

Public Exposure Draft: Discrimination Amendment Bill 2022

The ACT Government is working to modernise the *Discrimination Act 1991* (the Discrimination Act) to ensure the ACT is at the forefront of best practice in promoting equal opportunity, respect for diversity and social inclusion in the Canberra community.

This Draft Discrimination Amendment Bill 2022 (Draft Bill) is being released for public exposure to provide the public with a further opportunity to comment on proposed discrimination reforms. These reforms are intended to improve protections in the Discrimination Act, make the Act easier to understand and to ensure that it is consistent with rights protected in the *Human Rights Act 2004*.

If you are interested in providing feedback on the Draft Bill, comments on the Draft Bill are invited by **1 July 2022**. You can make a submission commenting on any aspect of the Draft Bill by emailing civilconsultation@act.gov.au or by leaving a voice message on (02) 6207 9008.

Expanded coverage of the Act

Currently the Discrimination Act only applies to specific areas of public life: work, education, access to premises, goods, services and facilities, accommodation and licenced clubs. The Draft Bill will expand the coverage of the Discrimination Act with respect to:

- Functions of a public nature;
- Sports; and
- Competitions.

Including functions of a public nature will make it clearer that more types of government decision-making is covered by the Discrimination Act.

The amendments would also clarify that all organised sporting activities and competitions are included.

Example: *A woman enters a singing competition and is told she did not win because although she had a great voice she was considered too old. The reforms will make it clear that she can make a discrimination complaint about the competition.*

Changes to the exceptions

There are currently over 50 exceptions in the Discrimination Act. The exceptions operate as a defence to a discrimination claim and excuse conduct that would otherwise be considered discriminatory. The Draft Bill makes a series of amendments to refine the exceptions under the Discrimination Act and ensure that they are consistent with our Human Rights Act. The revised exceptions are set out below.

Religious bodies

- > Under the Discrimination Act, religious bodies may discriminate on any ground in relation to arranging their religious observances such as ordination or appointment of clergy. The Bill will narrow this exception to ensure that religious bodies can only discriminate in arranging religious observances where it is necessary to conform with their doctrines.

Example: *Under the proposed reform, the Catholic Church will still be able to require that priests be male in line with their doctrines, but cannot discriminate on irrelevant grounds such as race or disability.*

- > Currently, religious bodies can discriminate as long as their actions or practices conform to their doctrines and are necessary to avoid injury to the religious susceptibilities of people adhering to that religion. The Bill proposes to limit this exception by providing that religious bodies' actions or practices must also be reasonable, proportionate and justifiable in the circumstances. This refinement will ensure that different human rights are considered when a religious body relies on this exception.

Example: *Under the proposed amendment, a religious body relying on this exception to justify excluding a same-sex couple from worship services would have to consider the human rights of the couple and demonstrate the discrimination was reasonable, proportionate and justifiable. What constitutes reasonable, proportionate and justifiable will depend on the circumstances of each matter.*

- > The Bill will also make it clear that religious bodies may only discriminate in employment on grounds of religious conviction where it is a genuine occupational qualification or requirement and where it is reasonable, proportionate and justifiable in the circumstances. Special provisions already apply to staff in religious schools.

Example: *A Christian disability support service cannot preference staff based on their religion unless religious conviction is a genuine requirement of the role such as in the case of providing pastoral care.*

- > The Bill will also ensure that religious bodies may not discriminate against a person in providing goods and services except on the grounds of religious conviction and where it is reasonable, proportionate and justifiable.

Example: *A Jewish aged care facility may preference admitting prospective Jewish residents over people of other faiths but must consider whether it is reasonable, proportionate and justifiable to do so.*

- > There may be some examples where religious bodies are receiving public funding to exercise functions of a public nature and where it would not be appropriate to allow them to discriminate in exercising these functions. The Bill makes it clear that the religious bodies exception does not apply to religious bodies exercising functions of a public nature as per section 40A of the Human Rights Act (excluding education). Functions of a public nature include but are not limited to public health services and public housing.

Example: *A religious body providing public health services cannot rely on the exception.*



- > It is important to note that in 2018 changes were made to the Discrimination Act which limit the ways in which religious schools may discriminate against students and staff to ensure that they are not treated unfairly on the grounds of sexuality, gender identity and other grounds.

Clubs and voluntary bodies

- > Currently, voluntary bodies and clubs which hold a license under the *Liquor Act 2010* are permitted to discriminate on some grounds in the admission of people as members and in the provision of benefits, facilities and services. Under the Bill the definition of 'clubs' is expanded to include clubs without a liquor licence. The Bill combines and refines the existing exceptions to provide that clubs and voluntary bodies may only discriminate when providing services to groups or members that are protected by discrimination law and are the reason the organisation was established.

Example: *A Spanish Club may preference people with Spanish heritage in providing membership or funding for projects or initiatives.*

- > Currently voluntary bodies are permitted to discriminate on any ground whereas licensed clubs may only discriminate on grounds of race, sex, disability or age. The Bill expands the clubs and voluntary bodies exception to cover all protected attributes.

Example: *A club may be established exclusively for individuals who are neurodivergent (for example people on the autism spectrum).*

Sport

- > Currently, people may be excluded from participating in competitive sport for reasons of sex, age and disability. This means a male may be excluded from a single sex sporting activity if the 'strength, stamina or physique of competitors' is relevant to that sport. Similarly, the Act currently includes an exception which allows a person to be excluded from a sport if a person has a disability, and the sport requires physical or intellectual attributes that they do not possess, or the sport is being conducted for people with a particular disability and the relevant person does not have that disability. A person may also be excluded on the ground of age if the sporting activity is only allowed between people belonging to a particular age group.

Under the Bill, these exceptions will be combined into a single exception which provides that excluding another person from participating in organised sport on the grounds of the other person's sex, disability or age is only permitted if the discrimination is necessary for fair, safe and effective competition and the outcome of discrimination is reasonable, justifiable in all circumstances.

Example: *A male-only football team may be required to allow a woman to play where there is no female team in that football code in the ACT and the outcome of the discrimination would result in that person not being able to play football at all.*

- > The Bill also provides that the sports exception will not apply to discrimination against a child under twelve years old on grounds of sex or disability.

Example: *Children's sports teams cannot be segregated based on sex or disability, however, age segregated teams are permitted.*



Work

- > The Act currently includes a 'genuine occupational qualifications' exception which recognises that there are particular types of jobs where an employer legitimately may want to choose an employee based on their race, age, sex or disability for reasons of authenticity, modesty or to better serve protected groups. The Bill retains and refines this exception by providing that discrimination is only permitted on the basis of genuine occupational qualifications where the conduct is reasonable, proportionate and justifiable in the circumstances.

Example: *Under the proposed reforms, an employer relying on this exception will now need to consider if the conduct is reasonable, proportionate and justifiable in the circumstances. What constitutes necessary, reasonable, proportionate and justifiable will depend on the circumstances of each matter.*

- > Currently, the Act provides that the genuine occupational qualification exception only applies in relation to choosing an employee based on their sex, age, disability or physical features. Under the Bill, the genuine occupational qualifications exception has been expanded to cover all protected attributes not just sex, age, disability or physical features.

Example: *Under the proposed amendment, a Community Support Centre would be permitted to preference a job applicant with lived experience of domestic or family violence.*

- > The Act currently includes an exception which permits discrimination against a person with a disability if the person is unable to carry out work essential for the job. The Bill limits this exception to provide that discrimination on the basis of 'inherent requirements' is only permitted where the conduct is reasonable, proportionate, and justifiable in all circumstances and cannot be mitigated by reasonable adjustments.

Example: *Under the proposed reforms, an employer relying on this exception will need to consider if the conduct is reasonable, proportionate and justifiable in the circumstances and whether or not the job can be done with reasonable adjustments.*

- > Currently, although people may make a complaint about indirect discrimination if they are not provided with reasonable adjustments, there is no specific duty on employers or other people with obligations under the Discrimination Act to make reasonable adjustments. The Bill provides that anyone with obligations under the Discrimination Act is subject to an explicit duty to make reasonable adjustments for people with any protected attribute.

Example: *Under the proposed reforms, an employer will have a duty to provide an employee with time off work due to family violence or Sorry Business.*

- > Currently the inherent requirements exceptions only apply to some protected attributes. Given that there will be a new duty to provide reasonable adjustments for all protected attributes, the Bill proposes to similarly expand the inherent requirements exception to cover all protected attributes.

Workers in Private Homes

- > The Act currently permits a person to discriminate for any reason when hiring someone if the position involves domestic duties in the premises where the employer lives. The Bill limits this exception to provide that discrimination in the employment of an individual to provide domestic duties in a private home is only permitted where it is reasonable, proportionate and justifiable in the circumstances.

Example: *Preferencing a female care attendant for another female for modesty reasons might be reasonable but discriminating on the grounds that a person is an Aboriginal and/or Torres Strait Islander person would not be reasonable.*

Insurance and Superannuation Companies

- > The Act currently permits insurers to discriminate against people on any ground in relation to offering or obtaining an insurance policy if the discrimination is reasonable in the circumstances having regard to any actuarial or statistical data. Superannuation providers may also discriminate against people on the ground of age if it is reasonable having regard to data and can discriminate on any other ground with no reasonableness or data requirement. Under the proposed amendments, insurance and superannuation companies are only permitted to discriminate where decisions are based on actuarial or statistical data.

Example: *Under the reforms, an insurance company may still be able to charge young men higher premiums due to statistical data indicating an increased rate of car accidents among people within that cohort.*

- > The Act does not currently require a superannuation or insurance company to provide a customer with information on the data used to inform their decision to discriminate against the customer. Under the Bill, if a consumer requests access to the data on which decisions about them are based, insurance and superannuation companies must:
 - provide consumers with the data or a meaningful explanation of the data; or
 - make a document containing the data available for inspection at a reasonable time and place.

Example: *Under the reforms, if a consumer questions why they are being charged a higher premium for car insurance, the insurance company must provide the consumer with motor vehicle accident statistics based on age and sex.*

Positive Duty

The Draft Bill introduces a positive duty to eliminate discrimination, sexual harassment and vilification that applies to all organisations under the Act where it is reasonable, proportionate and justifiable.

The duty will immediately apply to all public authorities on commencement of the reforms. It is anticipated that the duty will apply to other organisations after three years.

The Human Rights Commission will also be granted the power to consider whether an organisation has met their positive duty as part of investigating a complaint where a person has also experienced discrimination and the power to require organisations to provide information about the steps it has taken to meet the duty.

