



INCLUSIVE, PROGRESSIVE, EQUAL: DISCRIMINATION LAW REFORM

Discussion Paper 1

Extending the Protections of Discrimination Law

ACT Justice and Community
Safety Directorate

October 2021

CONTENTS

BACKGROUND.....	5
Purpose of this Discussion Paper	5
Statement of Principles.....	5
Making a submission.....	6
Notes on language and references.....	6
OVERVIEW OF DISCRIMINATION LAW.....	7
COVERAGE OF THE DISCRIMINATION ACT	9
Current law.....	9
LRAC recommendation.....	9
Discussion	9
Questions for public consultation	12
REFORMING EXCEPTIONS TO DISCRIMINATION LAW: OVERVIEW ..	13
LRAC recommendation – a new single ‘justification defence’	13
Refining the existing exceptions in the Discrimination Act	16
Questions for public consultation	16
EXCEPTION FOR ACTS DONE TO COMPLY WITH THE LAW.....	17
Current law.....	17
LRAC recommendation.....	17
Discussion	17
Questions for public consultation	18
EXCEPTIONS FOR RELIGIOUS BODIES.....	19
The right to freedom of religion	19

Federal developments	19
Current ACT law	19
LRAC recommendation.....	20
Exception for arranging religious observances.....	21
Limited exception for religious schools to discriminate on religious grounds	21
Exceptions for religious bodies dealing with the public generally.....	22
EXCEPTIONS FOR VOLUNTARY (NOT-FOR-PROFIT) ORGANISATIONS	
.....	26
Current law.....	26
LRAC recommendation.....	26
Discussion	26
EXCEPTIONS FOR LICENSED CLUBS	28
Current law.....	28
LRAC recommendation.....	28
Discussion	29
EXCEPTIONS FOR SPORT.....	30
Current law.....	30
LRAC recommendation.....	30
Discussion	30
Questions for public consultation	32
EXCEPTIONS RELATING TO WORK	33
Current law.....	33
LRAC recommendation.....	34
Discussion	34
.....	36

EXCEPTIONS FOR EMPLOYING WORKERS IN PRIVATE HOMES37

 Current law..... 37

 LRAC recommendation..... 37

 Discussion 37

EXCEPTIONS FOR INSURANCE AND SUPERANNUATION COMPANIES38

 Current law..... 38

 LRAC recommendation..... 39

 Discussion 39

POSITIVE DUTY TO ELIMINATE DISCRIMINATION42

 Current Law..... 42

 LRAC recommendation..... 42

 Discussion 42

TABLE OF REFERENCES47

APPENDIX.....49

 51

BACKGROUND

Purpose of this Discussion Paper

The Government is aiming to modernise our discrimination laws and put the ACT at the forefront of best practice in promoting equal opportunity, respect for diversity and social inclusion in our community.

Targeted consultations conducted by former ACT Attorney-General Mr Gordon Ramsay earlier this year, explored how the ACT's discrimination law impacts individuals in the community, and how the law could be strengthened and modernised. This Discussion Paper and related Consultation Guides have been informed by the feedback received during those consultations and are intended to support a wider community conversation about discrimination law reform in the ACT.

You can find out more about the background to this project at the Discrimination Law Reform Project website: <https://justice.act.gov.au/justice-programs-and-initiatives/discrimination-law-reform>.

This discussion paper considers options for responding to recommendations made by the ACT Law Reform Advisory Council (LRAC) in its 2015 review of the *Discrimination Act 1991*. Most of the LRAC recommendations for change to Discrimination Act have already been implemented. However, recommendations in the areas of coverage, exceptions and positive duty remain outstanding.

Currently, discrimination law only applies to some types of activities, and there are a wide range of exceptions from the law which allow some bodies to discriminate in some situations. Both the LRAC review and the Mr Ramsay's consultations suggest that many of the exceptions are outdated. This Discussion Paper looks at how we can make sure the balance is right, so that discrimination is not permitted except in circumstances where it is reasonable and proportionate, and consistent with the human rights of all.

In relation to a positive duty to eliminate discrimination as recommended by LRAC, Mr Ramsay's consultations indicate there is general support for this proposal. This discussion paper explores the ways in which this duty could work and how it would complement the existing human rights framework.

Short Consultation Guides are also available on the Discrimination Law Reform Project Website. These Guides provide a concise summary of the key exceptions to the Discrimination Act and reform proposals in a more easily accessible format.

Statement of Principles

The Government will be guided by the following principles in reforming discrimination law.

- > **Broader and stronger protections:** Any changes to discrimination law should create broader and stronger protections to send a clear message that our society believes in equality and respect.
- > **Clear, simple, and user-friendly:** Discrimination laws should be as clear, simple, and user-friendly as possible, to make it easier for people to know their rights and obligations.
- > **Align with our human rights framework:** Discrimination laws should align with our human rights framework, meaning that any exceptions should be reasonably justifiable and proportionate to legitimate objectives under the *Human Rights Act 2004*, and other human rights should also be protected.
- > **The same standard for everyone:** Discrimination laws should be comprehensive and consistent. Everyone should enjoy the same standard of protection, unless there are principled reasons based on reasonable and objective criteria to distinguish between the different protected groups.
- > **Promote systemic and preventive change:** Discrimination laws should promote systemic and preventive change.

We invite you to think about these principles when considering the issues in this Discussion Paper.

Making a submission

Submissions on any of the issues raised in this Discussion Paper are invited by **midnight Sunday 9 January 2022**.

Submissions or questions about the Discussion Paper can be sent to civilconsultation@act.gov.au.

If you require this document in an alternative, accessible format, or if you require assistance in making a submission, please contact us so we can help.

Submissions will be published on the ACT Government's Justice and Community Safety Directorate website unless you tell us that you would like your submission to be confidential.

The options in this Discussion Paper are intended to promote informed public debate. They are not the Government's final proposals. All submissions received will inform the final reform proposals.

Notes on language and references

This Discussion Paper summarises parts of the Discrimination Act in non-technical language where possible. It is not a complete statement of the law and should not be taken as legal advice.

The Table of References at the end of the Discussion Paper contains complete citations for commonly used references.

The information in this paper is current as at October 2021.

OVERVIEW OF DISCRIMINATION LAW

The Discrimination Act prohibits discrimination in **six areas of public life**:

- > work
- > education
- > access to premises
- > the provision of goods, services, and facilities
- > accommodation
- > the activities of clubs holding liquor licences.

Because the areas of public life cover a wide range of activities, individuals, government agencies, schools, private companies, and community organisations all have obligations not to discriminate.

A discrimination complaint must be based on one of the **protected attributes** or grounds recognised in ACT law. These grounds are:

- > accommodation status (e.g. homelessness)
- > age
- > association with a person who is identified by reference to another protected attribute
- > breastfeeding
- > disability
- > employment status
- > gender identity
- > genetic information
- > immigration status
- > industrial activity
- > irrelevant criminal record
- > parent, family, carer, or kinship responsibilities
- > physical features
- > political conviction
- > pregnancy
- > profession, trade, occupation or calling
- > race
- > record of a person's sex having been altered on an official register
- > relationship status
- > religious conviction
- > sex
- > sex characteristics
- > sexuality
- > subsection to domestic or family violence.

The Discrimination Act prohibits **direct and indirect** discrimination.

- > **Direct discrimination** happens when a person is treated unfavourably because they have one or more protected attributes. An example of **direct discrimination** is refusing to let a couple book a hotel room due to their sexuality.
- > **Indirect discrimination** happens when a condition or requirement is imposed that is neutral on its face (that is, it applies to everyone), but in practice it is likely to disadvantage someone because they have one or more protected attributes. However, indirect discrimination is not prohibited if the condition or requirement imposed was reasonable in the circumstances. This means there is a general 'reasonableness' defence built into the Discrimination Act for indirect discrimination, but not for direct discrimination.

An example of **indirect discrimination** is a Government agency holding a public meeting on the second floor of a building without a lift. While all attendees are required to go to the second floor, this will disproportionately disadvantage a person who uses a wheelchair, who may be unable to attend.

There are a wide range of different **exceptions** to discrimination law. If the conduct complained about falls within one or more of the exceptions, then a discrimination complaint cannot succeed. The exceptions apply to both direct and indirect discrimination. The availability of exceptions is most relevant where conduct would otherwise be direct discrimination because there is no reasonableness defence under the Act for direct discrimination (and so an exception is the only way that direct discrimination can be excused).

Additionally, anyone with obligations under the Discrimination Act may also apply for an **exemption** from the Act. Exemptions are granted by the ACT Human Rights Commission. They excuse the person or organisation from compliance with part of the Discrimination Act. This means complaints cannot be made about the conduct covered by the exemption. Exemptions are currently very rare.¹

The Discrimination Act also prohibits other types of conduct, in particular:

- > **sexual harassment**: making an unwelcome sexual advance, or other unwelcome sexual conduct, in circumstances where the person on the receiving end reasonably feels offended, humiliated, or intimidated;
- > **vilification**: inciting hatred, revulsion, serious contempt, or severe ridicule of a person, in public, on one of the following grounds: (a) disability; (b) gender identity; (c) HIV/AIDS status; (d) race; (e) religious conviction; (f) sex characteristics or (g) sexuality; and
- > **victimisation**: causing (or threatening) detriment to someone because they have made a complaint under the Discrimination Act.

¹ As at October 2021, only five organisations have been granted exemptions under the Discrimination Act since it commenced. All five exemptions permit the organisations (which conduct business related to defence exports) to discriminate on the basis of nationality when hiring staff for national security reasons. The exemptions are available on the ACT Legislation Register at: <https://www.legislation.act.gov.au/a/1991-81/>.

COVERAGE OF THE DISCRIMINATION ACT

Current law

A person bringing a discrimination complaint needs to show their complaint happened in one of the six areas of public life covered by the Discrimination Act:

- > work
- > education
- > access to premises
- > the provision of goods, services, and facilities
- > accommodation
- > the activities of clubs holding liquor licences.

The current six areas of public life provide very broad coverage and will capture most but not all types of public activity. For example, most types of work, schools and other places of learning, commercial transactions, and visits to places open to the public (e.g. pools, libraries, shopping centres, nightclubs etc) will be covered.

Discrimination law does not apply to private activities – for example, things said or done between friends and family outside of the six listed areas. There is no proposal to change this.

LRAC recommendation

- REC 6.1** > The Discrimination Act should be amended to prohibit discrimination generally (in all areas of life) with an exception for private conduct.
- REC 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.

The ACT Government is proposing to adopt the LRAC recommendation that the Discrimination Act be amended to prohibit discrimination generally (in all areas of public life) with an exception for private conduct.² This would result in the removal of the six listed areas from the Discrimination Act and mean that a person would only have to show that the conduct they are complaining about occurred in public life.

The key additional areas which will be covered as a result are organised sport, government functions, and the conduct of competitions, which were identified by LRAC as gaps in the current coverage.³

Discussion

Public life

LRAC considered it would be simpler and offer the broadest possible coverage for the Discrimination Act to apply to all areas of public life, with an exception for private conduct. This approach would assume that sport, competitions, and government functions would be covered under the general concept of public life, as would the existing six listed areas. The feedback from the consultations conducted by former Attorney-General Mr Gordon Ramsay indicated general support for this proposal.

This change would make the law **more-user friendly** and provide **broader protection**. However, it will be important to ensure that it is clear what is meant by “public life” and what is excluded as “private” conduct.

² LRAC Report, Recommendation 6.1.

³ LRAC Report, Recommendation 6.2.

New areas that would be covered under public life

Organised Sport

Currently, discrimination in sport is not explicitly covered in the Discrimination Act. However, LRAC expressed the view that it is impliedly covered given the fact that the Discrimination Act provides an exception that permits discrimination in sport in some circumstances (discussed further below). LRAC recommended that organised sport (as distinct from private social activities) should explicitly be covered by the Act, for the avoidance of any doubt and to improve the public's understanding of when discrimination law applies.⁴

Sport is explicitly covered under Commonwealth disability discrimination law.⁵ Adopting a definition of public life that explicitly includes sport would make the law **clearer, simpler, and more user-friendly**, and would reinforce existing obligations on sporting organisations not to discriminate.

In Victoria, the **Equal Opportunity Act 2010** (EOA (Vic)) provides a person must not discriminate against another person by excluding the other person from participating in a sporting activity. Participating in a sporting activity includes coaching people involved in a sporting activity, umpiring, or refereeing a sporting activity, and participating in the administration of a sporting activity. There are some exceptions for competitive sporting activities, including for example to facilitate the participation of men or women in the sport.

This means that, outside of the exceptions, restrictions (such as age or sex restrictions) which limit a person's access to a sporting activity may amount to discrimination contrary to the Act.

Conduct of competitions

LRAC noted that currently, competitions such as film festivals, talent quests or reality TV shows will only be covered if the organisers are providing a service to the participants, or the organisers are in an employment relationship with the participants.⁶ This may be difficult to prove in all cases.

Making sure that discrimination law applies to the conduct of any competitions conducted in the ACT would provide **broader and stronger protections** and send a clear message about the importance of respect and equality in these public activities.

Government functions

Currently, ACT Government agencies must comply with discrimination law when acting as an employer (including contractors and volunteers) and when providing education, accommodation, or access to premises (e.g. libraries and swimming pools) to the public.

Discrimination law will only apply to the Government's other activities if these involve the provision of "services".⁷ However, it can be unclear when the Government is providing a service to someone in its interactions with the public.

Government functions that may be services covered by discrimination law include:

- > collecting garbage and supplying electricity, gas, and water;⁸

⁴ LRAC Report, 54-55. Sport can be considered to fall within the existing areas of public life as the provision of a service.

⁵ DDA (Cth), s 28.

⁶ LRAC Report, 51.

⁷ The definition of "services" in the Dictionary to the Discrimination Act includes "services provided by a government".

⁸ [IW v City of Perth \[1997\] HCA 30](#) (per Brennan CJ and McHugh J).

- > providing public transport';⁹
- > altering a person's official records (e.g. a birth certificate);¹⁰
- > providing scholarships, prizes, and awards by Government;¹¹ and
- > assessing liability for taxes and providing information or advice about tax laws.¹²

Government functions that are currently not likely to be services include:

- > deciding an application under planning law;¹³
- > government-facilitated adoptions;¹⁴
- > the conduct of child protection agencies with respect to biological parents;¹⁵ and
- > the preparation of documents for consideration by Cabinet.¹⁶

Amending the Discrimination Act so that the performance of all Government functions is explicitly covered as part of a broad definition of public life would align with the Principles guiding these reforms, as it would make the Discrimination law more **clear, simple and user friendly**. It would also provide **broader and stronger protections** by clarifying that Government is required to consistently act in a non-discriminatory way.

It would also **align with our human rights framework**. Under the Human Rights Act, public authorities are already required to act consistently with human rights and to properly consider human rights in decision-making. This includes the right to non-discrimination.¹⁷ This means that the obligation to comply with discrimination law effectively already exists for public authorities in the ACT.

To ensure clarity on which 'Government functions' are an area of public life covered by the Discrimination Act, the following would be a guide:

- > the performance of any function under a law or for a Government program;
- > the exercise of any power under a law or for a Government program; and
- > any other responsibility carried out to administer a law or conduct a Government program.¹⁸

This has been interpreted to include decisions or actions of Government officials which involve discretion, but not non-discretionary decisions or actions (where the law or program criteria leave no choice as to how the Government official may carry out their job).¹⁹

⁹ Definition of "service", Dictionary, Discrimination Act. See also [Waters & Ors v Public Transport Corporation](#) [1991] HCA 49.

¹⁰ *AB v Register of Births Deaths and Marriages* (2007) 162 FCR 528.

¹¹ Definition of "service", Dictionary, Discrimination Act.

¹² [IW v City of Perth](#) (1997) 191 CLR 1.

¹³ Ibid.

¹⁴ The Discrimination Act (s 25A) provides for an exception for the Government when making decisions about adoption.

¹⁵ [Complainant 201 707 v the ACT \(Discrimination\)](#) [2019] ACAT 1.

¹⁶ [Vintila v Federal Attorney General](#) [2001] FMCA 110.

¹⁷ Human Rights Act, s 40B. See the definition of 'public authority' in s 40 of the Human Rights Act.

¹⁸ See Commonwealth discrimination laws (SDA (Cth) s 26, DDA (Cth) s 29, ADA (Cth) s 31, and RDA (Cth) s9 (by virtue of its application to all public life), as well as laws in QLD (ADA (QLD) s 101) and Tasmania (ADA (Tas) s 22(1)(f)).

¹⁹ Commonwealth Government, [Consolidation of Commonwealth Anti-Discrimination Laws, Regulatory Impact Statement](#), 6; Australian Human Rights Commission, [Decline/termination decisions: Administration of Commonwealth laws and programs \(Summaries of decisions to decline or terminate complaints under federal discrimination laws\)](#).

Another approach would be to use the Human Rights Act definition of “public authorities”, which includes Ministers and administrative units in Government, Territory authorities and instrumentalities and other entities that exercise “functions of a public nature” for the Territory.²⁰ It does not include the Legislative Assembly or the courts.²¹

Amending the Discrimination Act so that the actions of public authorities are an area of public life covered by discrimination law would promote consistency between the Discrimination Act and the Human Rights Act. This is because the Human Rights Act obligations also do not apply if a Territory law expressly requires something to be done in a particular way which is inconsistent with human rights.²²

The end result would be that Government interactions with the public would be covered by discrimination law, except where the Government decision or action was in direct compliance with a specific requirement of a law that cannot be implemented in another, less discriminatory way.

Questions for public consultation

The Government intends to amend the Discrimination Act to prohibit discrimination in all areas of public life, with an exception for private conduct. The Government welcomes comments on how this could best be achieved and what the limits of ‘public life’ and ‘private conduct’ should be.

For example:

1. *What concerns or considerations would be required in extending coverage to areas of public life including organised sport, competitions open to the public and government functions?*
2. *What areas of private conduct should **not** be covered by discrimination law? How would these areas be defined?*

²⁰ Human Rights Act, s 40A(3).

²¹ Human Rights Act, s 40(2), except where the courts are acting in an administrative capacity.

²² Human Rights Act, s 40B.

REFORMING EXCEPTIONS TO DISCRIMINATION LAW: OVERVIEW

An *exception* operates as a **defence to a discrimination claim**, and excuses conduct that would otherwise be discriminatory. It is different from an *exemption* which is where conduct is anticipated to be discriminatory and an application is made by an organisation to excuse the conduct before it happens.

A person who wishes to bring, or defend, a claim in discrimination will need to review the exceptions to determine if any apply to their case. The person who is relying on the exception (the respondent to the discrimination complaint) must prove that the exception applies.

The Discrimination Act contains over 50 different exceptions. Some of the exceptions are broad and apply in a wide range of circumstances. For example, if an act is done to comply with a law or court order, this is a defence to a claim in any area on any ground. Other exceptions only apply to certain types of discrimination. For example, there are exceptions that permit discrimination on the grounds of sex, disability, and age for competitive sport.

The exceptions in the Discrimination Act currently fall into three categories:

- > Exceptions that permit conduct which promotes the rights of a group of people who share a protected attribute (e.g. sex, race). These exceptions are often called “**special measures**”, “affirmative action” or, to use the terminology in section 27 of the Discrimination Act, “measures intended to achieve equality”.
- > Exceptions that exist to recognise that there are practical limits to resources, especially for smaller organisations.
- > Exceptions that reflect the balance struck between different human rights, or between discrimination and other legitimate objectives.

LRAC recommendation – a new single ‘justification defence’

- REC 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).

LRAC considered that the current approach under the Discrimination Act lacks “a clear, principled and unifying approach to excusing discriminatory conduct”.²³ LRAC noted that, in contrast, the Human Rights Act allows only justifiable limits on human rights. LRAC also considered that some of the existing exceptions are so broad they may be inconsistent with the Human Rights Act.²⁴

Criteria for a single justification defence would be the same as the test in section 28 of the Human Rights Act, which determines when a limitation on human rights is reasonable, namely consideration of:

- > the nature of the right affected (the right to non-discrimination);
- > the importance of the purpose that the person who is discriminating is trying to achieve;

²³ LRAC Report, 99.

²⁴ LRAC Report, 102.

- > the nature and extent of the limitation that the person’s conduct imposes on the right;
- > the relationship between the conduct of the person discriminating and their purpose; and
- > whether there is any less discriminatory way reasonably available for the person to achieve their purpose (whether their conduct was reasonable and proportionate).

Approach in United Kingdom and Canada

LRAC indicated that the single justification defence had been a feature of discrimination law in the United Kingdom and Canada, which are also jurisdictions with human rights legislation.²⁵ However, neither jurisdiction has a single justification defence for all types of discrimination. In the case of the United Kingdom, there is a single justification defence for cases of indirect discrimination and for cases that fall in the category of special measures (referred to as ‘positive actions’ in the UK Equality Act)²⁶ but there are numerous general and specific exceptions for types of direct discrimination.²⁷

In Canada, The Canadian Charter of Rights and Freedoms passed in 1982 guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²⁸ In addition, all Canadian provinces and territories have human rights Acts or Codes which are required to follow the Charter.²⁹ There is variation among the provinces and territories with respect to certain characteristics protected under different Acts (such as pay equity) and variations in the protected grounds.³⁰ Though the Charter specifies limitations must be demonstrably justified in a free and democratic society, the province and territory Acts and Codes spell out a range of specific exceptions for certain conduct.³¹

As noted in the Overview of Discrimination Law section above, the ACT Discrimination Act already contains a general reasonableness defence in relation to indirect discrimination.³²

Advantages

The approach recommended by LRAC has the advantage of imposing a single, principled test for excusing discriminatory conduct in a way that is consistent with the Human Rights Act. In this sense, the approach would better align discrimination law with our human rights framework.

The single justification defence would also mean the same standard of proportionality is applied to all types of discriminatory conduct. Rather than the legislation defining where a level of discrimination is permissible to achieve other legitimate objectives, parties would be able to make arguments to justify discrimination, for example where the objective is to protect another human right (such as, for example religious freedom or freedom of expression).

²⁵ LRAC Report, 99.

²⁶ *Equality Act 2010* (UK), s 19(2)(d); s 158(2).

²⁷ See for example *ibid* Schedule 9 Work: exceptions; Schedule 11 Schools: exceptions; Schedule 16 Association: exceptions; Schedule 23: General exceptions.

²⁸ Canada Act 1982 (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) art 1.

²⁹ Canadian Centre for Diversity and Inclusion, *Overview of Human rights Codes by Province and Territory in Canada* (January 2018), 4.

³⁰ *Ibid* 4-5.

³¹ For example Alberta Human Rights Act RSA 2000 s. 5(4)

³² Discrimination Act s. 8(4)-(5) provides the following in relation to indirect discrimination ‘(4) However, a condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances. (5) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—(a) the nature and extent of any disadvantage that results from imposing the condition or requirement; and (b) the feasibility of overcoming or mitigating the disadvantage; and (c) whether the disadvantage is disproportionate to the result sought by the person who imposes, or proposes to impose, the condition or requirement.

The proposal to adopt a single justification defence has been subject of support from some diverse groups and was explored by Mr Ramsay in his initial community consultation.

Disadvantages

The potential disadvantages with having a single justification defence include that:

- > it may make the law more uncertain for users;
- > it may lessen protections against discrimination because the defence would be arguable in all cases;³³
- > it would create a defence for direct discrimination when there currently is none in the Discrimination Act; and
- > it may lead to a considerable increase in exemptions being sought and granted under the Discrimination Act.

Currently, the legislation provides exceptions for conduct which might otherwise be unlawful discrimination. In many cases, these exceptions are supported by case law which guides their interpretation. In the absence of legislative limitations, detailed and prescriptive guidelines would likely need to be formulated to give users guidance on potentially discriminatory conduct to support their day to day application. One weakness with relying on guidelines to explain limitations is that they can be without a transparent legislative process and without the need for a human rights compatibility statement.

Another concern is that the single justification defence may actually lessen protections against discrimination.

Currently, if no specific exception (or exemption) applies in a particular case then direct discrimination in relation to a protected attribute in an area of public life will be unlawful. However, under a single justification defence a respondent could always raise a defence that the limitation on equality rights is justified, particularly where the discriminatory conduct is argued to be necessary to protect other human rights such as religious freedom. These arguments would need to be determined by the ACT Civil and Administrative Tribunal on a case-by-case basis. That is, what is clearly currently unlawful discrimination would become contestable in individual cases.

Such a provision may also weaken protections under existing exceptions, for example exceptions that allow discrimination by religious schools but only on certain grounds and subject to a range of conditions. A single justification defence would remove these clear restrictions and potentially allow discrimination in a broader range of circumstances, which may negatively impact LGBTIQ+ students and staff.

While the Human Rights Act imposes obligations on government to assess human rights compatibility, extending the single justification defence to discrimination law would mean that non-government entities may also be required to undertake ongoing assessments on whether they were meeting this defence. This may be more challenging or complex for smaller organisations such as small businesses. In such cases, a further drawback with a single justification defence is that because the application of the provision is less certain, people and organisations may be more likely to apply for exemptions in advance to ensure that proposed conduct is lawful under the Discrimination Act.

This would have resource implications for the Human Rights Commission which may see an increase in applications for exemptions from people and organisations that currently rely on specific exceptions (for example, the current exception for single sex schools). In addition, a greater reliance on exemptions would place a burden on smaller organisations with more limited access to resources and legal expertise, such as community organisations in the voluntary or sporting sectors.

³³ Some commentators have raised this concern in the United Kingdom context: see Alysia Blackham, [“A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK”](#) (2018) 41(3) *Melbourne University Law Review*, 34-35.

Currently in the ACT many organisations may be subject to both the ACT Discrimination Act and Commonwealth anti-discrimination laws. While there are some differences between these legislative frameworks, the current approach to exceptions is similar. If exceptions in the ACT Discrimination Act are replaced with a single justification defence this may create added complexity and regulatory burden for organisations required to comply with both regimes.

Refining the existing exceptions in the Discrimination Act

As noted earlier, there are currently over 50 specific exceptions in the Discrimination Act. Most of them pre-date the introduction of the Human Rights Act in 2004, and many of them are in substantially the same form as when the Discrimination Act was passed in 1991.

As an alternative to the single justification defence approach outlined above, the specific exceptions in the Discrimination Act could be reconsidered and refined.

In general, reforming the existing specific exceptions would enhance clarity. Any exceptions in the Act that are overly broad could be modified to better protect equality rights and better align with the Human Rights Act.

The approach would see the limits of acceptable and unacceptable conduct in specific situations reflected clearly and accessibly in legislation, providing certainty for organisations and individuals about conduct that may potentially discriminate.

LRAC's provided specific suggestions with respect to this alternative at Recommendations 19.1-19.9.

Questions for public consultation

3. *Should the exceptions in the Discrimination Act:*
 - a. *be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable, or*
 - b. *be refined to make them simpler, stronger, and better aligned with our human rights framework?*
4. *What concerns or considerations would be required in introducing a single justification defence to replace existing exceptions as applicable to:*
 - a. *Religious bodies*
 - b. *Voluntary bodies*
 - c. *Licensed clubs*
 - d. *Sports*
 - e. *Employment*
 - f. *Workers in private homes*
 - g. *Insurance and superannuation companies?*

The following sections of this Discussion Paper examine the LRAC Report recommendations 19.1-19.9. Included is a discussion of potential reform options which would aim to refine or simplify the exceptions to make them simpler, stronger, and better aligned with our human rights framework.

EXCEPTION FOR ACTS DONE TO COMPLY WITH THE LAW

Current law

Section 30 of the Discrimination Act provides an exception to discrimination law so that acts done to comply with the requirements of a law, or to comply with an order of a court or tribunal, will not be discriminatory. Anyone with obligations under the Discrimination Act can rely on this exception, including ACT Government agencies, businesses, community organisations and individuals.

When the Discrimination Act was passed in 1991, this exception was intended to be temporary on the basis that the exception should ultimately be unnecessary because laws should not require discrimination, but it was included in the Act to give time for any unsatisfactory laws to be amended.³⁴ However, the exception remains in force today.

Similar exceptions also exist in most Commonwealth anti-discrimination laws,³⁵ and in most other Australian jurisdictions.³⁶ Law reform reports in Victoria and NSW have recommended repeal of their exceptions.³⁷

LRAC recommendation

LRAC recommended repealing this exception and replacing it with a more limited exception that would only excuse acts done in specific compliance with a court or tribunal order.³⁸

Discussion

Should the exception for acts done to comply with the law be removed?

There are grounds to support LRAC's recommendation. The ACT has a Human Rights Act. The Government is committed to all new laws being compatible with human rights, including the right to non-discrimination. For laws passed after the Human Rights Act in 2004, there should be no need for the exception to exist. LRAC stated that there is no known example of an ACT law that specifically requires discrimination.³⁹ Keeping the exception arguably sends the wrong message when the Government and the ACT community is committed to promoting equality and inclusion. The reported case law suggests that the exception is infrequently used in the ACT.⁴⁰

Removing the exception would mean that, in the unlikely event the ACT Legislative Assembly did wish to pass a law which permitted discrimination, the law would need to be drafted to explicitly override the Discrimination Act. This approach promotes transparency and debate among our law-makers.

³⁴ See the [Explanatory Memorandum](#), Human Rights and Equal Opportunity Bill 1991 (ACT), 10.

³⁵ The equivalent exceptions in Commonwealth laws differ in their scope, but generally only apply to acts done in compliance with certain laws, including certain laws of the States and Territories: see ADA (Cth), s 39; SDA (Cth), s 40; and DDA (Cth), s 47.

³⁶ EOA (Vic), ss 75-76; ADA (NT), s 53; ADA (Tas), s 24; and ADA (NSW), s 54. A more limited exceptions for acts done under statutory authority exists in QLD and WA law, which only applies to laws in force at the time the discrimination law was passed: ADA (QLD), s 106; EOA (WA), ss 66ZS, 69. South Australia does not have a statutory authority exception.

³⁷ [NSW Law Reform Commission Report 92](#) (1999), [6.32]; [Victorian Parliamentary Committee Report 2009](#), Recommendation 42, 54-55.

³⁸ LRAC Report, Recommendation 19.1.

³⁹ LRAC Report, 103.

⁴⁰ *Butcher v The Key King Pty Ltd* [2000] ACTDT 2; *Woodbury v Australian Capital Territory* [2007] ACTDT 4; *D Commissioner for Social Housing & Ors (Discrimination)* [2010] ACAT 62; *Johnston v Ainslie Football Club Ltd* (Discrimination) [2018] ACAT 104; and *Keightley v ACT Ambulance Service (Discrimination)* [2019] ACAT 61..

Should a narrower exception for court orders be retained?

It would probably be rare that a court or tribunal order would require discriminatory conduct that was not also a special measure or covered by another exception under the Discrimination Act. However, there is merit in retaining a narrower exception that would permit conduct required under such orders, provided that the order is mandatory and specific about the conduct that must be performed.

This exception would ensure that parties can lawfully comply with judicial orders that require differential treatment because of a protected ground under the Discrimination Act. It would also meet the test under section 28 of the Human Rights Act for reasonable limitations on the right to non-discrimination. It would avoid any doubt, especially in circumstances where the parties may disagree about what an order requires.

Questions for public consultation

5. *Should the Discrimination Act be amended to remove the exception permitting acts done under statutory authority?*
6. *Should the Act keep a narrower exception to permit acts done directly to comply with a specific court or tribunal order?*

EXCEPTIONS FOR RELIGIOUS BODIES

The right to freedom of religion

The right of all individuals to freedom of religion is protected under human rights law both in the ACT and internationally.⁴¹ Religion is essential in the personal lives of many people and respect for religious belief and observance is a basic feature of a diverse and tolerant society.

The right to express one's religion is not unlimited.⁴² Human rights law permits (and in fact requires) limits to be imposed where necessary to protect the rights of others. The critical issue is determining where the limits should lie. This Discussion Paper seeks to identify principled and pragmatic options to reform ACT laws to strike a balance between the differing rights involved.

Federal developments

Before considering options for reform in the ACT, it must be noted that the ACT's discrimination laws may be affected by changes to Commonwealth laws. Following the Ruddock Review into religious freedoms in 2018, the Commonwealth Government proposed new laws to prohibit discrimination on religious grounds (the Religious Freedom Bills).⁴³ The ACT Government has recommended several changes to the Religious Freedom Bills.⁴⁴

The Commonwealth Government has also asked the Australian Law Reform Commission (ALRC) to consider how exceptions for religious bodies in discrimination laws could be reformed. The ALRC's report, which is not due to be published until 12 months from the date the Religious Discrimination Bill is passed by Federal Parliament, will likely make recommendations that would affect ACT law.⁴⁵

Current ACT law

The Discrimination Act contains exceptions for religious bodies⁴⁶ in ss 32, 44 and 46. Section 32 provides a general exception permitting religious bodies to discriminate on any ground when arranging their religious observances and when interacting with the public in some circumstances.

Sections 44 and 46 are more specific, and deal with discrimination by religious bodies on the ground of religion only, in the context of education and health care.

With respect to religious schools, as discussed below, discrimination on grounds other than religion (e.g. a student or teacher's sexuality) is not permitted when hiring staff or admitting students.⁴⁷

⁴¹ Human Rights Act, s 14; International Covenant on Civil and Political Rights, article 18.

⁴² There is an important distinction in human rights law between a person's right to hold a religious belief, which is absolute and cannot be interfered with by the State, and their right to manifest that belief, which can be limited. The right to manifest religion means to demonstrate it in public through worship, observance, practice, and teaching.

⁴³ Religious Discrimination Bill 2019 (Cth) (second exposure draft); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) (second exposure draft); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth) (second exposure draft), available at <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>> (**Commonwealth Religious Freedom Bills**).

⁴⁴ The ACT Government's submission is available at: <https://www.ag.gov.au/sites/default/files/2020-05/act-government-chief-minister-andrew-barr-mla.PDF>

⁴⁵ For further information see the ALRC's website <<https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>>.

⁴⁶ Note that the exceptions in the Discrimination Act apply only to religious bodies, and not to individuals with religious convictions.

⁴⁷ This is because the Discrimination Act makes it clear that religious schools cannot rely on the general exception in s 32(1)(d): s 32(1)(d) does not apply to 'defined acts', which are defined in 32(2) as the employment of staff and admission of students to religious schools.

With respect to health care, however, the position is not clear. There is a specific exception in section 44 that permits religious health care providers to discriminate based on religion when hiring staff for roles that involve the teaching, observance, or practice of religion (e.g. a hospital chaplain). However, it is likely that religious health care providers may also rely on the general exception in section 32 to discriminate more broadly when making employment decisions on other grounds (e.g. potentially refusing to hire someone based on their sexual orientation), and when providing services generally.⁴⁸

The effect of the current exceptions for religious bodies can be summarised as follows:

- > Religious bodies can discriminate on any ground when **arranging religious observances**. For example, discrimination for any reason is permitted when appointing priests, ministers, or members of religious orders.
- > **There is a limited exception for religious schools**, which permits discrimination against staff or prospective students only on the grounds of religion, and only on the condition that the school has made its public policy on these matters clear. For example, a Jewish school may prefer to admit Jewish students or employ Jewish teachers, if the school has a public policy making this known in advance.
- > When **dealing with members of the public** generally, religious bodies (except religious schools) may discriminate on any ground if their actions conform to their religion's teachings and are necessary to avoid injury to the "religious susceptibilities" of their adherents. For example, religious bodies that provide health care or social welfare services may rely on this exception to prefer some types of employees over others or to provide goods or services to some types of clients and not others. The religious body would need to show that the discrimination relates to religious doctrine.

LRAC recommendation

REC 19.2 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 Act 2004 (ACT).⁴⁹

LRAC considered that the correct approach, under human rights law, to accommodating competing rights is to limit the right to non-discrimination "only so far as is necessary and proportionate" to give effect to the right to freedom of religion. This recognises that the right to non-discrimination is a "cross-cutting right" which underpins the enjoyment of all other human rights.⁵⁰

⁴⁸ This is because, unlike religious schools, the activities of religious health care providers are not specifically carved out from the general exception in s 32. The structure of the Discrimination Act implies that s 32 may apply at the same time as s 44. Part 4 of the Act deals with exceptions. Section 32 is contained in Division 4.1 which contains "general exceptions" applicable to all attributes. The subsequent Divisions contain exceptions peculiar to specific protected attributes (e.g. Division 4.2 contains exceptions to sex discrimination, Division 4.3 contains exceptions to race discrimination, etc.). Section 44 is in Division 4.4 which contains exceptions to discrimination on the ground of religious or political convictions. A respondent may seek to rely on either the general exceptions, or attribute-specific exceptions, depending on the facts of the case.

⁴⁹ LRAC Report, Recommendation 19.2, 104-108.

⁵⁰ LRAC Report, 105.

LRAC also suggested narrowing the exceptions to attributes that are necessary to accord with the doctrines of the particular religion, rather than permitting discrimination on the basis of any protected attribute.⁵¹

The Overview on Reforming Exceptions discusses replacing the current exceptions with a single justification defence modelled on section 28 of the Human Rights Act. Therefore, the discussion that follows considers how the various exceptions in ACT law for religious bodies might be reformed in other ways so that they are consistent with the Human Rights Act.

Exception for arranging religious observances

This exception (s 32(1)(a)-(c) of the Discrimination Act) focuses on the internal affairs of a religious community. Religious bodies can discriminate on any ground when:

- > ordaining or appointing priests, ministers of religion or members of a religious order;
- > training or educating people to assume these roles; or
- > selecting lay people to exercise functions connected with religious observances or practices.

Changes to this exception should be carefully considered. The freedom of religious bodies to organise their worship independently from interference by the Government should be protected as a core part of the right to freedom of religion. Furthermore, the exception is only likely to impact individuals who share the religion in question and have little effect on members of the public generally.

However, the exception is very broad in that it permits discrimination on any ground, and because there is no need for any connection with the doctrine of the religion in question. LRAC expressed concern that this is not a necessary or proportionate limit on the right to non-discrimination.⁵²

The exception could be refined and limited so that it permits religious bodies to discriminate when arranging their religious observances only when their religion requires this differential treatment.

Questions for public consultation

7. *Should the exception protecting religious observances (e.g. appointment of ministers etc) be refined so that discrimination is only permitted where necessary to conform with the doctrines of the relevant religion?*

Limited exception for religious schools to discriminate on religious grounds

Religious schools may rely on a narrow exception (s 46) that allows them to make decisions on religious grounds. Religious schools may refuse to admit students who are not adherents to the religion under which the school is conducted, and make employment decisions based on a staff member's religious conviction, if the discriminatory treatment enables the school to be conducted in accordance with its religion. To rely on the exception, the school must make its policy about decision-making for students and staff on religious grounds public and readily accessible.

Religious schools may not treat students or staff (current or prospective) disadvantageously for any reason other than the religious belief of the student or staff member, including, for example, their sexuality or relationship status. For students, the protection is even stronger, and once they have been admitted by the school, they cannot be expelled or treated unfavourably on any protected ground (including religion).⁵³ The strict limits on discrimination recognise the importance of the school

⁵¹ LRAC Report, 106, 108.

⁵² LRAC Report, 106.

⁵³ These protections were introduced in 2018: *Discrimination Amendment Act 2018*.

community for young adults’ developing sense of identity and the fact that religious schools are a key employer in the education sector.

As the exception for religious schools was recently reformed, the Government does not currently propose further changes, subject to any feedback provided in consultations. However, as discussed in detail further below, the Government is interested in hearing community views on the ability of religious bodies to discriminate in employment more broadly (beyond the school environment). Any feedback from this consultation on employment discrimination by religious bodies may inform whether there should be any further changes to the exception for religious schools.

Exceptions for religious bodies dealing with the public generally

The exception in section 32(1)(d) of the Discrimination Act permits religious bodies to discriminate on any ground as long as their actions conform to the teachings of the religion, and are “necessary to avoid injury to the religious susceptibilities of” people adhering to that religion.

The exception has not been substantially amended since its introduction in 1991. It is closely modelled on an equivalent provision in Commonwealth law,⁵⁴ which is replicated (with some differences) in some other Australian anti-discrimination laws.⁵⁵ The equivalent exceptions in Tasmania, the Northern Territory, Victoria, South Australia and Queensland are more limited.⁵⁶

This is the primary exception that deals with the interaction between religious bodies and members of the public, for example in the provision of services, accommodation, or employment. The actions of religious bodies in these contexts may impact on the human rights of others. This exception accordingly raises the most complex issues, as it must protect the right to freedom of religion but should not permit unnecessary or disproportionate discrimination.

LRAC considered that the current test for the exception—whether an action is necessary to avoid “injury to the religious susceptibilities of adherents”—is inappropriate, as the right to freedom of religion does not require that people of faith are protected from having their susceptibilities injured. LRAC concluded that the exception is not a necessary or proportionate limit on the right to non-discrimination.⁵⁷ The *ACT LGBTIQ+ Legal Audit* recommended removing the exception in section 32(1)(d) altogether, or at a minimum, ensuring that religious organisations can no longer discriminate in employment or service delivery.⁵⁸

Should commercial organisations be able to rely on the religious bodies exception?

Currently, the exception benefits bodies “established for religious purposes”. This is not defined in the Discrimination Act.

Victorian discrimination law is interpreted so that organisations with primarily commercial purposes cannot rely on the religious bodies exception, even where they are effectively owned by, or closely affiliated with, a religious order.⁵⁹ It is arguable that the approach adopted by the Victorian Court of Appeal reflects the original intention of section 32(1)(d) of the ACT’s Discrimination Act, which was to

⁵⁴ See s 37 of the SDA (Cth).

⁵⁵ ADA (NSW), s 56(d) and EOA (WA), s 72.

⁵⁶ The Tasmanian exception only permits discrimination on the grounds of religion (s 52, ADA (Tas)). The Northern Territory exception permits discrimination on any ground, but only for acts of religious bodies that are done “as part of any religious observance or practice” (ADA (NT), s 51(d)). The Victorian exception permits discrimination only on the grounds of religion, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity (EOA (Vic), s 82), and the South Australian exception permits discrimination only on the grounds of sex, sexual orientation or gender identity (EOA (SA), s 50). The Queensland exception carves out employment and education from its general religious bodies exception (ADA (Qld), s 109).

⁵⁷ LRAC Report, 107.

⁵⁸ *ACT LGBTIQ+ Legal Audit*, Recommendations 24-26.

⁵⁹ [Christian Youth Camps Ltd v Cobaw Community Health Services Ltd \(2014\)](#) 50 VR 256.

except “acts or practices of a religious nature” from discrimination law.⁶⁰ It may be useful to amend the law to clarify whether bodies with commercial purposes can rely on it. An example of this approach is anti-discrimination legislation in the United Kingdom, which explicitly states that its religious exception “does not apply to organisations whose sole or main purpose is commercial”.⁶¹

Questions for public consultation

8. *Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when conducting commercial (for-profit) activities?*

Should religious bodies be permitted to discriminate when providing goods or services to members of the public?

At present, ACT law would permit religious bodies to discriminate for any reason when providing goods or services to members of the public, provided that the discriminatory conduct conforms to the teachings of the religion and is “necessary to avoid injury to the religious susceptibilities of” adherents.⁶² The issues relating to religious bodies relying on the exception when providing commercial (for-profit) services is discussed in the previous section.

Religious bodies (whether directly or through affiliated organisations) may also provide a wide range of goods or services to members of the public on a non-profit or charitable basis. Examples of include low-cost accommodation, second-hand shops, services for people at risk of homelessness and healthcare services. On the one hand, it is arguable that religious bodies that provide non-profit or charitable services should be free to do so in the manner that aligns with their beliefs and doctrines. Performing charitable works for some people may be an important part of living and demonstrating their religion.

However, the right to freedom of religion may be limited where it impacts disproportionately on the rights of others. Non-profit services are frequently provided to vulnerable people, and the impact of refusing services to some types of people may be serious for the individuals concerned, especially in geographical areas or sectors where other service providers are not readily accessible. Further, non-profit service providers may often receive Government funding, which may be a legitimate basis to expect compliance with discrimination laws. These are strong reasons to support a change to the law so that religious bodies would be required to provide services to the public on an equal basis to all groups of people (for example, not restricting services to people based on their marital status or sexuality).⁶³

Changing the law so that religious bodies would no longer be able to rely on an exception to discriminate in the provision of goods or services to the public would not mean that there would be no circumstances where discrimination could occur in service delivery. Religious bodies would still be able to rely on the other exceptions in the Discrimination Act, for example, to limit their services in accordance with the special measures exception in section 27 of the Act.

Questions for public consultation

9. *Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when providing goods or services to members of the public?*

⁶⁰ [Explanatory Memorandum](#), Human Rights and Equal Opportunity Bill 1991, 11.

⁶¹ *Equality Act 2010 (United Kingdom)* Sch 23, s 2(2).

⁶² Discrimination Act, s 32(1)(d).

⁶³ This is not concerned with regulating the types of services that religious bodies may provide (e.g. whether a religious health care provider can offer services relating to termination of pregnancy).

Should religious bodies be permitted to discriminate in employment?

As discussed above, ACT law provides protections from discrimination for employees of religious schools. Discrimination against prospective or current staff is permitted only:

- > on the grounds of the staff member's religion;
- > for the purpose of enabling the school to be conducted in accordance with its religion; and
- > in accordance with a public policy setting out the school's approach to these matters.

Extending stronger protections to employees more broadly would recognise the significant impact that employment decisions have on individual lives, and the fact that religious bodies may be major employers in sectors other than education (e.g. in healthcare). An example of this approach is Tasmanian anti-discrimination law, where employers are only permitted to discriminate on the grounds of religion.⁶⁴

There is a strong argument that there should be a further requirement that there be some connection between the religion and the role in question. That is, consideration should be given as to whether the duties of the role are of a religious nature.⁶⁵ For example, while it is unlikely to be controversial that a religious body providing support for homeless persons should be able to hire a chaplain of their faith, it is less clear whether that same rule should apply to the organisation hiring a cleaner of that faith.

As noted above, at present there is a limited exception in section 44 of the Discrimination Act that permits religious health care providers to discriminate on the ground of religion in employment decisions where the duties are of a religious nature. For example, a chaplaincy role may be limited to a person of the relevant religion. The difficulty is that the law is currently unclear about whether this is the *only* circumstance when health care providers can discriminate in employment or not. This uncertainty would be resolved by being more explicit in the legislation as to the narrow circumstances where discrimination is permitted in employment decisions (either as a specific exception for health providers or an exception for all employers).

Questions for public consultation

10. *Should religious health care providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?*
11. *Should any other religious service providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?*
12. *Are there any other circumstances in which religious bodies should be permitted to discriminate in employment decisions?*

Should a sector-based approach be adopted?

Another approach would be to limit the religious bodies exception so that it does not apply, or is much more limited, in certain sectors. Examples of the sector-based approach include Commonwealth sex discrimination law, which carves out the provision of Commonwealth-funded aged care from its religious exceptions (meaning that faith-based aged care providers cannot discriminate against aged-care

⁶⁴ Section 51, ADA(Tas).

⁶⁵ Another way of describing it could be that the practice of the particular religion is an inherent requirement (or a genuine occupation qualification) of the role: see section 51(1), ADA (Tas). Genuine occupation qualification and inherent requirements are discussed further below in the context of the employment exceptions.

consumers on grounds of sex, sexual orientation, etc)⁶⁶ and Queensland law, which carves out employment and education from its religious exceptions.⁶⁷

In the ACT, discrimination by religious bodies in education is already limited to religious belief. Options for limiting discrimination in employment and service delivery are discussed above. Other options for reform in the ACT may include limiting the exception so that it does not apply to bodies that receive a certain proportion of public funding.

Questions for public consultation

13. Should some sectors or types of organisations be prevented from relying on the general religious bodies exception? For example, organisations that receive a certain proportion of public funding?

Should an attribute-based approach be adopted?

Another approach is to limit the availability of the religious bodies exception so that it only permits discrimination based on some protected attributes (e.g. religious belief). At present, the exception permits discrimination on any ground. LRAC considered that the religious exceptions should be limited to attributes that are necessary to accord with the doctrines of the religion.⁶⁸

Examples of the attribute-based approach include:

- > Victorian law, which permits religious bodies to discriminate on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status, or gender identity only;⁶⁹
- > South Australian law, which permits religious bodies to discriminate on the ground of sex, sexual orientation, or gender identity only;⁷⁰ or
- > Tasmanian law, which permits religious bodies to discriminate on the ground of religious belief only.⁷¹

The benefit of attribute-based approaches is that they impose clear and pragmatic limits on exceptions. The disadvantage is that some groups of people end up privileged (more protected by the law) over others. It is arguably undesirable to draft laws which lock in or endorse certain types of discrimination as permissible over others.

The exception to this is the Tasmanian approach of permitting religious bodies to discriminate only on the grounds of religious belief, which is underpinned by a coherent rationale that in some circumstances religious bodies may need to exclude non-believers in accordance with their doctrines.

Questions for public consultation

14. Should religious bodies only be permitted to discriminate against members of the public on some grounds, and not others? If so, which grounds should be permissible?

⁶⁶ Discrimination is permitted by Commonwealth-funded aged care providers as employers: see SDA (Cth), ss 23(3A), 37(2).

⁶⁷ ADA (Qld), s 109(2).

⁶⁸ LRAC Report, 108.

⁶⁹ EOA (Vic), ss 82 and 84.

⁷⁰ EOA (SA), s 50.

⁷¹ ADA (Tas), s 52(d).

EXCEPTIONS FOR VOLUNTARY (NOT-FOR-PROFIT) ORGANISATIONS

Current law

The Discrimination Act provides an exception for “voluntary bodies” in section 31, which are defined as organisations that do not operate for profit (whether incorporated or unincorporated).⁷² Voluntary bodies can discriminate for any reason (e.g. race, religion, sexuality etc) when admitting members or providing services, benefits, or the use of their facilities, to any person.

This exception is very broad. It essentially means that voluntary bodies do not have to comply with discrimination law when interacting with their members or with the public. Discrimination law will apply to their activities as employers (including in respect of their volunteers).

Also, ACT case law has interpreted the definition of “voluntary body” broadly, so that even large organisations that conduct activities for profit may still rely on the exception if their primary objectives are not commercial.⁷³

Where an equivalent exception exists in other Australian discrimination laws, it is narrower, and only permits voluntary bodies to discriminate when admitting members or providing services to members.⁷⁴ This allows the organisation to refuse to provide services to non-members, but not to discriminate when interacting with the public generally (for example, by providing services to people of some racial backgrounds but not others).

LRAC recommendation

REC 19.3	The Discrimination Act should be amended so that the exception for voluntary bodies: <ul style="list-style-type: none">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 establishedii. be limited to the provision of benefits, facilities or services to members of the voluntary body.⁷⁵
-----------------	--

Discussion

Law reform bodies in NSW and the Commonwealth have recommended the complete repeal of the voluntary body exceptions in their laws.⁷⁶

If the exception were repealed, voluntary bodies that dedicate themselves to protected groups may need to apply for exemptions from the ACT Human Rights Commission to be certain that their activities are lawful.

Consideration should be given to whether there may be value in following LRAC’s recommendation to significantly limit the exception, so that it only permits voluntary bodies to discriminate by limiting

⁷² Under the Discrimination Act, “voluntary body” excludes clubs holding liquor licences, organisations established under a statute (e.g. government agencies), and associations that provide financial assistance to their members: see Discrimination Act, Dictionary. Clubs holding liquor licences have exceptions which are discussed further below.

⁷³ [Jones and the Scout Association of Australia, Australian Capital Territory Branch Incorporated & Ors](#) [2007] ACTDT 1.

⁷⁴ LRAC Report, 109.

⁷⁵ LRAC Report, 110 and Recommendation 19.3.

⁷⁶ NSW Law Reform Commission Report 92 (1999), Recommendation 47; [Australian Law Reform Commission, Report 69, Equality Before the Law: Justice for Women](#) (1994), Recommendation 3.13, with respect to the SDA (Cth).

membership to people with a protected attribute where the organisation's reason for existence is to promote the interests of that group of people.

An alternative approach would be to permit voluntary bodies to discriminate by way of special measures.⁷⁷ This would be somewhat narrower than the proposal by LRAC discussed in the previous paragraph, insofar as it would permit voluntary bodies to *refuse (or put conditions on) membership, or the provision of services*, provided that their purpose in doing so is to *ensure that people who share a protected attribute have equal opportunities with other people and/or to meet their special needs*.⁷⁸

Both approaches would resolve the current problem where voluntary bodies can lawfully refuse membership or services to some people and not others, even where this is entirely unconnected with the organisation's reason for existence. It would also ensure the continued legality and legitimacy of organisations that offer membership or services only to one or more protected groups (e.g. homeless people, young people, seniors' groups for women, etc). For either approach, it would be useful to make sure it covers the provision of services by voluntary bodies, and not just decisions on membership. This is because not all voluntary bodies operate on a membership basis.

It is not clear that the second limb of LRAC's recommended exception – which would permit voluntary bodies to discriminate between members and non-members – is necessary. "Membership" of an organisation is not a protected attribute under discrimination law, and so an organisation can legitimately limit service provision to its members as opposed to non-members.

Questions for public consultation

15. *Should voluntary bodies be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law where the organisation's reason for existence is to promote the interests of that group of people?*
16. *Should voluntary bodies only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?*
17. *Alternatively, should the exception for voluntary bodies be removed?*

⁷⁷ While LRAC stated that the intention behind the current voluntary bodies exception is to permit activities that are 'effectively, a special measure', LRAC's recommended model does not strictly align with the definition of a special measure in s 27 of the Discrimination Act. Section 27 requires that the measure's purpose is to ensure that members of protected groups (a) have access to equal opportunities with others, or (b) give members of protected groups access to facilities, services, or opportunities to meet their special needs. An organisation that is formed to promote the interests of a protected group may not necessarily meet this legal test. The concept of a special measure is designed to address past or present disadvantages experienced by a protected group.

⁷⁸ As noted earlier, consideration may be given at a later stage to LRAC's proposal to introduce a positive duty to promote equality instead of a general special measures exception. In that circumstance, targeted special measures exceptions could be retained where appropriate.

EXCEPTIONS FOR LICENSED CLUBS

Current law

The Discrimination Act (s 22) prohibits discrimination by clubs holding liquor licences⁷⁹ in decisions about membership.⁸⁰ It is unlawful for a club to:

- > refuse membership, or offer membership on terms and conditions; or
 - > deny members access to benefits or cancel their membership,
- where the reason for the club's actions is discriminatory.

Clubs for specific groups (sex, race, disability, or age)

There are exceptions which allow clubs to refuse membership, or offer it on different terms and conditions, to people of a particular sex, race, disability or age, if the club's principal reason for existence is to provide benefits for people of that sex, race, disability or age.⁸¹ For example, a Polish club limiting membership to Polish people or offering discounted membership to Polish people.

Sex discrimination – unequally shared benefits between the sexes

Clubs may discriminate on the ground of sex by offering different benefits to members of different sexes, if it is not practicable for them to receive the same benefits, provided that the benefits are equivalent or shared between them in fair and reasonable proportion.⁸²

Disability discrimination – exception if unjustifiable hardship

Clubs may discriminate against members with disabilities in the benefits it offers only if giving the person the same benefits as everyone else would cause unjustifiable hardship to the club, because of the person's disability.⁸³ This might, for example, apply if allowing a member with a disability to access a particular part of the club would require particularly costly adjustments to infrastructure.

LRAC recommendation

REC 19.4 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.⁸⁴

⁷⁹ See definition of "club" in the Dictionary to the Discrimination Act which links to the holding of a club licence under s 20 of the *Liquor Act 2010*.

⁸⁰ Many clubs provide services to non-members, for example renting out rooms or permitting non-members to dine in their facilities. The way clubs treat non-members is covered by the law on the provision of services and does not generally engage the clubs exceptions. The exception to this statement is s 57L of the Discrimination Act, which permits age discrimination and covers clubs both in membership decisions and the provision of goods, services, and facilities.

⁸¹ Discrimination Act, ss 40(1) (sex), 43(1) (race); 55(1) (disability); and 57L(1) (age). Section 57L operates as an exception regarding membership decisions as well as in offering goods, services, or facilities to members of the public generally. Further, unlike the exceptions for race, age and disability, the sex exception only relates to decisions whether to accept or refuse members, not decisions about terms and conditions of membership. Also note the race exception does not permit distinctions based on colour (e.g. clubs for "white" people would not be permitted).

⁸² Section 40(2), Discrimination Act. See mandatory considerations to be taken into account in s 40(3).

⁸³ Section 55(3), Discrimination Act.

⁸⁴ LRAC Report, Recommendation 19.4 and 110-111.

Discussion

There are currently 49 licensed clubs operating in the ACT. These clubs are an important part of the ACT community and economy and provide membership or services to many people.

Clubs for specific groups

For most clubs in the ACT, membership is open to all. It is not clear whether any clubs currently rely on the exception to make their membership exclusive. If the exception were repealed, clubs that wished to discriminate would have to apply for an exemption.

As noted in the LRAC report,⁸⁵ in most cases it would be possible for clubs that wished to favour people on the basis of race, disability or age to justify this as a special measure under section 27 of the Discrimination Act. To that end, consideration should be given as to whether clubs should be permitted to discriminate in membership decisions only as a special measure.

Against this, however, is that the current exceptions do provide some certainty and clarity for clubs and for members and they minimise the resource burdens involved in increasing reliance on the exemption mechanism. The current exceptions are also broader than the special measures protections in section 27 insofar as a club may exist principally for the purpose of providing benefits for people in a particular group (sex, race, disability or age), but may not necessarily be for the purpose of ensuring those people have equal opportunities with other people and/or meet their special needs. A German club, for example, could exist to provide a recreational and business networking space for people with German backgrounds, but members may not have any special needs or vulnerabilities.

If the exceptions are retained largely in their current form, there is an argument in favour of LRAC's recommendation that a club should be able to be formed to promote the interests of any of the groups of people protected by the Discrimination Act. This would create **the same standard for everyone**, making our discrimination law more comprehensive and consistent.

If the exceptions are retained, their drafting should be refined to make it clear that the discriminatory treatment permitted must be in favour of the people whose interests the club represents. The exceptions should only permit differential treatment as between the protected group and all others.⁸⁶

Sex and disability exceptions

Further, it is arguable that the sex and disability exceptions protect conduct that is likely to be covered by other sections of the Discrimination Act, including in the sporting exceptions (discussed further below), and special measures in section 27. In relation to disability discrimination, sections 53 and 54 separately provide a defence of unjustifiable hardship in relation to access to premises and the provision of goods and services. This means that removing the licenced clubs exceptions would not leave clubs without protection. Rather, protection would come from other areas of the Discrimination Act.

Questions for public consultation

18. *Should licenced clubs only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?*
19. *Should the exceptions relating to licenced clubs protect any of the groups protected under the Discrimination Act, not just race, sex, disability, or age?*
20. *Alternatively, should the exceptions for licenced clubs be repealed?*

⁸⁵ LRAC Report, 111.

⁸⁶ See Discrimination Act, s 43.

EXCEPTIONS FOR SPORT

Current law

The Discrimination Act allows people to be excluded from participating in competitive sport for reasons of sex, age, and disability. The exceptions do not apply to coaching, umpiring, or refereeing, or activities involved in the administration of sport.⁸⁷

There are currently no specific rules about how transgender, gender diverse or intersex people may participate in single-sex sporting activities.

Sex

Under the exception in section 41, people of one sex may be excluded from a single-sex sporting activity if the “strength, stamina or physique of competitors” is relevant in that sport. The test does not ask about the strength, stamina or physique of the individual person seeking to participate. There is no requirement that the exclusion of a person from sport is reasonable in their individual circumstances.

Disability

The exception in section 57 of the Discrimination Act permits a person to be excluded from sport if:

- > the person has a disability and the sport requires physical or intellectual attributes that the person does not have (s 57(1)(a)); or
- > the sport is being conducted for people with a particular disability and the person does not have that kind of disability (i.e. a special measure) (s 57(1)(b)).

Age

The exception in section 57M of the Discrimination Act permits people to be excluded from sport if the sport is only for people of a particular age group. The LRAC report did not discuss the sporting exceptions for age or disability.

LRAC recommendation

REC 19.5	The Discrimination Act should be amended so that the exception for sport: <ul style="list-style-type: none">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 section 28 of the Human Rights Act.
-----------------	--

Discussion

Canberra is a healthy and active city and for many people sport is an important lifestyle activity that supports social connections and well-being. Our discrimination laws should promote participation by all in sport. Submissions to the LRAC report identified that many people experience discrimination in sport because of their disability, sex, sex characteristics, sexuality, or gender identity.⁸⁸ Supporting inclusion is particularly important to these communities.

⁸⁷ Discrimination Act, ss 41(2), 57 and 57M. These provisions also allow for certain sports to be prescribed in regulations where the exceptions do not apply (there are currently no prescribed sports).

⁸⁸ LRAC Report, 112-113.

What is the purpose of the law on participation in sport?

The existence of the exceptions reflects society's consensus that in some circumstances it is fair and reasonable to differentiate between some groups of people when deciding who can compete in a sporting activity. The main reasons for this are to protect the *safety of the players* and the *integrity of the game*. In both cases, this may give rise to a need to ensure that players have relatively even standards of ability.

The special measures exception in section 57(1)(b) of the Discrimination Act is in a separate category, as its purpose is simply to promote sporting activities for people with disabilities. No concerns were raised in the LRAC Report with respect to this exception and no changes are proposed here.

Problems with the existing exceptions

The exceptions relating to sport have not been substantially changed since they were first introduced. One underlying difficulty is that the exceptions assume that conclusions about a person's ability —and therefore how their participation may affect the safety and competitiveness of the game—can be drawn based on a person's age, sex, or disability. This is not consistently true.

Sex

Current evidence does not clearly establish that a person's biological sex (including their level of testosterone) is consistently a significant determinant of their sporting performance.⁸⁹ If a person's sex is not necessarily connected with their strength, stamina or physique, blanket exceptions based on sex may be outdated.⁹⁰ Nonetheless, sex remains a widely-used and convenient organising basis for sporting activities, with important social benefits for people of both sexes and gender identities.

The challenge is how to organise sporting activities in a way that supports participation by people in our community who do not identify with binary categories of male and female, or whose gender identity is not the same as their sex assigned at birth. ACT law is currently silent on this. Ideally, people should be able to participate according to their self-identified gender.⁹¹ Discrimination law should only permit exceptions to this principle where player safety and competitiveness genuinely require.

Disability

As with a person's sex, the fact of having a disability is not a clear determinant of whether and how someone can participate in a sport safely and competitively. The exception in section 57(1)(a) that applies where the sport "requires physical or intellectual attributes that the person does not possess" is one-sided. It envisages people with disability being unable to perform to the same level as able-bodied athletes, but it is not readily adaptable to the situation where a person with a disability may compete in a manner which arguably gives them an advantage. Examples of this may include people competing with prosthetic limbs or alternative equipment such as hand cycles.

Secondly, the language in section 57(1)(a) may not reflect contemporary understandings of disability. A person's ability is significantly influenced by environmental barriers to their participation in society, rather than being determined by inherent "defects" in their intellect or physique.

Age

Age, like sex, is a widely used and convenient organising basis for sporting teams. While age is also an imprecise proxy for ability, it is less likely to be offensive to require people to play in a team with their age cohort, whereas exclusion based on perceptions of sex or disability has the potential to show lack of

⁸⁹ [ACT Human Rights Commission, "Everyone Can Play. Guidelines for Local Clubs on Best Practice for Inclusion of Transgender and Intersex Participants" \(2017\), 10; ACTLGBTIQ+ Legal Audit, 40.](#)

⁹⁰ LRAC Report, 113.

⁹¹ [ACTLGBTIQ+ Legal Audit, 5, 31.](#) The principle of self-identification is considered best practice for transgender and gender-diverse people. For intersex people, this language may often be inappropriate, but in the sporting context the ideal is still that they should be permitted to participate in the team of their choice.

respect for the person involved and their ability to self-identify. Accordingly, and subject to any feedback in consultations, no changes are proposed to the current exception that permits age discrimination.

Options for reform

Making safety and competitiveness the aims

The exceptions for both sex and disability discrimination could be recast to explicitly require that any discrimination is necessary to preserve safety and competitiveness. This would highlight the purposes of the law and better reflect modern evidence and attitudes. Victorian law, for example, permits discrimination where sporting activities are restricted to “people who can effectively compete”.⁹²

Approaches such as this could still be combined with the reasonableness test in section 28 of the Human Rights Act as an additional safeguard, to ensure that the individual circumstances of the person seeking to participate are properly considered and any exclusion of them is necessary and proportionate.

Sport for under-12s: open to all?

A further option for tailoring the exceptions would be to limit their application to sporting activities for children 12 years and over. This recognises that sport for younger children is primarily a social and health activity, where physical differences among the players are less likely to be critical for safety and competitiveness. Victorian law adopts this approach for sex discrimination, and the logic would arguably apply also for disability discrimination.⁹³

How far should the exceptions extend?

To cater for the needs of transgender, gender diverse and intersex people, it will be necessary to expand any sex discrimination exception so that it also deals with discrimination based on gender identity or sex characteristics.

As noted above, LRAC recommended that the exception should apply to all attributes. While in principle discrimination law should **provide the same standards for everyone**, care should be taken when widening exceptions, as this may undermine the protections in the Discrimination Act. It is difficult to see how the sports exception would be relevant to most of the other protected attributes in the Act, such as race. For attributes that may be relevant (in particular pregnancy and breastfeeding), expanding the exception would permit discrimination where currently the Act does not.

Questions for public consultation

21. *Should the exceptions permit people to be excluded from sport on the basis of their sex, sex characteristics, gender identity, or disability only where this is necessary for fair, safe, and effective competition?*
22. *Should discrimination against people in sport be prohibited entirely for children under 12 (except for permitting age-segregated teams?)*
23. *Should the exception for sport apply a wider range of protected attributes under the Discrimination Act?*

⁹² EO Act (Vic), s 72(2)(a).

⁹³ EO Act (Vic), s 72(3).

EXCEPTIONS RELATING TO WORK

Current law

The Discrimination Act (ss 34, 42, 48, 57A and 57Q) provides exceptions that recognise that there are some jobs where an employer may legitimately want to choose employees based on their race, sex, age, disability or physical features.⁹⁴ These are called ***genuine occupational qualifications***.

There is also an exception (s 49) that permits discrimination against a person with disability where the person is unable to carry out work essential to the job. This is often referred to as the ***inherent requirements*** of the job exception. Employers are required to make reasonable adjustments to enable a person with disability to perform in a role, but not if this would impose unjustifiable hardship on the employer.

The circumstances in which the exceptions apply can be grouped into categories.

Discrimination at work for reasons of authenticity

Employers may discriminate for jobs in the arts or entertainment industry, where employing people of a particular sex, race, age or disability, or people with certain physical features, is necessary for authenticity, aesthetics, or tradition.⁹⁵

Employers may discriminate for jobs in hospitality venues, on the ground of race only, where employing people of a particular race is necessary for authenticity.⁹⁶

Peer support workers to serve protected groups

Employers may discriminate when hiring for jobs that involve providing services to groups of people identified by a protected attribute (e.g. race), if the services can be most effectively provided by someone who shares that protected attribute. Positions like this are often described as peer support workers. Currently, this exception is only available on the grounds of sex, race, age, disability, or physical features.

Sex discrimination for reasons of privacy and decency

Employers may discriminate on the ground of sex in the following circumstances, most of which are intended to protect privacy and decency:

- > where the duties of the job can only be performed by a person with particular physical attributes (other than strength or stamina) that people of the other sex do not have;
- > where the duties of the position involve fitting clothing, doing body searches, or entering toilets or change areas; or
- > where the employee is required to live on-site, and the employer cannot reasonably be expected to provide separate sleeping accommodation or sanitary facilities for different sexes.

Disability – ability to perform inherent requirements of a job

Employers can discriminate against people with a disability in offering or terminating employment, if the employer believes on reasonable grounds that because of the disability:

⁹⁴ The term “employer” is used here for convenience. The work-related exceptions apply to commission agent, contract worker and partnership relationships as well as traditional employer-employee relationships.

⁹⁵ Discrimination Act, s 34(2)(b)-(c); s 42(2)(a)-(b); s 48(a)-(b); s 57A(a)-(b); s 57Q. There are drafting differences which mean that the scope of the genuine occupational qualifications exceptions differs across the protected attributes. The exceptions in relation to sex and race (ss 34 and 42) are not exhaustive, but the exceptions in relation to disability, age, and physical features (ss 48, 57A, 57Q) are exhaustive.

⁹⁶ Discrimination Act, s 42(2)(c).

- > the person would be “unable to carry out work that is essential” to the job; or
- > to carry out the job, the person would need extra services or facilities not required by others and providing them would impose unjustifiable hardship on the employer.⁹⁷

In determining whether it would impose unjustifiable hardship on an employer to make adjustments for a person with disability, all the relevant circumstances must be taken into account, including:

- > the nature of the benefit or detriment to all people involved in the situation;
- > the nature of the person’s disability; and
- > the costs and financial circumstances of the person claiming unjustifiable hardship.⁹⁸

Declared jobs

There are also provisions permitting discrimination on the basis of sex, race and disability for positions declared or prescribed in regulations.⁹⁹

LRAC recommendation

REC 19.6	<p>The Discrimination Act should be amended to repeal the exceptions for ‘genuine occupational qualifications’ and reliance placed on provisions for an exemption,</p> <p>If an exception for ‘genuine occupational qualifications’ is to be retained then the Discrimination Act should be amended to make a single provision for an exception for ‘genuine occupational qualifications’ that is available for all attributes.</p>
REC19.7	<p>The Discrimination Act should be amended so that:</p> <ul style="list-style-type: none"> 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 adjustments¹⁰⁰ 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.

Discussion

Participation in employment is an important opportunity for people to achieve economic independence and make social connections. It is also an area where discriminatory attitudes can be pervasive. It is important to ensure the law offers the greatest possible protection, without imposing unreasonable burdens on employers.

Should the exceptions be repealed?

LRAC recommended repealing the employment exceptions and requiring people who rely on them to instead apply for exemptions. There is no available data on how many employers in the ACT may currently rely on the employment exceptions. Diverse sectors such as arts, entertainment, hospitality, retail, community services and cleaning may be affected by any changes. The exceptions may apply to a wide range of employers and employment situations, including small businesses and/or small-scale or short-term roles (e.g. a low-budget theatre performance). There is cause for concern that in this context,

⁹⁷ Discrimination Act, s 49(1). See also s 49(2) and s 50.

⁹⁸ Discrimination Act, s 47.

⁹⁹ Discrimination Act, ss 34(2)(j), 42(2)(e), 48(d)).

¹⁰⁰ For a discussion on the LRAC recommendations on reasonable adjustments see below.

removing the employment exceptions altogether and requiring employers to rely on exemptions could impose new burdens on numerous employers.

As proposed more generally in this Discussion Paper, it may be **clearer, simpler and more user-friendly** for the law to provide appropriate exceptions upfront.

Should the exceptions be combined into a single inherent requirements test?

Recommendations have been made (but not implemented) in recent years in respect of both Commonwealth and Victorian laws to replace the genuine occupational qualifications test with the inherent requirements test (or a modified version of it).¹⁰¹ This approach is seen as offering greater protection from discrimination, as the inherent requirements test tends to be narrower than the genuine occupational qualifications test.

LRAC recommended keeping the tests separate. There is merit in LRAC's argument that genuine occupational qualifications are not the same in their principle or purpose as the inherent requirements of a job. The exceptions in this category tend to reflect what is culturally or commercially desirable according to consumer preferences or expectations, rather than what is necessary. The inherent requirements exception, in contrast, is intended to reflect the core duties of the role without which the role cannot be performed.

Questions for public consultation

24. Should the genuine occupational qualifications test be replaced with a single inherent requirements test?

Should the employment exceptions apply to all attributes?

There is merit in extending the employment exceptions so that they apply to all protected attributes.

The genuine occupational qualifications exceptions in the arts, entertainment or hospitality industries should be available for all groups of people. For example, a play with a character who is intersex may be more authentic if a person born with variations in their sex characteristics performs that role.

The inherent requirements exception may also be relevant to a wider range of attributes. LRAC observed that attributes such as "age, sex, pregnancy, breastfeeding, carer responsibilities, homelessness and physical features" may also "prevent a person from carrying out work".¹⁰² That said, there would be many attributes where the exception would presumably operate only in rare circumstances. For example, it is difficult to imagine cases in which a person's race, industrial activity, or accommodation status (including homelessness) would make them unable to carry out work essential to the position, especially if reasonable adjustments were made.

Questions for public consultation

25. Should the employment exceptions be extended to apply to a wider range of protected attributes?

A new explicit duty to make reasonable adjustments?

LRAC also recommended that the Discrimination Act should impose an **explicit duty to make reasonable adjustments** (either a general duty that would apply to all people with obligations under the Discrimination Act in respect of all attributes, or at least a specific duty on employers to make reasonable adjustments with respect to all attributes under this exception).¹⁰³

¹⁰¹ Victorian Parliamentary Committee Report 2009, 13-15; Exposure Draft, Commonwealth Human Rights and Anti-Discrimination Bill 2012, cl 24.

¹⁰² LRAC Report, 117.

¹⁰³ LRAC Report, Recommendations 3.1 and 3.2. LRAC Report, Recommendation 3 and discussion at 35-40.

If the inherent requirements exception is retained and extended to apply to all attributes, imposing an explicit duty on employers to make reasonable adjustments would contribute to ensuring that the exception is applied only where strictly necessary. The duty would require employers to properly consider the circumstances of each case, including the duties of the job that are genuinely essential, the person's capabilities and the nature of any adjustments that may be made (without unjustifiable hardship on the employer) to support the person to carry out those essential duties.

Commonwealth and Victorian discrimination laws impose a duty to make reasonable adjustments with respect to people with disability. In the Commonwealth context this applies to all people and organisations with obligations not to discriminate, while in Victoria the duty applies only in relation to work, education and the provision of services.¹⁰⁴ Victorian law also imposes a duty on employers not to “unreasonably refuse to accommodate” a person's responsibilities as a parent or carer.¹⁰⁵ The Northern Territory is the only jurisdiction in Australia that imposes a duty to make reasonable adjustments on all people and organisations with obligations not to discriminate and in relation to all protected attributes.¹⁰⁶

Having a general duty to make reasonable adjustments would provide **broader and stronger protections** for all under discrimination law. Before making any decisions, or taking any actions, that disadvantaged protected groups, the duty holder would always need to consider whether any reasonable adjustments may be made to accommodate the needs that a person has because of a protected attribute.

Questions for public consultation

26. *Should the law impose a duty to make reasonable adjustments not just for people with disabilities, but for people with any protected attribute?*
27. *For example, such a duty might require an employer to permit an employee to vary their working hours because of family responsibilities, provided that the employee could still perform all essential work.*
28. *Should the duty apply only to employers, or to all people and organisations with obligations not to discriminate?*

Declared jobs

There would be merit in removing the provisions allowing positions to be declared as having genuine occupational qualifications in regulations under the Discrimination Act, given that these have never been used.¹⁰⁷ An employer who wishes to discriminate in circumstances other than those described in the Act may apply for an exemption to permit the conduct.

Questions for public consultation

29. *Should the provisions allowing jobs to be declared in regulations as having genuine occupational qualifications be removed?*

¹⁰⁴ See ss 5(2) and 6(2) of the DDA (Cth); EOA (Vic), ss 20, 33 (work), 40 (education), 45 (services). Note that the availability of reasonable adjustments is also a factor in the test under Victorian law for whether indirect discrimination is reasonable (EOA (Vic), s 9(3)(e)).

¹⁰⁵ EOA (Vic), ss 17, 19, 22 and 32.

¹⁰⁶ ADA (NT), s 24 (see also s 58 which permits discrimination when it would be unreasonable to expect the special need to be accommodated).

¹⁰⁷ Discrimination Act, ss 34(2)(j), 42(2)(e) and 48(d).

EXCEPTIONS FOR EMPLOYING WORKERS IN PRIVATE HOMES

Current law

The Discrimination Act (section 24) permits a person to discriminate for any reason (e.g. race, age, sex) when hiring someone if the position involves domestic duties on the premises where the first person lives.¹⁰⁸ A similar exception applies (section 25) permitting discrimination for any reason (e.g. race, age, sex) if the position involves the care of a child in the child's home.

LRAC recommendation

REC 19.9 > 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 section 28 of the Human Rights Act.

LRAC noted that the exception for domestic workers (in section 24) is common across discrimination legislation and recognises a person's right to privacy since it allows the person to choose who will be in their home.¹⁰⁹ However, LRAC considered that the exception may operate too widely and recommended that it should be limited to permitting discrimination that would be reasonably justifiable under section 28 of the Human Rights Act. LRAC did not consider the exception for private childcare workers (in section 25).

Discussion

Strengthening the protections of the Discrimination Act for people who undertake domestic work in other people's homes is important. Many such workers may come from more marginalised or vulnerable backgrounds, which can mean it is more difficult for them to enforce their rights. The right to privacy is not unlimited, and work is an area of public life that is usually covered by discrimination law. There may be legitimate reasons (linked to protected grounds under the Discrimination Act) that people wish to prefer one person over another as a domestic worker or private child carer. This may include for example; the nature of the duties being performed (such as intimate personal care) making it reasonable for the hirer to prefer a person of the same gender. However, the exceptions are currently very broad, as it permits discrimination for any reason, even where there may objectively be no connection between the types of persons preferred and the duties of the job.

One option for reform would be add the reasonable limitations test in section 28 of the Human Rights Act as a criterion for this exception. The advantages and disadvantages of this approach are discussed in the Overview on Exceptions section of this discussion paper, including uncertainty for users on their rights and obligations. Another approach would be amending the existing exceptions with the aim of preventing a hirer from preferring people of a particular gender, age or racial background (for example), if this were irrelevant to the duties of the position. This is appropriate as such conduct may reflect prejudice.

30. What limitations should apply to people hiring workers to perform domestic duties or provide childcare in private homes?

¹⁰⁸ This exception applies whether the person is being hired as an employee or contract worker. Also note that because of s 26A of the Discrimination Act, this exception applies including when the person is hired through an employment agency. The exception applies only to the hiring decision, and it does not permit discrimination in the terms and conditions on which the person works.

¹⁰⁹ LRAC Report, 119.

EXCEPTIONS FOR INSURANCE AND SUPERANNUATION COMPANIES

Current law

Insurance

The Discrimination Act section 28 allows insurers to discriminate against people on any ground in relation to the terms on which an insurance policy is offered or may be obtained, if the discrimination is reasonable in the circumstances, having regard to any actuarial or statistical data the insurer holds, and as long as it is reasonable for the insurer to rely on that data.

Notably, the insurer is required to consider any reasonable data on which it is reasonable to rely. The wording of this exception (referring to consideration of *any* reasonable data) suggests that if *no* data is available insurers may still be permitted to discriminate and the exception would turn on whether discrimination is reasonable in all the circumstances. This recognises that in some cases there may not be any relevant and reliable data to inform decisions about risk.

The insurance exception was at issue in a recent ACT case in which an insurance company refused a person public liability insurance for his gardening business because of his criminal record. The Tribunal found that the insurer had discriminated against the person. The insurer's decision was based on internal company "moral guidelines" and was not supported by any relevant data that would indicate that the criminal record was relevant to the risk faced by the insurer. The Tribunal found that the insurer's decision was unreasonable, and the insurer could not rely on the exception.¹¹⁰

Superannuation

The Discrimination Act provides two distinct exceptions for superannuation. The first (s 29(1)) is a very broad exception that applies to all grounds except age and allows discrimination with no restriction.¹¹¹ Unlike the insurance exception, there is no requirement for the discrimination to be reasonable or for superannuation providers to take into account any available and reasonable data. This exception was originally intended to be temporary.¹¹²

The second exception (s 29(2)) applies specifically to age discrimination. It is based on the age and disability discrimination exceptions for insurance and superannuation in Commonwealth laws.¹¹³ The test permits age discrimination in superannuation only if one of the following applies:

- > the discrimination is because of the application of a Commonwealth law; or
- > the discrimination is based on reasonable actuarial or statistical data and is reasonable having regard to the data and any other relevant factors; or
- > if there are no reasonable actuarial or statistical data, the discrimination is based on reasonable data and is reasonable having regard to the data and any other relevant factors; or
- > if there are no reasonable data at all, the discrimination is reasonable having regard to any other relevant factors.¹¹⁴

¹¹⁰ [Complainant 201823 v Insurance Australia Group Ltd Trading as NRMA \(Discrimination\)](#) [2019] ACAT 64.

¹¹¹ The LRAC Report does not distinguish between the two categories of exception with respect to superannuation. It focuses only on the age discrimination exception in ss 29(2)-(5).

¹¹² See [Explanatory Memorandum](#), Human Rights and Equal Opportunity Bill 1991 (ACT), 10.

¹¹³ ADA (Cth), ss 37-38; DDA (Cth), s 46.

¹¹⁴ Whether or not the exception applies also depends on whether the fund condition was created before or after 4 March 1994, which is when ACT law was changed to make age discrimination unlawful.

It is not proposed to change the exception that permits discrimination because of the application of Commonwealth laws, and so the discussion in this section focuses on the remaining parts of the test (whether the discrimination is reasonable having regard to available data).

LRAC recommendation

REC 19.8	<p>> The Discrimination Act should be amended so that the exception for insurance and superannuation:</p> <ul style="list-style-type: none">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 Rights 2004 (ACT)ii. is assessed by reference only to actuarial or statistical data that is relevant to the circumstances.¹¹⁵
-----------------	---

Discussion

There is a legitimate reason for permitting discrimination by insurance and superannuation providers, as the commercial viability of their businesses requires them to be able to differentiate between people based on their risk profile, which may depend on protected attributes such as sex, age or disability. A common example is car insurance policies that charge higher premiums for younger drivers, based on data about the risks of car accidents for drivers of different ages.

However, discrimination law should ensure that insurance and superannuation make risk assessments that are not based on stereotypical or blanket assumptions, but are objectively reasonable, based on the best possible data, and sufficiently tailored to individual circumstances.

The denial of insurance (or its offer on prohibitively expensive or unduly narrow terms) can significantly affect a person's ability to participate in ordinary areas of life such as employment, travel and home ownership.¹¹⁶ LRAC's report noted that people with disabilities, including people with mental illness, can face systematic barriers in accessing superannuation and insurance.¹¹⁷ Recent law reform reports from around Australia have highlighted serious and systemic issues of discrimination on the grounds of disability (including mental health) and age in the insurance sector.¹¹⁸

Should the exceptions be repealed?

Repealing the superannuation and insurance exceptions would have disadvantages. Relying on a justification defence provision framed in general terms, such as section 28 of the Human Rights Act, could end up lessening protections in this area and impose transaction costs due to uncertainty. The single justification defence is discussed in further detail above. It also may be undesirable to require providers of insurance or superannuation to seek exemptions. It may prove difficult for the ACT Human Rights Commission to craft exemptions given the wide range of products on offer and the varied circumstances of people applying for insurance.

¹¹⁵ LRAC Report, Recommendation 19.8 and 117-119.

¹¹⁶ Productivity Commission, Disability Discrimination Review (2004), 331-332.

¹¹⁷ LRAC Report, 118, describing submissions received.

¹¹⁸ See, for example, Victorian Equal Opportunity and Human Rights Commission, ["Fair Minded Cover. Investigation into mental health discrimination in travel insurance"](#) (2019) (**VEOHRC Insurance Report (2019)**); Anti-Discrimination Commissioner, Tasmania, ["Volunteers, Age and Insurance. Investigation Report"](#) (2013); Productivity Commission, Disability Discrimination Review (2004), Ch 12.1; Australian Law Reform Commission, Report 120, [Access All Ages – Older Workers and Commonwealth Laws](#) (2013) (**ALRC Report 120 (2013)**), [6.7], 134. See also [Ingram v QBE Insurance \(Australia\) Ltd \(Human Rights\)](#) [2015] VCAT 1936.

The options discussed below focus instead on reforming the exceptions to strike a better balance between the right to non-discrimination and the legitimate interest of insurance and superannuation companies in differentiating based on risk when offering and pricing their products.

Should decisions be required to be based on data?

Implementing LRAC's recommendation that superannuation and insurance decisions must be based on actuarial or statistical data would strengthen the law. This proposal is not without precedent. Tasmanian law requires that the discrimination be based on reliable actuarial, statistical or other data, and that it is reasonable having regard to the data and any other relevant factors.¹¹⁹ Sex discrimination law at the Commonwealth level,¹²⁰ in South Australia,¹²¹ in WA,¹²² and in NSW¹²³ in respect of insurance requires that the discrimination is based on reasonable actuarial or statistical data, and is reasonable having regard to the data.

However, it remains common in other parts of Australia for exceptions to permit discrimination in insurance or superannuation based on any reasonable factors, if no reasonable actuarial or statistical data exist.¹²⁴

Insurers and superannuation providers may face difficulties obtaining reliable, relevant actuarial or statistical data on which to base their decisions. However, it is arguable that in the absence of data, discriminatory assumptions about risk based on protected characteristics should not be permitted. Narrowing the exception to circumstances where data is available would provide stronger protection from discrimination.

Questions for public consultation

31. Should insurance and superannuation providers only be permitted to discriminate where their decisions are based on actuarial or statistical data?

A new requirement to provide access to the data on which decisions are based

The complex nature of the insurance industry can create asymmetries of information and power between providers and consumers. An option to address this would be to require insurance or superannuation providers to give the consumer access to the data on which a decision about them is made, upon written request. This was not considered in LRAC's report but would respond to concerns raised in other reviews, including that it can be difficult for consumers to obtain data and reasons for decisions, making it hard to challenge decisions.¹²⁵ Requiring some transparency may also promote reliance on higher quality data from the outset.

Requirements to disclose data to consumers or to the Australian Human Rights Commission exist in Commonwealth discrimination laws.¹²⁶ There are also requirements in South Australian laws for disclosure to consumers¹²⁷ and requirements in Tasmanian and NSW laws for the disclosure of data to

¹¹⁹ ADA (Tas), ss 30, 33-34, 44.

¹²⁰ SDA (Cth), ss 41-41A.

¹²¹ EOA (SA), ss 49. South Australian law also requires insurers to rely on data for its exemption on age discrimination (other than in life insurance decisions) on the ground of age (85R(2)). Data is not required for the exemption under South Australian law for insurance decisions based on disability (but the discrimination must be reasonable): EOA (SA), s 85.

¹²² EOA (WA), s 34.

¹²³ ADA (NSW), s 37.

¹²⁴ See, e.g., ADA s 37(3)(b); DDA s 46(1)(g); EOA (Vic), s 47 and 79; EOA (SA), s 85; ADA (NT), s 49; EOA (WA), ss 35AR, 66P, 66T, 66ZL and 66ZR.

¹²⁵ VEOHRC Insurance Report (2019) 27. See also [ALRC Report 120](#) (2013), 140-142, and Productivity Commission, Disability Discrimination Review (2004), Ch 12.1.

¹²⁶ SDA (Cth), s 41(1)(e); ADA (Cth), ss 52, 54 and DDA (Cth), s 107.

¹²⁷ EOA (SA), s 89.

the Tribunal.¹²⁸ Providing the right of access to the data directly to the consumer may be more useful as it would inform decisions on whether and how to challenge the provider's decision.

There may be concern that some of the data relied on by insurers and superannuation providers is commercially sensitive. To protect those business interests, one option is to require providers to provide a meaningful explanation of the data on which their decisions are based (rather than the data itself). This approach was recommended by the Productivity Commission in respect of disability discrimination.¹²⁹

Questions for public consultation

32. Should insurance and superannuation providers be required to provide consumers with the data on which decisions about them are based (or a meaningful explanation of that data)?

¹²⁸ ADA (Tas), ss 30(2), 34(2), 44(2); ADA (NSW) ss 36, 37, 49, 49Q, 49ZYS, 49ZYT.

¹²⁹ Productivity Commission, Disability Discrimination Review (2004), 341.

POSITIVE DUTY TO ELIMINATE DISCRIMINATION

Current Law

The Discrimination Act and other anti-discrimination laws in Australia can be described as ‘negative’ in that the laws require persons and organisations to refrain from engaging in conduct that discriminates.¹³⁰ The LRAC Report noted that the current complaints-based system is reactive, and requires that a person make a complaint of discrimination before any action is taken to deal with systemic discrimination.¹³¹ It acknowledged that the complaints process itself can be a barrier to vulnerable persons and a positive duty to eliminate discrimination would ‘lessen the burden on individual complainants’.¹³²

By contrast the Human Rights Act imposes a positive duty on public authorities to act in a way that is compatible with human rights, and to consider relevant human rights in making decisions.¹³³

A positive duty in the Discrimination Act to eliminate discrimination would be consistent with the Human Rights Act and could assist to create a culture of equality and non-discrimination.

LRAC recommendation

- REC 5.1** > The Discrimination Act should be amended to include a positive duty to eliminate discrimination.
- REC 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.
- Rec 5.3** > The ACT Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

Discussion

A positive duty to eliminate discrimination requires identifying areas of potential discrimination and taking concrete steps to improve the systems or practices that result in persons with protected attributes experiencing exclusion or disadvantage. It does not guarantee that there will be no discrimination complaints.

A positive duty to eliminate discrimination would ensure that the Discrimination Act is aligned with the human rights framework and correspond with the duty in the Human Rights Act of public authorities to give consideration to human rights including the right to equality and non-discrimination.

Other legislation

Several Australian jurisdictions including the Commonwealth have laws that impose a positive duty on organisations to eliminate discrimination in certain contexts or for certain groups. For example, public

¹³⁰ LRAC Report, 43.

¹³¹ Ibid.

¹³² Ibid, 46. The Human Rights Commission already has a number of reporting functions that do not rely on individual complaints including the ability to initiate reports on discrimination matters and issue third party reports on systemic discrimination matters. Human Rights Commission Act 2005 ss 83 and 84.

¹³³ Human Rights Act s 40B

sector employment¹³⁴ and equality for women in employment.¹³⁵ In addition, several enquiries have examined the potential for extending the positive duty to other entities and other types of discriminatory conduct.¹³⁶

A positive duty on employers to eliminate workplace sexual harassment exists as a part of the duties imposed by Workplace Health and Safety legislation.¹³⁷ The emphasis under these laws is on managing health and safety risks of workplace sexual harassment and additional guidance materials are provided for employers on practical ways to prevent sexual harassment.

Other jurisdictions

Victoria

In its 2010 Equal Opportunity Act, Victoria was the first Australian jurisdiction to introduce a general positive duty to eliminate discrimination, specifying that a persons under a duty must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.¹³⁸

The rationale for this new positive duty was that the complaints-based regime, which focused on equal treatment, did nothing to address ‘systemic discrimination’ experienced by the most vulnerable people in society. Further, the reform recognised that systemic discrimination and disadvantage results in costs to the community and economy, including the loss experience and expertise, reduced labour productivity and higher health care costs.¹³⁹

‘Systemic discrimination’ is described as ‘patterns or practices of discrimination that are the result of interrelated policies, practices and attitudes that are entrenched in organisations or in broader society.’¹⁴⁰ Such practices may not in and of themselves be a result of direct or indirect discriminatory conduct on which to base a complaint. Moreover, the experience of discrimination is not always tied to a recognised attribute, for example:

- Migrant job seekers with professional qualifications but no local experience or local professional referees being confined to unskilled, low paid work;
- People who use wheelchairs experience longer wait times than other taxi users due to an inadequate number of accessible taxis;
- Homeless person being refused medical treatment or other services due to appearance.

Discrimination may be experienced through multiple systems or structures that marginalise and exclude

¹³⁴ *Public Service Act 2008* (Qld) requires agencies to promote equal employment opportunity for certain groups in public sector employment

¹³⁵ *Workplace Gender Equality Act 2012* (Cth) requires both public and private sector employers to take positive steps in relation to gender equality and report each year on workplace gender equality initiatives

¹³⁶ For a review of historical enquiries see S Rice, ‘And Which ‘Equality Act’ Would that Be?’ In M Thornton (ed.) *Sex Discrimination in Uncertain Times* ANU Press, 2010, Ch. 9; for more recent example see Australian Human Rights Commission, *Respect@Work: National Enquiry into Sexual Harassment in Australian Workplaces*, 2020 which included a recommendation to introduce a positive duty in the Sex Discrimination Act 1984 (Cth) to eliminate sex discrimination, sexual harassment and victimisation (Recommendation 17).

¹³⁷ Safe Work Australia ‘Workplace Sexual harassment’
<https://www.safeworkaustralia.gov.au/topic/workplace-sexual-harassment>

¹³⁸ EOA (Vic) s 15(2).

¹³⁹ J Gardner, *Equal Opportunity Review: An Equality Act for a Fairer Victoria* (Department of Justice (Vic), June 2008), Ch 1.

¹⁴⁰ *Ibid* 21.

individuals based on their differentiating characteristics, whether it is Aboriginality, immigration status, gender, sexual orientation, religion, age or disability.

People who experience discrimination on multiple levels face compounding levels of disadvantage. For example, failure of a person with a disability to secure adequate housing or employment can impact their economic wellbeing which in turn can have compounding effects on their health. Similarly, difficulty accessing education undermines future employment options and in turn can impact future wellbeing.

The positive duty under the Victorian Act applies to everyone who already has responsibilities under the Act, whether public or private bodies. This includes:

- > employers
- > providers of accommodation, education, or goods and services
- > clubs and sporting organisations.

The positive duty does not create a new basis for complaint,¹⁴¹ which means a person is not able to bring a dispute to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) arguing that there was a failure by another person or organisation to take action to eliminate discrimination. However, the positive duty complements the dispute process in that steps taken towards eliminating discrimination can be taken into account during the dispute process, and further actions agreed as part of a settlement agreement may contain positive measures to eliminate discrimination.

The specific measures or actions required to reduce discrimination depend on the size of the organisation and the resources available. To expand on this, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has identified six minimum standards that organisations must meet to comply with the positive duty: knowledge; prevention plan; organisational capability; risk management; reporting and response; monitoring and evaluation.¹⁴² The VEOHRC guidance is intended to provide a process for going about making organisational changes rather than directions as to the precise changes that must be implemented.

United Kingdom

Other jurisdictions that impose a positive duty not to discriminate include the United Kingdom. The *Equality Act 2010* (UK) introduced a public sector Equality Duty with three key aims. Public bodies are required to have due regard to the need to:

- > eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- > advance equality of opportunity between people who share a protected characteristic and people who do not share it; and
- > foster good relations between people who share a protected attribute and people who do not share it.¹⁴³

The duty covers the range of decision-making processes that public bodies undertake such as in decisions on employment, policy design, service delivery and procurement. Several principles guide how public

¹⁴¹ EOA (Vic) s 15(3).

¹⁴² See Victorian Equal Opportunity & Human Rights Commission, 'Positive Duty' <https://www.humanrights.vic.gov.au/for-organisations/positive-duty>

¹⁴³ Quick Start Guide 4.

bodies should go about fulfilling the 'Equality Duty', including the requirement that people must be aware of the duty as it applies to them, it must be considered as part of the decision process and not an afterthought and that it must be a substantive exercise, not just tick-a-box.¹⁴⁴

As suggested by the name, the public sector Equality Duty applies to public bodies as well as bodies carrying out public functions. The Equality Duty encompasses organisations such as police, armed forces, ministers, local government, public health and public education services, as well as various authorities, councils, boards and associations with public functions. These are all defined in a Schedule under the Act.¹⁴⁵

Summary

The Victorian and United Kingdom models provide two different examples of what a positive duty might look like in terms of scope: specifically, a positive duty that applies to public bodies or a duty for public and private organisations in general.

LRAC recommended a phased approach be taken where initially the duty be applied to public authorities with private bodies and community organisations brought in over a period of three years.

Questions for public consultation

33. Should a positive duty to eliminate discrimination be introduced into the Discrimination Act?

34. Should the duty apply to public bodies, or private businesses and organisations, or both, and how should this be implemented?

35. How would the duty be applied to organisations of different sizes and with different levels of available resources?

Compliance with a positive duty

The introduction of a positive duty, raises the question: How should entities to whom the positive duty applies, be supported to comply with the duty? LRAC recommended that the ACT Human Rights Commission be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

In Victoria, the positive duty is complemented by additional functions for the Victorian Equal Opportunity and Human Rights Commission¹⁴⁶ including issuing practice guidelines;¹⁴⁷ carrying out a review upon request of a person of compliance with the Act;¹⁴⁸ providing advice to persons on request on the development of action plans and keeping a register of action plans.¹⁴⁹

The ACT Human Rights Commission already has several functions that support compliance with the Discrimination Act. For example, the Discrimination Commissioner has the function to prepare

¹⁴⁴ Quick start Guide 5.

¹⁴⁵ Equality Act 2010: Schedule 19 (consolidated) - April 2011 - GOV.UK (www.gov.uk).

¹⁴⁶ EOA (Vic) Part 10.

¹⁴⁷ Ibid Part 10 Div 1.

¹⁴⁸ Ibid Part 10 Div 2.

¹⁴⁹ Ibid Part 10 Div 3.

'Commission-initiated reports' on discrimination matters¹⁵⁰ and to issue third party reports on systemic issues or issues of public interest arising from a complaint.¹⁵¹ The Commissioner also has education functions and promotes understanding of, and community responsibilities under, the Act.

There would be advantages to following the Victorian model of a positive duty to the extent that complaints about compliance with the positive duty could be raised and considered in the context of a complaint about unlawful discrimination (ie where discrimination has occurred), but could not of itself be the subject of a complaint. This approach would provide an incentive for organisations to comply with the duty without creating a new and complex complaints jurisdiction.

The Victorian model provides for VEOHRC to be consulted on the development of action plans for organisations. One disadvantage of having the Human Rights Commission directly involved in the development of individual action plans is that it would put the Commission in a position of potential conflict if an individual organisation is later the subject of a complaint. In a small agency it may be more difficult to separate advising functions from the complaint handling functions within the Human Rights Commission.

Additional functions for the Human Rights Commission raises an issue of resources and capacity. Resources directed towards assisting and educating organisations about the positive duty could have a wider community benefit than consulting on individual action plans and practices.

Questions for public consultation

- 36. How would organisations be supported to meet the positive duty?*
- 37. What additional functions and powers would the Human Rights Commission need to monitor organisations to ensure they are meeting the positive duty?*
- 38. What resources would be necessary to inform organisations of steps necessary to comply with the positive duty?*

¹⁵⁰ Human Rights Commission Act 2005 s 84.

¹⁵¹ Ibid s 83.

TABLE OF REFERENCES

Commonly used references in this Discussion Paper are listed in full below.

ACT laws <www.legislation.act.gov.au>	
Discrimination Act	<i>Discrimination Act 1991</i> (ACT)
Human Rights Act	<i>Human Rights Act 2004</i> (ACT)
Human Rights Commission Act	<i>Human Rights Act Commission Act 2005</i> (ACT)
Other Australian laws <www.austlii.edu.au>	
ADA (Cth)	Age Discrimination Act 2004 (Cth)
ADA (NSW)	Anti-Discrimination Act 1977 (NSW)
ADA (NT)	Anti-Discrimination Act 1996 (NT)
ADA (QLD)	Anti-Discrimination Act 1991 (QLD)
ADA (Tas)	Anti-Discrimination Act 1998 (Tas)
EOA (SA)	Equal Opportunity Act 1984 (SA)
EOA (Vic)	Equal Opportunity Act 2010 (Vic)
EOA (WA)	Equal Opportunity Act 1984 (WA)
DDA (Cth)	Disability Discrimination Act 1992 (Cth)
RDA (Cth)	Racial Discrimination Act 1975 (Cth)
SDA (Cth)	Sex Discrimination Act 1984 (Cth)
Reports	
<i>ACT LGBTIQ+ Legal Audit</i>	Equality Australia, <i>ACT LGBTIQ+ Legal Audit. Reforms for an Inclusive ACT</i> , 30 June 2019, available at: < www.equalityaustralia.org.au >
AHRC Federal Discrimination Law (2016)	Australian Human Rights Commission, <i>Federal Discrimination Law</i> (2016), available at: < https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016 >
Commonwealth Government Discussion	Australian Attorney-General's Department, <i>Consolidation of Commonwealth Discrimination Laws: Discussion Paper</i> , September 2011,

Paper on Consolidation of Discrimination Laws (2011)	< https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx >
LRAC Report	ACT Law Reform Advisory Council, <i>Review of the Discrimination Act 1991 (ACT)</i> (2015), available (along with public submissions to the review) at: < http://www.justice.act.gov.au/criminal_and_civil_justice/law_reform/law_reform_advisory_council >
NSW Law Reform Commission Report 92 (1999)	NSW Law Reform Commission, <i>Review of the Anti-Discrimination Act 1977 (NSW)</i> , Report 92 (1999). < https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-92.pdf >
Productivity Commission, Disability Discrimination Review (2004)	Productivity Commission, <i>Review of the Disability Discrimination Act 1992</i> , 14 July 2004, available at: < https://www.pc.gov.au/inquiries/completed/disability-discrimination/report/disability-discrimination.pdf >
Ruddock Review	P Ruddock et al, <i>Religious Freedom Review. Report of the Expert Panel</i> , 18 May 2018, available at: < https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf >
Senate Committee Report on Consolidation Bill	Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee Report, <i>Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012</i> , February 2013 < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/index >
Victorian Parliamentary Committee Report 2009	Scrutiny of Acts and Regulations Committee, Victorian Parliament, <i>Exceptions and Exemptions to the Equal Opportunity Act 1995. Final Report</i> (2009), available at: < https://www.parliament.vic.gov.au/archive/sarc/EOA_exempt_except/default.htm >

APPENDIX

LRAC Report Recommendations

Coverage of the Act – Public life

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

Positive duty

- 5.1 The Discrimination Act should be amended to include a positive duty to eliminate discrimination.
- 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.
- 5.3 The ACT Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

Justification defence

- 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).

Exceptions

- 19.1 The statutory authority exception should be limited to 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.
- 19.2 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 Act 2004* (ACT).
- 19.3 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, and
 - ii. be limited to the provision of benefits, facilities or services to members of the voluntary body.
- 19.4 The clubs exception should be either repealed or limited to allow clubs to only discriminate in terms of membership on the basis of race, sex or disability only if the club has the main purpose of providing benefits to that group of people
- 19.5 The sport exception should be limited to only reasonable discrimination when it is justified to take into account the strength, stamina or physique of competitors
- 19.6 The exception for genuine occupational qualifications should be repealed or made available for

every attribute, with exemptions available.

- 19.7** The exception for inherent requirements of work should be extended to cover any protected attribute (not just disability) provided that a general duty to make reasonable adjustments is also introduced into the Discrimination Act.
- 19.8** The exception allowing for discrimination in the terms of insurance and superannuation should be limited to where it is reasonable having regard to right to non-discrimination and relevant statistical and actuarial data.
- 19.9** The exception allowing for discrimination in the employment of domestic workers be limited to where it is reasonable having regard to non-discrimination.



ACT
Government

Justice and Community Safety Directorate

October 2021