[194] *Equal Opportunity Act 2010* (Vic) s 12.

Positive duties

Shifting the focus to prevention

Positive duties are an emerging feature of discrimination laws. They offer a partial response to weaknesses identified in the capacity of the law to proactively eliminate discrimination and sexual harassment, including systemic discrimination. Creating clear legislative obligations can inform cultural norms and reflect social expectations.

In Part B we identified that change may be required to shift away from the reactive nature of discrimination laws and foster a proactive approach to preventing discrimination and sexual harassment.

Given the significant complexity of the current law, a positive duty may make existing obligations clearer. Those existing obligations include an implied duty not to discrimination or sexually harass, which we discuss further below.

In any discussion about a positive duty, it is important to keep in mind the underlying drivers that contribute to discrimination and sexual harassment. These include cultural and social attitudes that can be difficult to identify and shift.

Comparative experience

Recommendations of past inquiries

A number of Australian reviews and inquiries have recommended that discrimination laws include a positive duty. These have applied in different settings and contexts.

The 2008 Senate inquiry into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality recommended that:

- the Sex Discrimination Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities
- that further consideration is given to amending the law to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.

Also in 2008, the Gardner Review recommended that the Victorian Act should contain a duty to eliminate discrimination as far as possible.

In 2015, the ACT Law Reform Advisory Council's inquiry into the *Discrimination Act 1991* recommended that:

- The Discrimination Act should be amended to include a positive duty to eliminate discrimination.
- The positive duty should apply to public authorities immediately, and should apply to private bodies and community organisations after a period of three years.
- The Australian Capital Territory Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

In 2020, the Australian Human Rights Commission's *Respect@Work* report recommended that:

- The Sex Discrimination Act be amended to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.
- That the Australian Human Rights Commission be given the function of assessing compliance with the positive duty, and for enforcement.

In 2021, the Victorian Legislative Assembly Legal and Social Issues Committee's Inquiry into anti-vilification recommended that the existing positive duty for discrimination, sexual harassment and victimisation matters should be expanded to vilification.

Current Australian law

Currently, the only jurisdiction that has enacted a positive duty is Victoria. It provides that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

In determining whether a measure is reasonable and proportionate, a number of factors must be considered, including:

a) the size of the person's business or operations
b) the nature and circumstances of the person's business or operations
c) the person's resources
d) the person's business and operational priorities
e) the practicability and the cost of the measures.[195]

[195] *Equal Opportunity Act* (Vic) s 15(6)(a)–(e).

Some provisions in other state and territory discrimination laws contain elements or objectives that are similar to positive duties. Tasmania contains a duty for an organisation to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.[196]

Positive duties are also contained in other forms of legislation. For example, recent legislation introduced in Victoria in the *Gender Equality Act 2020* (Vic) requires workplace gender audits, action plans, and impact assessments on governments.

International approaches

Some international jurisdictions have also introduced positive duties into their equality and discrimination laws in the area of employment.

For example, in relation to the United Kingdom public service, the *Equality Act 2010* (UK) expressly recognises the need to advance equality through imposing a duty that includes a duty on public authorities to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act.[197] The *Disability Discrimination Act 2005* (UK) also sets out a general duty to promote equality, and regulations require authorities to publish disability equality schemes that set out how the authority will carry out the general duty.

The *Northern Ireland Act 1998* (UK) provides a duty for public authorities to have regard to the need to promote equality of opportunity between various groups.[198]

In Canada, the *Employment Equity Act*, SC 1995, c 44 imposes an obligation on employers, including private sector employers, to implement employment equality by identifying and eliminating employment barriers for designated groups of people, instituting positive policies and practices, and making reasonable accommodations to ensure representation of people in the designated groups.[199]

[196] *Anti-Discrimination Act 1998* (Tas) s 104.
[197] *Equality Act 2010* (UK) s 149.
[198] *Northern Ireland Act 1998* (UK) s 75.
[199] *Employment Equity Act*, SC 1995, c 44, s 5.

Does this duplicate existing obligations?

Some past inquiries that recommended positive duties have received submissions or responses that form a view that duties to prohibit discrimination already exist within the vicarious liability provisions of discrimination laws, and in work health and safety laws.

Vicarious liability

Under the Anti-Discrimination Act, a person who contravenes the Act is civilly liable for the contravention.

If a person's worker or agent contravenes the Act in the course of work, both the person and the worker or agent are liable for the contravention.[200] However, it is a defence if an employer can prove that they took reasonable steps to prevent the worker or agent from contravening the Act.

Indirect discrimination happens where an unreasonable requirement is imposed that a person cannot comply with because of their attribute. Whether the requirement is unreasonable depends on all the circumstances, including the feasibility of an alternative requirement. The liability for indirect discrimination therefore creates an obligation to make reasonable adjustments for people with an attribute.

While these provisions require an employer to take reasonable steps to prevent unlawful conduct from happening, this defence is raised in response to conduct that has already occurred, rather than requiring proactive preventative action. This creates a fault-based system where there is limited positive onus on a duty holder to take positive steps against discrimination, sexual harassment and other objectionable conduct unless fault can be identified and attributed.

Relying on employers to take reasonable steps to prevent discrimination in order to defend potential complaints may not achieve the proactive aims of a positive duty. Defences cannot be proactively enforced, and the effectiveness of this approach in eliminating discrimination is unable to be tested.[201] Vicarious liability provisions also lack a normative setting approach, which would encourage shared accountability for proactive compliance.

Work health and safety law

Australia's Work Health and Safety (WHS) regime also provides an instructive model for the use of positive duties. Established in 2011 by Safe Work Australia, the model WHS laws comprise the Model WHS Act, the Model WHS Regulations, and 24 Model Codes of Practice which are maintained by Safe Work Australia. Each jurisdiction must separately implement them as their own laws to become legally binding. The *Respect@Work* report considered this framework to

[200] *Anti-Discrimination Act 1991* (Qld) s 133.
[201] Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

be a useful example of building a preventative practice through positive duties and clear understanding of workplace responsibilities.

The model WHS law framework has a three-tiered model based on the 'Robens model'. As set out in the *Respect@Work* report, this model recommends that duty holders be required to comply with:

- general duties of care set out in a broad-based WHS laws
- more detailed standards laid down in regulations
- codes of practice.

This model applies to all organisations, irrespective of their size or industry. While the obligations are framed as outcome-based, organisations can tailor their approach to fit with their circumstances, relative to the resources available to them.

A key element of the Model WHS Act is a positive duty for duty holders to eliminate or minimise risks arising from work. The primary duty is to identify, control, and address hazards and risks that may affect the physical and psychological health or safety of staff, so far as is reasonably practicable.

Submissions and government responses to recommendations that a positive duty be established have discussed the relationship between existing obligations under WHS laws and a positive duty in discrimination legislation, if it were to be introduced.

On one view, the WHS regime may lack comprehensive coverage to address the rationale for a positive duty in discrimination and sexual harassment laws because WHS laws apply only to workplaces. The purpose of WHS frameworks also have different orientations and focuses than the Anti-Discrimination Act.

Both Commonwealth and Queensland governments are currently developing a code of practice that will include sexual harassment as a general psychosocial risk, and will apply to the workplace. It will also cover matters including bullying, discrimination and other psycho-social risks.

In the *Respect@Work* report, the Australian Human Rights Commission considered that positive duties would interact with WHS laws in a mutually reinforcing way and have a complementary effect.[202]

[202] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).

What should a positive duty contain?

In essence, establishing a positive duty would add the requirement that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and victimisation, as far as possible.

Who should the duty apply to?

If a positive duty is imposed, it may apply to any person who has an obligation under the current Act, or it could be confined to particular entities or areas of operation - for example, in workplaces, but not in club membership and affairs.

To assist with a requirement to take reasonable and proportionate measures, the Victorian Act includes a non-exhaustive list of factors that should be considered in determining whether a measure is reasonable and proportionate.

This approach allows the duty to be scaled depending on the size and structure of an organisation, and any industry-specific considerations including risk profiles.

It may also be appropriate to stagger the introduction of a positive duty to maximise awareness and compliance readiness.

How could compliance be supported?

It is critical that duty holders are supported to implement a positive duty to ensure that the obligations imposed play a role in preventing discrimination and sexual harassment.

Regulatory mechanisms such as education and industry guidelines would be required to embed understanding of a positive duty. At the same time, to ensure the positive duty carries sufficient weight to achieve its purpose, enforcement mechanisms should also be considered. These could include the ability for the Commission to issue compliance notices and enforceable undertakings, which are discussed below.

Taking a punitive approach would be a final resort. Striking the right balance between education and enforcement in the regulatory framework could support individuals and entities with obligations under the Act to proactively eliminate discrimination and sexual harassment.

Discussion question 21:

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

A regulatory approach?

The Terms of Reference ask the Review to consider whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the Anti-Discrimination Act, to the greatest possible extent.[203]

Under the current Act, enforcement largely relies on complaints about contraventions,[204] and promotion of the law relies on the Commission's educative functions.[205] However, the issues identified in Part B suggest that a more proactive approach may be required to build a preventative culture to address discrimination.

This discussion paper also raises questions about:

- whether a positive duty to eliminate discrimination, sexual harassment and other objectionable conduct should be introduced
- limitations in addressing systemic discrimination under the current approach
- whether the Act should contain objectives that include a more positive approach to eliminating discrimination, including eliminating systemic discrimination.

[203] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(j). We note that this item also refers to the processes and outcomes of the Commission, however these aspects are considered in other areas of the discussion paper.
[204] *Anti-Discrimination Act 1991* (Qld) s 235(b).
[205] Including *Anti-Discrimination Act 1991* (Qld) ss 235(d), (e), (i), (l).

If these approaches are adopted, a compliance framework that would operate alongside the individual complaints process would be required to ensure duties and objectives are able to be enforced.

This section discusses options for a regulatory framework overseen by the Commission. In establishing a regulatory role for enforcement of the Anti-Discrimination Act, impacts and consequences for a range of stakeholder groups and all issues will need to be considered. In addition, the right mix of regulatory approaches must be fully considered.

The Review invites submissions on the discussion questions, as well as any other matter or issue the Review should consider in relation to this topic.

What does regulation involve?

Regulatory powers are a suite of tools used by government agencies to ensure people and organisations comply with legislative requirements. Overseas jurisdictions, including Canada, the United Kingdom, and Ireland, have increasingly moved toward towards a regulatory model, while retaining dispute resolution functions within their human rights bodies. These regulatory models are based on the concept of the 'enforcement pyramid'.

The singular focus on dispute resolution by most Australian human rights agencies contrasts with the role of statutory bodies that enforce privacy obligations, workplace, and consumer protections. These entities have an active role in monitoring and enforcing compliance with legislation. Some relevant examples include the:

- Fair Work approach, including the Fair Work Commission and the Fair Work Ombudsman
- Office of the Information Commissioner Queensland
- Australian Securities and Investment Commission
- Australian Competition and Consumer Commission

Regulatory models of enforcement are often arranged around a pyramid of increasing measures to achieve compliance. The conceptual starting point for modern approaches is often referred to as 'responsive regulation,'[206] which considers that different tools are required to achieve compliance with the law. The kind of regulation depends on a range of factors, including the willingness and capacity of people and organisations.

The model is depicted in the form of a regulatory hierarchy or enforcement pyramid. Starting with an educative focus, the pyramid progresses from self-regulation within an organisation, to co-regulation with the regulatory body, to enforcement options that may include civil and

[206] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

criminal sanctions.[207] The following section presents some options that can be included at each level of the regulatory pyramid.

Level one: education and persuasion

For most organisations, regulation is most effective and efficient if the regulatory agency can achieve the desired behaviour by developing the least punitive measures – that is, the approaches at the bottom of the regulatory pyramid focus on education, assistance, and persuasion.[208]

In the context of discrimination law, this starting point acknowledges that, as a cohesive community, we all share accountability for eliminating discrimination and working towards the goal of substantive equality. It also acknowledges that most organisations do not want to discriminate, and are willing and able to create supportive and inclusive environments that benefit from diversity and equality.

Education

To ensure a responsive regulation scheme, the Commission's existing education functions would be informed and shaped by the objectives of the Act. If those objectives change and/or if a positive duty is introduced, dedicated resourcing of those functions would be required to ensure the Commission has capacity to undertake research and education to fulfil its role.

Some examples of education that could apply at this level of regulation may include campaigns aimed at business, government, and non-government to encourage compliance with the Act and best practice.

Research and recommendation powers

The Commissioner has broad research functions to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.[209] The Commission has previously used this function to prepare reports, including in relation to women in prison and health equity for First Nations people.[210]

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[207] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Dominique Allen, 'Barking and Biting: the Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311; Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

[208] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

[209] *Anti-Discrimination Act 1991* (Qld) s 235(e).

[210] See Queensland Human Rights Commission, 'Reports' (Web page, 9 December 2020) <http://www.qhrc.qld.gov.au/resources/reports>.

However, the Act does not contain powers to support this function, for example to require or compel information and data. This can mean the capacity to conduct thorough research and to monitor progress is limited.

The Gardner Report recommended that the Victorian Commission be given the power to compel public and private sectors to provide data that they can analyse, and to access information on tribunal decisions. The *Equal Opportunity Act 2010* (Vic) provides the Commission with the power to compel a person to produce information or documents.[211]

The capacity to obtain data would provide the ability to identify systemic issues and trends, including to inform the allocation of resources to facilitate its educative functions.

Guidelines

The Commission currently develops a range of materials, such as factsheets and guides to support duty holders to understand their obligations under the Act. However, unlike some jurisdictions, the Commission does not have a legislative function to produce formal guidelines to assist organisations to comply with their obligations under Act.

Guidelines are non-binding, practical tools to assist with decision-making and compliance. They have educative value and can demonstrate best practice approaches to various issues. These have particular value in areas where the law is complex and difficult to understand and apply in practice. Guidelines can also be updated as the law changes, and as new issues or approaches to best practice emerge.

Guidelines can also be developed through community and industry stakeholder engagement to ensure they are fit for purpose in different contexts and settings. This would also ensure that the development of guidelines is informed by the practical realities and resources of the relevant industry or entity. This approach recognises that people and organisations are better able to comply with the law when they have clear guidance on what their obligations are, and how they can be met.

[211] *Equal Opportunity Act 2010* (Vic) s134.

Level two: co-regulation

The second tier of the regulatory pyramid includes a compliance framework that combines a number of mechanisms to measure and enforce compliance. This may include action plans and voluntary audits.

Action plans

Action plans are voluntarily developed by organisations to assist them to plan for continuous improvement. Action plans can include provisions requiring the development of policies and programs to achieve the objectives of the Act, how those policies will be communicated, policy reviews to identify discriminatory practices, setting goals and targets and measuring success, and appointing people within the organisation to be responsible for implementing the plan.

The success of action plans has been considered by previous reviews,[212] including in relation to the Disability Discrimination Act which includes provisions for actions plans, including setting out what the plan must include.

Voluntary audits

Voluntary audits would provide a capacity for organisations to request the Commission to assist with reviews of their policies or programs to assess compliance with the Act. If the Commission agreed to the request, it could assist with developing a preventative culture by assisting an organisation to understand and meet their legislative obligations and prevent discrimination, sexual harassment, or other objectionable conduct from occurring. The audits may provide a valuable tool to support compliance with a positive duty.

[212] Productivity Commission (Cth), *Review of the Disability Discrimination Act 1992* (Inquiry Report No 30, 30 April 2004); Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011).

Level three: addressing non-compliance

Own motion inquiries

An own motion inquiry or investigation power would allow the Commission to take action without having to rely on an individual to make a complaint. Own motion inquiries go further than general research functions, as they provide the Commission with a reporting framework, and investigation and enforcement powers.

Own-motion powers range from Commission-initiated complaints, where the role and powers of the Commission and the outcomes are the same as if the Commission were an individual complainant, to completely separate inquiry and reporting processes and powers.

Outcomes of an own motion inquiry may include:[213]

- no action is taken
- informal agreement is reached upon the action to be taken
- an enforceable undertaking is entered into
- a compliance notice is issued
- a report is prepared that may, at the discretion of the Commission, be provided to the Attorney-General for tabling in Parliament.[214]

Under the current Anti-Discrimination Act,[215] the Commissioner must initiate an investigation if requested to do so by the Minister, or if the tribunal becomes aware of circumstances that may constitute a contravention of the Act and refers the matter.

The Commissioner may initiate an investigation if:

- a possible contravention against a group or class of people is discovered, the matter is of public concern, and the Minister agrees; or
- an allegation is made that an offence against the Act has been committed; or
- a possible offence against the Act is discovered.

However, the powers of investigation, such as compelling information and documents, are the same as for any complaint investigations, and the outcomes are limited to those available through usual complaint processes.

These powers are therefore restricted to circumstances when the Commission is requested to do so by the Minister or a tribunal, rather than when it identifies systemic issues that it considers

[213] As recommended by the Gardner Review.
[214] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 128, Recommendation 6.127.
[215] *Anti-Discrimination Act 1991* (Qld) s 155.

require investigation.[216] It also limits the outcomes of the investigation to the options available for individual complaints and does not include a power to produce a public report containing recommendations.

In practice, this provision is not used. There has never been a request from the Minister or a tribunal to the Commission to initiate an investigation. Similarly, the Commission has never requested agreement from the Minister to conduct an investigation.

The Victorian legislation is different, in that it allows the Commission to undertake investigations into systemic discrimination that have the potential to harm particular groups of people and can have flow-on effects for the broader community.[217] The example given within the legislation includes:

> An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination. [218]

This Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has described this power as critical to relieve the burden from individual complainants and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible.[219] In 2017, the VEOHRC commenced an own-initiative investigation into the travel insurance industry. 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.[220]

Enforceable undertakings

The purpose of enforceable undertakings is to rectify contraventions of the Act.

Following an investigation where a contravention is identified, enforceable undertakings could allow the Commission to obtain agreement with the organisation involved to undertake steps to eliminate the identified discrimination, without a complaint being made.

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[216] Pursuant to *Anti-Discrimination Act 1991* (Qld) s155(2)(b)–(c), the Commissioner may also initiate an investigation if an allegation is made that an offence against the Act has been committed, or if while carrying out the Commission's functions, a possible offence against the Act is discovered.
[217] *Equal Opportunity Act 2010* (Vic) s 127.
[218] *Equal Opportunity Act 2010* (Vic) s 127 'Example'.
[219] Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 29.
[220] Ibid 11.

Compliance notices and injunctions

The purpose of compliance notices is to provide the Commission with the power to issue a notice where it has conducted an investigation or inquiry and found a breach of the duty to eliminate discrimination.

The notice could set out the details of the conduct or behaviour, or decision, policy or practice, that gives rise to the breach, and the steps that should be taken to comply within a specified timeframe. It may also require an action plan to be produced.

Another option would be for the Commission to apply to a court or tribunal for an order for compliance or an injunction restraining the person from committing the unlawful act.

Requiring the Commission to apply to a court or tribunal to issue a compliance notice has the advantage of emphasising the Commission's role as a facilitative body. It also means that the Commission does not have any determinative powers, and that this role is left exclusively to the tribunal.[221]

Civil penalties

In rare circumstances, following an outcome of an investigation, it may be appropriate for the Commission to have the power to apply to a court for an order that a person or entity alleged to have contravened a provision within the Act pay a civil penalty. This would only usually be used where other regulatory approaches have not been effective.

Other agencies with regulatory functions, for example the Office of the Australian Information Commissioner, have similar powers. They are required to act in accordance with their model litigant obligations, and the outcomes may be publicly communicated.

While there are currently some civil penalty provisions within the Anti-Discrimination Act, civil penalties may also attach to any additional powers to ensure enforcement of serious or repeated contraventions can be achieved. It is anticipated civil penalties would only be sought in very rare circumstances and may not ever need to be used.

Discretion to exercise use of powers

If powers are provided to the Commission to enforce a positive duty and to achieve the purposes of the Act, clear threshold criteria would need to be created that must be met before a power can be used.

[221] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 131, [6.149].

In Victoria, the Commission may conduct an investigation into any matter relating to the operation of the Act if the matter:

- raises an issue that is serious in nature, and
- relates to a class or group of people, and
- cannot reasonably be expected to be resolved through the dispute resolution process or application to the tribunal, and
- there are reasonable grounds to suspect that one or more contraventions of the Act have occurred, and
- the investigation would advance the objectives of the Act.[222]

Examples that may require a regulatory approach

This section provides two examples of how a regulatory approach could be applied in practice, and how it differs from individual enforcement processes.

Asking questions about race on tenancy applications

During the initial consultation phase, the Review heard that some real estate agents in a regional area have a regular practice of asking people whether they are Aboriginal or Torres Strait Islander on their tenancy applications. Rather than being an isolated issue, this was widespread and affected many people.

While it is likely this is unlawful under the Anti-Discrimination Act, community members did not wish to bring complaints because of the strong possibility of being 'blacklisted', the impact of which is exacerbated in a tight rental market.

Rather than waiting for a complaint on the issue, the Commission could commence an own motion investigation after receiving information about the practice. The Commission could then use this example to create enforceable guidelines regarding tenancy applications.

Barriers to accessing financial services for people with intellectual disability

Another example is from a complaint received by the Commission, involving two siblings with intellectual disability. Their mother had been appointed as their guardian and administrator by QCAT.

After the appointment, the siblings received a letter from their bank to say that now an administrator had been appointed they had no powers to make transactions, including opening or closing an account, or obtaining account-related information. When one sibling lost her wallet containing her bank card, the card was cancelled, but the bank refused to issue her with a new

[222] *Equal Opportunity Act 2010* (Vic) s127.

card, despite them having used the card for many years without incident. Subsequently, the other sibling's card was also cancelled. There had been no issues with their use of the card.

The siblings made a discrimination complaint to the Commission against the bank. Their mother also claimed discrimination by association. The matter was conciliated, and both siblings receiving compensation. However, as far as the Commission is aware, the underlying policy position causing the discrimination did not change and could still be impacting people with disability.

In this example, the Commission could commence an own motion investigation into the conduct of the banks, which could result in recommendations for policy change or an enforceable undertaking. This may have a broad impact on people with intellectual disability. Given the inherent challenges people with intellectual disability face in accessing the complaints process, which may be further ingrained if they are subject to guardianship orders, a proactive approach could address the impacts of ongoing discriminatory practices for vulnerable people.

Role of the Commission

Having regard to the issues outlined in this Discussion Paper, the Review must consider whether the Commission should be required to undertake an effective regulatory role to ensure individuals and industry comply with legislative requirements that may be imposed.

In particular, regulation and enforcement functions would be required to ensure any positive duty is addressed.

Discussion question 22:

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

Role of the tribunals

Two tribunals deal with matters under the Anti-Discrimination Act. For work-related matters the tribunal is the Queensland Industrial Relations Commission (QIRC) and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal (QCAT).

Until December 2009 anti-discrimination matters were dealt with by the Anti-Discrimination Tribunal (QADT). The Anti-Discrimination Tribunal ceased to exist when QCAT was established and became responsible for dealing with anti-discrimination matters. Since March 2017 the QIRC has been responsible for work-related anti-discrimination matters, and QCAT continues to be responsible for all other anti-discrimination matters.

Complaints that are not resolved through conciliation in the Commission may be referred to the relevant tribunal for hearing and determination. The relevant tribunal is also responsible for granting temporary exemptions from the operation of the Act.[223]

The issues identified are at a preliminary stage, and we are seeking guidance about key issues related to the tribunals that the Review should consider.

Specialisation

The tribunals have a key role in interpreting and applying the Anti-Discrimination Act. We heard that since the QADT ceased, there may have been a reduction in the extent of specialisation in anti-discrimination law and this may not be beneficial for the development of case law.

Discrimination and sexual harassment law is complex and technical. It includes sensitive subject matter quite distinct from that of other disputes that come before the tribunals.

To enhance consistency, there may be some benefit in introducing specialist lists in the tribunals.

One example of this approach can be found in the *Child Protection Act 1999* (Qld) which requires that the constitution of the tribunal includes at least one legally qualified member who has extensive professional subject matter knowledge.[224]

[223] *Anti-Discrimination Act 1991* (Qld) s 113.
[224] *Child Protection Act 1999* (Qld) s 99H requires the member to be committed to key principles, with extensive professional knowledge and experience of children, and with demonstrated knowledge and experience in 1 or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, indigenous affairs, law, psychology or social work.

This approach may improve consistency in the way matters are case-managed and in outcomes achieved, and could be supported by ongoing education for members and the publication of a bench book or other instructive guidance material.[225]

Consistency

With a split jurisdiction, there will inevitably be inconsistencies between the approaches of the two tribunals, which are dealing with similar matters in different 'areas of activity' (work or non-work). A uniform set of rules and procedures in the form of a handbook may be one way to alleviate this issue.

Publishing outcomes and data

Educating the community on the meaning of the Act and the scope of its protections is challenging when so few matters are heard and finally determined by the Tribunals. More recently, reasons for decisions are not being published regularly in favour of oral reasons.

An absence of published reasons for decisions contributes to the limited guidance on the operation of the Act in practice. Published cases also have a normative role in framing community expectations about what behaviours are lawful and acceptable and can therefore have a systemic impact.

Further data on the outcomes of matters that proceed to the tribunal might be helpful to identify systemic themes and trends including in relation to the number of complaints settled or withdrawn prior to hearing. Improving data sharing between the two tribunals and the Commission may support greater visibility of outcomes and improve overall transparency at all stages of the process.

Commissioner interventions

Human rights agencies across Australia can generally intervene in proceedings relating to discrimination. The Queensland Human Rights Commission may intervene in proceedings under the Anti-Discrimination Act with leave of the court or tribunal for proceedings which involve 'human rights issues'.[226]

In contrast, under the *Human Rights Act 2019* (Qld), the Commissioner may intervene in proceedings without leave of the court where a question of law arises that relates to the application of that legislation.[227] The term 'human rights' under the *Anti-Discrimination Act 1991*

[225] The online 'wiki' publication *Victorian Discrimination Law* was first released in 2013 and aims to provide the community with clear and accessible information about anti-discrimination laws. See Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law* (Web Page, 28 June 2019) <http://austlii.community/wiki/VicDiscrimLRes/VicDiscrimLaw>.
[226] *Anti-Discrimination Act 1991* (Qld) s 235(j).
[227] *Human Rights Act 2019* (Qld) s 51.

(Qld) is not defined as rights under the Human Rights Act, but rather by reference to section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).

The Review is seeking views about whether this power should be reflected in the Anti-Discrimination Act.

Discussion question 23:

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

Non-legislative measures

In Part B, we identified a range of measures required to eliminate discrimination and other objectional conduct that would complement the law, but not require legislative change.

Some of these include:

- resourcing of the legal service sector to enhance access to the complaints process
- building greater awareness of the operation of the law
- enhancing individual and systemic advocacy to support people to connect with the system and legal services.

During the course of our initial consultations, we heard about the limited resourcing of the legal service sector and the advocacy and support sector to support people to develop an understanding of the Anti-Discrimination Act and to assert their rights through complaints.

It is beyond the scope of this Review to make recommendations about resourcing. However, the Terms of Reference include ways to improve the accessibility for bringing a complaint of discrimination, and how the process should be enhanced to improve access to justice for people who experience discrimination.

Discussion question 24:

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

Part D:

Coverage of the Act

Grounds of discrimination

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

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

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

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

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

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

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

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

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

Current attributes

Impairment

This section considers the attribute of impairment with respect to:

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

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

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

[228] *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006).
[229] Michael Oliver and Colin Barnes, *The New Politics of Disablement* (Palgrave Macmillan, 2nd ed, 2012).

Scope of attribute

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

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

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

people who experience addiction may arguably be covered by the law. The issue has not been considered by a court or tribunal in Queensland, but has been considered by the federal jurisdiction,[231] in New South Wales[232] and the Northern Territory,[233] and decided cases have indicated that it may be arguable. If coverage of addictions is the intention, it may be beneficial to clarify that in the definition.

Assistance animals

Some people with disability experience ongoing discrimination because of having an assistance animal. The definition of 'impairment' partly covers this situation by including in the definition 'reliance on a guide, hearing or assistance dog, wheelchair or other remedial device'. However, both this definition and a separate section[234] which expressly prohibits discrimination in relation to guide, hearing or assistance dogs in the accommodation area, are limited to dogs only, rather than all kinds of assistance animals.

There are two potential reform options.

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

[230] For example, section 4(1)(d) *Equal Opportunity Act 2010* (Vic) clarifies that a malfunction of the body includes a mental or psychological disease or disorder.
[231] *Marsden v HREOC* [2000] FCA 1619 – found that opioid addiction may be covered under disability.
[232] *Hubbard v Roads and Traffic Authority of NSW* [2010] NSWADT 99; *Carr v Botany Bay Council* [2003] NSWADT.
[233] *Eccles v North One Pty Ltd, Doyle, Nikkie Beach One Pty Ltd & Bakaric* [2021] NTCAT 13 – the tribunal found that the issue of whether addiction is an impairment is not settled, but this may be 'arguable'.
[234] *Anti-discrimination Act 1991* (Qld) s 85.

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

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

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

Discussion question 25:

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

Gender identity

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

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

[235] *Disability Discrimination Act 1992* (Cth) ss 8 and 9.
[236] *Discrimination Act 1991* (ACT) s 5AA(2)(d) and (3).
[237] *Anti-discrimination Act 1991* (Qld) sch 1 Dictionary (definition of gender identity (a)).
[238] 'Gender identity' definition has been updated and separated from intersex status/sex characteristics in Victoria, Tasmania, Australian Capital Territory and South Australia; the Commonwealth introduced a broader definition and separate intersex status protections in 2013; and current reviews of legislation in Western Australia and Northern Territory anticipate potential reforms.

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

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

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

Discussion question 26:

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

Sexuality

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

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

Discussion question 27:

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

[239] *Anti-discrimination Act 1991* (Qld) sch 1 Dictionary (definition of gender identity (b)).
[240] *Public Health Act 2005* (Qld) s 213G.
[241] A set of principles on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics.

Lawful sexual activity

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

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

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

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

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

Discussion question 28:

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

[242] *Dovedeen Pty Ltd v GK* [2013] QCA 116.
[243] Prostitution Licensing Authority (Qld), *2018–2019 Annual Report* (Report 2019) 4.
[244] Anne Edwards, *Selling Sex, Regulating Prostitution in Queensland* (Prostitution Licensing Authority, 2009).
[245] Queensland Law Reform Commission, *Sex Work Industry Review* (Web Page, 27 August 2021) <https://www.qlrc.qld.gov.au/current-reviews>.
[246] *Anti-Discrimination Act 1998* (Tas) s 3, *Equal Opportunity Act 2010* (Vic) s 4(1). See *Cassidy v Leader Associated Newspapers Pty Ltd* [2002] VCAT1656.

Other current attributes

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

Discussion question 29:

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

Specific attributes

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

Criminal history

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

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

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

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

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

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

Spent conviction

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

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

Irrelevant criminal record

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

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

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

[248] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).
[249] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s5.
[250] *Complainant 201908 v Commissioner for Fair Trading (Discrimination)* [2020] ACAT 24.
[251] International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b). See, for example *AN v ANZ Banking Group Limited* [2015] AusHRC 93.

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

Expunged homosexual conviction

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

Discussion question 30:

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

Irrelevant medical record

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

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

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

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[252] *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld).
[253] Equal Opportunity Tasmania, *Irrelevant Medical Record Discrimination: Your health. Your private business*.
[254] International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b).

Currently under the Queensland Act, discrimination is prohibited on the ground of impairment, which includes an attribute that a person had in the past.[255] A failed federal Bill[256] included a 'medical history' ground with the intention to "…cover discrimination on the basis of highly sensitive medical information that does not constitute a disability (eg relationship counselling)."[257]

Discussion question 31:

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

Immigration status

See also State laws and programs exemptions – citizenship/visa status on page 123.

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

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

[255] *Anti-Discrimination Act 1991* (Qld) s 8(d).
[256] Human Rights and Anti-Discrimination Bill 2012 (Cth).
[257] Exposure Draft Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 24.
[258] *Anti-Discrimination Act 1991* (Qld) sch 1 Dictionary (definition of 'race').
[259] Australian Bureau of Statistics, *2016 Census QuickStats* (Web Page, 26 October 2021) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/3>.
[260] *Jin v The University of Queensland* [2015] FCCA 2982 [38]–[42].

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

Discussion question 32:

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

Employment activity

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

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

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

Discussion question 33:

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

[261] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 April 2007, 1143 (R Hulls, Attorney-General).
[262] Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019).
[263] *Fair Work Act 2009* (Cth) section 340 and 341(1); *Mahajan v Burgess Rawson & Associates Pty Ltd* [2017] FCCA 1560.

Physical features

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

In Victoria, the physical features attribute has been interpreted to include things done to a body by choice, such as tattoos[265] and piercings, although this was not the original intention.[266]

In another Victorian case, having a loud voice was successfully argued as falling under the attribute of physical features.[267] Complaints have been relatively uncommon in Victoria[268] and occur mostly in the context of work. However, some research suggests that children and young people experience discrimination on the basis of physical appearance.[269]

Discussion question 34:

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

[264] See *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT1365.
[265] *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849.
[266] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Wade).
[267] *Ruddell v DHS* [2001] VCAT 1510.
[268] Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019) 10: 39 complaints, in contrast 595 were made on the basis of disability.
[269] 'Teenagers' experiences of discrimination' *Growing Up in Australia: The Longitudinal Study of Australian Children*, Snapshot Series, Issue 1, March 2021.

Additional attributes

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

Gender

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

Community and scientific understanding of sex and gender has substantially advanced since the Act was introduced in 1991. The Australian Guidelines on Sex and Gender[270] recognise that gender and sex are conceptually different, but used interchangeably in legislation. The guidelines state that:

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

This delineation is also expressed in the ABS guidance from 2020.[271]

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

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

Discussion question 35:

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

[270] Australian Government, *Guidelines on the Recognition of Sex and Gender* (November 2015) [13]–[15].
[271] Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (Web Page, 14 January 2021) <www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>.
[272] *Anti-Discrimination Act 1998* (Tas) s 16(e).

Sex characteristics

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

As noted in the discussion under 'gender identity' attribute, having a variation of sex characteristics is not a gender identity. Most Australian jurisdictions have separated these attributes, for example the federal legislation has included 'intersex status' since 2013.[273]

Since that time, advocates have sought the inclusion of a universal sex characteristics attribute[274] which is a position endorsed in the community consensus Darlington Statement.[275] Tasmania includes an attribute called 'intersex variations of sex characteristics',[276] and Victoria and ACT include 'sex characteristics'.[277]

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

Discussion question 36:

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

[273] *Sex Discrimination Act 1984* (Cth) s 5C.
[274] Intersex Human Rights Australia, *Discrimination* (Web Page, 24 February 2021) <https://ihra.org.au/discrimination/>.
[275] Intersex Human Rights Australia, *Darlington Statement* (Web Page, 1 November 2019) <https://ihra.org.au/darlington-statement/>.
[276] *Anti-Discrimination Act 1998* (Tas) s 16(eb).
[277] *Equal Opportunity Act 2010* (Vic) s 6(oa).

Being subject to domestic or family violence

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

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

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

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

Discussion question 37:

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

[278] Queensland Government, *Domestic and Family Violence Prevention Strategy 2016–2026* – In particular the Early Intervention Strategy: Queensland's workplaces and workforce challenge attitudes contributing to violence and effectively support workers.
[279] *Housing Legislation Amendment Act 2021* (Qld).
[280] *Fair Work Act 2009* (Cth) ss 65(1A)(f) and 106A-E.
[281] *Industrial Relations Act 2016* (Qld) ss 52-54.

Accommodation status

Accommodation status is a protected attribute in the Australian Capital Territory. Protecting this attribute has been previously recommended in Victoria,[282] and the Northern Territory[283] has sought submissions on its inclusion. International case law has confirmed that homelessness is protected by the ICCPR as an 'other status'.[284]

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

Discussion question 38:

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

Other additional attributes

Discussion question 39:

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

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[282] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 98.
[283] Department of the Attorney-General and Justice (NT), *Modernisation of the Anti-Discrimination Act* (Discussion Paper, September 2017) 13.
[284] United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) para 18.

Exemptions

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

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

Exemptions for discrimination can be either:

a) general exemptions that apply across all areas of the Act, or

- specific exemptions applying to certain areas of activity in which discrimination is unlawful.

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

Tribunal exemptions

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

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

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[285] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).
[286] *Anti-Discrimination Act 1991* (Qld) s 206.
[287] *Anti-Discrimination Act 1991* (Qld) s 113.

What is the purpose of exemptions?

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

Some exemptions provide positive or protective measures. For example:

- the exemption for welfare measures that benefit members of a group of people with an attribute for whose welfare the Act was designed[289]
- the exemption for equal opportunity measures[290]
- the exemption that allows age-based benefits and concessions[291]
- the exemption that allows restrictions on access to sites of cultural or religious significance.[292]

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

What are the questions to consider?

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

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

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

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

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[288] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 164.
[289] *Anti-Discrimination Act 1991* (Qld) s 104.
[290] *Anti-Discrimination Act 1991* (Qld) s 105.
[291] *Anti-Discrimination Act 1991* (Qld) s 49.
[292] *Anti-Discrimination Act 1991* (Qld) s 48.
[293] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.
[294] *Anti-Discrimination Act 1991* (Qld) ss 26 and 27.

General exemptions

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

Sport

See also Areas of activity – Sport on page 127.

Currently, participation in a competitive sporting activity may be restricted to either males or females[295] if the restriction is reasonable based on a range of considerations.[296] Participation may also be restricted on the basis of gender identity (which includes intersex status)[297] if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity.[298]

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

There are two issues for consideration:

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

Competitive sporting activity

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

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

[295] *Anti-Discrimination Act 1991* (Qld) s 111(2) is only applicable to people 12 years and above.
[296] Ibid s 111(1) given the strength, stamina or physique requirements of the activity; or to people who can effectively compete; or to people of a particular age or age group; or to people with a specific or general impairment.
[297] As noted in Attributes, above, the current definition of 'gender identity' incorporates people 'of indeterminate sex', but the Review notes this is not wording used by people with variations of sex characteristics.
[298] *Anti-Discrimination Act 1991* (Qld) s 111(3).
[299] The words 'competitive sporting activity' appear in all but New South Wales and under the *Disability Discrimination Act 1992* (Cth).
[300] *Anti-Discrimination Act 1991* (Qld) s 4.

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

Strength, stamina, or physique

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

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

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

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

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[301] *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158 (17 February 2004) [19]–[20].
[302] *South v Royal Victorian Bowls*. *Association* [2001] VCAT 207.
[303] For example, International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).
[304] *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (Interim Arbitral Award) (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 154 [532]; Ross Tucker and Malcolm Collins, 'What makes champions? A review of the relative contribution of genes and training to sporting success' (2012) 46 *British Journal of Sports Medicine* 555, 560; Michael Sheard and Jim Goldby, 'Personality hardiness differentiates elite-level sport performers' (2010) 8(2) *International Journal of Sport and Exercise Psychology* 160,166.
[305] ACT Human Rights Commission, *Everyone Can Play: Guidelines for Local Clubs on Best Practice for Inclusion of Transgender and Intersex Participants*, 2017, 9.

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

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

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

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

Discussion question 40:

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

[306] Alex Azzi, 'Explainer: How will the IOC's framework impact transgender athletes?' *NBC Sports* (Webpage, 17 November 2021) <https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>.
[307] International Olympic Committee, *IOC Framework of Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations,* principle 3.1.
[308] Alex Azzi, 'Explainer: How will the IOC's framework impact transgender athletes?' *NBC Sports* (Webpage, 17 November 2021) <https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>.

Religious bodies

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

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

Ordination, training and selection of religious leaders

The Anti-Discrimination Act recognises religious rights by prohibiting discrimination on the ground of religious belief or activity[312] and by exempting religious bodies from the Act with respect to:

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

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

Discrimination based on religious doctrine and religious sensitivities

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

[309] *International Covenant on Civil and Political Rights,* art 18.
[310] *Human Rights Act 2019* (Qld) s 20.
[311] *Commonwealth of Australia Constitution Act (The Constitution)* (Cth) s 116.
[312] *Anti-Discrimination Act 1991* (Qld) s 7(i).
[313] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 115.

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

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

Discussion question 41:

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

Religious service providers

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

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

[314] *Anti-Discrimination Act 1991* (Qld) s 109.
[315] Supplementary Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 4.

A 2016 report by the South Australian Law Reform Institute[316] recommended that the religious exemption in the South Australian legislation be changed to clarify that it does not extend to discrimination in the provision of services to the general public, such as health and education,[317] or at a minimum to list specific services to be removed from the scope of the exemption, which should include education, health, housing, and adoption services.[318] A Bill was released in 2020 for public comment.[319]

Discussion question 42:

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

Religious accommodation providers

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

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

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

Discussion question 43:

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

[316] South Australian Law Reform Institute, *'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status* (Report, June 2016).
[317] Ibid 11. Noting that education has already been removed from the scope of the exemption in Queensland since 2002.
[318] Ibid 12.
[319] Equal Opportunity (Religious Bodies) Amendment Bill 2020 (SA).
[320] *Anti-Discrimination Act 1991* (Qld) ss 90 and sch Dictionary (definition of 'accommodation').

Work exemptions

Genuine occupational requirement – religious schools and other bodies

See also: General exemptions – Religious bodies.

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

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

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

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

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

The Australian Capital Territory[323] has narrower exemptions relating to religious school employment. In Tasmania, religious educational institutions cannot discriminate on any ground except for religious belief, affiliation, or activity in the area of employment.[324] This means a

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[321] *Anti-Discrimination Act 1991* (Qld) ss 25(2)-(8).
[322] Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 2002, 5010 (P Beattie).
[323] The religious bodies exemption in the Australian Capital Territory does not apply to a 'defined act' which includes employment in educational institutions – see *Discrimination Act 1991* (ACT) s 32(2).
[324] Tasmania only permits discrimination on the grounds of *religious belief or affiliation* in relation to employment, or in religious schools, rather than in relation other attributes – see *Anti-Discrimination Act 1998* (Tas) s 51. Gender discrimination is permitted where 'required by the doctrines of the religion of the institution' – s 27.

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

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

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

Discussion question 44:

- Should the religious educational institutions and other bodies exemption[329] be retained, changed, or repealed?
- If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

Working with children

A work exemption unique to Queensland[330] permits people who are sex workers (lawful sexual activity attribute), or who are transgender or intersex (gender identity attribute)[331] to be discriminated against in relation to employment that involves the care or instruction of minors. The exemption applies where it is 'reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person's actions'.

[325] Equal Opportunity (Religious Exceptions) Amendment Bill 2021 had passed the lower house at the time of publication of this paper..
[326] *Human Rights Act 1993* (NZ) s 28(2).
[327] *Equal Opportunity Act 1984* (SA) s 34(3).
[328] Expert Panel, *Religious Freedom Review* (Report, May 2018) 2, Recommendation 5.
[329] *Anti-Discrimination Act 1991* (Qld) s 25(2)-(5).
[330] *Anti-Discrimination Act 1991* (Qld) s 28.
[331] As noted in Attributes above, the current definition of 'gender identity' incorporates people with an 'indeterminate sex', but the Commission notes this is not wording that is used by people with variations of sex characteristics.

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

A working with children risk management and screening process – the 'blue card system' – has existed in Queensland since 2001.[332] It aims to create safe environments for children when participating in activities or receiving services. Blue card checks involve screening, ongoing monitoring, and risk management. As the current exemption applies only where it is reasonably necessary, having regard to all the relevant circumstances of the case, including the persons' actions the exemption appears to be redundant given the rigorous blue card screening processes that are already take place when people work with minors.

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

Discussion question 45:

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

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

Goods and services exemptions

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

Assisted reproductive technology services

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

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

Discussion question 46:

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

[333] Explanatory notes, Discrimination Law Amendment Bill 2002 (Qld) 15.
[334] Queensland Fertility Group, 'Options for single women' *Queensland Fertility Group* (Web page, 23 November 2021) <https://www.qfg.com.au/trying-to-conceive/options-for-single-women>; Queensland Fertility Group, 'Same sex IVF', *Queensland Fertility Group* (Web page, 23 November 2021) <https://www.qfg.com.au/trying-to-conceive/same-sex-ivf>.

Accommodation exemptions

Use of accommodation by sex workers

See also – Grounds of discrimination – current attributes – lawful sexual activity on page 98.

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

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

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

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

Discussion question 47:

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

[335] *Anti-Discrimination Act 1991* (Qld) s 106C.
[336] *GK v Dovedeen Pty Ltd and Anor* [2012] QCATA 128.
[337] *Dovedeen Pty Ltd v GK* [2013] QCA 116
[338] Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).
[339] Accommodation is broadly defined to include business premises, residential properties, hotel or motel, boarding house or hostel, caravan park or manufactured home site, camping sites and building or construction sites; *Anti-Discrimination Act 1991* (Qld) sch Dictionary.

State laws and programs exemptions

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

Prisoners

As noted in Part C, prisoners' rights to access the discrimination complaints process are limited by legislative barriers introduced in corrections legislation in 2008.[340] The changes made in 2008 (the 'CSA modifications') also modify the tests for direct and indirect discrimination for complaints by prisoners against prisons and service providers in prisons and community corrections.

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

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

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

Discussion question 48:

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

[340] *Corrective Services Act 2006* (Qld) pt 12A.
[341] *Corrective Services Act 2006* (Qld) s 319G.
[342] *Corrective Services Act 2006* (Qld) s 319I.
[343] *Corrective Services Act 2006* (Qld) s 319B.

Citizenship / visa status

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

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

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

> Public resources are finite. Limits must often by placed on who is eligible for government funded assistance.[344]

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

Discussion question 49:

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

Superannuation and insurance exemptions

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

The exemption has been successfully argued in other equality jurisdictions to defend an exclusion clause for people living with HIV/AIDS[346]and to deny travel insurance on the grounds

[344] Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).
[345] *Discrimination Act 1991* (ACT) s 57P.
[346] *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; [2001] FMCA 15.

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

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

Discussion question 50:

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

Other exemptions

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

Discussion question 51:

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

[347] *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936.
[348] *Metcalf v Cerberus Special Risks Pty Ltd* [2018] QCAT 175.
[349] Mental Health Council of Australia and beyondblue, *Mental Health Discrimination and Insurance: A Survey of Consumer Experiences* (2011) <https://www. beyondblue.org.au/about-us/about-our-work/discrimination-in-insurance>.
[350] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019); Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019); Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Life Insurance Industry* (Inquiry Report, March 2018); Productivity Commission (Cth), *Mental Health* (Inquiry Report, June 2020).
[351] Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021) <https://piac.asn.au/project-highlight/mental-health-and-insurance>.

Areas of activity

Goods and services

Non-profit service providers

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

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

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

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

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

Non-profit services have been confirmed to include private hospitals[354], sporting bodies[355] and hospitality venues run by clubs,[356] and are likely to also encompass aged care, social services, disability services, and art or cultural societies. The non-profit exception applies regardless of the assets and income of the relevant body. Instead, the relevant considerations are the purpose set out in the constitution or rules of the association, and the way in which income derived by the association is dealt with.[357]

[352] The 'voluntary body' exemptions in other equality jurisdictions allow for discrimination with respect to admission to membership and benefits, facilities and services received as members, but not when services are being provided to the public. See also Club membership and affairs on the following page.
[353] *Anti-Discrimination Act 1991* (Qld) s 46(2).
[354] *Haycox v The Uniting Church in Australia Property Trust (Q) trading as the Wesley Hospital* [2005] QADT 35.
[355] *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.
[356] *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.
[357] *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471 [34].

Discussion question 52:

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

Club memberships and affairs

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

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

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

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

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

[358] *Anti-Discrimination Act 1991* (Qld) ss 94 and 95.
[359] *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.

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

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

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

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

Discussion question 53:

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

Sport

See also – General exemptions – sport on page 111.

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

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

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

[360] For example, see *Sex Discrimination Act 1984* (Cth) s 4.
[361] *Disability Discrimination Act 1992* (Cth) s 4.

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

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

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

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

Discussion question 54:

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

Other areas of activity

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

Discussion question 55:

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

[362] *Disability Discrimination Act 1992* (Cth) s 28 covers discrimination in the area of sporting activity which also includes administration or coaching activity. *Equal Opportunity Act 2010* (Vic) s 71 provides for a specific sport area which covers refusing or failing to select a person in a sporting team and excluding a person from participation.
[363] *Equal Opportunity Act* (Vic) s 70; *Robertson v Australian Ice Hockey Federation* [1998] VADT 112.

Part E:
Human rights analysis

The Terms of Reference ask us to consider whether the Anti-Discrimination Act is compatible with the *Human Rights Act 2019*.

The Human Rights Act strengthens Queensland's anti-discrimination legislative framework, and like all legislation, the Anti-Discrimination Act must be interpreted compatibly with human rights. Any amendments made arising from this review must also be considered for human rights compatibility.

Notably, reviews of anti-discrimination legislation were conducted in the Australian Capital Territory and Victoria after commencement of the human rights legislation in those jurisdictions.

Human rights compatibility is a complex question that requires detailed consideration. However, the Commission has at this early stage identified the key provisions that affect human rights - see Appendix D. The Review notes that mere engagement of a human right does not mean a section is *incompatible* with human rights. Human rights can be subject to reasonable limits that can be justified in a free and democratic society.[364]

Discussion question 56:

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

[364] *Human Rights Act 2019* (Qld) s 13 (1).

Appendices

Appendix A: List of consultations

Non-government organisations

2 Spirits

Aboriginal and Torres Strait Islander Legal Service

Aboriginal and Torres Strait Islander Women's Legal Service North Queensland

Aged and Disability Advocacy Australia

Amparo Advocacy

Anti-Discrimination Law Experts Group

Associated Christian Schools

Australian Christian Higher Education Alliance

Australian Transgender Support Association

Bangladeshi Community Queensland

Basic Rights Queensland

Brisbane Bahá'í Community

Catholic Education

Caxton Legal Centre

Clubs Queensland

Coalition for Biological Reality - Australia and NZ

Council on the Ageing

Fair Go for Queensland Women

GLD Australia

HIV & AIDS Legal Service

Immigrant Women's Support Service

Independent Education Union Qld & NT Branch

Independent Schools

Indigenous Consumer Assistance Network

Intersex Human Rights Australia

Intersex Peer Support Australia

Islamic College of Brisbane

Islamic Women's Association of Queensland

IWD Brisbane Meanjin

Just.Equal

Kingston East Neighbourhood Group

Maternity Choices Australia

Maurice Blackburn

Micah Projects

National Association of People with HIV Australia

Noosa Council

One in Three Campaign

Pride in Sport

Q Shelter

QSport

Queensland Aboriginal and Islander Health Council

Queensland Advocacy Incorporated

Queensland African Community Council

Queensland Churches Together – Christian Churches

Queensland Churches Together – other faiths

Queensland Collective for Inclusive Education

Queensland Indigenous Family Violence Legal Service

Queensland Network of Alcohol and Other Drug Agencies

Queensland Positive People

Queensland Rugby League

REIQ

Respect Qld

Sikh Nishkam Society of Australia

Tenants Queensland

Townsville Community Law

Trans Health Australia

United National Association of Australia

Women's Legal Service

Youth Advocacy Centre

Youth Affairs Network Queensland

YWCA Australia

Statutory agencies

Australian Human Rights Commission

Crown Law

Legal Aid Queensland

Office of Industrial Relations

Office of the Public Guardian

Public Services Commission

Queensland Family and Children's Commission

Queensland Mental Health Commission

Queensland Small Business Commissioner

Victoria Equal Opportunity and Human Rights Commission

Victoria Legal Aid

Appendix B: Attributes in Australian jurisdictions

GROUNDS	QLD	SA	Cth	NSW	VIC	WA	TAS	ACT	NT
Accommodation status								+	
Age	+	+	+	+	+	+	+	+	+
Breastfeeding	+	+	+	+	+	+	+	+	+
Criminal record					+[365]	+[366]	+	+	+
Disability/impairment	+	+	+	+	+	+	+	+	+
Domestic or family violence								+	
Employment activity					+				
Employment status								+	
Family/caring responsibilities/family status	+	+	+	+		+	+	+	
Gender identity/gender history/transgender/record of a person's sex having been altered	+	+	+	+[367]	+	+	+	+[368]	+
Genetic information								+	
Immigration status								+	
Industrial/trade union/ employer association/activity	+				+		+	+	+

[365] Victoria includes the attribute of an 'expunged homosexual conviction'.
[366] In Western Australia, discrimination on the ground of spent conviction is made unlawful by the *Spent Convictions Act 1988* (WA), and the *Historical Homosexual Convictions Expungement Act 2018* (WA).
[367] New South Wales uses the term 'transgender', and 'recognised transgender person', and Northern Territory includes 'transsexuality' under sexuality.
[368] In addition to the attribute of gender identity, the ACT includes the protected attribute at of 'record of a person's sex having been altered under the *Births, Deaths and Marriages Registration Act 1997* or another law…'.

GROUNDS	QLD	SA	Cth	NSW	VIC	WA	TAS	ACT	NT
Intersex/sex characteristics[369]	+	+	+				+	+	
Lawful sexual activity	+				+		+		
Marital/relationship status/domestic partnership	+	+	+	+	+	+	+	+	+
Medical record							+		+
Parental status/ parenthood/carer status	+				+[370]		+		+
Physical features					+			+	
Political belief/ activity/conviction/affiliation	+				+	+	+	+	+
Pregnancy	+	+	+	+[371]	+	+	+	+	+
Profession, trade, occupation or calling								+[372]	
Publication of person's details						+[373]			+[374]
Race	+	+	+[375]	+	+	+	+	+	+
Religion/religious belief/ activity/ affiliation/conviction /religious appearance or dress	+	+[376]			+	+	+	+	+
Sex	+	+	+	+	+	+	+	+	+

[369] The definition of gender identity in Queensland includes 'indeterminate sex', which is a term not generally used by people with variations of sex characteristics. The Australian Capital Teritory and Victoria include the attribute of 'sex characteristics', and Tasmania includes 'intersex variations of sex characteristics' as an attribute.

[371] In New South Wales, pregnancy is said to be a characteristic 'that appertains generally to women' and is included in the definition of what constitutes sex discrimination.
[372] The Australian Capital Territory includes the attribute of 'profession, trade, occupation or calling' as a ground of discrimination, which covers sex workers.
[373] Western Australia created a ground of discrimination as 'the ground of the publication of relevant details of the person on the Fines Enforcement Registrar's website.'
[374] The Northern Territory creates a prohibited ground of discrimination of 'the person's details being published under the *Fines and Penalties (Recovery) Act 2001.*
[375] *Racial Discrimination Act 1975* (Cth) indicates that it includes a 'person or any relative or associate of that other person is or has been an immigrant' but only in limited circumstances.
[376] South Australia indicates that 'religious appearance or dress' is a ground of discrimination.

GROUNDS	QLD	SA	Cth	NSW	VIC	WA	TAS	ACT	NT
Gender							+		
Sexuality/sexual orientation / homosexuality	+	+	+	+	+	+	+	+	+
Spouse or partner identity		+[377]							
Association with a person identified on the basis of any of these attributes	+	+[378]	+	+	+	+	+	+	+

[377] South Australia includes discrimination on the identity of a spouse or domestic partner.
[378] South Australia includes discrimination on the ground of association with a child.

Appendix C: Current attribute definitions in Queensland

family responsibilities, of a person, means the person's responsibilities to care for or support—

a) a dependant child of the person; or

b) any other member of the person's immediate family who is in need of care or support.

immediate family, of a person, means—

(a) the person's spouse or former spouse; or

(b) a child of the person or the person's spouse or former spouse, including an exnuptial child, stepchild, adopted child, or past or present foster child of the person or the person's spouse or former spouse; or

(c) a parent, grandparent, grandchild or sibling of the person or the person's spouse or former spouse.

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

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

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

impairment, in relation to a person, means—

a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or

b) the malfunction, malformation or disfigurement of a part of the person's body; or

c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or

d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or

e) the presence in the body of organisms capable of causing illness or disease; or

f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;

whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—

g) presently exists; or

h) previously existed but no longer exists.

lawful sexual activity means a person's status as a lawfully employed sex worker, whether or not self-employed.

parent includes—

a) step-parent; and

b) adoptive parent; and

c) foster parent; and

d) guardian.

parental status means whether or not a person is a parent.

race includes—

a) colour; and

b) descent or ancestry; and

c) ethnicity or ethnic origin; and

d) nationality or national origin.

relationship status means whether a person is—

a) single; or

b) married; or

c) married to another person, but living separately and apart from the other person; or

d) divorced; or

e) widowed; or

f) a de facto partner; or

g) a civil partner.

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

religious belief means holding or not holding a religious belief.

sexuality means heterosexuality, homosexuality or bisexuality.

Appendix D: Key sections which affect human rights

The table on the following pages provides a list of key provisions when human rights are affected [section 58(5)], and the particular rights the Commission has identified in a preliminary rights identification process.

Section	Content	Rights affected under *Human Rights Act 2019*
Protected attributes (s 7)	Prohibits discrimination on the basis of 16 attributes. *Noting a potential for further attributes and change in name or definition of attributes to achieve compatibility.*	Right to equality (s 15) Freedom of thought, conscience, religion and belief (s 20) Protection of families and children (s 26) Cultural rights – generally (s 27) Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (s 28)
Work		
Genuine occupational requirements (s 25)	Allows a person to impose genuine occupational requirements for a position.	Right to equality (s 15)
Genuine occupational requirements religious school & bodies (s 25(2) to (8))	If it is a genuine occupational requirement that a person act in a way consistent with the employer's religious belief during the course of or in connection with the work, the employer may discriminate if the person openly acts in a way that is contrary to the employer's religious beliefs.	Right to equality (s 15) Freedom of thought, conscience, religion and belief (s 20)
Residential domestic services (s 26)	Allows discrimination on all grounds except race in relation to domestic workers in a person's home.	Right to equality (s 15) Privacy and reputation, including 'home' (s 25)
Residential childcare services (s 27)	Allows discrimination on all grounds except race in relation to workers caring for children in a person's home.	Right to equality (s 15) Privacy and reputation, including 'home' (s 25) Protection of families and children (s 26)

Work with children (s 28)	(1) Allows discrimination where person convicted of offence of a sexual nature involving a child, or person disqualified from working with children. (2) Allows discrimination on the basis of lawful sexual activity and gender identity in work involving the care or instruction of children.	Right to equality (s 15) Protection of families and children (s 26)
Single sex accommodation (s 30)	Allows discrimination on the basis of sex in the work area where live-in accommodation is supplied that is not equipped with separate sleeping accommodation for people of each sex, and supplying separate sleeping accommodation would impose unjustifiable hardship.	Right to equality (s 15) Privacy and reputation, including 'home' (s 25)
Workers to be married couple (s 31)	Allows discrimination on the basis of relationship status.	Right to equality (s 15) Protection of families and children (s 26)
Retiring age for partners (s 32)	Allows age limit and retiring age for partnerships.	Right to equality (s 15)
Youth wages (s 33)	Workers under the age of 21 may be remunerated according to their age.	Right to equality (s 15) Protection of children (s 26)
Special terms if job capacity is restricted by impairment (s 34)	Allows discrimination on the basis of impairment by imposing special terms where the person has a restricted capacity to do the work, or requires special conditions to do the work.	Right to equality (s 15)
Special services or facilities (s 35)	Allows discrimination on the basis of impairment in work where supplying special services or facilities for the person would impose unjustifiable hardship.	Right to equality (s 15)
Circumstances of impairment (s 36)	Allows discrimination on the basis of impairment in work if the circumstances of the impairment would impose unjustifiable hardship.	Right to equality (s 15)

Education		
Single sex, religion, impairment educational institution (s 41)	Allows an educational authority to operate an educational institution wholly or mainly for students of a particular sex, religion, or general or specific impairment.	Right to equality (s 15) Right to education (s 36) Freedom of thought, conscience, religion and belief (s 20) Protection of families and children (s 26)
Age-based admission scheme (s 43)	Allows an educational authority to select students on the basis of an admission scheme that has a minimum qualifying age.	Right to equality (s 15) Protection of families and children (s 26) Right to education (s 36)
Special services or facilities required (s 44)	Allows an educational authority to discriminate on the basis of impairment where supplying special services or facilities for the student would impose unjustifiable hardship.	Right to equality (s 15) Protection of families and children (s 26) Right to education (s 36)
Goods and services		
Assisted reproductive technology (s 45A(1))	Allows discrimination on the grounds of relationship status or sexuality.	Right to equality (s 15) Protection of families and children (s 26) Privacy and reputation (s 25) Right to health services (s 37)
Not-for-profit associations (s 46(2))	Allows discrimination by not-for-profit associations on all grounds.	Right to equality (s 15) Right to health services (s 37) Protection of families and children (s 26)
Age-based benefits (s 49)	Allows a person to supply benefits and concessions on the basis of age.	Welfare measure (s 15(5))

Children to be accompanied by an adult (s 50)	Allows a person supplying goods and services to a minor to require the minor to be accompanied by an adult if there is a reasonable risk or disruption or danger to the minor or others.	Right to equality (s 15) Protection of families and children (s 26)
Special services or facilities required (s 51)	Allows a person to discriminate on the basis of impairment in supplying goods or services, where supplying special services or facilities for the person would impose unjustifiable hardship.	Right to equality (s 15)
Superannuation		
Commonwealth exemption (s 59)	Allows discrimination on basis of sex or relationship status if the discrimination is otherwise permitted under Sex Discrimination Act.	Right to equality (s 15)
Existing superannuation fund conditions (s 60)	Allows discrimination on the basis of age or impairment in a superannuation fund condition that was in existence before 9 December 1992.	Right to equality (s 15)
New superannuation fund conditions – actuarial data (s 61)	Allows discrimination on the basis of age or impairment in a superannuation fund condition, if the condition is based on reasonable actuarial or statistical data and condition is reasonable.	Right to equality (s 15)
New superannuation fund conditions – other data (s 62)	Allows discrimination on the basis of age or impairment in a superannuation fund condition, if there is no actuarial or statistical data, but the condition is based on other reasonable data and condition is reasonable.	Right to equality (s 15)
New superannuation fund conditions – no data (s 63)	Allows discrimination on the basis of age or impairment in a superannuation fund condition, if there is no actuarial or statistical or other data and condition is reasonable.	Right to equality (s 15)

Application of Commonwealth occupational superannuation standard (s 64)	Allows discrimination on the basis of age or impairment in superannuation because of application of standard under the *Superannuation Industry (Supervision) Act 1993* (Cth).	Right to equality (s 15)
Compliance with Commonwealth legislation (s 65)	Allows discrimination on the basis of age or impairment in superannuation to comply with a Commonwealth Act or to obtain a benefit or avoid a penalty under such Act.	Right to equality (s 15)
Insurance		
Commonwealth exemption (s 73)	Allows discrimination on basis of sex if the discrimination is otherwise permitted under SDA.	Right to equality (s 15)
Actuarial or statistical data (s 74)	Allows discrimination on the basis of age or impairment, if it is based on reasonable actuarial or statistical data and condition is reasonable.	Right to equality (s 15)
No actuarial or statistical data (s 75)	Allows discrimination on the basis of age or impairment, if there is no actuarial or statistical data, and discrimination is reasonable.	Right to equality (s 15)
Disposition of land		
Disposition by will or gift (s 79)	Allows discrimination by way of a testamentary disposition or gift.	Right to equality (s 15)
Sites of cultural or religious significance (s 80)	Allows discrimination on the basis of sex, age, race, or religion if the interest in land or a building is of cultural or religious significance, and the discrimination is in accordance with the culture or doctrine of the religion, and is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.	Right to equality (s 15) Freedom of thought conscience, religion and belief (s 20) Cultural rights (s 27) Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (s 28)

Accommodation		
Shared accommodation (s 87)	Allows discrimination on all grounds, for sharing part of main home with no more than 3 people.	Right to equality (s 15) Property rights (s 24) Freedom of movement (s 19) Privacy and reputation (including 'home') (s 25)
Accommodation for workers (s 88)	Employer may provide different standards of accommodation for workers based on number of people in the worker's household, and the class of work performed or nature of position held.	Right to equality (s 15) Privacy and reputation (including 'home') (s 25) Protection of families and children (s 26)
Accommodation for students (s 89)	Education authority that operates an educational institution for students of a particular, sex, religion, or impairment may provide accommodation limited to those students.	Right to equality (s 15) Property rights (s 24) Privacy and reputation (including 'home') (s 25) Protection of families and children (s 26) Right to education – (s 36)
Accommodation with religious purposes (s 90)	Religious body that provides accommodation may discriminate if it is in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of people of the religion.	Right to equality – (s 15) Freedom of thought conscience, religion and belief (s 20) Property rights (s 24)
Accommodation with charitable purposes (s 91)	A charitable body that provides accommodation may discriminate on the basis of sex, relationship status, or age if the discrimination is in accordance with the particular purposes for which the accommodation was established by the body.	Right to equality (s 15) Welfare measures (s 15(5)) Property rights (s 24) Privacy and reputation (including 'home') (s 25) Protection of families and children (s 26)

Special services or facilities required (s 92)	Allows a person to discriminate on the basis of impairment in accommodation, where supplying special services or facilities for the person would impose unjustifiable hardship.	Right to equality (s 15) Property rights (s 24)
Club membership and affairs		
Minority cultures & disadvantaged people (s 97)	A club that operates to preserve a minority culture or prevent or reduce disadvantage suffered by people of a group, may exclude applicants who are not members of the group.	Right to equality (s 15) Welfare measures (s 15(5)) Freedom of thought conscience, religion and belief (s 20) Cultural rights (s 27) Cultural rights of Aboriginal peoples and Torres Strait Islander peoples (s 28)
Reasonable sex discrimination (s 98)	Allows a club to discriminate on the basis of sex where it is not practicable for males and females to enjoy the benefit at the same time, and both males and females can access equivalent benefits.	Right to equality (s 15)
Risk of injury (s 99)	Allows a club to exclude a minor if there is a reasonable risk of injury to a minor or other people.	Right to equality (s 15) Protection of families and children (s 26)
Special services or facilities (s 100)	Allows a club to discriminate on the basis of impairment if supplying special services or facilities needed by the person would impose unjustifiable hardship on the club.	Right to equality (s 15)
General exemptions		
Welfare measures (s 104)	May do an act to benefit group of people with an attribute for whose welfare the act was designed if the purpose is not inconsistent with the AD Act.	Right to equality (s 15) Welfare measures (s 15(5))
Equal opportunity measures (s 104)	Allows an act to promote equal opportunity for a group of people with an attribute if the purpose is not inconsistent with the AD Act.	Right to equality (s 15) Welfare measures (s 15(5))

Compliance with legislation etc. (s 106)	May do an act that is necessary to comply with court order etc. or provision of an Act existing at June 1992.	Right to equality (s 15)
Compulsory retirement age under legislation etc. (s 106A)	Allows discrimination on the basis of age by the imposition of compulsory retirement age for certain professions	Right to equality (s 15)
Citizenship or visa requirements imposed under State government policies (s 106B)	Allows discrimination on the basis of citizenship and visa status race by State government entities in relation to financial or other assistance, services, or support.	Right to equality (s 15)
Accommodation for use as sex work (s 106C)	Accommodation provider may refuse to supply accommodation, evict a person, or otherwise discriminate if the accommodation is to be used in connection with sex work.	Right to equality (s 15) Property rights (s 24) Privacy and reputation (including 'home') (s 25)
Public health (s 107)	May do an act that is reasonably necessary to protect public health.	Right to equality (s 15) Freedom of movement (s 19) Privacy and reputation (s 25) Right to liberty and security of person (s 29)
Workplace health and safety (s 108)	May do an act that is reasonably necessary to protect the health and safety of people at a place of work.	Right to equality (s 15) Right to liberty and security of person (s 29)
Religious bodies (s 109)	The Act does not apply to various activities of religious bodies – ordination etc. in relation to religious observance, as well as all other conduct that is in accordance with the doctrine of religion concerned and necessary to avoid offending religious sensitivities of people of the religion (other than in work or education).	Right to equality (s 15) Freedom of thought conscience, religion and belief (s 20) Right to health services (s 37)
Charities (s 110)	A person may include a discriminatory provision in a document that provides exclusively	Right to equality (s 15) Welfare measures (s 15(5))

	for charitable benefits, and may do an act required to give effect to the provision.	
Sport (s 111)	Allows discrimination in competitive sporting activities for people over the age of 12 years, on the basis of sex, age, impairment & gender identity.	Right to equality (s 15)
Legal incapacity (s 112)	May discriminate where legal incapacity is relevant to the transaction.	Right to equality (s 15) Protection of families and children (s 26)
Tribunal (s 113)	Tribunal may grant an exemption.	Right to equality (s 15) Fair hearing (s 31)
Process		
Making a complaint (s 136)	Complaint to be in writing.	Right to equality (s15) Fair hearing (s 31)
Commissioner must reject certain complaints (s 139)	Complaints that are frivolous, trivial, vexatious, misconceived, or lacking in substance must be rejected.	Right to equality (s15) Fair hearing (s 31)
Discretion to reject certain complaints (s 140)	Commissioner may reject complaints where there are concurrent proceedings elsewhere, or the subject has or could be effectively or conveniently dealt with by another entity.	Right to equality (s15) Fair hearing (s 31)
Commissioner must lapse certain complaints (s 168)	Complaints that are frivolous, trivial, vexatious, misconceived, or lacking in substance must be lapsed.	Right to equality (s 15) Fair hearing (s 31)
Discretion to lapse certain complaints (s 168A)	Complaints where the subject has been or could be effectively or conveniently dealt with by another entity may be lapsed.	Right to equality (s 15) Fair hearing (s 31)
Commissioner may obtain information &	Commissioner may direct a person to provide information or documents.	Privacy and reputation (s 25)

documents (s 156)		
Other sections		
Requests for information (s 124)	Unlawful to ask for information upon which discrimination might be based.	Right to equality (s15) Freedom of expression (s 21) Privacy and reputation (s 25)
Discriminatory advertising (s 127)	Offence to publish or display an advertisement that indicates a person intends to contravene the AD Act.	Right to equality (s 15) Freedom of expression (s 21)
Prisoners – *Corrective Services Act 2006* modifications to Anti-Discrimination Act		
Part 12A Discrimination Complaints	Requires prisoner to engage with internal complaints process before lodging complaint with Commission where it is a complaint about prisons, community corrections or other service providers. Modifies the tests for direct and indirect discrimination, and restrictions compensation orders of the tribunal.	Right to equality (s15) Humane treatment when deprived of liberty (s 30)