AN EQUALITY ACT FOR QUEENSLAND:

SUBMISSION TO THE QUEENSLAND HUMAN RIGHTS COMMISSION'S REVIEW OF QUEENSLAND'S ANTI-DISCRIMINATION ACT

March 2022

CONTENTS

Executive summary ... 3

Protections for LGBTIQ+ people ... 5

1. Protecting all LGBTIQ+ people from discrimination ... 5
   (a) Sexuality ... 5
   (b) Gender identity and sex characteristics ... 5
2. Inclusion of 'gender' as an additional attribute ... 6
3. Other attributes ... 7

Fixing the fundementals ... 9

4. Improving the definition of discrimination ... 9
   (a) Harassment as a form of discrimination ... 9
   (b) Improving the definitions of direct and indirect discrimination ... 9
   (c) A unified definition of discrimination? ... 11
5. Ending hate-based conduct ... 12
   (a) The need for effective anti-hate laws covering LGBTIQ+ people ... 12
   (b) The way forward ... 14

Playing by the same rules ... 16

6. Religious bodies and educational institutions ... 16
   (a) Specific exemptions applying to religious bodies and organisations ... 16
   (b) Towards a human rights conforming approach ... 17
   (c) A 'reasonable and proportionate in all the circumstances' test ... 18
7. Not-for-profit organisations ... 20
8. Assisted reproductive technology services ... 21
9. Working with children ... 21

Best practice reforms to the Act ... 23

10. Positive duties ... 23
11. An 'equality before the law' protection ... 25
12. Renaming the Act ... 26

Schedule: Responses to discussion paper questions ... 27

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

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 Queensland Human Rights Commission regarding the review of Queensland's *Anti-Discrimination Act 1991* (Qld) (the **Act**).

Our laws should protect all of us, equally.

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

However, there are a number of fundamental deficiencies in the Act which ought to be addressed. These include definitions that do not protect all LGBTIQ+ people from discrimination, legal discrimination frameworks that are complex and out-of-date, and significant carve-outs that exclude workers, students and service users from the protection that would otherwise have been provided to them by the Act.

Queensland now has the opportunity to fix the deficiencies in its Act and adopt best practice reforms that other states and territories can be inspired by and hope to emulate.

To that end, we propose the following:

1. **Ensure all LGBTIQ+ people are protected from discrimination**, by updating the definitions of 'sexuality', 'gender identity', 'parental status', 'family responsibilities' and 'relationship status' to be more inclusive, introducing a new attribute of 'sex characteristics' in the Act, and ensuring the 'sex' attribute captures all forms of gender-based discrimination (see sections 1 to 3 of this submission);
2. **Improve the definition of discrimination in the Act,** by:
    a. ensuring it applies in a more straightforward way to harassment based on protected attributes (see section 4(a));
    b. fixing problems with the 'direct' and 'indirect' discrimination tests (see section 4(b)); and
    c. expanding the definition rather than replacing it entirely (see section 4(c)).
3. **Introduce new protections against hate-based conduct** in the Act and in Queensland's sentencing laws. This should include lowering the threshold for vilification, introducing complementary civil and criminal harm-based protections against hate-based conduct, introducing a sentencing consideration for hate crimes and improving enforcement (see section 5).
4. **Narrow carve-outs which allow religious bodies and educational institutions to discriminate against employees or people who rely on their services or supports,** by:
    a. introducing a 'reasonable and proportionate' test into sections 41, 48, 80, 90 and 109(1)(d) 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. repealing subsections 25(2)-(8) of the Act;
    c. amending section 25(1) of the Act to prevent employers from being able to evade their discrimination obligations by unilaterally setting inherently discriminatory conditions of employment;
    d. narrowing the application of section 90 and 109(1)(d) of the Act to discrimination based on the attribute of religion only, and for section 90, to accommodation for or connected with religious purposes only,

    (see section 6);
5. **Ensure not-for-profit organisations are not able to discriminate** when delivering goods and services to the general public (see section 7);
6. **Ensure assisted reproductive technology (ART) providers are not able to discriminate** (see section 8);

7. **Ensure children are protected from harm** without unfairly stigmatising specific populations (see section 9);
8. **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 10).
9. **Consider including a new 'equality before the law' provision** that would enable an individual to challenge a law or order that discriminates against them based on a protected attribute (see section 11); and
10. **Rename the Act to the Equality Act,** as a strong statement of the Act's intention and purpose (see section 12).

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.

PROTECTIONS FOR LGBTIQ+ PEOPLE

All LGBTIQ+ people should be protected from discrimination. However, the Act's current definitions of 'sexuality' and 'gender identity', and its omission of a specific ground of 'sex characteristics', leave some members of the LGBTIQ+ community without protection from discrimination. The Act needs to be updated to include more inclusive definitions in line with best practice in other state and territory laws.

1. PROTECTING ALL LGBTIQ+ PEOPLE FROM DISCRIMINATION

(a) Sexuality

The Act currently limits the definition of 'sexuality' to *mean* heterosexuality, homosexuality and bisexuality.[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, 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] Victoria defines sexual orientation as 'a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender'.[4]

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.

(b) Gender identity and sex characteristics

'Gender identity' is currently defined in the Act by reference to people who live or seek to live as members of the 'opposite sex', including those of 'indeterminate sex'.[5] This definition is problematic for several reasons. First, it does not specifically protect gender-related expression. Second, it defines gender by reference to a binary, meaning non-binary people may be excluded from protection. Third, it conflates gender identity and innate variations of sex characteristics because of the inclusion of 'indeterminate sex' in the definition. As Intersex Human Rights Australia explains, and the Darlington Statement warns, this conflation imposes descriptions on the intersex population that marks them out as a 'third sex' and assumes that innate variations of sex characteristics determine a person's gender identity.[6]

The Australian Capital Territory, Tasmania and Victoria (and also, to a lesser extent, the Commonwealth and South Australia) have better definitions of gender identity that include gender-related expression, and provide protection to people with intersex variations using standalone protections and more contemporary definitions. 'Gender identity' is variously defined in the laws of the ACT, Victoria, Tasmania, South Australia and the Commonwealth to

---

[1] *Anti-Discrimination Act 1991* (Qld), Schedule 1 (definition of 'sexuality').

[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(1) (definition of 'sexual orientation').

[4] *Equal Opportunity Act 2010* (Vic), s 4(1) (definition of 'sexual orientation').

[5] *Anti-Discrimination Act 1991* (Qld), Schedule.

[6] 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]; Darlington Statement (2017), [8]. The Darlington Statement is a joint statement by Australia 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 (OIIAU/Intersex Day Project), Candice Cody (OIIAU), Alex David (OIIAU), Betsy Driver (Bodies Like Ours), Carolyn Hannaford (AISSGA), Eileen Harlow, Bonnie Hart (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.

include 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.[7] 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 the Commonwealth and South Australia, also provides protection to intersex people, but now reflects outdated definitions.

2. INCLUSION OF 'GENDER' AS AN ADDITIONAL ATTRIBUTE

The Discussion Paper's Question 35 queries whether an additional attribute of 'gender' should be introduced into the Act. In our view, the Act should recognise one inclusive attribute of 'sex' or 'gender', but not both, as this would result in legal uncertainty, achieve little additional protection, and may in fact narrow the discrimination protection given by the ground of 'sex', particularly for women who are trans or intersex.

The Act arguably already embodies gender-based discrimination under the attribute of 'sex'. This is because the attribute of 'sex' is not narrowly defined and the characteristics extension in section 8 of the Act extends discrimination based on sex to discrimination:

- based on characteristics associated with or imputed to sex (such as gendered expectations or stereotypes), or
- based on presumed sex (such as the sex that a person is presumed to have based on their gendered appearance).

Gender stereotypes and social expectations related to gender are therefore likely already captured by sex-based discrimination protections.

Adding an additional attribute of 'gender' while retaining a separate 'sex' attribute would likely have the effect of splitting two concepts which are interchangeable and overlapping in legal meaning. Courts may consider that the Parliament intended the two words to mean different things, otherwise they would not have evoked two different concepts in the same law. As a result, courts may well exclude trans and intersex women from the benefit of the protections offered by the discrimination protection based on 'sex'. Taking this approach could also introduce great uncertainty over which forms of discrimination amount to gender discrimination, and which amount to sex discrimination, when the Act arguably already adequately captures both under the attribute of 'sex'.

Taking this approach also sits uncomfortably with the requirement that transgender people be recognised in the sex 'reassigned' to them under the processes of the *Births, Deaths and Marriages Registration Act 2003* (Qld),[9] and the observation that Queensland law treats sex and gender as largely interchangeable legal concepts (with some legislation referring to gender,[10] while others refer to sex[11]). Making a legal distinction where none is necessary may therefore be more confusing than helpful, and have unpredictable legal consequences, particularly when comparisons have to be made for the purposes of determining whether direct or indirect discrimination has occurred.

---

[7] *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').

[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').

[9] *Births, Deaths and Marriages Registration Act 2003* (Qld), s 24.

[10] See e.g. *Acts Interpretation Act 1954* (Qld), s 32B.

[11] See e.g. *Police Powers and Responsibilities Act 2000* (Qld), ss 39G(6), 502(2), 517(3), 551(3), 625(2), 632(1) and 644(3); *Births, Deaths and Marriages Registration Act 2003* (Qld), Part 4.

Accordingly, we would not support the inclusion of two separate attributes of sex and gender within the Act, but would support:

- clarifying that the ground of 'sex' includes all forms of discrimination based on gender roles, expectations and stereotypes, or making clear that the definition of 'sex' is not limited to or defined by any particular physical sex characteristics but extends to social roles, expectations and stereotypes related to gender;
- introducing a separate standalone ground of 'sex characteristics' to protect intersex people from discrimination, as well as people who are discriminated based on physical characteristics related to sex;
- replacing references to:
    - 'opposite' sex with 'different' sex in section 30(1)(b),
    - 'males and females' with 'people of a different sex' in section 98,
    - 'either males or females' with 'people of a particular sex' in section 111(1)(a) (if that provision is to be retained, see item 72 in the table in the Schedule),

  so that no binary gendered language is used in the Act.

3. OTHER ATTRIBUTES

We would support amending further attributes to ensure they capture people in diverse relationship and family structures. This is particularly important for recognising the families of LGBTIQ+ people that may not have the same legal recognition as other families, particularly where there are co-parenting arrangements in place or relationships among companions or chosen families which are not couple relationships.

We suggest:

- expanding the attribute of 'parental status' to include anyone with parenting responsibilities, regardless of their legal relationship to the child;
- expanding the attribute of 'family responsibilities' to include anyone with carer responsibilities, similar to the protections found in Western Australia that are broadly defined;
- amending the 'relationship status' attribute to ensure de facto and civil partners have the same treatment as married couples who have separated or been widowed;
- ensuring that all familial definitions under the Act are inclusive of diverse familial structures, including:
    - the definition of 'parent' (and the use of the term 'child'), which is likely to be limited to legally recognised relationships formed through marriage, adoption, fostering or guardianship orders, but may not recognise people whose parental roles are not legally assumed or formulised through parental orders (e.g. a known donor and co-parent, the third and/or fourth parent in a co-parenting arrangement)
    - the definition of 'immediate family', which relies on tracing relationships through blood, marriage or legal recognition, and appears to be even narrower than the definition of a 'parent';
    - the definition of 'relation', which makes it unclear a person who is recognised as a member of the person's family is related by 'affinity', if they are not related by 'blood, marriage… or adoption'.

RECOMMENDATION 1

To ensure all LGBTIQ+ people are protected from discrimination:

- define 'sexuality' in the Act consistently with definitions in the ACT, Tasmanian or Victorian laws, which are inclusive in protecting people of different sexual orientations;
- define 'gender identity' in the Act consistently with definitions in the ACT, Victorian, Tasmanian, South Australian and Commonwealth laws, to include gender-related expression and to clarify that people do not need to have undergone medical treatment or update their legal gender in order to be protected;
- introduce a new protection in the Act based on the attribute of 'sex characteristics', defined consistently with definitions in ACT and Victorian laws, ensuring protections for people with innate variations of sex characteristics;
- do not (whether through the introduction of a separate ground of 'gender' or otherwise) expressly or impliedly narrow the definition of 'sex' in the Act, ensuring that it remains applicable to all forms of discrimination based on gender, and inclusive of trans and intersex women;
- amend the 'parental status' attribute to include anyone with parenting responsibilities, regardless of their legal relationship to the child;
- amend the 'relationship status' attribute to capture de facto or civil partners who have separated or been widowed.
- expand the attribute of 'family responsibilities' to include anyone with carer responsibilities, similar to the protections found in Western Australia that are broadly defined
- ensure that all familial definitions under the Act are inclusive of diverse familial structures, including the definition of 'parent', 'immediate family', and 'relation'.

FIXING THE FUNDEMENTALS

People who are discriminated against should be able to understand their rights and be able to enforce them easily. The Act currently defines discrimination in a way which is outdated, complex and unnecessarily burdensome. The Act should be amended to simplify the tests for direct discrimination, indirect discrimination and explicitly define harassment as being a form of discrimination. The Act also needs to address the vilification protections to ensure they address all forms of hate-based conduct.

4. IMPROVING THE DEFINITION OF DISCRIMINATION

(a) Harassment as 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,[12] leaving everyone else to rely on complex discrimination protections if they experience harassment on other grounds.

Including separate harassment protections covering all attributes protected by the Act would make a discrimination complaint involving harassment much simpler. Several other laws have taken this approach, including the Commonwealth *Disability Discrimination Act*[13] and the Northern Territory,[14] and in broader ways, so has the Commonwealth *Racial Discrimination Act*[15] and Tasmania.

The need for separate harassment protections stems from the complexity of applying the current definitions of direct discrimination to harassment-based discrimination.

For example, a male employee who is the subject of jokes at his workplace 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. Under the Act, this male employee would currently be required to characterise a claim for discrimination in a highly convoluted way to apply the test for direct discrimination, including relying on a comparator test, despite harassment being a well-accepted form of discrimination.[16]

Amending the definition of discrimination in the Act to explicitly include harassment based on a protected attribute or combination of attributes as a standalone form of discrimination would simplify the way in which a complaint can be made where harassment is the basis of the complaint.

(b) Improving the definitions of direct and indirect discrimination

The tests for direct and indirect discrimination in the Act are complex and out-of-date with best practice definitions in other federal, state and territory laws. They make it much more difficult than it needs to be for people who experience discrimination to seek a remedy.

Unlike the approach taken in the ACT, the Northern Territory, Tasmania and Victoria, the Act currently adopts a comparator test in defining direct discrimination.[17] The direct discrimination test also requires showing the attribute is a substantial reason for the treatment.[18] Further, establishing indirect discrimination under the Act

[12] *Anti-Discrimination Act 1991* (Qld), s 118.

[13] *Disability Discrimination Act 1992* (Cth), ss 35-39.

[14] *Anti-Discrimination Act 1992* (NT), s 20(1)(b).

[15] *Racial Discrimination Act 1975* (Cth), s 18C.

[16] 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 ¶92-626; *Qantas Airways v Gama* (2008) 157 FCR 537.

[17] See Discussion Paper, p. 30; *Anti-Discrimination Act 1991* (Qld), s 10(1).

[18] *Anti-Discrimination Act 1991* (Qld), s 11(4).

requires a complex and detailed analysis which can restrict individuals who have been discriminated against from accessing justice.

Direct discrimination. The comparator test for establishing direct discrimination 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. This can often mean that many claims for discrimination are characterised alternatively as indirect discrimination, which then results in the complainant having to respond to the harder-to-rebut defence that a discriminatory condition, practice or requirement imposed on them was not reasonable. In an effort to redress the barrier the comparator test presents for making simple discrimination complaints, the Queensland Court of Appeal has attempted to address the negative impact of the High Court's decision in *Purvis* by seeking to rely on the characteristics extension in section 8 of the Act.[19] This is a positive step forward, but it would be much simpler for the comparator test to be removed from the definition of direct discrimination altogether, as several other states and territories have done. For example, the ACT simply defines direct discrimination as treating, or proposing to treat, a person unfavourably because the other person has one or more protected attributes.[20]

Further, unlike a number of comparative laws, the test for direct discrimination requires showing that an attribute was a substantial reason for the treatment. This is out-of-step with provisions in the *Sex Discrimination Act*,[21] *Disability Discrimination Act*,[22] and laws in Victoria, Tasmania, the ACT, NSW, WA and NT,[23] which require showing the attribute was only part (and not necessarily a dominant or substantial reason) for the treatment.

Indirect discrimination. To establish indirect discrimination, the Act requires an individual to establish an inability to comply with a requirement, condition or practice with which a 'higher proportion' of people without the attribute are able to comply.[24] The inability to comply and higher proportion tests are entirely out of step with contemporary definitions of indirect discrimination in most federal, state and territory laws.

Taken together, this means the legal and evidential burden for proving discrimination under the Act can be very difficult for the person who has suffered it.

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

- *First*, an intersectional approach is required which acknowledges that discrimination may occur on 'one or more attributes', as is the case in the ACT.[25] This approach should protect people from discrimination because of a single protected attribute or a combination of attributes. By adopting an intersectional approach, a person who is being discriminated against will more easily be able to establish discrimination on the basis of a confluence of a person's characteristics.
- *Second*, remove the comparator requirement when defining direct discrimination. Similar to Victoria and the ACT, adopt an 'unfavourable treatment' test, which stipulates 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 attributes that the person or their associate has or is presumed to have. To avoid any uncertainty, such as in *Aitken*,[26] it will also be important to explicitly specify that a comparator is not required – but may be used to meet an evidential burden.

[19] *Woodforth v State of Queensland* [2017] QCA 100.

[20] *Discrimination Act 1991* (ACT), s 8(2).

[21] *Sex Discrimination Act 1984* (Cth), s 8.

[22] *Disability Discrimination Act 1992* (Cth), s 10.

[23] *Equal Opportunity Act 2010* (Vic) s 8; *Anti-Discrimination Act 1998* (Tas), s 14; *Discrimination Act 1991* (ACT) s 4A; *Anti-Discrimination Act 1977* (NSW) s 4A; *Equal Opportunity Act 1984* (WA), s 5; *Anti-Discrimination Act 1992* (NT), s 20.

[24] *Anti-Discrimination Act 1991* (Qld), s 11(1).

[25] *Discrimination Act 1991* (ACT), ss 8(2)-(3).

[26] *Aitken v State of Victoria* [2013] VSCA 28.

- *Third*, ensure that an attribute needs only be a part of the reason for the treatment, not necessarily a substantial or dominant reason, in a similar way to the position under the *Sex Discrimination Act*,[27] *Disability Discrimination Act,*[28] and laws in Victoria, Tasmania, the ACT, NSW, WA and NT.
- *Fourth*, consideration should be given as to 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 *prime facie* case of discrimination.[29] 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 with a test based on a consolidation of the tests in the Commonwealth's *Age Discrimination Act* and *Sex Discrimination Act* and the Victorian, Queensland and ACT Acts. 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; and
    - the practice, condition or requirement is not reasonable in the circumstances (which must be proven by the defendant, as per section 205 of the Act).

(c) A unified definition of discrimination?

We are not inclined to support entirely replacing the direct and indirect discrimination tests in the Act with a unified test as contemplated by the Discussion Paper.[30] This is because, for all their complexity, these tests have become ubiquitous in Australian discrimination law. Removing the tests altogether could discard decades of jurisprudence which provides more clarity over how the tests apply to particular circumstances.

We would however support expanding the definition of discrimination to use the existing formulations of direct and indirect discrimination (as improved in accordance with the suggestions above) alongside other tests. That way, courts could build up a body of jurisprudence over time in respect of other tests that establish discrimination.

So, for example, discrimination could be defined to mean any of the following:

- harassment based on an attribute or combination of attributes;
- direct discrimination (to be defined as discussed above);
- indirect discrimination (to be defined as discussed above);
- a distinction, exclusion, restriction or preference which:
        - has the purpose or effect of nullifying or impairing, based on a protected attribute or combination of attributes, the recognition, enjoyment or exercise by all persons, on an equal footing, of any right or freedom; and
        - is not justified (with this element to be established by the defendant).

[27] *Sex Discrimination Act 1984* (Cth), s 8.

[28] *Disability Discrimination Act !992* (Cth), s 10.

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

[30] See Discussion Paper, p. 37.

The latter test reflects the international definition of discrimination set out in General Comment No. 18,[31] as seen in the *Racial Discrimination Act 1975* (Cth).[32]

RECOMMENDATION 2

Simplify the tests for proving discrimination by adopting the following reforms:

- define discrimination to mean:
  - harassment based on an attribute or combination of attributes;
  - direct discrimination (to be defined as discussed above);
  - indirect discrimination (to be defined as discussed above); and/or
  - such other additional alternative tests, such as the international definition of discrimination or international comparative definitions of discrimination;
- define 'direct discrimination' broadly in line with the approach taken in Victoria and the ACT, removing the comparator test, ensuring an attribute needs only be a part of the reason for the treatment, 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, with the defendant bearing the burden of proof on the issue of reasonableness.

5. 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 are currently provided under the Act,[33] but these protections do not provide the harm-based protections afforded in some other discrimination laws. This means that LGBTIQ+ people, and others, remain vulnerable to conduct motivated by hate, and the harm caused by this conduct is not adequately addressed by the provisions of the Act.

(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 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).[34]

---

[31] UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

[32] *Racial Discrimination Act 1975* (Cth), s 9.

[33] *Anti-Discrimination Act 1991* (Qld), s 124A, 129-131A.

[34] 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
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%).[35]
- 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.[36]
- 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.[37]

[35] 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.

[36] 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.

[37] 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.[38]
- 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.[39] One-third also reported negative treatment by health workers.[40]

(b) The way forward

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.*[41] This would expand current protections which are limited to incitement to also capture harm-based conduct.[42] 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 approach 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 1899* (Qld), to bolster anti-vilification provisions by introducing harm-based protection.

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.[43]

---

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

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

[40] Ibid, at 2.

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

[42] *Criminal Code 2002* (Cth), s 750.

[43] *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).

Additionally, the Act's anti-vilification provisions in sections 124A and 131A could be bolstered by also prohibiting conduct that is reasonably 'likely' to incite hatred and clarifying their application to social media. This would slightly lower the threshold for vilification to ensure it is easier for victim-survivors to establish.

Finally, our experience of anti-vilification protections across the country is that they have rarely been utilised, and where they have been utilised, individuals who have brought them have not always understood the legal, financial and other costs involved in bringing such claims. This is partly because the procedure for bringing such complaints relies principally on individuals who are not always legally represented or well-funded, and who may not have had the benefit of legal advice regarding the extent of protections these laws provide and the costs implications of losing their claim. In addition to individual-led actions, we would support considering additional functions and powers that enabled the Queensland Human Rights Commission to investigate and initiate its own civil proceedings against people who breached the civil vilification and proposed civil hate-based conduct provisions.

RECOMMENDATION 3

Enact new protections in the Act against hate-based conduct based on a harm-based civil test. The provision should protect people who experience public conduct, on the basis of a protected attribute, that humiliates or intimidates them, or 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.

RECOMMENDATION 4

Improve the civil and criminal tests for vilification in the Act, to clarify that:

- it does not require proof of actual incitement or intention and is satisfied by public conduct which is *'likely to incite hatred towards, revulsion of, serious contempt for, or severe ridicule of'*.
- a 'public act' extends to social media.

RECOMMENDATION 5

Introduce a sentencing consideration into section 9 of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider whether any offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people with variations of sex characteristics or a particular disability).

RECOMMENDATION 6

Provide the Queensland Human Rights Commission with powers to launch civil proceedings against people who breach the anti-vilification and proposed hate-based conduct protections.

PLAYING BY THE SAME RULES

Unless a genuine and compelling reason exists for requiring an exception, all employers, educational institutions and organisations providing goods and services to the general public should play by the same rules, ensuring that they cannot discriminate against Queenslanders who wish to work, study or seek goods and services from these organisations. Outdated carve-outs for religious bodies and not-for-profit organisations must be removed or narrowed to ensure a person's sexuality, gender identity or sex characteristics do not limit where they can work, study or access services and support.

6. RELIGIOUS BODIES AND EDUCATIONAL INSTITUTIONS

Queensland has taken a unique approach to exemptions that apply specifically to religious bodies and educational institutions. While the Queensland approach is better than some equivalent provisions in federal, state and territory laws, Queensland can look to recent reforms in Victoria to further improve its exemptions in respect of religious bodies and organisations.

As recent cases have shown, this is becoming increasingly necessary to respond to the emergence of a new and significant issue for LGBTIQ+ people, namely that religious bodies and educational institutions that have attempted to reframe their discriminatory requirements in terms of beliefs and conduct concerning sexuality or gender (rather than whether the person is themselves LGBTIQ+) in an attempt to evade the protections afforded by anti-discrimination laws. By reframing sexuality and gender-based discrimination as discrimination in favour of people with particular religious beliefs regarding sexuality and gender, religious bodies and organisations have been able to discriminate not only against LGBTIQ+ people but also those who support and affirm them. The result has been a discriminatory loss of employment and refusals of access to educational opportunities and services.

(a) Specific exemptions applying to religious bodies and organisations

The specific carve-outs for religious bodies and educational institutions in the Act are:

- **subsection 25(1):** allowing religious schools to simply assert that hiring persons of a particular religion for any role amounts to a 'genuine occupational requirement';
- **subsections 25(2)-(8) (the "don't ask, don't tell" provisions):** allowing religious educational institutions to impose requirements that discriminate against an employee (other than on the basis of age, race, or impairment), by reasonably requiring them to not 'openly act in a way' which is contrary to their employer's religious beliefs;
- **section 41:** allowing religious educational institutions to exclude prospective students of other faiths or no faith from admission to the school;
- **sections 48, 80 (sites of cultural or religious significance):** allowing any person to limit access to sites of cultural or religious significance, or discriminate in land, based on a person's sex, age, race or religion;
- **section 89:** allowing religious educational institutions to limit accommodation to students of a particular religion;
- **section 90:** allowing religious bodies to discriminate in accommodation (broadly defined to include, among other premises, business premises, housing, hostels and campsites) where the discrimination is in accordance with the doctrine of the religion concerned, and is necessary to avoid offending the religious sensitives of people of the religion;
- **subsection 109(1)(d):** allowing religious bodies to discriminate, other than in work or education, where the discrimination is in accordance with the doctrine of the religion concerned, and is necessary to avoid offending the religious sensitives of people of the religion.

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

- the ordination, appointment, training or education of priests, ministers of religion or members of any religious order;[44]
- the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.[45]

Religious bodies and educational institutions are also able to rely on other exemptions, such as the not-for-profit exemptions referred to in the following section.

(b) Towards a human rights conforming approach

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.[46]

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 2019* (Qld), whether on their own or as part of a community with others.[47] 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, service providers or educational institutions. 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 sections 25(1), 25(2)-(8), 90 and 109(1)(d). 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', students' and service users' lives as a condition of employment or access to services and supports, many of which are significantly publicly funded. Significantly, sections 25(1), 25(2)-(8), 90 and 109(1)(d) apply to many or all protected attributes – not only religious conviction.

On the other hand, the fact that sections 25(1), 41, 48, 80 and 89 are framed in terms of the attribute of religion (as opposed to other attributes) 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 or enrolled in faith-based educational institutions in Queensland and in other states who were dismissed, forced to resign or reconsider their child's enrolment because they *believed* in marriage equality (even though they were heterosexually-married), refused to believe that homosexuality was immoral (even though they were Christian and

[44] *Anti-Discrimination Act 1991* (Qld), s 109(1)(a)-(b).

[45] *Anti-Discrimination Act 1991* (Qld), s 109(1)(c).

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

[47] *Human Rights Act 2019* (Qld), ss 11(2), 20.

otherwise believed in much of the same religious doctrines as their employer) or had affirming and welcoming views towards trans people.[48] These cases include:

- parents at a Brisbane school who were forced in 2022 to sign a declaration of faith to keep their children enrolled at their school, which stated, among other things, that *'any form of sexual immorality (including but not limited to; adultery, fornication, homosexual acts, bisexual acts, bestiality, incest, paedophilia, and pornography) is sinful and offensive to God and is destructive to human relationships and society'*;[49]
- a teacher, married mother of three and committed Christian who was constructively dismissed after 10 years' service from a Christian school in Victoria in 2019 because she refused to sign an amended school policy that she personally accept and abide by the principle that marriage be only between a man and a woman;[50]
- a lesbian teacher and committed Christian who was fired from her role as an English teacher at a Christian school in Sydney in 2021 because she would not affirm the "immorality" of homosexuality, which the school argued breached an '*inherent, genuine occupational requirement'* of her role;[51]
- a person in Victoria in 2015 who was counselled against disclosing their sexuality or wearing rainbow clothing at a refuge provided by a faith-based organisation for people fleeing family violence, and a transwoman in 2021 who was told she would need to go to a men's emergency shelter by a different faith-based organisation.[52]

These people were highly regarded and faithful employees who ably performed their roles, or were parents of children that, subscribed to many of the religious beliefs of these organisations – 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 LGBTIQ+ people and the people who support them for less favourable treatment.

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

- section 25(1) should be amended to remove the note suggesting that discrimination on the basis of religion will always be a *'genuine occupational requirement'* at a religious school. Further consideration should be given to carefully defining this exemption, given the inconsistencies which have emerged in how the provision should be interpreted when considering the 'inherent requirements' test in other jurisdictions, and how the test sits alongside an employer's obligation to make reasonable adjustments;[53]
- the 'don't ask, don't tell' provisions (subsections 25(2)-(8)) should be repealed. They are unnecessary as employers are already permitted to issue reasonable directions on their employees, provided they do not discriminate directly or indirectly. This means that they simply

---

[48] 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; Audrey Courtney and Jessica Rendall (2022) 'Brisbane's Citipointe Christian College defends demanding parents sign contract on student gender identity, homosexuality', *ABC News*, 31 January.

[49] Brielle Burns (2022) 'Everything we know about Citipointe Christian College's controversial new enrolment contract', *Mamamia*, 1 February.

[50] H 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/.

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

[52] See Equality Australia (2021) *Personal Stories of Religious Discrimination*, p. 2.

[53] See e.g. *Chivers v State of Queensland (Queensland Health)* [2014] QCA 141.

have to treat their employees consistently and reasonably, such that they cannot prevent LGBTIQ+ people from being open about who they are if the school otherwise would allow others to do so in a respectful and reasonable way;

- sections 90 and 109(1)(d) should be narrowed to apply to discrimination based on religion 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. Sections 90 and 109(1)(d) should not allow discrimination based on any other attribute, such as gender identity or sexuality. Further, section 90 should only apply to accommodation for or connected with religious purposes. Otherwise, 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);
- for the remaining provisions – consider including a 'reasonable and proportionate' test that allows a balancing of interests in individual cases, so that considerations such as public funding, the availability of other schools, services or facilities in the area, and the impact of discrimination on the persons being discriminated can also be taken into account in determining whether or not an exemption should apply in particular cases.

These proposals are similar to the approach which has recently been adopted in Victoria,[54] which itself represents a better-practice amalgamation of the approach taken in Europe and Tasmania, and the current approach in Queensland, on employment exemptions for faith-based organisations.[55] 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,[56] and is a risk identified in the case law on 'inherent requirements' in Australia.[57] That is why an objective 'reasonable and proportionate in all the circumstances of the case' test should be added to sections 90 and 109(1)(d) at least, to provide for that balancing of competing rights and interests. Many other exemptions in the Act could similarly be improved with the addition of this balancing test.

We also do not favour the Victorian approach of delineating between services which are publicly funded and those which are not for the purposes of determining whether a religious bodies exemption applies.[58] This is for three key reasons. First, to the person outside the organisation who is being discriminated against, it is impossible to know whether a service is publicly funded or not. Second, funding can be provided by any of the three levels of government to the organisation, a parent organisation or specifically to a project or service. This complexity makes it very difficult to draft a provision that traces government funding back to a particular service (including ancillary or wrap around services). Finally, a 'reasonable and proportionate' test would still allow considerations of public funding to be taken into account in determining whether the individual or the organisation's interests should be preferred in a particular case. This test would make the issue of government funding relevant to the question, but not determinative. It would allow courts to look to a wide range of factors, such as the nature, type and availability of services, the impact on the individual and the impact on the organisation and its religious ethos.

---

[54] *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

[55] *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.

[56] 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).

[57] *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.

[58] See e.g. *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), Part 2, Div 2, items 10-12.

RECOMMENDATION 7

Introduce a 'reasonable and proportionate in all the circumstances of the case' test into sections 41, 48, 80, 90 and 109(1)(d) 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.

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 8

Repeal subsections 25(2)-(8) of the Act.

RECOMMENDATION 9

In respect of section 25(1) of the Act:

- repeal the note suggesting that holding a particular religious belief is always a 'genuine occupational requirement' of employment in a religious school;
- consider replacing the 'genuine occupational requirement' defence with an 'inherent requirements' defence to ensure consistency with other laws, such as the *Fair Work Act;*
- regardless of whether the 'genuine occupational requirement' is retained or an 'inherent requirements' test is adopted, consider clarifying the boundaries of this defence so that employers are not able to evade their discrimination obligations by unilaterally setting inherently discriminatory conditions of employment, such as a requirement that all employees hold certain religious beliefs when those beliefs are not objectively relevant to the role in question. (This could also be done by repealing the defence insofar as it applies to religious bodies and educational institutions, and instead merging it with the new narrower exemptions suggested in recommendation 3).

RECOMMENDATION 10

In addition to recommendation 3, narrow the application of section 90 and 109(1)(d) of the Act to discrimination based on the attribute of religion only, and for section 90, to accommodation for or connected to religious purposes only.

7. NOT-FOR-PROFIT ORGANISATIONS

As set out in the Discussion Paper, currently only Queensland and Tasmania permit discrimination by a wide range of not-for-profit entities providing goods and services,[59] instead of having more specific exemptions for different

[59] See Discussion Paper, p. 125.

'voluntary bodies' as seen in other jurisdictions such as the ACT.[60] Section 46(1) of the Act prohibits discrimination in the provision of goods and services. However, section 46(2) provides exemptions from this prohibition for non-profit associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes. This exclusion is broad and as noted in the Discussion Paper, has been confirmed to apply in some cases to private hospitals, sporting bodies and hospitality venues run by clubs.[61]

Many significant organisations are run on a not-for-profit basis, but otherwise provide important services and goods to the general public. We would therefore support removing the exclusion in section 46(2). If an exemption is necessary at all, we would suggest considering a narrower 'voluntary bodies' exemptions approach, similar to that in the ACT, which allows for discrimination with respect to admission to membership and benefits, facilities and services received as members, but not when services are being provided to the public.

RECOMMENDATION 11

Ensure that the Act applies to not-for-profit organisations delivering goods and services to the general public.

8. ASSISTED REPRODUCTIVE TECHNOLOGY SERVICES

Section 45A of the Act currently permits service providers offering assisted reproductive technology (**ART**) services to discriminate against people on the grounds of sexuality and relationship status. This section should be repealed for two key reasons.

First, it is the love, care and security that a person is able to provide to a child which determines their capacity to parent, not their sexuality or relationship status.[62] Assisted reproductive technology services should be made available to those that need them without discriminatory assumptions being made about their fitness to parent because of their sexuality or relationship status.

Secondly, as found in *McBain v Victoria*,[63] the federal *Sex Discrimination Act 1984* (Cth) already prohibits ART service providers from discriminating against a person based on their sexuality or relationship status. Accordingly, section 45A does nothing more than prevent a Queenslander who has experienced unlawful discrimination from making a complaint via the cheaper, more accessible Queensland discrimination framework, instead of through the Commonwealth system. This provision does not (and cannot) override the obligations placed on Queensland ART providers by the *Sex Discrimination Act*; all it does is make it harder for a person who has suffered discrimination from accessing a remedy.

RECOMMENDATION 12

Repeal section 45A of the Act.

9. WORKING WITH CHILDREN

By the words of subsection 28(1), Queensland is the only jurisdiction which specifically allows discrimination against transgender people in work involving the care or instruction of children. This provision perpetuates the

---

[60] *Discrimination Act 1991* (ACT), ss 31 and 32.

[61] Ibid. See also *Haycox v The Uniting Church in Australia Property Trust (Q) trading as the Wesley Hospital* [2005] QADT 35, *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471, and *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.

[62] See e.g. Elizabeth Short et al (2007) *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A literature review prepared for the Australian Psychological Society*, August, Australian Psychological Society.

[63] [2000] FCA 1009.

harmful and offensive stereotype that children are inherently at risk around transgender people. This provision also treats people who are sex workers in the same manner.

We support the repeal of section 28(1) because it is not necessary. This is because, any employer who refuses work to someone because they would pose a risk to children in their care or instruction, would never be found to have discriminated against them. An employer taking steps to protect children would always be found to be acting reasonably for the purposes of indirect discrimination, and would never be directly discriminating against anyone, because it is a general requirement that applies to everyone.

Rather than protect children, this provision diverts attention away from where the risks to children truly lie. It suggests that transgender people and sex workers are more likely to pose a risk to children than a sex offender or a person who has not undertaken the requisite training or education necessary to provide appropriate care and instruction to children.

RECOMMENDATION 13

Repeal subsection 28(1) of the Act.

BEST PRACTICE REFORMS TO THE ACT

After the fundamental deficiencies of the Act are addressed and existing carve-outs are narrowed, Queensland can also take steps to ensure that its Act becomes a best practice model for other states and territories to emulate. It can do so by implementing a positive duty, considering an equality before the law provision, and renaming the Act to emphasise its renewed promise and intention of equality for all.

10. 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,[64] the notion of a positive duty is not new in Queensland. For example, the *Human Rights Act 2019* (Qld) 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.[65]

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;[66]
- workplace gender equality, where positive duties are imposed on certain employers to make reports including about remuneration;[67]
- 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;[68]
- financial service obligations, where reporting entities have positive duties to monitor and report customer transactions, including suspicious matters;[69]
- 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.[70]

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.

---

[64] *Equal Opportunity Act 2010* (Vic), s 15.

[65] *Human Rights Act 2019* (Qld), s 58(1).

[66] *Work Health and Safety Act 2011* (Qld), ss 19-29.

[67] *Workplace Gender Equality Act 2012* (Cth).

[68] *Modern Slavery Act 2018* (Cth), s 16.

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

[70] E.g. *Child Protection Act 1999* (Qld) ss 13E-13F,

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,[71] 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.

Queensland could also draw from the UK experience in considering a positive duty not only to eliminate discrimination but to promote equality.[72] 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.[73]

---

[71] See for example, Australian Consumer Law, s 79B.

[72] *Equality Act 2010* (UK), s 149.

[73] *Equality Act 2010* (UK), s 149(3).

RECOMMENDATION 14

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.

11. 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. Queensland may wish to consider a stronger protection that allows individual to challenge discriminatory laws or orders.

There may be scenarios where a law, or court or tribunal order, results in discrimination, and section 106 of the Act provides a defence, allowing a person to rely on that law or order notwithstanding its discriminatory effect.

An example of this is the case of *Lyons v Queensland*, where the High Court dismissed a claim by Ms Lyons, who was profoundly deaf, that she was unlawfully discriminated against from being entirely excluded from eligibility for jury service.[74] The High Court considered the interpretation of section 106. What the case ultimately shows is that discrimination which is based in the provisions of a particular law, cannot be properly challenged by the *Anti-Discrimination Act*. This leaves people like Ms Lyons with only a political solution to a case of legal discrimination.

[74] *Lyons v Queensland* [2016] HCA 38.

To address circumstances like those raised in *Lyons*, Queensland may wish to consider 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 this approach is taken, then an exception similar to in section 13 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')[75] may be needed.

If an equality before the law provision were introduced into the Act, Queensland 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 discriminatory and providing legislators with a specified time period to address the discrimination 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 15

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 that discriminates against them based on a protected attribute.

12. RENAMING THE 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. Once the recommended changes are adopted, the Act should be renamed the Equality Act.

RECOMMENDATION 16

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

[75] *Human Rights Act 2019* (Qld), s 13.

SCHEDULE: RESPONSES TO DISCUSSION PAPER QUESTIONS

This section provides our response to key discussion paper questions which relate to our areas of expertise. Where we have not commented on a question, that should not be taken that we do not support expanding the Act to promote equality. We broadly support other stakeholders in their mission to expand the Act to ensure protection for all.

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
Discussion question 1: Direct or Indirect?		
1.	Should the Act clarify that direct and indirect discrimination are not mutually exclusive?	Yes, see our proposed definition of discrimination in section 4 above.
Discussion question 2: Direct Discrimination		
2.	Should the test for discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?	We support the unfavourable treatment approach adopted in the ACT and Victoria, alongside other amendments to the definition of discrimination. See section 4 of our submission.
3.	Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?	As set out in section 4 of our submission, we suggest defining discrimination to mean any of the following: • Harassment based on an attribute or combination of attributes; • Direct discrimination (with the definition amended to (1) remove the comparator test; (2) ensure it applies to a combination of attributes and (3) ensure that it does not require an attribute to be a substantial reason for the treatment. We also suggesting considering reversing the burden of proof once a *prima facie* case of direct discrimination is established); • Indirect discrimination (with the definition amended to (1) adopt a 'likely to disadvantage' test and (2) apply to an attribute or combination of attributes); and/or • Such other alternative tests based on the international definition of discrimination or other international examples.

NO.	QUESTION	RESPONSE
Discussion question 3: Indirect discrimination		
4.	Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?	We support adoption of the 'likely to disadvantage' test and ensuring it can apply to an attribute or combination of attributes. See section 4(b) of our submission above.
5.	Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?	See above our response to items 3 and 4.
Discussion question 4: Unified test		
6.	Do you support a unified test for both direct and indirect discrimination? Why or why not?	No, but we support including other tests as part of a new expanded definition of discrimination that allows alternative pathways to proving discrimination. The key reason for this is to ensure relevant jurisprudence is not entirely displaced. See section 4 of the submission.
Discussion question 5: Special services or facilities		
7.	Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? If so, in which areas?	This exemption applies under Commonwealth law to the attribute of disability under the *Disability Discrimination Act 1992* (Cth). It is focussed on financial hardship and therefore would not be particularly relevant or appropriate applying to other attributes. The Queensland definition in section 5 of the Act is too broad. We would encourage consultation with organisations representing people with disability who are most likely to experience the impacts of this exemption. If the exemption is to be retained, to ensure consistency with Commonwealth law, it should not apply to attributes other than disability and should be narrowed only to deal with financial hardship.
8.	Should the factors relevant to determining unjustifiable hardship be redefined, and if so how?	See above our response to item 7.
9.	How can the compliance costs for business and organisations be appropriately considered and weighed?	See above our response to item 7.

NO.	QUESTION	RESPONSE
Discussion question 6: Reasonable accommodations beyond disability		
10.	Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'? If you consider that this approach should be adopted: • Should this be a standalone duty? • What factors should be considered when assessing 'reasonableness' of accommodations? • Should it apply to disability discrimination, other specific attributes, or all attributes? • Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation? How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?	A duty to make reasonable adjustments or accommodations is implied within the test of indirect discrimination. Accordingly, a new standalone duty of this kind is unnecessary, and it would be uncertain how such a standalone duty would interact with the definition of direct discrimination or the exemption for unjustifiable hardship. Instead, we suggest the adoption of 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. This would amplify the existing obligations under the Act, including a proactive obligation to eliminate indirect discrimination by making reasonable adjustments and accommodations. See section 10 of this submission.
Discussion question 7: Discrimination on combined grounds		
11.	Is there a need to protect people from discrimination because of the effect of a combination of attributes? If so, how should this be framed in the Act?	Yes, see our proposed definition of discrimination in section 4 of our submission.
12.	Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds?	Yes, see our proposed definition of discrimination in section 4 of our submission.
13.	What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?	The comparator test in direct discrimination claims makes discrimination on combined or intersecting grounds very difficult to prove. This is because there are other groups with similar experiences of disadvantage which can end up cancelling each other when comparisons need to be made. One way to address this is to consider a "because of" / "based on" an attribute or combination of attributes test, so the focus is not on a comparison with others but

NO.	QUESTION	RESPONSE
		remains about whether the unfavourable treatment can be connected to the attribute or combination of attributes of the complainant.
Discussion question 8: Burden of proof		
14.	Should the onus of proof shift at any point in the process? If yes, what is the appropriate approach?	We can see merit in shifting the burden of proof after a *prima facie* case of direct discrimination has been established by a complainant. The key reason for this is that rationales are not often given for refusals of employment, goods or services, so a complainant will not know whether discriminatory rationales were part of the reason for the conduct. In such cases, complainants must build an inferential case to prove a discriminatory reason underpinned the treatment they received. This is extremely difficult to do. By shifting the burden of proof it means that, once a complainant has shown that a discriminatory rationale may have underpinned the treatment, it is up to the respondent to establish that discriminatory rationales were not part of their conduct. They hold the relevant knowledge and material to be able to prove this, while the complainant will not often do so. However, careful statutory drafting work would be needed to make clear how and when the burden should shift.
Discussion question 9: Meaning of sexual harassment		
15.	Should a further contravention of sex-based harassment be introduced? If so, should that be applied to all areas of activity under the Act?	All harassment should be included as a form of discrimination under the Act, similar to the approach taken in *Anti-Discrimination Act 1992* (NT). See section 4(a) of our submission.
16.	Should the Act explicitly prohibit creating an intimidating, hostile, humiliating, or offensive environment on the basis of sex? If so, should that apply to all areas of activity under the Act?	As set out in section 4(a) and 5(b) of our submission, we suggest: • defining harassment as a form of discrimination applicable to all attributes, not just sex; • introducing a new harm-based protection for conduct, based on an attribute or combination of attributes, that humiliates or intimidates a person, or 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.

<table>
<tr><th>NO.</th><th>QUESTION</th><th>RESPONSE</th></tr>
<tr><td colspan="3">Discussion question 10: Two-stage enforcement model</td></tr>
<tr><td>17.</td><td>Should the Act include a direct right of access to the tribunals?</td><td>We would support the Commission having a discretionary power allowing it to permit a complainant or respondent to take their complaint directly to a tribunal, however we would not support a direct right of access to tribunals in every case.

The discretion could be exercised in cases where for example:
• The matter requires more urgent action;
• The matter raises an important issue of law or policy, or has implications for other people or cases;
• The matter would not be appropriate for conciliation (for example, because of allegations of violence).

This approach would ensure that the accessibility, affordability and informality of the current complaints process is preserved, while allowing appropriate cases to go directly to the tribunal. It could be used in circumstances where the impugned conduct is serious, the matter is in the public interest, or where the relationship between the parties has deteriorated to a level where conciliatory processes will not provide an effective and appropriate resolution.</td></tr>
<tr><td>18.</td><td>Should a complainant or respondent be entitled to refer the complaint directly to a tribunal?</td><td>We would support a complainant or respondent be given the right to seek permission from the Commission for a complaint to be referred directly to a tribunal in appropriate cases. See response to item 17 above.</td></tr>
<tr><td>19.</td><td>Should a person be entitled to apply directly to the Supreme Court where the circumstances of a complaint raises matters of significant public interest? If so:
• Should it be confined to certain matters?
• What remedies should be available to the complainant?

Who would have standing to bring the complaint?</td><td>We would be cautious in supporting a model that allowed direct applications to the Supreme Court unless it had some important caveats, such as protections against adverse costs and support for complainants in the event a respondent seeks to refer a matter to the Supreme Court. A better approach may be to vest the Commission or some other enforcement agency with the ability to prosecute issues before the Supreme Court on issues of significant public interest rather than individuals.

Enabling direct applications to the Supreme Court carries significant cost implications, making the cost of resolving a complaint more expensive for both parties – but would most likely work against the interests of the less resourced party. It could therefore result in the process functioning as a deterrent for complainants altogether, as well-resourced respondents seek to refer a dispute to</td></tr>
</table>

NO.	QUESTION	RESPONSE
		the more expensive, higher risk forum of the Supreme Court in order to stifle the complaint or encourage the complainant to discontinue with their complaint.
20.	What are the risks and benefits of any direct right of access?	The key risks of direct rights of access include: • increased costs for all parties involved; • it may reduce the prospects for an early resolution; • increases the adversarial nature of complaints resolution; • can be used by one party to maintain a strategic advantage over the other party, by increasing the costs or profile of the matter. The key benefits of direct rights of access include: • the potential for securing a remedy in cases where urgent relief is needed; • the potential for jurisprudence over time that set precedents for others; • allows tests cases that set a standard for all. We think the benefits of a direct right of access to the Supreme Court would be outweighed by the risks, particularly for poorly resourced parties.
21.	What circumstances could this right of access apply to?	We suggest that the Commission or some other enforcement agency be given the power to prosecute issues before the Supreme Court on issues of significant public interest rather than individuals. If a right of direct access to the Supreme Court is to be given to individuals, we suggest some important caveats to protect the interests of poorly resourced parties, such as: • protection against adverse costs orders; • relaxing the formal rules of evidence; • the availability of legal aid or other legal support; • limiting the types of matters which can be brought in the Supreme Court (e.g. only those which raise matters of significant public interest on an important issue of law, or which require urgent resolution); • requiring there to be compelling reasons for the Supreme Court hearing the matter rather than the tribunal.

NO.	QUESTION	RESPONSE
		In any case, the Supreme Court should have the ability to strike out vexatious or unmeritorious claims.
22.	How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims?	See response to item 21.
Discussion question 12: Written complaints		
23.	Should non-written requests for complaints be permitted, for example by video or audio?	Yes, provided that a respondent is provided sufficient detail to understand the complaint and is able to adequately respond. Allowing for non-written requests can ensure access to justice, particularly in the cases of persons who have difficulties communicating in written English. For example, the ACT allows for complaints to be made orally where the Commission is satisfied, on reasonable grounds, that exceptional circumstances justify action without a written complaint (for instance, where waiting until the complaint is put in writing then lodged would make an action in response to the complaint impossible or impractical).[76]
24.	Alternatively, should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing?	Yes, provided that the Commission can balance two competing considerations. The first is to ensure people who suffer discrimination can access a remedy. The second is to ensure that the Commission maintains its neutrality against claims or perceptions of bias. One option is to set up an advocate role independent from the Commission whose role is to assist complainants in making their complaints. This protects the Commission against accusations of actual or perceived bias, which can undermine the authority or legality of its decision-making functions. Another option is adopting the ACT approach of allowing the Commission to provide reasonable assistance in circumstances where a person cannot put their complaint in writing or has difficulty with doing so: *Human Rights Commission Act 2005* (ACT) s 44(3).

[76] *Human Rights Commission Act 2005* (ACT), s 44(4).

NO.	QUESTION	RESPONSE
25.	How would this impact on respondents?	The impact on respondents will depend on how the Commission is empowered to assist complainants while maintaining its neutrality.
26.	How can the right balance be achieved between ensuring certainty for the respondent about the contents of the complaint while addressing the barriers to access?	Allowing the Commission to assist in articulating the complaint may help respondents better understand what the complaint is about. However, it may also raise a perception that the Commission is biased because it is assisting one of the parties. One option is therefore to allow the Commission to also assist a respondent who cannot put their response in writing or has difficult with doing so. Another option is to ensure that the Commission must be open with the respondent about the assistance it has provided the complainant, so that there is transparency and accountability if the Commission oversteps its functions and is accused of taking sides. This becomes particularly important if the Commission's enforcement functions are boosted in other areas.
Discussion question 13: Efficiency and flexibility		
27.	How can the law be adapted to allow a more flexible approach to resolving complaints?	We would support giving the Commission some discretion in how it progresses complaints to suit the individual needs and circumstances of the matter, subject to a broader requirement for the Commission to ensure procedural fairness to all parties and that matters be resolved as efficiently as possible. Ways that can be achieved include: • making available a broader range of resolution pathways, including early intervention options; • giving the parties an opportunity to express preferences on particular resolution pathways with the Commission required to consider those preferences when deciding on the approach it will take; • ensuring the Commission has the power to manage vexatious or unmeritorious complaints at the outset; • ensuring the Commission publishes a guide on how it will triage complaints and seek to assist in their resolution;

NO.	QUESTION	RESPONSE
		• requiring the Commission to use its best efforts to finish dealing with complaints within a particular timeline, or otherwise refer the complaint to the tribunal or terminate it.
28.	Should the current provisions that require set notification and conference timeframes be retained, changed or appealed?	See our response to item 27.
29.	Should all complaints proceed through the same conciliation model, or should early intervention be an option?	See our response to item 27.
30.	What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?	See our response to item 27.
Discussion question 14: Legislative timeframe and process		
31.	Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?	1 year is a common timeframe seen in most jurisdictions in Australia.[77] By way of comparison, this is a short timeframe when compared to most common law actions but a longer timeframe when considering the timeframes set by the *Fair Work Act 2009* (Cth). The timeframe for complaints made under the *Sex Discrimination Act* has recently been extended to 2 years.[78] We would support the extension of the timeframe, such as to 2 years. In our experience of cases we have assisted, it can often take complainants some time to get legal advice and decide whether to make a complaint, particularly where they have lost their job and are looking for another, and/or have suffered significant mental harm from the discriminatory treatment. Extending the timeframe would likely give complainants more time to decide whether they want to bring a complaint or move on with their life, rather than actually increasing the number of complaints. It would also reduce pressure on prospective complainants to bring a complaint which may not have good prospects before they have had time to seek legal advice.

[77] Discussion Paper, p 58.

[78] *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1)(b)(i).

NO.	QUESTION	RESPONSE
32.	Should there be special provisions that apply to children or people with impaired decision-making capacity?	The Commission should have the ability to extend time limits for complaints in appropriate cases as determined by the circumstances surrounding the complaint and the complainant's ability to submit a complaint.
33.	Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?	The Commission should have a discretion to extend the timeframe by considering the impacts on both the complainant and the respondent. The key considerations should be the nature of the complaint, the reasons for the complainant's delay and any irremediable prejudice to the respondent in being able to respond to the complaint.
34.	Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?	Yes, because it is a more accessible and affordable option than the Supreme Court.
Discussion question 15: Representative complaints		
35.	Are there any changes that would improve the accessibility and utility of representative complaints?	In our experience, the difficulty of mounting representative complaints stems from the need for an individual to prosecute the case on behalf of a class of individuals. There are many practical challenges that make this an unattractive option for individuals, including the cost and complexity of representative actions. To improve the accessibility and utility of representative complaints, consider: • giving the Commission or another enforcement agency the ability to prosecute a case when systemic or serious issues arise; • give standing to representative organisations that advocate on behalf of the affected group, such as disability or LGBTIQ+ rights organisations, who can bring the complaint themselves on behalf of the class of people they represent.
36.	What factors influence the capacity for affected people to assert their rights as a representative complaint?	Factors influencing affected people's capacity to assert their rights through a representative complaint include: • knowledge of their rights to utilise this avenue for recourse; • the representative complainant not having a clear idea of what requirements need to be met or how to meet them for the complaint to be considered;

NO.	QUESTION	RESPONSE
		• time and resource constraints when trying to gather evidence or construct a class; • divergence of opinions within the representative class members on the best course of action forward; • ability to get legal advice or funding for the case.
Discussion question 16: Organisation complaints		
37.	Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?	Yes. Enabling not-for-profit representative organisations to have standing to bring complaints on behalf of a representative class allows for resources and expertise to be pooled to address systemic discrimination and reduces the burden on affected individuals. Representative bodies are also more likely to take forward cases that have impacts on a broader class of people, given they see the systemic and structural issues affecting their communities. Organisations are more likely to be able to secure pro bono legal support and funding, and if closely connected with their communities, are able to take forward cases sensitively, alive to the implications of winning or losing the case on the affected population as a whole.
38.	Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?	Complaints by not-for-profit representative organisations should be able to proceed to the tribunal.
Discussion question 17: Complaints by prisoners		
39.	Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?	As a matter of principle, prisoners should not face additional barriers in making complaints relative to the general population. Prisoners who experience discrimination deserve the same protection as everyone else, particularly given they may be vulnerable to misconduct in an environment where their agency is limited.
Discussion question 19: Objectives of the Act		
40.	What should be the overarching purposes of the Anti-Discrimination Act?	The purposes of the Act should reflect the new positive duties being introduced, with which are focused on preventing discrimination and promoting equality, rather than only addressing discrimination after discriminatory conduct has already taken place.

NO.	QUESTION	RESPONSE
41.	Should an objects clause be introduced? If so, what are the key aspects that it should contain?	We have no objection to an objects clause provided it does not create a hierarchy of rights where some are prioritised over others. For example, we would oppose provisions, such as those proposed in the One Nation NSW Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020,[79] which sought to prioritise religious considerations over other human rights, or which cherry-pick certain international human rights principles for special consideration. However, the introduction of an objects clause cannot materially amend an Act. Accordingly, the substantive provisions of the legislation must itself address inadequate discrimination protections, as discussed in our submission.
42.	If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?	Yes, see section 12 of our submission.
Discussion question 21: Positive duties		
43.	Do you support the introduction of a positive duty in the Anti-Discrimination Act?	Yes, see section 10 of our submission.
44.	Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?	Yes, see section 10 of our submission above. The aim of a positive duty is to prevent discrimination and promote equality. It should apply to all duty holders in respect of all their obligations under the Act.
45.	Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?	Positive duties should apply to all attributes and to all areas of activity, but the duty itself can be framed to accommodate differences in the size and scope of different duty holders. See section 10 of our submission above.
46.	Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?	Yes, see section 10 of our submission above. The positive duty is a natural extension of the obligations placed by the Act.
47.	What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is	While there may be some overlap between WHS laws and a positive duty to promote equality, insofar as both deal with the employment area, those duties are differently framed and would be enforced by different agencies. There is benefit is having a

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

NO.	QUESTION	RESPONSE
	introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?	specialist agency with expertise in discrimination law enforcing a positive duty to promote equality.
48.	What matters should be considered in determining whether a measure is reasonable and proportionate?	See section 10 of our submission.
Discussion question 22: Role of the Commission		
49.	Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?	Yes, the positive duty will require a regulatory agency with the power to enforce compliance. See section 10 of our submission.
50.	If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role?	One option is to set up an independent entity (such as an Equality Ombudsman), or a separate unit within the Commission or another department, with an independent regulatory and enforcement function. The separation of the Commission's complaints-handling and decision-making functions, from the regulatory and enforcement function, will ensure the Commission can continue to educate and engage openly with duty holders and resolve complaints without perceptions of actual or perceived bias.
51.	What should be the core components of the regulatory model, and what mechanisms and powers should it include?	As outlined in section 10 of our submission, we support adopting a spectrum of powers from educative through to enforcement powers. This ensures the regulatory response can be tailored to the circumstances.
52.	What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation?	As outlined in section 10 of our submission, we support a range of regulatory responses, including the ability to issue guidance to support compliance. We suggest a duty that is flexible enough to take into account the size of the organisation in determining what steps should be taken to prevent discrimination and promote equality.
53.	If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion?	We suggest an expansion of the Commission's powers, or the powers of another agency or unit, to ensure the positive duty can be enforced. See our response to item 50.

NO.	QUESTION	RESPONSE
Discussion question 23: Role of the tribunals		
54.	Should there be a specialist list for the tribunals?	Discrimination matters should be treated sensitively and consistently by decision-makers with appropriate skills and expertise in this complex and technical area of law. If specialisation would facilitate that approach, we would support the introduction of a specialist list system.
55.	If so, what would the appropriate qualifications be for a tribunal decision-maker?	If a specialist list is adopted, tribunal decision-makers should include members with the protected attributes. There should also be a strong representation of persons with technical experience in discrimination law or policy.
56.	Should a uniform set of procedural rules be developed to apply across both tribunals?	Not necessarily. While uniform rules may be beneficial in some circumstances, simplifying processes may be more beneficial for ensuring accessible and affordable justice in other circumstances.
57.	Should the tribunals be required to publish all decisions/substantive decisions?	Yes, subject to protecting the privacy of individuals where relevant (for example, through the use of pseudonyms for the parties and removing certain identifying details).
58.	Could data sharing be permitted and encouraged between Commission and tribunals to form a better overall picture?	Yes, subject to protecting the privacy of individuals where relevant and ensuring that any data sharing does not give rise to perceptions of bias. It would be better if the tribunal were required to make public de-identified data rather than liaising with the Commission in ways that may appear to undermine its independence.
59.	On what basis should the Commission be permitted to intervene in proceedings under the Anti-Discrimination Act. Should leave of the court or tribunal be required? Why or why not?	The Commission should have the same intervention powers as vested in it by the *Human Rights Act 2019* (Qld), which means it should be able to intervene in proceedings without leave where a question of law arises under the Act. Separate to this, we see a regulatory and enforcement role for an independent entity or unit, as set out in our response to item 50 above.
Discussion question 24: Non-legislative matters		
60.	What non-legislative measures are required to ensure protections under the law are available to everyone?	There should be support for people bringing claims, including additional earmarked funding granted to Legal Aid or community legal centres to provide advice and representation for complainants who are financially disadvantaged.

NO.	QUESTION	RESPONSE
Discussion question 26: Gender identity		
61.	Should there be a new definition of gender identity, and if so, what definition should be included in the Act?	Yes, see section 1(b) of our submission.
Discussion question 27: Sexuality		
62.	Should there be a new definition of sexuality, and if so, what definition should be included in the Act?	Yes, see section 1(a) of our submission.
Discussion question 29: Other current attributes		
63.	Does the terminology used to describe any existing attributes need to be changed?	Yes, see section 3 of our submission regarding the attributes of 'parental status', 'family responsibilities' and 'relationship status' (and associated defintiions).
64.	For attributes that have a legislative definition in the Act, do those definitions need to change?	Yes, see sections 1 to 3 of our submission regarding the attribute of sex, sexuality, gender identity, parental status, family responsibilities and relationship status.
65.	For attributes that do not have a legislative definition, should a definition be introduced?	Potential pregnancy should be included within the attribute of pregnancy and should be defined by reference to the capacity of a person to fall pregnant.
66.	Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?	We would have no objection to this proposal which is consistent with the *Disability Discrimination Act 1992* (Cth). We recommend consulting with organisations representing affected persons.
Discussion question 30: Criminal history		
67.	Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?	Expunged homosexual convictions should not be treated under the same attribute as criminal history. This is because an expunged conviction should be treated as never having existed in the first place. This would recognise that, for this class of historical offence, it is unjust to treat the person as having had any criminal history – because they never should have been treated as a criminal at all. We would support a separate and independent attribute for discrimination on the basis of an expunged conviction within the meaning of the *Criminal Law (Historical*

NO.	QUESTION	RESPONSE
		Homosexual Convictions Expungement) Act 2017 (Qld), such as the approach taken in Victoria.[80] Discrimination should not be permitted on the grounds of these expunged convictions, including in relation to Working with Children checks.
68.	How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?	See response to item 67.
Discussion question 35: Gender		
69.	Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?	We do not support introducing 'gender' as an additional attribute separate to and distinct from the attribute of 'sex' for the reasons in section 2 of our submission.
Discussion question 36: Sex characteristics		
70.	Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?	Yes, see section 1(b) of our submission.
Discussion question 37: Being subject to domestic or family violence		
71.	Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?	If this additional attribute is introduced into the Act, it is important that the definition of domestic and family violence recognises a broad range of circumstances in which domestic and family violence can occur, including from people who live with or are related to another person and who are not necessarily intimate partners or legally recognised as members of a family, such as members of a household, flatmates or people formerly in those relationships. Our 2020 research revealed that families of origin were a significant source of violence experienced by LGBTIQ+ people, in addition to intimate partners and housemates, and that 12.2% of LGBTIQ+ respondents were at risk of domestic or family violence. Certain LGBTIQ+ population groups, such as those who were under

[80] *Equal Opportunity Act 2010* (Vic) s 6(pa).

NO.	QUESTION	RESPONSE
		25 years, who were not 'out' about their sexuality, and/or who were trans or gender diverse were more likely to be at risk.[81] Currently, the familial definitions in the Act are likely to exclude people who do not have legal recognition of their relationships, such as co-parents in three or four parent households or others who are not legally recognised as parents/children but are members of chosen or kinship family structures. They may also exclude companions or people in caring but not couple relationships. The problematic definitions include: • the definition of 'family responsibilities', which is dependant on first being recognised as the 'child' of a person or a member of the person's 'immediate family'. Each of these terms has limited application to people in diverse familial structures; • the definition of 'parent' (and the use of the term 'child'), which is likely to be limited to legally recognised relationships formed through marriage, adoption, fostering or guardianship orders, but may not recognise people whose parental roles are not legally assumed or formulised through parental orders (e.g. a known donor and co-parent, the third and/or fourth parent in a co-parenting arrangement) • the definition of 'immediate family', which relies on tracing relationships through blood, marriage or legal recognition, and appears to be even narrower than the definition of a 'parent'; • the definition of 'relation', which makes it unclear a person who is recognised as a member of the person's family is related by 'affinity', if they are not related by 'blood, marriage… or adoption'. See section 3 of our submission.

[81] Equality Australia and Centre for Family Research and Evaluation, Drummond Street Services (2020) *There's No Safe Place at Home: Domestic and family violence affecting LGBTIQ+ people*.

NO.	QUESTION	RESPONSE
Discussion question 40: Sport		
72.	Should the sport exemption be retained, amended, or repealed?	Sport must find a place for everyone, and we are concerned that the existing exemptions mean that non-binary people can be excluding entirely from sporting competitions, while trans women and intersex people may find it very difficult to participate in sport. For that reason, we think that subsection 111(1)(a) should be amended and subsection 111(3) repealed. As currently framed, the interpretation of these sections is uncertain. Section 111(1)(a) uses binary gendered language, making it unclear whether the terms 'male' or 'female' refer to a person's affirmed gender or has some other meaning, and whether it is intended to exclude non-binary people altogether. As a result, these sections may have the effect of excluding trans, gender diverse and intersex people from participation in sports split along gendered lines. By way of comparison, the ACT allows discrimination in sport based only on the ground of sex (but not on the basis of gender identity or sex characteristics). This at least ensures that trans and intersex women and trans and intersex men can compete in sporting competitions that align with their gender. Secondly, the emphasis on strength, stamina and physique in this exemption is unnecessary. This is because the legal definitions of discrimination already give sports organisers the ability to impose reasonable conditions or requirements, even if they disadvantage a protected group. For example, with only a sex-based exemption, an organisation could impose a rule saying that all women who wish to participate must meet certain physical requirements, provided they show that those physical requirements are reasonable and they do not specifically rule out only trans and intersex female competitors. Accordingly, no specific exemptions seem to us to be necessary. Finally, if section 111(1)(a) is to be retained, it should be narrowed to the attribute of 'sex' only and the test on strength, stamina or physique should be amended to also allow consideration of the impact on the person being excluded. A more appropriate test may be whether or not the restriction based on strength, stamina or physique is reasonable and proportionate in all the circumstances of the case, including taking into account the impact on the person being excluded and other sporting participants.

NO.	QUESTION	RESPONSE
73.	Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?	See response to item 72.
Discussion question 41: Discrimination based on religious doctrine and religious sensitivities		
74.	Should the scope of the religious bodies' exemption be retained or changed?	The scope of religious bodies' exemptions should be narrowed. See section 6 of our submission.
75.	In what areas should exemptions for religious bodies apply, and in relation to which attributes?	See section 6 of our submission.
Discussion question 42: Religious service providers		
76.	Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?	See section 6 of our submission. While we consider the ability for religious bodies to discriminate should be narrowed (particularly if services are government funded), we do not think that the presence of government funding is a helpful legal test to adopt. We have suggested a more nuanced approach.
Discussion question 43: Religious accommodation providers		
77.	Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises?	No, see section 6 of our submission.
Discussion question 44: Genuine occupational requirement – religious schools and other bodies		
78.	Should the religious educational institutions and other bodies exemption be retained, changed, or repealed?	These provisions should be changed or repealed, as set out in section 6 of our submissions above.
79.	If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?	See section 6 of our submission.

NO.	QUESTION	RESPONSE
Discussion question 45: Working with children		
80.	Are there reasons why the work with children exemption should not be repealed?	No, the exemption should be removed. See section 9 of our submission.
Discussion question 46: Assisted reproductive technology services		
81.	Are there reasons why the Act should not apply to provision of assisted reproductive technology services?	No, section 45A should be repealed. See section 8 of our submission.
Discussion question 52: Non-profit service providers		
82.	Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed?	It should be changed, see section 7 of our submission.
Discussion question 54: Sport		
83.	Should a separate area of activity for sport be created?	Yes.
84.	What are examples of where the sport area would cover situations not already covered in other areas?	It would make it clearer that sport is covered as a regulated area (particularly for participants), without the need to rely on showing a connection with a service, good or facilities. An example would be participating in a competition for no fee or reward, or being selected as a member of a team.
85.	What exemptions should apply (if any) to sport if, it were to become a new protected area of activity?	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. See response to item 72.
Discussion question 56: Human rights analysis		
86.	Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate?	The following human rights set out in the International Covenant on Civil and Political Rights (**ICCPR**), and where applicable, their equivalent expressions in the Queensland *Human Rights Act* (**HRA**), are particularly relevant to this discussion:

NO.	QUESTION	RESPONSE
		• ICCPR Article 2(3): the duty of governments to ensure that people access to remedies when their rights have been violated, and these remedies will be enforced when granted (HRA s 15); • ICCPR Article 26: equality and non-discrimination before the law [HRA s 15]. • ICCPR Article 7: freedom from cruel, inhuman or degrading treatment or punishment (HRA s 17(b)); • ICCPR Article 17: right to privacy (HRA s 25(a)); • ICCPR Article 9: right to liberty and security (HRA s 29(1)); • ICCPR Article 18: right to freedom of thought, conscience and religion (HRA s 20(1)); and • ICCPR Article 23, read together with article 2(1): the right to found a family without discrimination (HRA, s 26(1)). As recognised internationally, these protections extend to people on the basis of sexual orientation, gender identity and sex characteristics. This position has been supported in a number of international decisions and commentary, including in the UN Human Rights Committee decisions of *Toonen v Australia* (1994) and *G v Australia* (2017), the *Yogyakarta Principles*, and reiterated in the UN OHCHR's 'Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law' (Second Edition, 2019). All reforms proposed in this table and our above submission relate to the rights to have access to remedies when breaches of human rights have occurred, and equality before the law. Improving the definitions of attributes and the definitions of discrimination, as well as new protections designed to respond to hate-based conduct, would ensure access to remedies for people who have faced discrimination or breaches of their human rights. Protections against hate-based conduct would also: • further protect the rights of people not to have their privacy, family or homes unlawfully or arbitrarily interfered with; and

NO.	QUESTION	RESPONSE
		• engage the freedom from inhuman or degrading treatment, which is covered under both the ICCPR article 7 and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; • further secure the right of security and liberty, as well as other rights such as the right to expression without discrimination; • promote ICCPR article 20(2) which prohibits advocating 'national, racial or religious' hatred that incites discrimination, hostility or violence. The recommendations in section 6 of our submission concerning religious bodies or educational institutions further the freedom of thought, conscience and religion by ensuring there is a proportionality assessment that allows consideration of an individual's right to their own thought, conscience or religion when they are employed or rely on the services provided by a religious organisation. This would be a positive shift from the current state of affairs, where religious bodies have been allowed to dominate in unilaterally setting religious beliefs applicable to their employees and service users with regard for the individual rights of those employees and service users to their own freedom of thought, conscience and religion. The introduction of a proportionality test also imports the international law standard of balancing rights, so that there is a mechanism in the act by which Article 18(3) of the ICCPR can take effect. This ensures the freedom of thought, conscience and religion is balanced against the fundamental rights and freedoms of others, particularly the right to non-discrimination. Our proposed repeal of section 45A which enables ART service providers to discriminate on the basis of sexuality or relationship status, would strengthen the right to found a family without discrimination.
87.	Where rights are being limited to meet a legitimate purpose, are there any less restrictive and reasonably available ways to achieve that purpose?	We have suggested reforms that allow a better case-by-case assessment of competition human rights claims, so that no one's human rights are entirely displaced by broad exemptions that do not allow countervailing considerations to be taken into account.