



OUR LAWS SHOULD PROTECT ALL OF US, EQUALLY

SUBMISSION TO THE REVIEW OF THE EQUAL OPPORTUNITY ACT 1984 (WA)
PROJECT 111 DISCUSSION PAPER

29 October 2021

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CONTENTS

Executive summary.....	3
Reforming the Act.....	4
1. Protecting all LGBTIQ+ people from discrimination.....	4
(a) Sexual orientation.....	4
(b) Trans and gender diverse people.....	4
(c) Intersex people	5
(d) Personal associates and attribute extensions	6
2. Ensuring religious schools and organisations play by the same rules.....	7
(a) Religious exemptions.....	7
(b) The impact of these exemptions.....	9
(c) A better way forward	10
3. Ending harassment, vilification and hate-based conduct.....	13
(a) Harassment.....	13
(b) Vilification and hate-based conduct	14
4. Modernising the Act.....	17
(a) The definition of discrimination.....	17
(b) Positive duties.....	21
(c) Enforcement and remedies	23
Other areas of reform.....	25
5. Legal recognition of gender.....	25
6. Conversion practices.....	27
(a) The types and incidence of conversion practices in Australia	27
(b) The harm caused by conversion practices	28
(c) The way forward.....	29
7. Ending harmful practices against intersex people.....	30
(a) Medical treatments on intersex people.....	31
(b) Reform demands and developments.....	31
8. Surrogacy.....	32
9. A human rights Act.....	33
Detailed response to discussion paper questions.....	34

ENDORSEMENTS

Equality Australia is proud to work alongside the following organisations serving LGBTIQ+ communities in Western Australia who join in endorsing this submission:

- Australian Professional Association for Trans Health (AusPATH)
- Curtin University's Centre for Human Rights Education
- Equal Voices WA
- GLBTI Rights in Ageing Inc (GRAI)
- Intersex Human Rights Australia (IHRA)
- Intersex Peer Support Australia (IPSA)
- Living Proud
- PFLAG Perth
- Pride WA
- Rainbow Futures WA
- Transcend Australia
- Transfolk WA
- WAAC (formerly WA AIDS Council)
- Youth Pride Network (YPN)

ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Borne out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to redress discrimination, disadvantage and distress experienced by LGBTIQ+ people.

Sydney office: 414 Elizabeth Street Surry Hills NSW 2010

Melbourne office: Victorian Pride Centre, 79-81 Fitzroy Street St Kilda VIC 3182

Telephone: +61 03 9999 4527

Email: info@equalityaustralia.org.au

www.equalityaustralia.org.au

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Thank you for the opportunity to make a submission to the Law Reform Commission of Western Australia's review of the *Equal Opportunity Act 1984* (WA) (the **Act**). Equality Australia is proud to make this submission endorsed by 14 organisations serving the LGBTIQ+ communities of Western Australia.

Our laws should protect all of us, equally.

The Act has provided a fair go and extended equal opportunities to many Western Australians. It has levelled the playing field, making available employment, education and services to people who were once denied these opportunities based on who they are or whom they love.

But in the time since the Act was enacted in 1984 and despite the amendments made to it, the Act is now one of the less protective anti-discrimination laws in Australia. For LGBTIQ+ people in particular, many are not protected by the Act because of missing provisions, and its outdated definitions and broad carve-outs.

It is time for Western Australia to amend or replace the Act with a new anti-discrimination and broader human rights framework that protects all of us, equally.

To this end, we support:

1. Prohibiting discrimination in all areas of public life based on updated and inclusive definitions of sexual orientation, gender identity, and sex characteristics.
2. Removing outdated carve-outs that allow religious organisations and schools to fire, expel and discriminate against LGBTIQ+ people in employment, education and whenever they provide goods or services to the public.
3. Ensuring harassment, vilification and hate-based conduct against LGBTIQ+ people are properly addressed, alongside similar protections for all groups who experience this harmful conduct.
4. Adopting a modern anti-discrimination framework that prevents discrimination before it happens and ensures people are properly protected and supported if they experience discrimination.
5. Amending laws to ensure trans and gender diverse people can access ID affirming their gender without unnecessary legal barriers.
6. Ending LGBTIQ+ conversion practices and supporting conversion survivors through a comprehensive scheme like the one adopted in Victoria.
7. Introducing laws that prohibit unnecessary medical interventions on intersex people without their personal consent.
8. Removing discrimination against same-sex couples and single people in the *Surrogacy Act 2008*.
9. Enacting a Human Rights Act that ensures everyone's human rights are protected when governments make decisions or take action that affect us.

In this submission, we set out our submissions in respect of each of these key areas, and provide further detailed submissions on technical matters set out in the Discussion Paper in a schedule at the end of this submission.

We would be very happy to discuss these matters or provide further information at the request of the Commission.

REFORMING THE ACT

1. PROTECTING ALL LGBTIQ+ PEOPLE FROM DISCRIMINATION

All LGBTIQ+ people should be protected from discrimination. But the Act currently prohibits discrimination based on outdated definitions of ‘sexual orientation’ and ‘gender history’, meaning that not all LGBTIQ+ people and their families are protected from discrimination. The Act needs updated and inclusive definitions of ‘sexual orientation’, ‘gender identity’, and ‘sex characteristics’, in line with best practice in other state and territory laws.

(a) Sexual orientation

The Act currently limits the definition of ‘sexual orientation’ to people who are straight, gay, lesbian or bisexual (or presumed to be).¹ By contrast, Victoria, the ACT and Tasmania provide more inclusive and contemporary definitions of ‘sexual orientation’ that more clearly extend to people however they define their sexual orientation. The ACT and Tasmania define ‘sexuality’/‘sexual orientation’ as *including* heterosexuality, homosexuality and bisexuality (meaning, these definitions are not exhaustive).² Victoria has recently adopted the definition contained in the Yogyakarta Principles; namely, an internationally-recognised statement drafted by human rights experts on the application of international human rights law to issues concerning sexual orientation, gender identity and expression, and sex characteristics.³ We would be comfortable with either approach, with a slight preference for the ACT and Tasmanian definitions because they achieve simplicity while retaining their ability to be inclusive.

RECOMMENDATION 1

In line with laws in Victoria, the ACT and Tasmania, amend the definition of ‘sexual orientation’ in the Act to ensure people are protected from discrimination no matter how they define their sexual orientation.

(b) Trans and gender diverse people

The Act currently has the most limited protections for trans and gender diverse people anywhere in Australia. The current definition of ‘gender history’ assumes a gender binary, and only protects people living ‘as a member of the opposite sex’ whose gender has been ‘reassigned’ under the *Gender Reassignment Act 2000* (WA).⁴ As stated below, the process for legal gender recognition in Western Australia is now lagging behind almost every state and territory, and the Commonwealth. Even if they wished to, many trans and gender diverse people in Western Australia would never be able to meet these requirements and would therefore never have protection from discrimination under the Act. This includes younger trans and gender diverse people, trans and gender people with disabilities, and Sistersgirls/Brotherboys.

The protection based on ‘gender history’ also does not include people who are presumed to be trans or gender diverse, or who are discriminated against because of their gender expression. It also does not protect associates of

¹ *Equal Opportunity Act 1984* (WA), s 4 (definition of ‘sexual orientation’).

² *Discrimination Act 1991* (ACT), Dictionary (definition of ‘sexuality’); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of ‘sexual orientation’).

³ See <https://yogyakartaprinciples.org/>. *Equal Opportunity Act 2010* (Vic), s 4 (definition of ‘sexual orientation’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)].

⁴ *Equal Opportunity Act 1984* (WA), ss 4 (definition of ‘gender reassigned person’) and 35AA. See also PartIIAA generally.

trans and gender diverse people, such as the child of a trans or gender diverse person who is discriminated against because their parent is trans or gender diverse.

When we consulted recently with 93 trans and gender diverse people living in Western Australia, more than a third identified their gender as non-binary or other than male or female, around 17% were parents to children, and only 8.7% had had their legal gender marker updated. That means, that over 90% of the trans and gender diverse population in Western Australia is unlikely to be protected by the Act as it currently stands.

The ACT, Tasmania, Victoria, the Commonwealth and South Australia all have better definitions of 'gender identity', ensuring that all trans and gender diverse people are protected. 'Gender identity' is variously defined in the laws of the ACT, Victoria, Tasmania, South Australia and the Commonwealth to include non-binary gender identities, gender-related expression, and to clarify that people do not need to have undergone medical treatment or updated their legal gender in order to be protected.⁵ All state and territory laws also generally protect personal associates, such as relatives of trans and gender diverse people.⁶

However, one aspect of the definition of 'gender history' in the Act is worth preserving, given its simplicity. The Act currently defines discrimination on the basis of 'gender history' as including treating a '*gender reassigned person*' as being of the person's former sex.⁷ While this protection is likely afforded by the definitions of 'gender identity' referred to above, it would be beneficial to ensure that misgendering a transgender or gender diverse person is clearly defined as a form of discrimination.

RECOMMENDATION 2

In line with Commonwealth laws and laws in Victoria, South Australia, the ACT and Tasmania, replace the discrimination protections based on 'gender history' with comprehensive protections based on 'gender identity', including gender-related expression. Ensure these protections apply to all trans and gender diverse people, regardless of whether they have legally or medically affirmed their gender, and without assuming a gender binary. Ensure that the protections clearly capture misgendering as a form of discrimination.

(c) Intersex people

The Act does not protect people with innate variations of sex characteristics from discrimination.

By contrast, the ACT, Tasmania, Victoria, South Australia and the Commonwealth provide protection to people with innate variations of sex characteristics using standalone protections. An independent protection for people with innate variations of sex characteristics is achieved through a separate 'sex characteristics' ground in the ACT, Victoria and Tasmania, which is the more contemporary and preferred approach.⁸ 'Intersex status', as defined in

⁵ *Discrimination Act 1991* (ACT), Dictionary (definition of 'gender identity'); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of 'gender identity' and 'gender expression'); *Acts Interpretation Act 1915* (SA), s 4(1) (definition of 'gender identity'); *Sex Discrimination Act 1984* (Cth), s 4(1) (definition of 'gender identity'); *Equal Opportunity Act 2010* (Vic), s 4 (definition of 'gender identity').

⁶ *Discrimination Act 1991* (ACT), s 7(1)(c); *Equal Opportunity Act 1984* (SA), ss 29(2a)(e), 29(3)(d), 29(4)(d); *Anti-Discrimination Act 1992* (NT), s 19(1)(r); *Equal Opportunity Act 2010* (Vic), s 6(q); *Anti-Discrimination Act 1998* (Tas), s 16(s); *Anti-Discrimination Act 1991* (Qld), s 7(p); *Anti-Discrimination Act 1977* (NSW), s 38B(1)(a).

⁷ *Equal Opportunity Act 1984* (WA), s 35AC(3)(a).

⁸ *Discrimination Act 1991* (ACT), Dictionary (definition of 'sex characteristics'); *Equal Opportunity Act 2010* (Vic), s 4 (definition of 'sex characteristics'); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of 'intersex variations of sex characteristics'). See also, now out-of-date definitions in *Acts Interpretation Act 1915* (SA), s 4(1) (definition of 'intersex status') and *Sex Discrimination Act 1984* (Cth), s 4(1) (definition of 'intersex status').

the Commonwealth and South Australia, also provides protection to intersex people, but now reflects outdated definitions.

We acknowledge and support the position of Intersex Human Rights Australia which advocates for an independent protection based on 'sex characteristics'.⁹ This recognises that 'intersex' describes a difference related to a person's bodily sex characteristics, not a gender or sexual identity. People born with intersex variations may identify as men or women, or as another gender, and may be attracted to the same or different genders. Like the ground of 'pregnancy', 'breastfeeding' or 'disability', a protection based on 'sex characteristics' recognises and protects against discrimination based on a bodily attribute which is not dependent on any personal identity.

RECOMMENDATION 3

In line with laws in Victoria, the ACT and Tasmania, introduce anti-discrimination protections based on a new attribute of 'sex characteristics', defined to mean a person's physical features relating to sex (including genitalia and other sexual and reproductive parts of the person's anatomy, and the person's chromosomes, hormones and secondary features emerging as a result of puberty).

(d) Personal associates and attribute extensions

The Act currently has inconsistent approaches to the protection of associates, presumed attributes and past attributes. Most anti-discrimination laws extend protections against discrimination to people who experience it based on their relationship with someone else who has (or is presumed to have) the protected attribute. Many anti-discrimination laws also protect people based on past attributes (e.g. past illnesses), or attributes that they may have in the future (e.g. future pregnancy). The rationale for these extensions is to recognise that discrimination based on a protected attribute is unacceptable, no matter what form it takes.

States and territories which have repealed and replaced their anti-discrimination laws with consolidated statutes tend to define the attributes at the front of the Act and apply all the various protection extensions to all the attributes. There is merit in this simplicity, but for some attributes (particularly those that are not visibly apparent, encompass heterogeneous populations, or may change over time, such as religious beliefs or political opinion) it can become difficult for duty holders to know what their obligations may be where they have to accommodate in their policies and practices certain presumed and future attributes.

On balance, we think there is a benefit in ensuring that all attributes have the following protection extensions:

- There should be protections for people regardless of whether they have a protected attribute or are presumed to have that attribute. For example, this would provide protection to lesbians, and who anyone who is presumed to be a lesbian.
- There should be protections for people based on characteristics (including stereotypes) that are assumed or imputed to people with a protected attribute. For example, discrimination against a gay man on the assumption that he is unlikely to have caring responsibilities for children.
- There should be protections for people who are discriminated against because they have a personal, social, caring or business relationship with another person who has a protected attribute. For example, this would protect a child who is discriminated against because their

⁹ Intersex Human Rights Australia (2019), 'Intersex is not a gender identity, and the implications for legislation', <https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/> [accessed 16 July 2021].

parents are LGBTIQ+. However, associations involving or among legal entities should not be protected under anti-discrimination laws designed to protect *human* rights.

- There should be protections for people who have had the protected attribute in the past or are expected to have the protected attribute in the future. However, this will be most relevant to attributes that may be change over time, such as gender history, disability, pregnancy, age or marital status.

RECOMMENDATION 4

Ensure that discrimination protections based on sexual orientation, gender identity and sex characteristics include protections for individuals who are discriminated against based on:

- their personal association with LGBTIQ+ people, such as the children of LGBTIQ+ people;
- presumed sexual orientations, gender identities or sex characteristics;
- characteristics and stereotypes associated with or imputed to LGBTIQ+ people;
- current, past or future attributes, such as gender history.

2. ENSURING RELIGIOUS SCHOOLS AND ORGANISATIONS PLAY BY THE SAME RULES

All employers, educational institutions and organisations delivering services to the public should play by the same rules. However, outdated carve-outs for religious schools and faith-based organisations mean that LGBTQ+ people and others can be fired, expelled, or discriminated against, even when religion is not relevant to the role being performed or the services being delivered. Outdated carve-outs must be removed to ensure a person's sexual orientation or gender identity does not limit where they can work, study or access services.

(a) Religious exemptions

The Act is replete with special carve-outs for religious bodies and educational institutions, allowing them to discriminate against LGBTIQ+ people and others in employment, education, access to places and vehicles, access to goods, services and facilities, accommodation, land and clubs.

Among the broad exemptions include:

- discrimination by a body established for religious purposes if an act or practice *'conforms to the doctrines, tenets or beliefs of that religion'* or is *'necessary to avoid injury to the religious susceptibilities of adherents of that religion'*¹⁰
- discrimination in employment or against contract workers by any faith-based educational institution if the discrimination is done *'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'*¹¹
- discrimination in the provision of education and training by any faith-based educational institution on any ground other than race, impairment or age if the discrimination is *'in good faith*

¹⁰ *Equal Opportunity Act 1984 (WA)*, s 72(d).

¹¹ *Equal Opportunity Act 1984 (WA)*, s 73(1)-(2).

in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed;¹²

- discrimination in any accommodation provided by religious bodies.¹³

These exemptions are additional to other exemptions that may be used to accommodate religious observance, worship or other religious needs, such as:

- an absolute freedom in respect of the ordination or appointment, or training and education, of priests, ministers of religion or members of any religious order;¹⁴
- an absolute freedom in respect of the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice;¹⁵
- discriminating on the basis of religious conviction in employment by any private educational authority or faith-based health service provider if the employee's duties *'are for the purposes of, or in connection with, or otherwise involve or relate to the participation of the employee in any religious observance or practice'*;¹⁶
- discriminating on the basis of religious conviction by any educational authority prescribed by regulations (none are currently prescribed);¹⁷
- membership to, or the provision of benefits, facilities or services to members of, a voluntary body;¹⁸
- aged care services restricted to members of a particular religious conviction;¹⁹
- any exemptions granted by the Tribunal.²⁰

Taken together, these exemptions mean that LGBTIQ+ people, women, people with disabilities, people with different or no beliefs, and many others, are less protected from discrimination under Western Australian laws than they are in many other Australian anti-discrimination laws. For example:

¹² *Equal Opportunity Act 1984* (WA), s 73(3).

¹³ See in respect of sexual orientation and gender identity specifically: *Equal Opportunity Act 1984* (WA), ss 35AM(3)(b) and s 33Z(3)(b). Similar provisions apply for other protected attributes.

¹⁴ *Equal Opportunity Act 1984* (WA), s 72(a)-(b).

¹⁵ *Equal Opportunity Act 1984* (WA), s 72(c).

¹⁶ *Equal Opportunity Act 1984* (WA), s 66(1).

¹⁷ *Equal Opportunity Act 1984* (WA), s 61(3).

¹⁸ *Equal Opportunity Act 1984* (WA), s 71.

¹⁹ *Equal Opportunity Act 1984* (WA), s 74(2)(a).

²⁰ *Equal Opportunity Act 1984* (WA), s 136.

- exemptions allowing faith-based schools to discriminate are narrower in the ACT,²¹ Tasmania,²² Queensland,²³ South Australia²⁴ and soon to be in Victoria;²⁵
- faith-based providers are not able to discriminate against LGBTQ+ people in Commonwealth-funded aged care under Commonwealth laws;²⁶
- faith-based organisations are not able to discriminate on the basis of race, disability, or intersex status under Commonwealth laws.²⁷

(b) The impact of these exemptions

The Western Australian exemptions go well beyond what is necessary to meet the genuine religious needs of adherents or faith-based organisations. Instead, they can be – and are – used to justify discrimination against LGBTQ+ people and many others. Moreover, the real impact of these exemptions is hard to quantify given these provisions have a chilling effect. Many LGBTQ+ people simply hide who they are, or avoid jobs, educational opportunities or services that would otherwise be available to them, because of the fear of discrimination or the indignity of being turned away.

There have been several high-profile examples of faith-based institutions in Western Australia discriminating against LGBTQ+ people, and the families, emboldened by these provisions. For example:

- In 2017, Craig Campbell a committed Christian teacher at South Coast Baptist College in Rockingham lost his job after he told senior staff he was in a long-term relationship with a man. Mr Campbell was never told the reason for his dismissal directly. Instead, Mr Campbell learnt from other teachers that he had been removed from the relief teacher roster at the school where he had attended as a student and then worked for about two years. The school principal confirmed that the reason for Mr Campbell's dismissal was an *'inconsistency with his beliefs on sexuality and the college's beliefs'*.²⁸
- In 2015, a seven-year-old student was told by the principal of Foundation Christian College in Mandurah that she could only stay enrolled at the school if she did not speak about her father's sexuality or of his relationship with this male partner. At a meeting with the school, the father was told by the school that it did not 'promote gay', and that if they had known that he was gay at the admission interview, his daughter 'would never have got in this school'. Worried that his daughter could be expelled at any time, the father withdrew his devastated daughter from the College and enrolled her in a public primary school.²⁹

²¹ *Discrimination Act 1991* (ACT), ss 32(1)(d) and 32(2), 44, and 46.

²² *Anti-Discrimination Act 1998* (Tas), ss 51, 51A and 52.

²³ *Anti-Discrimination Act 1991* (Qld), ss 25, 41 and 109(2).

²⁴ *Equal Opportunity Act 1984* (SA), s 34(3).

²⁵ Victorian Government Department of Justice and Community Safety (2021) '[Changing religious exceptions to anti-discrimination laws](#)', 6 October 2021.

²⁶ *Sex Discrimination Act 1984* (Cth), s 37(2).

²⁷ There are no religious exemptions under the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) or in respect of intersex status under the *Sex Discrimination Act 1984* (Cth).

²⁸ See Claire Moodie (2017) '[Is it really the Christian way? Teacher who lost job after revealing he was gay speaks out](#)', ABC News, 6 December 2017; '[Perth Baptist school sacks gay teacher](#)', SBS News, 22 November 2017;

²⁹ Nathan Hondros (2015) '[Gay man's daughter not welcome at Mandurah Christian school](#)', WA Today, 30 October 2015.

When considering the broad scope of the faith-based sector in Australia, these exemptions leave a significant number of Western Australian employees, students and people who rely on community services without protection from discrimination. In 2015, the Australian Charities and Not-for-profits Commission identified that faith-based charities employed more than 428,000 full time and 490,000 part time staff, with only about 3% employed in faith-based charities where religious activities were the main activity.³⁰ Faith-based charities which identified their main activity as higher education, primary/secondary education, hospital and rehab, employment and training, aged care, and social services sectors have significantly larger headcounts on average, and employ a significantly larger number of people, than many other faith-based charities. Many of the services in this sector, such as education, health and aged care, are publicly-funded; and most charities benefit from other government support in the way of favourable tax treatment and tax deductible donations.

Based on our own analysis of 2018 and 2019 Australian Charities and Not-for-profit Commission data, 27 of the top 100 not-for-profit faith-based organisations in Australia have a presence in Western Australia. Those organisations have a national total revenue of approximately \$9.9 billion of which approximately \$3.7 billion (or nearly 40%) is derived from direct government funding. Nationally, they employ almost 55,000 FTE employees and engage around 35,500 volunteers. All are Christian organisations of various denominations but many actually provide their services to the general community, young people, older people, people with disabilities, people who are homeless and people experiencing poverty.

Of course, not all faith-based organisations want to, or do, discriminate. The point is only that they can, and people will have no recourse if they do. It is not surprising then that some faith-based organisations, such as Uniting Church Homes and Mackillop Family Services, make a point of specifically indicating that their services welcome LGBTI people.³¹ The impact of these exemptions is accordingly impacting the work and missions of such organisations, wrongly tarring the entire faith-based sector with the reputation of being a safe harbour for discrimination. This denies these organisations many qualified workers, people in need of assistance, and potential donors who simply assume that faith-based organisations are not inclusive and affirming places for them to work at, go to or support.

(c) A better way forward

When it comes to framing any exemptions allowing faith-based organisations to discriminate, it is essential that exemptions are only granted where they can be justified when balanced with the fundamental rights and freedoms of others. The manner in which these exemptions are framed do not comply with international human rights law. International human rights law requires a balancing of competing rights, to ensure that discriminatory conduct is not permitted unless there is a legitimate purpose for the conduct, and the means by which that purpose is achieved is proportionate.³² Specifically, these exemptions are not consistent with the freedom of thought, conscience and religion in article 18 of the *International Covenant on Civil and Political Rights*, given they fail to faithfully implement the important limitations under article 18(3) for protecting the fundamental rights and freedoms of others (including the rights of others to non-discrimination and to have different religious beliefs).³³

Many exemptions for religious bodies in Australia do not currently strike this balance well, and thereby do not promote religious freedom. Instead, they stifle it by granting faith-based institutions a simple and legal way to exclude anyone who does not share their views in areas which are not closely connected to religious practice,

³⁰ Penny Knight and David Gilchrist (2015) [Faith-Based Charities in Australia](#), March 2015, Australian Charities and Not-for-profits Commission, at 12.

³¹ See for example: <https://www.mackillop.org.au/about-mackillop/our-guiding-principles/lgbtiq-communities>.

³² UN Human Rights Committee, [CCPR General Comment No. 18: Non-discrimination](#), 10 November 1989, [13].

³³ UN Human Rights Committee, [CCPR General Comment No. 22: Article 18 \(Freedom of Thought, Conscience or Religion\)](#), 30 July 1993, CCPR/C/21/Rev.1/Add.4, [8].

observance or the requirements of the role at hand. Any religious exemptions, if they are to be granted, must employ a better balancing mechanism to accommodate the rights of individuals with different and no religious beliefs who are employed, enrolled or interact with such organisations or who rely on services delivered by these organisations. They must also prevent the selective application of religious beliefs to target and single out LGBTQ+ people and the people who support them for less favourable treatment, as we have seen in a number of recent cases.

In this regard, we submit that any religious exemptions should not allow discrimination based on sexual orientation, gender identity or sex characteristics by faith-based organisations, but may allow for discrimination based on a person's religion if religious adherence is actually relevant to the particular role, program or service in question, and it is reasonable and proportionate for the religious body's religious practice or requirement to dominate an individual's own religious practice. This is the approach which has recently been proposed in Victoria,³⁴ and responds to the inadequacy of a pure 'inherent requirements' approach in employment, which effectively allows the employer to structure its operations in order to preserve its ability to discriminate. This has been the experience in some cases overseas,³⁵ and is a risk identified in the case law on 'inherent requirements' in Australia.³⁶ The Victorian approach represents a better-practice amalgamation of the approach taken in Europe, Tasmania and Queensland on employment exemptions for faith-based organisations.³⁷

To illustrate the application of these principles with a few examples:

- **Religious discrimination (education):** A Christian school would be allowed to discriminate in favour of admitting Christian students. However, if a Year 12 student were to renounce their faith, a school would not be able allowed to expel that student unless it were reasonable and proportionate to do so. It may be reasonable and proportionate to do so if the student seeks to express their new beliefs in a way which undermines the beliefs of the school. But it may not be reasonable and proportionate to do so if the student otherwise supports the rights of others to believe and the student's beliefs can be accommodated in a way respectful of others that would not disrupt their final year of education.
- **Religious discrimination (employment):** A Christian school would be allowed to employ people who act in conformity with its religious requirements for roles where religious practice or observance is an inherent requirement. However, where a Christian school employs a maths teacher or a gardener, it would not be able to require a maths teacher or gardener to adhere to and abide by every single religious belief that the school purports to uphold on personal matters such as sexuality or gender, unless it would be reasonable and proportionate to do so. The circumstances in which it would be reasonable and proportionate would very much depend on the individual case, but it would require the school to have a degree of consistency, transparency and coherence in how it applies its policies.
- **LGBTQ+ discrimination:** A Catholic hospital would not be able to turn away a gay or trans person simply because they are gay or trans, nor would a Christian school be able to turn away a child merely because their parents are in a same-sex relationship. Further, if a Catholic hospital or

³⁴ Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic).

³⁵ See e.g. *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 556 U.S. 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 591 U.S. ____ (2020).

³⁶ *X v Commonwealth* [1999] HCA 63 at [31]-[33], [37] per McHugh J, and [102]-[103] and [105]-[106] per Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed, see also [173]); cf at [105]-[151] per Kirby J dissenting.

³⁷ *Anti-Discrimination Act 1997* (Tas), ss 50-51; *Anti-Discrimination Act 1991* (Qld), ss 25(3)-(8), 109(2); A Hilkemeijer and A McGuire (2019) 'Religious schools and discrimination against staff on the basis of sexual orientation: lessons from European human rights jurisprudence', *Australian Law Journal*, 93(9): 752-765.

Christian school sought to impose conformity with a religious doctrine inconsistently based on the fact that a person is gay or trans, this could also amount to LGBTQ+ discrimination, given it requires LGBTQ+ people to meet a more stringent degree of conformity with religious doctrine than the entity imposes on others who are not LGBTQ+.

In our experience, some faith-based organisations have attempted to reframe discrimination based on sexual orientation and gender identity as a matter of the organisation instead requiring conformity with religious beliefs that deny the equal dignity of LGBTQ+ people. We have recently assisted several people employed by faith-based educational institutions who were dismissed or forced to resign because of their sexual orientation and their views about LGBTQ+ people. All of these people were highly regarded and faithful employees who ably performed their roles and subscribed to many of the religious beliefs of their employer – except those which undermined or diminished the equal dignity of LGBTQ+ people and their relationships.

One such case is that of Mrs Rachel Colvin, which was brought before the Victorian Civil and Administrative Appeals Tribunal, and which demonstrates the very real issue of institutions imposing religious beliefs on individuals employed by them. Mrs Colvin, a married woman with three children and a committed Christian, held religious beliefs in favour of same sex marriage. In 2019, she was forced to resign after the non-denominational Christian school at which she was employed in Victoria required her to personally accept and abide by an amended statement of faith stating that marriage must be between *‘a man and a woman’*. The statement of faith was amended and imposed on Mrs Colvin following the national marriage postal survey, some 10 years after she was first employed by the school and did not conform with her own religious beliefs. Mrs Colvin was forced to resign notwithstanding she offered to teach in accordance with the schools’ beliefs.³⁸

In 2020, Ms Karen Pack, a committed Christian and respected teacher, was fired from her job at a Baptist tertiary college in Sydney after she became engaged to her same-sex partner. Ms Pack, herself an ordained pastor, was employed by the college in February 2018 and lectured in chaplaincy and spiritual care, a post-graduate program she had been engaged by the college to develop. In a statement emailed to Ms Pack’s students after her employment was terminated, the college admitted that Ms Pack had a *‘deep and abiding faith in Jesus’* and was an *‘excellent and committed educator’*. It explained that the decision to end her role was made by the Principal with the support of the College Board and Leadership Team, based on the position held by the college on same-sex marriage.³⁹

In 2021, Ms Steph Lentz, a committed Christian and teacher, was fired from her role as an English teacher at a Christian school in Sydney after she came out as a lesbian. The school fired Ms Lentz because she would not affirm the “immortality” of homosexuality, which the school argued breached an *‘inherent, genuine occupational requirement’* of her role. This was despite Ms Lentz offering to respond to any questions raised by students about sexuality by presenting the school’s strong convictions while acknowledging that some Christians held different views.⁴⁰

These cases show the real need for reform to religious exemptions that currently allow faith-based organisations to discriminate on the basis of sexual orientation and gender identity, and insist that their employees, students and clients agree with every single religious belief – including on matters of sexuality and gender – in order to keep their job or access their services. These laws are not fair, and they are applied inconsistently and unreasonably so

³⁸ Hayley Elg (2019) *‘Ballarat Christian College under fire for same-sex marriage views’*, *The Courier*, 16 September. See also <https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/>.

³⁹ Michael Vincent and Laura Kewley (2021) *‘Karen Pack was praised as an ‘excellent’ educator, but she says she was sacked by her employer Morling College for being gay - but the College disputes this’*, *ABC News*, 8 April. See <https://equalityaustralia.org.au/lgbtq-teachers-and-students-in-faith-based-educational-institutions-need-urgent-protection/>.

⁴⁰ Ben Schneiders and Royce Millar (2021) *‘Steph Lentz was sacked this year for being gay. It was perfectly legal’*, *Sydney Morning Herald*, 10 August.

that faith-based organisations can selectively fire, expel or refuse services to LGBTQ+ people and the people who affirm them. In some cases, doctrines are updated on the run, and imposed retrospectively on people who are already contributing faithfully to the work of these organisations.

RECOMMENDATION 5

Remove all special exemptions that allow religious organisations to discriminate based on sexual orientation or gender identity (and ensure no new exemptions are introduced for the recommended new attribute of 'sex characteristics'). We would also welcome the removal of exemptions on other attributes, such as race, sex and marital status.

Consistent with international human rights law, provide carefully targeted exemptions allowing religious organisations to discriminate based on religious conviction in areas where religion is inherent to the role or relevant to the service or program in question, and the proposed conduct is reasonable and proportionate.

3. ENDING HARRASSMENT, VILIFICATION AND HATE-BASED CONDUCT

Everyone deserves to work, study and live with dignity and respect, no matter who they are or whom they love. Yet, the Act only explicitly prohibits sexual and racial harassment, leaving everyone else to rely on complex discrimination protections if they experience harassment. The Act is also out-of-step with many other state and territory anti-discrimination laws which protect people who experience vilification and hate-based conduct.

(a) Harassment

Sections 49A-49D of the Act include provisions prohibiting discrimination involving racial harassment in employment, education and accommodation. As is customary for Australian anti-discrimination laws, the Act also includes specific provisions prohibiting discrimination involving sexual harassment.⁴¹ The benefit of separate harassment provisions are that they make a discrimination complaint involving harassment much simpler, given the person will not have to identify how the conduct meets the more complex direct or indirect discrimination test. Several other laws have taken this approach, including the Commonwealth *Disability Discrimination Act*⁴² and the Northern Territory,⁴³ and in broader ways, so has the Commonwealth *Racial Discrimination Act*⁴⁴ and Tasmania.⁴⁵

Harassment is a well-accepted form of discrimination.⁴⁶ For that reason, it makes sense to ensure that, if specific harassment provisions are included, they should be included consistently and apply to all attributes and areas protected by the Act. For example, it is odd for racial and sexual harassment to be prohibited in employment,

⁴¹ *Equal Opportunity Act 1984* (WA), ss 24-26.

⁴² *Disability Discrimination Act 1992* (Cth), ss 35-39.

⁴³ *Anti-Discrimination Act 1992* (NT), s 20(1)(b).

⁴⁴ *Racial Discrimination Act 1975* (Cth), s 18C.

⁴⁵ *Anti-Discrimination Act 1998* (Tas), s 17.

⁴⁶ See *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72; *O'Callaghan v Loder* [1983] 3 NSWLR 89; *Elliot v Nanda* (2001) 111 FCR 240; *Daniels v Hunter Water Board* (1994) EOC ¶192-626; *Qantas Airways v Gama* (2008) 157 FCR 537.

education and accommodation only – but not in the provision of goods and services or other areas of public life protected by the Act.

RECOMMENDATION 6

Explicitly define harassment as a form of discrimination and ensure harassment protections are extended to all grounds and areas under the Act.

(b) Vilification and hate-based conduct

Laws must protect people who experience hate-based conduct as well as prohibiting conduct that incites hatred against LGBTIQ+ people and other groups. Vilification protections on various grounds are currently part of the law in the ACT, New South Wales, Queensland and Tasmania. South Australia prohibits racial vilification and victimisation.⁴⁷ Victoria prohibits racial and religious vilification,⁴⁸ and the Victorian Government has supported, in principle, a Parliamentary Committee recommendation for these laws be expanded to other grounds, including sexual orientation, gender identity, sex characteristics and HIV/AIDS status.⁴⁹ The Commonwealth also prohibits racial hatred.⁵⁰ Western Australia only has criminal prohibitions against racial harassment and hatred.⁵¹

The need for effective anti-hate laws covering LGBTIQ+ people

Unfortunately, LGBTIQ+ people remain the target of abuse, threats, harassment and violence in public and online settings. For example, here is the data on experiences of harassment and violence from the national *Private Lives 2* (2012) and *Private Lives 3* (2020) reports, being the largest surveys of LGBTIQ+ people in Australia (n = 6,835 LGBTIQ Australians in 2020; 5,476 LGBT Australians in 2012).⁵²

TYPE OF CONDUCT	PRIVATE LIVES 2 (2012) Experiences of heterosexist violence and harassment in the last year before the survey	PRIVATE LIVES 3 (2020) Experiences of violence and harassment due to sexual orientation or gender identity in the last year before the survey	APPROXIMATE CHANGE
Verbal abuse (including hateful or obscene phone calls)	25.5%	34.6%	↑ 9.1%
Harassment such as being spat at and offensive gestures	15.5%	23.6%	↑ 8.1%

⁴⁷ *Civil Liability Act 1936*, s 73; *Racial Vilification Act 1996* (SA), s 4.

⁴⁸ *Racial and Religious Tolerance Act 2001* (Vic).

⁴⁹ Legislative Assembly Legal and Social Issues Committee (2021) *Inquiry into anti-vilification protections*, Melbourne: Parliament of Victoria, rec. 1; [Victorian Government response to the recommendations of the Legislative Assembly Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections](#), 2 September 2021, p. 2.

⁵⁰ *Racial Discrimination Act 1975* (Cth), s 18C.

⁵¹ *Criminal Code* (WA), ss 76-80J.

⁵² Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Melbourne: ARCSHS, La Trobe University, at 40; Leonard et al (2012) *Private Lives 2*, Melbourne: ARCSHS, La Trobe University, at 47.

TYPE OF CONDUCT	PRIVATE LIVES 2 (2012) Experiences of heterosexist violence and harassment in the last year before the survey	PRIVATE LIVES 3 (2020) Experiences of violence and harassment due to sexual orientation or gender identity in the last year before the survey	APPROXIMATE CHANGE
Written threats of abuse	6.6% (including emails and graffiti)	22.1% (via emails, social media) 11.4% (in other ways)	c. ↑ 26.9%
Threats of physical violence, physical attack or assault without a weapon	8.7%	14.6%	↑ 5.9%
Deliberate damage to property or vandalism of a house and/or car	2.4% (house) 3.3% (car)	4.8% (house) 3.7% (car)	c. ↑ 2.8%
Physical attack or assault with a weapon (knife, bottle, stones)	1.8%	3.9%	↑ 2.1%

While the surveys each asked slightly different questions which makes it difficult to draw direct comparisons, this data still suggests both an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity), and also a significant number of LGBTIQ people (almost 1 in 5) who are now experiencing harassment online.

The research also shows that certain populations within the LGBTIQ+ population have experienced high – and sometimes higher than the broader LGBTIQ+ population – rates of violence and harassment, including:

- In data from the 2012 *Private Lives 2* national study, LGBT respondents with a disability were found even more likely to have been subject to verbal abuse than respondents without disability in the previous year (32% versus 24%); more likely to have ‘received written threats of abuse including emails and graffiti’ (11% versus 5%); more likely to have been subject to harassment (21% vs 14%); and more likely to have been subject to threats of physical violence or physical assault without weapon such as being punched, kicked, or beaten (13% vs 8%).⁵³
- A 2018-19 national survey of 528 trans and gender diverse adults found that 71% reported verbal harassment (74% of which occurred in the last 12 months) and 37% reported physical intimidation and threats (49% of which occurred in the last 12 months). One in five participants had been physically assaulted, with a third of those assaults occurring in the last 12 months.⁵⁴
- A 2016 survey of 272 people with intersex variations (80% of which currently lived in Australia) included data from 77 participants who reporting experiencing bullying while at school, including on the basis of visible physical characteristics associated with a known intersex variation.⁵⁵

⁵³ Leonard and Mann (2018) [The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex \(LGBTI\) People Living with Disability](#), Melbourne: GLHV@ARCSHS, La Trobe University, at 54.

⁵⁴ Kerr et al (2019) [TRANScending Discrimination in Health & Cancer Care: A Study of Trans & Gender Diverse Australians](#), Bundoora: ARCSHS, La Trobe University, at 32-33.

⁵⁵ Jones (2016) [‘The needs of students with intersex variations’](#), *Sex Education*, at 13-14.

- A 2010 national survey of 3,134 same sex attracted and gender questioning young people found that 61% reported verbal abuse and 18% reported physical abuse because of homophobia. School was the most likely place of abuse, accounting for 80% of those who were abused.⁵⁶
- A 2018 national survey of 847 people living with HIV found that more than half of participants (56%) reported experiencing stigma within the last 12 months in relation to their HIV status, including 9% reporting that they ‘often’ or ‘always’ experienced stigma.⁵⁷ One-third also reported negative treatment by health workers.⁵⁸

The way forward

We support the introduction of criminal and civil anti-vilification protections protecting LGBTIQ+ people and other targeted groups. These provisions should prohibit public acts which incite hatred towards, serious contempt for, or severe ridicule of, a person or group based on a list of protected attributes, including sexual orientation, gender identity and sex characteristics. Criminal prohibitions should also be introduced addressing such conduct that also includes threats of physical harm towards other people or property, or inciting others to threaten physical harm to other people or property. Examples of these laws are found in New South Wales,⁵⁹ Queensland,⁶⁰ Victoria,⁶¹ and the ACT.⁶²

We also support enacting complementary civil and criminal protections against hate-based conduct which use a harm-based legal standard, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee *Inquiry into Anti-Vilification Protections*.⁶³ Such provisions would make unlawful public conduct on the basis of a protected attribute that humiliates or intimidates a person or group of persons, or which has profound and serious effects on their dignity or sense of safety, and which is not done reasonably and in good faith for a legitimate purpose. The formulation proposed by the Victorian Parliamentary Legal and Social Issues Committee provides a good way forward, which builds on the strengths of existing Commonwealth and Tasmanian laws.

A harm-based protection would respond to a key limitation in traditional anti-vilification protections. Traditional anti-vilification protections tend to focus on the potential effects of the conduct in inciting hatred among a hypothetical audience, ignoring the very real and direct harm caused to the actual person who is targeted by that conduct. For example, in considering whether anti-LGBTIQ+ graffiti painted on someone’s fence amounts to vilification, traditional anti-vilification protections focus on whether that conduct is likely to incite hatred, serious contempt or severe ridicule of persons on the ground of their sexual orientation, gender identity or sex characteristics among passers-by. It does not consider whether the person whose fence has been graffitied has suffered any harm, such as the experience of being humiliated, intimidated, or being made to feel unsafe in their own home.

We would also support introducing an aggravating sentencing factor when crimes are committed involving prejudice-based motives. This recognises that many commonly committed crimes, such as assaults or damage to

⁵⁶ Hillier et al (2010) [Writing Themselves In 3](#), Melbourne: ARCSHS, La Trobe University, at 39.

⁵⁷ Centre for Social Research in Health (2019) [Stigma Indicators Monitoring Project: People living with HIV](#), Sydney: CSRH, UNSW, at 1.

⁵⁸ Ibid, at 2.

⁵⁹ *Anti-Discrimination Act 1977* (NSW), ss 20B-20C, 38R-38S, 49ZS-49ZT and 49ZXA-49ZXB; *Crimes Act 1900* (NSW), s 93Z.

⁶⁰ *Anti-Discrimination Act 1991* (Qld), ss 124A, 131A.

⁶¹ *Racial and Religious Tolerance Act 2001* (Vic), ss 7-8, 24-25.

⁶² *Discrimination Act 1991* (ACT), s 67A. There is no criminal equivalent in the ACT.

⁶³ Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into Anti-Vilification Protections](#), Melbourne: Parliament of Victoria, Recommendations 9 and 10.

property, can be motivated by prejudice, and that motivation can make a real difference in the impact it has on victims long after the crime has been committed. For example, it is a very different thing for someone to have their car or fence vandalised with a meaningless slogan, than it is for someone to have their car or fence vandalised with words that express condemnation or disgust about their sexual orientation, gender identity or sex characteristics. The first act of vandalism results in economic loss. The second act results in both economic loss and the loss of safety, dignity and sense of belonging which may have once been felt by the victim of that crime.

Laws in NSW, Victoria, the Northern Territory and soon-to-be in South Australia recognise these latter harms in their sentencing laws. They require courts to consider – often as an aggravating factor when imposing sentences – whether an offence was motivated (whether wholly or partly) by hatred for or prejudice against a group of people that the offender believed the victim belonged.⁶⁴

RECOMMENDATION 7

Introduce civil and criminal anti-vilification protections and complementary protections against hate-based conduct using a harm-based legal test. These should address public acts that:

- incite hatred towards, serious contempt for, or severe ridicule of, a person or group based on protected grounds; and
- humiliates or intimidates a person or group of person, or which has profound and serious effects on their dignity or sense of safety.

These protections should protect the attributes of sexual orientation, gender identity and sex characteristics, as well as other attributes such as gender, disability, HIV/AIDS status and race.

These protections should include standard exceptions for public acts done reasonably and in good faith for a legitimate purpose.

RECOMMENDATION 8

Introduce a sentencing factor requiring courts to consider whether an offence was motivated (whether wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged.

4. MODERNISING THE ACT

(a) The definition of discrimination

People who are discriminated against should be able to understand their rights and be able to enforce them easily. But discrimination laws are unnecessarily complex, meaning that people who have experienced discrimination are discouraged from seeking a remedy because of uncertainty in how the laws will apply to their circumstances. Much of the confusion arises from complex legal tests under the Act. The Act should be amended to simplify the tests for direct discrimination, indirect discrimination and explicitly define

⁶⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(h) (aggravating factors); *Sentencing Act 1995* (NT), s 6A(e) (aggravating factors); *Sentencing Act 1991* (Vic), s 5(2)(daaa); *Sentencing (Hate Crimes) Amendment Bill 2021* (SA).

harassment as being a form of discrimination. This should be done with an eye to intersectionality, so that all our unique attributes are equally recognised.

The Act is too complex for most people – including lawyers – to be used effectively. The tests of direct and indirect discrimination, while useful in some contexts, obfuscate even seemingly obvious discrimination scenarios where someone is simply treated unfairly because of a protected attribute or combination of attributes.

For example, and by contrast with the approach now taken in the ACT, Northern Territory, Tasmania and Victoria, the Act currently adopts a comparator test in defining direct discrimination.⁶⁵ The comparator test involves a complex process of seeking to divorce the person's attributes from the reality of how they manifest, so that a highly artificial and reductive comparison can be made between those with and those without the attribute. The comparator test in the Act may be distinguishable from the approach taken in *Purvis*,⁶⁶ given the test for direct discrimination in the Act includes a characteristics extension while the *Disability Discrimination Act* did not at the time that *Purvis* was decided.⁶⁷ However, this is not certain.⁶⁸ This uncertainty means that, in practice, many claims for discrimination are characterised alternatively as indirect discrimination, which in turn opens up the requirement for the person to prove that a condition or requirement imposed on them was *not* reasonable. It is here that the Act adds further barriers to a person who suffers discrimination. Unlike the approach now taken in the ACT, Tasmania and Victoria, and in most Commonwealth anti-discrimination laws, the person being indirectly discriminated against has to establish a complex '*substantial proportion*' test and bears the burden of proof on all elements of the test, even where they are the person least likely to know or be able to show the rationale for a particular requirement or condition. Taken together, this means that the legal and evidential burden for proving discrimination is very difficult for the person who has suffered it.

Basic harassment provides an example. A male employee who is the butt of jokes at work because of so-called 'feminine mannerisms' is – to any reasonable lay observer – being treated unfavourably because of any or all of the following: (1) stereotypes related to sex, (2) their gender expression, and/or (3) assumptions being made about their sexual orientation from their gender expression. But under many Australian anti-discrimination laws (including under the Act), this employee would have to characterise their claim in highly convoluted ways to come to the same conclusion in law. This is because of the way our attributes are defined, and our legal tests for discrimination incorporate extremely complicated elements which must be independently established.

So, for example, a person who has experienced harassment based on gender-related stereotypes has to go through a torturous process of:

- First, identifying an actual or presumed attribute (such as sex, sexual orientation etc.). They may fall over at this stage because attributes are defined narrowly by the Act or – like gender identity and expression – do not even exist; and
- And then either:
 - proving the test for direct discrimination by attributing the gender-related characteristic to that attribute, or otherwise applying a comparator analysis that requires them to show they have been treated less favourably than a hypothetical or

⁶⁵ See Discussion paper, pp. 132-135.

⁶⁶ *Purvis v NSW* [2003] HCA 62.

⁶⁷ *Woodforth v Queensland* [2017] QCA 100 at [53] per McMurdo JA (Holmes CJ and Bond JJ agreeing).

⁶⁸ In *McCabe v Victoria – Department of Education and Training* [2006] VCAT 1224, VCAT applied *Purvis* notwithstanding that the *Equal Opportunity Act 1995* (Vic), which was in operation at the time, extending the test for discrimination to discrimination based on characteristics appertaining generally to persons with the same disability as the complainant, or characteristics generally imputed to persons with that disability.

real other person without that attribute (who incidentally may also have been treated poorly based on other attributes), or

- establishing some gendered requirement or condition to which they are being required to comply, which is unreasonable, and to which a substantially higher proportion of persons without their attribute are able to comply.

By contrast, in *Bostock v Clayton County*,⁶⁹ the US Supreme Court answered the question of whether transgender or gay employees were discriminated against because of their sex, with a simply 'yes'. The reason was, a person who discriminates against gay or transgender people inescapably relies (at least partly) on sex-based distinctions in their decision-making. This is because gay and transgender people tend to challenge normative expectations relating to sex, such as sex-based expectations regarding their choice of partner and their expression of gender. The US Supreme Court was able to reach this conclusion because the federal statute being interpreted in that case, Title VII of the *Civil Rights Act of 1964*, relevantly states that it is unlawful to discriminate against any individual with respect to their compensation, terms, conditions or privileges of employment “because of” that individual’s sex. But because of the convoluted way that discrimination is defined in our laws, Australian courts have not taken this irresistibly simple approach.⁷⁰ And even when parliaments have sought to remove the requirement for a comparator, some courts have expressed doubt over whether this has been achieved.⁷¹

There are a number of ways in which the Act could be improved to simplify the tests for discrimination:

- *First*, define attributes broadly where appropriate. When the attribute is intended to capture a behavioural manifestation, including the behavioural manifestation in the definition of the attribute itself. So, for example, discrimination based on gender identity should automatically include gender-related expression. However, the issue with doing this uncritically may be to capture conduct that is unreasonable to protect. For example, if a person has a political opinion that espouses neo-Nazi sentiment, it should be open to their employer to impose reasonable restrictions on the expression of those views without that amounting to direct discrimination.
- *Second*, extend the definition of an attribute, as suggested above, to include presumed, past and future attributes, as well as characteristics imputed to or associated with that attribute.
- *Third*, define discrimination in a non-exhaustive way. Rather than define discrimination as simply being direct or indirect discrimination, define discrimination as *including* direct discrimination, indirect discrimination or harassment. This could be done by defining discrimination as simply: “Engaging or not engaging in conduct in a *protected area* that causes detriment to another person because of one or more of the *protected attributes*, and can include: *direct discrimination, indirect discrimination, or harassment*”. Further, specify that the “because of” test does not require a person to show that the unfavourable treatment was the sole, dominant or substantial reason for the treatment, only that it was part of the reason for the treatment. This definition would also explicitly recognise intersectionality in the definition of discrimination.
- *Fourth*, remove the comparator requirement when defining direct discrimination. Similar to Victoria and the ACT, stipulate that direct discrimination occurs if a person treats, or proposes to treat, a person unfavourably because of a protected attribute or any combination of protected

⁶⁹ 590 U.S. ____ (2020).

⁷⁰ See, for example, *Rohner v Scanlan & Minister for Immigration and Multicultural Affairs* [1998] FCA 1006 per Kiefel J (Finkelstein and Drummond JJ agreeing).

⁷¹ *Aitken v Victoria* [2013] VSCA 28 at [46], cf. *Kuyken v Chief Commission of Police* [2015] VSC 204 at [93]-[95] per Garde J.

attributes that the person or their associate has or is presumed to have. However, to avoid the uncertainty raised in *Aitken*, explicitly specify that a comparator is not required – but may be used to meet an evidential burden. The Commission should also consider whether to adopt the approach taken in the United Kingdom, whereby an evidentiary burden of proof is placed upon the defendant once the complainant has established a *prima facie* case of discrimination.⁷² This recognises that often the person who has been discriminated against does not know the reason for their treatment, given a prospective employer or service provider may disguise discriminatory rationales among seemingly benign ones if it gives any reason for the treatment at all.

- *Fifth*, replace the test for indirect discrimination test with a test based on a consolidation of the tests in the *Sex Discrimination Act* and Victorian, Queensland and the ACT Acts, which also include a reversed onus on the defendant to show reasonableness. This should include the following elements:
 - The person imposes, or proposes to impose, a practice, condition or requirement; and
 - The practice, condition or requirement has, or is likely to have, the effect of disadvantaging:
 - a person with one or more of the protected attributes; or
 - associates of a person with one or more of the protected attributes;
 - The practice, condition or requirement is not reasonable in the circumstances (which must be proven by the defendant).
- *Sixth*, define harassment as a form of discrimination, as done in the Northern Territory.
- *Seventh*, review the exemptions and defences to ensure they are fit for purpose, given the broader definitions and tests suggested above. This would ensure that there is a defence to *prima facie* direct discrimination where the conduct of the alleged discriminator is directed to achieving a purpose which is proportionate and consistent with protecting the fundamental rights and freedoms of others.

The Commission may also wish to explore whether to include the international human rights law definition of discrimination as another way in which to establish discrimination under the Act. This is the approach which has been adopted in the *Racial Discrimination Act* and in the Northern Territory. However, we would not recommend this approach on its own, given some of the complexities involved in its application. The international human rights law definition of discrimination is:

*any distinction, exclusion, restriction or preference which is based on [a protected attribute or attributes] ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms [unless that distinction, exclusion, restriction or preference is reasonable, objective and proportionate to achieving a legitimate aim, or is an affirmative action measure].*⁷³

We would also welcome measures taken to simplify and expand the protections given to people who experience sexual (and other forms of) harassment, wherever it occurs, no matter who is responsible for it, and regardless of the employment status of those who experience it.

⁷² See Dominique Allen (2009) 'Reducing the Burden of Proving Discrimination in Australia' *The Sydney Law Review* 31(4) 583 at 596-7.

⁷³ See UN Human Rights Committee, [CCPR General Comment No. 18: Non-discrimination](#), 10 November 1989, [7], [10], [13].

RECOMMENDATION 9

Simplify the tests for proving discrimination by adopting the following reforms as a minimum:

- defining the protected attributes broadly to include manifestations of those attributes, where appropriate;
- introduce a non-exhaustive definition of discrimination that applies to any detriment caused in a protected area because of a person's attribute or attributes, and includes but is not limited to direct discrimination, indirect discrimination or harassment;
- define 'direct discrimination' broadly in line with the approach taken in Victoria and the ACT, removing the comparator test, and consider reversing the evidentiary burden once a complainant has established a *prima facie* case of discriminatory treatment;
- define 'indirect discrimination' by consolidating the best aspects of the laws in Victoria, the ACT, Queensland and the Commonwealth, by proscribing unreasonable practices, conditions or requirements that are likely to disadvantage persons with one or more protected attributes, and reversing the burden of proof in respect of the reasonableness element.

(b) Positive duties

Addressing discrimination must be the responsibility of everyone – not just the people who experience discrimination directly. This is because discrimination costs society as a whole. By diminishing the opportunities available to each person to succeed and thrive in employment, education and in life, we all lose the benefit of seeing everyone's personal, social and economic potential realised to its full extent.

While only Victoria currently imposes a positive duty on eliminating discrimination, sexual harassment and victimisation,⁷⁴ the notion of a positive duty is not new. Indeed, the absence of a positive duty – particularly on employers – means the approach taken to discrimination is quite different to that taken to many other areas of regulated business and activity, including in relation to:

- occupational health and safety, where positive duties are imposed on employers, employees and others;⁷⁵
- workplace gender equality, where positive duties are imposed on certain employers to make reports including about remuneration;⁷⁶
- negligence, where duty holders have a duty of care to take all reasonable steps to comply with their duties;
- modern slavery, where reporting entities have positive duties to describe the due diligence and remediation processes adopted to identify and address the risks of modern slavery practices;⁷⁷

⁷⁴ *Equal Opportunity Act 2010* (Vic), s 15.

⁷⁵ *Occupational Health and Safety Act 1984* (WA), ss. 19, 20, 21, 22, 23, 23I, 23K.

⁷⁶ *Workplace Gender Equality Act 2012* (Cth).

⁷⁷ *Modern Slavery Act 2018* (Cth), s 16.

- financial service obligations, where reporting entities have positive duties to monitor and report customer transactions, including suspicious matters;⁷⁸
- child protection, where health professionals, teachers and police have positive duties to make mandatory reports where there is a risk of abuse.⁷⁹

Positive duties are an essential part of a regulatory regime. They need to be sufficiently broad so that they can adjust to different circumstances and keep up with evolving standards. But positive duties also need a degree of specificity, so that duty holders are guided as to the steps and due diligence they need to undertake to meet their obligations. Examples of these kinds of duties in other areas of law include requirements on persons: not to engage in misleading and deceptive conduct; to undertake due diligence and implement training on money laundering risk; to take reasonable steps to identify and respond to foreseeable risks of harm to worker safety. These are all examples of broad legal standards that could provide inspiration to the elements which should be incorporated into a positive duty to eliminate discrimination.

To be effective, positive duties need to have regulatory infrastructure and responses appropriate to the degree of any contravention so that:

- at the lower end of the scale, a positive duty supports educative responses that promote compliance and improves standards across an industry; and
- at the more acute end of the scale, a positive duty should enable a regulatory agency to prosecute systemic and serious discrimination against a class of persons.

The purpose of a positive duty is to prevent discrimination before it happens and relieve the burden on affected individuals from being required to bring personal complaints when it does. A positive duty should place the burden on a regulatory agency to investigate a potential breach, and take appropriate steps where a contravention has occurred. The regulatory agency needs a toolbox of regulatory ‘carrots and sticks’; the ability to seek penalties or injunctions from a court for serious breaches and the ability to accept enforceable undertakings for organisations that are willing to improve their compliance. Under this approach, individuals who have experienced discrimination become whistleblowers and witnesses to misconduct, rather than plaintiffs. However, there can also be provisions allowing affected individuals to obtain compensation for loss they have suffered,⁸⁰ concurrently with regulatory action.

An effective positive duty needs to be clearly expressed, and be supported by reporting requirements, enforcement powers and functions (with appropriate resourcing), and a mechanism for protecting witnesses and whistleblowers who report discrimination against victimisation.

⁷⁸ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), ss 41, 43, 45.

⁷⁹ *E.g. Children and Community Services Act 2004* (WA), s 124B.

⁸⁰ See for example, *Australian Consumer Law*, s 79B.

RECOMMENDATION 10

Introduce a positive duty to take reasonable and proportionate steps to eliminate discrimination (including harassment and victimisation) on persons who hold obligations under the Act.

In order to meet the positive duty, and consistent with the size and resources of the organisation, duty holders should be required to:

- conduct employee training on compliance with the Act;
- demonstrate they have introduced policies and procedures for people to make complaints of discrimination to the duty holder, and how those complaints will be handled to protect the person's confidentiality and prevent their victimisation;
- report to the agency on matters such as:
 - due diligence undertaken to identify, mitigate and address likely areas of discrimination, including harassment;
 - complaints outcomes and other metrics relevant to the Act, as prescribed by the agency.

The regulatory agency must have appropriate enforcement powers and functions (with adequate resourcing) similar to other types of misconduct. The enforcement scheme requires mechanisms for protecting witnesses and whistleblowers who report discrimination. In addition to penalties for contraventions of the duty, the scheme should allow compensation for victims of discrimination.

(c) Enforcement and remedies

Discrimination should be treated seriously, just like other forms of harm that limit the potential of people to live lives full of dignity and purpose. That's why the Act needs improved enforcement mechanisms that respond to discrimination wherever it occurs, and provides appropriate remedies to those who suffer it.

The Commission should consider a number of measures to improve the enforcement mechanisms and remedies available to people who experience discrimination. These should include:

- **Removing the \$40,000 on compensation awards in s 127(B)(i).** Each of Victoria, Tasmania, Queensland and South Australia allow the relevant administrative tribunals in their jurisdictions to award damages by way of compensation in the amount they see fit.⁸¹ In Victoria, the highest payout in discrimination cases between September 2011 and December 2018 was \$200,000, in *Collins v Smith*.⁸² Additionally, several cases in Queensland since 2009 have involved the granting of an award of compensation well over the \$40,000 cap in the Act.⁸³ It is important the people who experience loss due to discrimination, have an effective avenue to recoup that loss.

⁸¹ *Equal Opportunity Act 2010* (Vic), s 125(a)(ii); *Anti-Discrimination Act 1998* (Tas), s 89(1)(d); *Anti-Discrimination Act 1991* (Qld) s 209(1)(b); *Equal Opportunity Act 1984* (SA) s 96(1)(a).

⁸² *Collins v Smith* [2015] VCAT 103.

⁸³ *Green v State of Queensland* [2017] QCAT 008 (\$156,051); *Nunan v Aaction Traffic Service Pty Ltd* [2013] QCAT 565 (\$102,217); *Barney v State of Qld* [2012] QCAT 695 (\$76,704); *Carey v Cairns Regional Council* [2011] QCAT 26 (\$322,033); and *Irvine v Mermaids Café and Bar (No 2)* [2010] QCAT 482 (\$55,697).

- **Protecting parties from adverse costs orders except in exceptional cases.** Under the *Fair Work Act 2009* (Cth), a party may only be ordered to pay the other parties' costs if the proceedings are instituted vexatiously or without reasonable cause, or the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs.⁸⁴ The Act should establish a similar limitation on adverse costs orders being ordered by appeals courts unless these conditions apply. This will assist those affected by discrimination in bringing claims as they do not have to worry about potentially being ordered to pay the respondent's costs if they lose. The SAT regime on no adverse costs except in exceptional cases should be retained.
- **Empowering and funding the Equal Opportunity Commissioner to initiate and investigate discrimination of its own motion.** The Act currently largely relies on individuals and representatives bringing individual complaints to the Equal Opportunity Commission for an investigation to commence.⁸⁵ By contrast, the ACT, Tasmania and Victoria each confer broader powers on the relevant commissions to initiate investigations on their own motion in respect of certain forms of discrimination (or in Victoria, conversion practices).⁸⁶ Alongside a positive duty, these forms of investigative powers for serious and systemic contraventions, can remove the burden from individuals who have suffered discrimination to take action and reduce the risk of victimisation.

RECOMMENDATION 11

Improve the enforcement mechanisms and remedies under the Act by:

- removing the \$40,000 cap on compensation;
- protecting parties from adverse costs orders (including at appeal levels) except in exceptional cases;
- empowering and funding the Equal Opportunity Commission to initiated and investigate discrimination of its own motion.

⁸⁴ *Fair Work Act 2009* (Cth), s 570(2).

⁸⁵ See e.g. *Equal Opportunity Act 1984* (WA), ss 83-84.

⁸⁶ *Human Rights Commission Act 2005* (ACT), s 48; *Anti-Discrimination Act 1998* (Tas), s 60(2); *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), ss 34-35.

OTHER AREAS OF REFORM

The Terms of Reference for this inquiry include considering whether there is a need for reform, and if so, the scope of reform regarding any other laws relevant to equal opportunity and non-discrimination.⁸⁷ For LGBTIQ+ people, bad laws sometimes are the cause of barriers to our equal opportunity and right to non-discrimination. At other times, the absence of laws allow discrimination to continue against LGBTIQ+ people with impunity. For this reason, ensuring equal opportunity and non-discrimination for LGBTIQ+ people requires looking at other laws which either foster or fail to prevent discrimination, or are necessary to address discrimination. This section of our submission looks to other legal reforms which are necessary to ensure equal opportunity and non-discrimination for LGBTIQ+ people.

5. LEGAL RECOGNITION OF GENDER

Everyone should have access to official ID documents that reflect who they are. Until trans and gender diverse people are given a simple way to update their legal gender on official documents, they will continue to face barriers and risk being outed whenever they attempt to access employment, education, services or travel that requires them to prove who they are. Western Australia has some of the most difficult processes and requirements for updating legal gender anywhere in Australia.

The *Gender Reassignment Act 2000* (WA) now lags behind laws in most states and territories which allow trans and gender diverse people to update their gender on official documents, such as birth certificates, through a simple administrative process.

Western Australia is one of the last places in Australia that forces people to undergo medical or surgical treatment in order to update their legal gender.⁸⁸ The Commonwealth and almost all states and territories have now abolished requirements for people to undergo medical or surgical treatment before they can apply to update their gender.⁸⁹ Queensland has indicated it will be reforming its laws in this regard,⁹⁰ meaning that Western Australia and New South Wales will be the only states in Australia that continue to impose such requirements.⁹¹

Apart from Queensland (which has indicated that it will be reforming its laws in this regard), Western Australia is the only state in Australia which does not recognise genders other than male or female. Non-binary genders are recognised by the Commonwealth and by every other state and territory, with Tasmania and Victoria also allowing people to self-describe their gender within reasonable limits.⁹²

Western Australia is the only jurisdiction that requires people to submit themselves to a board for approval of their gender update. The Commonwealth and every state and territory all have simpler administrative processes, allowing trans and gender diverse people to make an application to the relevant registry or department. Victoria and Tasmania have processes that emphasise a self-declaration model, whereby the process for updating legal

⁸⁷ Discussion Paper, p. 2.

⁸⁸ *Gender Reassignment Act 2000* (WA), s 3; *AB v Western Australia* [2011] HCA 42.

⁸⁹ Australian Government Guidelines on the Recognition of Sex and Gender, [25]; removed by the *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT); *Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018* (NT); *Births, Deaths and Marriages Registration (Gender Identity) Amendment Act 2016* (NT); *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) and *Births, Deaths and Marriages Registration Amendment Act 2019* (Vic).

⁹⁰ Jordan Hirst (2021) '[Queensland government to introduce vital trans reform bill later this year](#)', *QNews*, 12 May.

⁹¹ *Gender Reassignment Act 2000* (WA), s 3; *AB v Western Australia* [2011] HCA 42; *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32A (definition of 'sex affirmation procedure').

⁹² *Births, Deaths and Marriages Registration Act 1999* (Tas), s 28A(2)(b); *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30A(2).

gender is not medicalised and relies instead on a declaration made by the person (and in Victoria, also by a person they know) regarding their gender.⁹³ This is the best practice model.

Like Western Australia, most jurisdictions also have in place processes for young people to update their legal gender if they are old enough to consent, or otherwise with the consent of a parent(s) and/or tribunal or court.

It has now been 3 years since the Law Reform Commission of Western Australia's report on the registration or change of a person's gender. Some of its recommendations have been superseded by reforms in other states and territories that provide a simpler way forward, but the essence of those recommendations and the need for reform remains as immediate as ever.

While trans and gender diverse people are unable to update their legal gender on official documents, they will continue to experience adverse legal and social consequences from these laws. They include:

- difficulties in proving their identity due to mismatching documents, particularly given the Commonwealth allows gender to be recognised without surgical requirements on passports and other documents while Western Australian laws do not.
- the risk of being outed, and the consequent loss of privacy and potential for discrimination, violence or harassment, which comes from having documents that disclose a gender other than your lived gender.

In our consultation with trans and gender diverse people living in Western Australia, only 8.7% had updated their legal gender marker on their birth certificate, while 54% had updated their passport. This means that a large number of trans and gender diverse Western Australians have mismatching identification documents, where they can only update some but not all of their identification. More than half told us that they have had to use a birth certificate which forced them to disclose a former name or gender assigned at birth in circumstances that they did not want to. And almost one third told us that they had difficulties in employment, education or when accessing services from having a birth certificate that did not reflect their gender.

For example, one person told us:

Shipping information and interacting with my bank for tax and medicare reasons. I have had packages held for months as there were discrepancies between shipping and billing information that I didn't declare. I still am constantly missgendered and deadnamed by both the ATO and Medicare regularly despite attempting to get my "preferred" name and pronouns used. This of itself being a demeaning and belittling process. As they are not my "preferred" name and pronouns. That is me. My self is not optional.

Another person told us:

I have had to use my birth certificate as part of proof of id at a previous workplace, my employer learnt my deadname and constantly called me by it even through it's not my legal name anymore and even placed it on my work id and refused to change it, he constantly referred to me as male pronouns and kept telling me "God made sure you were born male and you can never change that".

Western Australia is also the only jurisdiction in which protection from discrimination for trans and gender diverse people first relies on a person updating their legal gender, which makes the legal barriers for updating a person's gender particularly harsh and cruel.

⁹³ Births, Deaths and Marriages Registration Act 1999 (Tas), ss 24A(2)(c) and 5(c), 28C(3); Births, Deaths and Marriages Registration Act 1996 (Vic), s 28(6).

RECOMMENDATION 12

Repeal the *Gender Reassignment Act 2000* (WA).

Instead introduce a simple administrative process in the *Births, Deaths and Marriages Registration Act 1998* (WA) allowing people to update their legal gender, including on their birth certificate. That process should allow people to have their gender recognised primarily by way of a statutory declaration affirming their gender and should give people access to options for nominating a gender other than male or female. Ensure that the process does not otherwise include any clinical evidentiary requirements or requirements for medical or surgical treatment.

6. CONVERSION PRACTICES

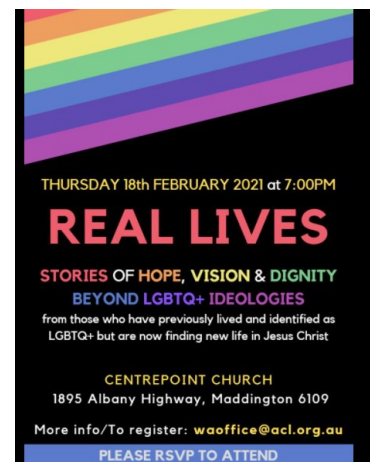
Everyone deserves to live freely, no matter who they are or whom they love. Yet, harmful conversion practices that attempt to change or suppress the sexual orientation or gender identity of people are still taking place around Australia. These practices, underpinned by ideologies that fail to support and affirm LGBTQ people just as they are, cause great harm to LGBTQ people, especially LGBTQ people of faith.

(a) The types and incidence of conversion practices in Australia

Victoria,⁹⁴ the ACT⁹⁵ and Queensland⁹⁶ have moved on reforms banning conversion practices, which find no support in the medical or psychological professional community.⁹⁷

Yet, we know these practices continue to occur. In 2021, the Australian Christian Lobby was the RSVP email address for an event held in Albany spruiking stories from people ‘who have previously lived and identified as LGBTQ+ but are now finding new life in Jesus Christ’. A senior pastor at Albany Baptist Church said a youth-focussed session promoted ‘counselling’ for same-gender attraction.⁹⁸

In 2018, the Human Rights Law Centre and La Trobe University *Preventing Harm, Promoting Justice* report concluded that up to 10% of LGBT Australians were vulnerable to harmful conversion practices.⁹⁹ It found that at least ten organisations in Australia and New Zealand currently advertise the provision of conversion therapies, and that conversion practices and ideologies are being mainstreamed within



⁹⁴ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

⁹⁵ *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT).

⁹⁶ *Public Health Act 2005* (Qld), Chapter 5B.

⁹⁷ Australian Medical Association (2002) *Position Statement: Sexual Diversity and Gender Identity*, para 6.10; Australian Psychological Society (2015) *Position Statement on Psychological Practices that attempt to change Sexual Orientation*; Psychotherapy and Counselling Federation of Australia (2018) *Position Statement on Therapeutic Support for Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People and their Families*; Royal Australian & New Zealand College of Psychiatrists (2019) *Position Statement: Sexual Orientation Change Efforts*.

⁹⁸ David Prestipino (2021) ‘[“Gay conversion therapy roadshow” hits WA churches with “reformed” gay man at the helm](#)’, *WA Today*, 4 June.

⁹⁹ Jones et al (2018) [Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia](#), Melbourne: GLHV@ARCSHS, La Trobe University and the Human Rights Law Centre, p. 3.

particular Christian churches.¹⁰⁰ It identified a historical shift in the form in which these conversion practices were taking place, and a shift in the claims which were being made to people about the possibility of change.¹⁰¹ Many of these practices were founded on fundamentally misleading claims about the so-called origins of same-sex attraction or gender non-conformity.¹⁰² Importantly, these practices occur in many settings including religious settings, not just health settings.¹⁰³

In 2019, the Victorian Health Complaints Commissioner published a summary of the findings from its inquiry into conversion practices. It found contemporary forms of conversion practices can include counselling, psychology or psychotherapy, formal behaviour-change programs, support groups, prayer-based approaches and exorcisms. Providers of conversion practices could include unregulated health service providers.¹⁰⁴

Other reports have further revealed the extent of the issue. For example, a 2020 report by the NSW LGBTIQ Domestic and Family Violence Interagency, ACON, and Western Sydney University found that 13% out of 53 sexuality and gender diverse culturally and linguistically diverse survey respondents in Greater Western Sydney reported experiences of conversion therapy.¹⁰⁵ A 2011 report by ACON and Arab Council Australia found that 7 out of 32 same-sex attracted respondents from Arabic-speaking backgrounds in NSW had been sent to a doctor or religious leader to be cured.¹⁰⁶

(b) The harm caused by conversion practices

Practices that seek to change or suppress a person's sexual orientation or gender identity cause grave harm.

Among the key findings of its 2019 report into conversion practices, the Victorian Health Complaints Commissioner found that survivors experience acute distress and/or ongoing mental health issues such as severe anxiety and depression. They also experience feelings of guilt and shame about their sexuality, reporting being overwhelmed by guilt which is ever present.¹⁰⁷

In 2021, following the 2018 *Preventing Harm, Promoting Justice* report, La Trobe University published further research on the harms on conversion practices.¹⁰⁸ Conducted in partnership with Macquarie University, the Brave Network (of conversion survivors), Australian LGBTIQ+ Multicultural Council and Victorian Government, the research interviewed 35 Australian survivors of conversion “therapy” practices and 18 mental health practitioners. It found that survivors commonly experience complex, chronic trauma and post-traumatic stress disorder (PTSD) symptoms as a result of these practices.¹⁰⁹ The report also highlighted that survivors experience barriers to

¹⁰⁰ Id, p. 19.

¹⁰¹ Id, pp. 12-19.

¹⁰² Id, p. 14.

¹⁰³ Id, pp. 31-36.

¹⁰⁴ Victorian Health Complaints Commissioner (2019) [Report on the Inquiry into Conversion Therapy – Executive Summary](#), p. 1.

¹⁰⁵ Asquith et al (2020) [Home is Where Our Story Begins: Family, community, and belonging for sexuality and gender diverse CALD people](#), Sydney: NSW LGBTIQ Domestic and Family Violence Interagency, ACON, and Western Sydney University, p. 6.

¹⁰⁶ Kasssieh (2011) [We're Family Too: The effects of homophobia in Arabic-speaking communities in New South Wales](#), Sydney: ACON and Arab Council Australia.

¹⁰⁷ Victorian Health Complaints Commissioner (2019) [Report on the Inquiry into Conversion Therapy – Executive Summary](#), p. 1.

¹⁰⁸ Jones et al (2021) [Healing Spiritual Harms: Supporting recovering from LGBTQIA+ change and suppression practices](#), AGMC, Brave Network, La Trobe University, Macquarie University and Victorian Government.

¹⁰⁹ Id, pp. 19, 25.

accessing health support following these experiences,¹¹⁰ revealing the importance of a wholistic response to conversion practices that supports healing, as well prohibiting harmful practices.

(c) The way forward

No matter the belief, no one has the right to harm a person's physical or mental health by seeking to change or suppress their sexual orientation or gender identity. Conversion practices operate on the basis of false and dangerous narratives that cause people lifelong trauma, convincing people that they – and not the prejudices of those who claim they need changing – are the problem.

We need a comprehensive response to the issue of conversion practices across Australia that includes:

- redress and support for survivors;
- stronger laws to prohibit harmful conversion practices in any setting in which they occur;
- sustained measures to support cultural change, such as education and training informed by the experience of survivors;
- encouraging religious leaders and institutions to denounce conversion practices.

Laws that only address conversion practices in health settings are not sufficient, given the key sites where LGBTQ conversion practices take place in Australia today.

The Victorian conversion practices legislation

The Victorian *Change or Suppression (Conversion) Practices Prohibition Act 2021* provides a world-leading example of a scheme that responds carefully to LGBTQ+ conversion practices wherever it occurs. It criminalises conversion practices that result in physical or psychological injury.¹¹¹ It instates a civil response scheme that has flexibility to respond to the most serious or systemic conversion practices which are likely to cause harm, while promoting education and voluntary facilitation that attempts to prevent harm before it occurs.¹¹² It also prohibits advertising that indicates a person intends to engage in conversion practices.¹¹³

At the heart of the Victorian conversion law is a crucial definition of conversion practices that includes several elements, all of which must be satisfied for a practice to be a prohibited conversion practice. Conversion practices (referred to as 'change or suppression practices' by the Victorian Act) are defined as:

- a practice or conduct directed towards a person, whether with or without their consent; and
- based on their sexual orientation or gender identity; and
- for the purpose of changing or suppressing, or inducing the person to change or suppress, their sexual orientation or gender identity.¹¹⁴

They exclude certain practices or conduct which are supportive or affirming of a person's sexual orientation or gender identity (such as facilitating a person's coping skills, social support or identity exploration and development, and assisting persons to express their gender identity or who are undergoing or considering gender

¹¹⁰ Id, pp.15-17.

¹¹¹ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), ss 10-12.

¹¹² *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), ss 24-45.

¹¹³ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), s 13.

¹¹⁴ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), s 5(1).

‘transition’). They also exclude health services provided reasonably or generally in line with legal or professional obligations.¹¹⁵

Practices can include psychiatry and psychotherapy consultations, treatments, therapies, prayer-based practices (such as deliverance practices or exorcisms) and referrals, but these have to meet *all* parts of the ‘change or suppression practice’ definition above, and have to cause injury to fall within the criminal offences. All offences must be proven beyond a reasonable doubt.

Further, conversion practices are defined to capture practices and conduct targeted towards a particular person, not people at large. It would not include any general or spiritual guidance (for example, communicated from a pulpit) however adverse to LGBTQ+ people, unless it was targeted towards a person, because of their sexual orientation or gender identity, and for the purpose of changing or suppressing their sexual orientation or gender identity.

Practices that have not caused provable injury can be investigated by the Commission if they are serious, systemic or persisting. Otherwise, the Commission is limited to offering education, voluntary facilitation (if all parties agree), or referring the matter to another agency if, for example, it considers a law or professional obligation has been breached.

Clarifying that conversion practices are a form of discrimination

In addition to a reform similar to that introduced in Victoria, an additional step could be to clarify that LGBTQ+ conversion practices are a form of discrimination based on sexual orientation or gender identity. However, such a reform will not be sufficient to address conversion practices that occur outside education or service settings. They would not address, for example, conversion practices which in family, voluntary or religious settings, however they may capture conversion practices that occur in some health contexts.

RECOMMENDATION 13

Introduce a legislative criminal and civil response scheme, similar to the scheme implemented in Victoria, prohibiting and responding to LGBTQ+ conversion practices wherever they occur.

In addition, clarify that conversion practices are a type of discrimination based on sexual orientation or gender identity.

7. ENDING HARMFUL PRACTICES AGAINST INTERSEX PEOPLE

Everyone should be able to make their own choices about what happens to their bodies. But many intersex people still do not have a say in medical procedures that modify their sex characteristics. As the Darlington Statement highlights and the Australian Human Rights Commission has again recently documented, these procedures can have lifelong consequences. We support the call of intersex advocates for reforms that protect the bodily integrity, physical autonomy and self-determination of intersex people. Western Australia should follow the lead of the ACT and Victoria in progressing reforms that end unnecessary medical procedures modifying the sex characteristics of intersex people without their personal consent.

¹¹⁵ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), s 5(2).

(a) Medical treatments on intersex people

People with intersex variations comprise a diverse group whose sex characteristics differ from medical and social norms for male and female bodies. Some medical treatment provided to people in connection with their intersex variations can be necessary and urgent, but treatments in connection with sex characteristics may also be inappropriately justified by reference to gender stereotypes and other psychosocial factors.

There can be life-long and significant physical and psychological consequences for a person who receives treatment modifying their sex characteristics, especially without their personal consent. Those consequences can include the loss of physical sensation or capacity for sexual or reproductive function; the need for additional surgery or treatment; a poor self-image or self-esteem; and a body that does not accord with the gender identity of the person. That is why unnecessary treatments modifying the sex characteristics of a person should wait until the person is able to give their own informed consent regarding whether they wish to have that treatment.

(b) Reform demands and developments

In 2017, the demands of intersex advocates, peer support volunteers and organisations for reform were crystallised in a statement, known as the [Darlington Statement](#), for the Australian and Aotearoa/New Zealand region.¹¹⁶ The Darlington Statement calls for a criminal prohibition on deferrable medical interventions that alter the sex characteristics of children without personal consent, and a human rights-based oversight mechanism (comprised of human rights experts, clinicians, and intersex-led community organisations) to determine individual cases where a person is unable to consent.¹¹⁷

The Australian Human Rights Commission has recently endorsed that demand and recommended that the Australian Government and state and territory governments should legislate to prohibit medical interventions modifying the sex characteristics of intersex people except with personal consent or where authorised by an independent oversight panel(s).¹¹⁸ These recommendations also reflect a number of recommendations made by international human rights bodies.¹¹⁹

Several countries have already considered and undertaken reforms that prohibit medical interventions modifying a person's sex characteristics without their personal consent. These include Malta, Iceland, Germany and Portugal. The Victorian and ACT Governments have also committed to reforms in this space.¹²⁰

¹¹⁶ Joint statement by Australian and Aotearoa/New Zealand intersex community organisations and independent advocates, including the Androgen Insensitivity Syndrome Support Group Australia (AISSGA), Intersex Trust Aotearoa New Zealand (ITANZ), Organisation Intersex International Australia (OIIAU), Eve Black, Kylie Bond (AISSGA), Tony Briffa (OIIAU/AISSGA), Morgan Carpenter (OIRRAU/Intersex Day Project), Candice Cody (OIIAU), Alex David (OIIAU), Betsy Driver (Bodies Like Ours), Carolyn Hannaford (AISSGA), Eileen Harlow, Bonnie Hard (AISSGA), Phoebe Hart (AISSGA), Delia Leckey (ITANZ), Steph Lum (OIIAU), Mani Bruce Mitchell (ITANZ), Elise Nyhuis (AISSGA), Bronwyn O'Callaghan, Sandra Perrin (AISSGA), Cody Smith (Tranz Australia), Trace Williams (AISSGA), Imogen Yang (Bladder Exstrophy Epispadias Cloacal Exstrophy Hypospadias Australian Community – BEECHAC) and Georgie Yovanovic.

¹¹⁷ [Darlington Statement](#), [7] and [22].

¹¹⁸ Australian Human Rights Commission (2021) [Ensuring health and bodily integrity: Towards a human rights approach for people born with variations in sex characteristics](#), rec. 9.

¹¹⁹ UN Human Rights Council, [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#), 1 February 2013, A/HRC/22/53, at [77]; UN Human Rights Committee, [Concluding observations on the sixth periodic report of Australia](#), 1 December 2017, CCPR/C/AUS/CO/6, at [26]; UN Committee on Economic, Social and Cultural Rights, [Concluding observations on fifth periodic report of Australia](#), 11 July 2017, E/C.12/AUS/CO/5, at [49]-[50]; UN Committee on the Rights of the Child, [Concluding observations on the combined fifth and sixth periodic reports of Australia](#), 1 November 2019, CRC/C/AUS/CO/5-6, at [31]; UN Committee on the Elimination of Discrimination against Women, [Concluding observations on the eighth periodic report of Australia](#), 25 July 2018, CEDAW/C/AUS/CO/8, at [26(c)]; UN Committee on the Rights of Persons with Disabilities, [Concluding observations on the combined second and third periodic reports of Australia](#), 15 October 2019, CRPD/C/AUS/CO/2-3, at [34(b)].

¹²⁰ Victorian Government (2021) [\(i\) Am Equal: Future directions for Victoria's Intersex community](#), 12 July 2021; ACT Government (2021) ['Protecting the rights of intersex people in medical settings'](#), website.

In 2021, Equality Australia was commissioned by the Victorian Government to provide legal policy advice on a Victorian intersex oversight scheme. Our partner in this work, Intersex Human Rights Australia was also commissioned to provide policy advice and prepare resources for intersex people and their families. As part of its work, Equality Australia published a background paper and consultation paper and conducted an extensive consultation with intersex people, their families, health professionals and other stakeholders.¹²¹ In 2021, Equality Australia also conducted a legal workshop for the ACT Government to analyse legal issues arising from various reform models being explored for implementing a prohibition on deferrable medical interventions on intersex people.¹²² Copies of these documents can be provided to the Commission upon request.

We stand with the intersex community to demand reforms in every state and territory that end unnecessary medical procedures modifying the sex characteristics of intersex people without their personal consent, and ensure intersex people receive the highest standard of non-discriminatory healthcare that affirms their bodily integrity, physical autonomy and self-determination.

RECOMMENDATION 14

Western Australia should introduce legislation to:

- prohibit unnecessary medical procedures modifying the sex characteristics of intersex people without their personal consent;
- establish an independent body, including members with lived experience, to oversee decisions where medical procedures are necessary but the person is unable to provide consent; and
- ensure intersex people are provided with fair and accurate information and support to be able to make fully informed decisions about their own healthcare.

Western Australia should take steps to:

- fund and provide access to affirming peer support, counselling and other intersex-led resources to ensure intersex people and their families are supported at every step in their journey;
- address stigma and discrimination through public and targeted education initiatives;
- redress the injustices of the past and provide support for healing.

8. SURROGACY

Western Australia is home to the last law in Australia which discriminates against same-sex couples. Reforms to the *Surrogacy Act 2008 (WA)* remain necessary to remove discrimination against the children of singles and same-sex couples born through surrogacy.

Despite the attempts of the WA Government,¹²³ the *Surrogacy Act 2008 (WA)* requires a surrogacy arrangement to be between an eligible couple, meaning 2 people of the opposite sex who are married or in a de facto relationship

¹²¹ <https://equalityaustralia.org.au/resources/intersex/>.

¹²² <https://equalityaustralia.org.au/resources/act-intersex-legal-workshop-report/>.

¹²³ Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 (WA).

with each other, or an eligible person, meaning a woman who is unable to conceive a healthy child.¹²⁴ This means that children born to same-sex couples and certain single people through surrogacy arrangements cannot have their parents legally recognised.¹²⁵ These children are denied the emotional and financial security of having the reality of their families recognised. It also seems likely that the *Surrogacy Act 2008* may offend the *Sex Discrimination Act 1984* (Cth) prohibitions on discrimination on the basis of marital status and sexual orientation.¹²⁶

RECOMMENDATION 15

Remove discrimination against same-sex couples and single people in the *Surrogacy Act 2008*.

9. A HUMAN RIGHTS ACT

Everyone deserves to have their rights and dignity respected when governments make decisions affecting them. Western Australia should join Victoria, the ACT and Queensland in introducing a Human Rights Act that ensures public authorities have regard to and comply with human rights standards when making decisions.

The ACT, Victoria and Queensland now each have a Human Rights Act.¹²⁷ These laws play an important role in decision-making, requiring public authorities to have regard to fundamental rights and freedoms when they take action or make decisions. These laws give courts the ability to construe laws in a manner which is consistent with fundamental rights and freedoms where this is possible, but otherwise leave the amendment of any infringing laws to parliaments. These laws support the development of a broader culture which respects and recognises fundamental rights and freedoms, helping to ensure that everyone can realise a life of dignity and purpose.

RECOMMENDATION 16

Introduce a Human Rights Act that recognises and respects our fundamental rights and freedoms whenever governments and other public authorities make decisions or engage in conduct which impacts its people.

¹²⁴ *Surrogacy Act 2008* (WA), s 19(2).

¹²⁵ *Surrogacy Act 2008* (WA), s 19(1).

¹²⁶ See e.g. *McBain v State of Victoria* [2000] FCA 1009.

¹²⁷ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

DETAILED RESPONSE TO DISCUSSION PAPER QUESTIONS

This section provides our response to key discussion paper questions which relate to our areas of expertise. We would be happy to provide the Commission with further information regarding any of these issues, or issues which are not covered in this submission.

NO.	QUESTION	RESPONSE
Objects		
1.	Should the scope and objects of the Act be broadened?	The scope and objects of the Act should be broadened consistently with the changes proposed in this submission. Provisions similar to those in sections 3(c)-(e) of the Victorian Act would also be welcome.
2.	Would the Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?	<p>The addition of an interpretative principle along the lines of the principle in section 4AA of the ACT Act would be welcome. However, interpretative principles are not sufficient on their own, as courts can only consider them if the statutory language allows for more beneficial interpretation. This means that reforms to the substantive provisions of the Act are necessary to achieve better protection against discrimination.</p> <p>We would oppose provisions, such as those proposed by Christian Schools Australia¹²⁸ in the One Nation NSW Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020,¹²⁹ which seek to prioritise religious considerations over other human rights, or which cherry-pick certain international human rights principles for special consideration. Further, these interpretive principles tend to contradict the direct language of the Act – importing select principles of international human rights law into domestic legislation that uses different definitions, tests of discrimination and explicit exceptions. Interpretative principles must help, not hinder, the ability of a court to properly construe the parliamentary intention.</p>

¹²⁸ Discussion paper, p. 105.

¹²⁹ Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW), Sch 1, item [I] (proposed section 3).

NO.	QUESTION	RESPONSE
Grounds of discrimination		
3.	Gender history, gender identity and intersex status: <ul style="list-style-type: none"> Should the protections in the Act be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions? What other legislation is relevant to this provision? 	<p>To the first question, the answer is yes, see section 1(b) and 1(c) above.</p> <p>There should be no specific exceptions that would allow discrimination only against trans and gender diverse people and/or people born with variations of sex characteristics. Where necessary, general exceptions may be appropriate allowing for discrimination based on a legitimate purpose where the discrimination proposed is proportionate to achieving those purposes (such as affirmative action measures).</p> <p>As set out in section 5 and 7 above, we have also recommended:</p> <ul style="list-style-type: none"> amending the <i>Births, Deaths and Marriages Registration Act</i> to simplify the process for people to be able to update their legal gender and to recognise people who are gender diverse; decoupling discrimination protections based on gender identity from any requirement for the legal or medical affirmation of gender; implementing an intersex oversight scheme and prohibition on unnecessary medical procedures modifying the sex characteristics of a person born with variations of sex characteristics without person consent.
4.	Religious and political conviction: <ul style="list-style-type: none"> Should the protections for religious or political conviction be defined or clarified? Should the protections for religious or political conviction expressly include religious and political beliefs and activities? Should the protections for religious or political conviction expressly include religious appearance or dress? Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground? 	<p>We have attached our submissions to the first and second exposure draft of the Commonwealth's Religious Discrimination Bill. They set out the very difficult questions that arise from providing discrimination protections based on religious belief and activity, given the variety of potential beliefs and activities and that they can include beliefs and activities that are harmful to others.</p> <p>If the term 'religious conviction' is to be replaced with religious beliefs and activities or the grounds of protections are extended, it is important to ensure that the law only protects lawful conduct and conduct which does not impinge on the fundamental freedoms and rights of others.</p>

NO.	QUESTION	RESPONSE
	<ul style="list-style-type: none"> Should the protections for religious or political conviction be extended to all areas covered by the Act? 	<p>As we have seen internationally, religious discrimination protections have been invoked (to varying degrees of success) by organisations and persons who seek to discriminate against others based on religious beliefs that diminish or demean LGBTQ+ people.¹³⁰</p> <p>Our laws must protect all of us, equally. This means that discrimination laws should not protect beliefs or activities that diminish the rights of others to non-discrimination.</p>
5.	Associates: Should the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the Act?	Yes, see section 1(d) above. However, it is important that the definition of an associate only extends to individuals, and not legal entities.
6.	Other protected attributes	Equality Australia recognises that LGBTQ+ people may experience discrimination on a number of fronts, including because of disability, race, religious belief or age. We have addressed those grounds of discrimination on which we have the closest expertise. We would be happy to provide additional comments if requested.
Areas of discrimination		
7.	Education: Should the area of education be extended to include the evaluation and selection of student applications?	Yes. Protections for both employees and students should apply to prospective employees and students.
8.	Local government: Should local government be included as a specific area in line with the specific protections afforded in some other jurisdictions?	Services, facilities, etc. provided or made available by local governments should be captured as a form of service, facility under the Act.

¹³⁰ See, for example, *Eweida v UK* [2013] ECHR 37; *Lee v UK* (2020) ECtHR, Application No. 18860/19, 23 March; *North Coast Women's Care Medical Group v San Diego County Superior Court*, 44 Cal. 4th 1145 (2008); *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. ____ (2018) and *Law Society of British Columbia v Trinity Western University and Brayden Volkenant* [2018] 2 SCR 293.

NO.	QUESTION	RESPONSE
9.	Services: Should the definition of 'services' in the Act be extended to expressly include statutory functions that a State government agency is bound to carry out, or activities of a coercive nature?	The administration of WA laws and programs should also be included as a new area, similar to s 26 of the <i>Sex Discrimination Act</i> (Cth). This would remove doubt over whether exercises of governmental power or the administration of government programs are covered by the Act, given there is often a difficulty in characterising the 'service' in question. ¹³¹
Key definitions		
10.	Defining discrimination: Should a definition of discrimination be inserted into the Act?	Introduce a non-exhaustive definition of discrimination that applies to any detriment caused in a protected area because of a person's attribute or attributes, and includes but is not limited to direct discrimination, indirect discrimination or harassment, see section 4(a) above.
11.	Direct discrimination and the use of the comparator test: Should the meaning of direct discrimination in the Act be amended to remove the comparator test and, if so, what test should be inserted into the Act?	Define 'direct discrimination' broadly in line with the approach taken in Victoria and the ACT, removing the comparator test, and consider reversing the evidentiary burden once a complainant has established a <i>prima facie</i> case of discriminatory treatment. See section 4(a) above.
12.	Meaning of indirect discrimination and the use of the proportionality test: <ul style="list-style-type: none"> Should it be sufficient to prove indirect discrimination that the aggrieved person has a characteristic which pertains to people who have a protected attribute; as opposed to that the complainant have the protected attribute? Should the meaning of indirect discrimination be amended to remove the proportionality test? 	Define 'indirect discrimination' by consolidating the best aspects of the laws in Victoria, the ACT, Queensland and the Commonwealth, by proscribing unreasonable practices, conditions or requirements that are likely to disadvantage persons with one or more protected attributes, and reversing the burden of proof in respect of the reasonableness element. See section 4(a) above.

¹³¹ See *Commissioner of Police v Mohamed* [2009] NSWCA 432 cf *Robinson v Commissioner of Police, NSW Police Force* [2013] FCAFC 64.

NO.	QUESTION	RESPONSE
	<ul style="list-style-type: none"> • Should the meaning of indirect discrimination be amended to shift the onus of proof from the complainant to the alleged discriminator? • Should the meaning of indirect discrimination be amended to remove the requirement that the complainant does not or is not able to comply with the requirement or condition? • Should the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination? 	
13.	<p>Harassment</p> <ul style="list-style-type: none"> • Should the definition of sexual harassment remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced? • Should the protections from sexual harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections? • Should the Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House? • Should the Act be amended to expressly prohibit judicial officers from sexually harassing their staff or those who carry out duties at the court of which the judicial officer is a member? To what extent should the Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)? • Should the Act be amended to expressly prohibit duty holders from sexually harassing unpaid or volunteer workers? 	<p>The Act should prohibit harassment based on any protected attribute, see section 3(a) above.</p> <p>We would also welcome measures taken to simplify and expand the protections given to people who experience sexual (and other forms of) harassment, wherever it occurs, no matter who is responsible for it, and regardless of the employment status of those who experience it.</p>

NO.	QUESTION	RESPONSE
	<ul style="list-style-type: none"> Should the definition of racial harassment be amended to remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced? Should the protections from racial harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections? 	
Vilification		
14.	<ul style="list-style-type: none"> Should anti-vilification provisions be included in the Act? If anti-vilification provisions are included in the Act, should they cover only racial vilification or extend to other types of vilification? Should or how may vilification provisions address concerns about the impact on other rights and exemptions under the Act? Should or how may vilification provisions address concerns around the loss of freedom of speech? Would there be any issues in accessing vilification law and reporting vilification under the Act? Would a different model for reporting vilification assist in protections? 	<p>Yes, the Act should include civil and criminal anti-vilification protections and complementary protections against hate-based conduct using a harm-based legal test. These should address public acts that:</p> <ul style="list-style-type: none"> incite hatred towards, serious contempt for, or severe ridicule of, a person or group based on protected grounds; and humiliates or intimidates a person or group of person, or which has profound and serious effects on their dignity or sense of safety. <p>These protections should protect the attributes of sexual orientation, gender identity and sex characteristics, as well as other attributes such as gender, disability, HIV/AIDS status and race.</p> <p>These protections should include standard exceptions for public acts done reasonably and in good faith for a legitimate purpose.</p> <p>See section 3(b) above.</p>

NO.	QUESTION	RESPONSE
Positive duty		
15.	<ul style="list-style-type: none"> • Should a positive duty to eliminate discrimination, other than the requirement to make reasonable adjustments, be included in the Act? • If a positive duty is included, what measures must be fulfilled by duty holders that are reasonable and proportionate? • If a positive duty is included, should it apply in respect of all Grounds and prohibitions and, if not, what Grounds or prohibitions should be exempt? • Should an individual complainant be able to make a complaint for breach of the positive duty by a duty holder, or should powers be limited to investigation at the initiative of the EOC? • Should the SAT have the power to hear an application for breach of the positive duty by a duty holder, or should powers be limited to investigation and recommendations by the EOC? • Should duty holders be required to publish information in relation to their compliance with this duty and, if so, which duty holders? 	<p>Introduce a positive duty to take reasonable and proportionate steps to eliminate discrimination (including harassment and victimisation) on persons who hold obligations under the Act.</p> <p>In order to meet the positive duty, and consistent with the size and resources of the organisation, duty holders should be required to:</p> <ul style="list-style-type: none"> • conduct employee training on compliance with the Act; • demonstrate they have introduced policies and procedures for people to make complaints of discrimination to the duty holder, and how those complaints will be handled to protect the person's confidentiality and prevent their victimisation; • report to the agency on matters such as: <ul style="list-style-type: none"> ▪ due diligence undertaken to identify, mitigate and address likely areas of discrimination, including harassment; ▪ complaints outcomes and other metrics relevant to the Act, as prescribed by the agency. <p>The regulatory agency must have appropriate enforcement powers and functions (with adequate resourcing) similar to other types of misconduct. The enforcement scheme requires mechanisms for protecting witnesses and whistleblowers who report discrimination. In addition to penalties for contraventions of the duty, the scheme should allow compensation for victims of discrimination.</p> <p>See section 4(b) above.</p>

NO.	QUESTION	RESPONSE
Exceptions		
16.	<p>Religious bodies:</p> <ul style="list-style-type: none"> Should the scope of the exception contained in section 72(a)-(c) of the Act (exception for religious personnel) be amended, and if so, how? Should the exception contained in section 72(d) of the Act (exception for religious bodies) be removed or retained? Should the scope of the exception contained in section 72(d) of the Act (exception for religious bodies) be amended, and if so, how? <p>Educational institutions established for religious purposes:</p> <ul style="list-style-type: none"> Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed? If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how? If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds? Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff? Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed? 	<p>Remove all special exemptions that allow religious organisations to discriminate based on sexual orientation or gender identity (and ensure no new exemptions are introduced for the recommended new attribute of 'sex characteristics'). We would also welcome the removal of exemptions on other attributes, such as race, sex and marital status.</p> <p>Consistent with international human rights law, provide carefully targeted exemptions allowing religious organisations to discriminate based on religious conviction in areas where religion is inherent to the role or relevant to the service or program in question, and the proposed conduct is reasonable and proportionate.</p> <p>See section 2 above.</p>

NO.	QUESTION	RESPONSE
	<ul style="list-style-type: none"> If the exception contained in section 73(3) of the Act is retained, should it be narrowed and if so, how? 	
17.	Goods and services: Should an exception allowing individuals or businesses to discriminate in the provision of goods or services on certain Grounds be introduced into the Act?	Care must be taken to ensure that any exception that allows discrimination is consistent with international human rights law. Except for measures taken to redress historical disadvantage or to meet a genuine or special need, we would strongly object to any measures that give individuals or business a special privilege to discriminate against LGBTIQ+ people, including where they are based on religious beliefs. This would be a radical departure from Australia's discrimination law framework and not consistent with recent reforms proposed in Victoria that remove an anomalous exception that allows individuals to effectively evade the law by relying on their religious beliefs. See further section 2 above.
Burden of proof		
18.	<ul style="list-style-type: none"> Should the Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances? Should the Act be amended to impose an evidential burden on a complainant and a persuasive burden on a respondent? 	Yes, once a <i>prima facie</i> case has been established in cases involving direct discrimination and in respect of the reasonableness requirement in indirect discrimination. See section 4(a) above.
Functions and investigative powers of the Commissioner for Equal Opportunity		
19.	Investigative and complaint handling function: Should the investigative powers of the Equal Opportunity Commissioner or complaints handling process under the Act be updated or expanded and, if so, how?	Yes, the Commissioner should have an own-motion power to investigate. See section 4(c) above.

NO.	QUESTION	RESPONSE
20.	Regulator involvement in compliance: Should the statutory framework be changed to require the EOC to play a greater role in monitoring and regulating compliance with anti-discrimination legislation or preventing discrimination?	Yes, alongside a positive duty, the Act should provide an enforcement mechanism to the Commissioner in the manner suggested in section 4(b) above.
21.	Role and Jurisdiction of the SAT: <ul style="list-style-type: none"> Should the Act be amended to enlarge the SAT's powers to enforce the obligations of the parties during the investigation and conciliation phase of a complaint? Should the Act be amended to provide the SAT with the power to order that costs follow the event or order costs in a broader range of circumstances than currently? 	<p>In response to the first question, yes.</p> <p>In response to the second question, costs should not follow the event except in exceptional circumstances. There needs to be a protection against adverse costs orders in respect of appeals as well as tribunal hearings, along the lines of the protections in the <i>Fair Work Act 2009</i> (Cth): see section 4(c) above.</p>
Other		
22.	Compensation cap: <ul style="list-style-type: none"> Should the \$40,000 compensation cap be retained, increased or removed? Should the Act be amended to clarify that an order may be made for the payment of interest on compensation amounts? 	<p>In respect of the first question, the cap should be removed entirely: see section 4(c) above.</p> <p>In respect of the second question, interest should be awarded. This recognises the lost value of past payments and encourages parties to finalise their matters without delay.</p>
23.	Intersectionality or multidimensional complaints: Should the Act be amended to make discrimination based on two or more overlapping Grounds unlawful?	Yes, see section 4(a) above.

NO.	QUESTION	RESPONSE
24.	Drafting form and style: Should the Act adopt a modern drafting style that is easier to follow?	Yes, if the Act is being overhauled this would be a good opportunity to simplify its structure.
25.	Complaints by representative organisations: Should the Act include clarification that a complaint may be made by a representative organisation, including lawyers and advocacy bodies, on behalf of more than one person or a group of persons who have the same or similar complaint against a respondent?	Yes.
26.	Prohibiting conversion practices: Should prohibitions on conversion practices be included in the Act?	Conversion practices could be defined as form of discrimination under the Act, but this would not address all the sites in which conversion practices are currently taking place. Accordingly, a prohibition on conversion practices in the Act would benefit from a scheme similar to the one in Victoria. See section 6 above.