



# AN EQUALITY ACT FOR THE EQUALITY CAPITAL:

SUBMISSION TO THE ACT DISCRIMINATION LAW REFORM REVIEW

January 2022

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**WE NEED YOUR VOICE. [EQUALITYAUSTRALIA.ORG.AU](https://equalityaustralia.org.au)**

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## 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.

Equality Australia has a proud history of providing expert legal and policy analysis to help achieve equality for LGBTIQ+ people in the Australian Capital Territory. In 2019, the ACT Government commissioned Equality Australia to conduct an independent and comprehensive legal audit of ACT legislation and regulations for laws which could discriminate against or cause harm to LGBTIQ+ people. In 2021, the ACT Government also commissioned Equality Australia to conduct a legal workshop analysing legal issues arising from various reform models being explored for implementing a prohibition on deferrable medical interventions on intersex people.

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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 ACT Government's Justice and Community Safety Directorate regarding the ACT Government's review of the *Discrimination Act 1991* (ACT) (the **Act**).

The ACT has a proud history of leading the nation on many reforms that promote and advance equality, particularly for LGBTIQ+ people and their families. The Act is an example of that legacy. The Act has provided a fair go and extended equal opportunities to many people in the ACT. 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. In 2018 and again in 2020, the Act was strengthened to protect LGBTIQ+ people from discrimination, particularly in religious educational institutions.

## **An Equality Act for the Equality Capital.**

As a leader in the protection of human rights, the ACT now can take the next step. The ACT has the opportunity to adopt best practice reforms that set the standard for anti-discrimination laws in this country. It is time for these laws to do more than provide a remedy when discrimination happens. The Capital of Equality needs an *Equality Act* which proactively promotes equality and prevents discrimination from happening in the first place.

Equality Australia recommends the following changes to the Act:

1. **Narrow existing carve-outs which allow religious bodies to discriminate against employees or people who rely on their services or supports**, by:
  - a. introducing a 'reasonable and proportionate' test into subsections 26(1)(b), 32(1)(d), 42(2), 42(2), 44 and 46(1) of the Act, such that any discrimination by religious bodies and educational institutions must be reasonable and proportionate in all the circumstances of the case;
  - b. amending subsection 32(1)(d) to limit its application to discrimination based on religious conviction only; and
  - c. requiring religious education institutions to conform to their religious doctrines if they wish to rely on subsection 46(2)(b),

(see section 1 of this submission);

2. **Broadening the definition of discrimination in the Act to:**
  - a. ensure it applies in a more straightforward way to harassment based on protected attributes (see section 2(a));
  - b. covers 'practices' that discriminate indirectly (see section 2(b)).

We also suggest considering adding an additional definition of discrimination, based on international human rights law, that covers any distinction, exclusion, restriction or preference which has the purpose or effect of impairing the equal enjoyment of any human right, and which is not justified (see section 2(c)).

3. **Introduce a positive duty** to take reasonable and proportionate steps to promote equality (including eliminating discrimination, harassment, vilification and victimisation) on persons who hold obligations under the Act (see section 3).
4. **Introduce new protections against hate-based conduct** in the Act and in the *Crimes (Sentencing) Act 2005* (ACT). This should include lowering the threshold for vilification, introducing complementary civil and criminal harm-based protections against hate-based conduct, and introducing a sentencing consideration for hate crimes (see section 4).

5. **Consider including new ‘equality before the law’ provisions** that would enable an individual to challenge a law or the administration of a Territory law or program that discriminates against them based on a protected attribute (see section 5); and
6. **Amend the Act to use gender inclusive language**, including by ensuring the pregnancy, childbirth and breastfeeding protections protect all persons whose bodies are inherently capable of carrying, giving birth or feeding children (see section 6).
7. **Rename the Act to the Equality Act**, as a strong statement of the Act’s intention and purpose (see section 7).

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 the schedule at the end of this submission.

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

# PLAYING BY THE SAME RULES

All employers and organisations providing goods, services, facilities, premises or accommodation to the public should play by the same rules. However, outdated carve-outs for religious bodies mean that LGBTIQ+ people and others can be fired, expelled, or discriminated against, even when religion is not relevant to the role being performed or the services or supports they deliver. Outdated carve-outs must be removed to ensure a person's sexuality, gender identity or sex characteristics do not limit where they can work, study or access services and support.

## 1. ENSURING RELIGIOUS BODIES PLAY BY THE SAME RULES

### (a) Religious exceptions

Currently, the Act contains special carve-outs for religious bodies and religious educational institutions. These carve-outs allow religious bodies and educational institutions to discriminate against employees, students and people who rely on their services or support. Some of these exceptions apply to the attribute of religious conviction only, while others allow religious bodies to discriminate based on any attribute, including sexuality, gender identity and sex characteristics. As discussed below, in practice, the distinction between the attributes of religious conviction and other attributes are often conflated in the way that discriminatory conduct is characterised, meaning all religious exemptions need to be considered and evaluated together. In particular, religious bodies tend to frame their discriminatory requirements in terms of beliefs and conduct concerning sexuality or gender, rather than whether the person is themselves LGBTIQ+.

The specific religious carve-outs in the Act are:

- **section 26(1)(b):** allowing religious bodies to discriminate in the provision of accommodation to a relevant class of people;
- **subsection 32(1)(d):** allowing a body established for religious purposes to discriminate on any attribute if the act or practice conforms with the body's religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. This carve-out does not apply to staff or students at a religious educational institution, but it could allow discrimination by religious bodies in the provision of a very wide range of goods, services, facilities, premises or accommodation provided to the public. The carve-out may also apply to staff in religious bodies other than educational institutions, such as hospitals and other service providers;
- **section 44:** allowing religious educational institutions and health service providers to only hire or promote employees with a particular religious conviction, if the job involves religious teaching, observance or practice;
- **subsection 46(1):** allowing religious education institutions to only admit students of a particular religious conviction, provided it publishes and makes its admissions policy readily accessible to prospective and current students;
- **subsection 46(2):** allowing religious educational institutions to discriminate against employees on the ground of religious conviction, if:
  - the discrimination *'is intended to enable, or better enable, the institutions to be conducted in accordance with its religious doctrines, tenets, beliefs or teachings'*; and
  - the institution publishes and makes its policy readily accessible to prospective and current staff.

The prohibitions on discrimination also do not apply in any way to:

- the ordination, appointment, trading or education of priests, ministers of religion or members of any religious order;<sup>1</sup>
- the selection or appointment of people to exercise functions for the purposes of, or in connection with, any religious observance or practice.<sup>2</sup>

Religious bodies and educational institutions are also able to rely on other exemptions.

## (b) Towards a human rights conforming approach

Throughout the Discussion Paper, the question of whether certain exceptions to the prohibition on discrimination should be narrowed or broadened is raised in relation to the activities of religious bodies.

As a matter of principle, it is essential that exceptions for religious organisations are only granted where they can be justified when balanced with the fundamental rights and freedoms of others. The way some existing religious exceptions are framed does not fully 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.<sup>3</sup>

The closer conduct is to religious worship, observance, practice and teaching, the stronger the argument for privileging the interests of a religious collective, however constituted, over the interests of an individual with a different religious conviction. But ultimately, it is individuals who hold the right to freedom of thought, conscience and religion under the *Human Rights Act 2004* (ACT), whether on their own or as part of a community with others.<sup>4</sup> That means, the freedom of thought, conscience and religion has relevance for all individuals, including individuals whose religious convictions differ in some way from those of their religious body employers or service providers. Religious exemptions need some flexibility to allow for a balancing of these interests and rights, depending on all the circumstances of the case. Australian religious legal exemptions have not tended to import adequate balancing mechanisms that conform with international human rights principles, although the Act is better in some respects than its counterparts in other Australian states and territories.

The broadest and most problematic carve-outs in the Act are subsections 32(1)(d) and 46(2). Among the problems with these sections is that they do not import any proportionality standard, as required by international human rights law. They prioritise only the views and interests of faith-based organisations, ignoring the impact of discrimination on the individual employees and service users who may themselves have their own religious convictions and protected attributes. They effectively allow faith-based organisations to set their own rules and apply them to all aspects of their employees' and service users' lives as a condition of employment or access to services and supports, many of which are significantly publicly funded. Significantly, section 32(1)(d) also applies to all protected attributes – not only religious conviction.

On the other hand, the fact that subsection 46(2) only applies to discrimination based on the grounds of religious conviction does not provide much comfort to LGBTIQ+ people or the people who affirm them. In our experience, some faith-based organisations have attempted to reframe discrimination based on sexuality and gender identity as a matter of the organisation instead requiring conformity with religious convictions that deny the equal dignity of LGBTIQ+ people. For example, we have recently assisted several people employed by faith-based educational

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<sup>1</sup> *Discrimination Act 1991* (ACT), s 32(1)(a)-(b).

<sup>2</sup> *Discrimination Act 1991* (ACT), s 32(1)(c).

<sup>3</sup> UN Human Rights Committee, [CCPR General Comment No. 18: Non-discrimination](#), 10 November 1989, [13].

<sup>4</sup> *Human Rights Act 2004* (ACT), ss 6, 14.

institutions in other states who were dismissed or forced to resign because they *believed* in marriage equality (even though they were heterosexually-married) or refused to believe that homosexuality was immoral (even though they were Christian and otherwise believed in much of the same religious doctrines as their employer).<sup>5</sup> 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.

### (c) A ‘reasonable and proportionate in all the circumstances’ test

Religious exemptions, if they are to be granted, must be justified and employ a better balancing mechanism to accommodate the rights of individuals with different and no religious beliefs who are employed or rely on services and supports 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.

That is why we support, as a minimum, the following amendments to the religious exceptions contained in the Act:

- subsection 32(1)(d) should be narrowed to apply to discrimination based on religious conviction only, when the relevant acts and practices conform to the religious doctrines, tenets or beliefs of the body, are necessary to avoid injury to the religious susceptibilities of adherents, and are reasonable and proportionate in all the circumstances, including having regard to the countervailing interests of the affected individual. Section 32(1)(d) should not allow discrimination on any other attribute. If religious bodies need a specific exemption in respect of another particular attribute, the onus should be on them to clearly explain what dispensations they need and in which contexts, such that a more reasonable and targeted exemption could be framed (if it would not otherwise be appropriate for them to seek a temporary exemption in the same way as other organisations).
- subsection 46(2) should be narrowed to allow discrimination on the ground of religious conviction that *actually* conforms to the doctrines, tenets or beliefs of the institution’s religion and it would be reasonable and proportionate in all the circumstances for the institution to enforce its policy, including having regard to the countervailing interests of the affected staff members. The current test which allows discrimination only because it is ‘*intended to enable, or better enable*’ a religious educational institution’s particular religious beliefs, is too loose and allows the religious educational institution to simply by-pass protections by deliberately defining its policy in ways designed to enable it to discriminate.

These proposals are similar to the approach which has recently been adopted in Victoria,<sup>6</sup> which itself represents a better-practice amalgamation of the approach taken in Europe, Tasmania and Queensland on employment exemptions for faith-based organisations.<sup>7</sup> However, this approach does not rely on the ‘inherent requirements’ test found in Victoria, 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,<sup>8</sup> and is a risk identified in the case law

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<sup>5</sup> See Equality Australia (2019) ‘[Rachel Colvin files discrimination complaint against Ballarat Christian College](#)’, 14 September; Ben Schneiders and Royce Millar (2021) ‘[Steph Lentz was sacked this year for being gay. It was perfectly legal](#)’, *Sydney Morning Herald*, 10 August.

<sup>6</sup> *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

<sup>7</sup> *Anti-Discrimination Act 1997* (Tas), ss 50-51; *Anti-Discrimination Act 1991* (Qld), ss 25(3)-(8), 109(2); A Hilgemeijer 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.

<sup>8</sup> 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).



on ‘inherent requirements’ in Australia.<sup>9</sup> That is why an objective ‘reasonable and proportionate in all the circumstances of the case’ test should be added to sections 32(1)(d) and 42(2) at least, to provide for that balancing of competing rights and interests. Sections 26(1)(b), 44 and 46(1) of the Act could similarly be improved with the addition of this balancing test.

#### (d) Additional comments on specific questions

To respond further to some of the Discussion Paper’s detailed questions:

- we would support the adding of a ‘reasonable and proportionate in all the circumstances’ test to sections 26(1)(b), 32(1)(d), 42(2), 44 and 46(1) to provide a balancing mechanism, so that the countervailing interests of the person being discriminated against can also be properly considered;
- we do not believe a sector-based approach to the religious bodies exception in section 32(1)(d), such as one distinguishing between organisations that receive a certain proportion of public funding and those that do not, is a reliable determinant of obligations.<sup>10</sup> A member of the public seeking goods or services from an organisation may not know whether such an organisation receives public funding or not, and therefore whether it is able to conduct its activities in such a way that discriminates against a person or a group of people based on certain attributes. The ‘reasonable and proportionate in all the circumstances test’ would allow considerations of public funding to be weighed up in deciding whether discrimination by a religious body is justified in the circumstances;
- we do not think that the phrase ‘established for religious purposes’ is likely to cover bodies with solely or primarily commercial purposes.<sup>11</sup> However, we would have no objection to clarifying that a religious body cannot be one with a commercial purpose. This change, however, would not fix the principal problem with section 32(1)(d), given our concern that many not-for-profit religious organisations provide goods, services, facilities, premises and accommodation which are not commercial in nature, such as health or aged care services, disability, homelessness, family and domestic violence and financial assistance.

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<sup>9</sup> *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.

<sup>10</sup> See Discussion Paper, pp. 24-25.

<sup>11</sup> See Discussion Paper, pp. 22-23. See *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 at [265].

### **RECOMMENDATION 1**

Introduce a ‘reasonable and proportionate in all the circumstances of the case’ test into subsections 26(1)(b), 32(1)(d), 42(2), 44 and 46(1), such that any discrimination by religious bodies and educational institutions must be reasonable and proportionate in all the circumstances of the case.

In considering whether any discrimination is reasonable and proportionate, courts should be required to have regard to all the circumstances of the case, including:

- the impact of the discrimination on the affected individual;
- to what extent the goods, services, facilities, premises or accommodation are publicly funded or supported.

### **RECOMMENDATION 2**

Amend subsection 32(1)(d) to limit its application to discrimination based on religious conviction only.

### **RECOMMENDATION 3**

Repeal subsection 46(2)(b) and replace with *‘the discrimination conforms to the doctrines, tenets, beliefs or teachings of that particular religion or creed’*.

# BEST PRACTICE REFORMS TO THE ACT

## 2. IMPROVING THE DEFINITION OF DISCRIMINATION

People who are discriminated against should be able to understand their rights and be able to enforce them easily. The Act currently defines discrimination as when a person discriminates either directly or indirectly, or both, against someone else.<sup>12</sup> Though this definition is better than some of the more complex legal tests existing under other legislation across Australia, the definition of ‘discrimination’ could be clarified and expanded.

### (a) Harassment is a form of discrimination

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 harassment,<sup>13</sup> leaving everyone else who experiences harassment on other grounds to rely on more complex discrimination protections.

Including separate harassment protections would make a discrimination complaint involving harassment based on other protected attributes much simpler. Several other laws have taken this approach, including the Commonwealth *Disability Discrimination Act*<sup>14</sup> and the Northern Territory,<sup>15</sup> and in broader ways, so has the Commonwealth *Racial Discrimination Act*<sup>16</sup> and Tasmania.<sup>17</sup>

The benefit of separate harassment provisions is 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.

#### RECOMMENDATION 4

Amend section 8 to make harassment based on a protected attribute or attributes a form of unlawful discrimination in its own right.

### (b) Expanding the definition of ‘indirect discrimination’

To further strengthen the definition of discrimination, the definition of ‘indirect discrimination’ in subsection 8(3) should be broadened to include the imposition of a ‘practice’ in addition to a ‘condition or requirement’ that indirectly discriminates. This would be consistent with the definition of ‘indirect discrimination’ in the Commonwealth *Sex Discrimination Act*, which extends to the imposition of a ‘condition, requirement or practice’ that disadvantages a particular attribute and is not reasonable in the circumstances.<sup>18</sup>

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<sup>12</sup> *Discrimination Act 1991* (ACT), s 8(1).

<sup>13</sup> *Discrimination Act 1991* (Act), Part 5.

<sup>14</sup> *Disability Discrimination Act 1992* (Cth), ss 35-39.

<sup>15</sup> *Anti-Discrimination Act 1992* (NT), s 20(1)(b).

<sup>16</sup> *Racial Discrimination Act 1975* (Cth), s 18C.

<sup>17</sup> *Anti-Discrimination Act 1998* (Tas), s 17.

<sup>18</sup> *Sex Discrimination Act 1984* (Cth), ss 5-7AA, 7B.

## RECOMMENDATION 5

Amend subsection 8(3) to expand the definition of 'indirect discrimination' to include a 'condition, requirement or practice'.

### (c) A single justification defence?

We are not inclined to support replacing all the exceptions in the Act with a single justification defence as contemplated by the Discussion Paper.<sup>19</sup> There are two key reasons for this. The first is that a single justification defence would result in greater legal uncertainty and confusion as to when discrimination is and is not permitted. The second is that such a defence would introduce a defence in circumstances where one does not currently apply. So, for example, direct discrimination based on sexuality, gender identity or sex characteristics could become justified in a wider range of contexts.

In our view, broad-based defences have tended to work against LGBTIQ+ people, given judges will accept as justified standards that are clearly discriminatory. For example, in a recent US Supreme Court decision, a similarly broad justification defence was invoked by a faith-based adoption service provider that excluded same-sex couples from its program, to demand successfully that the state maintain its public funding of those discriminatory programs.<sup>20</sup>

However, a single justification defence could be included as part of an additional test or limb within the definition of discrimination. That is, the definition of discrimination in section 8 could be amended to include all of the following:

- direct discrimination (as currently defined);
- indirect discrimination (as amended above);
- harassment based on a protected attribute or combination of attributes (as recommended above); or
- a distinction, exclusion, restriction or preference which has the purpose or effect of impairing the equal enjoyment of any human right, *and which is not justified*.

The last limb of the definition closely follows the international definition of discrimination set out in General Comment No. 18,<sup>21</sup> as used in the *Racial Discrimination Act 1975*,<sup>22</sup> and combines it with in-built justification defence.

Once a body of case law has developed interpreting and applying the last limb of this definition, the Act could be reviewed to consider whether a single justification defence would provide a simpler approach to defences under the Act in the future.

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<sup>19</sup> See Discussion Paper, p. 13.

<sup>20</sup> See *Fulton v City of Philadelphia* 593 US \_\_\_\_\_ (2021).

<sup>21</sup> UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

<sup>22</sup> *Racial Discrimination Act 1975* (Cth), s 9.

## RECOMMENDATION 6

Consider amending section 8 to introduce an additional definition of discrimination, modelled on the international human rights law definition of discrimination, that includes a single justification defence. This definition should not replace existing definitions or exceptions under the Act until the interpretation and application of this provision becomes clear.

### 3. 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,<sup>23</sup> the notion of a positive duty is not new. For example, as noted in the Discussion Paper, the *Human Rights Act* imposes a positive duty on public authorities to act in a way that is compatible with human rights and to consider relevant human rights in making decisions.<sup>24</sup> The absence of a positive duty in the Act – 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;<sup>25</sup>
- workplace gender equality, where positive duties are imposed on certain employers to make reports including about remuneration;<sup>26</sup>
- 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;<sup>27</sup>
- financial service obligations, where reporting entities have positive duties to monitor and report customer transactions, including suspicious matters;<sup>28</sup>
- child protection, where health professionals, teachers, police and other ‘mandated reporters’ have positive duties to make mandatory reports where there is a risk of abuse.<sup>29</sup>

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

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<sup>23</sup> *Equal Opportunity Act 2010* (Vic), s 15.

<sup>24</sup> *Human Rights Act 2004* (ACT), s 40B.

<sup>25</sup> *Work Health and Safety Act* (ACT), ss 19-29.

<sup>26</sup> *Workplace Gender Equality Act 2012* (Cth).

<sup>27</sup> *Modern Slavery Act 2018* (Cth), s 16.

<sup>28</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), ss 41, 43, 45.

<sup>29</sup> E.g. *Children and Young People Act 2008* (ACT), s 356.

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 or serious discrimination against a class of persons.

The purpose of a positive duty is to prevent discrimination before it happens and relieve any 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,<sup>30</sup> 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. Guidance on best practice should also be developed to support organisations to meet their positive duties.

The ACT could also draw from the UK experience in considering a positive duty not only to eliminate discrimination but to promote equality.<sup>31</sup> The latter looks at outcomes, seeking to promote equality of opportunity as a matter of ordinary business practice. In the UK, the duty applies to the public sector and explains that having due regard for advancing equality involves:

- removing or minimising disadvantages suffered by people due to their protected characteristics;
- taking steps to meet the needs of people from protected groups where these are different from the needs of other people; and
- encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.<sup>32</sup>

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<sup>30</sup> See for example, Australian Consumer Law, s 79B.

<sup>31</sup> *Equality Act 2010* (UK), s 149.

<sup>32</sup> *Equality Act 2010* (UK), s 149(3).

## RECOMMENDATION 6

Introduce a positive duty to take reasonable and proportionate steps to promote equality (including eliminating discrimination, harassment, vilification 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 could 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.

At least in respect of the public sector, the positive duty could also include requirements to advance equality of outcomes, such as placing requirements on public authorities to:

- remove or minimise disadvantages suffered by people due to their protected attributes;
- take steps to meet the needs of people with particular protected attributes where these are different from the needs of other people; and
- encourage people with protected attribute to participate in public life or in other activities where their participation is disproportionately low.

## 4. ENDING 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 and victimisation protections on various grounds are currently provided under the Act,<sup>33</sup> but these protections do not provide the harm-based protections afforded in some other discrimination laws.**

### (a) 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 that goes beyond 'incitement'. For example, here is the data on experiences of harassment and violence

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<sup>33</sup> *Discrimination Act 1991* (ACT), ss 67A and 68.

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).<sup>34</sup>

TYPE OF CONDUCT	PRIVATE LIVES 2 (2012) Experiences of heterosexual 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%
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%).<sup>35</sup>
- 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

<sup>34</sup> 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.

<sup>35</sup> 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.



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.<sup>36</sup>

- 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.<sup>37</sup>
- 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.<sup>38</sup>
- 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.<sup>39</sup> One-third also reported negative treatment by health workers.<sup>40</sup>

## (b) The way forward on hate-based conduct

We support the introduction of complementary civil and criminal protections against hate-based conduct which uses a harm-based legal standard, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee *Inquiry into Anti-Vilification Protections*.<sup>41</sup> This would expand current protections which are limited to vilification based on inciting hatred to also capture harm-based conduct.<sup>42</sup> Such provisions would make unlawful 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. Amendments could be made to the Act, along with the *Criminal Code 2002* (ACT), to bolster anti-vilification provisions by introducing harm-based protections.

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<sup>36</sup> 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.

<sup>37</sup> Jones (2016) ‘[The needs of students with intersex variations](#)’, *Sex Education*, at 13-14.

<sup>38</sup> Hillier et al (2010) *Writing Themselves In 3*, Melbourne: ARCSHS, La Trobe University, at 39.

<sup>39</sup> Centre for Social Research in Health (2019) *Stigma Indicators Monitoring Project: People living with HIV*, Sydney: CSRH, UNSW, at 1.

<sup>40</sup> *Ibid*, at 2.

<sup>41</sup> Legislative Assembly Legal and Social Issues Committee (2021) *Inquiry into Anti-Vilification Protections*, Melbourne: Parliament of Victoria, Recommendations 9 and 10.

<sup>42</sup> *Criminal Code 2002* (Cth), s 750.

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 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 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.<sup>43</sup>

Additionally, the Act’s anti-vilification provision in section 67A could be improved by also prohibiting conduct that is ‘reasonably likely to’ incite hatred, revulsion, serious contempt, or severe ridicule. This would slightly lower the threshold for vilification to ensure it is easier for victim-survivors to establish.

### RECOMMENDATION 7

Amend section 67A to prohibit vilifying conduct that is ‘reasonably likely’ to incite hatred, revulsion, serious contempt, or severe ridicule.

In addition to anti-vilification protections, introduce complementary civil and criminal protections against hate-based conduct using a harm-based legal standard.

### RECOMMENDATION 8

Amend section 33(1) of the *Crimes (Sentencing) Act 2005* (ACT) to introduce, as a sentencing consideration, ‘*whether the offence was motivated wholly or partly by hatred towards or prejudice against a group of people to whom the offender believed the victim belong (such as persons of a particular race, religion, sex, sexual orientation, gender identity, or persons with a particular disability or variations of sex characteristics)*’.

## 5. AN ‘EQUALITY BEFORE THE LAW’ PROTECTION

**Everyone is entitled to equality before the law, and discriminatory laws should not be used a defence for further discrimination. However, addressing discriminatory laws in a parliamentary democracy needs careful thought. The ACT may wish to consider a stronger protection that allows individual to challenge discriminatory laws or orders.**

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<sup>43</sup> *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 Act 2021* (SA).

As discussed in the Discussion Paper,<sup>44</sup> there may be scenarios where a law, or court or tribunal order, results in discrimination, and section 30 of the Act provides a defence, allowing a person to rely on that law or order notwithstanding its discriminatory effect.

Rather than removing the exception entirely, the ACT may wish to consider a number of reforms to limit its effect, including:

- introducing a new area of protection, namely the administration of Territory laws and programs;
- requiring an audit of laws, and only applying the section to prescribed laws;
- inserting an equality before the law provision, similar to section 10 of the *Racial Discrimination Act 1975* (Cth), which allows direct challenges to discriminatory laws or orders. If the latter approach is taken, then an exception similar to in section 28 of the *Human Rights Act* (which allows laws to limit human rights to the extent they can be ‘demonstrably justified in a free and democratic society’)<sup>45</sup> may be needed.

If an equality before the law provision were introduced into the Act, the ACT may wish to specify the remedies which could be sought apart from the ability of a court to declare a law invalid. For example, potential remedies could include:

- taking no action;
- declaring a law incompatible with a protected human right and providing legislators with a specified time period to address the incompatibility before the court may take further action, including ordering compensation or other form of remedy;
- declaring a law invalid or as having no effect to the extent that it discriminates on the basis of a protected attribute;
- granting the privilege or benefit which the person claiming the contravention was denied from accessing or otherwise ordering compensation; or
- ordering an injunction against the discriminatory conduct.

### **RECOMMENDATION 9**

Introduce a new area of protection, namely the administration of Territory laws and programs.

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<sup>44</sup> See Discussion Paper, pp. 18.

<sup>45</sup> *Human Rights Act 2004* (ACT), s 28.

### RECOMMENDATION 10

Consider including a new provision, similar to section 10 of the *Racial Discrimination Act 1975* (Cth), that would enable an individual to challenge a law, including the administration of a law, that discriminates against them based on a protected attribute.

## 6. GENDER INCLUSIVE LANGUAGE

There are a number of provisions in the Act which have the potential to discriminate against transgender and gender diverse people. These include:

- the Act sometimes uses binary gendered language, assuming only two sexes. For example, sections 34(1), 36 or 40 refers to a person of the ‘opposite’ sex to the relevant person, when the word ‘different’ or ‘particular’ could have been used to equal effect in those places;
- the ground of pregnancy and potential pregnancy could apply to all people who are capable of bearing of children, who desire to become pregnant or are likely to become pregnant;
- the exemption in section 37 permitting special measures for people in relation to pregnancy, childbirth or breastfeeding could be extended to all people whose bodies are inherently capable of carrying, giving birth or feeding children.

### RECOMMENDATION 11

Review the Act and update non-inclusive or binary gendered language, where relevant.

Ensure the pregnancy, childbirth and breastfeeding protections protect all persons whose bodies are inherently capable of carrying, giving birth or feeding children.

## 7. AN EQUALITY ACT FOR THE EQUALITY CAPITAL

**An Equality Capital needs an Equality Act. To demonstrate the intention and spirit behind reforms to improve the Act, the Act should be renamed the Equality Act.**

The name of a statute makes an important symbolic statement of its intention and purpose. Currently, the Act is defined by the negative conduct it serves to remedy: discrimination. But with the adoption of a positive duty, and other reforms to modernise and improve the Act, the Act should be renamed to more clearly state the purpose it is seeking to achieve: namely, equality for all. That is why, it is time to re-name the Act: the Equality Act.

### RECOMMENDATION 12

As a strong statement of the Act’s intention and purpose, rename the Act as the *Equality Act*.

# SCHEDULE: 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 further information regarding any of these issues, or issues which are not covered in this submission.

NO.	QUESTION	RESPONSE
<b>Coverage of the Discrimination Act</b>		
1.	What concerns or considerations would be required in extending coverage to areas of public life including organised sport, competitions open to the public and government functions?	<p>Equality Australia supports extending the protected areas under the Act to include other areas of public life, including organised sport, competitions open to the public and government functions.</p> <p>In respect of government functions, we would support amending the Act so that the performance of all government functions, including services, is explicitly covered, similar to section 26 of the <i>Sex Discrimination Act 1984</i> (Cth). As discussed in further detail in the Discussion Paper,<sup>46</sup> 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.<sup>47</sup></p>
2.	What areas of private conduct should not be covered by discrimination law? How would these areas be defined?	<p>It is important to consider each protected attribute on its own, as they raise different issues depending on the area protected. In principle, discrimination laws should regulate areas of public life, leaving areas of private life unregulated. However, as discussed in the Discussion Paper,<sup>48</sup> it is important to ensure that it is clear what is meant by ‘public life’ and what is excluded as ‘private conduct’.</p>

<sup>46</sup> See Discussion Paper, pp. 10-12.

<sup>47</sup> See *Commissioner of Police v Mohamed* [2009] NSWCA 432 cf *Robinson v Commissioner of Police, NSW Police Force* [2013] FCAFC 64.

<sup>48</sup> See Discussion Paper, pp. 9.

NO.	QUESTION	RESPONSE
<b>Reforming exceptions to discrimination law</b>		
3.	<p>Should the exceptions in the Discrimination Act:</p> <ul style="list-style-type: none"> <li>• be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable, or</li> <li>• be refined to make them simpler, stronger, and better aligned with our human rights framework?</li> </ul>	<p>We would not be inclined to support replacing the exceptions in the Act with a single justification defence, particularly given it is likely to expand the right to discriminate and will be legally uncertain.</p> <p>Instead, we have suggested supplementing the definition of discrimination with another limb, based on the international definition of discrimination, that includes a justification defence.</p> <p>See section 2(c) of our submission for further detail.</p>
4.	<p>What concerns or considerations would be required in introducing a single justification defence to replace existing exceptions as applicable to:</p> <ul style="list-style-type: none"> <li>• Religious bodies</li> <li>• Voluntary bodies</li> <li>• Licenced clubs</li> <li>• Sports</li> <li>• Employment</li> <li>• Workers in private homes</li> <li>• Insurance and superannuation companies?</li> </ul>	<p>See response to item 4 above.</p>
<b>Exceptions for acts done to comply with the law</b>		
5.	<p>Should the Discrimination Act be amended to remove the exception permitting acts done under statutory authority? Should the Act keep a narrower exception to permit acts done directly to comply with a specific court or tribunal order?</p>	<p>We have provided some potential reform options in section 5 of our submission.</p>

NO.	QUESTION	RESPONSE
<b>Exception for religious bodies</b>		
6.	Should the exception protecting religious observances (e.g. appointment of ministers etc) be refined so that discrimination is only permitted where necessary to conform with the doctrines of the relevant religion?	We would have no objection to this proposal.  For our detailed submissions on exceptions for religious bodies, see section 1 of our submission.
7.	Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when conducting commercial (for-profit) activities?	We would have no objection to this proposal, although we consider it unlikely that a body with commercial purposes could have the benefit of section 32(1)(d).  For our detailed submissions on exceptions for religious bodies, see section 1 of our submission.
8.	Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when providing goods or services to members of the public?	As discussed in further detail in section 1, we propose that discrimination by religious bodies in the provision of goods or services to the public should be allowed on the grounds of religious conviction only, and where that discrimination: <ul style="list-style-type: none"> <li>• is reasonable and proportionate in all the circumstances,</li> <li>• conforms with the doctrines, tenets or beliefs of a religion, and</li> <li>• is necessary to avoid injury to the religious susceptibilities of adherents of that religion.</li> </ul>
9.	Should religious health care providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?	As discussed in further detail in section 1, we suggest amending section 44 to include a 'reasonable and proportionate' test.
10.	Should any other religious service providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?	This would be covered adequately by the amended section 32(1)(d) we have proposed. See section 1 of our submission.

NO.	QUESTION	RESPONSE
11.	Are there any other circumstances in which religious bodies should be permitted to discriminate in employment decisions?	<p>This would be covered adequately by the amended section 32(1)(d) we have proposed, as well as existing exemptions that apply to other organisations.</p> <p>See section 1 of our submission.</p>
12.	Should some sectors or types of organisations be prevented from relying on the general religious bodies exception? For example, organisations that receive a certain proportion of public funding?	<p>Yes, although we do not think that a delineation based on public funding will work as intended. Instead, we have proposed amendments to section 32(1)(d) to address this.</p> <p>See section 1 of our submission.</p>
13.	Should religious bodies only be permitted to discriminate against members of the public on some grounds, and not others? If so, which grounds should be permissible?	<p>Yes, as discussed further in section 1 of our submission, discrimination by religious bodies should be based on the ground of religious conviction only. Religious bodies can otherwise benefit from the same exceptions applying to other organisations, and can seek temporary exceptions if they need further exceptions.</p> <p>If religious bodies need a specific exemption in respect of another attribute, the onus should be on them to clearly explain what dispensations they need and in which contexts, such that a more reasonable and targeted exemption could be framed.</p>
<b>Exceptions for voluntary (not-for-profit) organisations</b>		
14.	Should voluntary bodies be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law where the organisation's reason for existence is to promote the interests of that group of people?	<p>It is not currently clear which bodies are captured by the definition of 'voluntary body'. The definition suggests it could apply very broadly, including to an unincorporated social group that meets to advance particular hobbies or interests. Some of these groups are not likely to have the resources to put in place robust measures against discrimination.</p> <p>We would suggest an audit of the types of groups likely to fall within this category, and ascertain whether it would be possible to narrow the exemption in a reasonably clear and appropriate way.</p>



NO.	QUESTION	RESPONSE
15.	Should voluntary bodies only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?	See item 14.
16.	Alternatively, should the exception for voluntary bodies be removed?	See item 14.
<b>Exception for licensed clubs</b>		
17.	Should licenced clubs only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?	<p>Unlike voluntary bodies, such clubs are already required to meet various regulatory obligations to secure licensing. Accordingly, it is not clear whether any specific exemptions should otherwise apply.</p> <p>The ACT may wish to consider also the approach taken in Queensland, where a club may restrict its membership only if it operates to preserve a minority culture or to prevent or reduce disadvantage suffered by people of that group.<sup>49</sup></p>
<b>Exceptions for sport</b>		
18.	Should the exceptions permit people to be excluded from sport on the basis of their sex, sex characteristics, gender identity, or disability only where this is necessary for fair, safe, and effective competition?	<p>The sporting exemptions do not currently extend to the grounds of sex characteristics or gender identity, and we would not support their expansion to these grounds.</p> <p>The definition of discrimination already gives sports organisers' the ability to impose reasonable conditions or requirements, even if they disadvantage a protected group. Accordingly, no specific exemptions are necessary.</p>

<sup>49</sup> *Anti-Discrimination Act 1991* (Qld), s 97.

NO.	QUESTION	RESPONSE
19.	Should discrimination against people in sport be prohibited entirely for children under 12 (except for permitting age-segregated teams?)	See our response to item 18.
20.	Should the exception for sport apply a wider range of protected attributes under the Discrimination Act?	No, see our response to item 18.
<b>Exceptions relating to work</b>		
21.	Should the employment exceptions be extended to apply to a wider range of protected attributes?	<p>Generally, we do not support expanding exceptions unless such an expansion is actually necessary. There are already a number of exemptions available under the Act, including the possibility of seeking temporary exemptions.</p> <p>If employers need a specific exemption in respect of another attribute, the onus should be on them to clearly explain what dispensations they need and in which contexts, such that a more reasonable and targeted exemption could be framed.</p>
22.	Should the law impose a duty to make reasonable adjustments not just for people with disabilities, but for people with any protected attribute? For example, such a duty might require an employer to permit an employee to vary their working hours because of family responsibilities, provided that the employee could still perform all essential work.	We believe this is already implied under the definition of ‘indirect discrimination’, and is not necessary. Further, as discussed in section 3 of this submission, amendments to the Act could be made to introduce a positive duty to take reasonable and proportionate steps to promote equality.
<b>Exceptions for insurance and superannuation companies</b>		
23.	Should insurance and superannuation providers only be permitted to discriminate where their decisions are based on actuarial or statistical data?	In our view, the exception could be narrowed to where discrimination is justified by evidence, such as on the basis of actuarial or statistical data from a source on which it is reasonable for the discriminator to rely and where such discrimination is reasonable having regard to such data and any other relevant factors. The approach taken in the <i>Sex Discrimination Act 1984</i> (Cth) could be considered as a starting

NO.	QUESTION	RESPONSE
		point. <sup>50</sup> However, further consideration will be required to assess the full impact of such an exception.
24.	Should insurance and superannuation providers be required to provide consumers with the data on which decisions about them are based (or a meaningful explanation of that data)?	Yes, particularly where discrimination occurs on the basis of actuarial or statistical data.
<b>Positive duty to eliminate discrimination</b>		
25.	Should a positive duty to eliminate discrimination be introduced into the Discrimination Act?	Yes, see our submissions in section 3 above.
26.	Should the duty apply to public bodies, or private businesses and organisations, or both, and how should this be implemented?	<p>A positive duty should apply to both public bodies and private businesses and organisations, similar to the approach taken in Victoria.<sup>51</sup></p> <p>In Victoria, a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation. In determining whether a measure is reasonable and proportionate, the following factors are considered:</p> <ul style="list-style-type: none"> <li>• the size of the person's business or operations;</li> <li>• the nature and circumstances of the person's business or operations;</li> <li>• the person's resources;</li> <li>• the person's business and operational priorities; and</li> <li>• the practicability and the cost of the measures.</li> </ul>

<sup>50</sup> *Sex Discrimination Act 1984* (Cth), s 41A.

<sup>51</sup> *Equal Opportunity Act 2010* (Vic), s 15.

NO.	QUESTION	RESPONSE
		For further detail, see our submissions in section 3 above.
27.	How would the duty be applied to organisations of different sizes and with different levels of available resources?	<p>As discussed in section 3 of this submission, an effective positive duty needs to be clearly expressed and be supported by reporting requirements, enforcement powers and functions (with appropriate resourcing). Guidance on best practice should also be developed to support organisations to meet their positive duties.</p> <p>Further, as discussed in item 26 above, the size, nature and resources of a business should be taken into account when determining whether a measure is reasonable and proportionate to be taken to prevent discrimination.</p> <p>We have also suggested ways that, at least for the public sector, the duty could be framed as a positive duty to advance equality of outcomes.</p>
28.	How would organisations be supported to meet the positive duty?	As discussed in item 27 above, guidance on best practice should be developed to support organisations to meet their positive duties.
29.	What additional functions and powers would the Human Rights Commission need to monitor organisations to ensure they are meeting the positive duty?	<p>As discussed in section 3 of this submission, to be effective, positive duties need to have regulatory infrastructure and responses appropriate to the degree of any contravention to enable a regulatory agency to prosecute systemic or serious discrimination against a class of persons.</p> <p>A regulatory agency should be empowered to investigate a potential breach of a positive duty, 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.</p> <p>We recommend analysing the existing powers of the Human Rights Commission against these principles, to see whether further powers are needed.</p>

NO.	QUESTION	RESPONSE
30.	What resources would be necessary to inform organisations of steps necessary to comply with the positive duty?	See item 29 above.