ACT LAW REFORM ADVISORY COUNCIL

Review of the *Discrimination Act 1991* (ACT)

Final Report

ACT LAW REFORM ADVISORY COUNCIL

This Report is current as at 18 March 2015 and can be viewed online at www.lawreform.act.gov.au.

DISCLAIMER: This Report has been prepared for the purpose of seeking community views. It is not a comprehensive statement of the law. It should not be used as legal advice.

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TERMS OF REFERENCE

On 15 February 2011 Simon Corbell, MLA, Attorney-General for the Australian Capital Territory (ACT), asked LRAC to broadly inquire into the scope and operation of the *Discrimination Act 1991* (ACT). The Council commenced this inquiry in February 2012, after completing its inquiry into the legal recognition of transgender and intersex people, LRAC 2: *Beyond the binary: legal recognition of sex and gender diversity in the ACT.*

On 19 February 2014, the Attorney-General extended the terms of reference to consider and propose principles that could underpin complaint and enforcement mechanisms to promote the effectiveness of the *Discrimination Act*.

ACKNOWLEDGMENTS

ACT Law Reform Advisory Council

The ACT Law Reform Advisory Council (LRAC) was established by the ACT Attorney-General the Hon Simon Corbell MLA to provide expert advice and recommendations to the Attorney-General. LRAC operates as a collaborative undertaking between the ACT Government and the ANU College of Law at The Australian National University. Together they provide the funds, resources, infrastructure and staff necessary for LRAC's operation. LRAC is supported by a part-time Executive Officer located at the ANU College of Law.

Council members

Members of LRAC are appointed by the Attorney-General for a period of up to three years, on the basis of their relevant experience and expertise. Members contribute to the work of LRAC on a voluntary basis. Members of LRAC at the time of reporting on the *Discrimination Act* review were:

Dr Lorana Bartels

Justice John Burns

Mr David Heckendorf

Mr Martin Hockridge

Mr John Kalokerinos

Assistant Commissioner Rudi Lammers, APM

Mr Stuart Pilkinton SC

Professor Simon Rice, OAM (Chair)

Ms Louise Taylor

Chief Magistrate Lorraine Walker

Dr Helen Watchirs, OAM

Ms Heidi Yates

Staff

Ms Laura Sweeney was the LRAC Executive Officer responsible for the *Discrimination Act* review. Mr Christian Dent and Ms Olivia Kelly were ANU College of Law student interns with the Law Reform Advisory Council who conducted research and worked on the review, and Ms Eugenia Kavunenko and Ms Louisa Hermitage were ANU College of Law students whose independent research contributed to the review report.

Pro bono assistance

Valuable pro bono assistance in the preparation of the review report was provided by Ms Emma Turner and her team at Russell Kennedy Lawyers. Comments and advice were generously offered by academic staff of the ANU College of Law, and by members of the Discrimination Law Experts Group.

CONDUCT OF THE INQUIRY

Publicising the inquiry

The inquiry was promoted on the LRAC website <www.lawreform.act.gov.au> and advertised in the following forums:

- ABC 666
- ABC Big Diary
- ActewAGL Community Switch
- ACT Human Rights Commission mailing list
- ACT Government consultation website, 'Time to Talk Canberra'
- Canberra Weekly
- City News
- The RiotACT
- My Community Connect
- Community Development Network ACT

Community consultation paper

A community consultation paper was released in April 2014. The paper provided information about the current scope and operation of the *Discrimination Act 1991* (ACT) ('the *Discrimination Act'*) and possible alternative approaches. It also included a list of questions about the Act to which people could respond in their submissions.

Consultation sessions

LRAC conducted six open public consultation sessions at the following locations:

- Gungahlin Community Centre (6 May 2014)
- Woden Community Services (7 May 2014)
- Tuggeranong Community & Function Centre (8 May 2014)
- Majura Community Centre (8 May 2014)
- Belconnen Community Centre (9 May 2014)
- Griffin Centre (29 May 2014)

LRAC also conducted the following consultations:

- Youth Consultation in collaboration with the ACT Youth Coalition (26 May 2014)
- ACT Government Directorates (29 May 2014)
- ACT Human Rights Commission's Race Relations Roundtable (12 June 2014)

Submissions

LRAC invited 68 ACT community organisations, religious bodies and other stakeholders to participate in this inquiry. Submissions could be made to LRAC by post, email or telephone. LRAC received a total of 25 written and oral submissions, of which three were confidential.

Submissions, comments and observations were received from the following individuals and organisations:

- ACT Bar Association
- ACT Civil and Administrative Tribunal
- ACT Health Multicultural Policy Unit
- ACT Human Rights Commission
- ACT LGBTIQ Advisory Council
- ACT Mental Health Consumer Network
- ADACAS
- Advocacy for Inclusion
- Association of Independent Schools of the ACT
- Australian Christian Lobby
- Carers ACT
- Confidential submission (x3)
- COTA ACT
- Dr Asmi Wood
- Dr Dominique Allen
- Fiona Tito Wheatland
- Freedom 4 Faith
- Mental Health Community Coalition ACT
- People With Disabilities ACT
- Radium Mardia and Liam McAuliffe
- Welfare Rights and Legal Centre ACT
- Women With Disabilities ACT
- Women's Legal Centre (ACT and Region).

Accessibility

Community members were invited to make a submission using the Translating and Interpreting Service (TIS) and National Relay Service. All publications were available in alternative formats upon request.

Ethics approval

The process for the review was approved by the Human Research Ethics Committee at The Australian National University, and the review was conducted in accordance with requirements and conditions imposed by the Committee's approval.

THE NATURE OF THE PROPOSED REFORMS

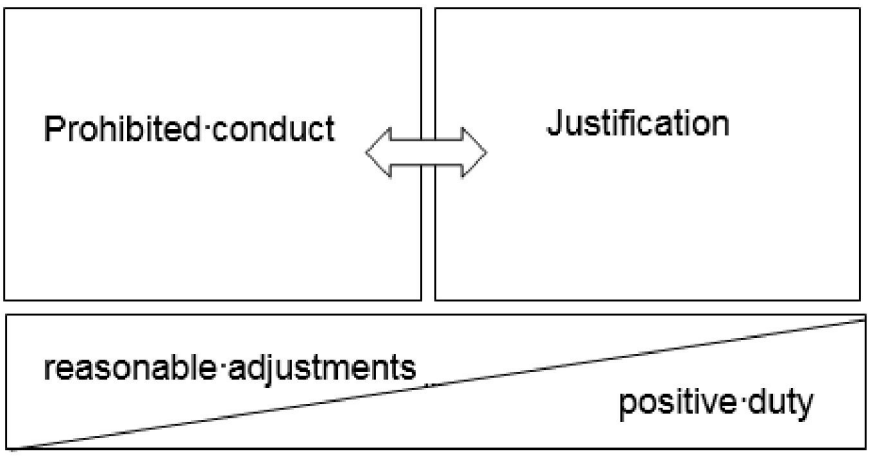
Overall structure

LRAC recommends a recraft of the *Discrimination Act* into a simplified model for identifying prohibited conduct, and allowing its justification, in a human rights-compliant manner.

The proposed model is essentially in two principal parts. The first sets out the prohibited conduct that can be complained of (discrimination, harassment, vilification, offensive conduct and victimisation), the areas of life where that conduct is prohibited, and the protected attributes for which the conduct is prohibited. The second part recognises that prohibited conduct can be justified (for example, for the enjoyment of another human right), either after the event, as a defence, or beforehand, by way of an exemption or as a special measure.

The process of establishing a justification or an exemption is the 'human rights test' of assessing whether the conduct to be justified or exempted is a necessary and proportionate limit on the right to non-discrimination. This both recognises non-discrimination as a 'cross-cutting right' – a right that underpins the enjoyment of all other rights – and allows for conduct that is in pursuit of another human right, such as freedom of expression or religion.

The two principal parts – setting out the circumstances of prohibited conduct and of its possible justification – are complemented by two measures that expand the *Discrimination Act* from merely responding to individual complaints to redressing systemic issues of discrimination: an obligation to make reasonable adjustments, and a positive duty to eliminate discrimination.



Human rights compliant

When deciding how best to reform the *Discrimination Act*, in light of the very different social, political, legal and economic environment since it was enacted in 1991, LRAC has been alert to the imperative of ensuring consistency with the ACT's 2004 *Human Rights Act*. The *Human Rights Act* guarantees non-discrimination subject only to reasonable limits as defined, and the recommended reforms are designed to give effect to that guarantee, while responding to the needs of a diverse society.

Building on existing practice

Adoption of the recommendations would put the ACT at the forefront of legislative measures in Australia to address discrimination. At the same time, the recommendations reflect wide-spread practice and commentary on anti-discrimination law. They give effect to measures that have been implemented in Great Britain and Northern Ireland, Canada and the USA and to varying degrees in other states and territories of Australia, and to measures that have been canvassed by expert commentators and were the subject of proposed reforms by the Federal Government in 2013.

Inter-related

Few of the recommendations can be adopted in isolation; the recommendations reflect an integrated conception of the *Discrimination Act* as a coherent implementation of the non-discrimination guarantee in the *Human Rights Act*, illustrated in the figure above. For example:

- because the *Human Rights Act* allows only justifiable limits on human rights, LRAC recommends that the *Discrimination Act* limit the right to non-discrimination in accordance with that test for 'justifiable limits', rather than by a variety of specific and idiosyncratic exceptions
- because the provision for 'justifiable limits' is available for all prohibited conduct, no specific exceptions are made for certain conduct, such as vilification
- the recommendation to remove specific exceptions and rely on justifiable limits is complemented by the effective operation of the exemption power, so that duty-bearers who might previously have relied on an exception after the event will be able instead to seek exemption in advance
- the effectiveness of the recommended positive duty relies on a range of recommended powers for the ACT Human Rights Commission

- recommended amendments to the objects of the *Discrimination Act* are necessary both to ensure that other provisions of the Act are interpreted in a way that is compatible with human rights, and to align the Act with the human rights guarantee of equal and effective protection against discrimination.

Resourced

The recommendations provide a practical framework for regulating conduct. Regulation is, however, not without cost, and many of the mechanisms that are necessary to monitor and enforce the *Discrimination Act* require a public commitment of resources, most particularly to the ACT Human Rights Commission. Measures such as a positive duty, the exemptions power, and the special measures power – integral to the overall scheme of the *Discrimination Act* – will fail if the ACT Human Rights Commission does not have the resources to give effect to them.

RECOMMENDATIONS

1. Objects

Recommendation 1

The *Discrimination Act* should be amended so that its objects*:*

i. are consistent with the *Human Rights Act* (ACT) 2004
ii. do not refer to particular inequalities
iii. refer to promoting the right to non-discrimination
iv. refer to achieving substantive equality, and
v. require beneficial interpretation*.*

2. Defining discrimination

Recommendation 2.1

The *Discrimination Act* should be amended to so that discrimination is defined as conduct that occurs directly, indirectly, or both directly and indirectly; where discrimination that occurs directly is unfavourable treatment as currently defined in the *Discrimination Act*; and discrimination that occurs indirectly is the imposition of a condition or requirement or practice as currently defined in the *Discrimination Act*.

Recommendation 2.2

The *Discrimination Act* should be amended to so that it protects against discrimination because of an attribute, or a combination of protected attributes.

3. Reasonable adjustments

Recommendation 3.1

The *Discrimination Act* should be amended to make explicit a duty to make reasonable adjustments to accommodate the needs that a person has because of a protected attribute.

Recommendation 3.2

Reasonable adjustments should be assessed having regard to an inclusive list of considerations such as those set out in the Victorian *Equal Opportunity Act*.

4. Prohibited conduct

Recommendation 4

The *Discrimination Act* should be amended to include harassment, offensive conduct and vilification with discrimination in that Part of the Act that identifies prohibited conduct, maintaining a distinct definition for each.

5. Positive duty

Recommendation 5.1

The *Discrimination Act* should be amended to include a positive duty to eliminate discrimination.

Recommendation 5.2:

The positive duty should apply to public authorities immediately, and should apply to private bodies and community organisations after a period of three years.

Recommendation 5.3

The ACT Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

6. Public life

Recommendation 6.1

The *Discrimination Act* should be amended to prohibit discrimination generally (in all areas of life) with an exception for private conduct.

Recommendation 6.2

If, contrary to Recommendation 6.1, the current specified areas of coverage are retained, then the *Discrimination Act* should be amended to cover conduct in the areas of organised sport, government functions, and the conduct of competitions.

7. Disability

Recommendation 7.1

The *Discrimination Act* should be amended to incorporate into the definition of disability 'disorders or malfunctions which result in a person learning differently from others'.

Recommendation 7.2

The *Discrimination Act* should be amended to protect against discrimination based on 'actual or presumed genetic predisposition to a disability'.

Recommendation 7.3

The *Discrimination Act* should be amended to incorporate into the definition of disability 'reliance on a disability aid or assistance animal'.

Recommendation 7.4

If contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, the *Discrimination Act* should be amended so that the exception for work-related

discrimination and discrimination by qualifying bodies is not available for an attribute that a 'person had in the past but no longer has'.

8. Gender identity

Recommendation 8.1

The *Discrimination Act* should be amended so that the attribute of gender identity is defined in the same terms as the definition of gender identity in the Commonwealth *Sex Discrimination Act*, but

i. referring as well to 'previous, current or presumed' gender identity, and
ii. without the phrase '(whether by way of medical intervention or not)'.

Recommendation 8.2

The *Discrimination Act* should be amended to give effect to Recommendation 27.ii of LRAC's 2012 report *Beyond the Binary* and include as a protected attribute the record of a person's sex having been altered under the ACT's *Births Deaths and Marriages Registration Act* or equivalent law or practice.

9. Religion

Recommendation 9.1

The *Discrimination Act* should be amended to separate the protected attributes of 'religious conviction' and 'political conviction' into independent protected attributes.

Recommendation 9.2

The *Discrimination Act* should be amended to restate the protected attribute of 'religious conviction' as having, or not having, a religious conviction, belief, opinion or affiliation, and engaging or not engaging in a religious activity.

Recommendation 9.3

The *Discrimination Act* should be amended to restate the protected attribute of 'political conviction' as having, or not having, a political conviction, belief, opinion or affiliation, and engaging or not engaging in a political activity.

Recommendation 9.4

The *Discrimination Act* should be amended to define religious conviction, belief, opinion, affiliation and activity to include 'spiritual conviction, belief, opinion or activity of Aboriginal and Torres Strait Islander people'.

10. Irrelevant criminal record

Recommendation 10

The *Discrimination Act* should be amended:

i. to replace the existing protected attribute of 'spent criminal conviction' and its definition with the protected attribute of 'irrelevant criminal record', defined in the

same terms that both criminal history and non-conviction information are defined in the *Working with Vulnerable People (Background Checking) Act 2011* (ACT)

ii. so that the prohibition against discrimination on the basis of irrelevant criminal record is subject to the operation of the *Working with Vulnerable People (Background Checking) Act 2011* (ACT).

11. Family, carer or kinship responsibilities

Recommendation 11

The *Discrimination Act* should be amended to replace the existing protected attribute of 'status as a parent or carer' with the protected attribute of 'family, carer or kinship responsibilities'.

12. Characteristics

Recommendation 12

The *Discrimination Act* should be amended so that the 'characteristics' extension of the definition of an attribute includes the actual characteristics of an attribute that a person has.

13. Age

Recommendation 13

The *Discrimination Act* should be amended to include an example to the effect that age discrimination includes discrimination because a person is a child or young person, and because they are an older person

14. New protected attributes

Recommendation 14.1

The *Discrimination Act* should be amended to include 'accommodation status' as a protected attribute.

Recommendation 14.2

The *Discrimination Act* should be amended to include as a protected attribute being, or having been, subjected to domestic violence or family violence.

Recommendation 14.3

The *Discrimination Act* should be amended to include 'employment status' as a protected attribute.

Recommendation 14.4

The *Discrimination Act* should be amended to protect against requests for and reliance on genetic information.

Recommendation 14.5

The *Discrimination Act* should be amended to include 'immigration status' as a protected attribute.

Recommendation 14.6

The *Discrimination Act* should be amended to include 'intersex status' as a protected attribute.

Recommendation 14.7

The *Discrimination Act* should be amended to include 'physical features' as a protected attribute.

15. Sexual harassment

Recommendation 15.1

The *Discrimination Act* should be amended to prohibit sexual harassment generally, in all areas of life.

Recommendation 15.2

If Recommendation 15.1 is not accepted and the current specified areas of coverage for sexual harassment are retained, then

1. the *Discrimination Act* should be amended so that:
    a. the meaning of 'workplace' extends to cover a place, other than the usual place of work, where work-related activities occurred, and
    b. the meaning of 'workplace participant' extends to cover a person, other than the usual workers in the workplace, who participates in a work-related activity.
2. consideration should be given to
    a. extending the prohibition to cover sexual harassment by any person in a position of authority in a club
    b. prohibiting conduct that does not occur in the presence of the person
    c. extending the prohibition to cover sexual harassment by a person performing any function or exercising any power under an ACT law or for the purposes of an ACT government program, or in the course of carrying out any other responsibility for the administration of an ACT law or the conduct of an ACT government program
    d. extending the prohibition to cover sexual harassment when a person is seeking or receiving goods, services or facilities.

16. Harassment

Recommendation 16

The *Discrimination Act* should be amended to prohibit conduct, called 'harassment', which occurs otherwise than in private in relation to a protected attribute.

17. Vilification and offensive conduct

Recommendation 17.1

The *Discrimination Act* should be amended to prohibit conduct, called 'vilification', which occurs otherwise than in private and that expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule towards or revulsion of, a person or people with a protected attribute.

Recommendation 17.2

The *Discrimination Act* should be amended to prohibit conduct, called 'offensive conduct', which occurs otherwise than in private and that offends, insults, humiliates or intimidates another person because of a protected attribute other than religious belief.

Recommendation 17.3

The offence of serious vilification should be renamed 'aggravated' or 'criminal' vilification.

Recommendation 17.4

Consideration should be given to adopting so many of the recommendations made by the 2013 report of the NSW Standing Committee on Law and Justice on serious vilification as are appropriate for the ACT.

18. Justification defence

Recommendation 18

The *Discrimination Act* should be amended to repeal Part 4 (Exceptions to Unlawful Discrimination) and to replace it with a general limitations clause that operates as 'justification defence', allowing a person who has engaged in unlawful conduct (discrimination, harassment, vilification and offensive conduct) to show that their conduct was a justifiable limitation on the right to non-discrimination having regard to the factors set out in section 28(2) of the *Human Rights Act 2004* (ACT).

19. Specific exceptions

Recommendation 19.1

Even if, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the exception for acts done under statutory authority should be repealed and replaced by an exception for an act done under an order of a court or tribunal which is mandatory and specific about conduct that must be performed in the absence of a non-discriminatory alternative.

Recommendation 19.2

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exceptions for religious bodies, educational institutions and workers are available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against

discrimination, having regard to the factors set out in section 28 *Human Rights Act2004* (ACT).

Recommendation 19.3

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for voluntary bodies:

i. be limited to allowing exclusion from membership of a person who is not a member of the group of people with a protected attribute for whose benefit the voluntary body was established
ii. be limited to the provision of benefits, facilities or services to members of the voluntary body.

Recommendation 19.4

Even if, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the exception for clubs should be repealed and reliance placed on provisions for an exemption. If that recommendation is not accepted then the *Discrimination Act* should be amended so that exceptions that allow clubs to limit membership on the basis of race, sex and disability be extended to allow clubs to limit membership on the basis of any protected attribute if the club has as its principal object the provision of benefits to people who have that attribute.

Recommendation 19.5

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for sport:

i. is available for discrimination in relation to the exclusion of people from participation in competitive sporting activity on the basis of any attribute
ii. is available only when taking into account the strength, stamina or physique of competitors can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT).

Recommendation 19.6

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then:

i. the *Discrimination Act* should be amended to repeal the exceptions for ‘genuine occupational qualifications’ and reliance placed on provisions for an exemption, but if an exception for ‘genuine occupational qualifications’ is to be retained then:
ii. the *Discrimination Act* should be amended to make a single provision for an exception for ‘genuine occupational qualifications’ that is available for all attributes.

Recommendation 19.7

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that:

i. an exception for 'inability to carry out work' is available for all attributes, and
ii. if Recommendations 3.1 and 3.2 concerning reasonable adjustments are not accepted, the exception is subject to a requirement that an employer or prospective employer must make reasonable adjustments (having regard to an inclusive list of considerations) to accommodate the needs of a person who would otherwise, because of a protected attribute, be unable to do the work.

Recommendation 19.8

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for insurance and superannuation:

i. is available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT)
ii. is assessed by reference only to actuarial or statistical data that is relevant to the circumstances.

Recommendation 19.9

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for domestic duties be available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights Act2004* (ACT).

20. Measures intended to achieve equality

Recommendation 20.1

The *Discrimination Act* should be amended so that the provision for 'measures intended to achieve equality' is not set out as an exception to the Act, but stands alone so that such measures are given their own status in pursuit of the objects of the Act.

Recommendation 20.2

The *Discrimination Act* should be amended so that 'measures intended to achieve equality' are defined in terms that are consistent with the approach to special measures in international human rights law, in particular requiring that special measures are

i. not restrictive of the rights of the affected people and communities
ii. designed and implemented on the basis of both prior consultation with affected people and communities and with their active participation.

Recommendation 20.3

The *Discrimination Act* should be amended to require a person who wishes to characterise conduct as a 'measure intended to achieve equality' to notify the ACT Human Rights Commission of that measure for its publication before implementing it, but failure to notify does not affect any later assessment of whether the conduct has the character of a measure intended to achieve equality.

21. Exemptions

Recommendation 21.1

The *Discrimination Act* should be amended so that:

i. an exemption is characterised as a justified limitation on the right to non-discrimination
ii. in exercising the exemption power, the ACT Human Rights Commission must have regard to the same factors that are set out in section 28 of the *Human Rights Act 2004* (ACT) to justify a limitation on a human right.

Recommendation 21.2

The *Discrimination Act* should be amended so that an application for an exemption, or for a further exemption, is publicly notified by the ACT Human Rights Commission which shall call for and, before deciding the exemption application, shall receive and consider, submissions that address whether the exemption should be granted.

22. Victimisation

Recommendation 22

The *Discrimination Act* should be amended so that the protection against victimisation covers:

i. not only the matters currently listed, but anything done in accordance with the Act
ii. not only detriment, but also threat of detriment
iii. not only a belief that a person proposes to do something, but also a belief that a person has done something
iv. not only conduct of and detriment to the person, but also conduct of and detriment to an associate of the person.

23. Attributed liability

Recommendation 23.1

The *Discrimination Act* should be amended so that the taking of 'all reasonable steps' is assessed by reference to an inclusive list of factors, such as those set out in section 105 of the *Anti-Discrimination Act 1992* (NT).

Recommendation 23.2

The *Discrimination Act* should be amended to require not only that the person took all reasonable steps to prevent the representative from engaging in the conduct, but also that the person exercised due diligence to avoid the discriminatory conduct.

24. Enforcement

Recommendation 24.1

As a matter of principle, the right to equal and effective protection against discrimination in the ACT, under the *Human Rights Act*, should not be protected principally by enabling a complaint to be made by a person denied that right, and procedures should be established

to relieve the burden on individuals and to establish broad and well-resourced responsibilities for protecting that right.

Recommendation 24.2

As a matter of principle:

i. others should be able to complain on behalf of a person who has experienced prohibited conduct
ii. ACAT should have the power to make an order that has broader effect than only providing remedy to an individual complainant, and that addresses circumstances that give rise to or facilitate the occurrence of prohibited conduct.

Recommendation 24.3

As a matter of principle, confidentiality should be presumed in relation to complaints made under the *Discrimination Act*, but parties should be permitted to consent to certain confidential information being made public, and confidential information should be made available for research purposes, subject to an ethics approval process.

Recommendation 24.4

As a matter of principle, a person complaining of prohibited conduct should be able to elect either to make a complaint to the ACT Human Rights Commission, or to make an application to the ACT Civil and Administrative Tribunal.

Recommendation 24.5

As a matter of principle, information and documents acquired by the ACT Human Rights Commission under its statutory power should be able to be used in later tribunal proceedings.

Recommendation 24.6

As a matter of principle, the ACT Human Rights Commission should have the power to pursue civil penalties for failure to comply with its statutory power to make recommendations.

25. Procedures

Recommendation 25.1

As a matter of principle, ACAT should be required to publish reasons in matters decided under the *Discrimination Act.*

Recommendation 25.2

As a matter of principle, in an ACAT hearing, once a complainant has established that they have been treated unfavourably, a respondent should be required to show that the protected attribute or attributes alleged by the complainant were not a reason for that treatment.

Recommendation 25.3

As a matter of principle, in response to a successful representative complaint, ACAT should have the power to recommend that certain action be taken, such as monitoring by the ACT Human Rights Commission.

Recommendation 25.4

As a matter of principle, the *Discrimination Act* should specify the factors to be taken into account when assessing damages.

Recommendation 25.5

As a matter of principle, the ACT Human Rights Commission should be empowered to intervene to make submissions on damages.

OBJECTS OF THE *DISCRIMINATION ACT*

Current Objects

The objects of an Act describe the Act's intended effect. The objects of the *Discrimination Act* are:

a. *to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs; and*

b. *to eliminate, so far as possible, sexual harassment in those areas; and*

c. *to promote recognition and acceptance within the community of the equality of men and women; and*

d. *to promote recognition and acceptance within the community of the principle of equality of opportunity for all people.*

The importance of statutory objects

Statutory objects have two important functions. First, they are a public statement by the ACT Legislative Assembly of its policy objectives in enacting a statute, setting out for the community the values that underpin the legislation. Secondly, they are essential to ensuring that the statute is implemented consistently with that policy, and consistently with human rights.

Beneficial interpretation

In the ACT (as is the case throughout Australia), legislation must be implemented in a way that is most likely to achieve its purpose (or 'aims', or 'objects').[1] The *Legislation Act 2001* (ACT) requires that 'In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.[2] As well, the *Human Rights Act 2004* (ACT) requires that 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.[3] The combined effect of the *Legislation Act* and the *Human Rights Act* is that the more closely an Act's purpose – expressed in its objects – aligns with human rights, the greater the likelihood that it will be interpreted in a way that is compatible with human rights.

[1] The common law approves reading beyond the literal meaning of the language of the statute and having regard to the purpose or 'mischief' to which the statute was directed, *Heyond's Case* (1584) 3 Co Rep 7a. This approach has been reflected in statutory interpretation legislation across all Australian jurisdictions. See *Acts*

The objects of the *Discrimination Act*, as a statement of the Act's purpose and values, are therefore an essential guide when working out the meaning of the Act.

LRAC's Community Consultation Paper asked whether there should be a beneficial interpretation provision for the *Discrimination Act* which would, for example, express a legislative intention that interpretation and implementation of the Act will promote the Act's objectives. Courts and tribunals have typically adopted a narrow approach to interpreting anti-discrimination law, despite the requirements of the *Legislation Act 2001* (ACT) and equivalent legislation in other jurisdictions.[4] The resulting failure to promote the anti-discrimination law's beneficial purpose may have disadvantaged existing complainants and discouraged potential complainants.[5] People With Disabilities ACT supports the inclusion of a beneficial interpretation clause, on the basis that 'this provision would support and work in conjunction the current common law principles and provisions of the ACT Legislation Act'.[6] The Welfare Rights and Legal Centre (ACT) similarly supports the inclusion of a beneficial interpretation provision.[7]

In LRAC's view, the *Discrimination Act* should include an explicit beneficial interpretation clause to promote the objects of the legislation, and to provide additional guidance to courts, tribunals and the community generally.

Recognition of the *Human Rights Act 2004*

The *Human Rights Act 2004* specifies that 'everyone has the right to equal and effective protection against discrimination on any ground'.[8] LRAC received a number submissions that the objects of the Act should be amended to reflect and promote this right to non-discrimination.[9]

Interpretation Act 1901 (Cth) s 15AA(1); *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Acts Interpretation Act 1931* (Tas) s 8A; *Legislation Act 2001* (ACT) s 139; *Interpretation Act* (NT) s 62A.

[2] Section 139.

[3] Section 30.

[4] In the ACT see, for example, *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 (24 July 2008). At the Commonwealth level, see, for example, *Purvis v New South Wales* (2003) 217 CLR 92.

[5] Neil Rees et al, *Australian Anti-Discrimination Law* (2nd ed, 2014), 29.

[6] People With Disabilities ACT (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014, 2 ('People With Disabilities ACT').

[7] Welfare Rights and Legal Centre (ACT) (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 30 May 2014, 2 ('Welfare Rights and Legal Centre (ACT)').

[8] Section 8(3).

[9] ACT Human Rights Commission (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014, 2 ('ACT Human Rights Commission'); Welfare Rights and Legal Centre (ACT), 2; People With Disabilities ACT, 2.

In LRAC's view, the objects of the *Discrimination Act* should be drafted to ensure that they function both as a public statement of the *Discrimination Act*'s policy objectives and underlying values, and as an aid to ensuring that the Act is implemented consistently with those values and with human rights. Further, the objects of the Act should be amended so that they are consistent with the non-discrimination guarantee in the *Human Rights Act*.

What type of equality?

The current objects of the *Discrimination Act* refer to the 'principle of equality of opportunity', which means ensuring that the same rules apply to everyone, an approach known as 'formal equality.'[10] It is now recognised that simply treating everybody in the same way, by providing the same opportunities, will not achieve equality of *outcome*, because some people start from a more disadvantaged or marginalised position than others and providing equal opportunity does not change these relative inequalities.[11] Responding to this, a widely accepted approach to equality, known as 'substantive equality',[12] recognises that it may be necessary to make adjustments, or take special measures, to address past disadvantage and enable people to have equal access to available opportunities.

A number of submissions to the LRAC inquiry recommend that the objects of the Act reflect these developments and include a commitment to promoting substantive equality.[13] People With Disabilities ACT says that, in its experience, 'reasonable adjustments and special measures are necessary to address our past disadvantage and to achieve true equality'.[14] Dr Asmi Wood proposes that the Act should refer to substantive equality, however, due to constitutional concerns, he did not consider that the Act could or should recognise a 'right' to substantive equality.[15] On this point, neither international human rights law nor countries' own laws promote 'equality' in a general sense. Rather, equality is aspired to in particular contexts, such as before the law, in employment, or relation to the enjoyment of other human rights such as access to education or participating in public life.[16]

[10] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011), 18-25.
[11] Ibid.
[12] Ibid, 25-33.
[13] See, for example, ACT Human Rights Commission, 1; Welfare Rights and Legal Centre (ACT), 2.
[14] People With Disabilities ACT, 2.
[15] Dr Dr Asmi Wood (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 5 June 2014.
[16] See, for example, *Equality Act 2010* (UK); *Equal Pay Act of 1963* (US); *Civil Rights Act 1964* (US); Canadian Charter of Rights and Freedoms (Part I of the Constitution Act 1982, being Schedule B of the *Canada Act 1982* (UK) s 2(b)).

One submission to the LRAC inquiry expresses concern about adopting an objects clause which focuses only on the right to equality and 'says nothing about the limits of the right or how it is to be balanced with other rights', thereby posing a 'serious risk that other human rights will be violated'. [17] The relationship between concurrent and competing rights is an important issue, which is addressed below when considering exceptions.

In LRAC's view, the objects of the *Discrimination Act* should explicitly encompass the substantive approaches to addressing inequality.

Equality for whom?

The current objects of the *Discrimination Act* provide a snapshot of the central policy concerns at the time it was passed, addressing equality between men and women, and sexual harassment. At the time the *Discrimination Act* was drafted, gender equality, particularly in the workplace, and the need for women to be able to work in an environment free from sexual harassment, were prominent issues. These issues remain important to the ACT community. However, since the *Discrimination Act* was drafted, other inequalities have been identified and are the subject of attention. New areas of inequality will continue to emerge. Submissions to LRAC's inquiry acknowledge the importance of the *Discrimination Act*'s current objects, however, they propose that the objects be amended to encompass existing and emerging areas of inequality.[18]

One submission cautions against using the gendered terms 'men' and 'women', and instead proposes that the Act refer to 'people of all sexualities'.[19] An earlier LRAC report on legal recognition of sex and gender diverse people demonstrated how references to 'men and women' or 'male and female' exclude people who cannot or do not identity with the gender binary.

In LRAC's view, references in the objects of the *Discrimination Act* to specific inequalities and to promoting equality between specific groups is no longer appropriate, as it risks excluding people in the ACT who are entitled to have their aspirations to equality recognised.

[17] Freedom 4 Faith (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014, 2 ('Freedom 4 Faith').
[18] Welfare Rights and Legal Centre (ACT), 2; ACT Mental Health Consumer Network (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 13 June 2014, 2; ('ACT Mental Health Consumer Network'); ADACAS (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 13 June 2014, 3 ('ADACAS'); ACT Human Rights Commission, 1-2.
[19] Radium Mardia and Liam McAuliffe (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 30 May 2014, 4 ('Radium Mardia and Liam McAuliffe').

Examples of objects

A contemporary statement of objects is in, for example, the Victorian *Equal Opportunity Act 2010*:

> (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
>
> (b) to further promote and protect the right to equal and effective protection against discrimination set out in the *Charter of Human Rights and Responsibilities*;
>
> (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
>
> (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
>
> (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
>
> (ii) equal application of a rule to different groups can have unequal results or outcomes;
>
> (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.

(Considering these objects in light of LRAC's views in this report, the particular reference to sexual harassment in (a) and (c) would not be appropriate in the *Discrimination Act*. Further objects in the Victorian Act, not set out above, relate to the functions of the relevant Commission.)

A further example is in the objects of the 2012 Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill, which were:

> (a) to eliminate discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and [International Labour Organisation (ILO)] instruments;
>
> (b) in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments;
>
> (c) to provide for the continued existence of the Australian Human Rights Commission as Australia's national human rights institution;
>
> (d) to promote recognition and respect within the community for:

(i) the principle of equality (including both formal and substantive equality); and

(ii) the inherent dignity of all people;

(e) to recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments;

(f) to enable complaints alleging unlawful conduct to be resolved in a way that emphasises alternative dispute resolution, promotes just outcomes for all parties and is low-cost and accessible to all;

(g) to encourage and facilitate compliance with the Act.

(Again considering these objects in light of LRAC's views in this report, the particular reference to sexual harassment and racial vilification in (a) would not be appropriate in the *Discrimination Act*, and reference to Australia's obligations under human rights and ILO instruments, is not relevant.)

Recommendation 1

The *Discrimination Act* should be amended so that its objects*:*

i. **are consistent with the *Human Rights Act* (ACT) 2004**
ii. **do not refer to particular inequalities**
iii. **refer to promoting the right to non-discrimination**
iv. **refer to achieving substantive equality, and**
v. **require beneficial interpretation*.***

DEFINING DISCRIMINATION

Types of discrimination: direct and indirect

In section 8, the *Discrimination Act* currently has a two-part definition of discrimination. Discrimination in the ACT occurs if a person:

- treats or proposes to treat the other person unfavourably because the other person has [a protected] attribute, or
- imposes or proposes to impose [an unreasonable] condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have a [protected] attribute …

These two parts are known as 'direct' and 'indirect' discrimination respectively, although they are not specifically referred to in the *Discrimination Act* in this way. Direct discrimination occurs when a person is treated unfavourably because they have a protected attribute. For example, it is direct discrimination in employment when an employer refuses to employ a young woman because she may go on maternity leave at some stage. Indirect discrimination occurs when someone imposes an unreasonable condition or requirement which disadvantages a person because they have a protected attribute. For example, it is indirect discrimination in provision of services if the only way to enter a public building is by a set of stairs, because this is a requirement for entry that applies to everyone but will disadvantage, for example, people confined to wheelchairs.

The distinction between direct and indirect discrimination is important to illustrate the different ways that discrimination can occur. Popular ideas of discrimination tend to the obvious unequal treatment – sometimes outright prejudice – that is direct discrimination. It is often harder to identify indirect discrimination, when a requirement or condition applies to everyone but has an unfavourable impact on some people. By distinguishing between direct and indirect discrimination, attention can be drawn to the less obvious ways in which discrimination can occur.

Another more technical reason for maintaining the distinction has been because courts have decided that, because of the way that anti-discrimination laws are drafted, these two characterisations of discriminatory conduct are mutually exclusive and conduct that is complained of has to be identified as either direct or indirect discrimination.[20]

[20] See, for example, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392-3 (McHugh J) and *Australian Medical Council v Wilson* 68 FCR 46, 55. The distinction was not recognised in the recent ACAT case of *Wang v Australian Capital Territory* [2015] ACAT 5.

But the distinction between direct and indirect discrimination can be conceptually difficult for people who want to complain about discrimination, and for people who are trying to comply with the Act and avoid discriminating. This confusion sometimes means, for example, that complaints are made about both types of discrimination, but one then has to be chosen if the complaint is taken to the tribunal. This adds to the complexity of the complaints procedure and any subsequent tribunal hearing.

In its submission relating to the Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill, the Discrimination Law Experts' Group said, 'the distinction between direct and indirect discrimination has shown itself not to be workable. It is a costly and time-consuming technical barrier to an inquiry into what actually happened'.[21] One submission to the LRAC inquiry highlights the complexity and confusion flowing from the current definition of discrimination, attributed to the lack of guidance provided by the *Discrimination Act* for people who are required to adhere to the legislation.[22] To address this issue, another submission recommends a definition of discrimination which explains both what is and *what is not* discrimination'. It states that, '[a]nti-discrimination legislation should ensure that adequate protection is given to such human rights as freedom of religion', and '[d]efining 'discrimination' to make clear that certain conduct is not discrimination is one way of balancing the goal of non-discrimination with the fundamental right to freedom of religion'.[23]

One approach to addressing the difficulty of distinguishing between direct and indirect discrimination would be to have a single definition of discrimination which clearly encompasses both types of discrimination. This approach is taken in Canada,[24] and is supported by a number of submissions to the LRAC inquiry.[25] For example, ADACAS explains that its clients are 'often subject to more generalised discrimination from a wide section of society' and the *Discrimination Act* 'should be amended in such a way that the term 'discrimination' is defined as broadly as possible'.[26] People With Disabilities ACT similarly supports this approach, on the basis that '[t]his would simplify the framing and

[21] Discrimination Law Experts Group (Submission to Attorney-General's Department), *Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011, 6.
[22] Freedom 4 Faith, 2.
[23] Australian Christian Lobby (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 30 May 2014, 2 ('Australian Christian Lobby').
[24] There is currently no statutory definition of discrimination in Canadian human rights and discrimination law, however, the Canadian Supreme Court has preferred a unified test. See, for example, *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Services Employees' Union* [1993] 3 SCR 3 and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1993] 3 SCR 868.
[25] Women With Disabilities ACT (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, May 2014, 4 ('Women With Disabilities ACT'); Council of the Ageing ACT (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, May 2014, 1 ('COTA ACT'); ADACAS, 2; Welfare Rights and Legal Centre (ACT), 3; People With Disabilities ACT, 2;
[26] ADACAS, 2.

presentation of complaints and make the *Discrimination Act* easier to understand'. [27] In its response to the Attorney-General's Department's discussion paper on the consolidation of Commonwealth anti-discrimination laws, the Discrimination Law Experts' Group said:

> A single definition will ease the regulatory burden and will assist understanding and compliance. As well as making compliance easier, a single definition of discrimination will more closely align Australia with internationally recognised definitions of discrimination, better fulfilling our international human rights treaty obligations. Such an approach is similar to s 9(1) of the [Commonwealth] *Racial Discrimination Act* and reflects the current approach in Canada, New Zealand and the USA, which makes no formal definitional distinction between direct and indirect discrimination.[28]

Another approach would be to accompany the existing definitions in section 8 with an express statement that claims of direct and indirect discrimination are not mutually exclusive. This approach was taken in the Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill, and is recommended in one of the submissions to the LRAC inquiry.[29] The ACT Human Rights Commission also expresses a preference for retaining 'both direct and indirect discrimination based on unfavourable (not less favourable) treatment', due to the 'practical challenge' of introducing a single definition of discrimination.[30]

A further alternative is to remove all references to discrimination, and instead refer to the two types of prohibited conduct as 'unequal treatment' and 'unequal impact'. This is the approach taken in the United States of America,[31] and reflects a concern that the word 'discrimination' may no longer be as effective as it was in conveying a sense of undesirable social conduct.

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[27] People With Disabilities ACT, 2.
[28] Discrimination Law Experts Group (Submission to Attorney-General's Department), *Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011, 7.
[29] Radium Mardia and Liam McAuliffe, 11.
[30] ACT Human Rights Commission, 3.
[31] *Civil Rights Act 1964* (US) 42 USC § 2000e. The concepts of disparate treatment and disparate impact have been developed and refined in the case law. On disparate impact see, for example, the seminal case of *Griggs v Duke Power Co* 401 US 424 (1971). On disparate treatment see, for example, *Teamsters v United States* 431 US 324 at 335-336 (1977).

In its report on recommendations for a consolidated federal anti-discrimination law in Australia the Discrimination Law Experts' Group recommended a definition based on the *International Labour Organization Convention* and the *Convention on the Elimination of All Forms of Discrimination against Women*.[32] Relevantly to the right of non-discrimination in the ACT Human Rights Act, such a definition is consistent with international human rights law. The definition recognises the two types of discrimination, but in a single definition and not in a mutually exclusive manner. Further, the Experts' Group recommended that discrimination should be said to occur when what is done has *more than one* 'purpose or effect' provided that the discriminatory purpose or effect is substantial, and that, for consistency with current case law, it should also make clear that the respondent's *intention as to or awareness of* the discriminatory purpose or effect is not a relevant consideration.[33]

On this latter point, section 10 of the Victorian *Equal Opportunity Act*, for example, says (for a differently defined concept of discrimination) that, '[i]n determining whether or not a person discriminates, the person's motive is irrelevant', although that is the well-accepted position in case law.[34]

In LRAC's view, the preferable means of reducing the confusion surrounding the concepts of 'direct' and 'indirect discrimination' is to adopt a definition of discrimination which makes it clear that these two ways of understanding discrimination are not mutually exclusive. However, while acknowledging the benefits of adopting a single definition of discrimination, LRAC considers that express references to 'direct' and 'indirect' discrimination perform an important educative function about the different types of discrimination. The preferable way to define discrimination is based on the approach taken by the Discrimination Law Experts' Group, explicitly identifying conduct as 'direct' and 'indirect' discrimination'.

Discrimination would therefore be defined as conduct that occurs directly, indirectly, or both directly and indirectly, where discrimination that occurs directly is unfavourable treatment as currently defined in the *Discrimination Act*, and discrimination that occurs indirectly is the imposition of a condition or requirement or practice as currently defined in the *Discrimination Act*.

[32] *Discrimination Law Experts' Group, Report on Recommendations for a Consolidated Federal Anti-Discrimination Law in Australia* (2011) 7.
[33] Ibid.
[34] See, for example, *IW v City of Perth* (1997) 191 CLR 1 at 59 (Kirby J).

Test for discrimination

The ACT, like Victoria, uses a 'detriment' test for direct discrimination, which means that discrimination occurs when a person is treated unfavourably because of their protected attribute. To succeed, a complainant must demonstrate that (1) they experienced unfavourable treatment which caused detriment, and (2) that the treatment was because of their protected attribute. By contrast, most State and Commonwealth anti-discrimination legislation uses a comparator test,[35] under which discrimination occurs when a person with a protected attribute is treated *less* favourably than another person without that protected attribute was or would have been treated. To succeed, a complainant must demonstrate that (1) they experienced treatment which caused detriment, (2) the treatment was less favourable than the treatment of a real or hypothetical other person without that protected attribute in the same circumstances, and (3) that the differential treatment was because of their protected attribute.

LRAC's inquiry received submissions expressing differing views on the test that should be used in the ACT. Women with Disabilities ACT supports the current approach and submits that the comparator test should not be adopted under the Act.[36] It provides examples of circumstances in which the comparator test would provide 'an impossible evidentiary burden on women with a disability' and considers that while '[a] comparator might be an indicator of unlawful discrimination…it is neither necessary nor decisive'.[37] Conversely, Freedom 4 Faith submits that 'the insertion of a comparator will ensure greater objectivity'.[38]

The difficulties imposed by the comparator test are well documented,[39] and were clearly demonstrated by the High Court case of *Purvis v New South Wales (Department of Education and Training*).[40] On the other hand, there has been no concern expressed in the ACT about the operation of the 'unfavourable treatment' test, or in Victoria since the test was adopted there in 2010. The Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill used the 'unfavourable treatment' test.

[35] ADA; DDA; SDA; Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1996 (NT); Anti-Discrimination Act 1991 (QLD); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas) ; Equal Opportunity Act 1995 (VIC); Equal Opportunity Act 1984 (WA).
[36] Women With Disabilities ACT, 5.
[37] Women With Disabilities ACT, 5.
[38] Freedom 4 Faith, 2.
[39] See, for example, *Queensland Health v Forest* (2008) 249 ALR 145; Standing Committee on Legal and Constitutional Affairs, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, Final Report, 2009: 43.
[40] (2003) 217 CLR 92.

Multiple attributes

The *Discrimination Act* defines discrimination by reference to 'an attribute', and does not explicitly recognise that discrimination may occur because of one or more, or a combination of, attributes (known as 'intersectional' discrimination). In practice, it can be difficult or inaccurate to try to ascribe to a single attribute the reason for conduct, or the reason for suffering the effect of a requirement. The options for a complainant are to make one complaint based on one attribute, or to make multiple complaints. For example, a person may not be able to tell whether the discriminatory conduct they experienced was because of their age, or their disability, or some combination of the two. Although the ACT Human Rights Commission usually accepts and conciliates a complaint that identifies multiple possible attributes to explain discriminatory conduct, a complaint that proceeds to the ACT Civil and Administrative Tribunal (ACAT) must identify a single attribute.

All submissions that LRAC received on this issue support amending the Act to include conduct on the basis of more than one attribute.[41] Women With Disabilities ACT makes a substantial submission; in its view, 'the express proscription of multiple discrimination within the *Discrimination Act* … will have a positive impact and result in a sustainable overall increase in wellbeing in the Territory'.[42] Citing a report of the UN Expert Group Meeting on Gender and Racial Discrimination, Women With Disabilities ACT explains that '[m]ultiple discrimination reveals 'both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination''.[43] It adds that multiple discrimination 'has an exponential impact on the lives of individuals and actively creates a dynamic of disempowerment'.[44]

Some submissions give examples of circumstances in which recognition of discrimination on the basis of multiple attributes would have benefited victims of discrimination. For example, People With Disabilities ACT provides an example of a woman with a disability who was discriminated against in her parenting role on the grounds of both her disability and her sex, and observes that 'many older people experience discrimination in circumstances in which it is difficult to determine whether the discrimination is due to their age or their disability'. Welfare Rights and Legal Centre (ACT) provides a similar example.

[41] COTA ACT, 1; Welfare Rights Legal Centre (ACT), 4; People With Disabilities ACT, 2; Radium Mardia and Liam McAuliffe, 11; Dr Asmi Wood, 5 June 2014.
[42] Women With Disabilities ACT, 10.
[43] Ibid, 9.
[44] Ibid.

The Multicultural Health Policy Unit, ACT Health, draws attention to the experiences of people from culturally and linguistically diverse (CALD) backgrounds. It explains that '[p]eople from CALD backgrounds may not be able to tell whether discriminatory conduct they may experience was because of their race, religious affiliation, immigration status (if included …), or a combination of these and related attributes'. [45]

In relation to older people, COTA ACT notes that that 'a person may, for instance, be discriminated against because of any one (or more than one) of a number of protected characteristics, such as age, disability (which often accompanies ageing), sex, having carer responsibilities (also a common characteristic of mature age), and certain physical characteristics (such as an older appearance, grey hair, etc)'. COTA ACT considers that '[t]o require a complainant to pick just one aspect is unreasonable, as they can't be expected to guess the motivations of the discriminator (which may not be based on a single characteristic either)'. [46]

In the Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill, discrimination was defined to cover 'a particular protected attribute, or a particular combination of 2 or more protected attributes'. Similarly, in Canada, discrimination includes conduct 'based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'.[47]

In LRAC's view, the *Discrimination Act* should define discrimination to protect against discrimination because of an attribute, or a combination of protected attributes. Such an amendment would avoid the need for complainants to make multiple complaints when they cannot easily or accurately attribute the discriminatory conduct to one single attribute.

Recommendation 2

Recommendation 2.1

The *Discrimination Act* should be amended to so that discrimination is defined as conduct that occurs directly, indirectly, or both directly and indirectly, where discrimination that occurs directly is unfavourable treatment as currently defined in the *Discrimination Act*, and discrimination that occurs indirectly is the imposition of a condition or requirement or practice as currently defined in the *Discrimination Act*.

[45] Multicultural Health Policy Unit, ACT Health, (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014, 1 ('Multicultural Health Policy Unit, ACT Health').
[46] COTA ACT, 1.
[47] *Canadian Human Rights Act,* RSC 1985, c H-6, s 3.1.

Recommendation 2.2

The *Discrimination Act* should be amended to so that it protects against discrimination because of an attribute, or a combination of protected attributes.

Duty to make reasonable adjustments

Overview

Under the *Discrimination Act*[48] and other Australian anti-discrimination laws,[49] a person has a defence to a disability discrimination complaint if they can show that it would have caused them unjustifiable hardship to do what was necessary to enable a person with a disability to do any of: carry out work; access premises, accommodation, facilities and education; receive goods and services; or enjoy the benefits of club membership. Enabling a person with a disability in this way is commonly referred to as 'making reasonable adjustments'.

There is currently no explicit obligation in the *Discrimination Act* to make reasonable adjustments, although it has been suggested in the ACT that such an obligation could be implied.[50] Making reasonable adjustments is referred to only in the context of a defence to a disability complaint, when doing so would cause unjustifiable hardship thereby excusing discriminatory conduct. It has commonly been inferred from the existence of this defence that there is actually a duty to make reasonable adjustments, but this inference was doubted by the High Court in the decision of *Purvis*.[51] In response to the High Court's comments, and on the recommendation of the Productivity Commission,[52] the Commonwealth *Disability Discrimination Act* was amended so that making reasonable adjustments is now an express duty under that Act, and unjustifiable hardship is an exception to that duty; a similar duty exists in the Victorian *Equal Opportunity Act*.[53]

Any claimed unjustifiable hardship in making reasonable adjustments is assessed taking into account the nature of the disability, the cost of making the adjustment(s), the likely benefit or detriment for all people concerned, and the financial circumstances of the person claiming unjustifiable hardship.

[48] *Discrimination Act 1991* (ACT) s 47.
[49] See, for example, the *Disability Discrimination Act 1992* (Cth) s 21B, 22(4), 23(2)(b), 24(2).
[50] *Couper v ACT Housing* [2004] ACTDT 4, [55]-[58].
[51] *Purvis v New South Wales* (2003) 217 CLR 92.
[52] Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004).
[53] *Equal Opportunity Act 2010* (Vic) ss 20, 33, 40 and 45.

An express duty?

Rather than relying on an implied duty to make reasonable adjustments, the *Discrimination Act* could be amended to take the same approach as that in the Commonwealth *Disability Discrimination Act,* the Victorian *Equal Opportunity Act*, and in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill.

Submissions to LRAC on this issue support a positive duty to make reasonable adjustments to redress a power imbalance between employers or service providers and people with protected attributes. For example, People with Disabilities ACT notes that a duty to make reasonable adjustments 'recognises in most situations employers and service providers are in a more powerful position than a person with a disability and are better placed than the person with a disability to take the action which would turn a potential situation of discrimination into one of non-discrimination'. In its view, '[t]his would reduce discrimination and reduce the need for people with disabilities to make discrimination complaints'.[54] Similarly, ADACAS submits that, in some cases, people with disabilities are 'effectively excluded from society', due to 'the failure of others to include them or make reasonable adjustments to cater for their needs'.[55] On this basis ADACAS recommends that '[t]he requirement to make reasonable adjustment should be made explicit in the Act'.[56] COTA ACT agrees that the law should include a duty to make reasonable adjustments.[57] An example of a reasonable adjustment for a person with a disability in a workplace is when an employer provides a visually impaired employee with screen-reading software.

The ACT Human Rights Commission submits that an explicit duty to make reasonable adjustments would 'bring greater certainty and clarity to this issue, and would harmonise ACT discrimination law with Commonwealth law'. [58] **In LRAC's view** it would, as well, be consistent with a commitment to substantive equality and with Australia's obligations under the UN *Convention on the Rights of Persons with Disabilities*.

[54] People With Disabilities ACT, 2-3.
[55] ADACAS, 3.
[56] Ibid, 2.
[57] COTA ACT, 1.
[58] ACT Human Rights Commission, 4.

Social model of disability

Although LRAC recommends below that a duty to make reasonable adjustments be available in relation to all protected attributes, a particular reason for such a duty in relation to the attribute of disability is that it gives effect to a social model of disability. On this model, a disability is understood to exist not because of a medical diagnosis, but 'when a person's impairment interacts with societal barriers in a society that has not been designed to accommodate the access needs of people with impairments'.[59] The United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) is based on the social model of disability,[60] and the ACT Human Rights Commission submits that 'it is both appropriate and desirable to amend the definition of disability to better reflect the *Convention on the Rights of Persons with Disabilities*'.[61] The social model of disability is recognised in the Commonwealth *Disability Discrimination Act*, and in the Victorian *Equal Opportunity Act*, and is discussed further below specifically in relation to the attribute of disability.

In LRAC's view, it is desirable to create an explicit, general duty to make reasonable adjustments. To do so would be consistent with a commitment to substantive equality and with the majority of submissions received on this issue.

Assessing reasonableness

If the *Discrimination Act* were to be amended to state an explicit duty to make reasonable adjustments, consideration must be given to what constitutes a 'reasonable adjustment'. Under the Victorian *Equal Opportunity Act*, the reasonableness of an adjustment is decided having regard to 'all relevant facts and circumstances', including factors such as the person's circumstances and the nature of their disability; the nature of the required adjustment; the financial circumstances of the employer or service provider and the effects on the service provider of making the adjustment; the number of people who would benefit from or be disadvantaged by the adjustment; and the consequences for the employer or service provider and the person of making the adjustment.

[59] Advocacy for Inclusion, 5.
[60] See, for example, Article 1 of the UN Convention on the Rights of Persons with Disabilities, which provides that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. In addition, the preamble recognizes that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.
[61] ACT Human Rights Commission, 13.

The ACT Human Rights Commission, and People With Disabilities ACT, support an approach to reasonableness based on the Victorian *Equal Opportunity Act* which lists a variety of factors to be taken into account when assessing the reasonableness of adjustments.[62] They do, however, recommend some modifications to the list of factors to be considered. For example, the Commission notes that under the Victorian *Equal Opportunity Act*, an education authority is not required to make reasonable adjustment if they are complying with the Federal Disability Standards for Education, a provision intended to address the potential for a direct operational inconsistency between the federal standard and the state obligation.

As a matter of principle, the Commission considers that a harmonised approach between the Commonwealth and State and Territories 'is both appropriate and desirable', [63] but is concerned that the Standards have been 'interpreted in a restrictive manner, and one that is inappropriate for the ACT when taking into account the ACT's status as a human rights jurisdiction with an explicit right to education'. On this basis, it submits that 'the Federal Standards be used as a component or factor to be taken into account when assessing the reasonableness of adjustments, rather than used as a complete defence'.[64]

People With Disabilities ACT also supports the approach taken in the Victorian *Equal Opportunity Act*, although it considers that the person's specific disability 'is irrelevant to this assessment' because such an approach 'resort[s] to the medical model of disability which is contrary to the human rights approach of the ACT'.[65] It submits that '[t]he assessment should focus on the access barriers and the required adjustments and not on the person's disability'. It also recommends 'that the assessment should include the consequences of not making the adjustment or accommodation as well as the consequences of doing so'.[66]

In LRAC's view, the assessment of reasonableness should be modelled on the approach taken by the Victorian *Equal Opportunity Act*, subject to the refinements suggested by the ACT Human Rights Commission and People With Disabilities ACT.

Scope of the duty

There are attributes other than disability on the basis of which a person is excluded from, or has limited access to, work, goods, services, accommodation and so on, such as a person's age, sex and carer's responsibilities. The *Discrimination Act* could require reasonable adjustments to be made to accommodate the needs of people with these other attributes.

[62] ACT Human Rights Commission, 5; People With Disabilities ACT, 3.
[63] ACT Human Rights Commission, 5.
[64] Ibid.
[65] People With Disabilities ACT, 3.
[66] Ibid.

An example of making reasonable adjustments for people with attributes other than disability is in a workplace where the first language of many employees is Arabic, but written workplace health and safety (WHS) instructions are provided to employees only in English; a reasonable adjustment would be for the employer to provide a version of the written WHS instructions in Arabic. Another example is a workplace where promotion to a particular position requires a specified minimum years of unbroken service; a reasonable adjustment would be to allow a candidate who did not meet the service requirement because they are young, or have taken parental leave, to rely on other means to establish their ability to perform in the higher position.

A number of submissions to the LRAC inquiry support the inclusion of a general duty to make reasonable adjustments to accommodate the needs of a person based on other attributes.[67] The ACT Human Rights Commission supports such a provision 'in the interests of substantive equality', and considers that the duty should be placed on employers and ACT Public Authorities.[68] The Commission supports an approach in which the employer is required to make a reasonable adjustment for a person, irrespective of the person's attribute, 'to determine whether they can carry out the essential nature of the work', and recognises the merit in applying this exception to all attributes.[69] This proposal is supported by Dr Asmi Wood[70] and COTA ACT.[71]

The Multicultural Health Policy Unit, ACT Health, also submits that such a duty would be 'in line with the concept of substantive equality', and suggests that consideration be given to amending the Act to include a duty to make reasonable adjustments to accommodate the needs of people with low English proficiency (written or oral) when providing essential services.[72] This suggestion accords with a confidential submission made to LRAC, which highlights the discrimination experienced by people with low English proficiency in the context of the provision of health care services.[73]

[67] See, for example, ACT Human Rights Commission, 5; Women's Legal Centre (ACT and Region), 1-4; Women With Disabilities ACT, 4; COTA ACT, 1-2; People With Disabilities ACT, 3 and Radium Mardia and Liam McAuliffe, 11.
[68] ACT Human Rights Commission, 5.
[69] Ibid, 38.
[70] Dr Asmi Wood, 5 July 2014.
[71] COTA ACT, 4.
[72] Multicultural Health Policy Unit, ACT Health, 1.
[73] Confidential submission, 29 April 2014.

Both the ACT Human Rights Commission and the Women's Legal Centre (ACT and Region) highlight 'the value of imposing a positive duty in relation to accommodating the needs of people based on their family and caring responsibilities'.[74] The Women's Legal Centre (ACT and Region) prefers an approach which imposes 'a positive duty that an employer is required to make reasonable adjustments to accommodate a person who would otherwise be unable to do the work'.[75] In its experience, 'the current exception is often relied upon to terminate a person's employment, without adequate consideration of reasonable adjustments'. The Centre provides two case studies to demonstrate how such a duty would promote the efficient resolution of workplace disputes, by increasing 'the number and quality of negotiated outcomes', and by promoting a systemic 'change in ACT workplace culture to recognise the importance of providing flexible work arrangements for all employees'.[76]

COTA ACT supports the inclusion of an express duty to make reasonable adjustments to accommodate the needs of a person based on other attributes. It notes, however, that that the word 'reasonable' is open to wide interpretation, and suggests that '[t]he duty to make reasonable adjustments should not be onerous enough to influence an employer not to employ (or not to continue to employ) a person who requires 'adjustments' (it is difficult enough for older people and people with disabilities to obtain and maintain employment already)'. It says that '[i]deally, assistance should be available, particularly for small employers, when they are required to make such adjustments'.[77] Dr Asmi Wood similarly considers that a duty to make reasonable adjustments should take into account the subjective circumstances of the party. For example, he considers that the duty should be less onerous for small business. [78]

In LRAC's view, creating an enforceable duty to make adjustments in relation to other attributes would broaden the scope of the existing law in a positive way, in that it would encourage reasonable steps to be taken to enhance access for a much wider range of people to areas such as work, goods, services and accommodation.

[74] Women's Legal Centre (ACT and Region), 2-4.
[75] Ibid, 14.
[76] Ibid, 3.
[77] COTA ACT, 2.
[78] Dr Asmi Wood, 5 June 2014.

Recommendation 3

Recommendation 3.1

The *Discrimination Act* should be amended to make explicit a duty to make reasonable adjustments to accommodate the needs that a person has because of a protected attribute.

Recommendation 3.2

Reasonable adjustments should be assessed having regard to an inclusive list of considerations such as those set out in Victorian *Equal Opportunity Act*.

Other prohibited conduct

As well as discrimination, the *Discrimination Act* prohibits 'harassment', and 'vilification', considered separately below. These other forms of prohibited conduct are covered in separate parts of the *Discrimination Act*, and only apply to limited grounds (sexual harassment, and vilification on the basis of race, sexuality, gender identity and HIV/AIDS status). Harassment can be said to be direct discrimination (unfavourable treatment because of a protected attribute), but the *Discrimination Act* does not explicitly prohibit harassment on the basis of, say, age or disability. Nor does it explicitly prohibit vilification on the basis of, say, disability or sex.

Rather than the current approach of dealing with 'discrimination' 'harassment', and 'vilification' separately, it is possible to include all these forms of prohibited conduct in the same part of the *Discrimination Act*, so that all prohibited conduct is applicable to all the attributes. A recommendation is made below that a category of prohibited conduct be identified as 'offensive conduct', and that too would be included as a form of prohibited conduct.

On this approach, each form of prohibited conduct would be defined separately, making clear that each is conceptually different, although related. This is similar to the approach taken in the Exposure draft of Commonwealth Human Rights and Anti-Discrimination Bill, and in the Tasmanian and the Northern Territory anti-discrimination legislation.[79] In his submission not the LRAC inquiry, Dr Asmi Wood notes that harassment and vilification are quite broad terms, and drafters should be mindful of not narrowing them. [80]

[79] Exposure Draft, Human Rights and Anti-Discrimination Bill 2012 (Cth); *Anti-Discrimination Act* 1992 (NT); *Anti-Discrimination Act 1998* (Tas).
[80] Dr Asmi Wood, 5 June 2014.

People With Disabilities ACT proposes that harassment and vilification on the basis of a disability should be included in the definition of disability discrimination. [81] COTA ACT similarly considers that harassment and vilification should be included as conduct that is prohibited in relation to the same attributes as are protected from discrimination, 'if it simplifies the law and enables potential discriminators to better understand the range of behaviour that is discriminatory'.[82] COTA ACT notes that '[h]arassment on the basis of age (including disrespectful language and conduct) is not uncommon in, for instance, employment situations, and should be treated in the same way as racial vilification'.[83]

In LRAC's view, the inclusion of harassment, offensive conduct and vilification in the same part of the *Discrimination Act* as discrimination would simplify the structure of the Act, making clear the conduct that is prohibited by the Act, and making it more straightforward to cover conduct relating to other attributes, such as age-based harassment or disability vilification. A 'reasonable limits' provision, discussed below, would be available for all types of prohibited conduct. The specific definitions of harassment, offensive conduct and vilification are discussed below.

Recommendation 4

The *Discrimination Act* should be amended to include harassment, offensive conduct and vilification with discrimination in that Part of the Act that identifies prohibited conduct, maintaining a distinct definition for each.

[81] People With Disabilities ACT, 3.
[82] COTA ACT, 2.
[83] COTA ACT, 2.

A POSITIVE DUTY

Overview

Australian anti-discrimination laws prohibit discrimination on the basis of certain personal attributes. In this way, the laws are 'negative' because they require a person 'not to discriminate'. Like most discrimination laws, the approach in the ACT is complaints-based, and relies on a person making a complaint of discrimination to the ACT Human Rights Commission. If the Commission is unable to resolve the complaint through conciliation, the person may make a claim in ACAT. The complaints process, with its emphasis on early conciliation and resolution when possible, can work well and achieve a result that satisfies the person who has complained. But the time, cost, process and stress can be a burden, particularly when conciliation does not lead to resolution and operate as a disincentive. A further consideration is that individual complaints offer individual redress and are not a mechanism for addressing systemic discriminatory practices.

An alternative to a reactive approach to discriminatory conduct is to encourage positive, pre-emptive action that will avoid or reduce the incidence of discrimination. A positive duty shares responsibility for giving effect to anti-discrimination law between an individual who complains about discrimination, and people and organisations who have a duty to not discriminate in the first place. There is, in fact, a positive 'human rights' duty on public authorities in the ACT; a public authority must not act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right.[84] A person aggrieved by a failure to do so can seek relief in the Supreme Court.[85]

As the ACT human rights duty shows, a positive duty can exist for government and public bodies in the provision of services. It can, however, be applied more widely to the private and community sectors; many community sector organisations are already 'public authorities' under the ACT *Human Rights Act* for the purposes of the human rights duty.[86]

[84] Section 40B.
[85] Section 40C.
[86] *Human Rights Act 2004* (ACT) s 40(1)(g).

A positive duty to eliminate discrimination, and/or to promote equality (it is expressed in different terms, discussed further below), exists in a number of countries, including the United Kingdom, Northern Ireland and Canada.[87] The United Kingdom, for example, imposes a 'public sector equality duty' on public bodies in relation to the attributes of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The United Kingdom provides detailed legislative guidance on how to carry out those duties, for example, through auditing practices that identify specific barriers.

In Victoria, after a recommendation from the Equal Opportunity Review, the Victorian *Equal Opportunity Act* imposes a positive duty on public bodies and businesses to 'take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible'.[88] The measures that are required depend on factors such as the organisation's size, resources and circumstances, and are monitored by the Victorian Commission.[89]

The Victorian *Equal Opportunity Act* gives these examples:

- a small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
- a large company undertakes an assessment of its compliance with the *Equal Opportunity Act*. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

Discussion

A positive duty is usually spoken of, in international experience, legislation and submissions, as one that either promotes equality or prevents discrimination. These are two different desired outcomes, conceptually and practically. Discrimination and its prevention have a reasonably clear and defined meaning, in Australian law and internationally. Equality, on the other hand, can encompass non-discrimination, but can refer as well to aims such as equality of treatment, equality of opportunity, and equality of outcomes.

[87] *Employment Equity Act*, SC 1995, c 44; *Equality Act 2010* (UK) s 149; *Northern Ireland Act 1998* (UK) s 75.
[88] *Equal Opportunity Act 2010* (Vic), ss 14, 15(2).
[89] Ibid s 15 (6).

Some submissions to LRAC are understandably wary of uncertainty relating to the meaning that can be given to equality. Freedom 4 Faith, for example, submits that it is 'hard to know what it [a positive duty] means in practice', due to the conceptual ambiguity associated with the concept of equality.[90] The ACT Bar Association supports a positive duty 'to take reasonable steps to prevent unlawful discrimination',[91] distinguishing between a duty to prevent discrimination and a duty to promote equality.

It is significant that the duty in the Victorian *Equal Opportunity Act* relates not to promoting equality but to eliminating discrimination, and that is the approach that LRAC proposes.

Submissions to the LRAC inquiry address these questions: whether the *Discrimination Act* should include a positive duty and, if so, to whom the duty should apply, what it should require, and who should be responsible for monitoring compliance.

A positive duty?

The majority of submissions to LRAC support amending the *Discrimination Act* to create a positive duty, and highlight the benefits of such a duty.[92] For example, People With Disabilities ACT submits that the current complaints model can be 'daunting and uninviting for many people with disabilities' and considered that '[t]he onus should not be on the person with a disability to initiate the process to have a discriminatory situation rectified because they are not in a position to do this'.[93] Dr Dominique Allen provides an example of how the positive duty would work in practice, by requiring duty-holders 'to assess the impact of their policies and procedures on equality of opportunity at the outset rather than waiting for a complaint to be made,[94] and the Welfare Rights and Legal Centre provides a case study in which a positive duty would have enabled the resolution of a complaint at an earlier stage and without the need for their client 'to go through the stress of another complaint'.[95] The Multicultural Health Policy Unit, ACT Health, submits that the introduction of a positive duty 'is preferable to placing responsibility on people with low English proficiency to demand such resources, or make complaints if such resources are not available',[96] adding that '[t]he inclusion of a positive duty could reduce the number of complaints'.[97]

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[90] Freedom 4 Faith, 3.
[91] ACT Bar Association (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 30 May 2014, 2 ('ACT Bar Association').
[92] ACT Human Rights Commission 8; Women's Legal Centre (ACT and Region), 4; COTA ACT, 2; ADACAS, 2; Welfare Rights and Legal Centre (ACT), 7; People With Disabilities ACT, 3; Multicultural Health Policy Unit, ACT Health, 2; ACT Bar Association, 2; Dominique Allen (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, 29 May 2014, ('Dominique Allen').
[93] People With Disabilities ACT, 3.
[94] Dominique Allen, 2.
[95] Welfare Rights and Legal Centre (ACT), 7.
[96] Multicultural Health Policy Unit, ACT Health, 2.
[97] Ibid.

Dr Asmi Wood considers that a positive duty should not be introduced, on the basis that it might create unrealistic expectations and doesn't take into account the constraints of federalism. As an alternative, he suggested that an aspirational statement might be included.[98]

Freedom 4 Faith submits that a positive duty 'is problematic because it suggests that some rights should trump other rights', which 'goes against the long standing premise of human rights law that there is no hierarchy of human rights'. LRAC notes that the position in international law is that the right to non-discrimination is a 'cross-cutting right', a right that underpins the enjoyment of all other rights; the ACT *Human Rights Act*, for example, guarantees everyone the right to enjoy their human rights 'without distinction or discrimination of any kind'. [99] A duty to promote non-discrimination gives effect to the ACT's obligation to ensure that that is the case.

In LRAC's view, introducing a positive duty to eliminate discrimination would lessen the burden on individual complainants who may lack the capacity to make and pursue a complaint, but are nonetheless vulnerable to discrimination. It would also promote consistency between the *Discrimination Act* and the *Human Rights Act*, which guarantees everyone the right to enjoy their human rights without discrimination.

A sufficiently prescriptive duty, supported by guidelines and implemented in stages, (discussed below) would, in LRAC's view, address concerns that a positive duty would be insufficiently clear for duty holders, particularly as the duty would be to eliminate discrimination, not to promote equality. Further, in LRAC's view, the recommended inclusion of a justification defence, and the availability of an exemption, would ensure that other rights in the *Human Rights Act* are adequately recognised.

The potential cost to business is likely to be minimal, due to existing policies and training programs that would encompass these obligations. The overall effect is likely to be a reduction in the incidence of discrimination. The potential scope of the duty, including to whom it should attach, is considered below.

[98] Dr Asmi Wood, 5 June 2014.
[99] *Human Rights Act 2004* (ACT) s 8(2).

Duty holders

A 'duty holder' is a person or entity with an obligation to not engage in unlawful conduct; the complementary concept is a 'rights bearer' – the person to whom the obligation is owed. Submissions to LRAC express conflicting views about who should be the bearers of a positive duty: who is required to adhere to a positive duty to eliminate discrimination? For example, the ACT Human Rights Commission supports imposing a positive duty to promote equality on both the public and private sectors; however, it considers that, at first instance, this broader duty should apply only to Public Authorities and 'include mandatory reporting on progress towards defined equality goals'.[100] In the Commission's opinion, this would be consistent with the duty placed on Public Authorities under Part 5A of the *Human Rights* (to act in a way that is compatible with a human right and, in making a decision, to give proper consideration to a relevant human right).[101] It adds that '[a] narrower duty could be made explicit for private sector bodies in the same way as is done by s 15 of the *Equal Opportunity Act 2010* (Vic).[102] The Women's Legal Centre (ACT and Region) agrees with the Commission's submission that 'a staged roll-out of a positive duty, beginning with ACT Public Authorities, would be a sound approach'.[103]

COTA ACT submits that a positive duty should apply to government and public agencies, and to a lesser extent (taking into account financial and resource limitations) to business and the community sector.[104] It considers that '[t]his would be a way of encouraging organisations to promote equality, rather than punishing them for not doing so'.[105]

People With Disabilities ACT agrees that the duty should apply to the ACT Government and its authorities and entities, but considers that '[c]are needs to be taken with the framing of this duty if it is also extended to include community organisations funded by the Act Government'. It is 'reluctant to endorse the extension of this duty to small community organisations and small private sector organisations as to do so may invite resistance to the idea which would result in the recommendation being rejected'.[106]

The ACT Bar Association considers that a positive duty should extend to 'all organisations, whether public or private'.[107]

[100] ACT Human Rights Commission, 8
[101] Ibid.
[102] Ibid, 9
[103] Women's Legal Centre (ACT and Region), 4.
[104] COTA ACT, 2.
[105] Ibid.
[106] People With Disabilities ACT, 3.
[107] ACT Bar Association, 2.

Duty holders' compliance with a positive duty in, for example, the UK and Northern Ireland, is supported by training, and the publication of guidelines and case studies, to explain steps that can be taken and conduct that should be avoided to give effect to the duty.[108]

In LRAC's view, the positive duty to eliminate discrimination should, at first instance, apply to Public Authorities. As noted by the ACT Human Rights Commission, this would be consistent with the existing obligation on public authorities, under Part 5A of the *Human Rights Act*, to act in a way that is consistent with human rights and to give proper consideration to human rights. The duty should then be extended to private sector bodies and community organisations, with sufficient resources allocated to providing these bodies with education and training about the requirements of the duty in advance of their becoming subject to it. Duty holders should be supported by training, and the publication of guidelines and case studies by the ACT Human Rights Commission, which would need to be sufficiently funded for this purpose.

Monitoring compliance

The effectiveness of a duty to eliminate discrimination will depend on the effectiveness of the compliance mechanisms. The ACT Human Rights Commission submits that '[t]o ensure the success of such a measure, resources of the kind used by Fair Work Australia would be required, to educate the public about anti-discrimination obligations'. [109] Similarly the Women's Legal Centre (ACT and Region) is concerned to ensure that if a positive duty is introduced, the 'Commission or another body be appropriately resourced to monitor the performance of Public Authorities in relation to any new duty'. [110]

The Fair Work Ombudsman's *Guidance Note 6, Discrimination Policy*, is a useful guide as to the regulatory powers that can be used to eliminate discrimination. A range of measures includes workplace audits; inspectors' powers to enter workplaces, seek evidence, interview people and require production of documents; caution notices; enforceable undertakings; proceedings for breach; and the imposition of civil penalties. Similar powers, including the

[108] For example, the UK Government Equalities Office has published a number of 'quick-start guides' to assist public bodies in understanding the equality duty (see, for example, *Equality Act 2010: Public Sector Equality Duty, What Do I Need to Know?* At <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85041/equality-duty.pdf>) In addition, the Equality and Human Rights Commission has published a series of non-statutory guides relating to engagement with the duty, technical guidance, meeting the duty in policy and decision-making and the equality objectives. (See, for example, *Meeting the Equality Duty in Policy and Decision-Making* at <http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/PSED/ehrc_psed_policy_making_web.pdf>).

[109] ACT Human Rights Commission, 9.

[110] Women's Legal Centre (ACT and Region), 4.

power to conduct public inquiries, were included in the Victorian *Equal Opportunity Act 2011* but were removed by the newly elected Coalition government in 2011. The Labor government elected in 2015 has undertaken to reinstate those powers.

In LRAC's view, the ACT Human Rights Commission should be empowered with a range of regulatory tools, including powers to require regular organisational reporting on steps taken to comply with the duty, and to investigate and report an organisation's failure to act on the duty. LRAC notes the necessary resource implications in enabling the Commission to regulate a positive duty.

Recommendation 5

Recommendation 5.1

The *Discrimination Act* should be amended to include a positive duty to eliminate discrimination.

Recommendation 5.2

The positive duty should apply to public authorities immediately, and should apply to private bodies and community organisations after a period of three years.

Recommendation 5.3

The ACT Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

AREAS OF DISCRIMINATION

Overview

The *Discrimination Act* prohibits discrimination based on protected attributes in certain areas of public life, such as work, education, access to premises, goods, services and facilities, accommodation, clubs, requests for information, and advertising. A person making a complaint is required to show that an act of unlawful discrimination occurred in one of these specific areas. The coverage of these prescribed areas is exhaustive: if conduct is not within one of these specific areas, it is not covered by the *Discrimination Act*.

The *Discrimination Act* makes exceptions that allow discrimination in some of the prescribed areas because if the conduct occurs in certain areas of private life, such as employment for domestic duties, residential care of children, and providing domestic accommodation.[111] This carves out 'private' areas from the more general 'public' areas that are covered by the Act.

Discussion

Areas of public life

An alternative approach is to prohibit discrimination that is connected with any area of public life, and to provide an exception for private conduct. Under this approach, a person making a complaint would not need to show that an act of discrimination occurred in a specific area of life. Instead, there would be a presumption of coverage under the *Discrimination Act*, but one that would not apply if the conduct occurred in a private context. This is the approach taken in the Commonwealth *Racial Discrimination Act*, under the Victorian *Racial and Religious Tolerance Act*, and under the Queensland *Anti- Discrimination Act* for sexual harassment. It was also the approach that was taken for discrimination generally in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill.

[111] *Discrimination Act 1991* (ACT) Pt 4.

The majority of submissions to LRAC support prohibiting discrimination in all areas of life with an exception for private conduct.[112] The ACT Human Rights Commission cites the recent VCAT decision of *Bakopoulos v Greek Orthodox Parish of Mildura (Human Rights)*[113] as an example of why this approach is preferable. In that case, a woman was denied financial membership of a Parish Committee and claimed that she had been discriminated against on the basis of her sex, but the Tribunal found that the conduct did not fall within any of the areas in which discrimination is prohibited by the *Equal Opportunity Act*. The Commission comments, without elaboration, that 'there may need to be further consideration about the extent of this new coverage, and whether exceptions need to be revisited'. [114]

COTA ACT also supports prohibiting discrimination in all areas of public life, noting that '[a]ged care is an area where discrimination does (anecdotally) occur based on, for instance, gender identity or intersex status, and this should be prohibited within the Act, where it occurs in aged care facilities or in home-based aged care services'.[115]

A further example is in the provision of government services. Although they are covered to an extent under the area of 'goods, services or facilities', this coverage can sometimes be unclear, because carrying out a government 'function' does not necessarily involve providing a service. A police officer is not obviously providing a service to someone whom they arrest, although they may then be providing a service to the same person once the person is in custody.[116] It may be considered anomalous that a government that promotes non-discrimination in the community is able to discriminate in its own operations.

Another example is the conduct of a competition, such as a talent quest or film festival. It is unlikely that the conduct of a competition is the provision of goods, services or facilities, or that the participants are involved in work. Although the conduct of a competition can be as public in nature as an employment relationship, or more so, organisers seem to be not covered by the *Discrimination Act*.

[112] COTA ACT, 2; Welfare Rights and Legal Centre (ACT), 8; People With Disabilities ACT, 4; ACT Bar Association, 3; Dr Asmi Wood, 5 June 2014; ACT Human Rights Commission, 10.
[113] [2014] VCAT 323 (26 March 2014).
[114] ACT Human Rights Commission, 10.
[115] COTA ACT, 2.
[116] See, for example, *Commission of Police v Estate of Russell* (2002) 55 NSWLR 232.

People With Disabilities ACT expresses 'cautious' support for an amendment to prohibit discrimination in all areas of life with an exception for private conduct, noting that this approach 'is the approach taken to the criminal law and other laws and has worked practically in the area of race discrimination'.[117] Conversely the Australian Christian Lobby and Freedom 4 Faith consider that prohibiting discrimination in all areas of public life would leave the Act 'dangerously open-ended',[118] and 'create significant uncertainties in determining where the distinction between public and private life should lie'.[119]

In Freedom 4 Faith's view, leaving the courts to determine the boundaries between public and private on a case by case basis is not an appropriate alternative, because 'the law needs to be comprehensible'. Further, it considers that such a requirement would impose 'unreasonable burdens on small business and non-profit organisations to seek legal advice which may, in any event, be tentative and qualified'.[120]

In LRAC's view the current scope of the coverage provided by areas specified under the *Discrimination Act* is inconsistent and uncertain, and this has led to uncertainty about when discrimination is unlawful. Submissions offered examples, noted above. LRAC considers that the Act should be amended to prohibit discrimination in all areas of public life. This would reflect the objectives of the Act to eliminate discrimination and promote consistency with the right to non-discrimination in the *Human Rights Act*. Such an amendment would make it clearer to people when the Act applies, and excluding private conduct would allow for discrimination in circumstances that are personal. Further, in LRAC's view, an approach which addresses public life generally will mean that the operation of the ACT's anti-discrimination law is closer to other laws that regulate people's conduct, such as criminal law and torts, and is following the lead given by other legislation.

In response to concerns that coverage in all areas of public life would be burdensome to some groups, LRAC considers that few activities or groups of people or interests are not currently covered by the *Discrimination Act*, and that the amendment is intended to achieve greater clarity and certainty of coverage. The discussion below, about the alternative approach of extending coverage to just three further specified activities, illustrates how broad the current coverage is.

[117] People With Disabilities ACT, 4.
[118] Australian Christian Lobby, 3.
[119] Freedom 4 Faith, 3-4.
[120] Ibid.

Specified areas

If the recommended approach of prohibiting discrimination in all areas of public life is rejected, and the current approach of covering specified areas is retained, additional areas could be covered to better protect against discrimination in public life. While the Australian Christian Lobby submitted that the coverage of the Act 'is currently adequate' and 'should not be extended, nor should any new areas of coverage be created',[121] other organisations submitted that certain areas should be included in the scope of coverage. For example, the ACT Human Rights Commission submitted that the exercise of government functions should be included.[122] Three prospective areas of additional coverage – the exercise of government functions, sport and competitions and festivals – are considered below.

Exercise of government functions

If the *Discrimination Ac*t is not amended to prohibit discrimination in all areas of life, the ACT Human Rights Commission supports an amendment to cover the exercise of government functions, noting that this would harmonise the *Discrimination Act* with the obligation on Public Authorities under Part 5A of the *Human Rights Act* to act in accordance with the human right of non-discrimination. The Welfare Rights and Legal Centre (ACT) similarly recommends that '[i]f the current specified areas of coverage are retained, then the area of government functions or services should be added.[123] People With Disabilities ACT also supports amending the *Discrimination Act* to apply to 'activities of the ACT Government, government authorities and Government owned corporations and business enterprises including activities which they fund and sponsor'.

As well, each of the ACT Human Rights Commission, People With Disabilities ACT, and the Welfare Rights and Legal Centre (ACT) proposes that the *Discrimination* Act should explicitly apply to the AFP when they are exercising a function under a Territory law. The ACT Human Rights Commission notes, without elaboration, that complexities could arise from such an amendment.[124] The Commission also suggests, without elaboration, that coverage under the *Discrimination* Act could include Corrections ACT.[125]

[121] Australian Christian Lobby, 2.
[122] ACT Human Rights Commission, 13.
[123] Welfare Rights and Legal Centre (ACT), 8.
[124] ACT Human Rights Commission, 13.
[125] Ibid.

In LRAC's view, if the *Discrimination Act* is not amended to prohibit discrimination in all areas of life then it is desirable to amend the *Discrimination Act* to include government functions, and explicitly to include the exercise by the AFP of a function under a Territory law. Doing so would address any uncertainty in coverage, would ensure that the government does not discriminate in its own operations, and would promote consistency with public authorities' non-discrimination obligations under the *Human Rights Act.* In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Competitions

People With Disabilities ACT supports explicit coverage of the conduct of competitions, but says, without elaboration, that an amendment that covers competitions such as talent quests and film festivals would need to be 'drafted with care'.[126]

In LRAC's view, if the *Discrimination Act* is not amended to prohibit discrimination in all areas of life then it is desirable to amend the *Discrimination Act* to include 'competitions' as an area of activity within which prescribed conduct is unlawful. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Sport

Currently, discrimination in sport is not explicitly covered by the *Discrimination Act*, but seems to be covered as an activity under 'goods, services or facilities'. This is impliedly recognised by the fact that there is an exception for aspects of sporting activity. In some other anti-discrimination legislation sport is specifically referred to as an area of public life.[127]

The ACT Human Rights Commission suggests that '[e]xplicitly including 'sport' as an area of public life in its own right would improve understanding of the scope of the law'.[128] It notes that 'Victoria and the United Kingdom both prohibit discrimination on the basis of sex (and gender identity in Victoria) in relation to sport. However, both jurisdictions provide an exception, permitting exclusion from a sporting activity in which the strength, stamina or physique of competitors is relevant'.[129] In The Commission's opinion, the inclusion of such provisions 'may be an improvement on the current ACT law'; however, there are matters that could be further improved by amendments to the ACT exception provisions, discussed further below.

[126] People With Disabilities ACT, 4.
[127] See, for example, *Disability Discrimination Act 1992* (Cth) s 3.
[128] ACT Human Rights Commission, 13.
[129] ACT Human Rights Commission, 10.

People with Disabilities ACT strongly supports the extension of the coverage of the Act to sport, citing 'instances of discrimination in sport such as the exclusion of persons using hand cycles from participation in the Canberra Marathon despite the fact that this event is sponsored by the ACT Government.'[130]

In LRAC's view, if the *Discrimination Ac*t is not amended to prohibit discrimination in all areas of life then it is desirable to amend the *Discrimination Act* to explicitly include 'sport' as an area of activity within which prescribed conduct is unlawful its own right, rather than relying on coverage under 'goods services or facilities', because to do so would improve public understanding of the scope of the law. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Recommendation 6

Recommendation 6.1

The *Discrimination Act* should be amended to prohibit discrimination generally (in all areas of life) with an exception for private conduct.

Recommendation 6.2

If, contrary to Recommendation 6.1, the current specified areas of coverage are retained, then the *Discrimination Act* should be amended to cover conduct in the areas of organised sport, government functions, and the conduct of competitions.

[130] People With Disabilities ACT, 25.

PROTECTED ATTRIBUTES

Overview

The *Discrimination Act* prohibits discrimination on the basis of the following personal attributes (set out in alphabetical order): age; breastfeeding; disability; gender identity; industrial activity; pregnancy; profession, trade, occupation or calling; race; relationship status; religious or political conviction; sex; sexuality; spent conviction; and status as a parent or carer.

The protected attributes have not been comprehensively reviewed since the *Discrimination Act* commenced more than 20 years ago. The following discussion draws on recent law reform and consultation in other Australian jurisdictions to recommend possible amendments to the attributes currently protected against discrimination.

Model

The list of protected attributes in the *Discrimination Act* is currently exhaustive, meaning that discrimination on the basis of attributes other than those listed is permitted. In contrast to this approach, Women With Disabilities ACT submitted that the Act 'should include a non-exhaustive list of protected attributes on the basis of which a claim of unlawful discrimination lies'.[131] Dr Asmi Wood similarly submits that the list of attributes should be inclusive, not exclusive. In his view, the potential for other attributes should be a question for the common law.[132]

In LRAC's view, that the *Discrimination Act* should not adopt a non-exhaustive list of protected attributes, even though a non-exhaustive list of protected attributes would be consistent with the *Human Rights Ac*t guarantee that '*everyone* has the right to equal and effective protection against discrimination *on any ground*' (emphasis added).[133] A non-exhaustive list of protected attributes risks creating uncertainty about when discrimination is and is not lawful, and risks failing to provide sufficient guidance to duty-bearers about the scope of their responsibilities. LRAC considers that the ACT Government should instead refine and add to the existing attributes as discussed below, and adopt other means of strengthening the protections against discrimination that are recommended elsewhere, such as a positive duty.

[131] Women With Disabilities ACT, 6.
[132] Dr Asmi Wood, 5 June 2014.
[133] S 8(3).

Existing attributes

Defining disability

It is unlawful under the *Discrimination Act* to discriminate on the basis of disability. The definition of disability includes the total or partial loss of a bodily function or body part; themalfunction, malformation or disfigurement of a body part; the presence of organisms that cause or are capable of causing disease; an illness or condition which impairs thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour and intellectual disability or developmental delay.[134] As noted by the ACT Human Rights Commission, it is unclear whether conditions such as dyslexia and attention deficit hyperactivity disorder fall within the definition of 'disability'.[135]

Submissions on this issue address two important questions; first, whether the definition of disability should incorporate disorder or malfunctions which result in a person learning differently from others and, secondly, whether the definition should reflect the medical model or the social model of disability.[136] A further issue, not addressed in submissions, relates to genetic status.

Disorder or malfunction

There have been significant developments in state and federal disability legislation since the definition of disability in the *Discrimination Act* was drafted. For example, the definition of disability in the Commonwealth *Disability Discrimination Act* was amended in 2009 to include 'behaviour that is a symptom or manifestation of the disability'. More recently, the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill 2012 included in its definition of disability a 'disorder or malfunction which results in a person learning differently from a person without the disorder or malfunction' in place of the term 'intellectual disability or developmental delay'.[137]

[134] *Discrimination Act 1991* (ACT), s 5AA.
[135] ACT Human Rights Commission, 13.
[136] A useful explanation of the shift from the medical model of disability to the social model of disability is provided in the Report on the United Nations Consultative Expert group Meeting on International Norms and Standards Relating to Disability, A/AC.265/CRP.4 <http://www.un.org/esa/socdev/enable/disberk0.htm>. As the report explains, under the 'medical model', 'disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care'. By contrast, the 'social model of disability 'recognises that the circumstances of people with disabilities and the discrimination they face are socially created phenomena and have little to do with the impairments of people with disabilities'.
[137] Human Rights and Anti-Discrimination Bill 2013 (Cth) cl 6 (definition of 'disability').

The ACT Human Rights Commission and the Welfare Rights and Legal Centre (ACT and Region) agree that the definition of disability should be extended to include 'a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction'.[138] LRAC notes that including reference to disorder and malfunction may tend to reinforce a negative, 'medical' model of disability, and fail to acknowledge the more positive social model, as is discussed below. Nevertheless, LRAC did not receive any submissions that the detailed, medically-driven definition of disability be abandoned. Rather, submissions favour the adoption of other measures, such as reasonable adjustments, to promote an understanding of the social dimensions of disability.

In LRAC's view, the current definition of 'disability' should be amended to clearly incorporate disorders or malfunctions which result in a person learning differently from others. This would provide greater clarity as to the scope of the definition, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination.

Social model of disability

Both People With Disabilities ACT and Advocacy for Inclusion submit that the definition of disability 'should be amended to use the social model of disability'.[139] On this model, disability is understood to occur 'when a person's impairment interacts with societal barriers in a society that has not been designed to accommodate the access needs of people with impairments'. [140] '[M]edical diagnosis is not significant' and '[d]isability is an aspect of identity rather than an object for medical intervention'.[141] Advocacy for Inclusion explains that under this model, '[d]iscrimination occurs on the basis of a person's impairment and related impairment support or access needs, as well as the basis of a disability arising out of an inaccessible society'.[142] People With Disabilities ACT notes that by contrast medical model 'is deficient in that it excludes many people who cannot demonstrate a medical diagnosis'.[143]

Significantly, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is based on the social model of disability.[144] The ACT Human Rights Commission submits that 'it is 'both appropriate and desirable' to amend the definition of disability to better reflect the *Convention on the Rights of Persons with Disabilities*'.[145]

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[138] Welfare Rights and Legal Centre (ACT and Region), 9; ACT Human Rights Commission, 13.
[139] Advocacy for Inclusion, 5;
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] People with Disabilities ACT, 4.
[144] See, for example, Article 1 of the UN Convention on the Rights of People With Disabilities which provides that Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments

The social model of disability is recognised in federal *Disability Discrimination Act*, which defines discrimination to be both less favourable treatment of a person because of their disability, and also less favourable treatment of a person with a disability *because of the failure to make reasonable adjustments* for the person. The latter definition focuses not on the person's disability, but on the environment in which a person with a disability is engaging in activity (such as employment). The Victorian *Equal Opportunity Act* similarly recognises the social model of disability by requiring the making of reasonable adjustments, although the approach to drafting is different and perhaps preferable, defining discrimination to be any of direct discrimination, indirect discrimination, and contravention of an obligation to make reasonable adjustments.

Dr Asmi Wood proposes that the definition of disability be as broad as possible, and left to the courts to be evaluated on a number of bases including expert evidence when necessary. He notes, for example, that in New South Wales the definition of mental health is based in common law, whereas elsewhere, legislative definitions are more complicated and have the potential to exclude people.

In LRAC's view, the definition of disability should be amended to reflect the social model of disability, and to pursue substantive equality, by requiring the making of reasonable adjustments; in Recommendations 3.1 and 3.2, that the *Discrimination Act* should be amended to make explicit a duty to make reasonable adjustments to accommodate the needs that a person has because of any protected attribute, not only disability.

Genetic predisposition

In 2008 the Australian Genetic Discrimination Project reported clients' perceptions and experiences regarding alleged differential treatment associated with having genetic information (eg neurological conditions and familial cancers).[146] Specific incidents of alleged negative treatment occurred in areas of life such as insurance, employment, and health services.

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which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. In addition, the preamble recognizes that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

[145] ACT Human Rights Commission, 13.

[146] Sandra Taylor et al, 'Investigating Genetic Discrimination in Australia: A Large-Scale Survey of Clinical Genetics Clients' (2008) 74(1) *Clinical Genetics* 20. See also Margaret Oltlowski, Sandra Taylor and Kristine Barlow-Stewart, 'Australian Empirical Study into Genetic Discrimination' (2002) 4 *Genetics in Medicine* 392.

In 2009 the *Disability Discrimination Act* was amended in response to recommendations made by the Australia Law Reform Commission in its 2003 report *Essentially Yours: The Protection of Human Genetic Information in Australia*.[147] Amendments clarified that the *Disability Discrimination Act* applies to discrimination on the basis of a genetic predisposition to a disability. The Victorian *Equal Opportunity Act* was enacted with the same provision to protect against discrimination on the basis of a genetic predisposition to a disability.

A further amendment to the *Disability Discrimination Act* inserted, as an example of a discriminatory request for information, that an employer 'may not require a prospective employee to provide genetic information if the employer intends to use that information to unlawfully discriminate against the employee on the ground of a disability of the employee'.

In 2014 the Queensland government announced it would look into the need for people undergoing genome sequencing to be protected from discrimination by insurance agencies and employers as the tests become more widely available.[148]

There seem to be at least two aspects of genetic testing that have to be addressed. One can be characterised as 'genetic status', which is when a person has the attribute of an actual or presumed genetic predisposition to a disability; this has been addressed in the Commonwealth *Disability Discrimination Act* and the Victorian *Equal Opportunity Act* by making clear that that is within the definition of disability. Another aspect is what can be characterised as 'genetic information', when – regardless of whether a person has an actual or presumed genetic predisposition to a disability – a person is discriminated against in circumstances that relate to genetic information. Such circumstances may be an unjustifiable requirement to undergo genetic testing, or an unjustifiable reliance on genetic information that indicates not a disability but the absence or presence of some other personal characteristic.

In LRAC's view, the *Discrimination Act* should be amended to clarify that the protected attribute of disability includes actual or presumed genetic predisposition to a disability; this would give effect to law reform recommendations from previous inquiries, and to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Further, the *Discrimination Act* should be amended to protect against reliance on genetic information, which is discussed below as a new attribute.

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[147] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* 96 (2003).

[148] Worthington Tolzek, *Health Minister Considers Laws to Cover Genome Sequencing,* ABC <http://www.abc.net.au/news/2014-10-24/health-minister-considers-laws-to-cover-genome/5840932>.

Related attributes

Separately from disability discrimination, the *Discrimination Act* makes it unlawful to discriminate on the basis that a person with a disability has an assistance animal or other aid associated with the disability.

Submissions on this issue emphasise the importance of protecting people against discrimination on the basis of a disability aid,[149] however they differ on whether this protection should be included in the definition of disability. The courts have been critical of an approach that separates disability discrimination from discrimination on the ground of possessing an assistance animal or other disability aid.[150] The ACT Human Rights Commission says that it is not aware of any situations in which this separation had caused significant issue, noting that '[o]ne advantage of retaining separate provisions is that it may emphasise the need for formal training of assistance animals'.[151] Overall, it considers that this issue 'may ultimately be a matter best determined based on consultations with people with a disability'.[152] Dr Asmi Wood considers that protection from discrimination for people with a disability aid or assistance animal should not be included in the definition, because the types of discrimination are conceptually different.[153]

Advocacy for Inclusion submits that an approach to the definition of disability based on the social model, noted above, would cover access and support requirements, including assistance animals, hearing loops, wheel chair or other mobility aid access.[154]

In LRAC's view, the definition of disability in the *Discrimination Act* should be amended to incorporate discrimination on the ground of possessing an assistance animal, or other aid. This would respond to the courts' criticisms and more closely reflect the social model of disability, discussed above. It would also eliminate any confusion caused by its being the subject of a separate provision.

Past disability

In the *Discrimination Act*, a reference to a protected attribute includes a reference to an attribute that a 'person had in the past but no longer has'. This does not, however, apply to work-related discrimination and discrimination by qualifying bodies. For example, under the *Discrimination Act* an employer is able to discriminate against a person because of a back complaint the person once had but no longer has.

[149] See, for example, COTA ACT, 2; Advocacy for Inclusion, 5.
[150] See, for example, Collier J in *Forest v Queensland Health* 161 FCR 152 at [173].
[151] ACT Human Rights Commission, 14.
[152] ACT Human Rights Commission, 14.
[153] Dr Asmi Wood, 5 June 2014.
[154] Advocacy for Inclusion, 5.

Submissions on this issue unanimously agree that the exception should be removed.[155] In support of removing the exception, Advocacy for Inclusion submits that, applying the social model of disability, 'if discrimination arises on the basis of an impairment that no longer exists, the presence of disability continues due to social barriers … and the Act should protect against this'.[156] People With Disabilities ACT cites reports of the Commonwealth and ACT Human Rights Commissions which demonstrate that 'employment discrimination complaints represent the largest percentage of their complaints and that these complaints are the most intractable and difficult to resolve'.[157] In its experience, 'the discriminatory practices and attitudes of qualifying bodies are a major barrier to the employment of people with disabilities'.[158]

In LRAC's view, the *Discrimination Act* should be amended so that there is no longer an exception for work-related discrimination and discrimination by qualifying bodies on the basis of an attribute that a 'person had in the past but no longer has'. Removing this exception be more consistent with the social model of disability discussed above, could give more people access to work and reduce prejudice, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination.

If the person is unable to carry out the duties because of a disability, then discrimination can be justified; if the person is able to carry out the duties then a past disability ought not be a barrier to their work.

Recommendation 7

Recommendation 7.1

The *Discrimination Act* should be amended to incorporate into the definition of disability 'disorders or malfunctions which result in a person's learning differently from others'.

Recommendation 7.2

The *Discrimination Act* should be amended to protect against discrimination based on 'actual or presumed genetic predisposition to a disability'.

[155] COTA ACT, 2; Advocacy for Inclusion, 5; People With Disabilities , ACT Human Rights Commission, 14;
[156] Advocacy for Inclusion, 5.
[157] People With Disabilities ACT Inc, Submission**,** *Response to ACT Law Reform Advisory Council (LRAC) Review of Discrimination Act 1991 (ACT),* Community Consultation Paper LRAC 3CP.
[158] People With Disabilities ACT, 4.

Recommendation 7.3

The *Discrimination Act* should be amended to incorporate into the definition of disability 'reliance on a disability aid or assistance animal'.

Recommendation 7.4

If contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the *Discrimination Act* should be amended so that the exception for work-related discrimination and discrimination by qualifying bodies is not available for an attribute that a 'person had in the past but no longer has'.

Gender identity

The *Discrimination Act* prohibits discrimination on the ground of 'gender identity' in the areas of work, education, access to premises, provision of goods, services, facilities and accommodation and club membership and benefits.

'Gender identity' is defined in the *Discrimination Act* by reference to the binary gender construct of female and male:

- the identification on a genuine basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)
    - by assuming characteristics of the other sex, whether by way of medical intervention, style of dressing or otherwise; or
    - by living, or seeking to live, as a member of the other sex; or
- the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)
    - by assuming characteristics of that sex, whether by way of medical intervention, style of dressing or otherwise; or
    - by living, or seeking to live, as a member of that sex.

In 2013, the Commonwealth Sex *Discrimination Act* was amended to provide federal discrimination protection for people on the basis of their gender identity without relying on

the male/female binary as a point of reference.[159] The definition of 'gender identity' in the *SDA* is:

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

This definition focuses on the subjective characteristics of the person – that is, on their own identity – rather than on any departure from a male/female norm. Tasmania recently amended its anti-discrimination law to prohibit discrimination on the basis of gender identity, using a definition similar to that in the Commonwealth *Sex Discrimination Act*.[160]

In 2010 the *Discrimination Act* was amended to replace the attribute of 'transsexuality' with the attribute of 'gender identity'.[161] In its 2012 report *Beyond the binary: legal recognition of sex and gender diversity in the ACT*, the Law Reform Advisory Council recommended the following amendments to the *Discrimination Act*:

- amending the attribute of gender identity to refer instead to sex and gender diversity.
- adding as a new protected attribute the record of a person's sex having been altered under the *Births Deaths and Marriages Registration Act* or equivalent law or practice
- adding as a new protected attribute a person's physical presentation (including physical features, manner of speech, and dress) when it is not consistent with the person's recorded birth sex or with the conventional physical presentation of a person of a particular sex.

The ACT Government noted these recommendations pending the current review of the *Discrimination Act*.[162]

Since that recommendation, the Commonwealth *Sex Discrimination Act* has made it unlawful to discriminate against a person on the basis of 'gender identity'; a term that is slightly different from that recommended earlier by LRAC. Submissions are clearly in support of the general approach, although not the precise definition, of the *Sex Discrimination Act*, and LRAC agrees that the better term to identify the protected attribute is 'gender identity', as is currently the case in the *Discrimination Act*.

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[159] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).
[160] *Anti-Discrimination Amendment Act 2013* (Tas).
[161] *Human Rights Commission Legislation Amendment Act 2010* (ACT).
[162] ACT Government, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT, Law Reform Advisory Council, Revised Government Response* (November 2013), 12-13.

Although a number of submissions recommend that the existing definition of 'gender identity' should be amended to draw on the 'best practice' definition of gender identity in the *Sex Discrimination Act*,[163] many, such as the Women's Legal Centre (ACT & Region) and ACT LGBTIQ Ministerial Advisory Council, emphasise that the Act should not refer to medical intervention, 'given the ACT's specific choice to move *away* from the medicalisation of gender-related issues'.[164] In their submission to LRAC, Radium Mardia and Liam McAuliffe strongly agree that the definition of the protected attribute of gender identity be amended, and recommend an approach based on the definition in the *SDA.* In their view, however, the definition should specifically refer to transgender and intersex people, and should explicitly extend to attributes that a person is presumed to have, and had in the past but no longer has.

The Mental Health Community Coalition of the ACT supports amending the definitions in the *Discrimination Act*, submitting that 'people of diverse gender orientation, including the LGBTI community, are often the victims of vilification and discrimination and have much higher rates of mental health issues, including suicide rates, than the average population'.[165]

Dr Asmi Wood agrees that the definition of the attribute could be amended to make it clear that gender identity is conceptually different from biological sex. [166] The Australian Christian Lobby submits, without elaboration, that it is unnecessary to amend the existing attribute of 'gender identity'.[167]

In LRAC's view, effect should now be given to LRAC's 2012 report *Beyond the binary: legal recognition of sex and gender diversity in the ACT*, having regard to the definition of gender identity in the *Sex Discrimination Act*. The definition of gender identity in the *Discrimination Act* should be amended so that it no longer assumes the need for medical intervention, and is no longer dependent on the binary gender construct of female and male, particularly in light of amendments to that effect to the ACT *Births Deaths and Marriages Registration Act*. This would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. To avoid confusion with the status of gender identity, LRAC considers that discrimination on the basis of intersex status should be included as a separate protected attribute, discussed below.

[163] ACT Human Rights Commission, 15; Women's Legal Centre (ACT), 7; LGBTIQ Ministerial Advisory Council, 2.
[164] Women's Legal Centre (ACT), 7; LGBTIQ Ministerial Advisory Council, 2.
[165] Mental Health Community Coalition ACT.
[166] Dr Asmi Wood, June 5 2014
[167] Australian Christian Lobby, 3.

Recommendation 8

Recommendation 8.1

The *Discrimination Act* should be amended so that the attribute of gender identity is defined in the same terms as the definition of gender identity in the *Sex Discrimination Act*, but

i. **referring as well to 'previous, current or presumed' gender identity, and**
ii. **without the phrase '(whether by way of medical intervention or not)'.**

Recommendation 8.2

The *Discrimination Act* should be amended to give effect to Recommendation 27.ii of LRAC's 2012 report *Beyond the Binary* and include as a protected attribute the record of a person's sex having been altered under the *Births Deaths and Marriages Registration Act* or equivalent law or practice.

Religious or political conviction

The *Discrimination Act* prohibits discrimination on the ground of 'religious or political conviction'. In doing so, it provides legislative protection for the right to freedom of thought, conscience, religion and belief in s 14 of the *Human Rights Act 2004* (ACT).

Among Australian anti-discrimination legislation, only the *Discrimination Act* deals with religious conviction and political conviction in the same phrase. There is no necessary or usual connection between the two attributes.

The *Discrimination Act* does not define 'religious or political conviction'. In the absence of a definition, the attributes do not extend to *not* having a religious conviction or political conviction.

Separate attributes

Other Australian anti-discrimination legislation distinguishes between these attributes, listing and defining them separately.[168] The ACT Human Rights Commission and Dr Asmi Wood submit that the provision in the *Discrimination Act* should be separated into two attributes; Dr Wood notes that this is not likely to affect the interpretation of the attribute. [169]

In LRAC's view, separating the provision into two attributes would give greater certainty about the scope of the Act and promote consistency with other anti-discrimination legislation in Australia.

[168] *Anti-Discrimination Act 1991* (QLD), *Anti-Discrimination Act 1992* (NT), s 19; *Anti-Discrimination Act 1998* (Tas), s 16 (Vic, NSW and WA are joint attributes).
[169] Dr Asmi Wood, 5 June 2014.

Scope of the attributes

The scope of the attributes differs from other jurisdictions. Anti-discrimination laws in Australia refer variously to political, or religious, 'belief', 'activity', 'opinion' or 'affiliation'.[170] In the Northern Territory, religious belief or activity is expressly defined to include 'Aboriginal spiritual belief or activity'.[171]

Beliefs, convictions, activity, opinions and affiliations

The ACT Human Rights Commission submits that the *Discrimination Act* should prohibit discrimination on the basis of religious or political belief, activity, opinion and affiliation.[172] More narrowly, the ACT Bar Association submits that the provision should be amended 'to include 'religious or political affiliation, background or practice' as well as 'religious or political conviction''.[173]

In LRAC's view, amending the attribute to include belief, activity, opinion and affiliation would give greater certainty about the scope of the Act and promote consistency with other anti-discrimination legislation. It would also accord with the *Human Rights Act*, which recognises the freedom to demonstrate religion or belief in worship, observance, practice and teaching.

Absence of belief

The ACT Human Rights Commission proposes that the attribute of 'religious conviction' should be expressly defined to include existence *or absence* of any religious belief, activity, opinion, affiliation; the current position in ACT law is that the absence of a religious conviction is not covered by the term 'religious conviction'.[174] The Commission does not, however, believe that the absence of a political belief could or should be a protected attribute.[175]

Freedom 4 Faith submits that there is no need to prohibit discrimination on the grounds of non-belief as well as belief, because 'anti-discrimination law seeks to protect groups that have historically been subject to persistent, sustained and unjustifiable discrimination over time by the majority and who are still at risk of such discrimination', and Australians who continue to hold and live out a religious belief are in the minority. In its view, '[t]here seems

[170] *Anti-Discrimination Act 1977* (NSW) ('conviction'); *Anti-Discrimination Act 1992* (NT) ('political opinion, affiliation or activity' and 'religious belief of activity'); *Anti-Discrimination Act* 1991 (QLD) ('belief or activity'); *Equal Opportunity Act 1984* (SA)('appearance or dress'); *Anti-Discrimination Act 1998* (Tas) ('belief, activity or affiliation'); *Equal Opportunity Act 1995* (Vic) ('belief or activity'); *Equal Opportunity Act* 1984 (WA) ('conviction').
[171] *Anti-Discrimination Act 1992* (NT) s 4 (1).
[172] ACT Human Rights Commission, 15.
[173] ACT Bar Association, 2.
[174] *Kloska and National Jewish Association* [2009] ACAT 8; *Best Practice Education Group P/L t/as Blue Gum School v Dept of Education and Community Services* [2002] ACDT 1.
[175] ACT Human Rights Commission, 15.

to be no risk of discrimination in Australia on the basis of non-belief'.[176] The Australian Christian Lobby is similarly of the view that '[i]t is unnecessary to amend the existing attribute of 'religious or political conviction', but does not elaborate on this view.[177]

In LRAC's view, the attribute of religious or political conviction should be amended to include *not* having a religious conviction or political conviction. The *Human Rights Act* recognises and protects the right of non-discrimination 'on any ground' in the ACT. Consequently, protection should be available for anyone who experiences discrimination on the basis of a particular attribute, irrespective of whether or to what degree there is a history of discrimination on the basis of that attribute. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Aboriginal spiritual belief or activity

As noted above, the Northern Territory *Anti-Discrimination Act* expressly defines religious belief or activity to include 'Aboriginal spiritual belief or activity'.[178] Dr Asmi Wood proposes that indigenous spiritual belief should be specifically incorporated into the definition of religious belief in the *Discrimination Act*, noting that Aboriginal people can identify with particular faiths, such as Christianity, Islam, Buddhism, or even atheism, but still hold Aboriginal spiritual beliefs.[179] The ACT Human Rights Commission similarly submits that the attribute should be expressly defined to include Aboriginal spiritual belief or activity.

In LRAC's view, amending the attribute to include indigenous spiritual belief or activity would give greater certainty about the scope of the Act, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination.

Recommendation 9

Recommendation 9.1

The *Discrimination Act* should be amended to separate the protected attributes of 'religious conviction' and 'political conviction' into independent protected attributes.

Recommendation 9.2

The *Discrimination Act* should be amended to restate the protected attribute of 'religious conviction' as having, or not having, a religious conviction, belief, opinion or affiliation, and engaging or not engaging in a religious activity.

[176] Freedom 4 Faith, 4; ACT Human Rights Commission, 15.
[177] Australian Christian Lobby, 3.
[178] *Anti-Discrimination Act 1992* (NT), s 4 (1).
[179] Dr Asmi Wood, 5 June 2014.

Recommendation 9.3

The *Discrimination Act* should be amended to restate the protected attribute of 'political conviction' as having, or not having, a political conviction, belief, opinion or affiliation, and engaging or not engaging in a political activity.

Recommendation 9.4

The *Discrimination Act* should be amended to define religious conviction, belief, opinion, affiliation and activity to include 'spiritual conviction, belief, opinion or activity of Aboriginal and Torres Strait Islander people'.

Spent criminal conviction

The *Discrimination Act* protects the attribute of having a 'spent criminal conviction', defined by reference to the *Spent Convictions Act 2000* (ACT). A 'spent' conviction' is one that is no longer part of a person's criminal history because it is a less serious offence that occurred over ten years ago (or five years ago for a juvenile offence).

The *Discrimination Act* does not prohibit discrimination against a person whose conviction is not spent, or that is not capable of being spent, under the *Spent Convictions Act*. For example, a job applicant who has a conviction that cannot be spent, but that is irrelevant to the particular job, can be discriminated against because of that conviction.

Relevance of the conviction

All submissions to LRAC on this issue support amending the *Discrimination Act* to prohibit discrimination on the basis of an 'irrelevant criminal conviction', rather than a 'spent criminal conviction'.[180] The ACT Human Rights Commission explains that it has taken 'enquiries from people with relatively minor or irrelevant unspent criminal convictions who have been discriminated against, particularly regarding employment opportunities'.[181] In the Commission's opinion, '[t]his is an important issue in the ACT'; and broadening the scope of this attribute beyond convictions that are technically 'spent', to include convictions that are not relevant in the circumstances, would provide fairer and more consistent protection to people who are attempting to rehabilitate after offending. [182]

[180] ACT Human Rights Commission, 15-16; Welfare Rights and Legal Centre (ACT), 10; Dr Asmi Wood, 5 June 2014.
[181] ACT Human Rights Commission, 16.
[182] ACT Human Rights Commission, 16.

Each of the Tasmanian *Anti-Discrimination Act 1998* and the Northern Territory (NT) *Anti-Discrimination Act* covers more than an irrelevant conviction, extending to an irrelevant *criminal record*. The attribute of 'irrelevant criminal record' is defined very broadly to encompass any record 'relating to arrest, interrogation or criminal proceedings', whether or not a charge was laid against the person, let alone a conviction recorded; the NT Act also includes a 'spent conviction' in the definition. In Tasmania and the NT, a conviction is an 'irrelevant criminal record' when 'the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises'.[183]

In January 2015, the ACT Attorney-General announced that men convicted of consensual homosexual acts in the ACT will be able to apply to have their conviction expunged, under legislation to be introduced later this year. Consensual homosexual sex was illegal in the ACT until November 1976, and a person may have been charged with offences including attempted buggery, buggery on a male person and indecent assault on a male person. This measure will address an aspect of discrimination on the basis of an irrelevant conviction in the ACT.

In LRAC's view, amending this attribute to refer to, at least, an 'irrelevant criminal conviction', rather than to a 'spent criminal conviction' would, as the ACT Human Rights Commission explains, provide 'fairer and more consistent protection' to people who are attempting to rehabilitate, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination.

Involvement in criminal investigation or proceedings, without an actual conviction, is an attribute that could be the basis of discrimination, and in this regard it seems desirable to follow the example of anti-discrimination legislation in Tasmania and the NT and describe the attribute by reference to 'record' rather than 'conviction, defining record' broadly to encompass any record 'relating to arrest, interrogation or criminal proceedings'.

Working with children

Tasmania and the Northern Territory make an exception for irrelevant criminal record discrimination in relation to 'the education, training or care of children if it is reasonably necessary to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances'.[184]

[183] *Anti-Discrimination Act 1998* (TAS), s 3; *Anti-Discrimination Act 1992* (NT), s 4(1).
[184] *Anti-Discrimination Act 1998* (Tas) s 50; *Anti-Discrimination Act 1992* (NT) s 37.

All submissions on this issue support the inclusion of a similar exception in the *Discrimination Act*.[185] For example, COTA ACT supports an exception 'where the criminal conviction was for an offence relevant to the employment situation', saying that the question of whether an exception should apply would 'depend on the nature of the offence, time elapsed, and other reasonable criteria'. [186]

The ACT Human Rights Commission notes that the *Working with Vulnerable People (Background Checking) Act 2011* already operates as an exception, permitting discrimination in relation to work with vulnerable people on the basis of any conviction other than a spent conviction, and any 'non-conviction history' which is largely the matters that are defined as an irrelevant criminal record in Tasmania and the Northern Territory. The Commission submits that an exception in the *Discrimination Act* could take into account whether a person is registered under the *Working with Vulnerable People (Background Checking) Act*.[187]

LRAC's recommended model does not create particular exceptions for different attributes or circumstances, but allows people to justify their conduct as a permissible limit on the right to non-discrimination. Consistently with this approach, an exception would not be made for working with children, but appropriate drafting can ensure that discrimination protection for this attribute is subject to the provisions of the *Working with Vulnerable People (Background Checking) Act 2011*.

In LRAC's view, the existing provisions of the *Working with Vulnerable People (Background Checking) Act 2011* operate to ensure that both criminal history and non-conviction information are taken into account when registering a person to work with vulnerable people. The continued operation of that regime would provide an important and necessary exception to the prohibition against discrimination on the basis of irrelevant criminal record. If other circumstances require discrimination then conduct can be justified, and an exemption can be sought.

Recommendation 10

The *Discrimination Act* should be amended:

i. **to replace the existing protected attribute of 'spent criminal conviction' and its definition with the protected attribute of 'irrelevant criminal record', defined in the same terms that both criminal history and non-conviction information are defined in the *Working with Vulnerable People (Background Checking) Act 2011* (ACT)**

[185] COTA ACT, 3; Dr Asmi Wood, 5 June 2014.
[186] COTA ACT, 3.
[187] ACT Human Rights Commission, 16.

ii. so that the prohibition against discrimination on the basis of irrelevant criminal record is subject to the operation of the *Working with Vulnerable People (Background Checking) Act 2011* (ACT).

Status as a parent or carer

The *Discrimination Act* currently protects the attribute of having 'status as a parent or carer.' In contrast, the Commonwealth *Fair Work Act* prohibits 'adverse action' (which includes discrimination) on the basis of a person's 'family or carer's responsibilities'. Approaches in other jurisdictions vary significantly. For example, the South Australian *Equal Opportunity Act* protects the attribute of having 'caring responsibilities',[188] while the Western Australian *Equal Opportunity Act* protects the attribute of 'family status'. [189]

The phrase 'status as a parent or carer' in the *Discrimination Act* could be amended to reflect a similarly broad approach; for example, the attribute could be framed to relate to a person's 'family or caring responsibilities'.

Submissions to LRAC support amending this attribute to make it more inclusive.[190] Carers ACT submits that the Act should be amended to refer to 'responsibilities', rather than 'status', on the basis that the term 'status' denotes a type of position whereas the term 'responsibilities' denotes the agency and activities that arise out of the role of being a parent or carer. It agrees with LRAC's observation in the Consultation Paper that the current description of this attribute may 'fail to protect a person who is discriminated against because they have to attend to the responsibilities that flow from that status'.

Carers ACT draws LRAC's attention to the detrimental impact of caring responsibilities on a person's ability to particulate in the workforce. It also highlights that 'carers' struggle with employers, including their experiences of discrimination'. [191] For example, it cites the Australian Unity Index Survey Report, which found that 'career progression may be more difficult for carers than the general population'. [192] It provides three case studies in which employers were unwilling to negotiate flexible working relationships with employees who were also carers, and assumed that the carer would not be able to work and maintain their caring role long term.

[188] *Equal Opportunity Act 1984* (SA) s 85T(6).
[189] *Equal Opportunity Act 1984* (WA) s 4(1).
[190] ACT Human Rights Commission, 17; Women's Legal Centre (ACT and Region), 7; Dr Asmi Wood, 5 June 2014; Carers ACT (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014, 3-4 ('Carers ACT').
[191] Carers ACT, 4.
[192] Ibid.

Dr Asmi Wood proposes that the attribute should just refer to carer, but include a definition that does not exclude Aboriginal families. He expresses concern that certain people may not be captured in the conventional idea of family.[193]

Some submissions raise the issue of discrimination against foster carers. Fiona Tito Wheatland, writing in her capacity as a foster carer, Carer Advocate, and previous President of the ACT Foster Care Association, expresses concern that there is 'almost no protection [for foster carers] under the general laws in the community'. She notes, for example, that foster carers are not considered volunteer workers under the ACT *Work Health and Safety Act 2011*, have very little access to information concerning them held by Child Protection Services, have 'virtually no right of review' when children are removed peremptorily, and lack the ability to advocate on behalf of children who have since been removed from them.[194] She is uncertain about whether amendments to the *Discrimination Act* or another reform process would be the best way to address these issues, but submits that 'none of this is forming part of the current Out-of-Home Care Strategic Plan 2015-2020', and that 'there needs to be some way of addressing these inequities'. [195]

In LRAC's view, the term 'parent' is an overly narrow one, and it is preferable to use terms that are inclusive of the variety of family, caring and kinship relationships that exist in the ACT, including kinship connections among Aboriginal and Torres Strait Islander communities. Similarly, LRAC considers that the term 'status' should be replaced with 'responsibilities', to ensure that the *Discrimination Act* protects people who engage in activities that arise from the role of being a parent or carer, but may not have the 'status' of parent or carer. Amending the definition to cover parent or carer responsibilities would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination, and would provide stronger protection against the types of discrimination raised by these submissions, although many of the issues relating to foster carers are outside the scope of LRAC's review of the *Discrimination Act*.

Recommendation 11

The *Discrimination Act* should be amended to replace the existing protected attribute of 'status as a parent or carer' with the protected attribute of 'family, carer or kinship responsibilities'.

[193] Dr Asmi Wood, 5 June 2014.
[194] Fiona Tito Wheatland (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, May 2014, 3 ('Fiona Tito Wheatland').
[195] Ibid.

The 'characteristics' extension

The *Discrimination Act* extends protection on the basis of an attribute to include protection on the basis of characteristics of the attribute (the 'characteristics extension'). Under the characteristics extension, reference to an attribute includes reference to:

a) a characteristic that people with that attribute generally have; and

b) a characteristic that people with that attribute are generally presumed to have; and

c) such an attribute that a person is presumed to have; and

d) such an attribute that the person had in the past but no longer has.

Similar provisions are found in all other Australian anti-discrimination laws, and are intended to ensure comprehensive protection.[196] For example, a person of Indian descent, born and raised in India, speaks English with an Indian accent; if they are refused a job because of their accent, they are being discriminated against not because of their race, but because of a characteristic of their race.[197] Pregnancy and breastfeeding are characteristics of being a woman, although in some anti-discrimination laws they are given their own status as protected attributes.

Missing from the characteristics extension in the *Discrimination Act* is reference to a characteristic of an attribute that a person *actually* has, even if such a characteristic is not one 'generally associated' with that attribute. The characteristics extension in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill included an actual characteristic of an attribute that a person has.

Submissions on this issue unanimously support amending the Act to include actual characteristics of an attribute that a person has.[198] COTA ACT emphasises that assumptions made by employers and others on the basis of a certain attribute, such as age alone, should be covered under the Act.[199] More broadly, the ACT Human Rights Commission supports such an amendment as it would offer greater protection than the characteristics extension currently provides.[200]

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[196] *Age Discrimination Act 2004* (Cth) s 14; *Sex Discrimination Act 1984* (Cth) ss 5(1), 6(1) and 7(1); *Anti-Discrimination Act 1977* (NSW) s 7(2); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (QLD) s 8; *Equal Opportunity Act 1984* (SA) s 29(2)(c); *Anti-Discrimination Act 1998* (Tas) s 14(2*); Equal Opportunity Act 1995* (VIC) s 7(2); Equal Opportunity Act 1984 (WA) s 8(1).

[197] See, for example, *D'Souza v Geyer and Directorate of School Education Victoria* [1996] HREOCA 4.

[198] COTA ACT, 3; ACT Human Rights Commission, 17.

[199] COTA ACT, 3.

[200] ACT Human Rights Commission, 17.

In LRAC's view, amending the characteristics extension to include a characteristic that a person actually has, rather than only that which a person might be presumed to possess, or that is 'generally associated' with people with the person's attribute, would provide a greater scope of protection than currently enjoyed by people under this provision, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination.

Recommendation 12

The *Discrimination Act* should be amended so that the 'characteristics' extension of the definition of an attribute includes the actual characteristics of an attribute that a person has.

Other attributes

Age

The *Discrimination Act* currently prohibits discrimination on the basis of age. The attribute of age is not defined in the *Discrimination Act*, or in any other anti-discrimination statute except in Western Australia, which defines age only as a person's 'chronological age'.

The ACT Human Rights Commission suggests that, in light of the specific protections for children and young people under s 11 of the ACT's *Human Rights Act*, the current reference in the *Discrimination Act* to age discrimination should be supplemented by explicitly 'including discrimination because a person is a child or young person, and because they are an older person'.[201]

In LRAC's view, including an example in the *Discrimination Act*,[202] to the effect that age discrimination includes discrimination because a person is a child or young person, and because they are an older person, is desirable for purposes of promoting a better understanding in the community of the full scope of age protection that is available under the *Discrimination Act* and would help to ensure equal and effective protection against discrimination. Using an example to illustrate the breadth of the term 'age' is a preferable approach to identifying only two aspects of age (being young, and being older) in an inclusive definition of age.[203]

[201] ACT Human Rights Commission, 17.
[202] *Legislation Act 2001* (ACT) s 132.
[203] Neil Rees et al, *Australian Anti-Discrimination Law* (2nd ed, 2014), 347-356.

Race

In its deliberations, LRAC considered recommending that the *Discrimination Act* no longer rely on the word 'race' to describe a protected attribute. The word notoriously lacks a sound rational basis to justify categorising and differentiating among people according to skin colour and geographic and cultural origins; its persistent use tends to reinforce its unwarranted legitimacy, and to invoke discredited but persistent stereotypes.[204] At the same time, the word 'race' is deeply entrenched in law, and international human rights law, as a shorthand term to refer to, for example in the ACT *Discrimination Act*, characteristics such as 'colour, descent, ethnic and national origin and nationality'.[205] A transition from reliance on the word 'race' for that purpose, to public recognition and acceptance of a different term, is a long process that is not best addressed simply by amending the *Discrimination Act*. It is notable that Sweden is reported to have appointed a judge to investigate the feasibility of removing all mentions of 'race' from Swedish legislation, and is due to report by the end of 2015.[206]

The ACT Bar Association submits, without elaboration, that the attribute of race in s 7(1)(h) should be amended to include 'ethnicity' as well as race,[207] although in LRAC's view 'ethnicity' is likely to be covered by the existing reference to 'ethnic origin'.

The ACT Human Rights Commission also supports an amendment to the definition of race to include 'ethnic, ethno-religious or national origin', which is addressed below.[208]

In LRAC's view, no change is needed to the definition of race.

Association

The ACT Bar submits that '[c]onsideration should be given to extending s 7(1)(n) to ensure that people are not subjected to discrimination or detriment by mere 'association' with any other person – by say, adding 'or otherwise' at end'. [209]

[204] In Australia, criticism of the concept of race has most frequently arisen in the context of discussions about the races power in s 51(xxvi) of the Constitution. In the 2012 report of the expert panel on recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, the panel explains that '[i]n contemporary practice and scholarship, the dominant view among biological scientists, anthropologists and social theorists is that the concept of 'race' is socially constructed, imprecise, arbitrary and incapable of definition or scientific explanation' <http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/html-report/5.html> at [5.2].
[205] *Discrimination Act 1991* (ACT) Dictionary (definition of 'race').
[206] Solveig Rundquist, *Race to be Scrapped from Swedish Legislation* The Local <http://www.thelocal.se/20140731/race-to-be-scrapped-from-swedish-legislation>.
[207] ACT Bar Association, 2.
[208] ACT Human Rights Commission, 7
[209] ACT Bar Association, 2.

In LRAC's view, adding the words 'or otherwise' risks extending coverage of the Act beyond the prescribed attributes, which is not a recommendation. Adding the words does not add either clarity or scope to the meaning of s 7(1)(n), and no change is needed to the definition of association.

Recommendation 13

The *Discrimination Act* should be amended to include an Example to the effect that age discrimination includes discrimination because a person is a child or young person, and because they are an older person

New attributes

The following discussion draws on recent law reform and consultations in other Australian jurisdictions to identify possible attributes (in alphabetical order) that should now be protected against discrimination.

Domestic violence and family violence

Domestic or family violence occurs when one family member or person in an intimate relationship uses violent or abusive behaviour against another family member or person in that relationship. Such violence can include physical, verbal, psychological, economic or sexual abuse. There are comprehensive, contemporary definitions of domestic violence and family violence in s 13 of the *Domestic Violence and Protection Orders Act 2008* (ACT) and s 4AB of the *Family Law Act 1975* (Cth) respectively.

Women and children are more likely to be victims of domestic or family violence, and a significant proportion of such violence is perpetrated at home.

Research shows that many people experience discrimination in areas such as employment and accommodation because they have been subjected to domestic or family violence.[210] For example, a person is treated unfavourably at work because they have to take time off to attend court to get a protection order in relation to domestic or family violence, or because their partner contacts them at work to abuse or harass them.

[210] See, for example, Alanna Heffernan and Lee Matahaere, 'Domestic Violence Discrimination in the Workplace: Is Statutory Protection Necessary?' (Paper presented at the Our Work, Our Lives: International Conference on Women and Industrial Relations, Norther Territory Working Women's Centre, Darwin, 12 and 13 August 2010) <https://www.alrc.gov.au/sites/default/files/pdfs/CFV%2020%20Attachment%20National%20Network%20of%20Working%20Women%27s%20Centres%20DomesticViolencePaper.pdf>.

LRAC is aware that the ACT Government has implemented a range of measures to support victims of domestic or family violence and to hold persons using violence to account.[211] LRAC is aware too that the Commonwealth *Fair Work Act* allows an employee to request a change in working arrangements if they are experiencing domestic violence.[212]

All submissions received on this issue support protecting people against discrimination on the basis that they are, or have been, threatened with or subjected to domestic violence or family violence.[213] In support of its submission, the Women's Legal Centre (ACT and Region) cites an example of a woman who was terminated from her employment due to her employer's concern about the workplace health and safety risk posed by the presence of her abusive partner at her workplace. [214] In its view, 'providing protection from discrimination on the basis of a person having been 'threatened with or subjected to domestic violence or family violence' would fulfil an important educative function', by raising awareness in the community and business about the impact of domestic / family violence on other aspects of public life, and supporting victims/survivors 'to disclose violence without fearing repercussions in other areas of their lives'. [215]

In LRAC's view, including the attribute of 'being subjected to domestic violence or family violence' would appropriately extend the protection of the *Discrimination Act* to a vulnerable part of the ACT community, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. Regard should be had to the definitions of domestic violence and family violence in s 13 of the *Domestic Violence and Protection Orders Act 2008* (ACT) and s 4AB of the *Family Law Act 1975* (Cth) respectively. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Employment status and homelessness

The *Discrimination Act* does not protect the attributes of unemployment status or accommodation status, including homelessness. People in the ACT have, however, reported experiencing discrimination on the basis of their employment status, receiving Centrelink or compensation payments, or being unemployed. People on unemployment benefits report being treated unfavourably based on inaccurate assumptions about their lifestyle, character, or ability to pay.

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[211] See, for example, the ACT Domestic Violence Policy Manual at <http://www.communityservices.act.gov.au/hcs/policies/domestic_violence_policy >.
[212] See, for example, Anthony Morgan and Hannah Chadwick, *Key issues in domestic violence, Research in Practice no. 7*, Australian Institute of Criminology, December 2009.
[213] Women's Legal Centre (ACT and Region), 5; ACT Human Rights Commission, 18.
[214] Women's Legal Centre (ACT and Region), 5-6.
[215] Ibid, 5.

Similarly, people are discriminated against because they have no fixed address, or security of accommodation tenure. For example, discrimination occurs if a person tries to make an appointment with a local medical practitioner but is told that they cannot be put in the appointment system unless they have a fixed home address, and when an assumption is made about a person's financial means or lifestyle because they are border or lodger. Research suggests that such discrimination can cause and further entrench homelessness, when it prevents a person from securing accommodation and accessing support services.[216]

Inclusion of 'social status' was recommended by the 2007 Gardner Review of the *Victorian Equal Opportunity Act*, but was not enacted. No Australian anti-discrimination law currently includes employment status or accommodation status as a protected attributed. New Zealand's *Human Rights Act 1983* does prohibit discrimination on the basis of a person's 'employment status', which is broadly defined to mean being unemployed or being in receipt of a social security benefit or compensation payment.

Protection against homelessness discrimination would support the ACT Homelessness Charter, which aims to improve the circumstances of homeless people by raising community awareness and promoting a rights-based approach to homelessness service delivery.

In LRAC's view, providing protection from discrimination on the basis of employment status and accommodation status, including homelessness, would appropriately extend the protection of the *Discrimination Act* to a vulnerable part of the ACT community, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Ethno-religious origin

The ACT Human Rights Commission proposes an amendment to the definition of race to include 'ethno-religious origin' as a protected attribute for vilification.

[216] Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7(2) *Deakin Law Review* 295.

The terms 'ethno-religious origin' is in the NSW *Anti-Discrimination Act*,[217] and was intended to protect, for example, Jews, Sikhs and Muslims, and to give ethno-religious groups access to the protection of the *Anti-Discrimination Act* in circumstances where there may be uncertainty as to whether conduct complained of was based on a person's race or their religion.[218] The need for this provision arose because the NSW legislation does not cover the attribute of religious conviction, and it was decided not to go that far.

The *Discrimination Act* does cover the attributes of both race and religious conviction, and so there is no need to protect an attribute of 'ethno-religious origin'. The Act does not, however, currently cover both those attributes in relation to vilification, and it is to this gap in coverage that the ACT Human Rights Commission's submission is addressed. The effect of Recommendation 4 above responds to this, and extends protection against vilification to both race and religion.

In LRAC's view, there is no need to add the attribute of ethno-religious origin to the *Discrimination Act*, as the effect of Recommendation 4 will be to give protection against vilification on the basis of both race and religion.

Genetic information

Two aspects of genetic testing are discussed above: 'genetic status', for which an amendment to the definition of disability is recommended (Recommendation 7.2) and 'genetic information' when – regardless of whether a person has an actual or presumed genetic predisposition to a disability – a person is discriminated against in circumstances that relate to genetic information. Such circumstances may be an unjustifiable requirement to undergo genetic testing, or an unjustifiable reliance on genetic information that indicates not a disability but the absence or presence of some other personal characteristic.

In LRAC's view, the *Discrimination Act* should be amended to protect against requests for and reliance on genetic information, giving effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

[217] ACT Human Rights Commission, 7
[218] ACT Human Rights Commission, 7.

Immigration status

The *Discrimination Act* currently provides protection on the basis of nationality, citizenship and race, but there is no specific protection for a person's immigration status; that is, whether they are born in Australia or overseas, and the terms on which they are in Australia. Almost a quarter of the ACT's population was born overseas.

Discrimination on the basis of immigration status occurs when, for example, a person is refused sporting club membership on the basis that they are in Australia on a student or bridging visa, or a person is treated unfavourably because they were born overseas.

Anti-discrimination legislation in the Northern Territory and Tasmania includes 'being or having been an immigrant' in the definition of race. The Commonwealth *Racial Discrimination Act e*xtends the grounds of prohibited discrimination to the status of being 'an immigrant'.

Two submissions were received on this issue. The ACT Human Rights Commission described discrimination against people on the basis of their immigration status as 'a pertinent issue facing people in the ACT'.[219] For example, the Commission is currently conducting an own-motion inquiry into the ACT Department of Education and Training (DET)'s International Fee Paying Student Policies, which require certain non-Australian citizens or non-permanent residents to pay tuition fees. In the Commission's view, a '[a] further strengthening of the discrimination protection in this area would protect this marginalised group, by rendering this a direct, rather than indirect, discrimination issue'. Dr Asmi Wood submits that the *Discrimination Act* should not include 'immigration status' as a protected attribute, because the Federal Government is permitted to discriminate in this way under the aliens' power in Constitution.

In LRAC's view, providing protection from discrimination on the basis of immigration status would appropriately extend the protection of the *Discrimination Act* to a vulnerable part of the ACT community, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. Such a provision in the Act would not affect the conduct of the Federal Government. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

[219] ACT Human Rights Commission, 20

Intersex status

The term 'intersex' refers to people who are born with genetic, hormonal or physical characteristics that are not exclusively 'male' or 'female'. An intersex person may have biological attributes of both sexes, or lack some of the biological attributes that are usually defined as male or female. Although the relevant biological attributes of an intersex person are present at birth, the person may not necessarily be aware of their intersex status until adolescence or adulthood.

Intersex status is a matter of biology, not gender identity. An intersex person may choose to identify, consistently or at different times, as male, female, intersex or in a different way.

The ACT Law Reform Advisory Council's 2012 report *Beyond the binary: legal recognition of sex and gender diversity in the ACT* recommended adding to the *Discrimination Act*, as a new protected attribute, 'a person's identifying as intersex, as a sex other than their registered sex, as having no sex, and as being in transition from one sex to another'. In August 2013, the Commonwealth *Sex Discrimination Act* was amended to include discrimination protection for intersex persons.

Submissions that LRAC received on this question unanimously supported the inclusion of intersex status as a protected attribute in the *Discrimination Act*.[220]

In LRAC's view, including the attribute of intersex status would appropriately extend the protection of the *Discrimination Act* to a vulnerable part of the ACT community, would implement an earlier recommendation of the ACT Law Reform Advisory Council, would be consistent with measures under Commonwealth law, and would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Physical features

The *Discrimination Act* does not provide any protection from discrimination on the basis of 'physical features'. Physical features could be defined, for example, to include a person's height, weight, size or other bodily characteristics including their shape, facial features, or birthmarks.

Protection on the basis of physical features has been in place in Victoria since 1995. When introducing the relevant provision, the then Victorian Attorney-General said:

[220] ACT Human Rights Commission, 19; ACT LGBTIQ Ministerial Advisory Council 2-3; Mental Health Community Coalition ACT; Radium Mardia and Liam McAuliffe, 11; Dr Asmi Wood, 5 June 2014.

> Society places too much emphasis on a person's bodily characteristics, over which the person may not have much control. For instance, a person may not have any control over a birthmark across his or her face. A person's physical features should not be used to judge the suitability of the person for a job. Ultimately, such judgment should be based on performance criteria. If a person is the best qualified person and can perform the required duties, the fact that he or she is of a certain height or weight should be irrelevant.[221]

In the Victorian Act, there are exceptions when discrimination on the basis of physical features is reasonably necessary to protect health, safety or property, or when offering dramatic, artistic, photographic or modelling work.[222]

There has been a debate about whether the protection should be available only for physical features that are involuntary, such as height or hair loss, but not for physical features that are chosen, such as tattoos or piercings.[223] It is, however, difficult to define what physical features are chosen, such as a person's weight.[224] An argument for protecting chosen features, such as tattoos, piercings or hair styles, is that freedom of choice and freedom of expression are values to be protected.

All submissions received on this issue support the inclusion of physical features as a protected attribute.[225] One submission draws attention to the discrimination experienced by people who are obese or overweight,[226] while another notes that people with disabilities often encounter discrimination on the basis of their physical features. [227] In addition, participants in the youth consultation session arranged by the Youth Coalition of the ACT provided examples of experiences in which they had been discriminated against on the basis of their physical appearance in employment contexts; particularly in relation to hospitality.[228]

Despite the support for the inclusion of this attribute, the majority of submissions acknowledge that care should be taken in defining this ground.[229] For example, Dr Asmi Wood submits that employers should be able to specify dress standards.[230]

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[221] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, vol 423, (Jan Wade, Attorney-General).
[222] *Equal Opportunity Act 2010* (Vic) ss 26(4), 86.
[223] *Kuyken v Lay* [2013] VCAT 1972 citing *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106.
[224] See, for example, the Council on Size & Weight Discrimination, <www.cswd.org>.
[225] Submissions addressing this issue were made by the ACT Human Rights Commission, 20; COTA ACT, 3; Fiona Tito Wheatland, 1-2; People With Disabilities ACT, 4; Dr Asmi Wood, 5 June 2014.
[226] Fiona Tito Wheatland, 1.
[227] People With Disabilities ACT, 4.
[228] Youth Consultation for ACT Discrimination Act, Monday 26 May 2014.
[229] See, for example, People With Disabilities ACT, 4; COTA ACT, 3.
[230] Dr Asmi Wood, 5 June 2014.

In LRAC's view, providing protection from discrimination on the basis of physical features would give effect to the guarantee in the *Human Rights Act* of equal and effective protection against discrimination and, at the same time, would respect freedom of choice and freedom of expression. In coming to this view, LRAC has in mind that conduct can be justified, and an exemption can be sought.

Recommendation 14

Recommendation 14.1

The *Discrimination Act* should be amended to include 'accommodation status' as a protected attribute.

Recommendation 14.2

The *Discrimination Act* should be amended to include as a protected attribute being, or having been, subjected to domestic violence or family violence.

Recommendation 14.3

The *Discrimination Act* should be amended to include 'employment status' as a protected attribute.

Recommendation 14.4

The *Discrimination Act* should be amended to protect against requests for and reliance on genetic information.

Recommendation 14.5

The *Discrimination Act* should be amended to include 'immigration status' as a protected attribute.

Recommendation 14.6

The *Discrimination Act* should be amended to include 'intersex status' as a protected attribute.

Recommendation 14.7

The *Discrimination Act* should be amended to include 'physical features' as a protected attribute.

SEXUAL HARASSMENT

Overview

The *Discrimination Act* prohibits sexual harassment in employment, educational institutions, providing access to public premises, providing goods, services facilities and accommodation and by club committee members.

The scope of the prohibition against sexual harassment in employment is unclear. The Act makes it unlawful for a 'workplace participant' to subject another 'workplace participant' or 'person seeking to become a workplace participant' to sexual harassment at a 'workplace' or 'potential workplace'. The term 'workplace participant' may not, for example, cover board members of a voluntary body.

Differently from harassment that takes place in relation to a person's attribute, such as disability or age or gender identity, sexual harassment is unique, and is treated separately, because it does not focus on the attribute of the victim, but on the nature of the harassing conduct (eg, 'sexual' in nature).

Discussion

Anti-discrimination legislation in Queensland and Tasmania prohibits sexual harassment in any aspect of life, public or private. The Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill proposed to extend coverage of its sexual harassment provisions to include all areas of public life, and the Explanatory Notes to that Bill stated that the patchy coverage of the sexual harassment provisions in the Commonwealth *Sex Discrimination Act* are undesirable as they create unnecessary complexity and uncertainty as to when such conduct is unlawful. This approach could be taken in the ACT, and sexual harassment could apply in all areas of public life.

Of the four submissions received on this issue, three supported extending the prohibition on sexual harassment to include all areas of public life.[231] The Australian Christian Lobby considered that the coverage should not be extended due to perceived lack of clarity about what constitutes public life.[232]

[231] Women's Legal Centre (ACT and Region), 8; Dr Asmi Wood, 5 June 2014; ACT Human Rights Commission, 21-22.
[232] Australian Christian Lobby, 3, 4.

What constitutes public life has been explained above in this report, and an understanding of public life is relied on in this report as the basis for recommendations above regarding coverage of the *Discrimination Act*. If those recommendations are accepted then harassment that takes place in relation to a person's attribute, such as disability or age or gender identity, will be covered, as a form of discriminatory conduct, in all areas of public life.

In LRAC's view, extending the prohibition on sexual harassment to all areas of public life would remove the complexity and uncertainty about when such conduct is unlawful, would provide further protection for victims of such conduct, and would ensure that coverage for sexual harassment is no less than coverage for harassment because of other attributes.

If the *Discrimination Act* continues to specify areas of coverage, all submissions that addressed the issue agreed that the *Discrimination Act* should be amended to provide greater clarification in relation to the definitions of 'workplace' and 'workplace participants', and to the applicability of the prohibition to situations that are connected to work but do not occur in the workplace.

In support of its submission, the Women's Legal Centre ACT (WLC) provides a case study in which a woman sought advice in relation to a sexual assault perpetrated against her by the chair of the not-for-profit organisation that she worked for. In these circumstances, '[f]urther clarity regarding the definition of 'workplace' and 'workplace participants' would have assisted the WLC in advising the client about her legal rights under the *Discrimination Act* in relation to the incident'. [233] The Australian Christian Lobby concurs, stating that '[i]f additional clarification can be added to these provisions, then they should be added'.[234]

The Women's Legal Centre ACT also submits that other changes be made to Part 5 of the *Discrimination Act* 'to bring the ACT's laws in line with the Commonwealth and with best practice in other jurisdictions'. Specifically it recommends that:

- the prohibition against sexual harassment concerning clubs be extended to prohibit sexual harassment by any person in a position of authority in a club, rather than just members of the management committee[235]
- the prohibition against sexual harassment be extended to make it clear that such conduct is prohibited regardless of whether the conduct occurred in the presence of the person, to ensure that the prohibition extends to unwelcome conduct of a sexual nature in the form of a statement on social media[236]

[233] Women's Legal Centre (ACT and Region), 9.
[234] Australian Christian Lobby, 4.
[235] Women's Legal Centre (ACT and Region), 10.
[236] Ibid.

- the prohibition against sexual harassment be extended to cover a person performing any function or exercising any power under an ACT law or for the purposes of an ACT government program, or in the course of carrying out any other responsibility for the administration of an ACT law or the conduct of an ACT government program[237]
- the prohibition against sexual harassment be extended to circumstances where a person is seeking or receiving goods, services or facilities, as is the case under the *Sex Discrimination Act* after amendments in 2011. In the WLC's view, this would be 'an important addition' to ensure that 'employees, contactors and other service providers are protected from sexual harassment by customers, clients and others they deal with in the course of their employment'. [238]

In LRAC's view, if the *Discrimination Act* continues to specify areas of coverage, it should be amended to address the gaps that exist around 'workplace', 'workplace participant' and situations that are connected with work but do not occur in the workplace. LRAC did not propose and has not consulted on the recommendations made by the Women's Legal Centre ACT, but is of the view that they appear desirable and warrant consideration.

Recommendation 15

Recommendation 15.1

The *Discrimination Act* should be amended to prohibit sexual harassment generally, in all areas of life.

Recommendation 15.2

If Recommendation 15.1 is not accepted and the current specified areas of coverage for sexual harassment are retained, then

1. **the *Discrimination Act* should be amended so that:**
    a. **the meaning of 'workplace' extends to cover a place, other than the usual place of work, where work-related activities occurred, and**
    b. **the meaning of ''workplace participant' extends to cover a person, other than the usual workers in the workplace, who participates in a work-related activity.**
2. **consideration should be given to**
    a. **extending the prohibition to cover sexual harassment by any person in a position of authority in a club**
    b. **prohibiting conduct that does not occur in the presence of the person**

[237] Women's Legal Centre (ACT and Region), 10-11.
[238] Ibid.

c. **extending the prohibition to cover sexual harassment by a person performing any function or exercising any power under an ACT law or for the purposes of an ACT government program, or in the course of carrying out any other responsibility for the administration of an ACT law or the conduct of an ACT government program**
d. **extending the prohibition to cover sexual harassment when a person is seeking or receiving goods, services or facilities.**

HARASSMENT

Overview

A common understanding of harassment is some form of unfavourable treatment because of a protected attribute. As is discussed above, sexual harassment is unique, and is treated separately, because it does not focus on the attribute of the victim, but on the nature of the harassing conduct (eg, 'sexual' in nature).

The *Discrimination Act* does not prohibit harassing conduct in relation to a protected attribute. Although harassing conduct can be said to be direct discrimination, as unfavourable treatment because of an attribute, that approach does not provide sufficient coverage as is discussed below.

An example of prohibit harassing conduct in relation to a protected attribute is in the federal *Disability Discrimination Act*, where it is unlawful to harass a person with a disability, in relation to their disability, in employment, education and the provision of goods and services.[239]

Defining terms

The provisions in the *Disability Discrimination Act*, for example, do not define harassment, although case law suggest that harassment is conduct that is 'persistent and harrying'.[240] The provisions in the *Disability Discrimination Act* prohibit harassment 'in relation to' a person's disability;' the phrase 'in relation to' suggests the possibility of a less direct causal relationship than the test in direct discrimination of 'because of', and so can cover conduct where no explicit reference is made to the protected attribute, although some relationship needs to exist between the conduct and the attribute.[241] So, while harassing conduct will often if not usually be, as well, direct discrimination (less favourable treatment because of a person's attribute) it will not always be so, and a stand-alone definition of harassment, in the wider terms of the *Disability Discrimination Act*, is appropriate.

[239] *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39.
[240] See, for example*, Sluggett v Commonwealth* [2011] FMCA 609 at [674].
[241] *O'Grady v Northern Queensland* 1990 CLR at 376 per McHugh J.

Coverage

LRAC recommends above that discrimination be unlawful in all areas of life other than in private, and the same approach should be taken for other forms of unlawful conduct, such as harassment. If, as is proposed above, harassment is included in the *Discrimination Act* as a form of prohibited conduct, then it would be prohibited in relation to all attributes, such as age, sexuality, disability, and intersex status.

LRAC recommends below that a defence is available for justifiable conduct. It is highly unlikely that harassment could be justified, but with the general availability of a justification defence for unlawful conduct, the opportunity exists.

Conclusion

In LRAC's view, harassing conduct is to a large extent already covered by protection against direct discrimination, which means that there is already coverage for harassment on the basis of any protected attribute. It is, however, desirable to make specific provision for harassment for at least two reasons: all manifestations of harassing conduct may not be covered by a prohibition against direct discrimination, and as a matter of public policy and education, harassment should be clearly identified as prohibited conduct, apart from discrimination.

Recommendation 16

The *Discrimination Act* should be amended to prohibit conduct, called 'harassment', which occurs otherwise than in private in relation to a protected attribute.

VILIFICATION AND OFFENSIVE CONDUCT

Overview

The *Discrimination Act* prohibits vilification, which occurs when 'a person, by a public act, incite[s] hatred towards, serious contempt for, or severe ridicule of, a person or group of people' on the basis of race, sexuality, gender identity or HIV/AIDS status

Vilification provisions exist in the *Racial Discrimination Act* and, for a small range of different attributes, in all other State and Territory jurisdictions except the Northern Territory, where no provision is made to cover vilification, and Western Australia, where racial vilification is an offence in the *Criminal Code*. The different attributes that are protected in different jurisdictions are race, religion, sexuality, gender identity, and HIV/AIDS status. In the ACT, the Discrimination Amendment Bill 2012 would have added 'religion' to the attributes that are protected against vilification, however the Bill lapsed and was not enacted into law.

As well as a vilification provision, Tasmania has an offensive conduct provision that protects all attributes.

Terms and definitions

To facilitate understanding of the law's approach to this issue, LRAC proposes clearly defined terms that distinguish the different approaches in different laws around Australia. The generally used term is 'vilification'[242] which, as is explained below, takes two forms in the legislation: incitement to hatred etc (in the ACT, for example), and causing offence etc (in the *RDA* and Tasmania). For clarity, this discussion uses the term 'vilification' to refer to incitement to hatred etc, and uses the term 'offensive conduct' to refer to causing offence etc.

The two types of conduct are different in their policy focus and practical effect. Vilification is conduct that is likely to stir up feelings of, for example, hatred, serious contempt or severe ridicule against a person or people because of an attribute they have; an example is a video or pamphlet or statement that says that gay men are 'depraved', 'sexual predators' or 'paedophiles'. Offensive conduct is conduct that is likely to, for example, offend, insult, humiliate or intimidate a person or people because of an attribute they have; an example is a

[242] In South Australia the term is 'racial victimisation': *Civil Wrongs Act 1936* (SA) s 73.

video or pamphlet or statement that says that lesbians are not fit to be parents. In some circumstances, conduct that is vilification may also be offensive conduct, while in some circumstances conduct that is offensive may not be vilification.

Both vilification and offensive conduct are described in different ways in the legislation. The usual description of vilification is conduct that is likely 'to incite hatred, serious contempt and severe ridicule'; the Victorian *Equal Opportunity Act* adds 'revulsion'.[243] This requires a complainant to prove the likelihood of incitement. Although the ACT's 'incitement' model prohibits conduct that 'incites' hatred etc, in practice this is treated as a test of whether the person's conduct was *reasonably likely* to incite hatred etc.

A variation on this approach is for legislation to prohibit not incitement, but expression, on the basis that conduct that expresses hatred etc is likely to incite those feelings. This would require a complainant to prove only that the conduct occurred, and was the approach taken in the original draft of the NSW legislation. Because there will be occasions when the conduct does not directly express hatred etc but is, in the circumstances, likely to incite it, both approaches could operate concurrently.

Although the *Racial Discrimination Act's* prohibition is often referred to as a vilification or 'racial hatred' provision, what it prohibits is 'offensive conduct': conduct that is likely to 'offend, insult, humiliate or intimidate'. Tasmania's 'offensive conduct' provision prohibits conduct that 'offends, humiliates, intimidates, insults or ridicules'. The *Racial Discrimination Act* requires proof of likelihood, in the circumstances, of the effect of the conduct; Tasmania requires both proof of the effect of the conduct, and of the likelihood, in the circumstances, of a reasonable person's anticipating that effect.

Free speech

As is the case in all anti-discrimination laws that address vilification and offensive conduct, there is a broad 'free speech' exception in the *Discrimination Act* that allows a fair report of the public act; communication of anything that would be protected by absolute privilege in defamation (such as what is said in parliament or the courts); and academic, artistic, scientific or research activity in the public interest, including discussion or debate.

[243] In Western Australia, incitement is defined as conduct that creates, promotes or increases animosity or harassment: *Criminal Code 1913* (WA) s 77.

In the ACT, the *Human Rights Act* recognises the right to freedom of expression, 'subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society'. Vilification provisions such as those in the *Discrimination Act* are usually accepted as a reasonable limit on free expression that can be demonstrably justified. Similar limits on free expression are in, for example, laws about defamation, misleading consumer statements, obscenity, pornography, blasphemy, and inciting crime.

Discussion

Submissions received on the vilification provisions focus on five principal issues: the areas in which vilification should be prohibited, the attributes that should be protected, the appropriate test for vilification, possible exceptions to the prohibition on vilification, and the offence of serious vilification.

Areas

As noted above, the *Discrimination Act* currently prohibits vilification in relation to 'public acts'. The ACT Human Rights Commission supports amending the scope of the provisions to vilification 'done otherwise than in private'. In the Commission's view, the current law leaves 'too much potential for a restrictive interpretation, which can exclude conduct that should be covered'.[244]

People With Disabilities ACT acknowledges the 'practical problems' that can arise from the need for a person alleging vilification to prove that the vilifying conduct was 'a public act'. It does, however, emphasise that if the provisions are extended to cover acts done otherwise than in private 'this should be done with great care so as not to excessively intrude into the private sphere'.[245] Dr Asmi Wood submits that the coverage of the vilification provisions should continue to be limited to acts done 'in public', rather than 'otherwise than in private', due to the lack of clarity associated with 'otherwise than in private'. In Dr Wood's opinion, 'public' should have a certain definition.[246]

[244] ACT Human Rights Commission, 23.
[245] People With Disabilities ACT, 5.
[246] Dr Asmi Wood, 5 June 2014.

Attributes

In contrast to the prohibitions against discrimination, vilification in the ACT is currently prohibited only in relation to the attributes of race, sexuality, gender identity or HIV/AIDS status. Some submissions to LRAC propose that particular attributes could be added to this list. For example, People With Disabilities ACT supports extending the coverage of the vilification provisions to the attribute of disability. It submits that '[p]eople with disabilities are particularly vulnerable to vilification', especially in social media' and provides an example of a person with a disability who was vilified for lodging a discrimination complaint on a website 'sponsored by a major ACT Government owned Corporation'. The ACT Human Rights Commission also submits that disability could be added to the list of protected attributes against vilification as a priority, noting that such an amendment is supported by several community groups.[247]

The ACT Human Rights Commission submits that consideration be given 'to making it unlawful to vilify someone on the basis of any attribute currently protected by unlawful discrimination under the Act'.[248] The Commission notes that it has previously 'recommended that religious vilification be considered in response to dissemination of anti-Islamic Chick Cartoons and leaflets criticising the proposed construction of a Mosque in Gungahlin', and notes recent instances of vilification in Canberra, such as the attack on the Canberra Islamic Centre.[249] The Commission suggests that 'community consultation may be necessary for such a change, including consideration to determine if the same thresholds, tests and exceptions are used for all forms of vilification'.[250]

Freedom 4 Faith submits that the vilification prohibitions should not extend to vilification on the basis of religious conviction, because this 'would be more likely to create division and increased tension rather than community cohesion'. It cites the Victorian case of *Islamic Council of Victoria (ICV) v Catch the Fire Ministries (CFM*) as an example of how religious vilification laws encourage litigation 'as the preferred method of dispute resolution.'[251]

The ACT Bar Association submits that '[p]eople should be protected from vilification for any of the reasons or attributes against which discrimination is prohibited…', subject to amendments to those attributes recommended by the Association and discussed elsewhere.[252]

[247] ACT Human Rights Commission, 24.
[248] Ibid.
[249] Ibid, 7.
[250] Ibid, 6.
[251] Freedom 4 Faith, 5.
[252] ACT Bar Association, 2.

In the course of LRAC's public consultations, it was submitted that vilification protection should be limited to personal attributes that are not a matter of choice, such as race, and should not be available for personal attributes that are a matter of choice, such as religion.[253] In LRAC's view, however, the criterion of choice cannot guide the extent of vilification protection. A person's religion is not necessarily a matter of choice, most obviously for children, and when it is deeply connected to a person's culture and identity. And it is not correct to assume that a person's 'race' is involuntary: a dimension of 'race', as defined, is 'nationality', which can be chosen.

Test for vilification

Freedom 4 Faith reiterates its support for '[existing] prohibitions on vilification that are carefully drafted and target the *incitement* of hatred or violence' (emphasis added).[254] The ACT Bar Association similarly submits that 'vilification' should be defined to refer to inciting hatred or actual harm, and should avoid subjective tests of liability so as not to unduly abridge traditional freedoms of expression and of the press etc'.[255]

Differently, the ACT Human Rights Commission recommends that the *Discrimination Act* be amended to contain 'a new test and threshold for what constitutes unlawful vilification'. Complaints received by the Commission show that experiences of vilification and racist abuse occur frequently for some people in the ACT. However, the conduct rarely meets the test for 'incitement' in the *Discrimination Act*. The Commission noted that in 2006 the former Human Rights Office recommended adopting the 'racially offensive behaviour' provisions in the Commonwealth *Racial Hatred Act 1995*. In the event that vilification is prohibited for other attributes, the Commission submits that 'consideration should be given as to whether the same tests and thresholds should apply to all attributes'.[256]

Exceptions

In the *Discrimination Act*, a public act is not unlawful when it is 'done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter'. Freedom 4 Faith proposes adding, after 'of any matter', the words 'including on religious issues'.[257]

[253] Don Dwyer, Public Consultation, Tuggeranong Community and Function Centre, 8 May 2014.
[254] Freedom 4 Faith, 5.
[255] ACT Bar Association, 2.
[256] ACT Human Rights Commission, 22.
[257] Freedom 4 Faith, 5-6.

LRAC recommends providing for justifiable limits for all prohibited conduct, discussed below. The current circumstances in which vilification is permitted would be covered by a justifiable limits provision, and so freedom of expression is limited only to that extent.

Conclusion

In LRAC's view, there are compelling reasons to prohibit *vilification*, occurring otherwise than in private, in relation to the same attributes that are protected by the prohibition on discrimination. Vilification would be defined as conduct that expresses, or is likely in the circumstances to incite, hatred towards, serious contempt of, severe ridicule towards or revulsion of, a person or people with a protected attribute.

There are, as well, compelling reasons to prohibit *offensive conduct*, occurring otherwise than in private, in relation to the same attributes that are protected by the prohibition on discrimination *except for the attribute of religious belief, activity, opinion and affiliation*; this limitation is discussed in the following paragraph. Offensive conduct would be defined as conduct that is likely, in the circumstances, to offend, insult, humiliate or intimidate a person or people because of a protected attribute that they have, but for religious belief.

Unlike other attributes, it can be argued that the attribute of religious belief carries with it the risk of causing offence on the basis of religion; for monotheistic religions, an adherent's exercise of free religious expression may necessarily cause offence to the adherent to another religion. More generally, it is likely that criticism of a religion will offend adherents to that religion. A prohibition against causing offence on the basis of religious belief does not, therefore, seem practical. Differently from causing offence, however, vilification on the basis of religious belief is beyond the usual bounds of both free religious expression and more general criticism of a religion, and a prohibition against vilification on the basis of religious belief seems appropriate.

Exceptions that allow freedom of expression would continue to be available under a justification defence, discussed below.

Serious vilification

The *Discrimination Act* also currently creates a criminal offence of 'serious vilification', which occurs when a person intentionally engages in a public act that threatens harm, and is reckless about whether that act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the basis of race, sexuality, gender identity or HIV/AIDS status. There have not yet been any prosecutions for this offence in the ACT. The 'serious vilification' offence provision in the *Discrimination Act* is modelled substantially on the NSW provision which, similarly, has never been used. In 2013 a NSW Parliamentary Committee report recommended that the offence of serious vilification be retained as a matter of policy, with procedural changes that might make it easier to use.[258] Those recommendations are set out at Appendix 1 of this report.

The ACT Human Rights Commission supports the opinion of the NSW Parliamentary Committee that the offence should be retained as a matter of public policy. It is, however, concerned that 'this offence can become 'lost' in the ACT *Discrimination Act*'. [259] Accordingly, it submits that 'consideration should be given to moving it to a piece of law more readily utilised by law enforcement, such as the *Crimes Act 1900* (ACT) or *Criminal Code 2002* (ACT) as is the case in Western Australia'. [260] Dr Asmi Wood similarly submits that the provision should be contained in the *Criminal Code*, rather than in a civil procedure document. Dr Wood is also concerned that the word 'serious' is misleading, because it implies that there is 'non-serious' vilification.

In LRAC's view, the name of the offence should be changed from 'serious vilification' to 'aggravated vilification', or 'criminal vilification', and consideration should be given to adopting so many of the recommendations made by the 2013 report of the NSW Standing Committee on Law and Justice on serious vilification as are appropriate for the ACT; those recommendations are set out at Appendix 1 of this report.

Recommendation 17

Recommendation 17.1

The *Discrimination Act* should be amended to prohibit conduct, called 'vilification', which occurs otherwise than in private and that expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule towards or revulsion of, a person or people with a protected attribute.

[258] Legislative Council Standing Committee on Law and Justice, New South Wales, *Racial Vilification Law in New South Wales* (2013).
[259] ACT Human Rights Commission, 22.
[260] ACT Human Rights Commission, 22.

Recommendation 17.2

The *Discrimination Act* should be amended to prohibit conduct, called 'offensive conduct', which occurs otherwise than in private and that offends, insults, humiliates or intimidates another person because of a protected attribute other than religious belief.

Recommendation 17.3

The offence of serious vilification should be renamed 'aggravated' or 'criminal' vilification.

Recommendation 17.4

Consideration should be given to adopting so many of the recommendations made by the 2013 report of the NSW Standing Committee on Law and Justice on serious vilification as are appropriate for the ACT.

EXCEPTIONS

Justifying a limit on the right to non-discrimination

Overview

In the *Discrimination Act*, exceptions excuse discriminatory conduct. Exceptions recognise that treating someone differently may be justified because of other considerations. An exception operates as a defence to a discrimination complaint: after the conduct happened, a person will say that their conduct should be excused because it was justified. This is different from an *exemption* when, before conduct happens – particularly if it is likely to be continuing or recurring – a person anticipates their intended discriminatory conduct is justified, and seeks to be excused in advance; this would be the subject of an *exemption* application, discussed separately below.

The *Discrimination Act* currently contains general, broad exceptions that apply in relation to all attributes, and some specific exceptions in relation to particular attributes. The exceptions are in different sections in the *Discrimination Act*, lacking a clear, principled and unifying approach to excusing discriminatory conduct.

At the same time that exceptions to discrimination are recognised in the *Discrimination Act*, the *Human Rights Act* recognises non-discrimination as a human right, and permits limitations on that right only if they are reasonable and 'can be demonstrably justified in a free and democratic society'.

In overseas jurisdictions that have both anti-discrimination laws and human rights legislation, such as the United Kingdom and Canada, exceptions for discrimination are dealt with under a 'human rights' approach, where the question is whether the discriminatory conduct is necessary, and a proportional and reasonable limit on the right to non-discrimination.[261] In Victoria, where there is human rights legislation (*Charter of Human Rights and Responsibilities)*, this approach was not taken, and the Victorian Act has the same range of exceptions that are in the *Discrimination Act* even though the *Charter* guarantees the right to non-discrimination subject only to reasonable limits.

[261] For example, under s 19(2)(d) of the *Equality Act 2010* (UK), a provision, criterion or practice in relation to a relevant protected characteristic will not be discriminatory if it can be shown that it was a 'proportionate means of achieving a legitimate aim'.

Discussion

The enactment of the *Human Rights Act 2004* has substantial implications for the form and content of the *Discrimination Act*, particularly in the area of exceptions. As noted above, the *Human Rights Act* recognises and protects a number of rights, including 'the right to equal and effective protection against discrimination on any ground',[262] and the right to demonstrate one's 'religion or belief in worship, observance, practice and teaching…'.[263] These rights are limited only to the extent to which the limitation 'can be demonstrably justified in a free and democratic society'.[264] Factors which must be considered in assessing whether a limitation is justified:[265]

a. the nature of the right affected;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation
d. the relationship between the limitation and its purpose;
e. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

By contrast, the right to non-discrimination protected by the *Discrimination Act* is limited by a range of exceptions throughout the Act which may be relied upon in a variety of circumstances subject to certain conditions being satisfied.

Submissions that LRAC received on this issue evaluate the current approach to exceptions, and the alternative of a general limitations clause (a justification defence) similar to that in the *Human Rights Act*. For example, the Australian Christian Lobby submits that the adoption of a general limitations clause would be preferable to retaining the exceptions model. In its view, 'provisions which exist in order to protect fundamental human rights, such as freedom of religion, should not be regarded as mere 'exceptions''.[266]

[262] *Human Rights Act 2004* (ACT) s 8(3)
[263] *Human Rights Act 2004* (ACT) s 14(1)(b)
[264] *Human Rights Act 2004* (ACT) s 28(1). The same approach is taken in the Canadian Charter of Rights and Freedoms, which guarantees the rights and freedoms set out within it 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.
[265] *Human Rights Act 2004* (ACT) s 28(2)
[266] Australian Christian Lobby, 2.

The Australian Christian Lobby recommends 'a general limitations clause, which would clarify that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective is not discrimination. Rather than being considered as discriminatory conduct which is exempt from the law, it would not be considered discrimination'.[267] The Australian Christian Lobby makes the point that characterising other rights, such as freedom of religion, as exceptions to the right of non-discrimination fails to give full recognition to those other rights, and that a general limitations clause will give appropriate recognition to those other rights.

The Women's Legal Centre (ACT and Region) also supports the inclusion of a general limitations clause in preference to the exceptions, citing the United Kingdom's *Equality Act 2010*, which imports a simple test of whether the conduct is a 'proportionate means of achieving a legitimate end or purpose'.[268] As well, both organisations prefer the exemptions model, discussed below, which requires an application to the ACT Human Rights Commission for permission to engage in conduct that is otherwise prohibited by the legislation before engaging in that conduct.

International law and the law of jurisdictions such as Canada offer clear guidance as to the type of justifications that can be made out for limiting different rights. These cases, the associated commentary, and guidelines produced by the ACT Human Rights Commission, would complement jurisprudence under the *Human Rights Act,* the amended *Discrimination Act*, and the Victorian *Charter*, to provide guidance to duty bearers as to the sort of conduct that should be avoided.

An important implication of moving to a general limitations provision for all discriminatory conduct is that a defence will be available for direct discrimination that does not currently exist. Under the current *Discrimination Act* there is no provision to argue that direct discrimination is justifiable in the circumstances; in the absence of an exception, conduct that amounts to discrimination is unlawful. This is consistent with a view that direct discrimination provisions target prejudice, for which there cannot be a justification. Indirect discrimination, on the other hand, does allow for an argument that it was justifiable in the circumstances to impose the requirement or condition. A general limitations provision for all discriminatory conduct will give a person who is alleged to have engaged in direct discrimination the opportunity to justify their conduct. To the extent that they are justifying prejudice they are unlikely to succeed, but the opportunity is there.

[267] Australian Christian Lobby, 2. A contrary view, from a religious perspective, is argued for in Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law Review* .
[268] Women's Legal Centre (ACT and Region), 11.

In LRAC's view, many of the current exceptions provisions may be inconsistent with the requirements of the *Human Rights Act*, because they permit limitations on rights that are protected by the *Human Rights Act*, including the right to non-discrimination, in a manner that is not consistent with the limitations that are permitted under the *Human Rights Act*. Under the *Human Rights Act* the right to non-discrimination can only be subject to reasonable limits 'set by law that can be demonstrably justified in a free and democratic society.' Replacing the exception provisions with a 'general limitations clause' would promote consistency with the rights protections afforded by the *Human Rights Act*, and provide a more consistent, principled, straightforward and visible way of permitting discriminatory conduct than is the case with the current approach to exceptions. A general limitations clause would operate as a defence to a claim of unlawful conduct under the *Discrimination Act*.

Recommendation 18

The *Discrimination Act* should be amended to repeal Part 4 (Exceptions to Unlawful Discrimination) and to replace it with a general limitations clause that operates as 'justification defence', allowing a person who has engaged in unlawful conduct (discrimination, harassment, vilification and offensive conduct) to show that their conduct was a justifiable limitation on the right to non-discrimination having regard to the factors set out in section 28(2) of the *Human Rights Act 2004* (ACT).

Specific exceptions, as an alternative

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, LRAC considers that the following amendments should be made to those exceptions. Even if specific exceptions are made, it remains the case that the *Discrimination Act* operates in an environment where, under the *Human Rights Act,* the right to equal and effective protection against discrimination is guaranteed and that right can be limited only according to formal test of 'reasonable limits', where regard is had to an inclusive list of considerations. Accordingly, specific exceptions, while adapted to the particular area of activity, do need to be decided according to a test that is consistent with the test in the *Human Rights Act* for limiting the right to non-discrimination.

Rather than a general 'reasonableness' test, for example, a test would be whether the conduct can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the nature of that right; the purpose of the conduct and its importance; the nature of the conduct; the relationship between the conduct and its purpose; and whether there was any less restrictive means reasonably available to achieve the same purpose. Any less rigorous test is inconsistent with the permissible limits on human rights under the *Human Rights Act*.

The 'statutory authority' exception

The *Discrimination Act* excuses discriminatory conduct on the basis of an attribute if the conduct is necessary to comply with a requirement of an ACT law, or court or tribunal order. The exception applies only if the law or order is mandatory and specific about the conduct that must be performed and is rarely available, usually because there is an alternative, non-discriminatory way to comply with the requirement.

When the *Discrimination Act* was enacted in 1991, this exception was intended to be temporary, to allow time for other ACT legislation to be amended so that it would not explicitly require discriminatory conduct.[269] Despite this intention, the exception remains in place.

There is no known example of an ACT law that is mandatory and specific in requiring discriminatory conduct, and, since this exception was enacted, the ACT has enacted the *Human Rights Act*. All laws must be compatible with the non-discrimination requirements in the *Human Rights Act*, unless the Legislative Assembly declares that the law is intended to be incompatible. There is, however, no requirement that a court or tribunal order be non-discriminatory.

All submissions that address this exception support the repeal of the 'statutory authority' exception.[270] The ACT Human Rights Commission notes that removing the exception for statutory authorities would be 'consistent with the requirements and goals of the *Human Rights Act*, to ensure that all ACT laws are non-discriminatory'.[271] People With Disabilities ACT similarly supports removing the exception in light of the operation of the ACT *Human Rights Act*. In addition, the Women's Legal Centre (ACT and Region) notes that the repeal of the exception would reflect the original intention of the legislature.[272]

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[269] Explanatory Memorandum, Human Rights and Equal Opportunity Bill 1991 (ACT), 10.
Submissions on this issue were made by the ACT Human Rights Commission, 27; The Women's Legal Centre (ACT and Region), 11; People With Disabilities ACT, 5 and Dr Asmi Wood, 5 July 2014.
[271] ACT Human Rights Commission, 27.
[272] Women's Legal Centre (ACT and Region), 11.

People With Disabilities ACT and Dr Asmi Wood suggest that in place of the statutory authority exception the Act could include an exception for acts under an order of a court or tribunal.[273]

In LRAC's view, removing this exception would reflect the original intention of the legislature and promote the ACT's commitment to protecting human rights, by recognising the requirement in the *Human Rights Act* that all laws must now be non-discriminatory unless declared otherwise. If contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then a narrower exception for acts done under an order of a court or tribunal would provide adequate protection for people who are directed to engage in discriminatory conduct by a court or tribunal, provided that the exception is available only when the order is mandatory and specific about the conduct which must be performed and there is no non-discriminatory alternative. An exception in these terms would meet the 'reasonable limits' test under the *Human Rights Act*. In the unlikely event that the Legislative Assembly does declare that a new law is intended to be incompatible with the right to non-discrimination, then compliance with such a law would be permitted under the justification defence.

Exceptions for 'religious bodies' and educational institutions

The *Discrimination Act* excuses discriminatory conduct for some matters relating to religion. Specifically, discriminatory conduct on the basis of any protected attribute is excused for:

- training and appointing ministers of religion
- appointing people in connection with a religious observance or practice
- the acts and practices of religious bodies which:
    - conform with the 'doctrines, tenets or beliefs of that religion'; and
    - 'are necessary to avoid injury to the religious susceptibilities of adherents of that religion'
- religious educational institutions in respect of employment and the provision of education or training, when the discrimination is 'in good faith to avoid injury to the susceptibilities of adherents of that religion or creed'.

[273] People With Disabilities ACT; Dr Asmi Wood, 5 July 2014.

Since the *Discrimination Act* was enacted in 1991, the ACT has enacted the *Human Rights Act*, which guarantees the right to 'freedom of thought, conscience and religion'. This includes the freedom to choose and practise a religion, and the right to not be coerced to adopt or practise a religion. At the same time, the *Human Rights Act* guarantees the right to non-discrimination. It is necessary, therefore, to craft exceptions for discriminatory conduct so that any limit to the right to non-discrimination conforms to the precise scope of the right to freedom of thought, conscience and religion.

Reconciling competing rights

Concerns about reconciling competing rights to non-discrimination and freedom of religion informed many of the submissions. For example, the Australian Christian Lobby is concerned that the language of 'exceptions' and 'exemptions' 'may emphasise non-discrimination at the cost of too narrow a protection for other fundamental rights', including freedom of religion and freedom of association.[274] In its view, a preferable option is a general limitations clause (a justification defence), because '[t]his clarifies that certain activity, legally, *is not* discrimination';[275] this is indeed what LRAC recommends at Recommendation 18. If that option is not possible, the Australian Christian Lobby submits that the next most preferable option is to use the exemption provisions, discussed below.

On the other hand, Freedom 4 Faith submits that the exceptions should be retained on the basis that they 'ensure that the principle of non-discrimination is appropriately balanced with other human rights, including rights that are central to maintaining a healthy multicultural society'. [276]

LRAC notes that, on the question of 'balance', which may imply an attempt to reach a 50/50 compromise, the better approach is to consider how best to accommodate competing rights. International law views the right to non-discrimination as a 'cross-cutting right' – a right that underpins the enjoyment of all other rights. The ACT *Human Rights Act*, for example, guarantees everyone the right to enjoy their human rights 'without distinction or discrimination of any kind'.[277] When rights compete, it is necessary to ensure that the rights are limited only so far is necessary and proportionate. Exceptions to non-discrimination must therefore operate to ensure that the right to non-discrimination is limited by the right to freedom of religion only so far is necessary and proportionate; this is the test that would be applied under the recommend approach of a justification defence in Recommendation 18 above.

[274] Australian Christian Lobby, 2.
[275] Australian Christian Lobby, 4, emphasis in the original.
[276] Freedom 4 Faith, 6.
[277] *Human Rights Act 2004* (ACT) s 8(2).

Attributes

The exceptions in the *Discrimination Act* for matters relating to religion are available on the basis of any protected attribute. As a result, there is no necessary connection between a protected attribute and the religious belief that is being recognised. For example, the *Discrimination Act* allows discrimination on the basis of any attribute when an employee's work involves the teaching, observance or practice of the relevant religion. This allows discrimination on, for example, the basis of age, disability and race in circumstances where those attributes have no relevance to the religious teaching, observance or practice. Such a limit on the right to non-discrimination is neither necessary nor proportionate, and the exception should be limited to discrimination that is necessary to accord with the doctrines of the particular religion.

People With Disabilities ACT submits that the exception should not apply to discrimination on the basis of disabilities, except when that disability is relevant to the religious observance or practice. It noted that '[r]eligious institutions and bodies operate schools and provide many social and community services', and considered that 'people with disabilities should not be denied access to education and to these services by purported reliance on this exception'.[278]

Threshold

Submissions express conflicting views about the different thresholds in the *Discrimination Act* that religious organisations and educational institutions should be required to meet in order to rely on the non-discrimination exceptions. Some consider that the thresholds should be raised,[279] while others submit that the current approach should be retained subject to minor amendments,[280] or that a different approach be adopted.[281] Although the Australian Christian Lobby, for example, considers that the current thresholds are appropriate, but its preference, discussed above, is an approach based on a general limitations clause (a justification defence) and the exemptions mechanism.[282]

Freedom 4 Faith considers that the language of the current religious exemptions is 'largely adequate'; however, it proposes lowering the threshold of the exception for religious bodies to one that excepts acts that either conform to the doctrines, tenets or beliefs of that religion or (rather than 'and') that are necessary to avoid injury to the religious susceptibilities of adherents of that religion. In its view, '[r]equiring religious organisations to satisfy both limbs

[278] People With Disabilities ACT, 5.
[279] ACT Human Rights Commission, 31-33; Women's Legal Centre (ACT and Region), 12;
[280] The Association of Independent Schools of the ACT (Submission to the ACT Law Reform Advisory Council), *Inquiry into the Discrimination Act 1991*, June 2014 ('Association of Independent Schools'), 2-3.
[281] Freedom 4 Faith, 7.
[282] Australian Christian Lobby, 4.

before they are able to invoke the exception is unnecessarily cumbersome, and fails to appreciate the different ways that religious organisations operate'.[283] On the issue of 'injury to susceptibilities', LRAC notes that such a standard is lower than, for example, the threshold in the *Discrimination Act* for sexual harassment, which requires a person to be 'offended, humiliated or intimidated'. The right not to have one's religious susceptibilities injured is not a part of the right to free religious belief that is recognised in the *Human Rights Act*, and so an exception that extends this far is not a necessary or proportionate limit on the right to non-discrimination.

The Association of Independent Schools considers that, 'in respect of the employment of staff by religious educational institutions it is sensible that the exception remain'. It notes that while 'many schools do not require that staff are adherents of a particular religion… they must be sympathetic to its teaching and will not act in a way that might cause injury to the religious susceptibilities of adherents of that religion'.[284] More broadly, it considers that it might be preferable 'for the government to provide guidance (perhaps through the Act or regulations) to schools in respect of ensuring that parents and students, or potential parents and students, are made aware of the religious basis of the schools and how this might impact on the expectation of enrolment, behaviour and participation of students'. In its view, '[t]his might preclude the need for the Human Rights Commission to entertain complaints of perceived discrimination where they are covered by the disclosure provided to parents/students before enrolment'. [285]

The Women's Legal Centre (ACT and Region) submits that, if the exception is retained, the threshold should, 'at the very minimum', 'include a 'reasonableness test''. [286] The exception for religious bodies in Victoria allows an act or practice of a religious body that is 'reasonably necessary' to avoid injury to religious sensitivities,[287] and the Australian Law Reform Commission previously recommended that there should be a test of reasonableness for such exceptions.[288] The exception in the *Discrimination Act* for religious bodies does not contain a test of reasonableness.

If an exception is dependent on doctrines, tenets or beliefs of that religion, Women's Legal Centre submits that the religious body or educational institution should be required to identify the religious doctrine and the source of the religious authority for their claim.[289]

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[283] Freedom 4 Faith, 7.
[284] Association of Independent Schools, 3.
[285] Association of Independent Schools, 2.
[286] Women's Legal Centre (ACT), 12.
[287] *Equal Opportunity Act 2010* (Vic) s 82(2)(b).
[288] Australian Law Reform Commission, Equality before *the Law: Justice for Women,* Report No 69 (1994) Recommendation 57.
[289] Women's Legal Centre (ACT), 12.

In LRAC's view, if contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, the scope of the excepted conduct must be a necessary and proportionate limit on the right to non-discrimination having regard to the scope of the right to freedom of thought, conscience and religion. This requires, for example, limiting excused discrimination to attributes that are necessary to accord with the doctrines of the particular religion, and ensuring that the conduct can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the nature of that right; the purpose of the discriminatory conduct and its importance; the nature of the discriminatory conduct; the relationship between the discriminatory conduct and its purpose; and whether there was any less restrictive means reasonably available to achieve the same purpose.

'Voluntary bodies' exception

Current approach

The *Discrimination Act* excuses discrimination, on the basis of any protected attribute, by voluntary bodies when the body is admitting members, or is providing benefits, facilities or services to anyone. The exception does not, however, apply to a voluntary body's employment practices.

Membership

The intention behind the exception for membership is to allow a voluntary body to dedicate itself to the interests of people with a particular attribute, such as a people of a particular ethnic and cultural background, sexual orientation, religious belief or disability. Such an activity is, effectively, a special measure or conduct for which an exemption from the *Discrimination Act* can be granted, and so there is no need for an exception. An exemption gives certainty that the proposed conduct is lawful; when an exemption has been granted, it is known that the *Discrimination Act* does not apply to the conduct, and no complaint of discrimination can succeed.

But if the exception is retained, its current scope – 'the admission of people as members of the body' – is so broad that it allows discrimination on the basis of protected attributes that are unrelated to the organisation's purpose. For example, a voluntary body that is dedicated to film appreciation or fishing can rely on the exception to deny membership to a person because they are a woman or not a white Australian, and one that runs a free community playgroup at its facilities can rely on the exception to prevent participation by the child of a same-sex couple, or a child with a disability.

A preferable approach would reflect that of the Victorian *Equal Opportunity Act*, and allow a voluntary body to exclude from membership a person who is not a member of the group of people with a protected attribute for whose benefit the body was established.

Provision of services

The *Discrimination Act* is unique in Australia in allowing voluntary bodies to discriminate when it provides goods, services and facilities to the public. Other anti-discrimination legislation in Australia makes exceptions for the activities of voluntary bodies, but limits those exceptions to activities among and relating to members. There is no apparent rationale for this overly-broad exception in the ACT.

Submissions

Four of the eight submissions received in relation to this exception support repealing it in its entirety.[290] The effect of not having the exception would be that voluntary bodies that wanted to discriminate would have to apply for an exemption from the ACT Human Rights Commission.

In support of its submission, the ACT Human Rights Commission refers to *Jones v The Scout Association of Australia, Australian Capital Territory Branch Incorporated*,[291] in which the (then) ACT Discrimination Tribunal said that 'this exception can allow bodies to discriminate with impunity', which in turn 'undermines attempts to eliminate discrimination in the ACT and does not assist efforts to create and maintain a culture of human rights'. [292]

A confidential submission to LRAC similarly emphasises the discriminatory nature of the exceptions for voluntary bodies, observing that '[t]hose people who experience disability discrimination at the hands of these organisations have little protection under the current Act…'.[293] The submission also notes the potentially significant costs for complainants who elect to pursue the matter under the Commonwealth scheme due to the lack of protection provided by the ACT *Discrimination Act*. In the submitter's view, '[t]he removal of the exemptions for voluntary organisations would certainly redress this particular inequality'.

[290] ACT Human Rights Commission, 33; confidential submission, 26 June 2014; Women's Legal Centre (ACT); Dr Asmi Wood, 5 June 2014.
[291] [2007] ACTDT 1 (11 January 2007).
[292] ACT Human Rights Commission, 34.
[293] Confidential submission, 26 June 2014.

People With Disabilities ACT and the Welfare Rights and Legal Centre (ACT) recommend that the scope of the exception be limited so as only to apply to the provision of benefits, facilities and services to members of the particular voluntary body,[294] and COTA ACT considers that 'the ACT Act should be consistent with legislation in other jurisdictions…'.[295]

By contrast, Freedom 4 Faith submits that the exception for voluntary bodies should be retained in its current form, on the basis that the exception 'is an expression of freedom of association, and voluntary groups should be able to set their own membership crtieria as well as determine who receives benefits etc in accordance with the intended purpose of the particular association'.[296]

Conclusion

In LRAC's view, an exception for membership should be repealed, and reliance placed on the provision in the *Discrimination Act* to apply for an exemption. If contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained then, to appropriately confine the circumstances in which voluntary bodies can discriminate, and to ensure that the approach in the ACT is consistent with that taken by other Australian jurisdictions, the exception relating to membership should be limited to allowing a voluntary body to exclude from membership a person who is not a member of the group of people with a protected attribute for whose benefit the voluntary body was established. As well, the exception relating to provision of services should be limited to provision of services to members of the voluntary body.

Clubs exception

The *Discrimination Act* deals with 'clubs' separately from 'voluntary bodies', defining a 'club' to be a club that holds a liquor licence under the *Liquor Act 2010*. An exception is made that allows clubs to discriminate on the basis of race, sex, age and disability when their object is to provide benefits to people of a stated race (except by reference to colour), and to people of one sex, of a particular age group, or who have a particular disability.

[294] Welfare Rights and Legal Centre ACT, 13; People With Disabilities ACT, 5.
[295] COTA ACT, 3.
[296] Freedom 4 Faith, 7-8.

As is the case with voluntary bodies, the intention behind the exception is to allow a club to dedicate itself to the interests of people with a particular attribute, such as a people of a particular ethnic and cultural background, sex, age or disability. Such an activity is, effectively, a special measure or conduct for which an exemption from the *Discrimination Act* can be granted, and so there is no need for an exception. It is for this reason that the Women's Legal Centre does not support retaining an exception for clubs. It considers that 'if the objects or intent of the club is to limit membership to persons of a particular attribute (not necessarily limited to sex, age, race and disability), an exemption should be sought'.[297] Dr Asmi Wood concurs, submitting that clubs should be required to make their case at the ACT Human Rights Commission using the exemption mechanism.

If the exception is retained, then there is no reason in principle why the opportunity to establish an exclusive club should not be extended to all attributes. The ACT Human Rights Commission submits that the *Discrimination Act* should 'explicitly require a club to show that they have attempted to improve gender equality, or that it would be unreasonable to provide equality of gender opportunity because of the hardship involved in providing equal access'.[298]

In LRAC's view, an exception for clubs should be removed, and reliance placed on the provision to apply for an exemption. If contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, then it should be extended to any attribute for which the club is formed, when it is formed for the benefit of people wit that attribute. An exception in these terms would meet the 'reasonable limits' test under the *Human Rights Act*. A desire to ensure that measures are taken to promote gender equality, and equality on the basis of other attributes would be addressed by the recommended positive duty, Recommendation 5.1.

Sports exception

The *Discrimination Act* does not currently cover sport as an area of activity in its own right. Explicit reference to sport is only in an exception for sex discrimination in competitive sport when competitors' strength, stamina or physique is relevant; the Act assumes that sport is covered by the provision of goods, services and facilities.

[297] Women's Legal Centre (ACT), 13.
[298] ACT Human Rights Commission, 37.

Submissions received on this issue highlight the discrimination encountered by people on the basis of their disability, sex, gender identity and intersex status in sport, and the need to ensure stronger protection against discrimination for people with these attributes. For example, People With Disabilities ACT notes that participation in sport is a major area in which its members 'experience disadvantage and discrimination'. It considers that '[t]he example of the exclusion of people using hand cycles from the Canberra Marathon is a high profile example of discrimination in participation in sport', and added that '[t]here are many less public instances based on discriminatory attitudes'. In its view, '[t]he *Discrimination Act* should expressly cover sport and not assume it is covered under goods, services and facilities. The exception for sport should be considerably narrowed so as to only apply to competitive sport in a way which is necessary to protect the integrity of the sport'.[299]

The Women's Legal Centre (ACT and Region) submits that 'the sports exception should not apply as it encourages assumptions to be made regarding a person's ability based on gender'.[300] It cited a case study in which a teenage girl, who was a skilled footballer and had played at her school for many years, was unable to continue playing in her team because of an arbitrary rule that females were not allowed to continue once they reached a certain age. The absence of a female football competition in the ACT meant she had to give up her sport or regularly travel to Sydney to play in the female competition. In the Centre's view, '[t]he critical question needs to be focused on a person's strength, stamina and physique'; this would remove considerations of gender or intersex identity and retain the focus on the ability of players.[301]

The ACT Human Rights Commission submits that exceptions relating to sport 'must be reconsidered' in light of 'attitudinal and legal changes regarding concepts of binary genders'.[302] In its opinion, 'any exception relating to sporting clubs should be on the grounds of player safety, perhaps continuing to be expressed in terms of the importance of separation on grounds of strength, not on particular attributes'.[303] As a 'transitional matter', the Commission notes that some consideration may need to be given to 'professional sport having further leeway in this area'; however, it adds that 'for many sports, particularly contact

[299] People With Disabilities ACT, 6.
[300] Women's Legal Centre (ACT), 13.
[301] Women's Legal Centre (ACT), 13.
[302] ACT Human Rights Commission, 37.
[303] ACT Human Rights Commission, 37.

sports, the player safety exception is likely to apply regardless of the amateur or professional nature of the competition.' [304]

Radium Mardia and Liam McAuliffe highlight the discrimination encountered by LGBTIQ Australians in sport. In their view, sport 'is a place where LGBTIQ Australians are largely invisible, silent and marginalised'. They submit that there should be no permanent sporting exceptions, and that 'discrimination in sport should separately covered by the Act', In their view the Act should be amended to say that 'A person must not discriminate against another person by refusing or failing to select the other person in a sporting team; or by excluding that other person from participating in a sporting activity.'

Dr Asmi Wood submitted that the exceptions for sport should continue to apply. For example, he considered that women should not be required to play five sets of tennis as male tennis players currently do.

In LRAC's view, a blanket gender-based exception for all competitive sport is inappropriate, particularly for sporting activity that is not at a professional or elite level, and for sporting activity among children and young people. Even when 'strength, stamina or physique' is relevant, it does not rationally follow that assumptions can validly be made about ability according to sex; what matters is a person's strength, stamina or physique, regardless of their sex and gender identity. If contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, then amendments that reflect these considerations would be consistent with recognition of intersex and gender identity status in the *Discrimination Act*, and would meet the 'reasonable limits' test under the *Human Rights Act*.

Exception for 'genuine occupational qualifications'

The *Discrimination Act* currently excuses discriminatory conduct when any of the attributes of sex, race, disability or age is a 'genuine occupational qualification'. Examples are limiting employment to women because the job involves entering female change rooms, or limiting employment to an Indigenous woman of a particular age when an actor is to be cast in the role of a person with those attributes. Submissions were made to the effect that there are genuine occupational requirements for work in religious organisations and institutions.

[304] ACT Human Rights Commission, 37.

An exception is relied on as a defence, after a complaint has been made. A genuine occupational qualification for a position, however, is known in advance, and when discriminatory conduct can be anticipated, it is commonly the subject of an exemption application. An exemption gives certainty that the proposed conduct is lawful; when an exemption has been granted, it is known that the *Discrimination Act* does not apply to the conduct, and no complaint of discrimination can succeed.

The Women's Legal Centre (ACT and Region) submits that this exception should be removed. It considers that '[i]f employment requires a person to have a particular attribute, the employer should seek an exemption rather than relying on the exception'. [305] The ACT Human Rights Commission similarly acknowledges there are benefits in replacing this exception with an exemption, 'on the basis that the behaviour is likely to be anticipated in advance, and it will give all parties greater certainty'. [306] The Commission is, however, concerned 'about whether this creates additional onerous requirements for employers'.[307]

If the exception were to be retained, the Commission supports the recommendation by the 2009 Victorian Scrutiny Committee's Report on *Exceptions and Exemptions to the Equal Opportunity Act 2010*, that the exception be amended to encompass a test of 'inherent requirements of the particular position'. In its report the Victorian Scrutiny Committee saw the terminology of 'inherent requirements' as involving a narrower inquiry than 'genuine occupational requirement', as the question shifts to 'a consideration of what is necessary to be able to perform the core elements of the employment, rather than considerations of what may be considered merely convenient or habitual'.[308]

The ACT Human Rights Commission further supports the recommendation by the 2009 Victorian Scrutiny Committee that the exception only apply to the attributes identified in that Report; the Committee recommended that an exception for inherent requirements should only apply to the attributes and the areas in respect of which it is essential, and listed them by reference to the Victorian Act as it then was. Dr Asmi Wood submits that the exception should be available for all attributes.[309]

[305] Women's Legal Centre (ACT and Region), 14.
[306] ACT Human Rights Commission, 37.
[307] ACT Human Rights Commission, 37.
[308] Scrutiny of Acts and Regulations Committee, Victoria, *Exceptions and Exemptions in the Equal Opportunity Act 1995* (2009), 14.
[309] Dr Asmi Wood, 5 July 2014.

The Mental Health Community Coalition ACT supports retaining the exception for genuine occupational qualifications, because its sector 'is increasingly employing people with experience of mental illness and recovery to identified positions because of the growing evidence for the benefits of such peer workers in mental health services'.[310] People with Disabilities ACT also considers that the exception should be retained, however, it submits that the exception should be narrowed 'as one of the measures to address the level of employment disadvantage experienced by people with disabilities'. It submits that '[t]he experience of people with disabilities who are seeking employment is that these exceptions are used to exclude people with disabilities from occupations and employment'. In its view, 'there should be an obligation on the employer or prospective employer to make or consider making reasonable adjustments before the employer is able to rely on these exemptions' and 'the employer or prospective employer should be required to prove a claim of unjustifiable hardship'.[311]

In LRAC's view, an exception for genuine occupational qualifications should be removed, and reliance placed on the provision to apply for an exemption. If contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, then it is LRAC's view that it is not necessary or appropriate to amend the exception to encompass a test of 'inherent requirements of the particular position'. LRAC is of the view that there can be real difference between a 'genuine occupational requirement' and an 'inherent requirement': it is not, for example, inherent to change room supervision that a person be of a particular sex, but in the circumstances it may be a genuine occupational requirement that the change room supervisor be of a particular sex. Another difference is that, while a 'genuine occupational requirement' can be identified in advance (hence the proposal that it be the subject of an exemption application), whether something is an inherent requirement is often not identified until and unless a person is found to be unable to do it without adjustments being made (discussed below).

Exception for inability to carry out work

[310] Mental Health Community Coalition ACT.
[311] People With Disabilities ACT, 6.

The *Discrimination Act* allows an employer or prospective employer, or a qualifying body for a trade or profession, to discriminate against a person with a disability when the employer or prospective employer or qualifying body 'believes on reasonable grounds' that the person is or would be 'unable to carry out work that is essential to the position concerned'. This is commonly known as the 'inherent requirements' exception. A relevant consideration in determining whether an employer, prospective employer or qualifying body has a reasonable belief that the person would be unable to carry out essential work is whether that body has considered what services or facilities would enable that person to work, as long as providing those service or facilities would not impose an unjustifiable hardship.

In addition, the *Discrimination Act* allows discrimination against a person with a disability when an employer or prospective employer or qualifying body 'believes on reasonable grounds' that, to carry out the work, the person with a disability would require services or facilities, and providing those services or facilities would impose an unjustifiable hardship. The considerations for unjustifiable hardship include the nature of the benefit or detriment likely to accrue or be suffered by all people concerned, the nature of the disability of the person concerned, and the financial circumstances of, and estimated amount of expenditure by, the person claiming unjustifiable hardship.

In other discrimination legislation in Australia, providing services or facilities that enable a person with a disability to carry out work duties, without causing unjustifiable hardship to the employer, is commonly called 'making reasonable adjustments'.[312] Making reasonable adjustments can be broader than providing services or facilities as it anticipates, for example, the possibility of actively changing the nature of the duties. A duty to make reasonable adjustment is proposed above, Recommendation 3.1.

The *Discrimination Act* creates an exception both for a reasonable belief in an inability to carry out work, and for when it would cause unjustifiable hardship to provide the services or facilities. A different approach is taken in the Victorian *Equal Opportunity Act*, where there is an exception for when a person is unable to carry out essential work, but there is also a requirement that an employer make reasonable adjustments. The Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill took a similar approach. A duty to make reasonable adjustments is discussed above.

[312] See, for example, *Equal Opportunity Act 2010* (Vic) ss 20, 33, 40, 45 and *Disability Discrimination Act 1992* (Cth) ss 4 (definition of 'reasonable adjustment'), 5(2)(a), 6(2)(b)-(c), 21(1)(b).

The Women's Legal Centre (ACT and Region) notes that employers 'can take a very narrow approach and identify one or two duties which the employee is unable to do, therefore allowing termination on this basis'. Further, it observes that '[o]ften consideration is not even given to the likely timeframe in which the person will be unable to perform the work.'[313] COTA ACT submits that the exception for 'inability to carry out work' 'shouldn't enable employers to discriminate based on arbitrary assumptions about people's age, sex or other characteristics as a group, but should only operate on the basis of people's actual abilities as individuals'.[314]

The point is made above that a duty to make reasonable adjustments seems apt for attributes other than disability which could otherwise prevent a person from carrying out work, such as age, sex, pregnancy, breastfeeding, carer responsibilities, homelessness and physical features. There is no reason in principle for requiring reasonable adjustments only for disability and not for other protected attributes. The 'unjustifiable hardship' qualification could be retained as a factor to be considered in determining whether an adjustment is 'reasonable'; the ACT Human Rights Commission emphasises the importance of clarifying 'how the concepts of inability to carry out work, unjustifiable hardship and reasonable adjustment interact'.[315]

In LRAC's view, if contrary to Recommendation 18 a justification defence is not enacted and exceptions are retained, then it is LRAC's view that the 'inherent requirements of work' exception should be made available for all attributes, but only if there is at the same time a requirement to make reasonable adjustments as proposed above, Recommendation 3. This would be a reasonable limit on the right to non-discrimination under the *Human Rights Act*.

Insurance and superannuation

The *Discrimination Act* excuses discriminatory conduct in the terms of insurance and superannuation, on the basis of all attributes, if the discrimination is 'reasonable in the circumstances, having regard to any actuarial or statistical data on which it is reasonable … to rely'. Other anti-discrimination legislation in Australia, including the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill, is similarly broad in describing the data, but limits the attributes to which this exception applies to attributes of sex, age and disability and, in some cases, relationship status.

[313] Women's Legal Centre (ACT and Region), 14.
[314] COTA ACT, 4.
[315] ACT Human Rights Commission, 38.

People With Disabilities ACT submits that it 'is aware that people with disabilities experience considerable discrimination in access to employment and superannuation'. In its view, '[t]he exemptions relating to employment and superannuation should be amended to limit their scope in relation to people with disabilities to matters relating to the viability of the insurance or superannuation fund and the onus of proof should be on the insurer or superannuation provider'. It considered that '[t]he provision in the draft Commonwealth Bill is a useful model';[316] that provision was more detailed but, in effect, in substantially the same terms as the current provision in the *Discrimination Act*.

The ACT Mental Health Consumer Coalition for the ACT expressed concern about 'excusing discrimination in relation to insurance and superannuation as people with mental illness are widely discriminated against in relation to insurance'. It acknowledges that amending the Act 'may not offer further support for this particular group', however, it supports 'limiting the attributes on which basis discrimination is permitted'.[317]

Dr Asmi Wood emphasises that decisions made by insurance companies must be based on the assessment of the person on the day the contract was entered into.[318]

The current exceptions in the *Discrimination Act* for insurance and superannuation differ in that they require actuarial or statistical data in relation to insurance, but anticipate that there may be no such data in relation to superannuation. That concession may have been appropriate in 1991, but sufficient time has passed for the exception in the *Discrimination Act* to require actuarial or statistical data in relation to superannuation.

Whether relying on actuarial or statistical data, or other data, the exceptions for insurance and superannuation in the *Discrimination Act* turn on a test of 'reasonable in the circumstances'. This is an imprecise test that is not consistent with the test in the *Human Rights Act* for limiting the right to non-discrimination where, as noted above, regard is had to an inclusive list of considerations to justify the conduct.

[316] People With Disabilities, 6.
[317] Mental Health Community Coalition ACT.
[318] Dr Asmi Wood, 5 July 2014.

In LRAC's view, If contrary to Recommendation 18, a justification defence is not enacted and the exceptions for insurance and superannuation are retained, then the test for excusing discriminatory conduct should not be mere 'reasonableness'. Rather it should have regard to the right to equal and effective protection against discrimination; the purpose of the discriminatory conduct and its importance; the nature of the discriminatory conduct; the relationship between the discriminatory conduct and its purpose; and whether there was any less restrictive means reasonably available to achieve the same purpose. If an exception is limited in this way it is not, in LRAC's view, necessary to limit the attributes in relation to which the exception can operate. When assessing this, there should be reliance on actuarial or statistical data for both insurance and superannuation, and only on actuarial or statistical data that is relevant to the circumstances.

Domestic duties

The *Discrimination Act* excuses discriminatory conduct, for all attributes, when employing a person to carry out 'domestic duties' on the premises where the employer lives. This exception currently exists in various forms in all Australian anti-discrimination legislation, and recognises a regulatory dividing line between private and public areas of life. The exception recognises a person's right to choose who will be in their home.

Dr Asmi Wood submits that this exception should be retained. [319]

LRAC notes that there is currently no limit or consideration of circumstances attached to the exception. Although the exception recognises a person's right to privacy by being able to choose who will be in their home, the circumstances of domestic duties do not relate to guests, but rather to a formal arrangement – employment – which is usually subject to anti-discrimination laws. As a result, the exception can operate much more widely than a justifiable limit on the right to non-discrimination under the *Human Rights Act*.

In LRAC's view, if contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the scope of the excepted conduct that recognises the right privacy must be a justifiable limit on the right to non-discrimination. This requires having regard to the right to equal and effective protection against discrimination; the purpose of the discriminatory conduct and its importance; the nature of the discriminatory conduct; the relationship between the discriminatory conduct and its purpose; and whether there was any less restrictive means reasonably available to achieve the same purpose.

[319] Dr Asmi Wood, 5 July 2014.

Recommendation 19

Recommendation 19.1

Even if, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the exception for acts done under statutory authority should be repealed and replaced by an exception for an act done under an order of a court or tribunal which is mandatory and specific about conduct that must be performed in the absence of a non-discriminatory alternative.

Recommendation 19.2

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exceptions for religious bodies, educational institutions and workers are available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT).

Recommendation 19.3

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for voluntary bodies

i. **be limited to allowing exclusion from membership of a person who is not a member of the group of people with a protected attribute for whose benefit the voluntary body was established**
ii. **be limited to the provision of benefits, facilities or services to members of the voluntary body.**

Recommendation 19.4

Even if, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, the exception for clubs should be repealed and reliance placed on provisions for an exemption. If that recommendation is not accepted then the *Discrimination Act* should be amended so that exceptions that allows clubs to limit membership on the basis of race, sex and disability be extended to allow clubs to limit membership on the basis of any protected attribute if the club has as its principal object the provision of benefits to people who have that attribute.

Recommendation 19.5

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for sport:

i. **is available for discrimination in relation to the exclusion of people from participation in competitive sporting activity on the basis of any attribute**
ii. **is available only when taking into account the strength, stamina or physique of competitors can be justified as a reasonable limit on the right to equal and**

effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT).

Recommendation 19.6

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then:

i. **the *Discrimination Act* should be amended to repeal the exceptions for 'genuine occupational qualifications' and reliance placed on provisions for an exemption, but if an exception for 'genuine occupational qualifications' is to be retained then:**
ii. **the *Discrimination Act* should be amended to make a single provision for an exception for 'genuine occupational qualifications' that is available for all attributes.**

Recommendation 19.7

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that:

i. **an exception for 'inability to carry out work' is available for all attributes, and**
ii. **if Recommendations 3.1 and 3.2 (reasonable adjustments) are not accepted, the exception is subject to a requirement that an employer or prospective employer must make reasonable adjustments (having regard to an inclusive list of considerations) to accommodate the needs of a person who would otherwise, because of a protected attribute, be unable to do the work.**

Recommendation 19.8

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for insurance and superannuation:

i. **is available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT)**
ii. **is assessed by reference only to actuarial or statistical data that is relevant to the circumstances.**

Recommendation 19.9

If, contrary to Recommendation 18, a justification defence is not enacted and exceptions are retained, then the *Discrimination Act* should be amended so that the exception for domestic duties be available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in s 28 *Human Rights2004* (ACT).

SPECIAL MEASURES ('MEASURES INTENDED TO ACHIEVE EQUALITY')

Overview

Australian anti-discrimination laws allow discrimination when it is intended to overcome disadvantage which has been experienced collectively by people because of a shared attribute, such as their race, sex, age or disability. Such an activity is commonly called a 'special measure to achieve equality' or, more succinctly, a 'special measure'.[320] The relevant provision in the *Discrimination Act* is titled 'Measures intended to achieve equality'.[321]

Differently from a general positive duty to promote equality as a means of reducing discrimination (which is recommended above), a special measure is a specific activity, measure or program that permits discriminatory conduct in favour of a group of people to remedy past disadvantage.[322]

The *Discrimination Act* allows such measures for two purposes: either to ensure that members of the disadvantaged group have equal opportunities with other people, or to give members of the disadvantaged group opportunities to meet their special needs, but only if it discriminates in a way that is reasonable to achieve the purpose. The *Discrimination Act* gives these examples of measures intended to achieve equality:

- an employer runs a management skills development course for female employees only, a purpose of which is to ensure that women have equal opportunities (in this case, for career development) with men.
- a health clinic provides speech therapy for autistic children only, a purpose of which is to give autistic children access to a service that meets their special needs as autistic children.

In the *Discrimination Act* as currently drafted, a measure intended to achieve equality is an exception to anti-discrimination laws, and so is argued as a defence to a claim of discrimination.

Discussion

Criteria for a special measure

[320] *Disability Discrimination Act* s 45; *Racial Discrimination Act* s 8; *Sexual Discrimination Act* s 7D; *Anti-Discrimination Act* 1996 (NT) s 57; *Anti-Discrimination Act 1991* (QLD) s 105; *Equal Opportunity Act 1984* (SA) s 47 (2)(c); *Equal Opportunity Act 1995* (VIC) s 12; *Equal Opportunity Act 1984* (WA) ss 31, 35K, 35ZD, 51, 66R, 66ZP.
[321] *Discrimination Act 1991* (ACT) s 27.
[322] *Gerhardy v Brown* (1985) 159 CLR 70.

In the Victorian *Equal Opportunity Act*, the special measures provision has been drafted to ensure that it is consistent with provision in the Victorian *Charter of Rights and Responsibilities* that provides that 'Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.[323] There is no equivalent provision in the ACT *Human Rights Act*, although the guarantee of a 'right to equal and effective protection against discrimination' will permit a special measure.[324]

The Victorian *Equal Opportunity Act* defines a special measure as a one that is 'for the purpose of *promoting or realising substantive equality* for members of a group with a particular attribute' (emphasis added).[325] The High Court in *Maloney v the Queen*[326] said that, on its interpretation of the *Racial Discrimination Act*, the nature of a special measure is not restricted to favourable or preferential treatment and may restrict rights of members of a racial group. LRAC notes that that is not the position in international human rights law; the Special Rapporteur on the Rights of Indigenous people has said (reporting on Australia), that it would be 'quite extraordinary to find, consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members'.[327]

The Victorian *Equal Opportunity Act* sets out more detailed requirements than the *Discrimination Act* does for something to be a special measure. It must be undertaken in good faith for achieving the purpose; be reasonably likely to achieve the purpose; be a proportionate means of achieving the purpose; be justified because the members of the group have a particular need for advancement or assistance; and be taken solely for that purpose or for that purpose as well as other purposes.[328] The ACT Human Rights Commission notes the value of this approach as a means to 'improve consistency with the *Human Rights Act's* right to equality protection'.[329] In their submission, Radium Mardia and Liam McAuliffe propose retaining the existing provisions. They express concern that the conditional approach taken in Victoria might constrain the 'positive expression' of the provisions in the ACT, which, in their view, 'allows for the ACT community to foster both formal and substantive equality'.[330]

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[323] Section 8(4).
[324] *Human Rights Act 2004* (ACT) s 8(3).
[325] Section 12(1).
[326] [2013] HCA 28
[327] Special Rapporteur, Report on the situation in Australia, U.N. Doc A/HRC/15/37/Add.4 (1 June 2010), Appendix B, [21]
[328] Section 12(3).
[329] ACT Human Rights Commission, 38.
[330] Radium Mardia and Liam McAuliffe, 7.

A requirement to consult?

The provision for special measures in the *Discrimination Act* could explicitly reflect international human rights practice by requiring consultation with the disadvantaged group about the special measure. Dr Asmi Wood endorses this approach and says that any such requirements should be within the meaning of the Declaration on the Rights of Indigenous People, and be based on the concept of free, prior and informed consent. [331] People With Disabilities ACT similarly submits that the special measures provisions should include a requirement for consultation with the persons for whom the special measure is made.[332]

Although the High Court in *Maloney v the Queen* said that, on its interpretation of the *Racial Discrimination Act*, there is no obligation to consult in relation to a special measure,[333] that is not the position in international human rights law.[334]

Characterisation

In the ACT, as in NSW, for example, the provision for special measures is drafted as an exception, excusing discriminatory conduct, and is not given status as being a positive measure in its own right to achieve equality. On the other hand, the special measures provision in the Victorian *Equal Opportunity Act*, like the same provision in the federal *Sex Discrimination Act*, is not drafted as an exception to unlawful discrimination, but as a positive measure in its own right in pursuit of equality, although it can be relied on as a defence.[335]

As an indication of how a special measure is characterised, the relevant procedures are confused. Under some legislation, such as the *Discrimination Act*, a special measure is set out as an exception, so that conduct that is complained of as discrimination can be characterised, after the event, as a 'special measure', and operate as a defence. Another approach, such as in NSW, is to require that advance notice be given of an intended special measure so that it can be approved and operate as an exemption.[336] In Victoria there is no requirement to seek approval of a special measure, but there is a required process to seek approval of an exemption; depending on the circumstances, the exemption process operates as a means of confirming the status of proposed conduct as a special measure, because the tribunal forms the view that the exemption being sought is a special measure.[337]

[331] Dr Asmi Wood, 5 July 2014.
[332] People With Disabilities ACT, 6.
[333] (2013) 298 ALR 208.
[334] See, for example, Committee on the Elimination of Racial Discrimination, General Recommendation 32 (2009): *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, [18].
[335] Section 12(2).
[336] Section 126A.
[337] See, for example, *Yooralla* (Human Rights) [2015] VCAT 78.

People With Disabilities ACT supports 'the inclusion of a special measure provision along the lines of the provision in the NSW Act'.[338] Similarly, the ACT Human Rights Commission notes that this is 'another exception area where the behaviour could likely be anticipated, and so could perhaps better be dealt with as an exemption'.[339] The Commission did, however, question whether this might 'unreasonably increase burdens on organisations'. [340] The Commission also submits that consideration might be given to 'whether there should be some limitation on relying on an exception, if a party could have anticipated the conduct and sought an exemption, but failed to do so. In doing so it noted that '[t]his would increase the workload of the Commission, which has an extremely small discrimination law team'.[341]

It is preferable that a special measure not be seen as, primarily, an exception to discriminatory conduct, but rather as a positive measure to promote equality. A special measure promotes substantive equality for people who share a protected attribute, and, in that it operates to discriminate positively, it is a justifiable limit on the right to non-discrimination. It will be known in advance that conduct is intended to operate as a special measure and, as for an exemption, it is desirable that such conduct be the subject of application, notification and assessment.

As the Victorian experience indicates, a special measure operates as a type of exemption, and when an exemption is sought and granted for conduct that can properly be described as a special measure, it should be recognised and approved as a special measure. Differently from a special measure, therefore, an exemption may be sought and granted to permit, for example, continuing conduct that is transitional towards a non-discriminatory state of affairs, or conduct that is necessary because of genuine occupational requirements (such as employing only women to work in a women's refuge).

Conclusion

In LRAC's view, the *Discrimination* Act should be amended so that the definition of, and criteria for, measures intended to achieve equality are consistent with the approach taken in international human rights law (eg favourable treatment; consultation, participation), and so that measures intended to achieve equality are a stand-alone provision in pursuit of equality rather than as an exception to unlawful conduct.

[338] People With Disabilities ACT, 6.
[339] ACT Human Rights Commission, 38.
[340] ACT Human Rights Commission, 38.
[341] ACT Human Rights Commission, 38.

Further, special measures should be obtained by a process of application, notification and scrutiny. Similarly to LRAC's view in relation to exemptions applications, discussed below, treating special measure applications as a public process would promote transparency, and would provide the community with an opportunity to learn about measures to promote equality for particular groups in the community.

Recommendation 20

Recommendation 20.1

The *Discrimination Act* should be amended so that the provision for 'measures intended to achieve equality' is not set out as an exception to the Act, but stands alone so that such measures are given their own status in pursuit of the objects of the Act.

Recommendation 20.2

The *Discrimination Act* should be amended so that 'measures intended to achieve equality' are defined in terms that are consistent with the approach to special measures in international human rights law, in particular requiring that special measures are

iii. **not restrictive of the rights of the affected people and communities**
iv. **designed and implemented on the basis of both prior consultation with affected people and communities and with their active participation.**

Recommendation 20.3

The *Discrimination Act* should be amended to require a person who wishes to characterise conduct as a 'measure intended to achieve equality' to notify the ACT Human Rights Commission of that measure for its publication before implementing it, but failure to notify does not affect any later assessment of whether the conduct has the character of a measure intended to achieve equality.

EXEMPTIONS

Overview

Exemptions to discrimination laws allow people or organisations to engage in discrimination on the basis of any attribute. Rather than relying on an exception, as a defence, after the conduct has happened, people or organisations can apply for permission in advance to engage in discriminatory conduct for a particular purpose. The ACT Human Rights Commission may grant an exemption for up to three years, and the period may be extended. When considering an exemption application, the Commission must have regard to the need to promote acceptance of and compliance with the Act, and, if relevant, the desirability of discriminatory conduct being permitted to redress the effects of past discrimination (that is, a special measure – see above).

Although the *Discrimination Act* identifies these two considerations that are consistent with non-discrimination and equality aims, these are not exclusive considerations and, on its terms, the Act does not prevent exemptions from being granted for conduct that is contrary to non-discrimination and equality aims. To date, the ACT Human Rights Commission has considered only two exemption applications, both of which were to allow defence companies to discriminate against workers on the basis of race, so as to comply with contractual obligations imposed by the United States of America. The ACT Commission refused both, but both were granted by the Tribunal on review.[342] One has since been renewed by the ACT Commission.[343]

Discussion

Assessment criteria

Radium Mardia and Liam McAuliffe propose an approach to exemptions based on the current model, but submit that the ACT Human Rights Commission should be 'required to ensure that any exemption is for conduct or conditions which are not inconsistent with the objects of the legislation' and to 'impose conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation'.[344]

[342] *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 (24 July 2008); *BAE Systems Australia Limited v Act Human Rights Commission* [2011] ACAT 53.
[343] *Raytheon Australia Pty Ltd v Act Human Rights & Discrimination Commission* [2012] ACAT 37.
[344] Radium Mardia and Liam McAuliffe, 17-18.

Importantly, however, since the exemption provisions were drafted, the ACT *Human Rights Act* has been enacted. As discussed previously, the *Human Rights Act* recognises a number of rights including the right to equality and non-discrimination. In Victoria, the only other Australian jurisdiction that has both anti-discrimination and human rights legislation, the anti-discrimination law requires an exemption decision to be made by taking account of whether the proposed exemption is a reasonable limitation on the right to equality. The *Discrimination Act* could similarly require an approach to creating exemptions that imposes only a reasonable limit on non-discrimination and equality rights.

People With Disabilities ACT supports this approach and submits that an exemption 'should only be granted if it has a legitimate aim, is necessary and proportionate and is a reasonable limit on the discrimination and equality rights'.[345] Dr Asmi Wood agrees that exemption applications should be considered having regard to the rights to equality and non-discrimination, but subject to the operation of s 51xxci and s 122 of the Constitution.[346]

In LRAC's view, requiring exemption applications to be assessed having regard to the justifiability of any limitation on the right to non-discrimination would promote both consistency in the way in which applications are decided and recognition of the importance of the right to equal and effective protection against discrimination in the *Human Rights Act*.

Application process

Submissions support a 'public and transparent' exemptions scheme.[347] In Victoria, and under the Commonwealth race, sex, disability and age discrimination laws, exemption applications are treated as a public process, in which the application is advertised and submissions are sought. This approach was formalised in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill, which treated exemptions as legislative instruments on which public consultation was required.

An exemption under the *Discrimination Act* is a notifiable instrument, however, no public process is required for exemption applications in the ACT. The *Discrimination Act* could require a public process for notifying, considering and deciding an exemption application.

[345] People With Disabilities ACT, 7.
[346] Dr Asmi Wood, 5 July 2014.
[347] Radium Mardia and Liam McAuliffe, 17-18; People With Disabilities ACT, 7.

In LRAC's view, treating exemption applications as a public process would promote transparency and provide parties who have an interest in the application to make their views known. More generally, it would provide the community with an opportunity to learn about the application of anti-discrimination legislation and the process by which competing interests may be balanced.

Recommendation 21

Recommendation 21.1

The *Discrimination Act* should be amended so that:

i. **an exemption is characterised as a justified limitation on the right to non-discrimination**
ii. **in exercising the exemption power the ACT Human Rights Commission must have regard to the same factors that are set out in section 28 of the *Human Rights Act 2004* (ACT) to justify a limitation on a human right.**

Recommendation 21.2

The *Discrimination Act* should be amended so that an application for an exemption, or for a further exemption, is publicly notified by the ACT Human Rights Commission which shall call for and, before deciding the exemption application, shall receive and consider submissions that address whether the exemption should be granted.

VICTIMISATION

Overview

In the ACT, the *Discrimination Act* prohibits subjecting a person to 'any detriment' because they have taken – or are believed to be intending to take – action specified under the Act. For example, a café owner hears that a female casual employee intends making a sexual harassment complaint against him, and stops giving her any work. To get work, the woman feels she has no choice but to say she won't complain. There is an exception in the *Discrimination Act*, which exists in similar terms in all other anti-discrimination laws, for a claim that 'is false and not made honestly'.

A complaint of victimisation can be made whether or not there has been a complaint made under the *Discrimination Act*, and whether or not a complaint that has been made is successful.

The reason for victimisation protection is to ensure that a person is not deterred from pursuing a discrimination complaint for fear of reprisals or being disadvantaged. For example, People With Disabilities ACT explain that '[t]he real or perceived fear of victimisation is a major issue for people with disabilities who encounter discrimination and a major barrier to them in taking action to resolve the discrimination either informally by dialogue with the discriminator or formally by the *Discrimination Act* complaints process'.[348]

The ACT Bar Association submit that people should be protected from victimisation because they use the *Discrimination Act*, however 'anyone proved to have made complaints or brought proceedings, on false or vexatious grounds, thus causing others loss, damage or legal costs, should be liable to pay just compensation or costs'.[349] Dr Asmi Wood agrees that victimisation should be prohibited, however he considers that victimisation should be conceived as a broad common law duty, and not limited further. [350]

[348] People With Disabilities, 7 ACT.
[349] ACT Bar Association, 3.
[350] Dr Asmi Wood, 5 July 2014.

Discussion

The victimisation provisions in the *Discrimination Act* differ from anti-discrimination laws in other Australian jurisdictions. For example, while the provisions in the Act protect a person who engages in specified conduct, other anti-discrimination laws in Australia protect a person who engages in specified conduct, but also have a 'catch-all' provision that protects a person who does anything in accordance with the anti-discrimination legislation. The *Discrimination Act* does not have such a 'catch-all' provision. The ACT Human Rights Commission highlights the absence of the catch-all provision, noting that, as a result, the Act 'does not cover a situation where a person's conduct is not specified, but should, in principle, be protected, such as telling another person about their anti-discrimination rights'.[351]

The *Discrimination Act* protects a person because of what they have done, or are believed to be intending to do, in relation to the Act, however other anti-discrimination laws in Australia also protect a person because of what their associate does. For example, in the café scenario above, the *Discrimination Act* will not cover victimisation of the employee by the café owner if the victimisation is based on the employee's partner complaining about the sexual harassment. Further, while the *Discrimination Act* protects a person against a detriment that has happened, unlike other Australian anti-discrimination laws it does not protect people from the threat of detriment. For example, in the café example above, the *Discrimination Act* may not cover victimisation by the café owner if the conduct is only a *threat* to stop giving the employee any work. Further, the *Discrimination Act* will not cover victimisation by the café owner if the café owner's conduct is to stop giving work to the female employee's sister, or to refuse to let her partner into the café. Protection against threatened detriment was recommended by the NSW Law Reform Commission in its 1999 review of the NSW anti-discrimination law.[352] People With Disabilities ACT submitted that '[t]he victimisation provisions should include the threat of detriment and conduct affecting a relative or associate'.[353]

Finally, the *Discrimination Act* protects a person because of what they have done, or are believed to be intending to do. There are similar protections in other Australian anti-discrimination legislation. In the café example above, the *Discrimination Act* will not cover

[351] ACT Human Rights Commission, 40.
[352] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* 92 (1999) Recommendation 98.
[353] People With Disabilities ACT, 7.

victimisation by the café owner if it is based on a *suspicion* that the employee has made a sexual harassment complaint against him, even if she hasn't done so. Without elaboration, People With Disabilities ACT does not support the inclusion of 'suspicion of conduct'.[354]

Conclusion

In LRAC's view, the Council considers that the *Discrimination Act* should be amended to include any conduct covered by the Act, the threat of detriment, and the actions of and detriment to, an associate of the person. In LRAC's view, these changes would extend the coverage of legislation that is designed to ensure that the *Discrimination Act* is used without fear, and would bring the *Discrimination Act* into line with other discrimination legislation in Australia.

Recommendation 22

The *Discrimination Act* should be amended so that the protection against victimisation covers:

i. **not only the matters currently listed, but anything done in accordance with the Act**
ii. **not only detriment, but also threat of detriment**
iii. **not only a belief that a person proposes to do something, but also a belief that a person has done something**
iv. **not only conduct of and detriment to the person, but also conduct of and detriment to an associate of the person.**

[354] Ibid.

ATTRIBUTED LIABILITY (ACTS OF REPRESENTATIVES)

Overview

The common law concept of 'vicarious liability' means that an employer or principal is responsible for what their employees or agents do in the course of their duties. All discrimination laws, including the *Discrimination Act*, make employers or principals responsible for the discriminatory behaviour of their employees or agents. Technically, this responsibility is different from vicarious liability, and is more accurately referred to as 'attributed liability'.[355]

The *Discrimination Act* says that a person is responsible for the discriminatory conduct of their 'representative', acting within their authority. Unlike the law of vicarious liability, attributed liability under the *Discrimination Act* excuses the employer or principal if they took 'all reasonable steps' to prevent the conduct. However, merely having a policy will not be sufficient, and an employer must ensure that its policies are communicated effectively.[356] The size and resources of an employer are relevant, so that larger employers will be expected to do more than smaller ones to rely successfully on the defence.[357]

Discussion

In the *Discrimination Act*, liability can be attributed only to a 'representative' who is acting 'within the scope of [their] actual or apparent authority'. The Commonwealth *Sex Discrimination Act*, for example, takes a broader approach and attributes liability for discriminatory conduct that occurs 'in connection with the employment of the employee or with the duties of the agent as an agent'.[358]

The Northern Territory Act sets out considerations to assess whether 'all reasonable steps' were taken by the person (or organisation) to whom liability would be attributed, including:[359]

(a) the provision of anti-discrimination training;

(b) the development and implementation of an equal employment opportunity management plan;

(c) the publication of an anti-discrimination policy;

(d) their financial circumstances; and

[355] Neil Rees et al, *Australian Anti-Discrimination Law* (2nd ed, 2014), 764-773.
[356] *Evans v Lee* (1996) EOC 92-822; *Hopper v Mt Isa Mines Ltd* (1997) EOC 92-879.
[357] *Asnicar v Mondo Consulting Pty Ltd* [2004] NSWADT 143.
[358] Section 106.
[359] Section 105.

(e) the number of workers and agents.

Another approach, taken in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill, is to excuse the employer or principal if they 'took reasonable precautions, and exercised due diligence' to avoid the discriminatory conduct. It is possible that 'exercising due diligence' requires more than simply taking steps and extends, for example, to monitoring and assessing compliance with policies and training.

Dr Asmi Wood submits that the attributed liability provisions should include a due diligence test, and the employer should automatically be included as a party to the action. He notes that it is an inherent duty on employers that there is a positive duty of due diligence. He also submits that consideration be given to exceptions for small businesses.[360]

Conclusion

In LRAC's view, an attributed liability provision encourages employers and principals to take positive steps to prevent unlawful conduct. It is desirable to make clear what steps can be taken to prevent unlawful conduct.

Recommendation 23

Recommendation 23.1

The *Discrimination Act* should be amended so that the taking of 'all reasonable steps' is assessed by reference to an inclusive list of factors, such as those set out in section 105 of the *Anti-Discrimination Act* (NT).

Recommendation 23.2

The *Discrimination Act* should be amended to require not only that the person took all reasonable steps to prevent the representative from engaging in the conduct, but also that the person exercised due diligence to avoid the discriminatory conduct.

[360] Dr Asmi Wood, 5 July 2014.

ENFORCEMENT AND COMPLIANCE

The mechanisms for enforcing the *Discrimination Act* are in the ACT *Human Rights Commission Act*, as are the mechanisms for enforcing some other ACT laws. Those mechanisms, and responsibility for them, are currently being reviewed by the ACT Government. To avoid LRAC's review of *Discrimination Act* overlapping with that review of responsibilities, the issues below are not directly related to the discrimination provisions in the *Human Rights Commission Act*. Instead, the issues have been expressed at a level of principle, so as to inform a possible redesign of responsibilities under the *Human Rights Commission Act*.

Principles

The *Discrimination Act* is currently enforced through the following process, set out in the ACT *Human Rights Commission Act*:[361]

1. a person who believes that they are the victim of discrimination, harassment, vilification or victimisation must make a written complaint (but is entitled to help in putting it in writing);

2. the person who complains (the complainant) and the person or organisation they complain about (the respondent) must make that complaint to a statutory body that may initiate a confidential conciliation process to try to reach an agreed resolution; and

3. if the complaint is not resolved the complainant has the option of running a case against the respondent in a tribunal as a matter of public accountability.

This process is based on principles of individual responsibility, confidentiality, mandatory statutory oversight, and public accountability.

Individual responsibility

The principle of individual responsibility in enforcing anti-discrimination laws has been widely and persistently criticised for asking too much of a person who is a victim of discrimination, harassment, vilification or victimisation.[362] It is often beyond the financial, personal and

[361] Part 4.

[362] See, for example, Margaret Thornton, The Liberal Promise: *Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 175; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325; Dominique Allen, 'Reducing the Burden of Proving

emotional resources of a victim to pursue the person or organisation alleged to have discriminated; by definition a person who complains of discrimination is usually in a less powerful position than the person or organisation they are complaining against.

The conciliation process has a high rate of success, and is a valuable means of providing redress for discrimination complaints, and for exploring and achieving solutions to systemic issues that are raised by a complaint. At the same time, it is not a sufficient guarantee of the human right to equal and effective protection against discrimination to protect it only by the complaint of a person denied that right.

Possible additional avenues for redress include allowing a person to give permission to another person or organisation, or enabling a statutory body to pursue a complaint about the conduct complained of. To an extent, these additional avenues for redress are already available in the ACT: another person can seek approval to complain on behalf of a person who is unable to complain, and the ACT Human Rights Commission can initiate a complaint when a person could do so, but has not. There are, however, limitations on these: the Commission's approval is needed for another person to complain on behalf of a person; only another person, and not an organisation, can complain on behalf of a person; and a complaint initiated by the Commission cannot be taken to the tribunal (ACAT) as a matter of public accountability.

The principle of individual responsibility has also been criticised for focussing only on the individual instance, and not taking account of what may be widespread or systemic reasons for the conduct complained of.[363] Possible alternatives include allowing a statutory body such as the ACT Human Rights Commission to conduct a wider inquiry arising from the conduct complained of, and to allow an individual complaint to be treated as one that is representative of broader issues. To an extent, these alternatives are already available in the ACT, where a complaint can be treated as a 'representative' complaint under certain conditions; the Commission can initiate a complaint when it is satisfied that 'it is in the public interest' to do so and can make recommendations to third parties arising from its consideration of a complaint. These alternatives are, however, limited: if a representative complaint is taken to ACAT, the tribunal does not have the power to make any orders that go

Discrimination in Australia (2009) 31(4) *Sydney Law Review* 579; Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *UNSW Law Journal* 699.

[363] See, for example, Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83.

beyond a remedy to an individual complainant, a complaint initiated by the Commission cannot be taken to ACAT, and recommendations to third parties are not easily enforceable. These limitations could be addressed by enhancing the powers of the Commission and ACAT, discussed below, and by allowing a complaint initiated by the ACT Human Rights Commission to be taken to ACAT.

Overall, an alternative or additional principle on which to base enforcement of the *Discrimination Act* could be that of state responsibility. For example, the introduction of a positive duty, discussed above, would lead to a greater role for the government as an active proponent of non-discriminatory conduct, shifting the focus to some extent from individual responsibility for enforcement.

In LRAC's view, as a matter of principle, the right to equal and effective protection against discrimination in the ACT in the *Human Rights Act* should be protected by more than merely enabling the complaint of a person denied that right, and procedures should be established to relieve the burden on individuals and to establish broad and well-resourced responsibilities for protecting that right. LRAC notes the necessary resource implications in enhancing the powers of the Commission and ACAT.

Confidentiality

The principle of confidentiality in enforcing anti-discrimination laws allows a person to complain under the Act without the burden of publicity and the fear of public criticism. Confidentiality can, however, make it difficult to achieve attitudinal change that would come through publicising the type of conduct that occurs and the way it is resolved: it is difficult to use real examples of complaints and their outcomes that will help people understand their rights, to give indicative information about the possible outcomes of a discrimination complaint, and to use information about previous conciliated outcomes to assist parties in coming to an agreement.

Two submissions to the inquiry directly addressed this issue. The ACT Human Rights Commission endorses an earlier recommendation made to the Federal Government by the Discrimination Law Experts' Group that 'the content, conduct and results of a conciliation process should be presumptively confidential, but that parties can agree to disclose information'.[364] Disclosure may, for example, be for the Commission's education and promotion purposes, or may be for a party to publicise the outcome of a complaint.

[364] ACT Human Rights Commission, 44.

The Commission also supports 'an amendment that would allow access to otherwise confidential information for research purposes, subject to the research being approved by an institutional ethics committee'. To assist in this process, the Commission suggests that 'complaints-related information could be preserved as archival information'.[365]

Dr Asmi Wood considers that the issue of confidentiality should be discretionary, and based on a public interest test. In his view, parties should be given the option of submitting their preference.[366]

In LRAC's view, as a matter of principle, complaints under the *Discrimination Act* should be presumptively confidential to enable victims to make a complaint without fear of adverse consequences. Parties should, however, be permitted to consent to certain confidential information being made public by the Commission, and this preference should be taken into account by the relevant decision-maker. Consideration should also be given to making confidential information available for research purposes, subject to an ethics approval process.

Mandatory statutory oversight

Direct access to the tribunal

Currently in the ACT, complaints of discrimination must be made to the ACT Human Rights Commission. The Commission may initiate a confidential conciliation process to try to reach an agreed resolution, and if the complaint is not resolved the complainant has the option of running a case against the respondent in a tribunal as a matter of public accountability. In comparison to litigation, conciliation is an accessible and low cost option. The principle of mandatory oversight by Human Rights and Equal Opportunity Commissions has, however, been criticised for creating duplication and delays and being overly rigid in preventing a complainant and/or respondent from having direct access to the public accountability stage.[367]

A possible alternative is to allow a complainant and/or respondent direct access to ACAT. Victoria, for example, has allowed direct access to its tribunal (Victorian Civil and Administrative Tribunal) since 2010. In Victoria in 2013/2014, 1057 complaints were made to the statutory body (the Victorian Equal Opportunity and Human Rights Commission) and about 70 complaints were made directly to the tribunal.

[365] ACT Human Rights Commission, 46.
[366] Dr Asmi Wood, 5 July 2014.
[367] Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, State of Victoria Department of Justice, June 2008, 69-70.

Submissions to LRAC on this issue emphasise the importance of both flexibility and accessibility respectively. For example, the ACT Bar Association submits that people should have 'their free choice of avenue to complain or proceed'. In its view, '[c]laims for relief under the Act should be dealt with by the ordinary Courts and Tribunals, which ought to be able to order or suggest mediation or conciliation wherever this is appropriate'.[368] Dr Asmi Wood considers that there should be a presumption that matters go to the Human Rights Commission, however, a test of reasonableness based on subjective issues should be applied in the event that one or both parties wish to bypass the Commission.

The ACT Human Rights Commission acknowledges the arguments in favour of direct access, however it submits that 'the free, complaint resolution service provided by the Commission outweighs these considerations'.[369] It considers that 'the addition of further legal supports through Community Legal Centres and/or the addition of positive duties not to discriminate' would address concerns that aggrieved persons may feel isolated after a failed conciliation at the Commission.[370]

If the Act is amended to allow complainants to directly access ACAT, the Commission submits that its role 'would need to move more to one of systemic oversight'. In its view, this might include 'more resources for own-motion investigations and industry-based education and compliance activities (akin to WorkCover), and would likely require new resources for the Commission'. [371]

In LRAC's view, as a matter of principle, complainants should be able to elect whether to complain to the ACT Human Rights Commission, which offers the less costly option of conciliation, or to apply directly to ACAT which is a forum of public accountability.

Investigation powers

It is central to a statutory agency's capacity to oversee compliance with the *Discrimination Act* that the agency has powers of investigation, which include a power to obtain information and documents. The ACT Human Rights Commission already has that power,[372] but the usefulness of what it obtains is limited because information and documents it obtains in this way are not allowed to be used in any subsequent legal proceedings. A possible alternative is to allow information and documents obtained in this way to be used only in proceedings under *Discrimination Act* but not for any other purpose.

[368] ACT Bar Association, 4.
[369] ACT Human Rights Commission, 47.
[370] ACT Human Rights Commission, 47.
[371] ACT Human Rights Commission, 47.
[372] *Human Rights Act 2004* (ACT) s 73.

Enforcement of recommendations

It is central to a statutory agency's capacity to oversee compliance with the *Discrimination Act* that the agency's powers are enforceable. Although the ACT Human Rights Commission can make recommendations to third parties arising from its consideration of a complaint,[373] the enforcement mechanism for failure to comply with those recommendations requires a formal prosecution, [374] and has not been used. A possible alternative is the use of civil penalty provisions. LRAC notes the necessary resource implications in enabling the Commission to engage in enforcement procedures.

The ACT Human Rights Commission also notes the complexity associated with the *Human Rights Commission Act*, which states that a conciliated agreement of a discrimination complaint 'is enforceable as if it were an order of the ACAT'.[375] This is complicated by the *ACT Civil and Administrative Tribunal Act 2008*,[376] which provides that a money order or non-money order made by ACAT is taken to have been filed in the Magistrate's Court for enforcement under the Court Procedures Rules 2006. As the Commission explains, this suggests that a breach of a conciliated agreement may have to be enforced in the Magistrates Court, with a significant cost implications for parties, possibly preventing them from utilising the 'lower cost, more accessible jurisdiction of the ACAT, the members of which are also more likely to be more familiar with discrimination law'.

Recommendation 24

Recommendation 24.1

As a matter of principle, the right to equal and effective protection against discrimination in the ACT, under the *Human Rights Act*, should not be protected principally by enabling a complaint to be made by a person denied that right, and procedures should be established to relieve the burden on individuals and to establish broad and well-resourced responsibilities for protecting that right.

Recommendation 24.2

As a matter of principle:

i. **others should be able to complain on behalf of a person who has experienced prohibited conduct**
ii. **ACAT should have the power to make an order that has broader effect than only providing remedy to an individual complainant, and that addresses**

[373] *Human Rights Act Commission 2004* (ACT) s 83.
[374] *Human Rights Act Commission 2004* (ACT) s 85.
[375] Section 62(4).
[376] Section 71.

circumstances that give rise to or facilitate the occurrence of prohibited conduct.

Recommendation 24.3

As a matter of principle, confidentiality should be presumed in relation to complaints made under the *Discrimination Act*, but parties should be permitted to consent to certain confidential information being made public, and confidential information should be made available for research purposes subject to an ethics approval process.

Recommendation 24.4

As a matter of principle, a person complaining of prohibited conduct should be able to elect either to make a complaint to the ACT Human Rights Commission, or to make an application to the ACT Civil and Administrative Tribunal.

Recommendation 24.5

As a matter of principle, information and documents acquired by the ACT Human Rights Commission under its statutory power should be able to be used in later tribunal proceedings.

Recommendation 24.6

As a matter of principle, the ACT Human Rights Commission should have the power to pursue civil penalties for failure to comply with its statutory power to make recommendations.

Public accountability

The principle of public accountability for discriminatory conduct through a tribunal hearing has not been subject to criticism itself, but aspects of ACAT process have been subject to criticism, and these are discussed below.

Reasons

At present, ACAT is not required to give reasons unless requested, and is not required to make publicly available any reasons that are provided in this way. As a result, ACAT publishes very little public guidance on how the *Discrimination Act* can be applied and should be interpreted. An option is to require ACAT to publish reasons in all matters arising under the *Discrimination Act*, although this is not a matter LRAC has raised with ACAT.

All submissions that addressed this issue considered that ACAT should publish reasons in matters under the *Discrimination Act*. Dr Asmi Wood considers that reasons should be

published in public interest cases,[377] while the ACT Human Rights Commission submits that it is 'vitally important' that written decisions be published in all cases,[378] noting the current lack of jurisprudence on the application of the *Discrimination Act*. Freedom 4 Faith emphasises the importance of published reasons 'to help organisations within the ACT to understand the scope and application of the anti-discrimination laws to which they are subject, especially given the vagueness of the current legislation'.[379]

In LRAC's view, as a matter of principle, ACAT should publish reasons in all matters heard under the *Discrimination Act*. This would promote certainty and consistency in the application of the Act.

Burden of proof

A complainant is currently responsible for demonstrating that the respondent treated them unfavourably because of a protected attribute. It can, however, be difficult for the complainant to establish the reasons for the respondent's conduct, because they cannot know what was in the mind of the respondent. One possible alternative is to require the complainant to show that they were treated unfavourably and then to require the respondent to show that the treatment was not for discriminatory reasons. This is the approach taken in the Commonwealth *Fair Work Act.*

A slightly different approach is to require the complainant to show that they were treated unfavourably *and* to provide evidence from which the court could decide that the respondent treated them unfavourably because of a protected attribute. The respondent would then be required to show that the treatment was not for discriminatory reasons. This approach was proposed in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill, and is the approach taken in the UK, Canada, US and European Union.

Freedom 4 Faith did not express a preference for a particular model, however, it submits that 'at the very least the applicant needs to prove that they have a protected attribute and that they have been subject to unfavourable treatment'. In its view, [t]hese are within the applicant's capacities to demonstrate'.[380]

The ACT Human Rights Commission supports an approach similar to that taken in the Commonwealth *Fair Work Act.* In its view, 'the Act should be amended to introduce a presumption that action was taken for the reason alleged, unless the respondent proves

[377] Dr Asmi Wood, 5 July 2014.
[378] ACT Human Rights Commission, 48; Freedom 4 Faith, 10.
[379] Freedom 4 Faith, 10.
[380] Freedom 4 Faith, 10.

otherwise. To 'prove otherwise', the respondent would prove that the alleged discriminatory conduct was a proportionate means of achieving a legitimate end or purpose'. [381] Dr Asmi Wood similarly submits that 'a reverse onus should apply after the prima facie case is made out by the complainant'. [382]

Women With Disabilities ACT and People With Disabilities ACT advocate a 'shifting burden of proof',[383] in which the burden would rest 'with the party best able to satisfy it and … can shift if necessary to accommodate revelations which come to light in the investigation or hearing of the matter'.[384] In support of its submission, People With Disabilities ACT explains that '[p]eople with disabilities often cannot make complaints of discrimination or have those complaints resolved because the evidence of discrimination is not within their control but rests with the alleged discriminator'.[385]

Women With Disabilities ACT draws particular attention to matters involving multiple discrimination, and the importance of ensuring that 'the evidentiary burden of proof should be proportionately lowered to reflect the exponential impact that unlawful multiple discrimination has on an individual'. Citing the Australian Human Rights Commission's submission to the inquiry into the proposed consolidation of Commonwealth discrimination law, it considers that a shifting burden of proof 'reflects a well-established common law principle that evidence should be weighed according to the capacity of the party to produce it'. [386]

In LRAC's view, complainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the complainant at the time of the unfavourable treatment.

Remedies

Representative complaints

A criticism of the process of public accountability under the *Discrimination Act*, noted above, is that ACAT does not have the power to make any orders that go beyond a remedy to an individual complainant. This means that even if a representative complaint is taken to ACAT,

[381] ACT Human Rights Commission, 49.
[382] Dr Asmi Wood, 5 July 2014.
[383] Women With Disabilities ACT 4, 11; People With Disabilities ACT, 7.
[384] People With Disabilities ACT, 7.
[385] Ibid.
[386] Women With Disabilities ACT, 11.

the tribunal cannot make representative orders or corrective orders. Possible alternatives include expanding the range of orders that ACAT is empowered to make, such as enabling ACAT to recommend changes to policy and practice or systemic responses to discrimination to be monitored by the ACT Human Rights Commission.

The ACT Human Rights Commission submitted that 'the *Discrimination Act* should be amended to enable the filing of representative complaints' and that 'ACAT should be able to award damages in these cases'.

Compensatory damages

A common criticism of damages awards under anti-discrimination laws throughout Australia is that they are inconsistent and unpredictable. There is confusion over what principles and considerations should guide the assessment of damages for unlawful conduct under anti-discrimination law. This uncertainty can, for example, hinder constructive attempts to resolve matters in advance of a tribunal hearing. An alternative approach is to provide legislative guidance about what matters the courts and tribunal should take into account when assessing damages. This would promote greater certainty in the assessment of compensatory damages.

On the topic of damages, the ACT Human Rights Commission noted that anti-discrimination complainants have typically been poorly compensated in comparison to parties involved in claims of other types of wrongful conduct. The Commission also submitted that it 'may be beneficial' to amend the Act to allow the ACT Human Rights Commission 'to intervene as an intervener or amicus at the end of a matter to make submissions only on damages, as the Victorian Commission has routinely done.'[387]

ACAT observed that 'complainants often have difficulty understanding what compensatory damages are and understanding that they may need to provide evidence to facilitate assessment of damages they seek, even when detailed information is provided about that at directions hearings'.[388]

Recommendation 25

Recommendation 25.1

As a matter of principle, ACAT should be required to publish reasons in matters in matters decided under the *Discrimination Act.*

[387] ACT Human Rights Commission, 49.
[388] ACAT (observations to LRAC).

Recommendation 25.2

As a matter of principle, in an ACAT hearing, once a complainant has established that they have been treated unfavourably, a respondent should be required to show that the protected attribute or attributes alleged by the complainant were not a reason for that treatment.

Recommendation 25.3

As a matter of principle, in response to a successful representative complaint, ACAT should have the power to recommend that certain action be taken, such as monitoring by the ACT Human Rights Commission.

Recommendation 25.4

As a matter of principle, the *Discrimination Act* should specify the factors to be taken into account when assessing damages.

Recommendation 25.5

As a matter of principle, the ACT Human Rights Commission should be empowered to intervene to make submissions on damages.

APPENDIX 1

Recommendations made by the 2013 report of the NSW Standing Committee on Law and Justice on serious vilification

Recommendation 1: That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.

Recommendation 2: That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to insert an exception for private conduct, as per section 12 of the *Racial and Religious Tolerance Act 2001* (Vic).

Recommendation 3: That, for avoidance of doubt, the NSW Government amend section 20D of the *Anti-Discrimination Act 1977* to state that recklessness is sufficient to establish intention to incite.

Recommendation 4: That the NSW Government amend Division 3A of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.

Recommendation 5: That the NSW Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice as soon as possible after the period of five years of any amendments to Division 3A of the *Anti-Discrimination Act 1977.*

Recommendation 6: That the NSW Government review the adequacy of the maximum penalty units in section 20D of the *Anti-Discrimination Act 1977*, taking into account the maximum penalty units for comparable offences within the *Crimes Act 1900* and other Australian jurisdictions.

Recommendation 7: That the NSW Government repeal the requirement for the Attorney General's consent to prosecutions of serious racial vilification in section 20D(2) of the *Anti-Discrimination Act 1977*.

Recommendation 8: That the NSW Government amend the standing for the lodgement of complaints provision in section 88 of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.

Recommendation 9: That, for the purposes of racial vilification proceedings only, the NSW Government extend the time limit for commencing prosecutions under section 179 of the *Criminal Procedure Act 1986* to 12 months to be consistent with the time limit for lodging complaints under section 89B of the *Anti-Discrimination Act 1977*.

Recommendation 10: That, if Recommendation 7 is not implemented, the NSW Government extend the timeframe for the President of the Anti-Discrimination Board to refer complaints to the Attorney General under section 91(3) of the *Anti-Discrimination Act 1977*.

Recommendation 11: That the NSW Government amend section 91 of the *Anti-Discrimination Act 1977* to allow the President of the Anti-Discrimination Board of NSW to directly refer serious racial vilification complaints to the NSW Police Force.

Recommendation 12: That the NSW Government amend the *Anti-Discrimination Act 1977* to allow the NSW Police Force to prepare a brief of evidence for the Director of Public Prosecutions, following the referral of a serious racial vilification complaint.

Recommendation 13: That, if Recommendation 7 is implemented, the NSW Government remove the requirement for the President of the Anti-Discrimination Board of NSW to refer serious racial vilification complaints to the Attorney General under section 91(2) of the *Anti-Discrimination Act 1977*.

Recommendation 14: That the NSW Police Force provide training to its members about the offence of serious racial vilification in section 20D of the *Anti-Discrimination Act 1977*.

Recommendation 15: That the NSW Government amend section 20C of the *Anti-Discrimination Act 1977*, where appropriate, to reflect any amendments made to section 20D.