THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Review of the *Equal Opportunity Act 1984* (WA)

Project 111 Discussion Paper

August 2021

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The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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FOREWORD FROM THE COMMISSION

For over 35 years the *Equal Opportunity Act 1984* (WA) (**the Act**) has helped to protect Western Australians from discrimination on many grounds and in many areas of life. We all expect that we shall be treated equally in society and that we shall not be discriminated against on the grounds of our race, age, sex, marital status, impairments or on other grounds. Part of why we have those expectations is because the Act tells us that to act otherwise is unlawful.

Statute law is an integral part of the framework within which people and institutions operate in the community. It tells us where the legal boundaries are, and it can help to set community standards of behaviour.

Yet many members of our community relate how they still experience discrimination because of their race, religion, sex, sexual orientation, impairment or other characteristics. Further, statistics tell us that some groups in our society are still treated inequitably. For example, the gender pay gap tells us that women as a group are discriminated against in some workplaces, and that steps that have been taken to address that discrimination have not been successful.

So, experience and statistics suggest that more could be done to protect and encourage the equal treatment which we expect, and to which we are entitled as members of the Western Australian community. It is reasonable to think that the Act could be changed and improved to help ensure that Western Australia continues to be a fair, respectful and non-discriminatory community.

It is against this background that the Attorney General for Western Australia referred to the Law Reform Commission of Western Australia (**Commission**) the task of determining whether there is a need for reform of the Act, and if so the scope of reform of the Act.

This Discussion Paper is an important step in the Commission's task. It is not intended as an exhaustive statement of the development of discrimination law in Western Australia, nor an analysis of all the case law in that area. It is designed to inform you about the most significant aspects of existing anti-discrimination law in Western Australia and elsewhere and other jurisdictions, to make you think about what improvements could be made to the existing law and to provoke you to tell the Commission your ideas and opinions on the very important topics covered by anti-discrimination laws.

The Commission is mindful that there are a range of different views in the community about many of the issues which are canvassed by this Discussion Paper. At this stage of the process, the Commission has not expressed definite views on what reform should look like, but rather seeks to allow interested parties to put forward their own views, which will form part of the Commission's consideration in issuing its final report on this important reference.

Early in the Commission's work on the reference it sought preliminary views from a range stakeholders. The Discussion Paper refers to many of the responses received by the Commission. The views expressed are those of the stakeholders identified and do not necessarily reflect the views of the Commission. They are included to provide the reader with the range of views on issues in the Act.

Thank you for taking the time to read the Discussion Paper and contribute to the process of law reform to make Western Australia a fairer and better place for all.

1. TERMS OF REFERENCE

1.1 Terms of Reference

The Commission assists in keeping the law up-to-date and relevant to the needs of society by making recommendations for the reform of areas of law referred to it by the Attorney General for Western Australia, the Honourable John Quigley MLA. The Commission is supported in its role by the Western Australian Department of Justice.

The Attorney General has instructed the Commission to review the Act in accordance with the Terms of Reference. The Terms of Reference say:

The Law Reform Commission of Western Australia is to provide advice and make recommendations for consideration by the Government on possible amendments to enhance and update the Equal Opportunity Act 1984 (WA) ('the Act') taking into account Australian and international best practices regarding equality and discrimination.

In carrying out its review, the Law Reform Commission should consider whether there is a need for any reform, and if so, the scope of reform regarding:

(a) *the objects of the Act and other preliminary provisions;*

(b) *the grounds of discrimination including (but not limited to) introducing grounds of gender identity and intersex status;*

(c) *the areas of public life to which the Act applies;*

(d) *definitions in the Act including (but not limited to) discrimination, harassment (including a requirement for disadvantage in a definition of sexual harassment), impairment (including a requirement to make reasonable adjustments for persons with an impairment), victimisation, services and employment;*

(e) *the inclusion of vilification, including racial, religious, sexual orientation and impairment vilification;*

(f) *the inclusion of a positive duty not to discriminate on grounds covered by the Act;*

(g) *exceptions to grounds of discrimination including (but not limited to) those for religious institutions;*

(h) *the burden of proof;*

(i) *the functions and investigative powers of the Commissioner for Equal Opportunity including (but not limited to) the functions of the Commissioner (either personally or by counsel) assisting complainants in the presentation of their case to the State Administrative Tribunal ('SAT');*

(j) *requirements around the referral of complaints to the SAT;*

(k) *the role and jurisdiction of SAT under the Act, including the requirement for leave if the complaint is dismissed by the Commissioner;*

(l) *interaction with the Commonwealth Marriage Amendment (Definition and Religious Freedoms) Act 2017 and with other relevant Commonwealth laws or proposed laws;*

(m) *any other element of the Act or other laws relevant to equal opportunity and non-discrimination; and*

(n) *any related matter.*

1.2 Background to Reference

The Act came into effect on 8 July 1985.

The first comprehensive review of the Act since its enactment was undertaken and completed by the Equal Opportunity Commission of Western Australia (**EOC**) in May 2007 (**2007 Review**). That review recommended that a number of extensive amendments be made to the Act. At the time, the EOC stated that any reform needed to be considered 'in light of trends and developments in equal opportunity law and

changes in community attitudes over the last twenty years'.[1] The 2007 Review found that although the Act was a front-runner in Australian discrimination law when it commenced operation in 1985, other States and Territories had since benefited from legislation with more modern drafting, incorporating more grounds of discrimination under the Act (**Grounds**) and areas of coverage.

The majority of the recommendations of the 2007 Review have not been adopted.

Since the 2007 Review, the most notable amendment to the Act was the introduction of a new Ground on the basis of breastfeeding or bottle feeding, which was introduced in 2010.[2]

A new Ground on the basis of publication on the Fines Enforcement Registrar's website was also introduced in 2012, although not specifically recommended by the 2007 Review.[3] In brief summary, if a person has accrued a threshold amount of unpaid fines and orders to pay or elect for infringement notices,, the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) empowers the Registrar to publish their name and other relevant details (including the amount they owe and the suburb where they live) on the Registrar's website. The new Ground was introduced to ensure that the publication of a person's name on the Registrar's website could not be used to discriminate against that person, including in relation to employment and accommodation.[4]

Five years after the 2007 Review, the then Western Australian Commissioner for Equal Opportunity appointed under s 75 of the Act (Equal Opportunity Commissioner) Yvonne Henderson, publicly spoke about the failure to implement the reforms suggested by the 2007 Review, commenting that the Act was 'lagging' behind anti-discrimination legislation in other States.[5]

In 2014, the Public Sector Commission also undertook a review of the Act, though with limited terms of reference.[6] The terms of reference for the review were 'to examine what organisational structures would enable the efficient and effective achievement of the objectives of the EO Act'.[7] The Public Sector Commission made four broad recommendations regarding:

(a) the structure and operations of the EOC;

(b) greater collaboration between the EOC and specified agencies, such as the Australian Human Rights Commission (**AHRC**) and Legal Aid Commission of Western Australia;

(c) the abolition of the role of the Director of Equal Opportunity in Public Employment and the transfer of its statutory functions to the Public Sector Commissioner; and

(d) the reporting and compliance regimes under Part IX of the Act being streamlined and rationalised with the current regimes under the *Public Sector Management Act 1994* (WA).

The Public Sector Commission recommendations are yet to be implemented into the Act.

In October 2018, the State Government announced that a review of the 'outdated' Act would be undertaken, taking into consideration the increasing public debate regarding exemptions for religious education institutions which enabled discrimination against lesbian, gay, bisexual, transgender, intersex, queer, asexual, and other diverse sexual orientations and gender identities (**LGBTIQA+**) students and teachers.[8]

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[1] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 1.

[2] The Equal Opportunity Amendment Bill 2009 sought to amend the Act to prohibit discrimination against people breast feeding in a public place, and for related purposes.

[3] Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2012.

[4] Hon Michael Mischin, Second Reading for the Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2012 (Speech delivered at Legislative Council, 2 May 2012).

[5] Kate Emery, 'WA equality laws now out of date', *The West Australian* (online, 24 October 2012), article no longer accessible.

[6] Public Sector Commission, *Review of organisational structures under the Equal Opportunity Act 1984* (Report, Public Sector Commission, August 2014).

[7] Ibid 11.

[8] Phoebe Wearne, 'Outdated equal opportunity laws to be reviewed by WA Government', *The West Australian* (online, 11 October 2018), < https://thewest.com.au/news/wa/outdated-equal-opportunity-laws-to-be-reviewed-by-wa-government-ng-b88986444z>.

Although most recent public debate about the Act has focused on religious educational exemptions, previous debate has also included (by way of example) calls to:

(a) remove the $40,000 cap on compensation payments contained in s 127(b)(i) of the Act, in particular in respect of sexual harassment;[9]

(b) prohibit vilification on the basis of sexual orientation;[10]

(c) introduce grounds of gender identity and intersex status, without the requirement for a certificate recognising the person's chosen gender;

(d) address conflicting provisions relating to discrimination on the grounds of religion and discrimination on the grounds of sexual orientation; and

(e) update the sexual harassment provisions in line with every other jurisdiction to remove the requirement of actual disadvantage.

Most recently there has been public debate on the adequacy of anti-discrimination laws to prevent sexual harassment in Australian Parliaments in particular and workplaces more generally.

There have been various legislative proposals which have sought to amend the Act but have not led to legislative amendment of the Act. A summary of the significant bills since 2006 which were introduced but did not lead to amendments are set out below:

(a) **Equal Opportunity Amendment Bill 2006**: This Government bill proposed to introduce a new division into the Act entitled 'Racially Offensive Behaviour' making it unlawful for a person to do any act, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate another person on the ground of race, or on the ground of a characteristic appertaining or imputed to persons of that race.[11] The bill lapsed on 7 August 2008 and the proposed amendments were not implemented in the Act.

(b) **Equal Opportunity Amendment Bill 2008**: This Government bill sought to extend the coverage of the Act to include sexual harassment by members of Parliament.[12] The proposed amendments sought to establish that 'sexist behaviour by members of Parliament is not just unacceptable, but also unlawful'.[13] The amendments were suggested to be necessary because under the Act sexual harassment must occur in an employment context, and given there is often no direct employment relationship between members of Parliament and staff, this requirement is difficult to establish.[14] The bill lapsed on 7 August 2008 and the proposed amendments were not implemented in the Act.

(c) **Equal Opportunity (Members of Parliament) Amendment Bill 2010**: This private member's bill sought to extend the coverage of the Act to include sexual harassment by members of Parliament.[15] The bill proposed similar amendments to the Equal Opportunity Amendment Bill 2008, including extending coverage of section 24 of the Act to people who are employed to work at Parliament House, and to people carrying out duties at Parliament House.[16] The proposed amendments were not implemented in the *Equal Opportunity Amendment Act 2010* (WA).[17]

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[9] Tom McIlroy, 'Harassment compensation caps outdated in #MeToo era', *Australian Financial Review* (online, 5 November 2018), <https://www.afr.com/politics/sexual-harassment-compensation-caps-outdated-in-metoo-era-20181104-h17hgs>.

[10] Amanda Banks, 'Call to outlaw gay vilification', *The West Australian* (online, 21 May 2010), <https://thewest.com.au/news/australia/call-to-outlaw-gay-vilification-ng-ya-211659>.

[11] Explanatory Memorandum, Equal Opportunity Amendment Bill 2006.

[12] Equal Opportunity Amendment Bill 2008, section 24(2A).

[13] Hon Jim McGinty, Second Reading for Equal Opportunity Amendment Bill 2008 (Speech delivered at Legislative Assembly, 9 April 2008); Equal Opportunity Amendment Bill 2008, section 24(2A).

[14] Ibid.

[15] Equal Opportunity Amendment Bill 2008, section 24(2A).

[16] Hon Martin Whitely, Second Reading for Equal Opportunity (Members of Parliament) Amendment Bill 2010 (Speech delivered at Legislative Assembly, 21 April 2010); Equal Opportunity (Members of Parliament) Amendment Bill 2010, s 24(2A).

[17] The Equal Opportunity Amendment Bill 2008 and the Equal Opportunity (Members of Parliament) Amendment Bill 2010 are discussed in Tess Ingram, 'Why sexual harassment is not unlawful at work in WA unless the victims meet "test"', *WA Today* (online, 17 March 2021) < https://www.watoday.com.au/politics/western-australia/why-sexual-harassment-is-not-unlawful-at-work-in-wa-unless-the-victims-meet-test-20210309-p5793k.html>.

(d) **Equal Opportunity Amendment Bill 2011**: This private member's bill proposed similar amendments to the Equal Opportunity Amendment Bill 2006. The bill sought to insert a new division into the Act entitled 'Racially Offensive Behaviour'. The proposed amendments have not been implemented.

(e) **Gender Reassignment Amendment Bill 2015**: This Government bill sought to slightly amend the definition of 'gender reassigned person' in section 4(1) of the Act to be in line with changes to the *Gender Reassignment Act 2000* (WA) (**Gender Reassignment Act**). The proposed amendments have not been implemented and the bill lapsed on 30 January 2017.

(f) **Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill 2018**: This private member's bill aimed to repeal and replace section 73 of the Act to remove the ability of religious schools to lawfully discriminate against people on the basis of their sexuality and/or gender. The proposed amendments were not passed.

1.3 Scope of Reference

The Terms of Reference, which are set out in full in paragraph 1.1, are broad in scope. The Commission is to provide advice and make recommendations for consideration by the Attorney General on possible amendments to enhance and update the Act taking into account Australian and international best practices regarding equality and non-discrimination.

1.4 Commission's approach

In 2019, the Attorney General directed the Commission to first consider paragraph (g) of the Terms of Reference, relating to exceptions to Grounds, including (but not limited to) religious institutions. The Commission appointed law firm, Corrs Chambers Westgarth, to assist the Commission in the initial targeted consultation and the preparation of a draft Discussion Paper for paragraph (g) of the Terms of Reference.

On 21 May 2020, the Commission appointed law firm, Clayton Utz, working under the direction of the Commission, to assist in the preparation of a Discussion Paper addressing the full Terms of Reference.

While there has been no general call for submissions at the pre-Discussion Paper stage, from early October 2020, the Commission conducted targeted consultation with the stakeholders referred to in Appendix A with a view to obtaining initial high level stakeholder feedback on the Terms of Reference. The stakeholders set out in Appendix A provided written preliminary submissions, which have been considered in the preparation of this Discussion Paper. The Commission invited more than 50 further stakeholders (who are not referred to in Appendix A as they chose not to make submissions at that stage) to make initial contributions or invite others to contribute any written submissions. The Commission also met with members of the EOC, as a key stakeholder, to discuss the issues.

The information provided by stakeholders was very helpful in the preparation of this Discussion Paper and the Commission is grateful to those stakeholders who provided their feedback.

As reflected in the structure of this Discussion Paper, the Commission has undertaken a comparison of the anti-discrimination laws that apply in Western Australia with those in effect in other States and Territories, as well as in the Commonwealth jurisdiction. As, in some cases, individuals in Western Australia can choose to make a complaint under either the Act or applicable Commonwealth anti-discrimination laws, those laws are compared and summarised separately in Chapter 5 of the Discussion Paper.

Considering the significant number of anti-discrimination laws across Australia, several of which have been recently reformed, extensive comparison with the approach of international jurisdictions has not been presented in this Discussion Paper. However, where international comparison has been helpful in relation to particular Terms of Reference, that is reflected in relation to the discussion on potential areas of reform. The Commission welcomes submissions which identify other international comparators that are worthy of consideration by the Commission.

In addition to the above, the Commission has considered whether there are new provisions which should be recommended.

The role of the Discussion Paper is to inform the reader and to raise issues for consultation. The Discussion Paper does not draw conclusions as to the matters discussed in it. Conclusions and recommendations will be in the Final Report and will be informed by the Commission's consideration of the responses to this Discussion Paper.

1.5 Structure of this Discussion Paper

This Discussion Paper is organised as follows.

Chapter 1 – Terms of Reference

This chapter sets out the scope of, and background to, the Commission's review of the Act.

Chapter 2 – Making a submission & the Commission's questions at a glance

This chapter sets out the questions and issues raised by the Commission's review of the Act, which are discussed in detail in Chapter 6.

Chapter 3 – The current Act

This chapter is designed to ensure that people who are not familiar with the Act can refer to a summary of its current provisions to inform their submissions. The summary reflects all the relevant areas of the Act that are subject to review under the Terms of Reference.

Chapter 4 – Other States and Territories

This chapter summarises how the Act compares with the anti-discrimination laws of other States and Territories. The summary is ordered in the same manner as Chapter 3, which is by order of the Terms of Reference. This starts with the objects of the relevant legislation, followed by the grounds of discrimination, then the areas of public life which are protected, followed by key definitions etc. This chapter will assist people to understand where the Act may differ from the protections offered in other States and Territories – particularly those which have been subject to more recent legislative reform, such as in Victoria and the ACT.

Chapter 5 – Commonwealth laws and proposals

This chapter summarises how the Act compares with the anti-discrimination laws of the Commonwealth. The summary is ordered in the same manner as Chapters 3 and 4, by order of the Terms of Reference. The laws of the Commonwealth are separately summarised because an individual in Western Australia may have the option to make a complaint or claim under Commonwealth anti-discrimination laws instead of the Act. Therefore, in addition to being useful as a comparison to the Act, it is important to be aware of those additional protections that are potentially available to potential individuals in Western Australia.

Chapter 6 – Potential reforms and questions

This chapter includes the substantive discussion of potential options for reform and questions in relation to the Act. This discussion has been formulated based on a comparison of other anti-discrimination laws, including those Australian laws summarised in Chapters 4 and 5, some international comparison and consideration of novel provisions. As noted above, the Commission has also had the benefit of a number of written preliminary submissions from some stakeholders, many of which are summarised and considered in this chapter. Throughout Chapter 6, the questions and recommendations raised by the review are highlighted and also included within Chapter 2.

2. MAKING A SUBMISSION & THE COMMISSION'S QUESTIONS AT A GLANCE

Call for Submissions

The Commission welcomes submissions and responses to this Discussion Paper.

What is a submission?

Submissions are ideas or opinions about the law being reviewed. Submissions can be anything from a personal story about how a law has affected you, to a research paper complete with footnotes and bibliography. The Commission wants to hear from anyone who has experience with the Act or has an idea for change to Western Australia's anti-discrimination laws.

A number of questions are set out in the Discussion Paper to guide those wishing to make a submission. It is not necessary to respond to every question. The Commission encourages people to make a submission even if their experience or interest is confined to only a few of the issues or questions raised in the Discussion Paper. All submissions will be carefully considered.

What is a submission used for?

Submissions help the Commission understand different views and experiences about the law it is researching. Information in submissions, along with other research, is used to develop recommendations. The Commission may seek to directly engage with some stakeholders prior to the finalisation of its recommendations in the final report.

How do I make a submission?

A submission can be made in several ways as detailed on the Commission's website. These include in writing via email or mail. There is no particular format you need to follow, however, it will assist the Commission if you address one or more of the questions listed in the Discussion Paper.

Submissions can be made by:

- Email: equalopportunityreview@justice.wa.gov.au
- Mail: Law Reform Commission, GPO Box F317, PERTH WA 6841

Assistance in making a submission

- If you require an interpreter; or
- if you require some other assistance to have your views on the issues heard, please telephone the Commission on (08) 9264 1600.

If you would like a copy of this paper in an accessible format, please contact the Commission.

The closing date for submissions is **Friday, 29 October 2021.**

Confidentiality

Law reform is a public process. If you do not tell the Commission you want your submission treated confidentially or that you wish your comments to be anonymous, it will treat it as public. The Commission may quote from public submissions or refer to comments in whole or in part and may attribute them to you. The Commission is subject to the *Freedom of Information Act 1992* (WA).

Questions

The Commission's questions on which it seeks submissions are set out below together with the section headings in this Discussion Paper under which they can be found. Further information on the question topics is found in the body of the Discussion Paper.

Objects

- *Should the scope and objects of the Act be broadened?*
- *Would the Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?*

Grounds of Discrimination

Assistant or therapeutic animal

- *Should the protections in the Act relating to guide or hearing dogs be extended to any assistance or therapeutic animal certified by a medical practitioner or regulation?*

Gender history discrimination/ gender identity/ intersex status

- *Should the protections in the Act be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions? What other legislation is relevant to this provision?*

Impairment

- *Should the definition of impairment be broadened in the Act and, if so, how?*

Religious or political conviction

- *Should the protections for religious or political conviction be defined or clarified?*
- *Should the protections for religious or political conviction expressly include religious and political beliefs and activities?*
- *Should the protections for religious or political conviction expressly include religious appearance or dress?*
- *Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground?*
- *Should the protections for religious or political conviction be extended to all areas covered by the Act?*

Pregnancy

- *Should the protections for pregnancy be broadened in the Act to potential pregnancy and/or child-bearing capacity?*
- *Should the requirement that pregnancy discrimination is 'not reasonable in the circumstances' be removed?*
- *Should express exceptions to the protections for pregnancy be incorporated and, if so, what exceptions should be incorporated?*

Race

- *Should the protections for race discrimination be broadened in the Act and, if so, how?*

Physical features

- *Should physical features be included as a Ground?*

Industrial / trade union activity / employment activity

- *Should industrial / trade union activity / employment activity be included as a Ground, or are those protections adequately covered by industrial laws?*

Employment status

- *Should employment status be included as a Ground?*

Irrelevant criminal record

- *Should irrelevant criminal record be included as a Ground?*

Irrelevant medical record

- *Should irrelevant medical record be included as a Ground? Should this also extend to a person's workers' compensation history?*

Social origin / profession/ trade / occupation / calling

- *Should social origin or profession, trade, occupation or calling be included as a Ground?*

Lawful sexual activity

Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?

Spouse or domestic partner identity

Should spouse or domestic partner identity be included as a Ground?

Relative of association with someone who has, or is assumed to have, specific protected attribute

Should the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the Act?

Accommodation status

Should accommodation status be included as a Ground? If so, what exceptions might be reasonable?

Immigration status

Should immigration status be included as a Ground?

Subjection to domestic or family violence

Should subjection to domestic or family violence be included as a Ground?

Family responsibility and family status

Should coverage of family responsibility and family status be extended to all areas under the Act?

Areas of public life to which the legislation applies

Education

Should the area of education be extended to include the evaluation and selection of student applications?

Should the area of education be extended to provide for prohibitions of the educational institution to refuse students to carry out their religious practices during school hours?

Sports

Should protection in the area of sports be extended to further Grounds?

Local government

- *Should local government be included as a specific area in line with the specific protections afforded in some other jurisdictions?*

Key Definitions

Defining discrimination

- *Should a definition of discrimination be inserted into the Act?*

Meaning of direct discrimination and the use of the comparator test

- *Should the meaning of direct discrimination in the Act be amended to remove the comparator test and, if so, what test should be inserted into the Act?*

Meaning of indirect discrimination and the use of the proportionality test

- *Should it be sufficient to prove indirect discrimination that the aggrieved person has a characteristic which pertains to people who have a protected attribute; as opposed to that the complainant have the protected attribute?*
- *Should the meaning of indirect discrimination be amended to remove the proportionality test?*
- *Should the meaning of indirect discrimination be amended to shift the onus of proof from the complainant to the alleged discriminator?*
- *Should the meaning of indirect discrimination be amended to remove the requirement that the complainant does not or is not able to comply with the requirement or condition?*
- *Should the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination?*

Harassment

- *Should the definition of sexual harassment remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced?*
- *Should the protections from sexual harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?*
- *Should the Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House?*

- *Should the Act be amended to expressly prohibit judicial officers from sexually harassing their staff or those who carry out duties at the court of which the judicial officer is a member? To what extent should the Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)?*

- *Should the Act be amended to expressly prohibit duty holders from sexually harassing unpaid or volunteer workers?*

- *Should the definition of racial harassment be amended to remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced?*

- *Should the protections from racial harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?*

Impairment
(including a requirement to make reasonable adjustments for persons with an impairment)

- *Does the Act protect against discrimination on the Ground of impairment where the discriminator does not make reasonable accommodation for the impairment? If not, should the current protections in the Act be amended or clarified?*

- *Should the Act include positive obligations to make reasonable adjustments for persons with impairment?*

- *Should any positive obligations be framed as stand-alone obligations or included within the discrimination definitions?*

- *What matters should be included in the Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'?*

- *What parameters or definitions are required for the scope of any positive obligation or duty?*

Victimisation

- *Do the victimisation protections or related provisions in the Act require reform?*

Services

- *Should the definition of 'services' in the Act be extended to expressly include statutory functions that a State government agency is bound to carry out, or activities of a coercive nature?*

Employment

- *Should the definition of employment in the Act be extended to include unpaid and voluntary workers?*
- *In the event the definition of employment in the Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?*

Vilification

- *Should anti-vilification provisions be included in the Act?*
- *If anti-vilification provisions are included in the Act, should they cover only racial vilification or extend to other types of vilification?*
- *Should or how may vilification provisions address concerns about the impact on other rights and exemptions under the Act?*
- *Should or how may vilification provisions address concerns around the loss of freedom of speech?*
- *Would there be any issues in accessing vilification law and reporting vilification under the Act?*
- *Would a different model for reporting vilification assist in protections?*

Positive Duty

- *Should a positive duty to eliminate discrimination, other than the requirement to make reasonable adjustments, be included in the Act?*
- *If a positive duty is included, what measures must be fulfilled by duty holders that are reasonable and proportionate?*
- *If a positive duty is included, should it apply in respect of all Grounds and prohibitions and, if not, what Grounds or prohibitions should be exempt?*
- *Should an individual complainant be able to make a complaint for breach of the positive duty by a duty holder, or should powers be limited to investigation at the initiative of the EOC?*
- *Should the SAT have the power to hear an application for breach of the positive duty by a duty holder, or should powers be limited to investigation and recommendations by the EOC?*
- *Should duty holders be required to publish information in relation to their compliance with this duty and, if so, which duty holders?*

Exceptions

Acts done under statutory authority

- *Should the exception contained in section 69 (exception for acts done under statutory authority) of the Act be amended, and if so, how?*
- *Should the exception contained in section 66ZS (exception for acts done under statutory authority) of the Act be amended, and if so, how?*

Charities

- *Should the scope of the exception contained in section 70 of the Act (exception for charities) be amended, and if so, how?*
- *Should a statutory definition of 'charity' be inserted into the Act, and if so, how should 'charity' be defined?*

Voluntary bodies

- *Should the scope of the exception contained in section 71 of the Act (exception for voluntary bodies) be amended, and if so, how?*

Religious bodies

- *Should the scope of the exception contained in section 72(a)-(c) of the Act (exception for religious personnel) be amended, and if so, how?*
- *Should the exception contained in section 72(d) of the Act (exception for religious bodies) be removed or retained?*
- *Should the scope of the exception contained in section 72(d) of the Act (exception for religious bodies) be amended, and if so, how?*

Educational institutions established for religious purposes

- *Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed?*
- *If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how?*
- *If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds?*

- *Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff?*
- *Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed?*
- *If the exception contained in section 73(3) of the Act is retained, should it be narrowed and if so, how?*

Establishments providing housing accommodation for aged persons

- *Should section 74 of the Act (exception for establishments providing housing accommodation for aged persons) be retained or removed?*
- *Should providers of housing accommodation for aged persons who rely on the exception in section 74 of the Act be permitted to instead apply for an exception from the provisions of the Act pursuant to section 135 of the Act?*
- *Should the Act stipulate specific criteria to be considered when determining whether to grant an exception from the provisions of the Act to providers of housing accommodation for aged persons?*

Goods and services

- *Should an exception allowing individuals or businesses to discriminate in the provision of goods or services on certain Grounds be introduced into the Act?*

Other exceptions

- *Should any additional general exceptions be included in Part VI of the Act?*
- *Should section 135 of the Act be amended, for example by specifying criteria that must be satisfied before an exemption may be granted?*

Burden of Proof

- *Should the Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances?*
- *Should the Act be amended to impose an evidential burden on a complainant and a persuasive burden on a respondent?*

Functions and Investigative Powers of the Commissioner for Equal Opportunity

Investigative and complaint handling function

- *Should the investigative powers of the Equal Opportunity Commissioner or complaints handling process under the Act be updated or expanded and, if so, how?*

Dismissal powers

- *Should the dismissal powers of the Equal Opportunity Commissioner be amended and expanded?*

Assistance

- *Should the Equal Opportunity Commissioner's assistance function be amended and expanded?*

Management plans

- *Are management plans effective? Should the process be amended to make it more effective?*
- *Should Part IX be moved from the Act into the Public Sector Management Act 1994 (WA)?*

Regulator involvement in compliance

- *Should the statutory framework be changed to require the EOC to play a greater role in monitoring and regulating compliance with anti-discrimination legislation or preventing discrimination?*

Requirements for the Referral of Complaints to the SAT

- *Should the complainant's option to request the Equal Opportunity Commissioner to refer a dismissed complaint to the SAT be retained?*

Role and Jurisdiction of the SAT

- *Should the Act be amended to enlarge the SAT's powers to enforce the obligations of the parties during the investigation and conciliation phase of a complaint?*
- *Should the Act be amended to provide the SAT with the power to order that costs follow the event or order costs in a broader range of circumstances than currently?*

Interaction with the Relevant Commonwealth Laws or Proposed Laws

- *Should the Act be amended to clarify that a person is prevented from lodging a claim under the Act if they have already made a complaint under Commonwealth anti-discrimination legislation in relation to the same conduct?*

Other

Compensation cap

- *Should the $40,000 compensation cap be retained, increased or removed?*
- *Should the Act be amended to clarify that an order may be made for the payment of interest on compensation amounts?*

Intersectionality or multidimensional complaints

- *Should the Act be amended to make discrimination based on two or more overlapping Grounds unlawful?*

Drafting form and style

- *Should the Act adopt a modern drafting style that is easier to follow?*

Complaints by representative organisations

- *Should the Act include clarification that a complaint may be made by a representative organisation, including lawyers and advocacy bodies, on behalf of more than one person or a group of persons who have the same or similar complaint against a respondent?*

Timeframe for lodging complaints

- *Should the timeframe for lodging a complaint be increased from the current 12 months?*
- *Should the current discretion for the Equal Opportunity Commissioner to accept a complaint made out of time on good cause being shown be changed?*

Use of technology in the EOC

- *How can the Act best facilitate the just and efficient disposition of complaints using technology?*

Prohibiting conversion practices

- *Should prohibitions on conversion practices be included in the Act?*

3. THE CURRENT ACT

3.1 Objects of the Act

Section 3 of the Act specifies that the objects of the Act are:

(a) *to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age, publication of relevant details on the Fines Enforcement Registrar's website or, in certain cases, gender history in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs; and*

(b) *to eliminate, so far as is possible, sexual harassment and racial harassment in the workplace and in educational institutions and sexual harassment and racial harassment related to accommodation; and*

(c) *to promote recognition and acceptance within the community of the equality of men and women; and*

(d) *to promote recognition and acceptance within the community of the equality of persons of all races and of all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages.*

3.2 Grounds of discrimination

The Act is confined to particular fields (the Grounds) and particular activities within those fields.[18] The Grounds are often referred to as protected attributes.

The Grounds and their definitions are summarised in the following table:

Grounds	Summary
Age	Part IVB of the Act, specifically section 66V(1), protects against discrimination on the ground of the age of the aggrieved person, a characteristic that appertains generally to persons of the same age as the aggrieved person, or a characteristic that is generally imputed to persons of the same age as the aggrieved person. Section 4(1) defines age to mean the chronological age of a person. Section 66V(2) also provides protection from discrimination against a relative or associate of a person who is protected from discrimination on the ground of their age.
Assistance or therapeutic dog	Section 66A(4) of the Act provides that a person discriminates against a person who is blind, deaf, partially blind or partially deaf if the discriminator treats the aggrieved person less favourably on the ground of the fact that the aggrieved person possesses, or is accompanied by, a guide dog or hearing dog, or on the ground of any matter related to that fact. This protection is not a separate and distinct Ground; rather, it falls within the impairment ground detailed below.
Breastfeeding	Part II of the Act, specifically section 10A, protects against discrimination on the ground that the aggrieved person is breast feeding or bottle feeding an infant or proposing to do so, a characteristic that appertains generally to persons who are breast feeding or bottle feeding, or a characteristic that is generally imputed to persons who are breast feeding or bottle feeding.[19]

[18] *W v The City of Perth* (1997) 191 CLR 1, 15 (Brennan CJ and McHugh J).
[19] *Equal Opportunity Act 1984* (WA), s 10A(1).

Grounds	Summary
Family responsibility or family status	Part IIA of the Act, specifically section 35A, protects against discrimination on the ground of family responsibility or family status of the aggrieved person, a characteristic that appertains generally to persons having the same family responsibility or family status as the aggrieved person, or a characteristic that is generally imputed to persons having the same family responsibility or family status as the aggrieved person. Section 4(1) defines family responsibility or family status as: (a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment; (b) the status of being a particular relative; or (c) the status of being a relative of a particular person.
Fines Enforcement Registrar's website	Section 67A protects against discrimination against a person on the ground of the publication of relevant details of the person on the Fines Enforcement Registrar's website, whereby the discriminator: (a) treats an aggrieved person less favourably (in substantially similar circumstances) to someone who has not been convicted of an offence and against whom an infringement notice had never been issued; and (b) requires the aggrieved person to comply with a requirement or condition that is not reasonable having regard to the circumstances of the case.
Gender history / gender identity	Part IIAA of the Act, specifically section 35AB, protects against discrimination against a gender reassigned person on the ground of their gender history, a characteristic that appertains generally to persons who have a gender history, or a characteristic that is generally imputed to persons who have a gender history.[20] A gender reassigned person is a person who holds a recognition certificate under the Gender Reassignment Act or another equivalent certificate.[21] This certificate is issued to persons who have undergone medical procedures to change their sexual characteristics from male to female or vice versa.[22] A person has a gender history if they identify as the opposite sex (i.e., a sex the person was not a member of at birth).[23]
Impairment	Part IVA of the Act deals with discrimination on the basis of impairment. Section 4(1) of the Act defines impairment as meaning one or more of the following conditions: (a) *any defect or disturbance in the normal structure or functioning of a person's body;* (b) *any defect or disturbance in the normal structure or functioning of a person's brain; or* (c) *any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,* *whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment—*

[20] *Equal Opportunity Act 1984* (WA), s 35AB.
[21] Ibid s 4(1) (definition of 'gender reassigned person').
[22] *Gender Reassignment Act 2000* (WA), s 3.
[23] *Equal Opportunity Act 1984* (WA), s 35AA.

Grounds	Summary
	(d) *which presently exists or existed in the past but has now ceased to exist; or* (e) *which is imputed to the person.* Section 66A(1) prohibits direct discrimination on of the basis of the impairment of the aggrieved person, a characteristic that appertains generally to persons having the same impairment as the aggrieved person, a characteristic that is generally imputed to persons having the same impairment as the aggrieved person, or a requirement the aggrieved person be accompanied by or in possession of any palliative device in respect of a person's impairment. Section 66A(3) prohibits indirect discrimination on the basis of impairment. Section 66A(1a) also protects from discrimination against a relative or associate of a person who is protected from discrimination on the ground of their impairment. Further, section 66A(4) protects against discrimination against blind, deaf, partially blind or partially deaf persons on the ground of the fact that that person possesses, or is accompanied by, a guide dog or hearing dog.
Marital status	Part II of the Act, specifically section 9, protects against discrimination on the ground of the marital status of the aggrieved person, a characteristic that appertains generally to persons of the marital status of the aggrieved person, or a characteristic that is generally imputed to persons of the marital status of the aggrieved person. Section 4(1) of the Act defines marital status to mean the status or condition of being: (a) *single;* (b) *married;* (c) *married but living separately and apart from one's spouse;* (d) *divorced;* (e) *widowed; or* (f) *the de facto partner of another person.*
Religious or political conviction	Part IV of the Act, specifically section 53, protects against discrimination on the ground of the religious or political conviction of the aggrieved person, a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person, or a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person. Section 4(3) of the Act provides that religious or political conviction includes a lack or absence of religious or political conviction. There is no further definition of the meaning of 'religious or political conviction'.
Pregnancy	Part II of the Act, specifically section 10, protects against discrimination on the ground of the pregnancy of the aggrieved person, a characteristic that appertains generally to persons who are pregnant, or a characteristic that is generally imputed to persons who are pregnant. Unlike the other Grounds, it includes a requirement that 'the less favourable treatment is not reasonable in the circumstances'.

Grounds	Summary
Race	Part III of the Act, specifically section 36, protects against discrimination on the ground of the race of the aggrieved person, a characteristic that appertains generally to persons of the race of the aggrieved person, or a characteristic that is generally imputed to persons of the race of the aggrieved person. Section 4(1) of the Act defines race to include colour, descent, ethnic or national origin or nationality and the fact that a race may comprise two or more distinct races does not prevent it from being a race for the purposes of the Act. Section 36(1a) also protects from discrimination against a 'relative or associate' of a person who is protected from discrimination on the ground of their race.
Sex	Part II of the Act, specifically section 8, protects against discrimination on the ground of the sex of the aggrieved person, a characteristic that appertains generally to persons of the sex of the aggrieved person, or a characteristic that is generally imputed to persons of the sex of the aggrieved person. Sex is not defined under the Act.
Sexual orientation	Part IIB of the Act, specifically section 35O(1), protects against discrimination on the ground of the sexual orientation of the aggrieved person, a characteristic that appertains generally to persons of the sexual orientation of the aggrieved person, or a characteristic that is generally imputed to persons of the sexual orientation of the aggrieved person. Section 4(1) of the Act defines sexual orientation to mean heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person. Section 35O(2) also protects from discrimination against a relative or associate of a person who is protected from discrimination on the ground of their sexual orientation.

3.3 Areas of public life to which the Act applies

In addition to establishing the above Grounds, the Act specifies which areas of public life each of those Grounds applies to. In some areas of public life, it will be unlawful to discriminate on any of the Grounds. However, in some areas of public life, the Act only provides that it is unlawful to discriminate on certain of the Grounds.

Subject to exceptions which are summarised at 3.7, the Act protects against discrimination in the following specific areas of public life:

Work, for each of the Grounds. In the area of work, the protections provide that it is unlawful for an employer to discriminate:

(a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment;

(c) in the terms or conditions on which employment is offered;

(d) in the terms or conditions of employment that the employer affords the employee;

(e) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;

(f) by dismissing the employee; or

(g) by subjecting the employee to any other detriment.

For the year 2019-20, work was the area of public life which had the highest number of allegations of unlawful discrimination, totalling 64.6% of all complaints.[24]

Education, for each of the Grounds except publication on the Fines Enforcement Registrar's website. In the area of education, the protections provide that it is unlawful for an educational authority to discriminate:

(a) by refusing or failing to accept a person's application for admission as a student;

(b) in the terms and conditions on which it is prepared to admit the person as a student;

(c) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;

(d) by expelling the student; or

(e) by subjecting the student to any other detriment.

Access to places and vehicles, for each of the Grounds except family responsibility or status, religious or political conviction, and publication on the Fines Enforcement Registrar's website.

Goods, services and facilities, for each of the Grounds except family responsibility or status. In the area of goods, services, and facilities, it is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person;

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Accommodation, for each of the Grounds except family responsibility or status. In the area of accommodation, it is unlawful for a person, whether as principal or agent, to discriminate against another person:

(a) by refusing the other person's application for accommodation;

(b) in the terms or conditions on which accommodation is offered to the other person;

(c) by deferring the other person's application for accommodation or according to the other person, a lower order of precedence in any list of applicants for that accommodation;

(d) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;

(e) by evicting the other person from accommodation occupied by the other person; or

(f) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

Land, for each of the Grounds except family responsibility or status, religious or political conviction, impairment, and publication on the Fines Enforcement Registrar's website. In the area of land, it is unlawful for a person, whether principal or agent, to discriminate against another person:

(a) by refusing or failing to dispose of an estate or interest in land to the other person; or

(b) in the terms or conditions on which an estate or interest in land is offered to the other person.

Activities of clubs, for each of the Grounds except family responsibility or status and publication on the Fines Enforcement Registrar's website. In the area of clubs, it is unlawful for a club, the committee of management of a club, or a member of the committee of management of a club to discriminate against a person who is not a member of the club:

[24] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 23.

(a) by refusing or failing to accept the person's application for membership; or

(b) in the terms or conditions on which the club is prepared to admit the person to membership.

Requesting or requiring provision of certain information, for each of the Grounds except publication on the Fines Enforcement Registrar's website. In the area of requesting or requiring provision of certain information, it is unlawful, in particular circumstances, for a person to discriminate against another person on the relevant Ground, in doing a particular act, to request or require the other person to provide, in connection with or for the purpose of doing the particular act , information that persons who do not have the attribute protected by the Ground would not, in circumstances that are the same or not materially different, be requested or required to provide.

Sport, for each of the Grounds of gender history, age and impairment. However, sport is expressly stated as an exception under Grounds of sex, marital status, pregnancy and breast feeding. In the area of sport, it is unlawful to discriminate against a person on the relevant Grounds by excluding that person from:

(a) a sporting activity; or

(b) an administrative, coaching, refereeing or umpiring activity in relation to any sport.

Superannuation schemes and provident funds, for each of the Grounds of age, gender history and impairment.

Insurance, for each of the Grounds of age, impairment and in some instances sex and marital status.

3.4 Key concepts

3.4.1 Direct discrimination and the comparator test

The Act does not contain definitions of discrimination. Rather in relation to each Ground, the Act describes in similar terms two distinct forms of discrimination. One has come to be known as direct discrimination and the other as indirect discrimination. This Discussion Paper will use those terms.

Under the Act, unlawful **direct discrimination** on a particular Ground occurs in a specified area if the aggrieved person has:

(a) an attribute protected by the Act (**protected attribute**) (for example, race, sex, pregnancy, or marital status); or

(b) a characteristic that appertains generally to persons who have the protected attribute; or

(c) a characteristic that is generally imputed to persons who have the protected attribute,

and the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who does not have the protected attribute.

As this definition involves consideration of a comparison with a person who does not have the protected attribute, it is commonly referred to as a 'comparator test'.

3.4.2 Indirect discrimination and reasonableness

Under the Act, unlawful **indirect discrimination** on a particular Ground occurs in a specified area if:

(a) the discriminator imposes a requirement or condition on the aggrieved person;

(b) a substantially higher proportion of persons without the protected attribute of the aggrieved person comply or are able to comply with the requirement or condition;

(c) the requirement or condition is not reasonable in the circumstances; and

(d) the aggrieved person does not or is not able to comply with the requirement or condition.

As this definition involves consideration of whether a substantially higher proportion of persons without the protected attribute comply or are able to comply, it is commonly referred to as the 'proportionality test'.

3.4.3 Harassment

In addition to prohibiting discrimination on the basis of the Grounds, the Act also provides that sexual and racial harassment are unlawful.

Both sexual and racial harassment are unlawful under the Act in the areas of employment,[25] education[26] and accommodation.[27]

For the purposes of the Act, a person is taken to 'harass sexually' another person if they make an unwelcome sexual advance, make a request for sexual favours, or engage in other unwelcome conduct of a sexual nature in relation to the other person, and:

(a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in connection with the area of life to which the Ground applies; or

(b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the area of life to which the Ground applies.

Similarly, a person is taken to 'harass racially' another person if they threaten, abuse, insult or taunt the other person, and:

(a) the other person has reasonable grounds for believing that objecting to the relevant threat, abuse, insult or taunt would disadvantage the other person in connection with the area of life to which the Ground applies; or

(b) as a result of the other person's objection to the relevant threat, abuse, insult or taunt the other person is disadvantaged in connection with the area of life to which the Ground applies.

3.4.4 Impairment / absence of a positive duty to make reasonable adjustments

The Act provides that discrimination on the impairment Ground occurs where the discriminator treats the person less favourably than, in the same circumstances, or in circumstances that are not materially different, the discriminator treats, or would treat a person, who does not have such an impairment. By section 66A(2), circumstances are not materially different by reason of the fact that different accommodations or services may be required by the person who has an impairment. Section 66A(3) prohibits indirect discrimination on the basis of impairment.

The Act permits impairment discrimination by an employer, principal or person if it is reasonable for the employer, principal or person to conclude that the person with the impairment because of that impairment 'would be unable to carry out work reasonably required to be performed in the course of the employment or engagement concerned' or 'would, in order to carry out that work, require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer, principal or person'.[28] The Act has no explicit positive duty for a person to make reasonable adjustments for another person who has an impairment, although the provisions may operate so as to effectively achieve such a duty, albeit implicitly.

3.4.5 Victimisation

Under the Act, it is unlawful to subject, or threaten to subject, another person to detriment on the Ground that that person has been involved in, or proposes to be involved in, proceedings commenced under the Act, such as making a complaint, commencing proceedings, providing information or appearing as a witness.[29]

[25] *Equal Opportunity Act 1984* (WA), ss 24, 49A.
[26] Ibid ss 25, 49B.
[27] Ibid ss 26 and 49C.
[28] Ibid s 66Q(1).
[29] Ibid s 67.

3.4.6 Advertisements

The Act also prohibits publishing or displaying advertisements and notices which indicate, or could reasonably indicate, an intention to engage in conduct that is unlawful under the Act.[30]

3.4.7 Services

One of the areas of public life to which the Act applies is the provision of goods, services and facilities. The definition of 'services' under the Act is not exhaustive, but includes:

(a) services relating to banking, insurance, superannuation and the provision of grants, loans, credit or finance; and

(b) services relating to entertainment, recreation or refreshment; and

(c) services relating to transport or travel; and

(d) services of the kind provided by members of any profession or trade; and

(e) services of the kind provided by a government (other than the assessment of an application for suitability for adoptive parenthood, or the placement of a child for adoption or with a view to the child's adoption, under the *Adoption Act 1994* (WA)), a government or public authority of a local government body.

The High Court of Australia has held that, when a State government agency is bound to carry out statutory functions, or when the nature of the activity is coercive rather than beneficial, then the activity cannot generally be described as a 'service' for the purposes of the Act.[31] The decision from which this principle derives related to whether a council's refusal to give planning approval was a refusal to provide a 'service', finding that it was not a service, but a power.

As stated above, the definition of services also explicitly excludes the assessment of an application for suitability for adoptive parenthood or the placement of a child for adoption or with a view to the child's adoption under the *Adoption Act 1994* (WA).

This means that protections from discrimination under the Act would not extend to services of these types, even if there was clear evidence of discrimination.[32]

3.4.8 Employment - unpaid or volunteer workers

Although the Act offers protections in the area of work, including in relation to applicants, employees and contract workers, unpaid and volunteer work is not recognised as a type of employment under the Act. Therefore, individuals who are categorised as unpaid or volunteer workers are not afforded employment protections under the Act.

3.5 Vilification

The Act does not include any specific prohibitions in relation to vilification. The Oxford English Dictionary defines 'to vilify' as 'to lower or lessen in worth or value' and 'vilification' as 'the action of vilifying by means of abusive language'.[33] Consistent with these definitions, French J (as his Honour then was) described vilification as 'hate speech' in *Bropho v Human Rights & Equal Opportunity Commission*.[34] Some

[30] *Equal Opportunity Act 1984* (WA), s 68.
[31] *IW v City of Perth* (1997) 191 CLR 1.
[32] Submission from the Equal Opportunity Commission, 20 November 2020, 4.
[33] *Oxford English Dictionary* (online at 16 April 2020) 'vilify', 'vilification'.
[34] (2004) 135 FCR 105, 120 [57].

jurisdictions' anti-discrimination laws define 'vilification' to mean a public act capable of inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of people.[35]

However, there are criminal sanctions in Western Australia against select instances of racial vilification. Under the *Criminal Code Act 1913* (WA), any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years. Additionally, any person possessing written or pictorial material that is threatening or abusive, or that, if that material were to be published, distributed or displayed, is intended to, or is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, then that person is also guilty of a crime and is liable to imprisonment for 14 years. These sanctions were introduced by the *Criminal Code Amendment (Racial Vilification) Act 2004* (WA).

Also, as noted at section 3.4.3 above, racial harassment is unlawful under the Act in the areas of employment, education and accommodation.[36] Racial harassment involves threats, abuse, insults or taunts made on a racial basis which the person reasonably believes would cause disadvantage or which actually do cause disadvantage to the person.

3.6 Positive duty not to discriminate

The Act sets out the circumstances in which it is unlawful for a person to discriminate, either directly or indirectly, against a person on one of the Grounds. Putting aside any implicit duty to make reasonable adjustments (which is not expressed as a positive duty but in practice may have the same effect), the Act does not include any positive duties not to discriminate. That is, there are no provisions that require duty holders to take positive measures to eliminate discrimination. However, section 146 of the Act provides that public authorities in Western Australia must provide an annual report to the Director of Equal Employment Opportunity in Public Employment on actions taken to eliminate and ensure the absence of discrimination. This section embraces positive equal employment opportunity.

As will be explained in Chapter 4, Victoria is the only State or Territory jurisdiction in Australia that includes such a positive duty not to discriminate. The *Equal Opportunity Act 2010* (Vic) (**Victorian Act**) establishes a positive duty not to engage in discrimination, sexual harassment or victimisation, and to fulfil this duty the duty holder must take 'reasonable and proportionate measures to eliminate…discrimination, sexual harassment or victimisation as far as possible.' The Victorian Act sets out factors that can be taken into account in determining whether measures taken are reasonable and proportionate, and includes examples of successful measures for both small and large organisations. The consequences of contravening the duty are limited to an investigation by the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**).

3.7 Exceptions

3.7.1 Forms of exceptions

Part VI of the Act sets out various general exceptions to the Grounds contained in the Act. What would otherwise be unlawful discrimination is not unlawful if it the conduct occurs in one of the circumstances set out in Part VI.

In addition to the general exceptions provided for in Part VI of the Act, there are other exceptions contained in the Act in relation to Grounds pertaining to specific areas of public life. For example, it is not unlawful to do an act a purpose of which is to ensure that persons of a particular race have equal opportunities with other persons in circumstances in relation to which provision is made by the Act or to afford persons of a

[35] See, for example, definitions of types of vilification in *Anti-Discrimination Act 1977* (NSW). See also Victorian Equal Opportunity & Human Rights Commission, 'Racial and Religious Vilification' (Web Page) <https://www.humanrights.vic.gov.au/for-individuals/racial-and-religious-vilification/>; Anti-Discrimination New South Wales, 'Vilification' (Web Page) <https://www.qhrc.qld.gov.au/your-rights/discrimination-law/vilification>.

[36] *Equal Opportunity Act 1984* (WA), ss 49A - 49C.

particular race access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare, or any ancillary benefits.[37] In *Doepgen v Mugarinya Community Association Incorporated*[38] the Court of Appeal dismissed an appeal against the SAT's determination that a fee imposed on non-Aboriginal people to enter a reserve, whilst discriminatory, was imposed for a purpose described in section 51 and accordingly was lawful.

There are corresponding exceptions permitting special measures to be taken in relation to people with the protected attributes of sex, marital status, pregnancy, breast feeding, bottle feeding, particular sexual orientation and impairment.[39] As noted at section 3.11 below, the SAT also has the power to grant exemptions from the operation of specified provisions of the Act.[40]

This section of the Discussion Paper focusses on the general exceptions contained in Part VI of the Act. Part VI of the Act contains six general exceptions which apply to all the Grounds, concerning:

(a) acts done under statutory authority;

(b) charities;

(c) voluntary bodies;

(d) religious bodies;

(e) educational institutions established for religious purposes; and

(f) establishments providing housing accommodation for aged persons.

3.7.2 Acts done under statutory authority

Originally, section 69(1)(a) of the Act provided a general exception for anything done which was necessary for a person to do in order to comply with any other Act which was in force when the section came into force. Section 69(1)(b) provided an exception in regard to compliance with rules of various types of financial institutions and section 69(1)(e) provided an exception for compliance with an order of a court or tribunal having power to fix wages and terms of employment. These provisions explain why the heading of the section is 'Acts done under statutory authority'. However, those provisions ceased to be in force two years after the coming into operation of section 69.[41] Section 69(1)(c) and (d) now only provide exceptions for acts that are necessary to comply with the requirements of an order of the SAT or a court.

The Commission considers that the need for this exception is self-evident, and that there are sound policy reasons in justifying its inclusion.

In 2017, section 69 was amended to delete the already defunct exceptions in section 69(1)(a), (b) and (e) (described above).[42] The amendment adopted a recommendation made by the EOC as part of the 2007 Review.[43] In the 2007 Review, the EOC explained that section 69 provided that those exceptions would cease to have effect two years after coming into operation, except to the extent that regulations provided otherwise. Having identified that no regulations had been made since the exceptions expired, nearly 20 years prior to the Review, the EOC considered the exceptions to be irrelevant and never likely to be used.

3.7.3 Charities

Section 70 of the Act provides an exception for provisions in documents conferring charitable benefits and acts done to give effect to the provisions. Exceptions of this nature appear in the relevant legislation of a number of other jurisdictions. Section 70 states that nothing in the Act affects:

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[37] *Equal Opportunity Act 1984* (WA), s 51.

[38] *Doepgen v Mugarinya Community Association Incorporated* [2014] WASCA 67. The decision of the Court of Appeal does not discuss the meaning of s 51.

[39] *Equal Opportunity Act 1984* (WA), ss 31, 35ZD and 66R.

[40] Ibid s 135(1).

[41] Ibid s 69(2).

[42] *Statutes (Minor Amendments) Act 2017* (WA), s 8.

[43] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, (May 2007) 45.

(a) a provision of a deed, will or other document that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the Grounds; or

(b) an act that is done in order to give effect to such a provision.

'Charitable benefits' are benefits for purposes that are exclusively charitable according to Western Australian law.[44] There are a range of laws which encompass the notion of 'charitable purposes'. For example, in the *Charitable Collections Act 1946* (WA) 'charitable purpose' is defined to mean:

(a) the affording of relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed persons, or to the dependants of any such persons;

(b) the relief of distress occasioned by war, whether occasioned in Western Australia or elsewhere;

(c) the supply of equipment to any of His Majesty's naval, military, or air forces, including the supply of ambulances, hospitals and hospital ships;

(d) the supply of comforts or conveniences to members of the said forces;

(e) the affording of relief, assistance or support to persons who are or have been members of the said forces or to the dependants of any such persons;

(f) the support of hospitals, infant health centres, kindergartens and other activities of a social welfare or public character;

(g) any other benevolent, philanthropic or patriotic purpose.[45]

This exception has been in force since the enactment of the Act without amendment. There is no explanatory material that evidences why the charities exception was included in the Act, however such exceptions are common in other jurisdictions. The exception appears to further protect the rights and interests of persons facing discrimination on the basis of one or more of the Grounds because the conferral of charitable benefits to those persons may help to remove some of the structural barriers to equality and balance their rights and interests as against persons not facing discrimination. In addition, seemingly, the exception ensures that any entity conferring charitable benefits in this way is not in jeopardy of a discrimination claim being made against them because others (even in the same class identified by reference to any one or more of the Grounds) do not receive the same benefits. The section attempts to balance a person's right not to be discriminated against, with the interest in permitting charities to provide benefits to groups and people in need.

3.7.4 Voluntary bodies

Section 71 of the Act provides that it is not unlawful for a voluntary body to discriminate against a person, on any of the Grounds, in connection with:

(a) the admission of persons as members of the body; or

(b) the provision of benefits, facilities or services to members of the body.

A 'voluntary body' is an association or other body (whether incorporated or unincorporated), the activities of which are not profit motivated. The definition in the Act of a 'voluntary body' excludes clubs, bodies established by a Commonwealth, State or Territory law and associations that provide grants, loans, credit or finance to their members.[46]

A 'club' is defined to mean an association of not less than 30 persons associated for social, literary, cultural, political sporting, athletic or other lawful purposes that provides or maintains facilities in whole or in part from the funds of the association and sells or supplies liquor for consumption on its premises.[47]

[44] *Equal Opportunity Act 1984* (WA), s 70(2).
[45] *Charitable Collections Act 1946* (WA), s 5.
[46] *Equal Opportunity Act 1984* (WA), s 4(1).
[47] Ibid s 4(1).

As a result, in Western Australia, the voluntary bodies exception does not apply to a not-for-profit club of 30 or more persons who associate together for lawful purposes, which provides facilities from the funds of the association and sells or supplies liquor on its premises.

Section 71 was intended to provide a general exception from the operation of the Act for voluntary bodies in connection with the admission of persons to membership of the body, or the provision of benefits, facilities or services to members of the body.[48]

This exception has significantly changed twice since the Act was enacted in 1984, so that now it does not apply to discrimination on the Ground of impairment or age by a voluntary body that is an incorporated association.

By way of elaboration, in 1988, s 71(2) was inserted to make discrimination on the 'ground of impairment' by an incorporated voluntary body unlawful.[49] The change occurred in the wake of the Western Australian government's examination into the issue of discrimination against people with disabilities that commenced shortly after the passage of the Act in November 1984.[50] As a result of this amendment, the exception is narrower than the equivalent provisions in the *Anti-Discrimination Act 1977* (NSW) (**NSW Act**) and the *Discrimination Act 1991* (ACT) (**ACT Act**), which are canvassed in Chapter 3.

In drafting s 71(2), the Western Australian government aimed to reflect the progress that was occurring at an international level to address the needs, and protect the rights of, people with disabilities. The use of the term 'impairment' was also intended to include the so-called 'invisible handicaps' such as diabetes, epilepsy and asthma.[51]

The second significant amendment occurred in 1992, which narrowed the scope of the exception further by inserting 'or age' after 'impairment'.[52]

However, the 1992 amendment did allow for specific exceptions for aged-based discrimination where it is both 'practical and reasonable',[53] for example, the provision of bona fide benefits, including concessions to a person on the ground of age, or in respect of membership of incorporated associations, where there is an exception for junior and senior membership categories.[54]

3.7.5 Religious bodies

Section 72 of the Act provides that the Act does not apply:

(a) in relation to the ordination or appointment, or training or education of, priests, ministers of religion or members of any religious order (or persons seeking such ordination or appointment), or the selection or appointment of persons to perform duties or functions for the purposes of participating in any religious observance or practice (generally referred to in this Discussion Paper as the **Religious Personnel Exception**);[55] or

(b) to any other act or practice of a religious body, where the otherwise discriminatory act conforms to the 'doctrines, tenets or beliefs' of the religion or is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion' (generally referred to in this Discussion Paper as the **Religious Bodies Doctrine Exception**).[56]

The religious exemptions provided for under the Act have not been amended since the Act was enacted.

[48] Explanatory Memorandum, Equal Opportunity Bill 1984 (WA) 30.
[49] *Equal Opportunity Amendment Act 1988* (WA).
[50] Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 1988, 3944 (Pearce, Leader of the House).
[51] Ibid.
[52] *Equal Opportunity Amendment Act 1992* (WA), s 21.
[53] Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1992, 7656 (D.L. Smith, Minister for Lands).
[54] Ibid.
[55] *Equal Opportunity Act 1984* (WA), s 72(a)-(c).
[56] Ibid s 72(d).

Saje and Cohen[57] (***Saje***) is a recent Western Australian decision which considered the Religious Personnel Exception. The respondent in *Saje* was a Rabbi of a Synagogue. The respondent ran courses converting students to Judaism. The complainant was a student who was expelled from the respondent's conversion course. The complainant alleged that they were unlawfully victimised by the respondent contrary to section 67 of the Act. As a preliminary issue, the respondent sought to establish that the Synagogue constituted a religious body under section 72 of the Act, and that the complainant's involvement as a conversion candidate should be held to be either:

(a) training or education of the complainant as a person seeking ordination or appointment (together meaning official acceptance and approval) as a member of a religious order (being the Progressive Jewish faith) (section 72(b) of the Act); and/or

(b) in relation to the selection or appointment of the complainant to be able to perform duties or functions as a member of the Progressive Jewish faith, and/or for the applicant to otherwise participate in the observances and practices of that faith (section 72(c) of the Act).[58]

The SAT accepted that the Synagogue was a religious body under section 72, however it did not accept that the act of 'expelling a student of conversion' was within the sections 72(b) and (c) protections (that is, the Religious Personnel Exception) for two reasons:[59]

(a) first, the respondent did not discharge his onus of proof under section 103 of the Act; and[60]

(b) second, when considering the principles of statutory construction (looking to the objects, language, subject matter and context of the Act), section 72 relates to 'officials of religious organisations – Priests, Ministers and members of orders and people who perform functions in relation to religious observance or practice.'[61] For these reasons, it could not be said that by converting to Judaism (or any other religion), a person is trained or educated into being 'appointed' into the formal structures of a religious body in the sense of assuming a position of authority or 'appointed' to perform any religious observance or practice.[62] The SAT found that conversion was 'a thing of itself' and 'comes prior to the sorts of circumstances covered by the exceptions in section 72 of the Act.'

The SAT held that the term 'religious order' in section 72(b), when read with the whole of that subsection in the context of section 72, did not refer to the branches of a religion (Progressive Judaism in Judaism or Catholicism in Christianity) but rather has a more limited sense as subdivisions of those branches. For example, the Catholic Archdiocese of Perth has as its religious orders a number of entities including Clerical Religious Institutes under which is included amongst others the Benedictine Monks, Carmelites, Dominicans, Franciscan Friars etc.[63] As a consequence, the respondent's submission that the congregation of the association was a 'religious order' for the purposes of section 72(b) of the Act was not accepted.[64]

3.7.6 Educational institutions established for religious purposes

Section 73 of the Act provides that nothing in the Act renders it unlawful for a person to discriminate against another person on any one or more of the Grounds:

(a) in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed;[65]

[57] *Saje and Cohen* [2018] WASAT 102.
[58] Ibid [43].
[59] Ibid [59].
[60] Ibid [70].
[61] Ibid [70].
[62] Ibid [74].
[63] Ibid [77].
[64] Ibid [76] - [78].
[65] *Equal Opportunity Act 1984* (WA), s 73(1).

(b) in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed ((a) and (b) together are generally referred to in this Discussion Paper as the **Religious Educational Bodies Employment Exception**);[66] or

(c) other than the grounds of race, impairment or age, in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed (generally referred to in this Discussion Paper as the **Provision of Education Exception**).[67]

The Commission notes that the 2007 Review contained a recommendation that the Religious Educational Bodies Employment Exception be amended so that it was confined to employees and contract workers with educational, teaching or pastoral responsibilities.[68] The recommendation has not yet been implemented.

Goldberg v Korsunski Carmel School[69] (***Goldberg***) considered the exception concerning educational institutions established for religious purposes.

The respondent in *Goldberg* was the G Korsunski Carmel School, a private school in Western Australia, which was established to provide local Jewish children with an Orthodox Jewish education. Whilst the school altered its Constitution in 1992 to permit a discretion to enrol any child in the school, it imposed a number of restrictions on children wishing to attend the school whom it did not consider to be Jewish. For example, non-Jewish students were ineligible for a position as head student, scholarships and fee assistance.[70]

The complainant, Gary Goldberg, had a child who was not considered to be Jewish according to Orthodox Jewish law. The complainant sought to enrol the child as a student of the respondent. The complainant's child was accepted as a student by the respondent, but a number of restrictions were placed on that acceptance in accordance with the respondent's policy in relation to students it did not consider to be Jewish.

The complainant contended that these restrictions constituted discrimination on the Grounds of religious conviction, race and family status contrary to the Act. The complainant's main contention was that the special conditions that applied to the child's enrolment were not justified by Orthodox Jewish law and that this factor, together with the enrolment procedure, indicated a lack of good faith.

The Equal Opportunity Tribunal of Western Australia (**EOT**) (which was the relevant tribunal prior to the SAT from 2005) found that the complainant's child had been discriminated against as a result of their religious conviction. However, it also found that the exception in section 73(3) of the Act (the Provision of Education Exception) was available to the respondent, as it was acting generally within its stated objective of upholding and promoting an education in accordance with the tenets of Orthodox Judaism. The EOT found that the respondent discriminated in good faith in favour of 'adherents of that religion' because adherents of the religion extended, in the context of the facts of the case, to all those regarded as Orthodox Jews by those in authority. Further, the discrimination occurred in a manner which did not discriminate against a particular class who were not adherents. This was because all prospective students who were not regarded as Orthodox Jews (including prospective students such as the complainant's child) were treated in the same manner.[71]

[66] *Equal Opportunity Act 1984* (WA), s 73(2).
[67] Ibid s 73(3).
[68] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 7.
[69] (2000) EOC 93-074.
[70] *Goldberg v Korsunski Carmel School* (2000) EOC 93-074, 19.
[71] Ibid 40 - 41.

Significantly, the EOT found that the requirement of 'good faith' in section 73(3) of the Act (the Provision of Education Exception) was satisfied because the respondent acted in a way that was generally in accordance with the respondent's own particular views of what the doctrines of its religion required of its adherents. *Goldberg* establishes that 'good faith' in the context of section 73(3) means acting in a way that is generally in accordance with the practices or beliefs of that religion or creed, and that it is not incumbent on the educational institution to justify those practices or beliefs to the outside world.[72]

3.7.7 Establishments providing housing accommodation for aged persons

Section 74 of the Act provides an exception for establishments providing housing accommodation for aged persons. An institution may have in place a rule or practice which restricts admission to applicants of any class, type, sex, race, age or religious or political conviction. Nothing in the Act affects the provision of benefits, facilities, or services to such persons as are admitted to such an institution.[73]

An 'institution' is an establishment which provides housing accommodation and ancillary services for aged persons.[74]

The exception contained in section 74 was included in the Act as passed in 1984 to exempt such an institution from the provisions of the Act in relation to any rule or practice of the institution which restricts admission thereto to applicants of any class, type, sex, race, age or religious or political conviction; or in relation to the provision of benefits, facilities or services to such persons as are admitted to such an institution.

Section 74 was first amended in 1988 to ensure persons with an impairment or a particular class or type of impairment were not regarded as constituting a 'class' or 'type' of applicant for the purposes of the exception.[75] This was done for the purpose of making discrimination on the ground of impairment unlawful.[76] Section 74(3a) has since been added to exclude gender reassigned persons from constituting a 'class' or 'type' of applicant for the purposes of the exception.

The exception was further restricted in 1992, when discrimination on the basis of age was made unlawful, to add section 74(4) to provide that once a person is admitted to such an institution, the exception does not apply to discrimination on the ground of age in the provision of benefits, facilities or services.[77] This limitation on the exception was said to have been introduced to 'mitigate against absurdities'.[78]

3.7.8 Other exceptions

There is no exception to discrimination on grounds of religion in relation to the provision of goods, services and facilities under the Act. This is consistent with other anti-discrimination legislation in Australia.

In contrast, under section 35Y of the Act, it is unlawful to discriminate against a person on the basis of sexual orientation in the provision of goods, services and facilities.

By way of example, in 2018 a complaint on the Ground of sexual orientation was made to the EOC against a photographer.[79] The photographer had been approached by a same-sex couple in 2018 to photograph their children and agreed to the work. The photographer had a 'conflict of belief' on the issue of same-sex marriage which related to the photographer's Christian religion. The photographer suggested that the

[72] Kate Offer, 'Case Notes – Religious Schools and Equal Opportunity: Lessons from *Goldberg v Korsunski Carmel School*' (2000) 5(1) *Australia & New Zealand Journal of Law & Education* 74, 74, 79.

[73] *Equal Opportunity Act 1984* (WA), s 74(2).

[74] Ibid s 74(1).

[75] Ibid s 74, as inserted by *Equal Opportunity Amendment Act 1988* (WA), s 11.

[76] Western Australia, *Parliamentary Debates,* House of Assembly, 19 October 1988, 3944 (Pearce, Leader of the House).

[77] *Equal Opportunity Act 1984* (WA), s 74, as inserted by *Equal Opportunity Amendment Act 1992* (WA), s 23.

[78] Western Australia, *Parliamentary Debates,* House of Assembly, 1 December 1992, 7656 (D.L. Smith, Minister for Lands).

[79] Western Australia, *Parliamentary Questions (Question On Notice No. 2239 by Hon Charles Smith)*, Legislative Council, 25 June 2019 (Hon J.R. Quigley).

couple might be more comfortable hiring someone else to take the photographs. The complaint was referred to the SAT, but the complainant withdrew the complaint prior to hearing.[80]

3.7.9 Judicial consideration

Other than as noted above, there has been very limited judicial consideration of the general exceptions contained in Part VI of the Act. That is not to say, however, that these general exceptions are not in fact relied on frequently in practice. In 2017, a relief teacher was allegedly dismissed by a Baptist school in Perth after revealing they were in a same-sex relationship.[81] This sparked public debate and commentary about whether religious schools should be allowed to discriminate on such a basis. However, there is no public record of the matter being the subject of a complaint to the EOC. This may or may not have been because of the Religious Educational Bodies Employment Exception. This is perhaps an example of how it is difficult to ascertain the extent to which the exceptions are relied on.

Further, in a previous review of the Act, the EOC said that it had received a complaint that a gardener was dismissed at a school because they were not religious, with the EOC unable to accept the complaint due to the exception in section 73. The EOC was concerned that religious schools, universities, and colleges can, and do, in some cases, discriminate on the grounds of religious conviction, regardless of the nature of the employment or the position held by the person discriminated against. The EOC found that 'such discrimination seems clearly unreasonable and should not be exempt from investigation by the Commission'.[82]

3.8 Burden and standard of proof

Under the Act, the complainant has the burden of proving their allegations on the balance of probabilities.[83] The standard to be applied was summarised by the Tribunal in *D'Alto and Curtin University:*[84]

> *Ms D'Alto bears the onus of proof in establishing her complaint of discrimination. The standard of proof is the balance of probabilities, but having regard to the serious nature and consequences of allegations of discrimination under the EO Act, the approach which the Tribunal takes is that discussed in Dixon J in Briginshaw v Briginshaw (1938) 60 CLR 336 (Briginshaw) at 361-362; see Edoo and Minister for Health [2010] WASAT 74 (Edoo) at [53].*
>
> *The Tribunal must feel an 'actual persuasion' of the occurrence or existence of the facts alleged by Ms D'Alto before those facts can be found: Briginshaw at 361. Furthermore, although it is enough that the affirmative of an allegation is made out to the 'reasonable satisfaction' of the Tribunal, that reasonable satisfaction should not be produced by 'inexact proofs, indefinite testimony, or indirect inferences': Briginshaw at 362.*

However, if a respondent to a complaint seeks to rely on an exception under the Act, the onus is on the respondent to establish that the exception applies in the circumstances.[85]

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[80] Joe Kelly, 'Companies 'need protection' under new religion laws', *The Australian* (online, 20 November 2018) <https://www.theaustralian.com.au/nation/politics/companies-need-protection-under-new-religion-laws/news-story/abca34e0259ab163c6ffd56341ade11a>. See also 'Jason Tey discrimination case abandoned', *Inside Imaging* (online, 26 March 2019) <https://www.insideimaging.com.au/2019/jason-tey-discrimination-case-abandoned/>.

[81] Phoebe Wearne, 'Gay teacher fired by South Coast Baptist College in Waikiki sparking debate about discrimination rights of religious schools', *The West Australian* (online, 22 November 2017) https://thewest.com.au/news/wa/gay-teacher-fired-by-south-coast-baptist-college-in-waikiki-sparking-debate-about-discrimination-rights-of-religious-schools-ng-b88665819z.

[82] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 42.

[83] *Haines v Leves* (1987) 8 NSWLR 442, 457; *Williams and Commissioner of Police* [2005] WASAT 349 at [34].

[84] [2019] WASAT 61 at [21] - [22].

[85] *Equal Opportunity Act 1984* (WA), s 123.

3.9 Functions and investigative powers of the Equal Opportunity Commissioner

3.9.1 Receipt of and timeframe for making complaints

A complaint alleging a person has committed a contravention of the Act may be lodged in writing with the Equal Opportunity Commissioner. Unless good cause can be shown, a complaint must be lodged within 12 months after the date on which the contravention of the Act is alleged to have been committed.[86] Good cause usually requires the complainant to show that the lapse of time will not cause the respondent prejudice.

In circumstances where a complainant has not clarified the ground of the complaint, the Equal Opportunity Commissioner may provide the complainant with information regarding what constitutes unlawful discrimination to assist in preparing the application.

Where allegations of unlawful discrimination are accepted by the Equal Opportunity Commissioner and categorised as complaints under the Act, a conciliation officer is assigned to the complaint to investigate and conciliate.[87]

3.9.2 Investigative function

Pursuant to section 84 of the Act, the EOC must investigate each complaint lodged. The investigative powers include the power to request the production of documents relevant to that investigation.[88]

If the complaint is not resolved through written submissions, the Equal Opportunity Commissioner may direct the complainant and respondent to attend a conciliation conference in an effort to resolve the matter.[89] The EOC encourages the resolution of complaints via conciliation, where possible.

The parties may seek leave of the Equal Opportunity Commissioner to be represented at the conciliation.[90] Often, the resolutions at conciliations are a combination of outcomes including monetary settlements, a policy change and an apology.[91] In 2019-20, 20.7% of settlements involved a monetary settlement, and 17.4% involved an apology.[92]

Where complaints are not resolved at conciliation, a report may be prepared for the Equal Opportunity Commissioner's consideration in order to assist with further investigation.[93]

If the Equal Opportunity Commissioner is satisfied that a complaint is vexatious, frivolous, misconceived or lacking in substance, the Equal Opportunity Commissioner may dismiss the complaint by notifying the complainant in writing under section 89.[94] The Equal Opportunity Commissioner does not have the power to award costs against a party. In the event the Equal Opportunity Commissioner considers that the complaint should be dismissed, the complainant is entitled to request the matter be referred to the SAT.

If a complaint is unresolved after conciliation or the Equal Opportunity Commissioner is of the view that the complaint cannot be resolved by conciliation or is of such a nature that it should be referred to the SAT, the Equal Opportunity Commissioner must refer the complaint to the SAT.[95] Under the Act, the Equal Opportunity Commissioner has the power to compel complainants, respondents and witnesses to attend conferences and produce evidence, if necessary.[96]

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[86] Ibid ss 83(1) and 83(4).
[87] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 18.
[88] *Equal Opportunity Act 1984* (WA), s 86.
[89] Ibid ss 87(1), 91.
[90] Ibid s 92(1).
[91] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 31.
[92] Ibid 31.
[93] Ibid 22.
[94] *Equal Opportunity Act 1984* (WA), s 89(1).
[95] Ibid s 93.
[96] Ibid ss 87, 88.

In 2019-20, the EOC received 410 new complaints, which was lower than the 475 received in the previous year.[97] During the 2019-20 year, the complaints received by the EOC were resolved in the following ways:

(a) **withdrawal**: by the complainant (following receipt of the response, or an inability to provide evidence) (34.3%);

(b) **dismissed**: by the Equal Opportunity Commissioner if there is insufficient substance or the complaint is considered vexatious or frivolous (24.2%);

(c) **conciliation**: where an agreement is reached between parties (20.7%);

(d) **lapse**: where there has been no response from the complainant following attempts to contact them, or if information is not provided (19.9%); and

(e) **referral to the SAT**: where the complaint cannot be conciliated and there are prospects of success (1.0%).[98]

In addition to the EOC having jurisdiction over the Grounds under the Act, the Equal Opportunity Commissioner also has jurisdiction over victimisation for making a disclosure under the *Public Interest Disclosure Act 2003* (WA) and also discrimination on the grounds of a spent conviction in the context of employment under the *Spent Convictions Act 1988* (WA).

3.9.3 Additional functions of the Equal Opportunity Commissioner

In addition to the investigative powers of the Equal Opportunity Commissioner, for the purposes of eliminating discrimination, the Equal Opportunity Commissioner may also:[99]

(a) arrange and coordinate consultations, inquiries, discussions, seminars and conferences;

(b) review the laws of Western Australia;

(c) consult with governmental, business, industrial and community groups in order to ascertain means of improving services and conditions affecting a person or persons who are subject to discrimination;

(d) develop programmes and policies promoting the achievement of the principle of equality between men and women, persons of all races and persons regardless of religious or political conviction, impairment or age;

(e) subject to section 167 of the Act (relating to non-disclosure of private information), publish any written reports compiled in the exercise of the powers conferred on the EOC; and

(f) perform any function conferred on the Equal Opportunity Commissioner by any other State or Federal written law, any arrangement in force under section 7 (relating to inter-governmental arrangements) and do anything conducive or incidental to the performance of the functions conferred or imposed.

3.9.4 Assistance for complainants

Where the complaint is referred to the SAT, the Equal Opportunity Commissioner must, where requested to do so, assist the complainant in the presentation of their case at the SAT.[100] Further, if requested by the complainant, the Equal Opportunity Commissioner shall make a contribution to the costs of witnesses and other expenses.[101]

Where a complaint is on appeal to the Supreme Court of Western Australia, the Equal Opportunity Commissioner may also assist a complainant who has received assistance at the SAT, if the Equal

[97] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 22.
[98] Ibid 30, 31.
[99] *Equal Opportunity Act 1984* (WA), s 80.
[100] Ibid s 93(2)(a).
[101] Ibid s 93(2)(b).

Opportunity Commissioner considers it appropriate in all of the circumstances.[102] This includes arranging legal representation or granting financial assistance.

3.10 Requirements for the referral of complaints to the SAT

Under section 93 of the Act, the Equal Opportunity Commissioner may refer matters to the SAT where:

(a) the Equal Opportunity Commissioner is of the opinion that the complaint cannot be resolved by conciliation;[103]

(b) endeavours to resolve the complaint by conciliation have been unsuccessful;

(c) the Equal Opportunity Commissioner is of the opinion that the complaint is of a nature that should be referred to the SAT; or

(d) under section 90, where the Equal Opportunity Commissioner is asked to do so by the complainant because the Equal Opportunity Commissioner has dismissed the complaint.[104]

Where the Equal Opportunity Commissioner has been requested by a complainant to refer the matter to the SAT, the Equal Opportunity Commissioner must provide the complainant with assistance by assigning a legal officer to assist the complainant.[105] During 2019-20, 66.7% of matters referred to the SAT under section 93 were settled with the assistance of an EOC legal officer.[106]

3.11 Role and jurisdiction of the SAT

Under the Act, the SAT has the jurisdiction to hear applications concerning alleged discrimination under the Act, and to hear complaints referred to it by the Equal Opportunity Commissioner.[107]

In receiving the referral, the SAT will receive a report from the Equal Opportunity Commissioner detailing the complaint, and the matter may be resolved by mediation or hearing. In the year 2019/20, 45 applications were lodged under the Human Rights stream of the SAT, 60% of which were applications pursuant to the Act.[108]

After holding an inquiry, the SAT may decide to dismiss the complaint or find the complaint substantiated.[109]

If the complaint is substantiated, then the SAT may do one or more of the following:

(a) award damages to the complainant up to $40,000;

(b) make an order prohibiting the respondent from continuing or repeating the unlawful conduct;

(c) order the respondent to redress any loss or damage;

(d) make a declaration that an agreement made in contravention of the Act is void; or

(e) decline to take any further action in the matter.[110]

Decisions of the SAT may be appealed to the Supreme Court of Western Australia, with leave from the Court.[111]

[102] Ibid s 93A.
[103] Ibid s 93(1).
[104] *Equal Opportunity Act 1984* (WA), s 89, 90.
[105] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 32.
[106] Ibid 32.
[107] *Equal Opportunity Act 1984* (WA), s 107(1).
[108] State Administrative Tribunal, *State Administrative Tribunal Annual Report 2019-20*, p14.
[109] *Equal Opportunity Act 1984* (WA), s 127(a)-(b).
[110] Ibid s 127(b)(i)-(iv).
[111] *State Administrative Tribunal Act 2004* (WA), s 105.

The SAT also has the power to grant exemptions from the operation of specified provisions of the Act.[112] During the year 2019-20 only one exemption was granted.[113]

The SAT may prohibit the publication of any evidence, the contents of any documents produced, or any information that would enable a person before the SAT to be identified.[114]

On application from the Equal Opportunity Commissioner or any party to an investigation, the SAT may make interim orders to preserve the rights of the parties to a complaint or the status quo between the parties, pending determination of the matter.[115]

3.12 Interaction with relevant Commonwealth laws or proposed laws

Interaction with Commonwealth laws

Anti-discrimination legislation exists in all States and Territories in Australia and also at the Federal level. This can lead to confusion, particularly for complainants, in relation to the interaction between the Act and Commonwealth laws.

The Commonwealth anti-discrimination laws are discussed in detail in Chapter 5 of this Discussion Paper. Although the Commonwealth does not have any express powers to legislate in relation to discrimination, it principally relies on the external affairs power in the Australian Constitution in order to give effect to the various international treaties and conventions which Australia has ratified.[116] For example, section 3(a) of the *Sex Discrimination Act 1984* (Cth) (**SDA**) states that one of its objectives is to give effect to certain provisions of the *Convention on the Elimination of all Forms of Discrimination Against Women* and to provisions of other relevant international instruments. Western Australia, like the other States, does not have to rely on the external affairs power to legislate in this area of law and so it does not have the same legislative limitations as the Commonwealth.

Inconsistencies between State and Commonwealth laws are addressed by section 109 of the Australian Constitution, which provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The practical effect of concurrent State and Federal anti-discrimination regimes is that if a particular ground of discrimination is protected at both a State and Federal level, an aggrieved person may choose which law to rely on when lodging a complaint. Often, but not always, an individual in Western Australia has the option of either pursuing a complaint of discrimination under the Act or under Commonwealth anti-discrimination laws. The jurisdiction in which to pursue a complaint is at the discretion of the individual and will likely be selected based on the limitation of any grounds of discrimination or areas of public life to which those grounds apply, as well as other issues such as the process for pursuing the complaint and potential awards of compensation. However, instrumentalities of States are often excluded from Commonwealth protections. In such circumstances, their employees are unable to lodge a complaint for discrimination under the Commonwealth laws that occurs during their employment.[117]

In order to avoid a complainant pursuing concurrent claims at a State and Federal level (often referred to as 'double dipping'), the *Age Discrimination Act 2004* (Cth) (**ADA**), *Disability Discrimination Act 1992* (Cth) (**DDA**), *Racial Discrimination Act 1975* (Cth) (**RDA**) and SDA each contain provisions which prevent complainants from lodging a complaint under Federal anti-discrimination laws if they have already done so under a State law in relation to the same matter.[118] Similarly, the *Fair Work Act 2009* (Cth) (**FW Act**)

[112] *Equal Opportunity Act 1984* (WA), s 135(1).

[113] Equal Opportunity Commission, *Equal Opportunity Commission Annual Report 2019-20* (Report, 2020), 14; *Equal Opportunity Act 1984* (WA), s 135; note exemptions can be granted for the provisions in Part II, IIAA, IIA, IIB, III, IV, IVA, IVB or IVC.

[114] *Equal Opportunity Act 1984* (WA), s 122.

[115] Ibid s 126.

[116] Australian Constitution, s 51(xxix).

[117] See, for example, *Sex Discrimination Act 1984* (Cth), s 13.

[118] *Age Discrimination Act 2004* (Cth); s 12(4), *Disability Discrimination Act 1992* (Cth) s 13(4); *Sex Discrimination Act 1984* (Cth) s 10(4); *Racial Discrimination Act 1975* (Cth), s 6A(2). Note that 'State' is relevantly defined in each Act to include the Australian Capital Territory and the Northern Territory.

provides that a person who has been dismissed may not make an application under the FW Act if they have made a complaint under another law at the State or Federal level regarding the dismissal.[119]

There is no express equivalent provision in the Act which prevents a complainant from lodging a complaint under the Act if they have already done so under the ADA, DDA, RDA or SDA in relation to the same matter.

The differences and inconsistencies between the Act and the Commonwealth laws leaves scope for practical and 'constitutional issues' to arise for parties to cases brought under the Act.

Interaction with the *Marriage Act 1961* (Cth)

As noted in section 3.2 above, section 9 of the Act prohibits direct and indirect discrimination on the basis of marital status.

Section 4 of the Act defines marital status to mean the status or condition of being:

(a) single;

(b) married;

(c) married but living separately and apart from one's spouse;

(d) divorced;

(e) widowed; or

(f) the de facto partner of another person.

The Act uses but does not define the terms 'married' or 'marriage'.

Since its inception, the Australian Constitution has provided Federal Parliament the power to legislate with respect to marriage.[120] However, it was not until the introduction of the *Matrimonial Causes Act 1959* (Cth) and the *Marriage Act 1961* (Cth) that the 'marriage power' was relied upon by the Commonwealth. Previously, each jurisdiction independently regulated its own marriage laws. The relevant legislation in Western Australia was the *Marriage Act 1894* (WA), which having become redundant in 1961, was repealed in 1967.

Neither the *Marriage Act 1894* (WA) nor the *Marriage Act 1961* (Cth) contained a definition of 'marriage' when enacted.[121] Prior to 2004, the common law was used to determine the meaning of marriage. For this reason, it appears there was no need to define 'married' or 'marriage' under the *Marriage Act 1961* (Cth) or the Act when each was first enacted.

In 2004, the *Marriage Amendment Act 2004* (Cth) was passed, which inserted the following definition into the *Marriage Act 1961* (Cth): '**marriage** means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[122] As was held by the High Court of Australia in *Commonwealth of Australia v Australian Capital Territory*,[123] this amendment made plain (if it was not already) that the Federal marriage law is a comprehensive and exhaustive statement of the law of marriage. Accordingly, it appears that since 2004, the Ground of marital status in relation to 'being … married' has been determined by reference to the definition in the *Marriage Act 1961* (Cth).

The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (**CMA Act**) subsequently amended the *Marriage Act 1961* (Cth) to define marriage as 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.

[119] *Fair Work Act 2009* (Cth), ss 725, 732.

[120] *Australian Constitution,* s 51(xxi).

[121] The *Marriage Act 1961* (Cth) did however require the authorised celebrant to say "Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', or words to that effect. See s 46(1).

[122] *Marriage Amendment Act 2004* (Cth), s 1 amending *Marriage Act 1961* (Cth), s 5(1).

[123] *Commonwealth of Australia v Australian Capital Territory* (2013) 250 CLR 441, 467-8 [57].

3.13 Other

3.13.1 Compensation cap

The Act provides that the SAT can make an order for compensation for 'any loss or damage suffered by reason of the respondent's conduct', up to the amount of $40,000. An order for the respondent to pay compensation cannot exceed this amount.[124]

3.13.2 Intersectionality or multidimensional complaints

The Act provides that a complaint alleging that a person 'has committed a contravention' of the Act may be lodged with the Equal Opportunity Commissioner.[125] If such a complaint is referred to the SAT, after holding an inquiry, it may dismiss the complaint or find the complaint substantiated.[126] As the Act contains individual statements that it is unlawful to discriminate against another person on one of the Grounds and by particular conduct, the language of the Act appears to require that the complaint occurred by reason of each separate ground rather than a combination of grounds which individually may not have resulted in the discriminatory act.

3.13.3 Drafting form and style

The Act uses the older model of drafting of anti-discrimination laws, which separates each of the Grounds and includes the test for direct and indirect discrimination, as well as the exceptions specific to each Ground. In the 2007 Review, the EOC made the observation that other States and Territories have benefited from more modern drafting.[127]

3.13.4 Complaints by representative organisations

Section 83 of the Act provides that a complaint alleging that a person has committed a contravention of the Act may be lodged in writing with the Equal Opportunity Commissioner by:

(a) a person on the person's own behalf or on the person's own behalf and the behalf of other persons;

(b) two or more persons on their own behalf or on behalf of themselves and other persons; or

(c) a trade union of which a person or persons aggrieved by the alleged contravention is a member or are members on behalf of that person or those persons.

Presently there is no express power for representative organisations with standing to be permitted to make complaints on behalf of disadvantaged groups, nor to represent them during the investigation of the complaint.

3.13.5 Conversion practices

The Act does not deal with conversion practices which seek to change or suppress an individual's sexual orientation or gender identity.

[124] *Equal Opportunity Act 1984* (WA), s 127(b)(i).
[125] Ibid s 83.
[126] Ibid s 127.
[127] Equal Opportunity Commission, *Review of Equal Opportunity Act 1984 Report* (May 2007), 2.

4. OTHER STATES AND TERRITORIES

4.1 Equivalent State and Territory legislation

Each State and Territory of Australia has its own anti-discrimination legislation. These include the following:

(a) ACT;

(b) NSW Act;

(c) *Anti-Discrimination Act 1992* (NT) (**Northern Territory Act**);

(d) *Anti-Discrimination Act 1991* (QLD) (**Queensland Act**);

(e) *Equal Opportunity Act 1984* (SA) (**South Australian Act**);

(f) *Anti-Discrimination Act 1998* (TAS) (**Tasmanian Act**); and

(g) Victorian Act.

All of the above Acts have been amended, to varying extents, since their commencement. As has been seen in relation to the Act, amendments to anti-discrimination legislation arise principally due to changes in community values and expectations regarding the scope of protections that are, or should be, afforded under such legislation. It is to be expected that the legislative landscape will continue to change as community values and expectations evolve. Emblematically, at the time of releasing this Discussion Paper, a number of private members' bills are in the New South Wales (**NSW**) Parliament to amend the NSW Act to, among other things, protect religious freedom.[128]

4.2 Objects

Compared to the objects of the Act, the objects of the Victorian Act explicitly acknowledge the need to combat the systemic causes of discrimination. Section 3(c) states that the objects of the Victorian Act include 'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation.' Further, sections 3(d) and 3(e) expressly promote and facilitate the progressive realisation of equality, as far as reasonably practicable, and enable the VHREOC to encourage best practice, and facilitate compliance with the Victorian Act by undertaking research, education and other enforcement functions.

In addition, in contrast to the Act, section 4AA of the ACT includes an interpretive obligation, which provides that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the ACT Act and human rights under the *Human Rights Act 2004* (ACT).

4.3 Grounds of discrimination

The Grounds are reflected in the protections in most of the other States and Territories. However, the definitions of the Grounds, and therefore the extent of their protections, do differ in some respects. This is summarised in the following table.

[128] See Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW). See also Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW); Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW); Anti-Discrimination Amendment (Sex Workers) Bill 2020 (NSW).

Grounds in the Act	Position in other States and Territories
Age	Age is a protected attribute in all jurisdictions.[129]
Assistance or therapeutic animal	Assistance or therapeutic animal is a protected attribute in all jurisdictions except NSW.[130] In all jurisdictions except the ACT and South Australia, the legislation protects discrimination based on 'guide dog', 'hearing dog' or 'assistance dog'. In the South Australian Act, the protection is provided in the context of accommodation and it is given to 'therapeutic animals'.[131] 'Therapeutic animal' is defined to mean an animal certified by a medical practitioner as being required to assist a person as a consequence of the person's disability, or an animal of a class prescribed by regulation.[132] It is also unlawful to impose a condition that would result in a person with a disability being separated from their 'assistance animal', defined to mean a dog that is an accredited assistance dog under the *Dog and Cat Management Act 1995* (SA) or an animal of a class prescribed by regulation.[133] In the ACT Act, protection is provided to those with a disability, which is defined to include reliance on an assistance animal.[134] Like the South Australian Act, the ACT Act does not specify which animal can be regarded as an 'assistance animal' as long as that animal is trained to assist a person with disability and satisfies any requirements prescribed by regulation.[135]
Breast feeding	All State jurisdictions include breastfeeding as a protected attribute.[136] South Australia protects 'breastfeeding' under the ground of 'association with a child.'[137] It also includes 'bottle feeding' in its protection. But it extends further to provide protection to relatives and associates of a person that is breastfeeding or bottle feeding a child[138] and against education authorities discriminating against a student breastfeeding an infant.[139]

[129] *Discrimination Act 1991* (ACT), s 7(1)(b); *Anti-Discrimination Act 1997* (NSW), s 49ZYA; *Anti-Discrimination Act 1992* (NT), s 19(1)(d); *Anti-Discrimination Act 1991* (QLD), s 7(f); *Equal Opportunity Act 1984* (SA), s 85A; *Anti-Discrimination Act 1998* (TAS), s 16(k); *Equal Opportunity Act 2010* (Vic), s 6(e); *Equal Opportunity Act 1984* (WA), s 66V.

[130] *Discrimination Act 1991* (ACT), s 5AA(2)(d); *Anti-Discrimination Act 1992* (NT), s 21; *Anti-Discrimination Act 1991* (QLD), s 85; *Equal Opportunity Act 1984* (SA), s 88A; *Anti-Discrimination Act 1998* (TAS), s 3 (definition of 'disability'); *Equal Opportunity Act 2010* (Vic), s 7(4)(c); *Equal Opportunity Act 1984* (WA), s 66A(4).

[131] *Equal Opportunity Act 1984* (SA), s 88A(1).

[132] Ibid s 88A(3)(a)-(b).

[133] Ibid ss 5(1), 88.

[134] *Discrimination Act 1991* (ACT), s 5AA(2)(d).

[135] Ibid s 5AA(3).

[136] *Discrimination Act 1991* (ACT), s 7(1)(d); *Anti-Discrimination Act 1997* (NSW), s 24(1C); *Anti-Discrimination Act 1992* (NT), s 19(1)(g); *Anti-Discrimination Act 1991* (QLD), s 7(d); *Equal Opportunity Act 1984* (SA), s 85T(5); *Anti-Discrimination Act 1998* (TAS), s 16(i); *Equal Opportunity Act 2010* (Vic), s 6(i); *Equal Opportunity Act 1984* (WA), s 10A.

[137] *Equal Opportunity Act 1984* (SA), s 85T(5)(a).

[138] Ibid s 85T(5)(b).

[139] Ibid s 87B.

Grounds in the Act	Position in other States and Territories
Family responsibility or family status	All jurisdictions include parental status / family responsibility as a ground of discrimination.[140] The Act defines 'family responsibility or family status' to mean 'having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment; or the status of being a particular relative; or the status being a relative of a particular person.'[141] In comparison, the Northern Territory, Queensland, Tasmanian and Victorian Acts protect against discrimination based on 'parenthood', 'parental status' or 'parental or carer status' respectively.[142] South Australia protects 'associations with a child'.[143] The ACT Act protects parent, family, carer or kinship responsibilities, while the NSW Act provides a more general protection which is 'responsibilities as a carer'.[144] The South Australian Act has a separate provision for carer responsibilities.[145] The Northern Territory Act does not include carer status or caring responsibilities as a ground of discrimination.[146]
Gender history / gender identity	Gender identity is a protected attribute in all jurisdictions except the Northern Territory.[147] Other State jurisdictions provide a more inclusive protection than the limitations of the Act, which is restricted to 'gender reassigned persons' and 'gender history', as discussed in section 3.2 above. The NSW, Queensland and Victorian provisions include 'indeterminate sex' in their definition of gender identity,[148] while Tasmania defines 'gender identity' as identifying as the opposite sex or 'another sex.'[149] The ACT is the broadest, as it protects gender identity irrespective of a person's gender at birth.[150] Intersex status is also a protected attribute in the ACT, South Australia and Tasmania.[151]

[140] *Discrimination Act 1991* (ACT), s 7(1)(l); *Anti-Discrimination Act 1997* (NSW), s 49S; *Anti-Discrimination Act 1992* (NT), s 19(1)(c); *Anti-Discrimination Act 1991* (QLD), s 7(n); *Equal Opportunity Act 1984* (SA), s 85T(1)(d); *Anti-Discrimination Act 1998* (TAS), s 16(c); *Equal Opportunity Act 2010* (Vic), s 6(p); *Equal Opportunity Act 1984* (WA), s 35A.

[141] *Equal Opportunity Act 1984* (WA), s 4(a) (definition of 'family responsibility or family status').

[142] *Anti-Discrimination Act 1992* (NT), s 19(1)(d); *Anti-Discrimination Act 1991* (QLD), s 7(f); *Anti-Discrimination Act 1998* (TAS), s 16(k); *Equal Opportunity Act 2010* (Vic), s 6(e).

[143] *Equal Opportunity Act 1984* (SA), s 85T(1)(d).

[144] *Discrimination Act 1991* (ACT), s 7(1)(l); *Anti-Discrimination Act 1997* (NSW), s 49S.

[145] *Equal Opportunity Act 1984* (SA), s 85T(1)(e).

[146] *Discrimination Act 1991* (ACT), s 7(1)(l); *Anti-Discrimination Act 1997* (NSW), s 49S.

[147] *Discrimination Act 1991* (ACT), s 7(1)(g); *Anti-Discrimination Act 1997* (NSW), ss 49ZF, 49ZG; *Anti-Discrimination Act 1991* (QLD), s 7(m); *Equal Opportunity Act 1984* (SA), s 29(2a); *Anti-Discrimination Act 1998* (TAS), s 16(ea); *Equal Opportunity Act 2010* (Vic), s 6(d); *Equal Opportunity Act 1984* (WA), s 35AB.

[148] *Anti-Discrimination Act 1997* (NSW), s 38A(c); *Anti-Discrimination Act 1991* (QLD) s 4 (definition of 'gender identity'); *Equal Opportunity Act 2010* (Vic), s 4 (definition of 'gender identity').

[149] *Anti-Discrimination Act 1998* (TAS), s 3 (definition of 'gender identity').

[150] *Discrimination Act 1991* (ACT), s 2 (Dictionary) (definition of 'gender identity').

[151] *Discrimination Act 1991* (ACT), s 169B, *Equal Opportunity Act 1984* (SA), s 29; *Equal Opportunity Act 2010* (Vic), s 16(eb).

Grounds in the Act	Position in other States and Territories
Impairment	All State and Territory jurisdictions protect against discrimination on the grounds of disability and impairment.[152] The ACT, NSW, South Australian, Tasmanian and Victorian Acts use the term 'disability' as their protected attribute. The Northern Territory and Queensland use the term 'impairment', like the Act. The Northern Territory Act's definition of impairment is particularly elaborative. It includes any physical or intellectual disability, a total or partial loss of bodily function or part of a body, a condition, malfunction, dysfunction, malformation or disfigurement of a part of a body, a condition, malfunction or dysfunction leading to slower learning than those without it, any permanent or temporary psychiatric or psychological disease, the presence in the body of an organism that has caused or is capable of causing disease, an organism that hinders or is capable of hindering the body's ability to defend against disease, or reliance on a guide dog, wheelchair or other remedial aid.[153] Some other States and Territories also have definitions of disability that are more elaborative than the Act.[154] The ACT, NSW, South Australian, Tasmanian and Victorian Acts define impairment or disability to include a future impairment or disability.[155] By way of example, the Victorian Act states that disability includes 'a disability that may exist in the future (including because of a genetic predisposition to that disability) and … behaviour that is a symptom or manifestation of a disability'.[156]
Marital status	Marital / relationship status is a protected attribute in all jurisdictions.[157] Unlike the Act (and also in Tasmania and Victoria), in the ACT and Queensland it is 'relationship status' rather than 'marital status' that is protected. The Queensland Act definition of 'relationship status' includes all the elements of the Act's definition of 'marital status' except for the addition of civil partnerships.[158] A civil partner is not defined. The ACT Act has the most extensive definition of all the jurisdictions, as it also includes the status of being in a civil union; in a civil union but living separately from one's civil union partner; in a civil partnership but living separately from one's civil partner; and the surviving spouse (instead of the 'widow'). A civil union is not defined.[159]

[152] *Discrimination Act 1991* (ACT), s 7(1)(e); *Anti-Discrimination Act 1997* (NSW), s 49A; *Anti-Discrimination Act 1992* (NT), s 19(1)(j); *Anti-Discrimination Act 1991* (QLD), s 7(h); *Equal Opportunity Act 1984* (SA), s 85A; *Anti-Discrimination Act 1998* (TAS), s16 (b); *Equal Opportunity Act 2010* (Vic), s 6 (a); *Equal Opportunity Act 1984* (WA), s 66A.

[153] *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'impairment').

[154] See, for example, *Discrimination Act 1991* (ACT), s 5AA(1); *Equal Opportunity Act 1984* (SA), s 5(1).

[155] *Discrimination Act 1991* (ACT), s 5AA(2); *Anti-Discrimination Act 1977* (NSW), s 49A; *Equal Opportunity Act 1984* (SA), s 66(a); *Anti-Discrimination Act 1998* (TAS) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1).

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

[157] *Discrimination Act 1991* (ACT), s 7(1)(s); *Anti-Discrimination Act 1997* (NSW), s 39; *Anti-Discrimination Act 1992* (NT), s 19(1)(e); *Anti-Discrimination Act 1991* (QLD) s 7(b); *Equal Opportunity Act 1984* (SA) s 85T(2); *Anti-Discrimination Act 1998* (TAS) s 16(f); *Equal Opportunity Act 2010* (Vic), s 6(h); *Equal Opportunity Act 1984* (WA), s 9.

[158] *Anti-Discrimination Act 1991* (QLD), s 4 (definition of 'relationship status').

[159] *Discrimination Act 1991* (ACT), s 2 (dictionary) (definition of 'relationship status').

Grounds in the Act	Position in other States and Territories
Religious or political conviction	With the exception of NSW and South Australia, all jurisdictions protect against discrimination based on religious[160] and political conviction[161] (sometimes by reference to the associated notions of religious and political beliefs, affiliations and activities). The ACT Act defines 'political conviction' to include having a political conviction, belief, opinion or affiliation; engaging in political activity; not having a political conviction, belief, opinion or affiliation; and not engaging political activity.[162] Similarly, the Tasmanian and Victorian Acts similarly define 'political activity' as engaging in, not engaging in, or refusing to engage in, political activity, and 'political belief or affiliation' as holding or not holding a political belief or view.[163] The ACT Act defines 'religious conviction' to include having a religious conviction, belief, opinion or affiliation; engaging in religious activity; the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; not having a religious conviction, belief, opinion or affiliation; and not engaging in religious activity.[164] The Queensland, Tasmanian and Victorian Acts similarly define 'religious activity' as engaging in, not engaging in or refusing to engage in a religious activity, and 'religious belief' or 'religious belief or affiliation' as holding or not holding a religious belief or view.[165]
Pregnancy	All State and Territory jurisdictions protect against discrimination based on pregnancy.[166] The ACT and South Australian Acts extend their protection to include 'potential pregnancy'.[167] The ACT Act defines the 'potential pregnancy' of a woman to include the fact that the woman is or may be capable of bearing children; the fact that the woman has expressed a desire to become pregnant; and the fact that the woman is likely, or is perceived as being likely, to become pregnant. The South Australian Act picks up on the last part of that definition, defining the 'potential pregnancy' of a woman to mean that the woman is likely, or is perceived to be likely, to become pregnant. The Northern Territory and Tasmanian Acts also extend their protection to include 'child-bearing capacity'.[168]

[160] *Discrimination Act 1991* (ACT), s 7(1)(t); *Anti-Discrimination Act 1992* (NT), s 19(1)(m); *Anti-Discrimination Act 1991* (QLD), s 7(i); *Anti-Discrimination Act 1998* (TAS), s 16(o); *Equal Opportunity Act 2010* (Vic), s 6(n); *Equal Opportunity Act 1984* (WA), s 53(1).

[161] *Discrimination Act 1991* (ACT), s 7(1)(n); *Anti-Discrimination Act 1992* (NT), s 19(1)(n); *Anti-Discrimination Act 1991* (QLD), s 7(j); *Anti-Discrimination Act 1998* (TAS), s 16 (m); *Equal Opportunity Act 2010* (Vic), s 6(k); *Equal Opportunity Act 1984* (WA), s 53(1).

[162] *Discrimination Act 1991* (ACT) s 2 (dictionary).

[163] *Anti-Discrimination Act 1998* (TAS) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1). Note that the Victorian Act provides that the political belief or view, or political activity, must be lawful.

[164] *Discrimination Act 1991* (ACT) s 2 (dictionary).

[165] *Anti-Discrimination Act 1991* (QLD) s 4 (dictionary); *Anti-Discrimination Act 1998* (TAS) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1). Note that the Queensland Act provides that the religious activity must be one that is lawful, and the Victorian Act provides that the religious belief or view, or religious activity, must be lawful.

[166] *Discrimination Act 1991* (ACT) s 7(1)(o); *Anti-Discrimination Act 1997* (NSW) s 35; *Anti-Discrimination Act 1992* (NT) s 19(1)(f); *Anti-Discrimination Act 1991* (QLD) s 7(e); *Equal Opportunity Act 1984* (SA) s 85T(4); *Anti-Discrimination Act 1998* (TAS) s 16(g); *Equal Opportunity Act 2010* (Vic) s 6(l); *Equal Opportunity Act 1984* (WA) s 10.

[167] *Discrimination Act 1991* (ACT) s 5A; *Equal Opportunity Act 1984* (SA) s 85T(4)(a).

[168] *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'pregnancy'); *Anti-Discrimination Act 1998* (TAS), s 3 (definition of 'pregnancy').

Grounds in the Act	Position in other States and Territories
Race	All State and Territory jurisdictions protect against discrimination on the ground of race.[169] 'Race' is defined similarly across jurisdictions insofar as they all include notions of colour, descent, ethnic or national origin, and nationality.[170] However, some differences in meaning are present. The NSW and Tasmanian Acts include ethno-religious origins in their definitions.[171] The Northern Territory and Tasmanian Acts include a person's status of being, or having been, an immigrant in their definitions.[172] The Northern Territory, Queensland, South Australian and Victorian Acts include the ancestry of a person in their definitions.[173] Like the Act, the ACT Act and Victorian Act recognise that two or more distinct races can collectively be a race.[174] The South Australian Act includes nationality that is 'current, past or proposed'.[175]
Sex / gender	Sex is a protected attribute in all State and Territory jurisdictions.[176]
Sexual orientation	Sexual orientation and sexuality are protected attributes in all State and Territory jurisdictions.[177] Sexuality and sexual orientation have been defined similarly across the States and Territories. However, in NSW, the relevant protected attribute is 'homosexuality' which includes 'reference to the person's being thought to be a homosexual person, whether he or she is in fact a homosexual person or not.'[178]

[169] *Discrimination Act 1991* (ACT), s 7(1)(q); *Anti-Discrimination Act 1997* (NSW), s 7; *Anti-Discrimination Act 1992* (NT), s 19(1)(a); *Anti-Discrimination Act 1991* (QLD) s 7(g); *Equal Opportunity Act 1984* (SA) s 51; *Anti-Discrimination Act 1998* (TAS) s 16(a); *Equal Opportunity Act 2010* (Vic), s 6(m); *Equal Opportunity Act 1984* (WA), s 36.

[170] *Discrimination Act 1991* (ACT), s 2 (dictionary) (definition of 'race'); *Anti-Discrimination Act 1997* (NSW), s 4 (definition of 'race'); *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'race'); *Anti-Discrimination Act 1991* (QLD) s 4 (definition of 'race'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'race'); *Anti-Discrimination Act 1998* (TAS) s 3 (definition of 'race'); *Equal Opportunity Act 2010* (Vic), s 4(1) (definition of 'race'); *Equal Opportunity Act 1984* (WA), s 4(a) (definition of 'race').

[171] *Anti-Discrimination Act 1997* (NSW), s 4 (definition of 'race'); *Anti-Discrimination Act 1998* (TAS), s 3 (definition of 'race').

[172] *Anti-Discrimination Act 1992* (NT), s 4 (definition of 'race'); *Anti-Discrimination Act 1998* (TAS), s 3 (definition of 'race').

[173] *Anti-Discrimination Act 1992* (NT), s 4 (definition of 'race'); *Anti-Discrimination Act 1991* (QLD), s 4 (definition of 'race'); *Equal Opportunity Act 1984* (SA), s 5 (definition of 'race'); *Equal Opportunity Act 2010* (Vic), s 4(1) (definition of 'race').

[174] *Discrimination Act 1991* (ACT), s 2 (dictionary) (definition of 'race'); *Equal Opportunity Act 2010* (Vic), s 4(1) (definition of 'race'); *Equal Opportunity Act 1984* (WA), s 4(a) (definition of 'race').

[175] *Equal Opportunity Act 1984* (SA), s 5 (definition of 'race').

[176] *Discrimination Act 1991* (ACT), s 7(1)(u); *Anti-Discrimination Act 1997* (NSW), s 24; *Anti-Discrimination Act 1992* (NT), s 19(1)(b); *Anti-Discrimination Act 1991* (QLD), s 7(a); *Equal Opportunity Act 1984* (SA), s 29(2); *Anti-Discrimination Act 1998* (TAS), s 16(e); *Equal Opportunity Act 2010* (Vic), s 6(o); *Equal Opportunity Act 1984* (WA), s 8.

[177] *Discrimination Act 1991* (ACT), s 7(1)(w); *Anti-Discrimination Act 1997* (NSW), s 49ZF; *Anti-Discrimination Act 1992* (NT), s 19(c); *Anti-Discrimination Act 1991* (QLD), s 7(n); *Equal Opportunity Act 1984* (SA), s 29(3); *Anti-Discrimination Act 1998* (TAS), s 16(c); *Equal Opportunity Act 2010* (Vic), s 6(p); *Equal Opportunity Act 1984* (WA), s 35O.

[178] *Anti-Discrimination Act 1997* (NSW), s 49ZF.

In addition to the Grounds, the anti-discrimination laws of the other States and Territories include other grounds of discrimination that are not explicit in the Act as set out as follows.

Physical features

Physical features is a protected attribute in the ACT and Victorian Acts.[179] The ACT and Victorian Acts define physical features to mean a person's height, weight, size or other bodily features or characteristics.[180]

Religious appearance or dress

Religious appearance or dress is a ground of discrimination in the South Australian Act.[181] However, it may also be protected under the Act, which protects against discrimination on the basis of a 'characteristic generally associated with or attributed or imputed to a person of the religious... conviction of the aggrieved person'.[182]

Industrial / trade union activity / employment activity

Industrial / trade union activity is a protected attribute in all jurisdictions except NSW and South Australia. In Western Australia, while there is no such provision in the Act, the *Industrial Relations Act 1979* (WA) protects a person's membership or non-membership of an organisation.[183]

The Victorian Act also includes employment activity as a protected attribute,[184] which means an employee making reasonable requests for information pertaining to their employment entitlements or communicating concerns regarding receipt of their employment entitlements to their employer.[185]

For any employee covered by the FW Act which includes most private sector employees, these protections are provided in that legislation.

Employment status

Employment status is a protected attribute under the ACT Act.[186] It is defined as 'being unemployed, receiving a pension or another social security benefit, receiving compensation, being employed on a part-time, casual or temporary basis and undertaking shift or contract work.'[187]

Criminal record or spent conviction

The ACT, Northern Territory and Tasmanian Acts protect against discrimination based on 'irrelevant criminal record'.[188] There is no equivalent protection in the Act, but protection is provided in Western Australia in the area of work under the *Spent Convictions Act 1988* (WA)[189] for spent convictions and the *Historical Homosexual Convictions Expungement Act 2018* (WA) for expunged homosexual convictions.[190]

[179] *Discrimination Act 1991* (ACT), s 7(1)(m); *Equal Opportunity Act 2010* (Vic), s 6(j).
[180] *Discrimination Act 1991* (ACT) s 2 (dictionary) (definition of 'physical features'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'physical features').
[181] *Equal Opportunity Act 1984* (SA), ss 85T(5), 85T(1)(f).
[182] *Equal Opportunity Act 1984* (WA), s 53(1).
[183] Ibid, ss 96C-96E.
[184] *Equal Opportunity Act 2010* (Vic), s 7(c).
[185] Ibid s 4(1).
[186] *Discrimination Act 1991* (ACT), s 7(f).
[187] Ibid s 2 (dictionary) (definition of 'employment status').
[188] *Discrimination Act 1991* (ACT), s 7(1)(k); *Anti-Discrimination Act 1992* (NT), s 19(1)(q); *Anti-Discrimination Act 1998* (TAS), s 16(q).
[189] *Spent Convictions Act 1988* (WA), Pt 3, Div 3.
[190] *Historical Homosexual Convictions Expungement Act 2018* (WA), s 17.

Medical record

The Northern Territory and Tasmanian Acts protect against discrimination based on 'irrelevant medical record.'[191] There is no equivalent protection in the Act.

Social origin

No State or Territory jurisdictions provide protection against discrimination based on social origin.

Profession / trade / occupation / calling

The ACT Act protects against discrimination based on profession, trade, occupation or calling.[192] There is no equivalent protection in the Act.

Lawful sexual activity

Lawful sexual activity is a protected attribute in the Queensland, Tasmanian and Victorian Acts.[193] The definition of 'lawful sexual activity' varies. The Queensland Act defines it as 'a person's status as a lawfully employed sex worker, whether or not self-employed.'[194] The Victorian Act defines it as 'engaging in, not engaging in or refusing to engage in a lawful, sexual activity.'[195] Lawful sexual activity is not defined in the Tasmanian Act. There is no equivalent protection in the Act.

Spouse or domestic partner identity

Currently, the South Australian Act is the only state that protects against discrimination based on the identity of a spouse or domestic partner.[196] No other State or Territory has an equivalent provision.

Personal association with someone who has, or is assumed to have, a certain protected attribute

The Act partially protects relatives or associates of people who have or are assumed to have a protected attribute. The protection is partial because it is only available in the context of race, impairment, age or sexual orientation.[197] The Act defines 'relative' as a person that is related by blood, marriage, affinity or adoption to the person with the protected attribute. It also includes a person who is wholly or mainly dependent or is a member of the household of the protected person.[198]

The Victorian Act protects people with a 'personal association' to a person with a protected attribute. Personal association can be by relation or otherwise.[199] A relative of a person with a protected attribute means spouse or domestic partner, parent or grandparent, child, stepchild or grandchild (whether or not under the age of 18 years), sibling, a child of a sibling, spouse or domestic partner's sibling, a child of a spouse or domestic partner's sibling or a child of a parent's sibling or a child of a parent.[200]

The ACT, NSW, Northern Territory, South Australian and Tasmanian Acts also include this ground.[201] These jurisdictions protect 'relatives or associates' or 'associates' of a person with a protected attribute against discrimination.

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[191] *Anti-Discrimination Act 1992* (NT), s 19(1)(p); *Anti-Discrimination Act 1998* (TAS), s 16(r).
[192] *Discrimination Act 1991* (ACT), s 7(j).
[193] *Anti-Discrimination Act 1991* (QLD) s 7(l); *Anti-Discrimination Act 1998* (TAS), s 16(d); *Equal Opportunity Act 2010* (Vic), s 6(g).
[194] *Anti-Discrimination Act 1991* (QLD), s 4 (definition of 'lawful sexual activity').
[195] *Equal Opportunity Act 2010* (Vic), s 4(1) (definition of 'lawful sexual activity').
[196] *Equal Opportunity Act 1984* (SA), s 85T.
[197] *Equal Opportunity Act 1984* (WA), ss 36, 66A, 66V, 35O.
[198] Ibid s 4(1).
[199] *Equal Opportunity Act 2010* (Vic), s 6(q).
[200] Ibid s 4(1).
[201] *Discrimination Act 1991* (ACT), s 7(1)(c); *Anti-Discrimination Act 1997* (NSW), s4(1); *Anti-Discrimination Act 1992* (NT), s 19(1)(r); *Equal Opportunity Act 1984* (SA), see for example ss 29(2a)(e), 51(d), 66(F), 85A(d), 85T(2)(d); *Anti-Discrimination Act 1998* (TAS), s 16(s).

Others

The ACT Act also protects the following grounds of discrimination:

(a) **Accommodation status**: defined to include the status of being a tenant, an occupant within the meaning of the *Residential Tenancies Act 1997* ACT), in receipt of or waiting to receive, housing assistance under the *Housing Assistance Act 2007* (ACT), and homeless.[202]

(b) **Immigration status**: defined to include the status of being an immigrant, a refugee or an asylum seeker, or the holder of any kind of visa under the *Migration Act 1958* (Cth).[203] This includes 'the immigration status that the person has or has had in the past, or is thought to have or have had in the past.'

(c) **Alteration of person's recorded sex**: record of a person's sex having been altered under the *Births, Deaths and Marriages Registration Act 1997* (ACT) or a law of another jurisdiction that corresponds, or substantially, corresponds, to the Act, section 26 (Alteration of register).[204]

(d) **Domestic or family violence:** a person being subjected to domestic or family violence.[205]

4.4 Areas of public life

There are differing structural approaches throughout the State and Territory legislation.

The legislation in the ACT, NSW and South Australia is structured in the same way as the Act, according to areas of public life to which the legislation applies with the relevant applicable grounds added into each part or division. In contrast, the legislation in the Northern Territory, Tasmania, Queensland and Victoria set out the grounds of discrimination generally, which are then applied to specified areas of public life.

Work

Like the Act, the Northern Territory,[206] Tasmania,[207] Queensland,[208] and Victoria[209] grant protection against discrimination on all grounds of discrimination in regard to employment. In the ACT, NSW and South Australian Acts, all specified grounds relating to work are afforded protection from discrimination.[210]

Education

The Northern Territory,[211] Tasmanian,[212] Queensland, and Victorian[213] Acts provide protection against discrimination on all grounds regarding education. In the ACT, NSW and South Australian Acts, all specified grounds relating to education are afforded protection from discrimination.[214]

[202] *Discrimination Act 1991* (ACT), s 7(1)(a).
[203] Ibid s 7(1)(i).
[204] Ibid s 7(1)(r).
[205] Ibid s 7(1)(x).
[206] *Anti-Discrimination Act 1992* (NT), pt div 3.
[207] *Anti-Discrimination Act 1998* (TAS), s 22.
[208] *Anti-Discrimination Act 1991* (QLD), div 2 sub-div 1.
[209] *Equal Opportunity Act 2010* (Vic), pt 4, divs 1 and 2.
[210] *Discrimination Act 1991* (ACT), div 3.1; *Anti-Discrimination Act 1977* (NSW), ss 8, 22B, 25, 38C, 40, 49D, 49V, 49ZH, 49ZV, 49ZYB; *Equal Opportunity Act 1984* (SA), pt 3 div 2, pt 4 div 2, pt 5 div 2, pt 5A div 2.
[211] *Anti-Discrimination Act 1992* (NT), div 2.
[212] *Anti-Discrimination Act 1998* (TAS), s 22(b).
[213] *Equal Opportunity Act 2010* (Vic), pt 4 div 3.
[214] *Discrimination Act 1991* (ACT), div 3.2; *Anti-Discrimination Act 1977* (NSW), ss 17, 22E, 31A, 38K, 46A, 49L, 49ZO, 49ZYL; *Equal Opportunity Act 1984* (SA), pt 3 div 4, pt 4 div 4, pt 5 div 4, pt 5A div 4, pt 5B div 4.

Access to places and vehicles

While the Act and the Victorian Act have express provisions which afford protection against discrimination regarding access to places and vehicles, in all other States and Territories,[215] grounds relating to access to places and vehicles are covered under protections for 'services' or 'premises.'

Goods, services and facilities

The ACT,[216] Northern Territory,[217] Queensland,[218] Tasmania,[219] Victoria,[220] NSW [221] and South Australia[222] afford protection against discrimination regarding goods, services, and facilities on all grounds pursuant to their respective Acts.

Accommodation

The ACT,[223] Northern Territory,[224] Queensland,[225] Tasmania,[226] Victoria,[227] NSW[228] and South Australia[229] afford protection against discrimination on all grounds regarding accommodation.

Land

In all States and Territories,[230] except for the ACT[231] and South Australia,[232] protection is afforded against discrimination on all grounds regarding land. In South Australia, the protection is limited to specified grounds,[233] and in the ACT there is no protection at all.

Activities of clubs

In all States,[234] except South Australia[235] and NSW,[236] protection is afforded against discrimination on all grounds regarding activities of clubs. In the NSW Act, all specified grounds relating to the activities of clubs are afforded protection from discrimination, except for grounds relating to sexual harassment.[237] In South Australia there is no protection.

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[215] *Discrimination Act 1991* (ACT), div 3.2; *Anti-Discrimination Act 1977* (NSW), ss 19, 22F, 33, 38M, 47, 49M, 39ZP, 49ZYN; *Anti-Discrimination Act 1992* (NT), div 5; *Anti-Discrimination Act 1991* (QLD), div 4, sub-div 1; *Equal Opportunity Act 1984* (SA), ss 39, 61, 76, 85K, 85ZG; *Anti-Discrimination Act 1998* (TAS), s 22(c).

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

[217] *Anti-Discrimination Act 1992* (NT), s 41.

[218] *Anti-Discrimination Act 1991 (*QLD), ss 37 - 39.

[219] *Anti-Discrimination Act 1998* (TAS), s 22(c).

[220] *Equal Opportunity Act 2010* (Vic), ss 44 - 51.

[221] *Anti-Discrimination Act 1977* (NSW), ss 19, 33, 38M, 47, 49M, 49ZP, 49ZYN.

[222] *Equal Opportunity Act 1984* (SA), ss 39, 61, 76, 85K, 85ZG.

[223] *Discrimination Act 1991* (ACT), ss 21, 62.

[224] *Anti-Discrimination Act 1992* (NT), s 38.

[225] *Anti-Discrimination Act 1991 (*QLD), ss 81 - 85.

[226] *Discrimination Act 1998* (TAS), s 22D.

[227] *Equal Opportunity Act 2010* (Vic), ss 52 - 63.

[228] *Anti-Discrimination Act 1977* (NSW), ss 20, 22G, 34, 38N, 48, 49N, 49ZQ, 49ZYO.

[229] *Equal Opportunity Act 1984* (SA), ss 39, 62, 77, 85L, 85ZH.

[230] *Anti-Discrimination Act 1977* (NSW), s 22H; *Anti-Discrimination Act 1992* (NT), s41; *Anti-Discrimination Act 1991* (QLD), ss 76-77; *Anti-Discrimination Act 1998* (TAS), s 22(c); *Equal Opportunity Act 2010* (Vic), ss 44 - 51.

[231] *Discrimination Act 1991* (ACT).

[232] *Equal Opportunity Act 1984* (SA), ss 38, 60, 75, 85L, 85ZF.

[233] Ibid.

[234] *Discrimination Act 1991* (ACT), s 22; *Anti-Discrimination Act 1992* (NT), s 46; *Anti-Discrimination Act 1991 (*QLD), ss 93 - 95; *Anti-Discrimination Act 1998* (TAS), s 22(e); *Equal Opportunity Act 2010* (Vic), ss 64 - 69.

[235] *Anti-Discrimination Act 1992* (NT).

[236] *Anti-Discrimination Act 1977* (NSW), ss 20A, 34A, 38P, 48A, 49O, 49ZR, 49ZYP.

[237] Ibid, ss 20A, 34A, 38P, 48A, 49O, 49ZR, 49ZYP.

Requesting / requiring provision of certain information

The ACT,[238] Northern Territory,[239] Queensland and Victorian[240] Acts grant protection against discrimination on all grounds regarding request or requirement provisions of certain information under the relevant Acts. In contrast, the NSW,[241] South Australian,[242] and Tasmanian[243] Acts do not provide any protection regarding request or requirement provisions of certain information.

Sports

Under the ACT,[244] Northern Territory,[245] Queensland,[246] South Australian,[247] and Tasmanian[248] Acts, an exception-based approach to discrimination in sports applies, such that protection will be afforded unless an express exception under an Act regarding sports applies.

There are three exceptions regarding sports under the ACT Act, namely sex,[249] age,[250] and disability.[251] In the Northern Territory[252] and Queensland,[253] exceptions apply in which a person may restrict participation in a competitive sporting activity:

to either men or women, if the restriction is reasonable having regard to the strength, stamina, or physique requirements of the activity;

(a) to people who can effectively compete;

(b) to people of a specified age or age group; or

(c) to people with a general or specific impairment.

In South Australia, there are five exceptions regarding sports, namely sex, sexual orientation and gender identity,[254] disability[255] and age.[256] In Tasmania, there are three exceptions regarding sports - gender,[257] age,[258] and disability.[259] If the exceptions are not applicable then the legislation will afford protection against discrimination regarding sports.

These exception-based approaches to sports differ from the Act, which provides positive provisions surrounding grounds which give rise to discrimination in sports. NSW[260] and Victoria[261] have similar provisions. However, like the Act, NSW and Victoria have similar exceptions to the other States surrounding age, sex and disability in regards to competitive sports.[262]

[238] *Discrimination Act 1991* (ACT), s 23.
[239] *Anti-Discrimination Act 1992* (NT), s 26
[240] *Equal Opportunity Act 2010* (Vic), s 104.
[241] *Anti-Discrimination Act 1977* (NSW).
[242] *Equal Opportunity Act 1984* (SA).
[243] *Anti-Discrimination Act 1998* (TAS).
[244] *Discrimination Act 1991* (ACT), s 29.
[245] *Anti-Discrimination Act 1992* (NT), s 56.
[246] *Anti-Discrimination Act 1991 (*QLD), s 111.
[247] *Equal Opportunity Act 1984* (SA), ss 48, 81, 85Q.
[248] *Anti-Discrimination Act 1998* (TAS), ss 29, 31, 43.
[249] *Discrimination Act 1991* (ACT), s 41.
[250] Ibid s 57.
[251] Ibid s 57M.
[252] *Anti-Discrimination Act 1992* (NT), s 56.
[253] *Anti-Discrimination Act 1991 (*QLD), s 111.
[254] *Equal Opportunity Act 1984* (SA), s 48.
[255] Ibid s 81.
[256] Ibid s 85Q.
[257] *Anti-Discrimination Act 1998* (TAS), s 29.
[258] Ibid s 31.
[259] Ibid s 43.
[260] *Anti-Discrimination Act 1977* (NSW), s 22I.
[261] *Equal Opportunity Act 2010* (Vic), pt 4, div 7.
[262] *Anti-Discrimination Act 1977* (NSW), ss 38, 38P, 49R, 49ZYW; *Equal Opportunity Act 2010* (Vic), s 72.

Superannuation schemes and provident funds

In the ACT,[263] NSW,[264] Tasmanian,[265] and Victorian[266] Acts, the grounds of discrimination regarding superannuation schemes and provident funds are set out as exceptions under the relevant Acts. Where an express exception under an Act does not apply in the circumstances, protection will be afforded. This structure differs from the Act which, as has been noted in Chapter 3, affords protection in the areas of superannuation schemes and provident funds on the Grounds of age, gender history and impairment. The Northern Territory[267] and Queensland[268] Acts are similar to the Act in structure.

Local government

In the Victorian, Queensland and NSW Acts, 'local government' is included as an area of public life and is afforded protection from grounds of discrimination. For example, the Victorian Act stipulates that a councillor of a municipal council must not, in the performance of their public functions, discriminate against another councillor of that council, or a member of a committee of that council who is not a councillor of that council.[269]

Further, the Victorian Act also provides that a councillor of a municipal council must not sexually harass another councillor of that council, or a member of a committee of that council who is not a councillor of that council.[270]

In the NSW Act, it is unlawful for any member, or member of a council of a local government, when acting in the course of the member's official functions, to discriminate against another member of the council on the relevant grounds.[271] Further, under the Queensland Act, a member of a local authority must not discriminate against another member in the performance of official functions.[272]

The Northern Territory, ACT and South Australian Acts are similar to the Act, in which the inclusion of local government is limited to the definition under 'services'. It is defined as services of the kind provided by a government, a public authority, or a local government body.

Local government is not included in the Tasmanian Act.

4.5 Key definitions

4.5.1 Direct discrimination and the comparator test

Similar definitions of direct discrimination to that of the Act, involving the use of a comparator test, apply in the anti-discrimination legislation in New South Wales, Queensland and South Australia. The definitions require the comparison of the treatment of another person who does not have the protected attribute.

However, the ACT, Northern Territory, Tasmanian and Victorian Acts do not use the comparator test in determining whether direct discrimination has occurred. Instead, these definitions provide that a person has directly discriminated against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes.[273]

[263] *Discrimination Act 1991* (ACT), s 29.
[264] *Anti-Discrimination Act 1977* (NSW), ss 36, 38Q, 49, 49Q, 49ZYS.
[265] *Anti-Discrimination Act 1998* (TAS), ss 30, 33, 44.
[266] *Equal Opportunity Act 2010* (Vic), pt 5.
[267] *Anti-Discrimination Act 1992* (NT), s 48.
[268] *Anti-Discrimination Act 1991 (*QLD), ss 52-27.
[269] *Equal Opportunity Act 2010* (Vic), s 73.
[270] Ibid s 102.
[271] *Anti-Discrimination Act 1977* (NSW*),* ss 10B, 27B, 38G, 42B, 49H, 49Z, 49ZKA.
[272] *Anti-Discrimination Act 1991 (*QLD), s 102.
[273] *Discrimination Act 1991* (ACT), s 8(2); *Anti-Discrimination Act 1992* (NT), s 20(2); *Anti-Discrimination Act 1998* (TAS), s 14(2); *Equal Opportunity Act 2010* (Vic), s 8(1).

4.5.2 Indirect discrimination and the proportionality and disadvantageous tests

Like the Act, the NSW, Queensland and South Australian Acts require satisfaction of the proportionality test to establish indirect discrimination. In contrast, under the ACT, Tasmanian and Victorian Acts, there is no proportionality test. Rather, indirect discrimination occurs (subject to some variation in wording across the legislation) if the person imposes, or proposes to impose, a requirement or condition that has, or is likely to have, the effect of disadvantaging the other person because the other person has one or more protected attributes.[274]

The ACT, Tasmanian and Victorian Acts also do not require proof that the aggrieved person does not or is not able to comply with the requirement or condition.

The ACT, Queensland and Victorian Acts also shift the onus of proving that the requirement or condition is reasonable (or unreasonable) from the aggrieved person to the discriminator.

The Queensland, Tasmanian and Victorian Acts further provide that it is not necessary for the discriminator to be aware of the indirect discrimination.[275]

4.5.3 Harassment

In contradistinction to the Act, the anti-discrimination legislation in other States and Territories does not require the harassed person to prove either that they have reasonable grounds for believing that following a rejection, refusal or objection to the harassment they would be disadvantaged, or that as a result of rejecting, refusing or objecting to the harassment they have been disadvantaged.

Under the ACT Act, the relevant inquiry is whether the harassed person reasonably feels offended, humiliated or intimidated.[276]

Under the NSW, South Australian, Tasmanian and Victorian Acts, the relevant inquiry is whether a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted, or ridiculed by the harassment.[277]

The Queensland Act adds an intention inquiry in addition to the inquiry under the NSW, South Australian, Tasmanian and Victorian Acts. The relevant inquiry is thus whether the harasser intended to offend, humiliate or intimidate the other person, or whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the harassment.[278]

Under the Northern Territory and Queensland Acts, the relevant inquiry is whether the harasser intended to offend, humiliate or intimidate the harassed person, or whether a reasonable person in the circumstances would have anticipated the possibility that the other person would be offended, humiliated or intimidated, or whether the other person is or reasonably believes that they are likely to be subjected to some detriment if they object to the harassment.[279]

Furthermore, the other States and Territories grant protection against harassment beyond and in addition to the areas of employment,[280] education[281] and accommodation.[282] For example, the NSW Act also prevents sexual harassment in the areas of sport, land and the provision of goods and services, and Victoria also prevents sexual harassment in the areas of clubs and local government.

Notably, the South Australian Act makes it unlawful for:

[274] *Discrimination Act 1991* (ACT), s 8(3)-(5); *Equal Opportunity Act 2010* (Vic), s 9.
[275] *Anti-Discrimination Act 1991* (Qld), s 11(3); *Anti-Discrimination Act 1998* (TAS), s 15(2); *Equal Opportunity Act 2010* (Vic), s 9(4).
[276] *Discrimination Act 1991* (ACT), s 58(1).
[277] *Anti-Discrimination Act 1977* (NSW), s 22A; *Equal Opportunity Act 1984* (SA), s 87(9)(a); *Anti-Discrimination Act 1998* (TAS), s 17(3); *Equal Opportunity Act 2010* (Vic), s 92(1).
[278] *Anti-Discrimination Act 1991* (Qld), s 119.
[279] *Anti-Discrimination Act 1992* (NT), s 22(2).
[280] *Equal Opportunity Act 1984* (WA), ss 24, 49A.
[281] Ibid ss 25, 49B.
[282] Ibid ss 26, 49C.

(a) a judicial officer to sexually harass a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member;[283]

(b) a member of Parliament to sexually harass a member of their staff; another member of Parliament; a member of the staff of another member of Parliament; an officer or member of the staff of the Parliament; or any other person who in the course of employment performs duties at Parliament House;[284] and

(c) a member of a council to sexually harass an officer or employee of the council.[285]

Unlike the Act, none of the other State and Territory anti-discrimination legislation specifically defines racial harassment. However, some deal with harassment on the basis of race by other methods. For example, Tasmania prohibits any conduct which offends, humiliates, intimidates, insults or ridicules another person in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed on the basis of all grounds of discrimination.[286] The Northern Territory Act also includes 'harassment on the basis of an attribute' as part of its definition of discrimination,[287] however the term 'harassment' is undefined.

4.5.4 Impairment / positive duty to make reasonable adjustments

The approaches in the ACT, NSW, Queensland and Tasmanian Acts are similar to the Act, in that there is no positive duty to make reasonable adjustments for a person with a disability. However, to establish that it is reasonable for a person to discriminate in the area of employment against another person on the grounds of a disability, the employer must believe on reasonable grounds that the person with a disability is unable to carry out work that is essential to the position concerned because of the disability or the person with a disability requires, to carry out the work, services or facilities that would not be required by a person who does not have the disability and providing the services or facilities would impose unjustifiable hardship on the employer.`

Victoria

In contrast, the Victorian Act also creates a positive duty for employers to make 'reasonable adjustments' for any person offered or currently in employment, who has a disability. These 'reasonable adjustments' refer to any adjustments that a person with a disability requires 'in order to perform the genuine and reasonable requirements of the employment.'

Employers have a duty to make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.[288]

To determine whether an adjustment is 'reasonable', there must be an assessment of 'all relevant facts and circumstances', including the:

(a) person or employee's circumstances and nature of their disability;

(b) nature of the employee's role or their offered role;

(c) nature of adjustment required for the person or employee's disability;

(d) employer's financial status;

(e) size and nature of employer's business and workplace;

[283] *Equal Opportunity Act 1984* (SA), s 87(6a).
[284] Ibid s 87(6c).
[285] Ibid s 87(6e).
[286] *Anti-Discrimination Act 1998* (TAS), s 17.
[287] *Anti-Discrimination Act 1992* (NT), s 20(1).
[288] *Equal Opportunity Act 2010* (Vic), s 20(2).

(f) the effect of making adjustments to the employer's workplace and business, including any financial impact, the number of persons who will benefit from or be disadvantaged by any adjustment and the impact on efficiency, productivity and customer service, if applicable;

(g) consequences for the employer of making any adjustment;

(h) consequences of not making any adjustment, on the employee or person; and

(i) any relevant action plan made under the *Disability Discrimination Act 1992* (Cth) or the *Disability Act 2006* (Vic) (for public sector bodies).[289]

The person's or employee's training, qualifications, and experience, as well as their current performance in the employment, can also be used to assess whether that person will be able to adequately perform 'the genuine and reasonable requirements of the employment' with any adjustments made.

An employer may lawfully discriminate against a person with a disability or an employee, if the employer has complied with section 20 of the Victorian Act, or it is not reasonable to make reasonable adjustments, due to the facts and circumstances of the case, or the employee would not be able to able to meet their genuine and reasonable requirements of employment with any reasonable adjustments made.

There are also specific provisions that create a duty for firms,[290] education providers[291] and service providers[292] to make reasonable adjustments for persons with a disability.

South Australia

Unlike the standalone reasonable adjustments prohibition of the Victorian Act, the South Australian Act integrates the prohibition against the denial of reasonable adjustments into its discrimination definition. Under the South Australian Act, the grounds of disability discrimination include if a person:[293]

(a) fails to provide a safe and proper means of access to, or use of, a place or facilities for a person who requires special means of access to, or use of, the place or facilities as a consequence of the person's disability;

(b) treats another unfavourably because the other requires special means of access to, or use of, a place or facilities as a consequence of the other's disability;

(c) in circumstances where it is unreasonable to do so, fails to provide special assistance or equipment required by a person in consequence of the person's disability; or

(d) in circumstances where it is unreasonable to do so, treats another unfavourably because the other requires special assistance or equipment as a consequence of the other's disability.

However, discrimination does not arise in relation to the provision of access to or use of a place or facilities if the provision of access or use would impose 'unjustifiable hardship' on the person, having regard to:[294]

(a) the nature of the benefit or detriment likely to accrue or be suffered by the persons concerned;

(b) the effect of the disability of the person concerned; and

(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

Discrimination also does not arise in relation to the performance of a service if, in consequence of the disability, the person requires the service to be performed in a special manner and the person performing the service 'cannot reasonably be expected to perform the service in that manner' or 'cannot reasonably be expected to perform the service in that manner except on more onerous terms than would otherwise apply'.[295]

[289] *Equal Opportunity Act 2010* (Vic), s 20(3).
[290] Ibid s 33.
[291] Ibid s 40.
[292] Ibid s 45.
[293] *Equal Opportunity Act 1984* (SA), s 66.
[294] Ibid s 84.
[295] Ibid s 76(3).

Northern Territory

The Northern Territory Act[296] prescribes that a person must not discriminate against another person by failing or refusing 'to accommodate a special need that another person has because of an attribute'. Such a failure or refusal to accommodate arises where:

(a) a person makes inadequate or inappropriate provision to accommodate the special need; and

(b) a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.

Whether a person has 'unreasonably failed to provide for the special need of another person' requires an assessment of all the circumstances of the case, including:

(a) the nature of the special need;

(b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;

(c) the financial circumstances of the person;

(d) any disruption that accommodating the special need may cause; and

(e) the nature of any benefit or detriment to all persons concerned.

It is also unlawful to discriminate against another person with an impairment, by failing or refusing to meet their special needs by altering any accommodation.[297]

However, a person may discriminate against another person in a work context based on the other person's inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated.[298]

A person may also discriminate against another person with a special need if that other person requires special services or facilities, and it would be 'unreasonable to require the person to supply the special services or facilities'.[299] The reasonability of supplying special services or facilities is examined based on the circumstances of the case, and factors such as:

(a) the nature of the special services or facilities;

(b) the cost of providing special services or facilities, and number of persons benefited or disadvantaged;

(c) the financial circumstances of the person;

(d) any disruption that providing the special services or facilities may cause; and

(e) the nature of any benefit or detriment to all persons concerned.

4.5.5 Victimisation

All States and Territories have provisions under their anti-discrimination legislation that prohibit victimisation of a person because they have taken or intend to take discrimination action.[300]

A person will have victimised another if they subject, or threaten to subject, another person to a detriment because that other person has:

(a) made or intends to make a discrimination complaint;

(b) given or intends to give evidence or information or produce documents for proceedings in relation to a discrimination complaint;

[296] *Anti-Discrimination Act 1992* (NT), s 24.

[297] Ibid s 39.

[298] Ibid s 35.

[299] Ibid s 58.

[300] *Discrimination Act 1991* (ACT), s 68; *Anti-Discrimination Act 1977 No 48* (NSW), s 50(1); *Anti-Discrimination Act 1992* (NT), s 23; *Anti-Discrimination Act 1991* (QLD), s 129 - 131; *Equal Opportunity Act 2010* (Vic), ss 103-104; *Equal Opportunity Act 1984* (SA), s 86; *Anti-Discrimination Act 1998* (TAS), s 18.

(c) alleged or intends to allege, in 'good faith', that a person has committed an unlawful act under their relevant State or Territory legislation;

(d) refused or intends to refuse to act in a manner that would contravene their relevant State or Territory legislation;

(e) reasonably asserted or intend to assert their rights or another person's rights under their relevant State or Territory legislation; or

(f) done anything else under or by reference to their relevant State or Territory legislation.[301]

4.5.6 Employment

In contrast to the position under the Act, unpaid and volunteer work is recognised in anti-discrimination legislation in Queensland, South Australia and the ACT.[302]

4.6 Vilification

Like the Act, the Northern Territory Act does not provide any vilification provisions. However, all other States and Territories include vilification provisions, as set out below. Also, as noted at section 3.4.3 above, racial harassment is unlawful under the Act in the areas of employment, education and accommodation,[303] which involves threats, abuse, insult or taunts made on a racial basis which the person reasonably believes would cause disadvantage or which actually do cause disadvantage to the person. The harassment definition in the Act clearly does not extend to the vilification provisions of other States and Territories, which relate to inciting hatred, contempt and ridicule, as summarised as follows:

ACT

The ACT Act makes it unlawful for a person to publicly incite hatred, serious contempt, revulsion, or severe ridicule of a person or group of people on the basis of disability, gender identity, HIV/AIDS status, intersex status, race, religious conviction, or sexuality.[304]

The ACT and Victoria are the only jurisdictions that include inciting 'revulsion' within the meaning of vilification.

The ACT Act exempts conduct said or done reasonably and honestly that is engaged in for academic, artistic, research or scientific purposes, or for the accurate reporting of any event or matter of public interest.[305]

NSW

The NSW Act makes it unlawful for a person to publicly incite hatred towards, serious contempt for, or severe ridicule of, a person or group on the basis of race,[306] homosexuality,[307] transgender status,[308] or HIV/AIDS status.[309]

The NSW Act exempts conduct said or done reasonably and in good faith that is engaged in for academic, artistic, research or scientific purposes, or for the accurate reporting of any event or matter of public interest.[310]

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[301] *Discrimination Act 1991* (ACT), s 68; *Anti-Discrimination Act 1977 No 48* (NSW), s 50(1); *Anti-Discrimination Act 1992* (NT), s 23; *Anti-Discrimination Act 1991* (QLD), s 129 - 131; *Equal Opportunity Act 2010* (Vic), ss 103-104; *Equal Opportunity Act 1984* (SA), s 86; *Anti-Discrimination Act 1998* (TAS), s 18.

[302] Equal Opportunity Commission, *Review of Equal Opportunity Act 1984 Report* (May 2007), 36.

[303] *Equal Opportunity Act 1984* (WA), ss 49A - 49C.

[304] *Discrimination Act 1991* (ACT), s 67A(1).

[305] Ibid s 67A(2).

[306] *Anti-Discrimination Act 1977* (NSW), s 20C.

[307] Ibid s 49ZT.

[308] Ibid s 38S.

[309] Ibid s 49ZXB.

[310] Ibid ss 20C(2), 49ZT(2), 38S(2), 49ZXB(2).

In 2012, NSW conducted a parliamentary inquiry into racial vilification laws under the NSW Act. In particular, the inquiry focused on the effectiveness of section 20D, which created the offence of serious racial vilification. At the date of the inquiry, there had been no successful prosecutions under the section.[311] In its 2013 report, the Standing Committee on Law and Justice concluded that 'the effectiveness of section 20D has been hindered by a number of procedural impediments.'[312]

In response to the 2013 report, the NSW Parliament enacted the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW), which amended the *Crimes Act 1900* (NSW) to create an offence of threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. Consequential amendments were also made to the NSW Act, including repealing the offences of serious vilification (including section 20D) and giving the NSW Police primary responsibility for prosecuting the new offence, removing the role of the Anti-Discrimination Board NSW (**ADNSW**) in referring people for prosecution.[313]

Queensland

The Queensland Act makes it unlawful for a person to publicly incite hatred towards, serious contempt for, or severe ridicule of, a person or group on the basis of race, religion sexuality, or gender identity.[314]

Further, the Queensland Act exempts conduct said or done reasonably and in good faith that is engaged in for academic, artistic, research or scientific purposes, or for the accurate reporting of any event or matter of public interest.[315]

Section 131A also prohibits a person:

(a) from knowingly or recklessly inciting hatred towards, serious contempt for, or severe ridicule of persons in a way that includes threatening physical harm towards the person or group of persons, or towards any property of the person or group of persons; or

(b) inciting others to threaten physical harm towards the person or group of persons, or towards any property of, the person or group of persons.[316]

South Australia

The *Racial Vilification Act 1996* (SA) makes it unlawful for a person to publicly incite hatred towards, serious contempt for, or severe ridicule of, a person or group by threatening physical harm to the person, or members of the group, or to property of the person or members of the group or inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group on the basis of race.[317] There are no express exemptions to the vilification provision.

Tasmania

The Tasmanian Act makes it unlawful for a person to publicly incite hatred towards, serious contempt for, or severe ridicule of, a person or group on the basis of race, religion, sexual orientation or lawful sexual activity, disability, or gender identity or intersex variations. [318]

Additionally, the Tasmanian Act prohibits any conduct which offends, humiliates, intimidates, insults or ridicules another person in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated,

[311] Standing Committee on Law and Justice, *Racial vilification law in New South Wales* (Report 50, December 2013).
[312] Ibid 26 [3.21].
[313] Alastair Lawrie, 'NSW reforms vilification offences', *Public Interest Advocacy Centre* (online at 22 June 2018) <https://piac.asn.au/2018/06/22/nsw-reforms-vilification-offences/>.
[314] *Anti-Discrimination Act 1991* (QLD), s 124A.
[315] Ibid s 124A(2).
[316] Ibid s 131A.
[317] *Racial Vilification Act 1996* (SA), s 4.
[318] *Anti-Discrimination Act 1998* (TAS), s 19.

insulted or ridiculed on the basis of all grounds of discrimination. This prohibition is more analogous to the racial harassment definition of the Act. [319]

Victoria

In Victoria, the *Racial and Religious Tolerance Act 2001* (Vic) (**RRTA**) prohibits public conduct that incites hatred, serious contempt, revulsion, or severe ridicule on the basis of race,[320] or religion.[321]

The RRTA exempts conduct said or done reasonably and in good faith that is engaged in for academic, artistic, religious or scientific purposes, or for the accurate reporting of any event or matter of public interest.[322] Sections 24 and 25 also consider serious vilification to be a more serious offence where a person knowingly engages in conduct that the person knows is likely to vilify.[323]

The RRTA has been subjected to criticism for being ineffective. Since the RRTA's enactment in 2001, only two claims have been successful. In one successful claim, a member of Ordo Templi Orientis lodged a number of complaints to the VEOHRC after being offended and distressed by claims made on a website. The website, maintained by Dyson Devine and Vivienne Legg, claimed the Ordo Templi Orientis was a protected paedophile group in Australia. The Victorian Civil and Administrative Tribunal (**VCAT**) found this conduct constituted religious vilification within the meaning of the RRTA and ordered Dyson Devine and Vivienne Legg to remove the statements and to pay the claimant's legal costs.[324]

In the other successful claim, the respondents were accused of racially vilifying their neighbours. This included calling them offensive terms such as 'ugly monkeys', 'import fish' and 'possums' and making statements such as 'F**ng Arabs, get out' over a period of eight months. Ultimately, the respondents were found to have racially vilified the claimants and were ordered to publish an apology in the *Herald Sun* and pay $2,000 in damages.[325]

The RRTA also attracted significant attention when Gunditjmara Elder Charmaine Clarke made a complaint alleging they were vilified in a cafe. The complainant tried to pursue action under the RRTA but the threshold of 'inciting' could not be proven. Subsequently, the complainant has joined the VEOHRC in calling for what they described as 'unusable laws' to be amended.[326]

Other groups have also sought for legislative reform, after an increase in anti-Asian attacks[327] and anti-Semitism, including an incident in a Victorian school where a five-year-old Jewish child was forced to kneel and kiss the shoes of their Muslim classmates.[328]

In September 2019, a parliamentary inquiry into the expansion of Victoria's anti-vilification laws and extension of protections in Victoria was initiated. When making submissions at the parliamentary inquiry, the VEOHRC said 'We know that the act is not working effectively to prevent or respond to hate conduct.'[329] The Legal and Social Issues Committee released a report in March 2021 detailing their

[319] Ibid s 17.
[320] *Racial and Religious Tolerance Act 2001* (Vic), s 7.
[321] Ibid s 8.
[322] *Racial and Religious Tolerance Act 2001* (Vic), s 11.
[323] Ibid ss 24, 25.
[324] *Ordo Templi Orientis v Legg (Anti-Discrimination)* [2007] VCAT 1484.
[325] *Khalil v Sturgess (Anti-Discrimination)* [2005] VCAT 2446.
[326] Tammy Mills, 'I felt fear, humiliation': Aboriginal elder joins push to change hate crime laws', *The Age* (online at 28 May 2020) <https://www.theage.com.au/national/victoria/i-felt-fear-humiliation-aboriginal-elder-joins-push-to-change-hate-crime-laws-20200528-p54xd3.html>.
[327] 'Victoria urged to toughen hate crime laws as anti-Asian attacks rise' *SBSNews* (online at 12 June 2020) <https://www.sbs.com.au/news/victoria-urged-to-toughen-hate-crime-laws-as-anti-asian-attacks-rise>.
[328] Rebecca Davis, 'No apology, no accountability,' *Australian Jewish News* (online at 4 June 2020) <https://ajn.timesofisrael.com/no-apology-no-accountability/>.
[329] Tammy Mills, 'I felt fear, humiliation': Aboriginal elder joins push to change hate crime laws', *The Age* (online at 28 May 2020) <https://www.theage.com.au/national/victoria/i-felt-fear-humiliation-aboriginal-elder-joins-push-to-change-hate-crime-laws-20200528-p54xd3.html>.

findings.[330] The Legal and Social Issues Committee produced 36 recommendations including the following:

(a) extending anti-vilification provisions to cover the attributes of race and religion, gender and/or sexual orientation, gender identity or expression, sex characteristics and/or intersex status, disability, HIV/AIDS status and personal association;

(b) incorporating vilification protections into the Victorian Act;

(c) developing and delivering community education on vilification and hate conduct;

(d) lowering the civil incitement test and introducing a new civil harm-based provision to assess harm from the perspective of the target group;

(e) expanding the powers and responsibilities of the VEOHRC to vilification;

(f) simplifying and lowering the criminal test for current criminal offences of serious vilification; and

(g) criminalising the display of symbols of Nazi ideology, including the Nazi swastika.

4.7 Positive duty not to discriminate

The Victorian Act is the only anti-discrimination legislation in Australia that includes a positive duty not to discriminate. Part 3 of the Victorian Act imposes on a duty holder[331] a positive duty not to engage in discrimination, sexual harassment or victimisation. To fulfil the duty, the duty holder is required to take 'reasonable and proportionate measures to eliminate…discrimination, sexual harassment or victimisation as far as possible.'

Section 15(6) specifies several factors that must be considered in determining whether a measure taken to eliminate discrimination is reasonable and proportionate, including the:

(a) size of the business or operation;

(b) nature and circumstances of the business or operation;

(c) person's resources;

(d) person's business and operational priorities; and

(e) practicability and cost of the measures.

Further, section 15(6) includes examples of successful measures for both small and large organisations.

However, the consequences of contravening the positive duty are limited to an investigation by the VEOHRC. While section 122 of the Victorian Act gives jurisdiction to the VCAT to hear and determine applications for alleged contraventions of Parts 4, 6 or 7 of the Victorian Act, those powers do not extend to the new positive duty of Part 3.

Hence, the VCAT lacks jurisdiction to hear any application for contravention of section 15. A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the VHREOC under Part 9.

4.8 Exceptions

Statutory exceptions to the rights and obligations created by anti-discrimination legislation arise in each Australian jurisdiction. However, the exceptions are not uniform and drafters of the various pieces of anti-discrimination legislation have not adopted a consistent approach to how they express the exceptions, what activities are excepted, or where the exceptions are located within the legislation.

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[330] Parliament of Victoria, 'Inquiry into Anti-vilification Protections' (3 March 2021) <https://www.parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_Anti-Vilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf>.

[331] A duty holder is anyone who is under an obligation, under Parts 4, 6 and 7 of the Victorian Act, not to discriminate.

Some anti-discrimination legislation in Australia uses the term 'exemption' to refer to what the Act calls an 'exception.' For consistency, the term 'exception' is used throughout this Discussion Paper.

This section focuses on equivalent general exceptions to discrimination. Where there are no general exceptions, the focus will be on equivalent provisions to those contained in Part VI of the Act.

Acts done under statutory authority

All State and Territory anti-discrimination legislation contains exceptions for compliance with a court order, and in certain instances, a tribunal, commission or industrial court order.[332]

The Northern Territory Act also contains an exception for compliance with an order, guideline, code of practice, or advice of the local anti-discrimination Commissioner,[333] while the Queensland Act has an exception for a pre-existing industrial agreement.[334] The South Australian Act contains an exception for acts done in order to comply with provisions of certain instruments under the FW Act and *Fair Work Act 1994* (SA).[335]

The exceptions outlined above are similar, albeit broader in scope, to the exception in section 69 of the Act. Notably, none are more restrictive or narrowly focussed than section 69 of the Act.

In most Australian jurisdictions (besides Queensland, South Australia and Western Australia), anti-discrimination legislation also provides an exception for compliance with other written laws of a State or Territory. These exceptions are not uniform and differ in each jurisdiction.

The NSW Act provides an exception for compliance with any other NSW Act 'whether passed before or after this Act' and any instrument made under it.[336] The ACT Act provides an exception for compliance with a law of the ACT and a determination or direction made under it.[337] The Northern Territory Act provides an exception for compliance with a Territory or Commonwealth Act or regulation.[338] Similarly, the Tasmanian Act makes an exception for compliance with any law of Tasmania or the Commonwealth.[339] The Victorian Act makes an exception for compliance with an act and an enactment, other than the Victorian Act itself.[340]

Charities

All Australian States and Territories, other than the ACT, provide an exception relating to charitable benefits.[341] In NSW, Victoria, Queensland, Western Australia, Tasmania and the Northern Territory, the charitable exceptions are similarly worded. These provisions provide a wide scope to allow charities to discriminate in relation to the conferral of a charitable benefit. The NSW and Victorian provisions define 'charitable benefits' in similar terms to the Western Australian definition.[342]

In contrast, the exception in South Australia provides a relatively narrow scope for charities to lawfully discriminate. Section 45 of the South Australian Act provides that charities may only lawfully discriminate on the ground of sex, gender identity, sexual orientation or intersex status.[343]

The rationale for the inclusion of a charities exception differs between the different States and Territories. In Victoria, Attorney General R.J. Hulls noted in a 2010 parliamentary speech that the charities exception

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[332] *Equal Opportunity Act 2010* (Vic), s 76(a)-(b); *Anti-Discrimination Act 1992* (NT), s 53(c); *Anti-Discrimination Act 1977* (NSW), s 54(1)(c); *Anti-Discrimination Act 1991* (QLD), s 106(1)(e); *Discrimination Act 1991* (ACT), s 30(2)(d); *Anti-Discrimination Act 1998* (TAS), s 24(b); *Anti-Discrimination Act 1991* (QLD), s 106(1)(c).

[333] *Anti-Discrimination Act 1992* (NT), s 53(f)-(h).

[334] *Anti-Discrimination Act 1991* (QLD), s 106(1)(d).

[335] *Equal Opportunity Act 1984* (SA), s 85F(4).

[336] *Anti-Discrimination Act 1977* (NSW), s 54.

[337] *Discrimination Act 1991* (ACT), s 30.

[338] *Anti-Discrimination Act 1996* (NT), s 53.

[339] *Anti-Discrimination Act 1998* (TAS), s 24.

[340] *Equal Opportunity Act 2010* (Vic), s 75.

[341] *Anti-Discrimination Act 1977* (NSW), s 55; *Equal Opportunity Act 2010* (Vic), s 80; *Anti-Discrimination Act 1991* (Qld), s 110; *Equal Opportunity Act 1984* (SA), s 45; *Anti-Discrimination Act 1998* (TAS), s 23; *Anti-Discrimination Act 1992* (NT), s 52.

[342] Discussed at 3.7.3.

[343] *Equal Opportunity Act 1984* (SA), s 45.

was included to allow donors to choose upon whom to confer charitable benefits, promoting the right to privacy, freedom of thought, conscience, religion and belief, and freedom of expression.[344] In NSW, the charities exception was required in order to uphold wills that were intended to benefit particular groups in society.[345] In other jurisdictions, the rationale for the charities exception is unclear.

The charities exception was considered in the 1999 review of the NSW Act by the Law Reform Commission of NSW (**NSW Commission**). The NSW Commission recommended that section 55 of the NSW Act be replaced in order to broaden the scope to apply more broadly than just to 'charities' by replacing section 55 'with an exception covering the provision of goods or disposal of property by inter vivos gift or by will to a specific recipient or recipients.'[346] This was on the basis that there is no particular reason to limit the exception to charitable purposes, and that the exception should extend to any purpose which does not contravene the NSW Act.[347] However, despite the NSW Commission's recommendation, the proposed amendment has not been effected.

Voluntary bodies

An exception to discrimination relating to voluntary bodies is provided in Western Australia, NSW and the ACT. There is no equivalent provision in Victoria, Queensland, South Australia, Tasmania or the Northern Territory. The Western Australian voluntary bodies exception is the only provision to provide that it does not apply to discrimination on the ground of impairment or age.

In NSW, section 57(2) of the NSW Act provides that a voluntary body may discriminate to restrict admission to membership of that body or discriminate in relation to the provision of benefits, facilities or services to members of that body.[348]

Section 57(1) defines a 'voluntary body' as a body the activities of which are carried on otherwise than for profit and which is not established by an act.[349] This is similar to the definition of 'voluntary body' in the Act.

Since the enactment of the NSW Act, the application of the voluntary bodies exception has been narrowed. Originally, the exception applied to both voluntary bodies and registered clubs in relation to the admission of members and the benefits, facilities and services available to members (including clubs registered under Part X of the *Liquor Act 1912* (NSW) or Division 4 of Part IIIA of the *Gaming and Betting Act 1912* (NSW)). The exception for registered clubs was removed from the NSW Act in 1981. The Western Australian voluntary bodies exception has never applied to a club, if the club does not provide its own facilities and does not sell liquor for consumption on its premises.[350]

Further reform to the NSW voluntary bodies exception has occurred in the years since 1981. Various amendments have narrowed the scope of the voluntary bodies exception by excluding specific registered co-operatives, societies and clubs, and clarifying which organisations would not be covered by the exception.[351] For example, an amendment to the NSW Act in 1997 means that a credit union, building society or a society registered under the *Friendly Societies Act 1989* (NSW) would no longer be covered by the exception.[352]

The legitimacy of the voluntary bodies exception has been questioned in NSW. A common argument is that while voluntary bodies are part of the private sphere, they often receive substantial government funds

[344] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 770 (R.J. Hulls, Attorney General).

[345] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1976, 3341 (Wran, Premier). The Minister stated that an exception for charities was required as '*a will which set up a trust for the Aboriginal children of New South Wales…shall not be struck down by this Act.*'

[346] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (November 1999), recommendation 45.

[347] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (November 1999) 6.57.

[348] *Anti-Discrimination Act 1977* (NSW) s 57(2).

[349] Ibid s 57(1), but does not include: (a) a co-operative registered under the *Co-operatives National Law* (NSW) or a society under the *Friendly Societies Act 1989* (NSW); or (b) a friendly society registered under the *Friendly Societies Act 1989* (NSW); or (c) a building society or credit union registered under the *Financial Institutions* (NSW) Code; or (d) a co-operative housing society registered under the *Co-operative Housing and Starr-Bowkett Societies Act 1998* (NSW); or (e) a registered club.

[350] *Equal Opportunity Act 1984* (WA), s 4(1).

[351] See, for example, *Anti-Discrimination (Amendment) Act 1981* (NSW); *Anti-Discrimination (Amendment) Act 1982* (NSW); *Anti-Discrimination (Amendment) Act 1997* (NSW).

[352] *Anti-Discrimination (Amendment) Act 1997* (NSW) s 21.

or financial benefits such as exemptions from full taxes, charges or rates and may themselves generate profits.[353] Therefore, such bodies should, as a matter of public policy, comply with the generally accepted standards such as non-discrimination.[354]

In light of the submissions, the NSW Commission recommended that the NSW Act specifically prohibit discrimination in relation to membership and access to benefits by all incorporated associations whose membership is open to the public or to a section of the public.[355] To date, this recommendation has not been implemented.

In comparison with the Western Australian exception, the ACT exception permits a wider scope of lawful discrimination. The ACT Act provides that a voluntary body may discriminate against a person in relation to the admission of people as members of the body or in the provision of benefits, facilities or services to people, whether the people are members of the body or otherwise.[356] Specifically excluded from the definition of 'voluntary body' are clubs established under State, Territory or Commonwealth law and associations providing grants, loans, credits or finance to their members.[357]

The ACT Act voluntary bodies exception was amended in 1996 to omit 'members of the body' and substitute it with 'persons, whether those persons are members of the body or otherwise' which broadened the scope of the exception.[358] The purpose of the change was to 'allow for voluntary bodies to cater for groups of persons with particular attributes or interests', on the basis that 'it would be reasonable for some bodies to wish to provide benefits, facilities or services to non-members with those particular attributes or interests.'[359] By contrast, as has been identified above, the exception in the Act is limited to permitting a voluntary body to discriminate on any Ground in connection with either the admission of persons as members of the body, or the provision of benefits, facilities or services to members of the body.

Religious bodies and educational institutions established for religious purposes

The equal opportunity/anti-discrimination statutes in each Australian State and Territory contain exceptions based on religious belief or practice.

The precise formulations and scope of these exceptions vary and are reflective of the legislative history and the public policy debate unique to each jurisdiction.

The Commission has structured the discussion of exceptions on religious grounds in other jurisdictions based on the following sub-categories:

(a) Religious Personnel Exception;

(b) Religious Bodies Doctrine Exception;

(c) Religious Educational Bodies Employment Exception; and

(d) Provision of Education Exception.

[353] Ministry for the Status and Advancement of Women, Submission to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (26 August 1998) 24.

[354] National Pay Equity Coalition, Submission to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (19 November 1993) 2.

[355] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (n 129) cl 6.88.

[356] *Discrimination Act 1991* (ACT), s 31.

[357] Explanatory Memorandum, *Human Rights and Equal Opportunity Bill 1991* (ACT) cl 31.

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

[359] Explanatory Memorandum, *Discrimination (Amendment) Bill 1996* (ACT).

Religious Personnel Exception

The anti-discrimination legislation in NSW,[360] Victoria,[361] Queensland,[362] South Australia,[363] Tasmania,[364] the ACT[365] and the Northern Territory[366] all contains exceptions to discrimination in relation to the ordination, training, selection, and appointment of priests, religious ministers, and other persons seeking ordination. The exception in NSW, Victoria, Queensland and the ACT applies to all of the protected attributes, whereas the exception in Tasmania only applies to the grounds of religious belief or affiliation and religious activity.

By way of example, the exception under section 109 of the Queensland Act provides for an exception to discrimination in respect of the:

(a) ordination or appointment of priests, ministers of religion or members of a religious order;

(b) training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(c) selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

Religious Bodies Doctrine Exception

General exceptions to discrimination for acts done by religious bodies in conformity with religious doctrines in order to avoid injury to 'religious susceptibilities' (to use the language of the Act) remain a contested area of law reform.

An academic, Liam Elphick, provides the following useful commentary on the exception as it concerns discrimination on grounds of sexual orientation:

> *All Australian anti-discrimination laws contain a general religious exemption, which remains the greatest source of disagreement and debate. This general religious exemption excludes liability for discrimination on the ground of sexual orientation in all jurisdictions except for Tasmania. This two-limbed exemption typically requires that any other act or practice of a body established for religious purposes either:*
>
> 1. *conforms to the doctrines, tenets or beliefs of the religion; or*
> 2. *is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*
>
> *Therefore, the typical 'baseline' test only requires that one of these two limbs be satisfied. Some variants exist in the legislation: for example, the South Australian Act refers to religious 'precepts' while the Victorian Act refers to 'principles'. These differences are terminological and largely immaterial. However, more critical differences in the legislation create substantial inconsistencies. The Victorian Act, for example, adds the requirement that the necessity to avoid injury to religious susceptibilities be 'reasonable', enshrining a more rigid objective test. Victoria and Tasmania also provide a general religious exemption to individuals, utilising the same two-limb test. Tasmania's individual religious exemption does not, however, apply to sexual orientation. The NSW Act requires that the body be 'established to propagate religion', which is more narrow than the usual requirement. Contrastingly, the Northern Territory Act's exemption is broader, requiring only that the act is done 'as part of any religious observance or practice'. Tasmania, the ACT and Queensland require that an act both conforms to the beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents,*

[360] *Anti-Discrimination Act 1977* (NSW), s 56.
[361] *Equal Opportunity Act 2010* (Vic), s 82(1).
[362] *Anti-Discrimination Act 1991* (QLD), s 109.
[363] *Equal Opportunity Act 1984* (SA), s 50.
[364] *Anti-Discrimination Act 1998* (TAS), s 52.
[365] *Discrimination Act 1992* (ACT), s 32.
[366] *Anti-Discrimination Act 1992* (NT), s 51.

rather than only requiring one of these two limbs. Finally, Queensland's exemption does not apply in regards to employment or education, while the Commonwealth's exemption does not apply to Commonwealth-funded aged care facilities.[367]

The various statutory formulations are summarised below. In all jurisdictions, the Religious Bodies Doctrine Exception appears as a 'catch all' to the Religious Personnel Exception, as the exception generally covers any acts or practices that conform to the tenets, doctrines, or beliefs of the relevant religion.

The NSW Act excepts any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[368]

The Victorian Act exception extends to exempt 'anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity' by a religious body that:

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.[369]

The Victorian Act contains a further 'catch all' exception under section 84, which provides that nothing in Part 4 of the Victorian Act applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The Queensland Act exception provides, in effect, that an act by a body established for religious purposes is exempt from discrimination if the act is:

(a) in accordance with the doctrine of the religion concerned; and

(b) necessary to avoid offending the religious sensitivities of people of the religion.

The South Australian Act extends that State's exception to religious bodies in respect of any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[370]

In Tasmania, the exception operates for religious bodies in relation to any other act that:

(a) is carried out in accordance with the doctrine of a particular religion; and

(b) is necessary to avoid offending the religious sensitivities of any person of that religion.[371]

The ACT Religious Bodies Doctrine Exception operates in relation to any other act or practice (other than a defined act)[372] of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[373]

The Northern Territory Act casts the Religious Bodies Doctrine Exception in the widest terms of any of the exceptions in this category, excepting from discrimination an act by a body established for religious purposes if the act is done as part of any religious observance or practice.[374]

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[367] Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 159-160.

[368] *Anti-Discrimination Act 1977* (NSW), s 56(d).

[369] *Equal Opportunity Act 2010* (Vic), s 83.

[370] *Equal Opportunity Act 1984* (SA), s 50(1)(c).

[371] *Anti-Discrimination Act 1998* (TAS), s 52(d).

[372] Meaning 'an act or practice in relation to a) the employment or contracting of a person by the body to work in an educational institution; or b) the admission, treatment or continued enrolment of a person as a student at an educational institution.'

[373] *Discrimination Act 1992* (ACT), s 32(1)(d).

[374] *Anti-Discrimination Act 1992* (NT), s 51(d).

Religious Educational Bodies Employment Exception

Many jurisdictions contain stand-alone exceptions permitting discrimination in the employment or engagement of teachers at religious schools or institutions. Other jurisdictions, such as Victoria, do not contain exceptions specific to discrimination in the employment of teachers, but nevertheless contain broad provisions that permit such conduct.

Section 25 of the Queensland Act provides an exception which allows a person to impose genuine occupational requirements for a position. The section provides examples of genuine requirements for a position, including employing persons of a particular religion to teach in a school established for students of the particular religion.

Section 25 further provides that it is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under sections 14 or 15 (recruitment and work), in a way that is not unreasonable, against a person if:

(a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs:

  (a) during a selection process;

  (b) in the course of the person's work; or

  (c) in doing something connected with the person's work; and

(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.

Section 34(3) of the South Australian Act provides an exception to the prohibition of discrimination on grounds of sexual orientation, gender identity or intersex status in relation to employment or engagement (as a contractor) for the purposes of an educational institution if:

(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion;[375]

(b) the educational authority administering the institution has a written policy stating its position in relation to the matter;[376]

(c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority;[377] and

(d) a copy of the policy is provided on request, free of charge to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate and to students, parents and guardians of the institution and to other members of the public.[378]

Under section 51 of the Tasmanian Act, a person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment:

(a) if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment; or

(b) in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

In the ACT, section 44 of the ACT Act provides an exception relating to 'religious workers'. Exceptions to the prohibition of discrimination under various sections of the ACT Act apply in relation to:[379]

[375] *Equal Opportunity Act 1984* (SA), s 34(3)(a).
[376] Ibid s 34(3)(b).
[377] Ibid s 34(3)(c).
[378] Ibid s 34(3)(d).
[379] *Discrimination Act 1991* (ACT), ss 10(1)(a) or (b) (determining who should be offered employment), s 12(1)(a) or (b) (engaging commission agents), s 13(b) (discrimination against contract workers) or s 14(1)(a) or (2)(a) (discrimination in forming partnerships).

(a) discrimination on the ground of religious conviction by an educational authority in relation to employment or work in an educational institution conducted by the authority; and

(b) discrimination on the ground of religious conviction by a religious body in relation to employment or work in a hospital or other place conducted by the body in which health services are provided.

Section 46(2) provides further exceptions to discrimination under section 10 (offering employment, and determining the conditions upon which an offer of employment is made) and section 13 (contract workers) on the ground of religious conviction in relation to staff matters at an educational institution if the:

(a) institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed; and

(b) discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings.

However, these exceptions are only available if the educational institution has published its policy in relation to staff matters, and the policy is readily accessible by prospective and current employees and contractors of the institution.[380]

In the Northern Territory, section 37A of the Northern Territory Act provides that an educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination:

(a) is on the grounds of:

  (a) religious belief or activity; or

  (b) sexuality; and

(b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.

Provision of Education Exception

Comparable exceptions in other jurisdictions are confined to permitting religious schools to discriminate in relation to the admission of students who are not of the relevant faith group.

In NSW, 'private educational authorities' (which includes religious schools) are excepted from discrimination on the basis of sex, homosexuality, transgender grounds, and disability in relation to admission of students, or the terms on which it may admit students.[381]

In Victoria, section 83 of the Victorian Act provides a general exception to discrimination for religious schools, which applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution that:

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

The Victorian Act also contains an exception for educational authorities operating an educational institution or program 'wholly or mainly' for students of a particular religious belief, where people who are not of the particular religious belief may be excluded.[382]

In Queensland, section 41 of the Queensland Act provides an exception in relation to religious educational institutions. Where an educational authority operates, or proposes to operate, an educational institution 'wholly or mainly for students of a particular sex or religion', the institution may exclude 'applicants who are not of the particular sex or religion'.

[380] *Discrimination Act 1991* (ACT), s 46(4).
[381] See, for example, *Anti-Discrimination Act 1977* (NSW), s 49ZH(3)(c).
[382] *Equal Opportunity Act 2010* (Vic), s 39.

In South Australia, section 37 of South Australian Act provides that, in education, single-sex education institutions are permitted to discriminate on the ground of sex in relation to admission and provision of boarding facilities.[383]

In Tasmania, section 51A of the Tasmanian Act provides that a person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.

This exception does not apply to persons already enrolled, nor does it permit discrimination on any grounds referred to in the Tasmanian Act other than religious belief or affiliation or religious activity.

Section 51A also provides that a person may discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.

In the ACT, section 46(1) of the ACT Act provides an exception to discrimination under section 18 (discrimination in accepting a student to a school or the terms and conditions upon which the student is admitted for educational institutions). Section 46(1) provides that section 18 does not make it unlawful to discriminate on the ground of religious conviction in relation to a failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students having a religious conviction other than that of the applicant.

However, this exception only applies if:

(a) the educational institution has published its policy in relation to student matters; and

(b) the policy is readily accessible by prospective and current students at the institution.[384]

In the Northern Territory, section 30 of the Northern Territory Act provides that an educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.[385]

Establishments providing housing accommodation for aged persons

The only State or Territory with an equivalent exception for housing accommodation for aged persons is NSW. There is no equivalent exception provided for in the remaining States and Territories. Instead, aged accommodation providers must apply to the relevant tribunal for an exception in order to restrict admission to applicants.

The NSW exception is narrower in scope than the Western Australian exception. The NSW exception provides that nothing in the NSW Act affects any rule or practice of an establishment which provides housing accommodation for aged persons, whether by statute or otherwise, whereby admission to the establishment is restricted to persons of a particular sex, marital or domestic status, or race.[386]

The exception was added to the NSW Act to safeguard the atmosphere and living environment for aged persons.[387] This was ultimately based on the belief that aged persons have a right to spend their final days in an environment where their backgrounds, beliefs and identity are not threatened.[388]

When the NSW Act was enacted, this exception was broad and drafted similarly to the Western Australian exception. However, the exception was amended in 1994 to address concerns raised by the Anti-

[383] *Equal Opportunity Act 1984* (SA), s 37(3).
[384] *Discrimination Act 1991* (ACT), s 46(3).
[385] *Anti-Discrimination Act 1992* (NT), s 30(2).
[386] *Anti-Discrimination Act 1977* (NSW), s 59.
[387] New South Wales, *Parliamentary Debates,* Legislative Council, 23 March 1977, 5524 (John Fuller, Leader of the Opposition).
[388] Ibid.

Discrimination Board of NSW (**NSW ADB**) and is now much narrower than the Western Australian exception.

As a result, the exceptions for 'class' and 'age' and the exception for the provision of benefits, facilities or services were removed, thereby narrowing the scope of the exception significantly.[389]

In its review of the NSW Act in 1999, the NSW ADB expressed the view that arbitrary exclusion of a person from accommodation because of their race, sex or marital status should not be allowed.[390] The NSW ADB proposed that the exception be removed, with the result being a general non-discriminatory policy for aged housing where specific exceptions could be applied for under section 126 of the NSW Act.[391] In doing so, those who wish to cater for special groups would still be allowed to provide housing for the benefit of that group. However, they would be accountable for and required to justify the rationale for an exception being granted.[392] To date the exception remains in the NSW Act.

In all other States and Territories, the ability to lawfully discriminate in relation to aged accommodation is not automatic and aged accommodation providers must apply to the relevant tribunal for an exception in order to restrict admission to applicants.[393] In some jurisdictions, the legislation does not stipulate any criteria which are to be taken into account when determining whether to grant an exception, while in others the criteria are very broadly worded.[394]

Other exceptions

There are many exceptions contained in the statutory regimes operating across States and Territories which have no direct equivalent to the general exceptions contained in Part VI of the Act. In many cases these exceptions are similar. However, there are often subtle but important differences between them.

Special needs exception

The Victorian Act contains a general exception which provides that 'a person may establish special services, benefits or facilities that meet the special needs of people with a particular attribute and may limit eligibility for such services to people with the particular attribute.'[395] A similar general exception is contained in the Queensland Act,[396] Tasmanian Act,[397] and the ACT Act.[398]

There is no equivalent 'general exception' in the Act. However, there are a number of exceptions contained throughout the Act, which apply to specific grounds of discrimination, and have a similar, though more limited, effect.[399] Similarly, there is no 'general exception' to this effect contained in the NSW Act and South Australian Act, but there are a number of exceptions contained throughout those Acts, which apply to specific grounds of discrimination.[400] There is no exception for discrimination on the grounds of a person's special needs in the Northern Territory Act at all.[401] This demonstrates the non-uniform nature of the exceptions in varying Australian jurisdictions.

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[389] *Anti-Discrimination (Amendment) Act 1994* (NSW).
[390] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* cl 6.95.
[391] Ibid.
[392] Ibid cl 6.96.
[393] *Equal Opportunity Act 2010* (Vic), s 89; *Anti-Discrimination Act 1991* (QLD), s 113; *Equal Opportunity Act 1984* (SA), s 92; *Anti-Discrimination Act 1998* (TAS), s 56; *Discrimination Act 1991* (ACT), s 109; *Anti-Discrimination Act 1992* (NT), s 59.
[394] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 882.
[395] *Equal Opportunity Act 2010* (Vic), s 88.
[396] *Anti-Discrimination Act 1991* (QLD), s 104.
[397] *Anti-Discrimination Act 1998* (TAS), s 25.
[398] *Discrimination Act 1991* (ACT), s 27(1)(b).
[399] *Equal Opportunity Act 1984* (WA), ss 31, 35K, 35ZD(b), 51(b) and 66ZP(b).
[400] *Equal Opportunity Act 1984* (SA), ss 65, 82 and 85P; *Anti-Discrimination Act 1977* (NSW), ss 21, 49ZYR and 126A.
[401] See generally, *Anti-Discrimination Act 1992* (NT).

Pension exception

The Victorian Act contains a general exception which proscribes that nothing in the Victorian Act 'affects discriminatory provisions relating to pensions'. There is no equivalent 'general exception' in the Act. Similarly, the NSW, Queensland, South Australian, Tasmanian and ACT Acts do not contain a pension exception.

It is beyond the scope of this Discussion Paper to consider each of the exceptions to discrimination contained within the different pieces of legislation. There are hundreds of exceptions which apply to a particular sphere of a person's life or to a particular attribute or ground. Further discussion in relation to these exceptions can be found in the literature,[402] and the Commission welcomes submissions relating to exceptions which should or should not apply in the context of the Act.

4.9 Burden and standard of proof

Like the Act, the anti-discrimination laws of the other States and Territories require a complainant to prove the occurrence of discrimination on the balance of probabilities.

However, where indirect discrimination is involved, recent amendments to the Victorian Act and the removal of the proportionality test (see further discussion at sections 4.5.2 and 5.5.2 of this Discussion Paper) have shifted the burden of proof from the complainant, who originally had to prove the imposition of a requirement or condition was discriminatory, to the respondent who now has to show that the requirement or condition is reasonable. If the respondent cannot show objective justification, then the requirement or condition will be considered indirect discrimination. While the Queensland Act retains the proportionality test in indirect discrimination, it reverses the burden of proof to the respondent to show that the requirement or condition is reasonable.

4.10 Functions and investigative powers of the Equal Opportunity Commissioner

Investigative and conciliatory function

All States and Territories largely adhere to the same process for handling and resolving complaints, which involves an initial assessment followed by acceptance by the relevant commission and then referral to conciliation. Where conciliation is unsuccessful, complaints in all jurisdictions can be referred to the relevant court or tribunal for hearing and determination.

In all States and Territories except Victoria, complainants must bring complaints to the relevant board or commission in the first instance before being referred to the relevant tribunal.[403]

Complaints process

Across all Australian jurisdictions, the State and Territory anti-discrimination commissions have the power to assess, investigate and conciliate complaints brought under the relevant State or Territory anti-discrimination legislation.[404]

In Victoria, complaints are made to the VEOHRC, a body corporate governed by a board of no more than seven members.[405]

In the ACT, complaints are made to the ACT Human Rights Commission (**ACT HRC**) which is made up of a President, six separate commissioners and the public advocate. The President of the ACT HRC is also the Human Rights Commissioner.[406]

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[402] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018).

[403] *Equal Opportunity Act 2010* (Vic), s 122.

[404] See e.g.: *Anti-Discrimination Act 1998* (TAS), s 6(h); *Equal Opportunity Act 2010* (Vic), s 129; *Anti-Discrimination Act 1977* (NSW), s 90; *Anti-Discrimination Act 1991* (QLD), s 154A; *Human Rights Commission Act 2005* (ACT), s 14(1)(a); *Anti-Discrimination Act 1992* (NT), s 13.

[405] *Equal Opportunity Act 2010* (Vic), s 161.

[406] *Human Rights Commission Act 2005* (ACT), s 12.

In NSW, complaints are made to the President of the NSW ADB.[407]

In the Northern Territory and Tasmania, complaints are made to the Anti-Discrimination Commissioner,[408] in Queensland it is the Commissioner of the Queensland Human Rights Commission (**QHRC**),[409] and in South Australia it is the Commissioner for Equal Opportunity.[410]

Assessment for acceptance or rejection

Following the receipt of a complaint, the relevant commission, commissioner or President will assess the complaint in order to decide whether it should be accepted or rejected.[411]

There are many reasons why complaints may be rejected. However, some common examples are where the complainants are not covered by the relevant legislation,[412] where they are frivolous, vexatious or lacking in substance,[413] or where the commissioner considers that the subject matter of the complaint has been adequately dealt with by another entity.[414]

During this process, the parties to the complaint may be required to provide particular information or documents. In NSW[415], the Northern Territory,[416] South Australia,[417] Tasmania,[418] the ACT[419] and Queensland,[420] a party to the complaint may be ordered or directed to provide information or documents, where relevant to the proceedings.

In NSW and the ACT, such information may also be provided orally. Further, if the ACT HRC reasonably believes that someone can provide relevant information in relation to a complaint, the ACT HRC may require the person to attend before an interviewer to answer certain questions.[421]

If the VEOHRC considers particular information reasonably necessary for the purpose of conducting an investigation, it may request such information or apply to the VCAT requiring a person to provide the information or document to the VEOHRC.[422]

Unlike in Western Australia, the VEOHRC must apply to the VCAT for an order compelling attendance.[423] The VEOHRC cannot compel attendance at its own discretion and is therefore reliant on the parties to agree.

In Victoria, there is not a prescribed process for acceptance or rejection in the legislation.

Dispute resolution

Where complaints are accepted, in most States and Territories, where appropriate, the complaint is then referred to dispute resolution which is typically in the form of conciliation.[424] However, in Tasmania,

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[407] *Anti-Discrimination Act 1977* (NSW), s 89A.

[408] *Anti-Discrimination Act 1992* (NT), s 60; *Anti-Discrimination Act 1998* (TAS), s 60(1).

[409] *Anti-Discrimination Act 1991* (QLD), s 136.

[410] *Equal Opportunity Act 1984* (SA), s 93(1)(c).

[411] *Anti-Discrimination Act 1977* (NSW), s 89B; *Anti-Discrimination Act 1992* (NT), s 66A; *Anti-Discrimination Act 1991* (QLD), s 141; *Equal Opportunity Act 1984* (SA), s 95A; *Anti-Discrimination Act 1998* (TAS), s 64; *Human Rights Commission Act 2005* (ACT), s 45(3).

[412] *Anti-Discrimination Act 1977* (NSW), s 88; *Anti-Discrimination Act 1998* (TAS), s 64(1)(b).

[413] *Anti-Discrimination Act 1977* (NSW), s 92(1)(a)(i); *Anti-Discrimination Act 1991* (QLD), s 139; *Equal Opportunity Act 1984* (SA), s 95A(1)(a); *Anti-Discrimination Act 1998* (TAS), s 64; *Human Rights Commission Act 2005* (ACT), s 45(3)(a)(i).

[414] *Anti-Discrimination Act 1991* (QLD), s 140(2); *Anti-Discrimination Act 1998* (TAS), s 64(f).

[415] *Anti-Discrimination Act 1977* (NSW), s 90B.

[416] *Anti-Discrimination Act 1992* (NT), s 84.

[417] *Equal Opportunity Act 1984* (SA), s 94(2a).

[418] *Anti-Discrimination Act 1998* (TAS), s 97.

[419] *Human Rights Commission Act 2005* (ACT), s 73.

[420] *Anti-Discrimination Act 1991* (QLD), s 156.

[421] *Human Rights Commission Act 2005* (ACT), s 74.

[422] *Equal Opportunity Act 2010* (Vic), s 130.

[423] Ibid s 131.

[424] *Human Rights Commission Act 2005* (ACT), s 51; *Equal Opportunity Act 2010* (Vic), s 115; *Anti-Discrimination Act 1977* (NSW), s 91A; *Anti-Discrimination Act 1992* (NT), ss 78-79; *Anti-Discrimination Act 1991* (QLD), s 158; *Equal Opportunity Act 1984* (SA), s 95; *Anti-Discrimination Act 1998* (TAS), s 75.

following the completion of the investigation, the commissioner is to determine whether the complaint is to proceed to conciliation or an inquiry.[425]

In Victoria, the VEOHRC will determine whether the application can be dealt with via the dispute resolution process. Where the VEOHRC considers it can be, the parties must agree to cooperate and proceed with the dispute resolution.[426] By contrast, in all other States and Territories, where the commissioner or commission considers that a complaint may be resolved by conciliation, they must try to resolve it by conciliation. In doing so, a party to the proceedings in the ACT,[427] Northern Territory,[428] Queensland,[429] South Australia,[430] Tasmania[431] and NSW,[432] may be directed or required to attend the conciliation.

If conciliation is successful

Most commissions do not have the ability to decide whether unlawful discrimination or other unlawful conduct has or has not occurred. At best, where conciliation conferences are successful, depending on the jurisdiction, parties to the conciliation may be required to enter into an agreement. In other jurisdictions it may only be optional, such as in the ACT.[433] For example, in Queensland, if a complaint is resolved by conciliation, the commissioner must record the terms of the agreement and file the document with the Queensland Civil and Administrative Tribunal (**QCAT**).[434] In the Northern Territory, the commissioner may record the terms of the agreement reached between the parties if the complainant provides their consent.[435] Further, in Tasmania, agreements are drawn up, held on file with the commission and are enforceable as if they were an order made by the Tasmanian Civil and Administrative Tribunal (**TCAT)**.[436]

In Victoria, the VEOHRC may take any action it thinks fit, including but not limited to entering into an agreement, referring a matter to the VCAT and/or making a report to the Attorney-General or Parliament.[437] The VEOHRC does not have the power to make orders or award compensation.

The success of conciliation in resolving complaints differs between each jurisdiction. For the year 2019-20, the following number of settlements were recorded:

(a) **NSW**: 11.1% of complaints were settled at or after conciliation.[438]

(b) **Victoria**: 65% of complaints were resolved through the dispute resolution process.[439]

(c) **Northern Territory**: 43% of complaints were settled.[440]

(d) **South Australia**: 81% of accepted complaints were settled via conciliation.[441]

(e) **ACT**: 68% conciliation success rate.[442]

(f) **Tasmania**: 63% of conciliations held were resolved.[443]

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[425] *Anti-Discrimination Act 1998* (TAS), s 71(1).
[426] *Equal Opportunity Act 2010* (Vic), s 115.
[427] *Human Rights Commission Act 2005* (ACT), s 59.
[428] *Anti-Discrimination Act 1992* (NT), s 79(1).
[429] *Anti-Discrimination Act 1991* (QLD), s 159(1).
[430] *Equal Opportunity Act 1984* (SA), s 95(3).
[431] *Anti-Discrimination Act 1998* (TAS), s 75(1).
[432] *Anti-Discrimination Act 1977* (NSW), s 91A(2).
[433] *Human Rights Commission Act 2005* (ACT), s 62(1).
[434] *Anti-Discrimination Act 1991* (QLD), s 164.
[435] *Anti-Discrimination Act 1992* (NT), s 81(1).
[436] *Anti-Discrimination Act 1998* (TAS), s 76.
[437] *Equal Opportunity Act 2010* (Vic), s 139.
[438] Note: the statistics recorded by NSW captured all statistics in relation to complaints, i.e., those that were declined before and after investigation, those that were withdrawn and abandoned, so the figures appear comparatively lower.
[439] Victorian Equal Opportunity and Human Rights Commission, *Victorian Equal Opportunity and Human Rights Commission Annual Report 2019-20* (Report, 2020), 6.
[440] Northern Territory Anti-Discrimination Commission, *Annual Report 2019/20* (Report, 2020) 21.
[441] South Australian Equal Opportunity Commission, *South Australian Equal Opportunity Commission Annual Report 2019-20* (Report, 2020) 32.
[442] ACT Human Rights Commission, *ACT Human Rights Commission Annual Report 2019-20* (Report, 2020) 10.
[443] Equal Opportunity Tasmania, *Equal Opportunity Tasmania Annual Report 2019-20* (Report, 2020) 27.

(g) **Queensland**: 53.8% settlement rate.[444]

If conciliation is unsuccessful

It is common among the different States and Territories that, where conciliation is unsuccessful, complaints are referred to the relevant tribunal for inquiry. [445] This referral may arise out of a request from the complainant seeking a referral to the tribunal following an unsuccessful attempt at conciliation, or following receipt of notice that the matter cannot be resolved by conciliation.[446] See section 4.11 below for more details.

In the Northern Territory, if the complaint is not resolved, the complainant may request the commissioner to evaluate the complaint.[447] This is unique to the Northern Territory. During the evaluation phase, both parties must provide evidence of the matter in contention. The commissioner can also order a person to produce documents or information in possession of any person relevant to the proceedings.[448] Following evaluation, the Northern Territory Anti-Discrimination Commission (**NTADC**) will decide whether there is a reasonable prospect of success in the Northern Territory Civil and Administrative Tribunal (**NTCAT**). Where the NTADC considers there is reasonable prospect of success, the NTADC will refer the matter to the NTCAT for hearing. The commissioner can also evaluate complaints upon request by the Minister or in circumstances where the commissioner considers that evaluation is appropriate.[449]

Commission-initiated complaints

In Victoria, the VEOHRC may conduct investigations into any matter where the matter raises an issue that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution or by an application to the VCAT.[450]

In order to conduct an investigation, the VEOHRC, must be satisfied that there are reasonable grounds to suspect that one or more contraventions of the Victorian Act have occurred and that the investigation would advance the objectives of the Victorian Act.[451] Under the Victorian legislation, an example of circumstances giving rise to a commission-initiated complaint is where an organisation's policy indirectly discriminates persons with a particular attribute, and the VEOHRC has received many calls complaining about the policy and media attention. In such circumstances, where the policy in question has not been changed, despite some individual claims being settled, the VEOHRC may initiate an investigation.

During the year 2017-18, the VEOHRC conducted a major investigation into mental health discrimination in travel insurance. The eight-month investigation, uncovered that three Australian travel insurance providers sold more than 365,000 policies containing terms which discriminated against persons with mental health conditions.[452] Following the investigation, all three insurance providers committed to changing their practice of a blanket mental health exclusion as a result of the investigation.[453]

The ACT HRC has a similar power, where it is able to consider, on its own initiative, any act, service or conduct that appears to be one which a person could make a complaint about under the ACT Act.[454] This is known as a 'commission-initiated consideration'. The ACT HRC may initiate a complaint on its own initiative in circumstances including, but not limited to, where:

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[444] Queensland Human Rights Commission, *Putting people first: The first annual report on the operation of Queensland's Human Rights Act 2019-20* (Report, 2020) 41.
[445] *Anti-Discrimination Act 1998* (TAS), s 78.
[446] *Anti-Discrimination Act 1991* (QLD), ss 164A, 165.
[447] *Anti-Discrimination Act 1992* (NT), s 81(3).
[448] Ibid s 84.
[449] Ibid s 83(1).
[450] *Equal Opportunity Act 2010* (Vic), s 127(a)(iii).
[451] Ibid s 127(b)-(c).
[452] Victorian Equal Opportunity and Human Rights Commission, *Victorian Equal Opportunity and Human Rights Commission Annual Report 2019-20* (Report, 2020) 27.
[453] Ibid.
[454] *Human Rights Commission Act 2005* (ACT), s 48(1).

(a) the complainant has withdrawn the complaint for any reason, but the commission is satisfied that it is in the public interest to consider the complaint;

(b) the complaint appears to reveal a systemic problem about an activity or a service;

(c) the complaint, if substantiated, raises a significant issue for the ACT, or an issue of public safety; and

(d) the group affected is particularly vulnerable (e.g., children, detainees or persons with severe disability).[455]

Examples include where a complaint is made anonymously and raises concerns with the commission, or where issues are raised in the media or through community organisation representations.[456] During this process, the ACT Commissioner will work with organisations to resolve any issues including by recommending policies or practices be updated or staff to be trained or educated.[457] The ACT Commissioner may also make formal recommendations and request evidence of compliance following a prescribed review period.[458] In addition, the Minister may direct the ACT HRC to inquire into and report on any matter that can be complained about under the ACT Act.[459]

During the year 2019-20, eight new ACT Commission-initiated considerations commenced, and nine from the previous year were closed. Only one of these related to discrimination, with the majority relating to the quality and delivery of health services in the ACT (for example, one ACT Commission-initiated consideration investigated the timeliness of delivery of oral health services at a maximum-security prison in the ACT).[460]

In Queensland, where requested by the Minister or the QCAT, the Queensland Commissioner must initiate an investigation.[461] The Queensland Commissioner is also permitted to initiate an investigation if during the course of carrying out its function, a possible contravention or offence against the Queensland Act is uncovered, the matter is of public concern and the Minister agrees.[462]

Educational and promotional function

In addition to the investigative powers of the relevant commission or board, there are common additional functions and powers that exist among the States and Territories. These relate to the broad range of promotional and educational roles and research functions that the commissions perform.[463]

For example, in the ACT, the President is required to promote community discussion and provide community education and information about the ACT Act.[464] The Northern Territory Commissioner also has the ability to institute or promote research, the collection of data and the dissemination of information.[465] The Northern Territory Commissioner's promotional role means they must promote the recognition and acceptance of non-discriminatory attitudes, acts and practices.

The South Australian Commissioner must foster and encourage informed and unprejudiced attitudes amongst the public with a view to eliminating discrimination.[466] The South Australian Commissioner may also institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination.[467]

The Tasmanian Commissioner must promote recognition and approval of accepted attitudes, acts and practices, disseminate information about discrimination and prohibited conduct, undertake research and

[455] Ibid, s 48(3).
[456] ACT Human Rights Commission, *ACT Human Rights Commission Annual Report 2019-20* (Report, 2020), 42.
[457] Ibid 42.
[458] Ibid.
[459] *Human Rights Commission Act 2005* (ACT), s 17.
[460] ACT Human Rights Commission, *ACT Human Rights Commission Annual Report 2019-20* (Report, 2020) 48.
[461] *Anti-Discrimination Act 1991* (QLD), s 155.
[462] Ibid ss 155(2)(a) and (c).
[463] *Equal Opportunity Act 2010* (Vic), ss 156, 15; *Anti-Discrimination Act 1991* (QLD), s 235(d); *Anti-Discrimination Act 1977* (NSW), 119; Anti-Discrimination New South Wales, *ADNSW Annual Report 2019-20* (Report, 2020) 8.
[464] *Human Rights Commission Act 2005* (ACT), s 18(1)(i).
[465] *Anti-Discrimination Act 1992* (NT), s 13(1).
[466] *Equal Opportunity Act 1984* (SA), s 11(1).
[467] Ibid s 11(2).

educational programs, and prepare and publish guidelines for the avoidance of attitudes, acts and practices.[468]

Assistance

A function unique to the Western Australian and South Australian systems is the ability to assist complainants with the preparation of their case before the State tribunal and in some circumstances, receive financial assistance.[469]

Under the South Australian Act, if requested, the South Australian Commissioner may provide representation for a party to proceedings before the South Australian Civil and Administrative Tribunal (**SACAT**).[470] Unlike the Act, the South Australian Commissioner is under an obligation to apply available public funds judiciously and must take into consideration the following factors:[471]

(a) the capacity of the complainant or respondent to represent themselves or provide their own representation;

(b) the nature and circumstances of the alleged contravention; and

(c) any other matter considered relevant.

Where representation is provided, the representative has an obligation to disclose any information reasonably required by the South Australian Commissioner in order to determine whether the Commissioner should cease to provide representation.[472]

The remaining States and Territories do not provide assistance for either party in proceedings before the relevant Tribunal. Some jurisdictions however can assist complainants with formulating their complaint in the first instance.[473]

4.11 Requirements for the referral of complaints

Victoria

Following an investigation, the VEOHRC may refer a complaint to the VCAT.[474] Aside from complaints referred to it by the VEOHRC, the VCAT can hear applications lodged with them directly.[475] There are no other notable requirements for referral.

ACT

The ACT HRC may also refer the complaint to the ACT Civil and Administrative Tribunal (**ACAT**). Where the commissioner decides the complaint is not to be referred for conciliation, the commissioner must provide the complainant with a discrimination referral statement.[476] If upon receipt of a statement, a complainant requests the complaint be referred to ACAT, the commissioner must refer the complaint.[477] A similar process occurs upon receipt of a final report in relation to a discrimination report. If the complaint is not conciliated, the complainant may ask the ACT HRC to refer the complaint to the ACAT within 60 days after the day the final report is given to the complainant. If 60 days has passed, the complainant may apply to the ACAT on their own accord. Where a commission-initiated report is prepared, the ACT HRC may refer the matter to the ACAT.[478]

[468] *Anti-Discrimination Act 1998* (TAS), s 6.
[469] The Western Australian system is discussed at paragraph 3.9 above.
[470] *Equal Opportunity Act 1984* (SA), s 95C(1).
[471] Ibid s 95C(2).
[472] Ibid s 95C(3).
[473] *Human Rights Commission Act 2005* (ACT), s 44(3)*; Anti-Discrimination Act 1977* (NSW), s 88A.
[474] *Equal Opportunity Act 2010* (Vic), s 139(2)(c).
[475] Ibid s 122.
[476] *Human Rights Commission Act 2005* (ACT), s 45(2)(d).
[477] Ibid s 53A(1)(a)(i) and (2).
[478] Ibid s 53A.

NSW

Where the President has declined to investigate the complaint, the complainant can ask the President to refer the complaint to the New South Wales Civil and Administrative Tribunal (**NCAT**).[479] A party to the complaint may request the President by notice in writing to refer the complaint to the NCAT if the complaint has not been declined, terminated or otherwise resolved within 18 months.[480] In addition, where the President is of the opinion that a complaint cannot be resolved by conciliation, or the parties have attempted conciliation and the complaint has not been resolved, the President is to refer the complaint to the NCAT. The President is also permitted to refer the matter in circumstances where the nature of the complaint is such that it should be referred, or if the President is satisfied that all the parties wish the complaint to be referred and it is appropriate in the situation.[481] The Minister can also refer any matter to the NCAT as a complaint.[482]

Northern Territory

The Northern Territory Commissioner's delegate will refer the matter to the NTCAT if they find merit in doing so, to determine whether there has been discriminatory or other prohibited conduct. After evaluating the complaint, the commissioner may refer the complaint to the NTCAT if they are of the view that the complaint has reasonable prospects of success at a hearing of the NTCAT.[483] If the complaint is referred, the commissioner must provide a report to the NTCAT and the parties within 60 days of the referral.[484] The commissioner may also refer the complaint to the NTCAT if the commissioner believes the complaint has a reasonable prospect of success at a hearing of the NTCAT.[485] Where the ADC has made arrangements for a legal practitioner to appear at proceedings, the legal practitioner is there to assist the commissioner and is subject to the commissioner's direction and control.[486]

Queensland

The QCAT has the jurisdiction to make orders in relation to complaints before they are referred to the QCAT, to review decisions of the commissioner about lapsing of complaints, to enforce agreements for resolution of complaints by conciliation and to hear and decide complaints.[487] Except for work-related matters, the QCAT can also grant exemptions from the Queensland Act and provide opinions about the application of the Queensland Act.[488] The QCAT also has the wide freedom to take any other action incidental to the discharge of any function under the Queensland Act.[489]

Where a complaint is not resolved by conciliation, the complainant may give the Queensland Commissioner a written notice requiring a referral of the complaint to the QCAT.[490] If the Queensland Commissioner considers that the complaint cannot be resolved by conciliation, the complainant may also request a referral to the QCAT.[491]

The QCAT must accept a complaint that is referred to it by the commissioner, unless it has been more than one year after the alleged contravention.[492] The QCAT may consider the complaint in any event if it considers it would be reasonable to do so on the balance of probabilities.[493] The QCAT is constituted by a

[479] *Anti-Discrimination Act 1977* (NSW), s 93A.
[480] Ibid s 93B.
[481] Ibid s 93C.
[482] Ibid s 95(2).
[483] *Anti-Discrimination Act 1992* (NT), s 85(1).
[484] Ibid s 87A(1).
[485] *Anti-Discrimination Act 1992* (NT), s 86(1).
[486] Ibid s 94.
[487] *Anti-Discrimination Act 1991 (*QLD), s 174A(a)(i)-(iv).
[488] Ibid s 174A(b).
[489] Ibid s 174A(e).
[490] Ibid s 164A.
[491] Ibid s 166.
[492] Ibid s 175(1).
[493] Ibid s 175(2).

legally qualified member for the hearing.[494] However, the QCAT may make arrangements for a solicitor or counsel to appear at a proceeding to assist.[495]

South Australia

If following an investigation of a matter referred to the South Australian Equal Opportunity Commission, the South Australian Commissioner is of the opinion that the matter should be referred to the SACAT, the commissioner will lodge the complaint with the SACAT.[496]

If, in the opinion of the South Australian Commissioner, a complaint cannot be resolved by conciliation, has unsuccessfully attempted to resolve the matter by conciliation, or is of the opinion that the matter should be referred to the SACAT, then the commissioner must refer the matter to the SACAT for hearing and determination.[497]

Tasmania

The Tasmanian Commissioner may refer the matter to inquiry at the TCAT if the commissioner believes the complaint cannot be resolved by conciliation or if the conciliation attempt has not been successful or if the nature of the complaint is such that it should be referred to inquiry.[498]

The Tasmanian Commissioner is to provide the TCAT with a report relating to the complaint.[499]

The TCAT may permit any party to be represented or accompanied by another person during the hearing.[500] During or prior to a hearing of an inquiry, the TCAT has the power to refer the matter for conciliation.[501]

4.12 Role and jurisdiction of adjudicator

The role and jurisdiction of the relevant State and Territory tribunal is to hear and determine complaints of discrimination referred to it by the State or Territory commission, or in the case of Victoria, complaints referred to it and also brought to it directly. In NSW, the NCAT also has the jurisdiction to hear complaints referred to it by the Minister.

Following the hearing of evidence, and where satisfied that a person has contravened the relevant State or Territory legislation, all State and Territory tribunals can make the following orders:[502]

(a) an order that the person refrain from acting in further contravention of the legislation;

(b) an order that the person pay compensation to the complainant; and

(c) an order that the person do anything to eliminate future contraventions of the legislation or redress circumstances that have arisen from the contravention.

In addition to the orders listed above, some tribunals are permitted to make other orders as prescribed under their relevant legislation.

In NSW, the Northern Territory, Queensland and Tasmania the relevant tribunal may also:

(a) order the respondent to apologise (and in NSW and Queensland publish a public apology); and

[494] Ibid s 176.
[495] Ibid s 185.
[496] *Equal Opportunity Act 1984* (SA), s 95D(1).
[497] Ibid s 95B(1).
[498] *Anti-Discrimination Act 1998* (TAS), s 78(1).
[499] Ibid s 79(1).
[500] *Anti-Discrimination Act 1998* (TAS), s 79A.
[501] Ibid s 80A.
[502] *Equal Opportunity Act 2010* (Vic), s 141; *Human Rights Commission Act 2005* (ACT), s 53E(2); *Anti-Discrimination Act 1977* (NSW), ss 102, 103; *Anti-Discrimination Act 1992* (NT), s 88(1); *Anti-Discrimination Act 1991* (Qld), s 209(1); *Equal Opportunity Act 1984* (SA), s 96(1); *Anti-Discrimination Act 1998* (TAS), s 89.

(b) declare void in whole or in part any contract or agreement made in contravention of the relevant Act or regulations.[503]

In Queensland and NSW, the tribunals may also make an order that the respondent develop and implement policies or procedures aimed at eliminating unlawful discrimination.[504]

Further, in Queensland, the QCAT may order that interest be paid on any compensation amount[505], and in Tasmania the tribunal may make an order for re-employment.[506]

Some State and Territory tribunals also have the power to make interim orders to prevent prejudice to the investigation,[507] or to preserve the status quo and rights between the parties to the complaint.[508]

4.13 Interaction with relevant Commonwealth laws or proposed laws

Although the inconsistencies between the Commonwealth and State legislation vary due to the drafting variations as between State anti-discrimination legislation, the principles of how each State's anti-discrimination legislation interacts with Commonwealth laws are uniform. The principles outlined in section 3.12 concerning the interaction of the Act with Commonwealth laws therefore apply to other State anti-discrimination legislation.

Strictly, section 109 of the Australian Constitution does not apply to Territories. However, in both the ACT[509] and the Northern Territory[510], Territory laws must not be inconsistent with the laws of the Commonwealth.

4.14 Other

4.14.1 Compensation cap

In NSW, the NCAT can make orders for the respondent to pay compensation for 'any loss or damage suffered by reason of the respondent's conduct', up to the amount of $100,000.[511] In the Northern Territory, compensation orders for 'loss or damage caused by the prohibited conduct' cannot exceed $60,000.[512]

In the remaining State and Territory jurisdictions, there is no limit to the amount of compensation that can be ordered by a court or tribunal.

In Tasmania, the tribunal can make any order for compensation that it 'thinks appropriate' for any loss or injury suffered as a result of discriminatory or prohibited conduct.[513]

Both the VCAT and SACAT have the discretion to make an order for compensation of an amount the Tribunal 'thinks fit' to compensate the applicant for loss or damage as a result of the contravention'.[514]

In Queensland, the QCAT can make an order for compensation of 'an amount the tribunal considers appropriate' for a contravention of the Queensland Act.[515]

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[503] *Anti-Discrimination Act 1977* (NSW), s 108(2); *Anti-Discrimination Act 1991* (QLD), s 209(1); *Anti-Discrimination Act 1992* (NT), ss 88(1), 89(1)); *Anti-Discrimination Act 1998* (TAS), ss 89, 92.
[504] *Anti-Discrimination Act 1991* (QLD), s 209(1)(f); *Anti-Discrimination Act 1977* (NSW), s 108(2)(e).
[505] *Anti-Discrimination Act 1991* (QLD), s 209(1)(g).
[506] *Anti-Discrimination Act 1998* (TAS), s 89(c).
[507] *Equal Opportunity Act 2010* (Vic), s 137; *Equal Opportunity Act 1984* (SA), s 96(2); *Anti-Discrimination Act 1998* (TAS), s 98(3).
[508] *Anti-Discrimination Act 1977* (NSW), s 105(1); *Anti-Discrimination Act 1992* (NT), s 101(1).
[509] *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 28.
[510] *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, 75.
[511] *Anti-Discrimination Act 1977 No 48* (NSW), s 108(2)(a).
[512] *Anti-Discrimination Regulations 1994* (NT), r 2.
[513] *Anti-Discrimination Act 1998* (TAS), s 89(1)(d).
[514] *Equal Opportunity Act 2010* (Vic), s 125(a)(ii).
[515] *Anti-Discrimination Act 1991* (QLD), s 209(1)(b).

4.14.2 Complaints by representative organisations

In NSW, complaints can be made by a representative body on behalf of a named person or persons[516] where the President is satisfied that each person on whose behalf the complaint is made consents to the complaint being made and that the body has a sufficient interest in the complaint.[517] A sufficient interest is one where the contravention is a matter of genuine concern because of the way such conduct adversely affects the interests of the body or the interests or welfare of the group of people it represents or purports to represent.[518]

In Victoria, there is a very similar approach, where a representative body may bring a dispute where each person being represented is entitled to bring a dispute and has consented to it being brought.[519] The representative body must also have a sufficient interest and where there is more than one person being represented, the alleged contravention arises out of the same conduct.[520]

Similarly, again, in Queensland, a relevant entity may complain to the commissioner about a relevant alleged contravention[521] only where the commissioner is satisfied that the complaint is made in good faith, the alleged contravention is about conduct that has affected or is likely to affect relevant persons for the relevant entity and it is in the interests of justice to accept the complaint.[522] A relevant entity is one which has the primary purpose of promoting the interests or welfare of persons of a particular race, religion, sexuality or gender identity.[523]

In the ACT, a person who has a sufficient interest in a complaint can bring a complaint before the ACT HRC.[524] A sufficient interest in the ACT is consistent with its meaning in Victoria and NSW.[525]

There is no equivalent provision in South Australia, the Northern Territory or Tasmania.

4.14.3 Timeframe for lodging complaints

Like under the Act, in the Northern Territory, Queensland, South Australia and Tasmania, the time limit for bringing a complaint for alleged discrimination is 12 months from the date of the alleged conduct.[526] There is also a consistent approach where the relevant commission may accept the complaint outside the 12 month time limit where it would be 'appropriate to do so,'[527] 'shows good cause,'[528] where there is 'good reason'[529] or where it is reasonable to do so.[530]

In NSW and Victoria, the President or commissioner has the discretion to decline to provide dispute resolution services to a complainant where the conduct alleged occurred more than 12 months before the complaint had been made.[531]

In the ACT, there is no express time limit prescribed in the legislation. However, there is the discretion to close a complaint where it was lodged more than two years after the alleged incident.[532]

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[516] *Anti-Discrimination Act 1977* (NSW), s 87A(1)(c).
[517] Ibid s 87C.
[518] Ibid s 87C.
[519] *Equal Opportunity Act 2010* (Vic), s 114(2).
[520] Ibid ss 114(1), 114(2).
[521] *Anti-Discrimination Act 1991* (QLD), s 134(3).
[522] Ibid s 134(4).
[523] Ibid s 134(5).
[524] *Human Rights Commission Act 2005* (ACT), s 43(1)(f).
[525] Ibid s 43(2).
[526] *Anti-Discrimination Act 1992* (NT), s 65(1); *Anti-Discrimination Act 1991* (QLD), s 138(1); *Equal Opportunity Act 1984* (SA), s 93(2)(b); *Anti-Discrimination Act (1998)* (TAS), s 63(1).
[527] *Anti-Discrimination Act 1992* (NT), s 65(2).
[528] *Anti-Discrimination Act 1991* (QLD), s 138(2).
[529] *Equal Opportunity Act 1984* (SA), s 93(2a).
[530] *Anti-Discrimination Act (1998)* (TAS), s 63(2).
[531] *Equal Opportunity Act 2010* (Vic), s 116(a); *Anti-Discrimination Act 1977* (NSW), s 89B(2)(b).
[532] *Human Rights Commission Act 2005* (ACT), s 78(1)(a).

Therefore, the Act is consistent with the majority of the States and Territories in terms of the time limit for bringing complaints.

4.14.4 Prohibiting conversion practices

Conversion practices, also known as 'change practices' or 'suppression practices', are practices that seek to change or suppress an individual's sexual orientation or gender identity.[533] They often involve the subtle and recurrent messaging that a person can change or suppress their sexual orientation or gender identity. Persons who identify as being LGBTIQA+ are usually the targets of conversion practices in an attempt to 'çonvert' them to heterosexuality. These conversion practices do not have a basis in medicine and are typically based on flawed ideology.[534] The conversion practices can be very harmful both physically and mentally to individuals involved.

A recent development was the passing of the Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic) (**Prohibition Bill**) by the Victorian Upper House on 4 February 2021.

The *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) (**Prohibition Act**) denounces and prohibits conversion practices which seek to change or suppress an individual's sexual orientation or gender identity.[535] In doing so, the Prohibition Act also establishes a civil response scheme within the VEOHRC and provides it with the powers to consider and resolve allegations of such practices.[536] In addition to the resolution of individual allegations, the VEOHRC is empowered with own-motion powers to investigate and enforce a prohibition of such practices where it is aware of any systemic practices in the community.[537]

The Prohibition Act also amends definitions of 'sexual orientation' and 'gender identity' in the Victorian Act as well as amendments to include sex characteristics as a protected attribute.[538] The amended definitions draw on the Yogyakarta Principles relating to the application of international human rights law on sexual orientation and gender identity.[539]

The new definition of 'gender identity' has been drafted in order to focus on the individual's experience of their gender-related identity which may be different from their designated sex at birth. The definition includes a personal sense of the individual's body and other expressions of gender.[540]

A new definition of 'sex characteristics' has been drafted based on the definition found in the ACT Act which focuses on the individual's physical features relating to sex.[541] A substituted definition of sexual orientation has also been introduced, which is defined 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.[542]

'Sex characteristics' has also been inserted as a protected attribute within the Victorian Act. The Explanatory Memorandum makes the comment that existing protections given to intersex persons in Victoria are inappropriate as they fall under the definition of gender identity.[543]

Victoria is now the third jurisdiction in Australia to introduce legislation of this kind, the other two being Queensland and the ACT. Each statute aims to communicate to the public that conversion practices are not tolerated or supported by the community and that an individual's sexual orientation and gender identity are not 'broken' and do not need to be 'fixed'.[544] The Prohibition Act is the first statute to prohibit such

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[533] Explanatory Memorandum, Change or Suppression (Conversion) Practices Prohibition Bill 2020, 1.
[534] Hon Jill Hennessy, Second Reading for the Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic), (Speech delivered at Assembly, 26 November 2020).
[535] Explanatory Memorandum, Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic), 1.
[536] Ibid 1.
[537] Explanatory Memorandum, Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic), 1.
[538] Ibid 2.
[539] Ibid 17.
[540] Ibid.
[541] Ibid 18.
[542] Ibid.
[543] Ibid.
[544] Hon Jill Hennessy, Second Reading for the Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic) (Speech delivered at Assembly, 26 November 2020).

practices in religious settings, including but not limited to a prayer-based practice, a deliverance practice or an exorcism.[545]

[545] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), s 5(3)(b).

5. COMMONWEALTH LAWS AND PROPOSALS

5.1 Equivalent legislation

The Commonwealth equal opportunity framework is made up of the following Federal legislation:

(a) Australian Human Rights Commission Act 2004 (Cth) (**AHRCA**);

(b) ADA;

(c) DDA;

(d) RDA; and

(e) SDA,

together, the Commonwealth Acts.

As detailed in section 3.12 of this Discussion Paper, the Commonwealth Acts seek to implement the terms of various international treaties and conventions which Australia has ratified.[546] These treaties and conventions include, for example, the *International Convention on the Elimination of all forms of Racial Discrimination* (**CERD**), *Convention on the Elimination of all forms of Discrimination against Women* (**CEDAW**) and *Convention on the Rights of Persons with Disabilities* (**CRPD**). Western Australia is not a party to the international treaties and conventions. The Act therefore does not necessarily reflect the obligations imposed on parties to the international conventions, although best practice is to implement the provisions in principle, unless they are not relevant at the State level, or it is not practicable to do so.

Unlike the legislation enacted in each individual State and Territory, the Commonwealth Acts are separated by application to specific grounds of discrimination to reflect the international instruments on which they rely. A 2009 review of the Commonwealth Acts recommended that the Commonwealth Acts be combined in one Act. This recommendation has not been implemented.

In addition to the Commonwealth Acts, the FW Act also includes protection from discrimination on grounds including but not limited to race, sex, sexual orientation, age and physical or mental disability.[547] The FW Act operates to protect against adverse action in employment where it is taken against a protected ground.

5.2 Objects

In brief summary, section 3 of the ADA provides that its objects are to eliminate discrimination against persons on the ground of age and ensure that everyone has the same rights to equality before the law regardless of age. In addition, the ADA allows benefits and other assistance to be given to people of a certain age in recognition of their particular circumstances, and permits responses to demographic change by removing barriers to older people participating in society and changing negative stereotypes about older people.

Similarly, section 3 of the DDA provides that its objects are to eliminate discrimination against persons on the ground of disability and ensure that everyone has the same rights to equality before the law regardless of disabilities.

Although the RDA does not have an express objects section, it prohibits discrimination against persons on the ground of race by making provisions for giving effect to CERD. The RDA was the first Commonwealth Act to address discrimination when it was passed in 1975. It has been updated to reflect various recommendations, particularly those of the Royal Commission into Aboriginal Deaths in Custody. The RDA was also relevant in the recognition of native title to Australian land.

[546] *Australian Constitution,* s 51(xxix).
[547] *Fair Work Act 2009* (Cth), s 351.

The SDA gives effect to CEDAW. Section 3 of the SDA provides that it aims to eliminate discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding. It also aims to eliminate discrimination on the ground of family responsibilities in the area of work, and discrimination involving sexual harassment in the workplace, educational institutions and other areas of public activity.

The AHRCA regulates other forms of discrimination such as discrimination in employment or occupation on numerous grounds including race, sex, religion, irrelevant criminal records, political opinion, sexual preference and trade union activity.

5.3 Grounds of discrimination

Sex / gender

Like the Act, sex is recognised as a ground of discrimination in the Commonwealth jurisdiction.[548] The provisions providing for this protection are very similar.

Sexual orientation / sexuality

Like the Act,[549] sexual orientation is a protected attribute in the Commonwealth jurisdiction. The provisions providing for this protection are very similar. However, the Act extends its protection to relatives and associates of a person who is identified with the attribute of sexual orientation[550] while Commonwealth does not.

Further, the definition of 'sexual orientation' differs. The SDA defines 'sexual orientation' to mean 'a person's sexual orientation towards persons of the same sex, or persons of a different sex, or persons of the same sex and persons of a different sex,'[551] while the Act defines 'sexual orientation' as 'heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person.'[552]

Gender identification

Section 5B of the SDA recognises gender identification as a protected attribute. The SDA defines gender identity as: 'The gender-related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.' Under the Act, gender identity as a protected attribute is limited to 'gender reassigned persons' on the basis of 'gender history', as referred to above.

The SDA includes intersex status as a ground of discrimination. Intersex status is defined to mean the 'status of having physical, hormonal or genetic features that are neither wholly female nor wholly male; or neither wholly female nor wholly male; or neither female nor male'.[553] No equivalent protection is provided under the Act.

Race / ethnicity

Race is a protected attribute under section 9 of the RDA, which prevents discrimination based on 'race, colour, descent or national or ethnic origin'. This is to be compared to the definition under the Act, which also includes 'the fact that a race may comprise two or more distinct races does not prevent it being a race for the purposes of this Act'[554] and protects a relative or associate of a person who is identified with the attribute of race.

[548] *Sex Discrimination Act 1984* (Cth), s 5.
[549] *Equal Opportunity Act 1984* (WA), s 35O.
[550] Ibid s 35O(2).
[551] *Sex Discrimination Act 1984* (Cth), s 4(1).
[552] *Equal Opportunity Act 1984* (WA), s 4(a).
[553] *Sex Discrimination Act 1984* (Cth), s 4(1).
[554] *Equal Opportunity Act 1984* (WA), s 4(1)(a).

Marital / relationship status

Like the Act, the Commonwealth Acts[555] include marital status as a ground of discrimination with very similar provisions. However, in relation to de facto relationships, the Commonwealth's definition of marital status is more expansive and includes 'the de facto partner of another person but living separately and apart from that other person'[556] and 'the former de facto partner of another person.'[557]

Pregnancy

Like the Act, pregnancy is a ground of discrimination under the Commonwealth Acts.[558] However, the Commonwealth's protection extends to 'potential pregnancy' whereas the Act does not.

Disability or Impairment

The definition of 'disability' under the DDA is more extensive than the definition of disability under the Act. It includes the presence in the body of organisms causing or capable of causing disease or illness and 'behaviour that is a symptom or manifestation of the disability',[559] while the definition of impairment under the Act does not. The definition of 'disability' also expressly includes bodily malformation and disfigurements while the definition of 'impairment' covers this broadly by including 'defects to the normal structure of a person's body.'[560]

Aid of assistance animal

Like the Act,[561] the DDA[562] protects against discrimination based on the aid of assistance animals. The DDA defines 'assistance animal' as 'a dog or any other animal' and includes a set of requirements which the animal must meet to qualify as a disability aid.[563] The Act only refers to 'guide dog or hearing dog' and does not include in its meaning 'other animals' or any requirements.

Age

The ADA[564] recognises direct and indirect age-based discrimination.[565] It also expands its definition of age to include 'age group.'[566]

Parental status / family responsibility

Parental status / family responsibility or family status is a protected attribute under the Act and in the Commonwealth jurisdiction.[567] However, the Commonwealth protection is limited to the context of an employer and employee relationship,[568] whereas the Act provides broad protection in a general context to anyone who has family responsibility.

[555] *Sex Discrimination Act 1984* (Cth), s 6.
[556] Ibid s 4(1).
[557] Ibid s 4(1).
[558] Ibid s 7.
[559] *Disability Discrimination Act 1992* (Cth), ss 5, 6.
[560] *Equal Opportunity Act 1984* (WA), s 4(1)(a) (definition of 'impairment').
[561] Ibid s 66A(4).
[562] *Disability Discrimination Act 1992* (Cth), s 8(1).
[563] Ibid s 8.
[564] *Age Discrimination Act 2004* (Cth), s 14.
[565] Ibid ss 14, 15.
[566] Ibid s 5 (definition of 'age').
[567] Ibid s 7A.
[568] Ibid s 7A.

Carer status / caring responsibilities

Carer status or caring responsibilities is a protected attribute under the DDA.[569] It defines carer to mean an assistant, an interpreter or reader who provides care or services to a person with a disability.[570] In the Act, this attribute is protected under the 'family responsibility or family status' ground which includes in its definition 'having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment'.[571]

Breastfeeding

Like the Act, discrimination on the ground of breastfeeding is protected under the SDA[572] which defines breastfeeding as 'the act of expressing milk' and includes 'the act of breastfeeding' and 'breastfeeding over a period of time'.[573]

Physical features

As under the Act, physical features are not a specific protected attribute under the Commonwealth jurisdiction. Discrimination based on a 'malfunction, malformation or disfigurement of part of a person's body' is protected insofar as it comes under the definition of 'disability' in the DDA.

Political belief or activity

The Commonwealth Acts provide limited protection against discrimination based on political belief or activity. Under the FW Act an employer must not take adverse action against an employee or prospective employee based on inter alia that person's political opinion.[574] Further, under the AHRCA, discrimination includes discrimination based on political opinion. However, unlike discrimination based on age, race, sex or disability, discrimination based on political opinion is not unlawful under the AHRCA. Therefore, the same remedies do not apply to this ground.

In contrast, the Act expressly protects from discrimination based on political belief or activity by including 'political conviction' as a protected attribute.[575]

Religious appearance or dress

Like the Act, religious appearance or dress is not a protected attribute within the Commonwealth jurisdiction.

Religious belief or activity

As noted above, the Act expressly protects from discrimination based on religious belief or activity by including 'religious conviction' as a protected attribute.[576] In the Commonwealth jurisdiction, limited protection from discrimination is afforded based on religious beliefs. In the context of an employer and employee relationship, general protection is provided under the FW Act[577] but only to the extent it is a protected attribute for the employee in the relevant jurisdiction (such as for an employee in Western Australia under the Act).

Religion is also a ground of discrimination under the AHRCA. However, under this protection, if a complaint is not resolved by the AHRC, the complainant has no pathway to court. As a result, it cannot

[569] *Disability Discrimination Act 1992* (Cth), s 8.
[570] Ibid ss 8(a), 8(d).
[571] *Equal Opportunity Act 1984* (WA), s 4(1)(a).
[572] *Equal Opportunity Act 1984* (WA), s 10A; *Sex Discrimination Act 1984* (Cth), s 7AA.
[573] *Sex Discrimination Act 1984* (Cth), s 7AA(3)-(4).
[574] *Fair Work Act 2009* (Cth), s 351.
[575] *Equal Opportunity Act 1984* (WA), s 53.
[576] Ibid s 53.
[577] *Fair Work Act 2009* (Cth), s 351.

lead to a determination from an adjudicative body that provides a legally enforceable outcome (**Limited AHRC Conciliation / Referral outcome**).

Under the Religious Discrimination Bill 2019 (Cth) (**Religious Discrimination Bill**), it is proposed that discrimination based on religious beliefs or activity will be included.[578]

Industrial / trade union activity

Industrial / trade union activity is protected under various legislation. In the context of an employer and employee relationship, general protection is provided under the FW Act.[579] It is also a protected attribute under the extended meaning of discrimination in the AHRCA. However, it only has a Limited AHRC Conciliation / Referral outcome. Also, under the RDA, it is unlawful to prevent or hinder a person from joining a trade union by reason of the race, colour or national or ethnic origin of that person.[580]

Employment Activity

Employment activity is not a protected attribute under the Commonwealth Acts.

Criminal record or spent conviction

In the Commonwealth jurisdiction, criminal record or spent conviction is a protected attribute under the AHRCA but only has a limited AHRC Conciliation/Referral outcome.

Medical record

Medical record is a protected attribute under the Commonwealth Acts following the extending of the definition of discrimination under Regulation 6 of the *Australian Human Rights Commission Regulations 2019* (Cth) (**AHRCR**). However, it has a Limited AHRC Conciliation / Referral outcome. No such protection is available in the Act.

Social origin

Social origin is a protected attribute in the Commonwealth jurisdiction under the AHRCR. It has a Limited AHRC Conciliation / Referral outcome. A person can also make a general protections complaint under the FW Act if the discriminatory conduct occurred in the course of their employment by their employer because of that person's social origin.

Profession / trade / occupation

Profession / trade / occupation are not protected by either the Commonwealth or Western Australian jurisdictions as grounds of discrimination.

Lawful sexual activity

Lawful sexual activity is not protected by either Commonwealth or Western Australian jurisdictions as a ground of discrimination.

Spouse or partner identity

Spouse or partner identity is not protected by either Commonwealth or Western Australian jurisdictions as a ground of discrimination.

Personal association with someone who has, or is assumed to have, a protected attribute

The Commonwealth jurisdiction protects an associate of a person with disability, and an associate of person who is or has been an immigrant, from discrimination. In contrast, the Act more extensively

[578] Religious Discrimination Bill 2019 (Cth), s 7.
[579] *Fair Work Act 2009* (Cth), s 346.
[580] *Racial Discrimination Act 1975* (Cth), s 14(1)-(2).

protects a relative or associate of a person who is identified with the attribute of race,[581] impairment,[582] age[583] or sexual orientation.[584]

5.4 Areas of public life

There are some differences between the protection afforded by the Act in comparison to the Commonwealth Acts in relation to areas of public life. Notably, the areas of public life to which the RDA applies are very broad. Under the RDA it is unlawful to discriminate on the ground of race and related characteristics in respect of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[585] Additionally it contains prohibitions related to specific matters, some of which are summarised below.

Work

There are a number of protected grounds in the area of work under the Commonwealth statutes, which are not included in Western Australia - intersex status, potential pregnancy, colour, national origin, ethnic origin, and religious activity.

Section 35 of the FW Act also operates to protect all employees, or prospective employees, of national system employers from any adverse action by an employer, but only on a ground that would otherwise by protected in the employee's relevant jurisdiction (that is, in the laws applying in the employee's State or Territory, in addition to the Commonwealth anti-discrimination statutes).

Education

All grounds of discrimination regarding education are afforded protection under the Commonwealth Acts, except for family responsibilities. The Act affords protection on all specified grounds under the Act except for publications on the Fines Enforcement Registrar's website.

Access to places and vehicles

Protection against discrimination regarding access to places is only afforded on grounds of disability pursuant to section 23 of the DDA, race pursuant to section 11 of the RDA, and age pursuant to section 27 of the ADA. However, protection against discrimination regarding access to vehicles is only afforded on grounds of race pursuant to section 11 of the RDA. Section 23 of the DDA and section 27 of the ADA both limit the access to premises provisions by omitting the inclusion of vehicles. Conversely, under the Act, all Grounds are protected except for family responsibility and status.

Goods, services and facilities

Protection against discrimination regarding goods, services and facilities are afforded to all grounds, except for grounds of family responsibilities. However, pursuant to section 13 of the RDA, grounds relating to race are not protected regarding facilities - protection is only afforded regarding goods and services.

Accommodation

Protection against discrimination regarding accommodation is afforded to all grounds, except for grounds of family responsibilities. This is consistent with the position under the Act.

[581] *Equal Opportunity Act 1984* (WA), s 36(1a).
[582] *Equal Opportunity Act 1984* (WA), s 66A(1a).
[583] Ibid s 66V(2).
[584] Ibid s 35O(2).
[585] *Racial Discrimination Act 1975* (Cth), s9(1).

Land

Protection against discrimination regarding land is afforded to all grounds except for family responsibilities. In contrast, the Act does not afford protection to family responsibility and status, religious and political conviction, impairment, and publication on the Fines Enforcement Registrar's website.

Section 10(3) of the RDA provides that where a law contains a provision which authorises property owned by an Aboriginal or Torres Strait Islander person to be managed by another person without the consent of the owner or prevents or restricts the owner from terminating the management of the land by another, and the provision does not apply to persons generally without regard to race and related characteristics, that provision is deemed to be a provision to which s10(1) applies. This has the effect of nullifying the relevant provision.

Activities of clubs

Protection against discrimination regarding activities of clubs is afforded to all grounds except race, family responsibilities and age. In comparison, the Act does not afford protection to family responsibilities and status, and publication on the Fines Enforcement Registrar's website.

Requesting / requiring provision of certain information

Protection against discrimination regarding requesting or requiring provision of certain information is afforded to all grounds except race. In contrast, the Act only excludes publication on the Fines Enforcement Registrar's website from the protection.

Sport

Protection against discrimination regarding sports is only afforded on the ground of disability pursuant to section 28 of the DDA. The Act affords protection on grounds of gender history, age and impairment.

Superannuation schemes and provident funds

Protection against discrimination regarding superannuation schemes and provident funds is only afforded on grounds of sex, sexual orientation, and marital and relationship status per section 14(4) of the SDA. Similarly, the Act only affords protection on grounds of gender history, impairment, and age.

5.5 Key definitions

5.5.1 Direct discrimination and the comparator test

Like the NSW, Northern Territory and Queensland Acts, the definition of direct discrimination in the RDA does not require the comparison of the treatment of another person who does not have the protected attribute. Rather it provides that it is unlawful to do any act involving a distinction, exclusion, restriction or preference where the act is based on the other person's race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying the recognition, enjoyment or exercise on an equal footing of any human right or fundamental freedom in any field of public life.[586]

The relevant definitions of the AHRCA and the FW Act also do not include the comparator test.

However, the remainder of the Commonwealth anti-discrimination legislation, including the proposed Religious Discrimination Bill, use the comparator test by requiring comparison with another person who does not have the protected attribute.

Section 10(1) of the RDA is also a unique provision in Australian law. It provides that if a provision of an Australian statute[587] would deny to persons of a particular race a right that is enjoyed by persons of

[586] *Racial Discrimination Act 1975* (Cth), s 9(1); *Wotton v Queensland (No 5)* [2016] FCA 1457.
[587] That is, a law of the Commonwealth or any State or Territory.

another race, then notwithstanding that provision, persons of the first-mentioned race are to enjoy that right to the same extent as persons of the second-mentioned race.[588]

5.5.2 Indirect discrimination and the disadvantageous test

Like the ACT, Tasmanian and Victorian Acts, the ADA, DDA and SDA do not utilise the proportionality test in the determination of indirect discrimination. Instead, the definitions of discrimination in those laws include where a person imposes a requirement or condition that 'has, or is likely to have, the effect of disadvantaging a person'[589] with the same protected attribute as the aggrieved person. As such the proportionality element of the definition contained in the Act (that is, that a substantially higher proportion of persons without the prescribed attribute comply or are able to comply with the requirement or condition) is not relevant.

5.5.3 Harassment

The definition of 'sexual harassment' under section 28A of the SDA is similar to that in some of the other States and Territories. It involves a person making an unwelcome sexual advance, or an unwelcome request for sexual favours, or engaging in other unwelcome conduct of a sexual nature in relation to the person harassed. Furthermore, the test for determining the harassment falls to the 'reasonable person test' as opposed to the Act's requirement to show actual or perceived disadvantage on the part of the harassed person.

5.5.4 Impairment and positive duties

Positive duties to make reasonable adjustments were included in the DDA following amendments made in 2009.

Under section 5(2) of the DDA, the discriminator will be deemed to have directly discriminated against the aggrieved person on the grounds of the aggrieved person's disability, if:

(a) *the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and*

(b) *the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.*

Under section 6(2) of the DDA, the discriminator will be deemed to have indirectly discriminated against the aggrieved person on the grounds of the aggrieved person's disability, if:

(a) *the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition;*

(b) *because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and*

(c) *the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.*

Under section 21A of the DDA, the discriminator may lawfully discriminate against the aggrieved person, on the grounds of a disability, if:

(a) *the discrimination relates to particular work (including promotion or transfer to particular work); and*

[588] *Maloney v The Queen* (2013) 252 CLR 168.
[589] *Age Discrimination Act 2004* (Cth), s 15; *Disability Discrimination Act 1992* (Cth), s 6; *Sex Discrimination Act 1984* (Cth), s 5(2).

(b) *because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.*

The following factors can be used to assess whether 'the aggrieved person would be able to carry out the inherent requirements of the particular work' under section 21A(1)(b) of the DDA:

(a) *the aggrieved person's past training, qualifications and experience relevant to the particular work;*

(b) *if the aggrieved person already works for the discriminator—the aggrieved person's performance in working for the discriminator; and*

(c) *any other factor that it is reasonable to take into account.*

Under sections 21B and 29A of the DDA, it may be lawful to discriminate against a person on the grounds of a disability, 'if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.'

Whether an unjustifiable hardship would be imposed upon a person is evaluated based on the relevant circumstances of the case, including at section 11 of the DDA:

(a) *the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;*

(b) *the effect of the disability of any person concerned;*

(c) *the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;*

(d) *the availability of financial and other assistance to the first person; and*

(e) *any relevant action plans given to the commission under section 64.*

5.5.5 Victimisation

Victimisation is an offence under the ADA, DDA and SDA.[590] The RDA does not include any reference to victimisation.

It is an offence to subject, or threaten to subject another person (person victimised) to an intentional detriment, because of one or more of the following grounds:

(a) *the person has made or will make a complaint under the Act in question or under the AHRCA;*

(b) *the person has given or intends to give evidence or information to someone performing a function or power under the Act in question or the AHRCA;*

(c) *the person appeared or intends to appear as a witness for proceedings under the Act in question or the AHRCA;*

(d) *the person has 'reasonably asserted, or proposes to assert' any right under the Act in question or the AHRCA; or*

(e) *the person has made an allegation that a person has committed an unlawful act under the Act in question.*[591]

The offence of victimisation carries a penalty of six months imprisonment under the ADA and the DDA. Under the SDA, the penalty for individuals is 25 penalty units or 3 months imprisonment, and for corporations, is 100 penalty units.[592]

The SDA also contains a defence to the offence of victimisation, if the defendant can prove that the allegation made against them was false and not made in good faith.[593]

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[590] *Age Discrimination Act 2004* (Cth), s 51; *Disability Discrimination Act 1992* (Cth), s 42; *Sex Discrimination Act 1984* (Cth), s 94; *Australian Human Rights Commission Act 1986* (Cth).

[591] *Age Discrimination Act 2004* (Cth), s 51; *Disability Discrimination Act 1992* (Cth), s 42; *Sex Discrimination Act 1984* (Cth), s 94.

[592] *Sex Discrimination Act 1984* (Cth), s 94(1). At the time of publication of this Discussion Paper, the value of a Commonwealth penalty unit is $222.

[593] Ibid s 94(3).

5.5.6 Employment

Under the Commonwealth Acts, unpaid and volunteer work is not recognised as employment and therefore not afforded discrimination protection. However, under the proposed Religious Discrimination Bill, unpaid work is captured in the definition of 'employment'.

The Act follows the current Commonwealth position and does not include unpaid and volunteer work under the definition of 'employment.'

5.6 Vilification

Section 18C of the RDA makes conduct unlawful that is likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people that is done on the basis of race, colour or national or ethnic origin.[594]

Section 18D of the RDA contains exemptions for artistic works, scientific debate and fair comment on matters of public interest, provided they are said or done reasonably and in good faith.

Section 18C has attracted significant criticism and has been accused of impeding freedom of speech. A complaint filed under section 18C after a cartoon portrayed an Aboriginal person with a beer can, apparently unable to remember their child's name, as a police officer questions them, led to debate over the RDA's implications to freedom of speech. In response to the public backlash and the complaint, the cartoonist said they were 'bewildered' when they were accused of being racist, and that the AHRC complaint 'stifled free speech.' The complaint was later dropped by the complainant.[595]

A 2017 Parliamentary Report considered whether section 18C, amongst other things, imposed an unreasonable restriction upon freedom of speech. The Parliamentary Joint Committee on Human Rights found that the case law demonstrates that the section provides limited but important protections against vilification such as Holocaust denial and serious racial abuse against Aboriginal and Torres Strait Islander groups and ethnic communities. It was also noted that courts have interpreted section 18C of the RDA as conduct that has 'profound and serious effects' on the basis of race, rather than merely 'offensive' or 'insulting.'[596]

In 2017, following the report, the Commonwealth Government sought to raise the threshold of the section by replacing the words 'insult' and 'offend' with a stronger word like 'harass', however, the proposed amendments were not passed. Section 18C remains unchanged.

5.7 Positive duty not to discriminate

The DDA contains requirements to make reasonable adjustments and the RDA contains positive duties not to discriminate in certain circumstances. Otherwise, the Commonwealth Acts do not approach the regulation of discrimination by the imposition of a positive duty not to discriminate.

5.8 Exceptions

The RDA contains few exceptions when compared with the other Australian Acts. For example, the RDA does not make an exception for insurance and superannuation or for genuine occupational requirements.

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

[595] Parliamentary Joint Committee on Human Rights, *Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (28 February 2017) 47 [4.13] - [4.35].

[596] Ibid, [2.129] - [2.130].

Acts done under statutory authority

The SDA provides an exception for direct compliance with a determination or decision of the AHRC,[597] an order, determination or award of an industrial court or tribunal,[598] or an industrial instrument.[599] The DDA also makes an exception for direct compliance with an industrial instrument,[600] and in limited prescribed circumstances, an order, award or determination of an industrial court or tribunal.[601] The RDA does not contain any equivalent exception.

The SDA, DDA and ADA also explicitly state that there is an exception from the prohibition against discrimination for conduct that is done 'in direct compliance with' prescribed Commonwealth legislation.[602] There is no equivalent exception contained in the RDA, except in relation to compliance with the requirements of the RDA itself.

Charities

The Commonwealth Acts each contain an exception relating to charities.[603] The relevant sections under each of the Commonwealth Acts are similarly worded, broadly allowing a registered charity to discriminate on the grounds of discrimination referred to in the relevant Act.[604]

The scope of the exception is fairly uniform between each of the Commonwealth Acts. However, there are some differences:

(a) The DDA permits discrimination on the grounds of disability by a registered charity if the provision confers benefits for charitable purposes, or enables such benefits to be conferred to persons who have a disability or any act that gives effect to such rules.[605]

(b) The RDA permits a registered charity to confer benefits for charitable purposes, or enable such benefits to be conferred, on persons of a particular race, colour or national or ethnic origin, or any act that gives effect to such a provision.[606]

(c) The SDA permits a registered charity to confer benefits for charitable purposes or enable such benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in the Act.[607]

(d) The ADA permits discrimination against persons on the basis of age in an instrument that confers charitable benefits to people of a particular age.[608]

The charity exception was amended across all applicable pieces of Commonwealth legislation in 2013 to modernise and provide greater clarity and certainty around the meaning of 'charity' and 'charitable purpose'.[609] The Commission is not aware of any cases which have been litigated on this basis in WA.

Voluntary bodies

The ADA and SDA both contain an exception which allows voluntary bodies to discriminate against a person in relation to the admission to membership of the voluntary body, or the provision of benefits, facilities or services to members of the body.[610]

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[597] *Sex Discrimination Act 1984* (Cth), s 40(1)(c).
[598] Ibid s 40(1)(e).
[599] Ibid s 40(1)(f).
[600] *Disability Discrimination Act 1992* (Cth), s 47(1)(c).
[601] Ibid s 47(1)(d).
[602] *Sex Discrimination Act 1984* (Cth), s 40(2); *Disability Discrimination Act 1992* (Cth), s 47(2); *Age Discrimination Act 2004* (Cth), s 39(1)-(1A).
[603] *Disability Discrimination Act 1992* (Cth), s 49; *Racial Discrimination Act 1975* (Cth), s 8(2); *Age Discrimination Act 2004* (Cth), s 34; *Sex Discrimination Act 1984* (Cth), s 36.
[604] Within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).
[605] *Disability Discrimination Act 1992* (Cth), s 49.
[606] *Racial Discrimination Act 1975* (Cth), s 8(2)(a)-(b).
[607] *Sex Discrimination Act 1984* (Cth), s 36(a)(i)-(ii).
[608] *Age Discrimination Act 2004* (Cth), s 34.
[609] *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth).
[610] *Age Discrimination Act 2004* (Cth), s 36; *Sex Discrimination Act 1984* (Cth), s 39.

The SDA states that the voluntary body may discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities, in connection with the admission of persons as members of the body or the provision of benefits, facilities or services to members of the body.[611]

The Commonwealth anti-discrimination legislation is similarly worded to the Act's exception and provides similar scope for voluntary bodies to lawfully discriminate in relation to admission to membership, and the provision of benefits, facilities or services. Unlike the Act, however, the ADA permits voluntary bodies to discriminate on the basis of age, making the ADA exception wider than the Act's exception.

Religious bodies

Religious Personnel Exception

The SDA permits discrimination in respect of the appointment, training and ordination of priests and ministers of religion, in similar terms to that of most State and Territory legislation. Section 37 of the SDA provides that the prohibitions on discrimination under the SDA[612] do not affect:

(a) *the ordination or appointment of priests, ministers of religion or members of any religious order;*

(b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or*

(c) *the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.*

Religious Bodies Doctrine Exception

Section 37 of the SDA excepts any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion unless the act or practice:

(a) is connected with the provision, by the body, of Commonwealth-funded aged care; and

(b) is not connected with the employment of persons to provide that aged care.

Section 35 of the ADA exempts acts or practices of religious bodies where the act or practice conforms with the beliefs of the religion and is necessary to avoid injury to the religious sensitivities of adherent of the religion.

Educational institutions established for religious purposes

Religious Educational Bodies Employment Exception

Section 38 of the SDA provides that it is not unlawful to discriminate against another person on the ground of sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution, which is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.[613]

The provision requires that the first-mentioned person discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Provision of Education Exception

Section 38(3) of the SDA provides that nothing in section 21 of the SDA (discrimination in the area of education) renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection

[611] *Sex Discrimination Act 1984* (Cth), s 39.
[612] Which apply to sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy and potential pregnancy.
[613] *Sex Discrimination Act 1984* (Cth), s 38(1).

with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

As with the Religious Educational Bodies Employment Exception, this provision requires that the first-mentioned person discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Establishments providing housing accommodation for aged persons

The Commonwealth Acts do not contain specific exceptions for housing accommodation for aged persons.

Under the SDA, Commonwealth-funded aged care accommodation providers cannot rely on religious exceptions to discriminate on the grounds of sexual orientation, or gender identity.[614]

The rationale behind this is that Commonwealth-funded services are provided using taxpayer dollars. Therefore, it is not appropriate for providers to discriminate in the provision of those services.[615]

The Commission notes that there is a significant level of Commonwealth regulation and funding in relation to aged care.[616] The Commission also notes that the Royal Commission into Aged Care Quality and Safety Final Report: Care, Dignity and Respect (**Aged Care RC Report**) was tabled on 1 March 2021. The Royal Commission into Aged Care Quality and Safety made numerous recommendations, including that the new *Aged Care Act 1997* (Cth) should specify a list of rights of people seeking and receiving aged care, including the right to freedom from degrading treatment or any form of abuse. It was also recommended that the Disability Discrimination Commissioner and the Age Discrimination Commissioner report annually to the Parliament on the number of people receiving aged care with a disability who are aged 65 years or older and their ability to access daily living supports and outcomes.

Amendments were also made to the SDA in 2013 which resulted in protections under the SDA being extended to LGBTIQA+ people, including in relation to aged care.[617]

Other exceptions

Special measures exceptions

All jurisdictions, including the Commonwealth, permit special measures to be taken for the benefit of people with certain protected attributes. Actions which amount to a special measure as defined by an Act are an exception to a prohibition in the relevant Act, although it may not always be apparent from the wording of the relevant provision.

The RDA contains exceptions for charities and for special measures to which paragraph 4 of Article 1 of the CERD applies.[618] The latter exception has been applied to render lawful legislation which would otherwise be unlawful because it would contravene section 10 of the RDA.[619]

Similar to the exceptions contained in the Victorian Act, Queensland Act, Tasmanian Act and the ACT Act referred to in section 4.8 above, the ADA provides that it is not unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of ADA, if the act:

(a) provides a bona fide benefit to persons of a particular age;

(b) is intended to meet a need that arises out of the age of persons of a particular age; or

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[614] *Sex Discrimination Act 1984* (Cth), ss 3A and 37(2)(a).

[615] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill (2013), 2.31.

[616] See Australian Government, 'Rights and responsibilities – residential care', *My Aged Care* (Web Page, 31 December 2018) <https://www.myagedcare.gov.au/quality-and-complaints/quality-of-care-and-consumer-rights/rights-and-responsibilities-residential-care>.

[617] Australian Government, 'Royal Commission into Aged Care Quality and Safety' (Web Page) <https://agedcare.royalcommission.gov.au/Pages/default.aspx>; *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) ss 5A, 5B, 5C.

[618] *Racial Discrimination Act 1975* (Cth), s 8.

[619] *Maloney v The Queen* (2013) 252 CLR 168.

(c) is intended to reduce a disadvantage experienced by people of a particular age.[620]

Pensions exception

Similar to the exception contained in the Victorian Act, the ADA similarly prescribes that acts done in compliance with a range of pensions, allowances and benefits legislation will be a general exception to discrimination claims.[621]

The DDA also contains a provision analogous to the ADA, which applies to discrimination on the grounds of disability.[622]

Religious Freedom Review and future Commonwealth legislation

On 22 November 2017, following the Australian Marriage Law Postal Survey, the Commonwealth Government announced the Religious Freedom Review to examine whether Australian law adequately protects the human right to freedom of religion. The review was conducted by an Expert Panel chaired by the Hon Philip Ruddock (**Panel**).

In undertaking the review, the Panel was required to consider the intersections between the enjoyment of the freedom of religion and other human rights,[623] including the right of individuals to remain free from discrimination. In December 2017, shortly after the commencement of the review, the Panel invited submissions in relation to the matters contained within its terms of reference. The Panel received more than 15,500 submissions.[624]

At the conclusion of the review, the Panel produced a public report containing a number of recommendations. Notably, the Panel recommended that 'those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations'.[625]

Reflective of the divergence of approaches among stakeholders, the Panel noted that:

> *Most groups acknowledged the difficult conversations that need to occur when rights intersect and highlighted the need to adopt a position of minimal harm. However, there were divergent views expressed on how the balance should be struck between competing rights. For example, although some groups felt that the current exceptions for religion in anti-discrimination law strike an appropriate balance, others argued for increased protections, such as through a Religious Freedom Act, while others argued that existing protections should be limited. Others argued that a Human Rights Act or mechanisms such as a general limitations clause would provide a more sophisticated and appropriate protection for everyone's rights.*[626]

In approaching its task, the Panel observed that:

> *Importantly, there is no hierarchy of rights: one right does not take precedence over another. Rights, in this sense, are indivisible. This understanding was absent from some of the submissions and representations the Panel received. Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both under its international obligations. Sometimes this will mean one right will 'give way' to another, but this must occur within the framework provided by international law.*[627]

[620] *Age Discrimination Act 2004* (Cth), s 33.
[621] *Age Discrimination Act 2004* (Cth), s 41.
[622] *Disability Discrimination Act 1992* (Cth), s 51.
[623] Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018).
[624] Department of the Prime Minister and Cabinet, *Religious Freedom Review* (Web Page) <https://pmc.gov.au/domestic-policy/religious-freedom-review>.
[625] Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 46.
[626] Ibid 10.
[627] Ibid 13-14.

Relevantly, the Panel considered the existing exemptions and exceptions to State and Territory anti-discrimination laws that permit discrimination by certain religious bodies or schools on the basis of race, disability, pregnancy or intersex status to be unjustified.[628]

Accordingly, the Panel recommended that with respect to these specific attributes, relevant jurisdictions should:

(a) abolish any such exceptions permitting discrimination by religious schools in employment or with respect to students;[629]

(b) ensure that any exceptions do not permit discrimination by religious schools against an existing employee solely on the basis that the employee has entered into a marriage;[630] and

(c) review any such exceptions permitting discrimination by religious bodies, having regard to community expectations.[631]

The Panel also considered the intersection between the attributes of sexual orientation, gender identity, relationship status and the right to religious freedom. The Panel recommended amendments to the SDA in order to ensure religious schools could only discriminate in relation to the admission of new students, the employment of staff, or engagement of contractors,[632] on the basis of these attributes where:

(a) the discrimination is founded in the precepts of the religion;

(b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced;

(c) the school provides a copy of the policy in writing to existing and prospective employees, contractors, students and their parents (either at the time of enrolment or when the policy is updated); and

(d) the school has regard to the best interests of the child as the primary consideration in its conduct.

As the legislation on this topic varies across different jurisdictions, the Panel did not make specific recommendations for changes to State and Territory laws. Nevertheless, the Panel encouraged the States and Territories to consider transparency in relation to the use of exceptions in anti-discrimination law,[633] and found that there was no need to introduce such exceptions where they did not already exist in particular jurisdictions.[634]

In addition to proposing specific amendments to anti-discrimination legislation, the Panel recommended that Commonwealth, State and Territory governments:

(a) consider the use of objects, purposes or other interpretive clauses in such legislation to reflect the equal status in international law of all human rights, including freedom of religion;[635]

(b) have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.[636]

The Commonwealth Government's response to the Report was publicly released on 13 December 2018.[637]

With respect to recommendations relating to the States and Territories, the Commonwealth Government indicated in its response that it plans to encourage State and Territory governments to review and amend

[628] Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 44, 62, 68.
[629] Ibid 63, 69.
[630] Ibid 63.
[631] Ibid 46.
[632] Ibid 63.
[633] Ibid 63.
[634] Ibid 68.
[635] Ibid 47.
[636] Ibid 46.
[637] Australian Government, *Australian Government Response to the Religious Freedom Review* (Report, December 2018). Since this recommendation was made, the Council of Attorneys General has become the Meeting of Attorneys General.

their own policies and legislation. This is proposed to be done through the Council of Australian Governments (**COAG**) Education Council, and a proposed Council of Attorneys General Working Group.[638]

The Commonwealth Government has subsequently released two exposure drafts on a package of proposed Religious Freedom Bills.[639] The Commonwealth invited submissions on the Religious Freedom Bills exposure drafts. As of the closing date on 31 January 2020, approximately 7,000 submissions have been received.[640]

The Australian Law Reform Commission (**ALRC**) is also currently undertaking an inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*. The ALRC plans to release a Discussion Paper in the future.[641]

5.9 Burden of proof

Part 3-1 of the FW Act establishes that where it is alleged by a complainant that a particular action was taken for a prohibited reason, there is a presumption that the action was taken for that reason unless proved otherwise by the respondent. The matters covered by the general protections provisions of the FW Act that are subject to this 'reverse burden of proof' are limited to being in relation to a person's employment or prospective employment and include dismissal from employment, injury to employment, alteration of a person's employment to that person's prejudice, and discrimination against a person.

Also, similar to the position under the ACT, Queensland, and Victorian Acts, as discussed at section 4.9 above, where indirect discrimination is involved, the SDA and the ADA shift the burden of proof from the complainant to the respondent in relation to proving whether the imposition of a requirement or condition is reasonable and not discriminatory.

5.10 Functions and investigative powers of the Australian Human Rights Commission

The AHRC has jurisdiction to investigate and resolve complaints relating to unlawful discrimination under the Commonwealth Acts.

One function of the AHRC is to inquire into and attempt to conciliate complaints of unlawful discrimination.[642] The AHRC has the power to do all things necessary and convenient to be done in connection with this function.[643]

Complaints lodged with the AHRC must be submitted in writing. Following receipt of the complaint it will be referred to the President.[644] The President must then inquire into the complaint and attempt to settle the matter by conciliation, unless the President is satisfied that the complainant does not want the President to inquire into the complaint, or the President is satisfied that the complaint has been settled or resolved.[645]

The President may exercise discretion in terminating a complaint for any of the following reasons:

(a) the President is satisfied that the complaint does not amount to unlawful discrimination because an exemption applies;

(b) the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place;

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[638] Australian Government, *Australian Government Response to the Religious Freedom Review* (Report, December 2018) 6.

[639] Religious Discrimination Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019; Human Rights Legislation Amendment (Freedom of Religious) Bill 2019 (**Religious Freedom Bills**).

[640] See Australian Government, Attorney-General's Department, *Religious Freedom Bills – Second Exposure Drafts* (9 February 2021) <https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-second-exposure-drafts>.

[641] Estimated release date of the Discussion Paper is currently 'TBA'. See: Australian Government, *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation* (8 February 2021) <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/timetable/>.

[642] *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(aa).

[643] Ibid s 13.

[644] Ibid s 46PD.

[645] Ibid s 46PF(5).

(c) the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;

(d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

(f) in a case where the subject matter of the complaint has already been dealt with by the commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority; and

(h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court.[646]

Further, the President must terminate a complaint where the President is satisfied that the complaint is trivial, vexatious, misconceived or lacking in substance, or that the complaint has no reasonable prospect of being settled by conciliation.[647] The President must also terminate the complaint if they are satisfied there would be no reasonable prospect of the Federal Court or the Federal Circuit Court finding the alleged complaint amounted to unlawful discrimination.[648]

In conducting an inquiry, the AHRC is not bound by the rules of evidence[649] and must conduct the inquiry with as little formality and technicality and with as much expedition as the requirements of the legislation and proper consideration of the matters before it allows.

Where the President considers it appropriate, the parties will be referred to conciliation to attempt to resolve the complaint.[650] The conciliator decides how the conciliation process works.

The AHRC may conduct inquiries on the request of the Minister, where a complaint has been made in writing to the AHRC or where it appears to be desirable to do so.[651]

Where the complaint is not resolved and the AHRC finds that there has been a breach of human rights, the President can report on the matter to the Federal Attorney-General. Under the AHRCA, the AHRC does not have the authority to implement its recommendations or make respondents to a complaint comply with them.

Where the dispute cannot be resolved, the AHRC may ask for further information before making a final determination. Where the President is satisfied that the complaint cannot be resolved it will be terminated.

By application from the AHRC, or a party to a dispute, and at any time after a complaint is lodged with the AHRC, the Federal Court or the Federal Circuit Court may grant an interim injunction to maintain the status quo, as it existed immediately before the complaint was lodged or the rights of any complainant, respondent or affected person.[652]

Where a complaint is terminated, any person affected may make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination.[653]

[646] *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1).
[647] Ibid s 46PH(1B).
[648] Ibid s 46PH(1C).
[649] Ibid s 14.
[650] Ibid s 31(b)(ii).
[651] Ibid s 32(1).
[652] Ibid s 46PP.
[653] Ibid s 46PO.

The AHRC's functions also include research and educational programs for the purpose of promoting human rights.[654]

5.11 Requirements for the referral of complaints

Unlike the various State commissions, the AHRC does not have the power to refer complaints to the courts for hearing and determination. Rather, applications can be made by the parties to the complaint as discussed in further detail below at 5.12.

However, where the subject matter of the complaint relates to the jurisdiction of the Fair Work Commission (**FWC**),[655] Remuneration Tribunal[656] or the Defence Force Remuneration Tribunal,[657] the AHRC has the power to refer such complaints in those specific circumstances.

5.12 Role and jurisdiction of courts

Where a complaint has been terminated, an application can be made to the Federal Court or Federal Circuit Court.[658] An application of this kind is permitted only where the court concerned has granted leave to make the application, or the complaint was terminated because the President was satisfied the subject matter involved an issue of public importance that should be considered by the Federal Court or Federal Circuit Court[659] or where it was terminated because the President did not consider it had reasonable prospects of being resolved at conciliation.[660]

In such proceedings, the Federal Court or Federal Circuit Court are not bound by technicalities or legal forms.[661]

In circumstances where a respondent had made or makes an offer to settle the matter and the offer was rejected, the relevant court will have regard to the offer in deciding whether to award costs in the proceedings.[662]

Parties to the proceedings before the courts may apply to the Attorney-General for the provision of assistance.[663] The Attorney-General may authorise the provision of assistance, whether legal or financial, if the Attorney-General is satisfied that the application will involve hardship to the person and that it is reasonable in all of the circumstances to provide such assistance.[664]

5.13 Interaction with relevant Commonwealth laws or proposed laws

Commonwealth Marriage Amendment (Definition and Religious Freedoms) Act 2017

The CMA Act was introduced in 2017 following Australia's plebiscite on same-sex marriage. The CMA Act amends the *Marriage Act 1961* (Cth) to allow two people the freedom to marry regardless of sex or gender. In doing so, the CMA Act removes the restrictions that limit marriage in Australia to being the union between a man and a woman.[665]

The CMA Act also updated references to marriage celebrants. That is, marriage celebrants are required to describe their identification as either a religious marriage celebrant or marriage celebrant in any document

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[654] *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(h).
[655] Ibid s 46PW.
[656] Ibid s 46PX.
[657] Ibid s 46PY.
[658] Ibid s 46PO.
[659] Ibid s 46PH(1)(h).
[660] Ibid s 46PH(1B)(b).
[661] Ibid s 46PR.
[662] Ibid s 46PSA.
[663] Ibid s 46PU(1).
[664] Ibid s 46PU(2).
[665] Explanatory Memorandum, *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, 1.

relating to the services they provide.[666] The reason for this is so couples can make an informed decision about engaging a celebrant, with the understanding that a religious marriage celebrant may refuse to solemnise their marriage on religious grounds.[667]

The CMA Act makes it lawful for:

(a) ministers of religion to refuse to solemnise marriages on the basis of religious beliefs, or otherwise;[668]

(b) religious marriage celebrants to refuse to solemnise marriages if the celebrant's religious beliefs do not allow the celebrant to solemnise the marriage;[669] and

(c) bodies established for religious purposes to refuse to make facilities available or provide goods or services, if the refusal conforms to the doctrines, tenets or beliefs of the religion of the body or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[670]

To ensure the CMA Act was not inconsistent with the SDA, section 40(2A) of the SDA was amended to ensure the exemptions for religious ministers and religious marriage celebrants are included.[671]

Religious Discrimination Bill

The Commonwealth released a second exposure draft of the Religious Discrimination Bill for public consultation between December 2019 and January 2020. The Religious Discrimination Bill is one of the three Religious Freedom Bills drafted in response to the recommendations of the Panel,[672] the other two Bills being the Religious Discrimination (Consequential Amendments) Bill 2019 and the Human Rights Legislation Amendment (Freedom of Religions) Bill 2019.

The Religious Discrimination Bill proposes to make it unlawful to discriminate on the ground of religious belief or activity in a range of areas of public life.[673] The Religious Discrimination Bill also establishes the office of the Freedom of Religion Commissioner.

The Religious Discrimination Bill seeks to ensure that the ability of people to express their religious beliefs in good faith is protected from the operation of Commonwealth, State and Territory anti-discrimination law.[674]

The Bill follows the form of other anti-discrimination laws by containing provisions relating to indirect and direct discrimination in various areas of public life, by identifying exceptions to the general prohibitions and by permitting exemptions to be given from the general prohibitions. As modern statutory drafting in the same form as the Act, its style is worth considering by the Commission.

Under clause 42(1) of the Religious Discrimination Bill, a statement of belief, whether oral or in writing, does not constitute discrimination under any Commonwealth, State or Territory anti-discrimination law, unless it is malicious, or would or is likely to harass, threaten, seriously intimidate or vilify another person or group or is such that a reasonable person would conclude that it counsels, promotes, encourages or urges a serious criminal offence. Section 5 provides that a statement is a statement of belief if it is:

(a) of a religious belief held by a person, made by the person in good faith, and of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the person's religion; or

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[666] Explanatory Memorandum, *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, 30.

[667] Ibid.

[668] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), s 47.

[669] Ibid s 47A.

[670] Ibid s 47B.

[671] Explanatory Memorandum, *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, 83.

[672] Second Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes, 1; Attorney-General's Department, Religious freedom reforms, 1, accessed on 4 February 2020 at https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-reforms-outline-of-the-bills.pdf

[673] Religious Discrimination Bill 2019 (Cth), Exposure Draft dated 29 August 2019.

[674] Attorney-General's Department, Religious freedom reforms, 7, accessed on 4 February 2020 at https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-reforms-outline-of-the-bills.pdf

(b) made by a person who does not hold a religious belief, of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief, made in good faith and about religion.

5.14 Other

5.14.1 Compensation cap and costs

The Federal Court and Federal Circuit Court can make an order for the respondent to pay compensation to the applicant 'it thinks fit', where the relevant court is satisfied there has been unlawful discrimination by the respondent.[675] These compensation orders can be made for discrimination complaints lodged under the Commonwealth Acts.

Compensation caps under the Commonwealth Acts are often significantly higher than under the Act, particularly if the complainant can prove economic loss in employment.

Costs can be, and are, awarded in the Federal Court and Federal Circuit Court in discrimination cases. However, awards of costs are made on a party-party basis and do not necessarily cover the legal costs of the proceedings to the successful party.

In the Fair Work context, the FWC must make an order for an employer to pay compensation for an employee's dismissal and reinstatement, which abides by the following conditions:

Under section 392(5) of the FW Act, the amount of compensation ordered by the FWC must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high-income threshold immediately before the dismissal.

Under sub-section (6), the amount is the total of the following amounts:

(a) the total amount of remuneration:

  (a) received by the person; or

  (b) to which the person was entitled;

  (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.[676]

5.14.2 Intersectionality or multidimensional complaints

As the Commonwealth Acts are separated into distinct pieces of legislation in relation to each ground of discrimination, a complainant is required to elect which legislation a complaint is made under. For example, section 18 of the RDA provides that, where an act is done for two or more reasons and one of the reasons is race, then for the purposes of the RDA, 'the act is taken to be done for that reason'.

5.14.3 Timeframe for lodging complaints

Under the Commonwealth Acts, there is no express time limit for making a complaint. However, there is the discretion to close a complaint where it was lodged more than 6 months after the alleged incident.[677]

[675] *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4).
[676] *Fair Work Act 2009* (Cth), s 392(5) - (6).
[677] *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1)(b).

6. POTENTIAL REFORMS & QUESTIONS

6.1 Objects

The objects of a statute may serve to give a general understanding of the purpose of the legislation, or to set out general principles or aims which are sought to be achieved.[678] Objects clauses may assist the courts in interpreting the substantive provisions of the legislation. Section 18 of the *Interpretation Act 1984* (WA) states:

> *In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.*

As a 'statement of purpose', an objects clause can be valuable in enabling the purpose of a provision to be carried into effect. Importantly, however, courts have made clear that an objects clause 'does not control clear statutory language, or command a particular outcome of exercise of discretionary power'.[679]

In *IW v City of Perth*,[680] Brennan CJ and McHugh J of the High Court of Australia had regard to the objects clause of the Act (as that clause was then drafted), observing:[681]

> *… the provisions of the Act should as far as possible be given a construction that would eliminate discrimination on the ground of impairment.*
>
> *In applying section 18 of the Interpretation Act, however, it must be kept in mind that the Act, like many anti-discrimination statutes, defines discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner. As a result, conduct that would be regarded as discriminatory in its ordinary meaning may fall outside the Act. The object referred to in section 3(a) of the Act must, therefore, be understood by reference to the definitions of discrimination which occur in various parts of the Act.*

While it is accepted that objects clauses must be understood in their context, they arguably remain useful as aids to interpreting legislation. Courts have stated that objects clauses are not 'an exercise in apologetics' but give 'practical content' to abstract terms.[682]

An objects clause differs, of course, from a principles clause and a paramount considerations clause. A principles clause has the effect of constraining administrative decision-making powers. By way of example, section 9 of the *Children and Community Services Act 2004* (WA), in part, states:

In the administration of this Act the following principles must be observed —

(a) *the principle that the parents, family and community of a child have the primary role in safeguarding and promoting the child's wellbeing;*

(b) *the principle that the preferred way of safeguarding and promoting a child's wellbeing is to support the child's parents, family and community in the care of the child…*

A paramount consideration clause states that a particular consideration (or considerations) must be the 'overriding' consideration[683] in the exercise of a power or function under the Act. It is often used in combination with a principles clause.

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[678] Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients* (3rd ed, 2008), [125].

[679] *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 (Cole JA) at 78. See also *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* (2012) 297 ALR 289 (Robertson J) [99]; *Lynn v New South Wales* (2016) 91 NSWLR 636 (Beazley P) at [54].

[680] (1997) 191 CLR 1.

[681] *IW v City of Perth* (1997) 191 CLR 1,11 - 12.

[682] *Russo v Aiello* (2003) 215 CLR 643 (Gleeson CJ)[5] (referring to the terms 'reasonable', 'justification' and 'satisfactory'), cited in *Lynn v New South Wales* (2016) 91 NSWLR 636 (Beazley P) [54].

[683] *Director General Department of Human Services; Re M* [2011] NSWSC 369 [89]-[90].

For example, section 6 of the *Child Care Services Act 2007* (WA) states:

> *A person or body with functions under this Act must, in the performance of those functions, regard the best interests of children as the paramount consideration.*

A number of paramount considerations may also be identified in order of priority.[684]

The Act currently contains only an objects clause.

To date, the objects of the Act have been reformed in an incremental fashion, with amendments to section 3 reflecting the broadening number of attributes protected under the statute.[685]

Several preliminary stakeholder submissions were received at the pre-Discussion Paper stage recommending reform to the objects of the Act.[686] Preliminary submissions were also made which suggest the inclusion of preliminary provisions of other forms, such as a principles clause or a paramount considerations clause, as a means of aiding construction of the substantive terms of the Act.

The Office of Multicultural Interests suggests reform of the objects of the Act; that section 3(d) might be broadened to include ethnic or cultural backgrounds as follows:[687]

> *(d) to promote recognition and acceptance within the community of the equality of persons of all races and of all persons regardless of their sexual orientation,* ***ethnic or cultural backgrounds****, religious or political convictions or their impairments or ages.*

Given 'race' is defined in section 4 of the Act to include 'ethnic or national origin or nationality', it could be said that the inclusion of the words 'equality of persons of all races' in section 3(d) already conveys the aim of ensuring equality regardless of ethnic or cultural backgrounds. Conversely, it may be said that not all individuals identify ethnic or cultural backgrounds as falling within the notion of race, and that the suggested amendment could further impress upon those interpreting the legislation that the Act should be interpreted in a manner that ensures equality regardless of ethnic or cultural backgrounds.

The Office of Multicultural Interests proposes the inclusion of a further object, such as:[688]

> *(e) to promote an inclusive and harmonious society where 'everyone can participate and contribute fully in all aspects of life and can achieve their goals.'*

It appears to the Commission that this object, in substance, promotes equality and conveys to the reader a vision of what equality could look like in society. Given sections 3(c) and (d) of the Act expressly promote equality, there may be some doubt as to whether this proposed additional object would further aid interpretation. However, the Commission notes that the proposed object is directed at the promotion of equality in both form and substance, and an express articulation of what equality could look like may not only be significant to those the Act is intended to protect, but might also assist those applying the Act to interpret provisions in a manner that could better fulfil that vision.

Several stakeholders proposed more expansive amendments to the scope of the Act generally, typically with regard to the equivalent legislation in the ACT and Victoria - each of these jurisdictions being jurisdictions where express human rights legislation has been passed.[689]

UnionsWA observes that the objectives of the Act 'would benefit from having a more explicit acknowledgement of the need to combat the systemic causes of discrimination',[690] and, like the Office of Multicultural Interests,[691] recommends the approach taken in section 3(c) the Victorian Act, which includes

[684] See, for example, *Declared Places (Mentally Impaired Accused) Act 2015* (WA) s 5.

[685] Section 3(a) was amended to include: 'impairment' in 1988; 'family responsibility or family status', 'age' and 'racial harassment' in 1992; 'gender history' in 2000; 'sexual orientation' in 2002; and 'publication of relevant details on the Fines Enforcement Registrar's website' in 2012.

[686] See *Equal Opportunity Act 1984* (WA), s 3.

[687] Submission from the Office of Multicultural Interests, November 2020, 1.

[688] Ibid.

[689] See the *Human Rights Act 2004* (ACT), *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).

[690] Submission from UnionsWA, 19 November 2020, 1.

[691] Submission from the Office of Multicultural Interests, November 2020, 2.

'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation'.

Perhaps unsurprisingly given the inclusion of section 3(c) of the Victorian Act, the Victorian Act was enacted principally to provide a framework for dealing more effectively with systemic discrimination and thereby alleviate the burden on individuals to address discrimination through making complaints.[692] This was an express recognition of the fact that systemic discrimination, such as that resulting from policies and practices that are entrenched in organisations or in society more broadly, remains a structural barrier to equality.[693]

On one view, the Act, in substance and effect, provides a framework for effectively dealing with systemic discrimination. For example, as discussed in Chapter 3, it confers on the Equal Opportunity Commissioner various powers to, among other things, consult with governmental, business, industrial and community groups in order to ascertain means of improving services and conditions affecting a person or persons who are subject to discrimination, and also develop programmes and policies promoting the achievement of the principle of equality.

However, the Commission notes that there is an argument to be made that more explicit acknowledgement of the need to combat the systemic causes of discrimination, (similar to that in section 3(c) of the Victorian Act), would help ensure that the Act is interpreted and applied in a way that best fulfils that need.

In a similar vein, preliminary submissions[694] suggest that the objects of the Act could be widened to include provisions equivalent to sections 3(d) [695] and 3(e) [696] of the Victorian Act.

In brief summary, section 3(d) of the Victorian Act states that an objective is to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society; equal application of a rule to different groups can have unequal results or outcomes; and the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures. This objective makes clear that the Victorian Act seeks to go further than simply achieving formal equality, whereby people are treated the same – it seeks to achieve substantive equality as well, whereby people are given equal opportunities and the ability to achieve similar outcomes. As was stated in the Second Reading Speech for the Equal Opportunity Bill 2010 (Vic):[697]

> *According to the [recent ANU] research, 21st-century employers are still more likely to grant interviews to candidates with Anglo-Celtic names, on otherwise identical job applications in a supposedly open field. Further, a 2004 report of the Productivity Commission found that only 53.2 per cent of people with disabilities were in work compared to 80.6 per cent of those without a disability.*
>
> *If such basic forms of discrimination are still entrenched, then we need to acknowledge that some opportunities remain more equal than others - that Victorians are competing on uneven ground and that we need to level the playing field. We need a legal framework and commission that is properly equipped to tackle all forms of discrimination - individual or systemic - to dismantle it where it does exist, and nurture and encourage a future in which it does not.*

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[692] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 764 (R.J. Hulls, Attorney-General).

[693] Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 3-4.

[694] Submission from the Office of Multicultural Interests, November 2020, 2.

[695] Section 3(d) of the *Equal Opportunity Act 2010* (Vic) states that the objective of the statute is 'to promote and facilitate the progressive realisation of equality, as far reasonably practicable, by realising that -- (i) discrimination can cause social and economic disadvantage and that access to opportunities is to not equitably distributed throughout society; (ii) equal application of a rule to different groups can have unequal results or outcomes; (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures'.

[696] Section 3(e) of the *Equal Opportunity Act 2010* (Vic) states that the objective of the statute is 'to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions'.

[697] Hon M P Pakula, Second Reading for *'Equal Opportunity Bill 2010'* (Speech delivered at Legislative Council, 25 March 2010) 1110.

This demarcation between formal and substantive equality is not expressed in the Act, though the notion of substantive equality is at least partially promoted throughout (see, for example, the long title which states that the Act is 'to promote equality of opportunity in Western Australia', and provisions such as section 11(2)(b) whereby it is unlawful to discriminate by denying opportunities for promotion based on a Ground). However, those provisions fall short of an express acknowledgment of the kind contained in the Victorian Act. In the Commission's view, in order to achieve equality in Western Australia, the Act must fully promote both formal and substantive equality.

Section 3(e) of the Victorian Act states that the Victorian Act aims to enable the VEOHRC to encourage best practice and facilitate compliance with the Victorian Act by undertaking research, education and other enforcement functions. To an extent, as discussed above, the Equal Opportunity Commissioner has some capacity under the Act to encourage best practice and facilitate compliance with the Act. By way of further example, section 80(b) further empowers the Equal Opportunity Commissioner to acquire and disseminate knowledge on matters relating to eliminating discrimination. Section 80(c) also empowers the Equal Opportunity Commissioner to arrange and coordinate consultations, inquiries, discussions, seminars and conferences, all of which may provide some opportunity for encouraging best practice and facilitating compliance. Although unlikely to add much from a statutory interpretation perspective, the inclusion of a section such as section 3(e) may further reinforce the broader investigative and educational powers of the EOC and the Equal Opportunity Commissioner.

The Commission seeks submissions as to whether the scope and objects of the Act should be broadened in any of the ways discussed above, or in any other way not canvassed above.

Question

Should the scope and objects of the Act be broadened?

The objects provision of the Act as it is presently drafted does not contain an interpretive obligation, such as a paramount considerations provision. The EOC submits that it should be amended to expressly provide that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute, or a combination of attributes, to the extent it is possible to do so consistently with the objects of the Act, in a similar fashion to the ACT Act.[698] Section 4AA of the ACT Act provides that the legislation must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the Act and also the *Human Rights Act 2004* (ACT).

Other stakeholders suggest that interpretive provisions might be incorporated to give effect to the recommendations of the Ruddock Review on Religious Freedom,[699] so as to bring the Act in line with Australia's obligations under international human rights treaties. Preliminary submissions from the Human Rights Law Alliance[700] and Christian Schools Australia[701] referred to Recommendations 2 and 3, that:

(a) 'Commonwealth, state and territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion'; and

(b) 'Commonwealth, state and territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion'.

[698] Submission from the Equal Opportunity Commission, 20 November 2020, 2.
[699] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018).
[700] Submission from the Human Rights Law Alliance, 30 October 2020, 3.
[701] Submission from Christian Schools Australia, 4 November 2020, 3.

Christian Schools Australia recommends that the following interpretive provision be inserted into the Act:[702]

(1) In carrying out functions and making determinations under this Act, the Minister, Commissioner, Director, Tribunal and Courts shall have fundamental regard to the following —

(a) the International Covenant on Civil and Political Rights (ICPR);

(b) the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the UN General Assembly on 25 November 1981; and

(c) the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).

(2) In particular, in interpreting the requirement of the ICPR, Article 18(3), that limitations upon a person's right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the Siracusa Principles provide that limitations must, amongst other matters—

(a) be prescribed by law,

(b) respond to a pressing public or social need,

(c) pursue a legitimate aim and be proportionate to that aim, and

(d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.

(3) So far as it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with the international instruments referred to in sub-section (1).

As noted above, section 4AA of the ACT Act provides relevantly that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute (to the extent it is possible) consistently with human rights under the *Human Rights Act 2004* (ACT). One object of the ACT Act is to promote and protect the right to equality before the law under the *Human Rights Act 2004* (ACT). That Act contains, but is not exhaustive of, certain human rights at international law, and thus goes some of the way to recognising human rights under international law.

Similarly, section 3(b) of the Victorian Act states an objective to further promote and protect the right to equality set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires all statutes to be interpreted in a way that is compatible with human rights, and international law relevant to a human right may be considered in interpreting statute.[703]

An interpretive provision such as that suggested by Christian Schools Australia may make it easier for complainants to assert and exercise rights under international law, at least to the extent those rights do not conflict with provisions in the Act. It may be, however, that some provisions in the Act limit the full enjoyment of those rights in any event (for example, notwithstanding the religious exemptions in section 72, the right to freedom of religion may be limited under the Act). Further, if such an interpretive provision were incorporated, that would require the relevant interpreter of the Act to understand the panoply of rights under international law and determine incompatibilities with provisions of the Act. Given the widely varying views on international law rights and obligations across the world and in Australia, this could lead to extreme uncertainty and variability in applying the Act.

The Commission welcomes submissions on whether reference to international instruments or the international law principle of equal protection should be incorporated into any interpretative provision introduced into the Act.

[702] Submission from Christian Schools Australia, 4 November 2020, 3.
[703] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32.

Question

Would the Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?

6.2 Grounds of discrimination

Possible grounds of discrimination not currently in the Act which could be recommended for inclusion, or which are in the Act but could be recommended for amendment, include the following grounds.

Assistance or therapeutic animal

The protection currently conferred by section 66A(4) of the Act relates only to persons who possess or are accompanied by guide dogs or hearing dogs, and who are blind, deaf, partially blind or partially deaf.[704] This is in contrast to the protection offered by the South Australian Act, for example, which extends that protection to those with an assistance or therapeutic animal. In the Second Reading Speech for the Bill that amended the South Australian Act to broaden the definition of therapeutic animal, it was stated:[705]

> *A change is made to the rules about disabled persons being accompanied by guide dogs. This protection is expanded to cover any animal of a class prescribed by regulation. The review heard from Assistance Dogs Australia, a non- profit organization that trains dogs to assist people with disabilities, for example, people in wheelchairs. Having regard to this work, it seemed that the present provisions, limited to guide dogs, are too narrow.*

By contrast, the Act does not include in its meaning animals other than guide dogs or hearing dogs, and does not specify requirements that must be met in order for another class of animal to qualify as a disability aid. The scope of the Act is therefore narrower than legislation in South Australia and the ACT.

The current wording in the Act reflects the traditional view that assistance or therapeutic animals have predominantly been recognised as a 'guide dog' or 'hearing dog' for individuals who are blind or vision-impaired or hearing-impaired. However, as was noted in the Second Reading Speech extracted above, it is now recognised that assistance or therapeutic animals may also be required for other types of work. By way of example, they may act as an 'alert function' for individuals with mobility issues, or experiencing changes in blood pressure or blood sugar, psychiatric illnesses or epilepsy. Further, it is now also recognised that such assistance may be proffered by a wider variety of animals, and is not limited to dogs.

If it is now generally accepted that a variety of forms of assistance or therapeutic support can be provided by a variety of animals, the question arises not only as to whether the provisions should be extended but what the proper limits of those provisions might be if they were to be extended. Extending section 66A of the Act to cover any assistance or therapeutic animal certified by a medical practitioner or regulation would capture individuals who would not otherwise be protected under the Act. There is some risk that an expansion to include assistance or therapeutic animals other than guide dogs or hearing dogs may cast the application of the Act too wide, and lead to ambiguity as to what evidence is required to prove that an animal is a therapeutic animal.[706] However, as can be seen in section 88A of the South Australian Act, ambiguity may be resolved by including a provision to the effect that a therapeutic animal means an animal certified by a medical practitioner as being required to assist a person as a consequence of that person's disability, or an animal prescribed by regulation. The EOC could also be given a role in the certification of a therapeutic animal.

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[704] *Equal Opportunity Act 1984* (WA), s 66A(4).

[705] Hon G E Gago, Second Reading for Equal Opportunity (Miscellaneous) Amendment Bill 2009 (SA) (Speech delivered at Legislative Council, 26 November 2008).

[706] See for example discussions about the interpretation of section 9 of the *Disability Discrimination Act 1992* (Cth) in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157.

The Commission invites submissions as to whether the protections in the Act relating to guide or hearing dogs should be extended to any therapeutic animal certified by a medical practitioner or regulation.

Question

Should the protections in the Act relating to guide or hearing dogs be extended to any assistance or therapeutic animal certified by a medical practitioner or regulation?

Gender history discrimination / gender identity / intersex status

The Act provides that a person discriminates against a gender reassigned person (a person who holds a recognition certificate under the Gender Reassignment Act or another equivalent certificate) on gender history grounds if, on the grounds that the person has a gender history (that is, where the person identifies as a member of the opposite sex), the person treats the gender reassigned person less favourably than they would treat a person without a gender history in circumstances that are the same or not materially different. It follows that, under the Act, intersex status is only protected if a person holds a gender recognition certificate under the Gender Reassignment Act or another equivalent certificate.[707] This certificate is one that is issued to persons who have undergone a medical or surgical procedure to change their sexual characteristics from male to female or vice versa.[708]

It is clear that the protection in the Act does not protect all gender diverse people. In the 2007 Review, the EOC identified that the protection in the Act does not apply to transgender people who cannot (or choose not to) obtain, or are in the process of obtaining a gender recognition certificate under the Gender Reassignment Act.[709] In addition, TransFolk of WA suggests that the protection does not apply to gender diverse people who do not identify as the 'opposite sex'.[710] It would seem that the foundation for that view is that section 35AA(1) of the Act defines gender history by reference to a person who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.

By contrast, statutory protections in other Australian jurisdictions are broader in scope and encompass more gender diverse people. The NSW, Queensland and Victorian Acts include 'indeterminate sex' in their definition of gender identity.[711] The ACT Act confers a protection that is the broadest in scope, as it defines 'gender identity' as the 'gender expression or gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth'.[712] Further, intersex status is a protected attribute in itself under the Commonwealth, South Australian, ACT and Tasmanian Acts.

The exposure of gender diverse people to discrimination based on their gender identity is readily apparent. In its final report on the *Review of Western Australian legislation in relation to the registration or change of a person's sex and/or gender and status relating to sex characteristics*, the Commission stated that 'the reality is that many transgender, gender diverse and intersex people experience such discrimination'.[713] The report details the following observation by the AHRC on the subject: [714]

> *While comparatively little data is available on the experiences of trans and gender diverse people, a significant number of structural barriers exist to equality of opportunity. Trans and gender*

[707] *Equal Opportunity Act 1984* (WA), s 4 (definition of 'gender reassigned person').
[708] *Gender Reassignment Act 2000* (WA), s 3.
[709] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.
[710] Submission from TransFolk of WA, 29 October 2020, 1.
[711] *Anti-Discrimination Act 1997* (NSW), s 38A(c); *Anti-Discrimination Act 1991* (QLD) s 4 (definition of 'gender identity'); *Equal Opportunity Act 2010* (Vic), s 4 (definition of 'gender identity').
[712] *Discrimination Act 1991* (ACT), s 2 (Dictionary) (definition of 'gender identity').
[713] Law Reform Commission of Western Australia, *Project 108 Final Report - Review of Western Australian legislation in relation to the registration of a person's sex and/or gender and status relating to sex characteristics* (December 2008), 24.
[714] Ibid.

> *diverse people also report disproportionately high rates of violence, harassment, bullying and exclusion related to their identity … Differences in the physical presentation to a person's gender identity (particularly during transition) led to significant unjust discrimination for the trans person for a number of participants in the* consultation. These experiences of discrimination heightened and exacerbated reported feelings of shame and low self-worth.

Acknowledging that such discrimination occurs, the question that arises for the Commission is whether the Act should be expanded to protect those persons and, if so, how?

The purpose of the Act is to promote equality in Western Australia and provide remedies in respect of discrimination on certain grounds.[715] Expanding the protections under the Act to protect the above-mentioned persons who continue to face discrimination would plainly further that purpose.

Having regard to the protections afforded in other Australian jurisdictions, one way to protect such persons under the Act is to introduce the additional Grounds of 'gender identity' and 'intersex status'.

In the 2007 Review, the EOC recommended that the Act incorporate a 'gender identity' ground as follows:[716]

> *Western Australia is the only state or territory in Australia that does not recognise gender identity or transsexuality discrimination, and there is evidence of discrimination against persons of indeterminate, or non-birth gender identity, the Commission recommends that the Act be amended to include this ground.*

Consistent with the above recommendation, in its preliminary submission to the Commission, the EOC suggests that the Act should be amended to include the grounds of gender identity and intersex status.[717]

In its final report on the Review of Western Australian legislation in relation to the registration or change of a person's sex and/or gender and status relating to sex characteristics, the Commission itself recommended that the Act be amended to include protections against discrimination based on gender identity and intersex status.[718] Further, if the Commission's recommendation in that report that the Gender Reassignment Act be repealed or amended is implemented then, at a minimum, protections against discrimination based on gender identity and intersex status in the Act would be required.[719]

The Department of Communities also makes preliminary submissions in support of the requirement for a gender recognition certificate being reviewed.[720] UnionsWA also support the inclusion of 'gender identity' and 'intersex status' in the Act.[721] They submit that LGBTIQA+ workers are more likely to experience workplace discrimination, bullying, harassment, and consequently financial insecurity.[722] UnionsWA holds that these issues prevent the transitioning of gender diverse people.[723]

Council on the Ageing (WA) are concerned that the 'adverse life experiences' of gender diverse people hinder their involvement with the community and legal system, especially as they age.[724] Thus, they suggest that recognition of gender identity and intersex status in the Act be given priority.[725] People with Disabilities WA are also supportive of the inclusion of gender identity and intersex status in the Act.[726]

Although a number of preliminary submissions were received in support of expanding the protections of the Act with respect to gender identity and intersex status, concerns regarding the inclusion of gender identity

[715] *Equal Opportunity Act 1984* (WA), long title.
[716] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.
[717] Submission from the Equal Opportunity Commission, 20 November 2020, 3.
[718] Law Reform Commission of Western Australia, *Project 108 Final Report - Review of Western Australian legislation in relation to the registration of a person's sex and/or gender and status relating to sex characteristics* (December 2008), 7, 57.
[719] Ibid.
[720] Submission from the Department of Communities, 25 November 2020.
[721] Submission from UnionsWA, 19 November 2020, 2.
[722] Ibid.
[723] Ibid.
[724] Submission from the Council on the Ageing (WA), 30 October 2020, 4.
[725] Ibid.
[726] Submission from People with Disabilities (WA), 30 October 2020, 1.

and intersex status in the Act were also raised. The Human Rights Law Alliance does not support including 'gender identity' and 'intersex' status as the same protected ground.[727] Further, it suggests that the inclusion of gender identity would require 'strong balancing provisions' to safeguard the existing sex-based laws and the fundamental freedoms of people who hold different views on gender.[728] The Australian Christian Lobby also submits that if gender identity is to be included in the Act, it should be drafted in a way that disallows 'males identifying as females invading the spaces that women have carved out'.[729]

These submissions appear to address the concern that a ground of discrimination based on a more expansive definition of gender history would apply to persons other than gender reassigned persons and would infringe the rights of others to privacy and safety, or, more fundamentally, challenge the traditional conceptions of birth sex status.

The WA Feminist Lobby Network makes a preliminary submission that gender identity does not exist and, consequently, the inclusion of recognition of gender identity in the Act is unlawful and unnecessary and will lead to unintended & destructive outcomes. They advocate for the repeal of a number of the existing provisions in the Act regarding gender discrimination, and advocate that the provision of female only services, facilities, programs and the like should be covered by an exception such that it cannot constitute discrimination. They submit that 'the need for sex-based services and spaces is historic, proven and imperative'.

Christian Schools Australia highlighted that in the EOC Annual Report 2018-2019, enquiries based on gender identity represented only 1% of all enquiries and suggest that the 'small size and scale of [these] incidents' must be considered.[730] However, the Commission notes that the purpose of anti-discrimination legislation is to promote equal treatment irrespective of how commonly discrimination occurs, or how often it is reported or complained about.

The Commission understands there are evolving and different opinions about these issues. It does not seek to impose any particular view of these issues on the community but rather it seeks to ensure, that as far as possible, its recommendations, if implemented, will protect people from discrimination on these grounds. A determination of how this can be achieved in the context of other statutory provisions and the rights of others will need to be explored with stakeholder feedback and the Commission therefore seeks submissions to assist in this process.

Questions

Should the protections in the Act be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions? What other legislation is relevant to this provision?

Impairment

The Act protects against discrimination on the basis of impairment (see section 3.2 of this Paper). Section 4 defines impairment as 'any defect or disturbance in the normal structure or function of a person's body' or 'brain', or 'any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour'. Notably, the definition of impairment only includes impairment 'which presently exists or existed in the past but has now ceased to exist' or 'which is imputed to the person'. This means that the Act does not protect against discrimination on the basis of an impairment that may exist in future, or an imputed future impairment.

[727] Submission from the Human Rights Law Alliance, 30 October 2020, 2.
[728] Ibid.
[729] Submission from the Australian Christian Lobby, 20 November 2020, 4.
[730] Submission from Christian Schools Australia, 4 November 2020, 2.

As discussed in section 4.3 above, there are more elaborative definitions of impairment (or disability) in other States and Territories. For example, the Northern Territory Act definition is broad and expansive, and includes 'the total or partial loss of a bodily function', 'the presence in the body of an organism which has caused or is capable of causing disease' or 'organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease', 'total or partial loss of a part of the body', 'the malfunction or dysfunction of a part of the body', 'the malformation or disfigurement of a part of the body', 'reliance on a guide dog, wheelchair or other remedial device', 'physical or intellectual disability', 'psychiatric or psychological disease or disorder, whether permanent or temporary', and 'a condition, malfunction or dysfunction which results in a person learning more slowly than another person without that condition, malfunction or dysfunction'.[731] In addition, the ACT, NSW, South Australian, Tasmanian and Victorian Acts define impairment or disability to include a future impairment or disability.[732] In the Commission's view, the definition of impairment in the Act could be amended in two key ways.

First, the definition could be redrafted so that it is more elaborative or, arguably, extensive. On one view, a potential issue with the current definition of impairment in the Act is that its limited extent may, in practice, mean that not all matters which might be considered impairments are readily covered. For example, arguably, schizophrenia more readily falls within 'any permanent or temporary psychiatric or psychological disease'[733] than the Act's less specific definition of 'any defect or disturbance in the normal structure or function of a person's brain' or 'any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour'.

The Disability Discrimination Legal Service (DDLS) recommends an extension of the definition of 'impairment' in the Act to reflect the more inclusive definition of other jurisdictions.[734] Suggestions proposed for this extension include the addition of 'manifestations of the underlying disability' so as to reflect the decision in *Purvis v New South Wales* (see further at section **6.4.3** below),[735] subsequent to which other jurisdictions altered their definitions to include 'behaviour that is a symptom or manifestation of a disability'.[736] In the Commission's view, this is a suggestion worthy of serious consideration.

The Northern Suburbs Community Legal Centre and Older People's Rights Service further submitted that the terms 'frailty' and 'cognitive impairment' and their definition be included in the section on 'disability'.[737] It appears that cognitive impairments would already fall within the definition of impairment in the Act. It is less clear that frailty resulting from a natural aging process would be included in the definition. Whilst the positive motivations of such a submission are clearly apparent, this will have to be considered in the context of whether it is desirable to label a manifestation of the aging process to be an impairment. The Commission invites submissions in relation to whether there are any impairments that should be protected by the Act, but which do not fall within the current definition.

Second, the Act could be amended to extend the definition to future impairment, and the Commission notes that it received some preliminary submissions in support of such a proposal. Further, in its 2007 Review, the EOC recommended that the definition be expanded to include future impairment for the following reasons:[738]

> *This [the current definition of impairment in the Act] means, for example, that a job applicant who is refused employment because he or she comes from a family with a history of heart disease could not lodge a complaint under the Act, if the reason for the refusal is that the applicant may develop heart disease at some stage in the future. If the reason is that the employer has imputed to the applicant an existing heart condition, based on the family history, then a complaint can still be lodged. The distinction between the two scenarios has no rational basis, and should be corrected.…*

[731] *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'impairment').
[732] *Discrimination Act 1991* (ACT), s 5AA(2); *Anti-Discrimination Act 1977* (NSW), s 49A; *Equal Opportunity Act 1984* (SA), s 66(a); *Anti-Discrimination Act 1998* (TAS) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1).
[733] *Anti-Discrimination Act 1992* (NT), s 4(1) (definition of 'impairment').
[734] Submission from the Disability Discrimination Legal Service, 29 October 2020, 3.
[735] Also see the decision in *Edoo and Minister for Health* [2010] WASAT 74.
[736] Submission from the Disability Discrimination Legal Service, 29 October 2020, 3.
[737] Submission from the Northern Suburbs Community Legal Centre, 24 October 2020, 3.
[738] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 33-34.

As genetic screening becomes a real possibility in many areas of life, not least employment, the need for protection against discrimination on the ground of a future impairment will increase. 'Future' disability is included in the relevant definitions in the Commonwealth [DDA], in NSW, the ACT and Tasmania. It should also form part of the definition of impairment under the Act.

The Commission seeks submissions regarding the merit of broadening the definition of impairment.

Question

Should the definition of impairment be broadened in the Act and, if so, how?

Religious or political conviction

Numerous issues arise for the Commission's consideration in relation to protections for religious or political convictions.

The first issue is whether 'religious or political conviction' should be defined in the Act. It may be that it is sufficiently understood in the community so as to not require an exclusive or even inclusive definition. However, it could also be said that the phrase is not sufficiently prescriptive to be clear, which might result in uncertainty when applying the Act.

The second issue is, if the phrase requires definition in the Act, how should it be defined?

The Human Rights Law Alliance submits that the meaning of 'religious conviction' should be consistent with the meaning of 'religion' discussed by the High Court of Australia decision of *Church of the New Faith v Commissioner of Pay-Roll Tax*[739] where the Court was divided on the meaning of 'religion'. The Human Rights Law Alliance has highlighted the following two meanings from that decision:

(a) Per Mason ACJ and Brennan J: '[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.'[740]

(b) Per Wilson and Deane JJ: 'One of the most important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium … is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.'[741]

Arguably, the more critical question is how should 'conviction' be defined? That is, what does it mean under the Act to have a religious or political 'conviction'?

There appears to be, at least, two options. First, 'religious conviction' and 'political conviction' could each be defined by reference to beliefs and activities of the relevant kind. Second the Ground itself could be amended so that it protects against 'religious beliefs and activities' and 'political beliefs and activities', and

[739] (1983) 154 CLR 120; Submission from the Human Rights Law Alliance, 30 October 2020, 4.
[740] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.
[741] Ibid 174.

those phrases can then be defined in section 4. A further consideration arises as to whether any such definitions should extend to *not* having a religious or political conviction.

The Commission has received some preliminary submissions in relation to the above questions. The Office of Multicultural Interests submits that the definition of religious conviction should include 'religious conviction and activity'.[742] Similarly Christian Schools Australia suggests that the term 'religious conviction' should be replaced by 'religious activities and beliefs.'[743] They suggest definitions for both 'religious activities' and 'religious beliefs' as follows:

(a) **Religious activities** includes engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales (sic) or the Commonwealth.

(b) **Religious beliefs** includes the following:

  (a) having a religious conviction, belief, opinion or affiliation;

  (b) not having any religious conviction, belief, opinion or affiliation.[744]

Critical to the notion of a conviction or belief is the mechanism by which one establishes the existence or otherwise of that conviction or belief. In order to determine when a belief is (or is not) held, Christian Schools Australia suggests that the following be inserted into the Act:

> *For the purposes of this Act, a person holds [or does not hold] a religious belief (inclusive of the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief) if the person genuinely believes [or does not believe] the belief.*[745]

Christian Schools Australia also outlines the meaning of 'genuinely believes', as being 'in relation to a person means the person's holding of the religious belief is sincere and is not fictitious, capricious or an artifice'.[746]

In addition, Christian Schools Australia suggests that 'religious activity' requires a definition as follows:

A reference to a person's religious activity is a reference to a religious activity:

(a) *that a person engages in, does not engage in or refuses to engage in;*

(b) *that a person is thought to engage in, thought not to engage in, or refuses to engage in (whether or not the person in fact engages in the religious activity);*

(c) *that a person engaged in in the past, or is thought to have engaged in the past did not engage in or refused to engage in in the past, or it is thought to have not engaged in or to have refused to engage in in the past (whether or not the person in fact engaged in the religious activity); or*

(d) *that a person will engage in in the future, or that it is thought a person will engage in in the future, or will not engage in or refuse to engage in in the future, or it is thought a person will not engage in or refuse to engage in in the future (whether or not the person in fact will engage in the religious activity).*[747]

Christian Schools Australia also suggests that it will be necessary to ensure that religious belief or activity includes past, future and presumed religious belief or activity.[748]

The Human Rights Law Alliance suggests inserting a provision to the effect that statements of belief do not constitute discrimination.

[742] Submission from the Office of Multicultural Interests, November 2020, 3.
[743] Submission from Christian Schools Australia, 4 November 2020, 5.
[744] Ibid.
[745] Ibid.
[746] Ibid.
[747] Ibid 6.
[748] Ibid.

Amendments to the Act such as those suggested may eliminate potential ambiguity attending the Ground, which would aid more consistent interpretation and application of the Ground. However, it could be that defining exclusively the meaning of the phrase 'religious or political conviction' could unnecessarily limit the scope of the Ground. That argument may lack force, however, if the definitions adopted were inclusive rather than exclusive.

An additional matter that arises for consideration is whether any definition of 'religious conviction' (or beliefs or activities) should include reference to the 'cultural heritage and distinctive spiritual practices, observances, beliefs and teachings or Aboriginal and Torres Strait Islander people', which is akin to the definition of 'religious conviction' in the ACT Act. It is arguable that this may appropriately highlight and protect the important and unique heritage and practices of Aboriginal and Torres Strait Islanders.

Without limiting the scope of submissions, the Commission's work would be greatly enhanced by submissions from Aboriginal and Torres Strait Islander people and groups as to how the Act might best address the important and unique heritage and practices of Aboriginals and Torres Strait Islanders.

The Islamic Council of WA raises a third issue for the Commission to consider. It suggests that the use of the term 'generally' in the Ground is inadequate as it suggests that the 'characteristic' has to be prominent in the particular religion, or socially accepted for it to be protected.[749] The Islamic Council of WA submits that the fact a certain characteristic is not prominent should not allow employers to prevent a person from practicing that aspect of their religion, where it is appropriate.[750]

The fourth issue that arises for the Commission's consideration is whether the Act protects against discrimination based on religious appearance or dress and, if not, whether and how it should so extend. In this regard, the Commission notes that the South Australian Act creates a specific ground covering protecting these religious appearance or dress.

There is some basis for concluding that religious appearance or dress is protected under the religious or political conviction Ground, as it protects against discrimination on the basis of a characteristic that appertains generally or is generally imputed to persons of the religious or political conviction of the aggrieved person.[751] However, there may remain some uncertainty on the point.

If the Act does not extend so far, the question arises as to whether it should? Conversely, if there is doubt as to whether the Act extends so far, it may be beneficial expressly to include 'religious appearance or dress' in the Grounds for the sake of clarity. On this point, the Islamic Council WA submits that, because the term 'characteristic' is ambiguous in its meaning, it should be defined under section 4 of the Act to include religious dress, behaviour and practices.[752] Alternatively, if the Ground were amended to incorporate notions of religious beliefs and activities, 'religious appearance or dress' could be defined as falling within the notion of religious activities (or introduced as a new Ground).

The fifth issue is whether the Act should make it unlawful to discriminate against the relatives or associates of a person who has been discriminated against (in whatever form) on the religious or political conviction Ground.

The Human Rights Law Alliance suggests that implementation of various provisions reflected in the exposure draft of the Religious Discrimination Bill should be implemented in the Act, for example, by extending the protections in the Act for religious conviction to apply to associates of a person holding a particular religious conviction.

The sixth issue is whether the protections should be extended to all areas of public life covered by the Act. Currently, discrimination on the grounds of religious and political conviction is unlawful in all areas except access to places and vehicles, and land. In the 2007 Review, the EOC recommended that the Ground of

[749] Submission from the Islamic Council of WA, November 2020, 4.
[750] Ibid 4.
[751] *Equal Opportunity Act 1984* (WA), s 53(1).
[752] Submission from the Islamic Council of WA, November 2020, 3.

religious and political conviction be extended to all the areas currently covered by the other grounds.[753] In that review, the EOC stated:

> *The Commission does not know why these grounds were not included when the Act was enacted, and cannot identify any reason why they should not be. This is particularly so, given that it is unlawful to discriminate on these grounds in the area of goods and services, an area that frequently crosses over the area of access to places, in relation to other grounds.*

The Commission seeks submissions as to any or all of the above questions and issues.

Questions

- *Should the protections for religious or political conviction be defined or clarified?*
- *Should the protections for religious or political conviction expressly include religious and political beliefs and activities?*
- *Should the protections for religious or political conviction expressly include religious appearance or dress?*
- *Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground?*
- *Should the protections for religious or political conviction be extended to all areas covered by the Act?*

Pregnancy

In the 1999 report entitled '*Pregnant and Productive: It's a right not a privilege to work while pregnant*', the Australian Human Rights and Equal Opportunity Commission published its findings from the national inquiry into pregnancy and work. The report made clear that potential pregnancy discrimination can, and does, exist in various forms. In a keynote address at a national conference, Australia's then Sex Discrimination Commissioner, Susan Halliday, revealed:[754]

> *Throughout the inquiry we have heard many stories of discrimination on the basis of potential pregnancy, mainly to do with recruitment and promotion. Women are still asked about their plans to start a family in job interviews.*

More recently, in 2019 the QHRC noted that '[s]ome women experience discrimination because of potential pregnancy, for example, not being considered for a position because they might become pregnant'.[755] In addition to the workplace, such discrimination may also occur in other contexts, such as in the housing rental market or dealing with a financial institution.

There are competing views that might be taken of the current protection afforded by the Act against discrimination on the ground of potential pregnancy.

On one view, the Act may already protect against this form of discrimination. Section 8 relevantly protects against discrimination based on 'a characteristic that appertains generally' or 'is generally imputed to

[753] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 38.

[754] Susan Halliday, 'Pregnancy Discrimination – A Growing Concern' (Speech, IIR Diversity and EEO Conference, 22 March 1999).

[755] Queensland Human Rights Commission, 'What is pregnancy discrimination?' (Web Page, 28 June 2019) <https://www.qhrc.qld.gov.au/your-rights/discrimination-law/pregnancy>.

persons of the sex of the aggrieved person', and such a characteristic may be potential pregnancy or child-bearing capacity. Further or alternatively, as section 10 protects against discrimination based on the ground of pregnancy, potential pregnancy or child-bearing capacity may be included within the meaning of pregnancy as a matter of interpretation. There may be some force to this argument: if the purpose of the Act is to promote equal opportunity and prevent discrimination in Western Australia, a broad interpretation of pregnancy would likely be adopted (which may include potential pregnancy and child-bearing capacity).

That said, even if this form of discrimination is potentially covered by the Act, there is an argument to be made that this is an issue in respect of which absolute clarity is needed and that the Act should be amended so that it explicitly provides that discrimination on the basis of potential pregnancy and child-bearing capacity is in fact unlawful in Western Australia. As part of the 2007 Review, the EOC recommended that the Act should be amended to include either the ground of 'potential pregnancy', or a definition of pregnancy which includes 'potential pregnancy'.[756]

The Commission seeks submissions as to whether there is merit in the Act expressly protecting against such discrimination, even in the absence of ambiguity.

In the 2007 Review, the EOC also recommended that the requirement in section 10 of the Act that a complainant prove that the pregnancy discrimination is not reasonable in the circumstances should be removed.[757] It noted that:[758]

> *In Western Australia, no complaint of pregnancy discrimination has ever been dismissed by the Equal Opportunity Tribunal or the State Administrative Tribunal on the ground that the less favourable treatment was considered reasonable. In the Commission's view, it is difficult to imagine a case where this would be the correct decision.*

Although the circumstances where such discrimination might be reasonable are plainly limited, and noting the views of the EOC expressed in the 2007 Review, consideration is nonetheless still required as to whether there are any circumstances where what would otherwise constitute pregnancy discrimination may in fact be reasonable. For example, would less favourable treatment be acceptable where health and safety issues may arise as a result of the person's pregnancy? Should those health and safety issues relate to the wellbeing of the unborn child, the pregnant person or other persons, or all of them? What degree of risk might be acceptable before less favourable treatment would be reasonable, and should the discriminator or the aggrieved person be entitled to determine that?

By way of context, the South Australian Act similarly acknowledges that discrimination may be appropriate in some cases, but by way of express exceptions. As an example, section 85Z(3)(a)(i) of the South Australian Act exempts discrimination against a pregnant woman on the ground of pregnancy in certain circumstances, such as where “the woman is not, or would not be, able to perform adequately, and without endangering herself, the unborn child or other persons, the work genuinely and reasonably required of her”.

If it is accepted that there may be some circumstances in which pregnancy discrimination might be reasonable, the risk remains that the requirement in section 10 for a complainant to establish that the discrimination was not reasonable in the circumstances is too great a burden to discharge. If so, such a requirement could allow for discrimination beyond what is contemplated by the Act. Such a consequence is plainly to be avoided. One possible way of mitigating that risk is to remove the requirement and instead carve out certain exceptions, such as those in the South Australian Act.

The Commission invites submissions as to the practical impact of the reasonableness requirement, whether the reasonableness requirement should be removed, and if removed, whether there should instead be exceptions to this Ground which expressly provide that certain treatment that might otherwise be considered discrimination if done in connection with a relevant area of public life is not unlawful.

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[756] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.
[757] Ibid 5.
[758] Ibid 29.

Questions

- *Should the protections for pregnancy be broadened in the Act to potential pregnancy and/or child-bearing capacity?*
- *Should the requirement that pregnancy discrimination is 'not reasonable in the circumstances' be removed?*
- *Should express exceptions to the protections for pregnancy be incorporated and, if so, what exceptions should be incorporated?*

Race

The concept of race, although commonly referred to, remains a matter of quite subjective understanding. Unlike the Act, the NSW and Tasmanian Acts expressly include ethno-religious origins in their definitions of 'race'.[759] On one view, the Act's definition of race, which refers to ethnic origin, may already largely protect against discrimination on the ground of ethno-religious origins. In support of this proposition, reference should be made to the Full Court of the Federal Court's decision in *Miller v Wertheim*[760] that the phrase 'ethnic origin' in the RDA includes Jewish people. The religious and political conviction Ground may also, to an extent, protect against discrimination on the ground of ethno-religious origin.

In NSW, 'ethno-religious' was added to the definition of 'race' by way of the Anti-Discrimination (Amendment) Act 1994 (NSW). This change was explained during the second reading speech as follows:[761]

> *Section 4 of the Anti-Discrimination Act will be amended so that the existing definition of 'race' will include concepts of descent and ethno-religious origin … The effect of the latter amendment is to clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act. At present, it is not clear whether such groups are covered by the racial vilification discrimination provisions, although this would appear to be the position at common law. The amendment will make it clear that vilification or discrimination against a person on the basis of ethno-religious origin falls within the protections against racial discrimination and racial vilification currently contained in the Act. The amendment is in line with existing judicial authority from both New South Wales and overseas which indicates that ethno-religious background is included in the legal concept of race.*

In *Azriel v NSW Land and Housing Corporation*,[762] Basten JA made the following comment:

> *It has long been accepted that Jews constitute a 'race' for the purposes of this definition. Any possible doubt on this score was removed by the inclusion in 1994 in the ADA of the term 'ethno-religious'.*

Another question is whether a person's status of being, or having been, an immigrant should be included in the definition.[763] Protection of this kind may already be afforded by the Act's definition which includes

[759] *Anti-Discrimination Act 1997* (NSW), s 4 (definition of 'race'); *Anti-Discrimination Act 1998* (TAS) s 3 (definition of 'race').
[760] [2002] FCAFC 156, [14].
[761] New South Wales, *Parliamentary Debates*, 4 May 1994 (Hon J L Hannaford MLC, NSW Attorney General).
[762] [2006] NSWCA 372, [47].
[763] *Anti-Discrimination Act 1992* (NT), s 4 (definition of 'race'); *Anti-Discrimination Act 1998* (TAS) s 3 (definition of 'race').

national origin or nationality. However, the extent to which this covers all matters that may be related to an individual's status of being, or having been, an immigrant is not entirely certain.

It is also necessary to consider whether the ancestry of a person should be included within the definition of 'race'.[764] Again, this sort of protection may already be encompassed within the Act's definition of 'race' which includes ethnic origin.

The Commission seeks submissions as to whether the Act's definition of race provides these sorts of protections and, regardless, whether it should do so more explicitly.

The Office of Multicultural Interests suggests that the definition of 'race' should be amended to include 'ethnic origin including but not limited to language spoken at home'. It submits that this will protect against language-based discrimination which is a ground in the *Human Rights Act 1993* (NZ) (**NZ Act**). It also suggests that this definition would lead to better application of the Western Australian Language Services Policy 2020 for which there is currently no legal mandate.[765] Again, it may be that the current reference to ethnic or national origin in the Act's definition of race protects against language discrimination. For example, under the Act it may be unlawful to discriminate against a person because of the language which they speak in the workplace if that language is directly linked to the person's ethnic or national background and the job description or requirements do not provide that essential skills for the position include a high level of spoken English in the workplace. An issue for the Commission is whether this should be explicit in the Act.

The Commission would benefit from submissions on the above including, in particular, whether there are any persons that should be protected on the basis of race, but do not fall within the current definition.

Question

Should the protections for race discrimination be broadened in the Act and, if so, how?

Physical features

Physical features are not a protected attribute in Western Australia. They are, however, a protected attribute in the ACT and Victorian Acts.[766] The ACT and Victorian Acts define, exhaustively, physical features to mean a person's height, weight, size or other bodily features or characteristics.[767]

The phrase 'bodily features' or 'bodily characteristics' has been interpreted widely in those jurisdictions. In Victoria, VCAT has held that physical features include facial hair, the styling, colour and location of hair,[768] and tattoos.[769] However, the phrase does not extend to clothing, posture, facial expressions, personal hygiene (such as body odour), not wearing underwear, and overeating.[770] The VEOHRC considers that physical features include shape, facial features, hair and birthmarks.[771] The ACT HRC considers that physical features include facial features, hair, scarring, birthmarks, piercings, tattoos and body modifications.[772]

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[764] *Anti-Discrimination Act 1992* (NT), s 4 (definition of 'race'); *Anti-Discrimination Act 1991* (QLD) s 4 (definition of 'race'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'race'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'race').

[765] Office of Multicultural Interests, Department of Local Government, Sport and Cultural Industries, *Western Australian Language Services Policy 2020 – Policy statement and guidelines*, 3 November 2020.

[766] *Discrimination Act 1991* (ACT), s 7(1)(m); *Equal Opportunity Act 2010* (Vic), s 6(j).

[767] *Discrimination Act 1991* (ACT) s 2 (dictionary) (definition of 'physical features'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'physical features').

[768] *Fratas v Drake International Ltd* (1998) EOC 93-038.

[769] *Jamieson v Benalla Golf Club* [2000] FCAT 1849.

[770] *Fratas v Drake International Ltd* (1998) EOC 93-038; *Hill v Canterbury Road Lodge Pty Ltd* (2004) EOC 93-340.

[771] Victorian Equal Opportunity and Human Rights Commission, 'Physical features' (Web Page) <https://www.humanrights.vic.gov.au/for-individuals/physical-features/#:~:text=What%20is%20physical%20features%20discrimination,height>.

[772] ACT Human Rights Commission, 'Physical Feature' (Web Page) <https://hrc.act.gov.au/discrimination/physical-feature-discrimination/>.

As part of the 2007 Review, the EOC recommended that where the physical feature is irrelevant to the particular area of life concerned, for example employment, then discrimination against the person with the feature should be unlawful, and that discrimination on the ground of physical features should become a new Ground.[773] That recommendation was not adopted.

If a new Ground were introduced, the Commission is of the view that an exhaustive and extensive definition should be included so as to avoid the situation that has arisen in Victoria, where there has been numerous claims about the metes and bounds of the meaning of 'bodily characteristics'. The scope and breadth of the definition would need to be carefully considered, with particular regard to whether the definition should extend as far as the interpretations of the ACT and Victorian Acts.

Further, if physical features is included as a Ground, it would seem that certain exceptions should be included in the Act to allow discrimination in those circumstances. In the ACT and Victoria, a number of exceptions apply. For example, an employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment, and a person may discriminate on the basis of physical features if the discrimination is reasonably necessary to protect the health or safety, or property, of any person or of the public generally.[774]

The Commission welcomes submissions on whether discrimination on the basis of physical features occurs, whether it should form the basis of a new Ground and the nature of any exceptions that might be warranted.

Question

Should physical features be included as a Ground?

Industrial / trade union activity / employment activity

The Act does not include a Ground based on industrial or trade union activity. All other Australian jurisdictions except NSW and South Australia contain such a ground. The Commission is therefore to considering whether such a Ground should be included, or whether protection for these activities is adequately provided by the industrial laws in Western Australia.

Whilst in certain circumstances industrial or trade union activity might align, to a degree, with a religious or political conviction, the Supreme Court of Western Australia has held that a belief in, or membership of, a trade union or employer association, or participation in industrial activity, is not necessarily a political conviction or political activity which would be protected by the religious or political conviction Ground. Rather, a belief may be a conviction as to the policies, structure, composition and role of government.[775]

The *Industrial Relations Act 1979* (WA) prevents discrimination against a person based on their membership or non-membership of an industrial organisation.[776] A contravention of these protections is an offence which attracts monetary penalties, and a court may order compliance with the protections under section 96J. There are, also, the protections provided under the Commonwealth Acts which are discussed above, in particular for employees covered by the FW Act, which includes most private sector employees.

The Commission seeks submissions as to whether industrial or trade union activity is adequately protected by the Act or industrial laws in Western Australia.

[773] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4, 23.
[774] *Discrimination Act 1991* (ACT) ss 57Q, 57R; *Equal Opportunity Act 2010* (Vic) ss 26(4), 86(1).
[775] *Ralph M Lee (WA) Pty Ltd v Fort* [1991] WASC 51.
[776] *Industrial Relations Act 1979* (WA), ss 96C, 96D, 96E.

If the protections under industrial laws in Western Australia are not adequate, the question arises as to whether the industrial laws should be amended, or whether the Act should include a Ground which provides further protection. Notably, in the 2007 Review, the EOC recommended that the Act should be amended to include discrimination on the ground of industrial activity, or trade union or employer association membership, including the lack of those attributes or activity, to provide certainty that the Act does cover less favourable treatment on these grounds, which are lawful activities.[777]

Arguably, duplicating the jurisdiction such that both industrial relations bodies and bodies under the Act can adjudicate on industrial or trade union activity discrimination is unnecessary. On that point, the EOC stated:[778]

> *This distinction is made clear in the discrimination laws of some other States and Territories, which provide for discrimination on the ground of political conviction (or belief) as well as industrial or trade union activity. There is no evidence that these provisions have been misused for industrial purposes or indeed that they have been much used.*

A potential practical benefit of including a new Ground in the Act is that, in cases where complainants have been discriminated against on multiple Grounds, they can include all their claims in one complaint as opposed to having to make a complaint under the Act and then again under the *Industrial Relations Act 1979* (WA). Including a new Ground would also allow for the streamlining of complaints through a comprehensive discrimination framework, and promote consistency of outcome and management of complaints.

The Commission would benefit from submissions on whether the industrial law protections are adequate and, if not, whether a new Ground should be added.

A further issue that arises is whether the Act, like the Victorian Act, should include employment activity (such as requesting information or raising concern pertaining to employment entitlements or rights) as a protected attribute. An example of employment activity discrimination would be where a sales attendant asks about weekend penalty rates and then has their shifts cut down to weekdays only. It does not appear that industrial laws in Western Australia protect against this type of discrimination. On one view, the Act should protect against *any* discrimination that results in inequality. However, another view is that this sort of protection is more appropriately afforded under the *Industrial Relations Act 1979* (WA), which aims to, amongst other things, provide for rights and obligations in relation to good faith bargaining and facilitate the efficient organisation and performance of work. The Commission invites submissions on this point.

Question

Should industrial / trade union activity / employment activity be included as a Ground, or are those protections adequately covered by industrial laws?

Employment status

Employment status is not a protected attribute under the Act. In the ACT Act, where it is a protected attribute,[779] it is defined as 'being unemployed; and receiving a pension or another social security benefit; and receiving compensation; and being employed on a part-time, casual or temporary basis; and undertaking shift or contract work'.[780] The effect of employment status not being a protected attribute

[777] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4, 21.
[778] Ibid.
[779] *Discrimination Act 1991* (ACT), s 7(f).
[780] Ibid s 2 (dictionary) (definition of 'employment status').

under the Act means that Western Australians are not protected from discrimination on the basis that they receive, for example, Government Centrelink payments.

The Commission would benefit from submissions as to whether and in what circumstances such discrimination arises, and whether the Act should protect against that discrimination.

Even if it is accepted that discrimination on the basis of employment status should not generally be permitted, the Commission notes that there may be circumstances where there may be a reasonable justification for such discrimination. This is recognised in the ACT Act, whereby section 57O provides that it is not unlawful to discriminate against a person on the ground of employment status in arrangements regarding offers of employment, where discrimination is reasonable, having regard to any relevant factors (such as the effect of discrimination on the person discriminated against). The aim of this exception is to recognise that there may be situations where a person's employment status is a relevant consideration in offering a person employment. For example, an agent might look to a person's work history as part of an assessment about the suitability of a prospective application for a particular offer of employment.[781] The NZ Act also makes it unlawful to discriminate on the ground of employment status, though some exceptions include in pre-employment, advertising, goods and services (to allow for charging reduced amounts), and accommodation.

The Commission invites submissions as to whether there should be exceptions to any new Ground.

Question

Should employment status be included as a Ground?

Irrelevant criminal record

As part of the 2007 Review of the Act, the EOC recommended the inclusion of a new Ground for a person's irrelevant criminal record. This change, if implemented, would bring the Act in line with the anti-discrimination laws in the Commonwealth, ACT, Northern Territory and Tasmania. It is noted that protections are provided in Western Australia in the area of work under the *Spent Convictions Act 1988* (WA)[782] for spent convictions and *Historical Homosexual Convictions Expungement Act 2018* (WA) for expunged homosexual convictions.[783]

The AHRC has undertaken considerable work in the area of discrimination based on irrelevant criminal record and has found that persons who have a criminal record often face significant barriers to full participation in the Australian community. This may be, for example, because employers perceive that those persons pose a higher risk of dishonesty, unreliability, irresponsibility or undesirable character, or employers may be concerned about how their clients or employees might react to the persons.[784] An irrelevant criminal record can thus hinder employment opportunities, and also act as a barrier to access social opportunities and inclusion, making it difficult for convicted criminal offenders to re-enter and integrate into the community. These barriers to employment and social inclusion can lead to higher rates of reoffending. Where a person's criminal record is not relevant to the area of public life in question, the Act should aim to provide that person with equal opportunities to enter that area of public life. One way to achieve this would be through the introduction of a new Ground as suggested by the EOC.

In introducing a new Ground, consideration needs to be given to whether there may be certain circumstances where a person with a particular criminal record poses an unacceptably high risk if they are

[781] Explanatory Memorandum, *Discrimination Amendment Bill 2016* (ACT) 14.
[782] *Spent Convictions Act 1988* (WA) Pt 3, Div 3.
[783] *Historical Homosexual Convictions Expungement Act 2018* (WA), s 17.
[784] Australian Human Rights Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper December 2004) 3, 7.

employed in a particular position. This is an issue that was specifically acknowledged by the AHRC in its consideration of the issue of discrimination based on criminal record.[785] For example, there are particular types of employment, such as working with children, where people with a certain criminal record are not able to be employed.

If a Ground was introduced, there is a balance to be struck between the desirability of convicted criminal offenders re-entering the community, and protecting the community against any risk that arises from re-entry. That balance is perhaps best struck with the requirement that the criminal record be *irrelevant* for discrimination on the basis of the record to be unlawful under the Act. On this point, in the 2007 review, the EOC stated that if a person's criminal record does not impact on the inherent requirements of a job, and that person is the best candidate for the job in every other way, then they should not be denied equal opportunity because of the criminal record.[786] The EOC further stated that:[787]

> *[A] person's criminal record should not affect that person's access to education, accommodation, places and services, if the record is irrelevant for that purpose. This is a matter of public policy supported by both some of the Commonwealth's Department of Employment and Workplace Relations (DEWR) programs and some State Justice Department's programs that fund community agencies to work with job seekers who may have criminal conviction to help them regain their economic independence and the social integration and benefits that accompany it.*

The Commission seeks submissions on whether a new Ground of irrelevant criminal record should be introduced and, if so, whether there should be any exceptions to the Ground.

Question

Should irrelevant criminal record be included as a Ground?

Irrelevant medical record

The Act does not currently include irrelevant medical record as a protected attribute. By comparison, the Commonwealth, Northern Territory and Tasmanian Acts protect against discrimination based on 'irrelevant medical record'.[788] The inclusion of this Ground in the Act would ensure that Western Australians would not be discriminated against on the basis of an irrelevant medical record, for example when applying for a job where a medical record has no impact on the individual's ability to perform the inherent requirements of the role. Such protection may be of increasing relevance as advances continue to be made in medical science including, for instance, in the area of genetics.

As part of the 2007 Review, the EOC recommended the inclusion of irrelevant medical record, including a person's workers' compensation history, as a Ground in all areas.[789] It noted in this regard that:[790]

> *Issues have also arisen when a person who has a previous history of work-caused injury and workers' compensation claims has been treated less favourably in employment decisions. It is often assumed that the person cannot do the job or will make compensation claims in future.*

[785] Australian Human Rights Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper December 2004) 3.
[786] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.
[787] Ibid 22 - 23.
[788] *Anti-Discrimination Act 1992* (NT), s 19(1)(p); *Anti-Discrimination Act 1998* (TAS), s 16(r); *Australian Human Rights Commission Regulations 2019* (Cth), r 6(a)(ii).
[789] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.
[790] Ibid 33.

The introduction of a new Ground would, at least to some degree, and perhaps not an insignificant one, potentially overlap with the protection already offered by the prohibition of discrimination on the Ground of impairment. By way of example, if a person is discriminated against based on an accurate medical record of a current or previous condition, that would fall within the section 4 definition of impairment, specifically a condition 'which presently exists or existed in the past but has now ceased to exist'. It is noted, however, that there may remain a gap in relation to future impairment. By way of further example, if a person is discriminated against based on an inaccurate medical record, that may well fall within the definition of impairment, specifically a condition 'which is imputed to the person'. Although in the context of a different statutory framework, the significant likelihood of overlap between a Ground of irrelevant medical record and the existing protections conferred by discrimination legislation in relation to impairment and disability, was similarly identified by the ALRC in its Report 96: 'Essentially Yours: The Protection of Human Genetic Information in Australia'.[791]

In light of the EOC's recommendation that a person's workers' compensation history be specifically mentioned in the Ground, regard must be had to whether the definition of 'impairment' would also encompass a work-caused injury that garnered workers' compensation payments. It is not contentious that the work-caused injury would fall within the section 4 definition. However, the definition focuses only on the defect, disturbance or the like, and not *how* that defect, disturbance or the like was caused. Accordingly, while it may be unlawful for an employer to discriminate against a person based on their injury, the extent to which the same protection extends to workers' compensation history is less clear. Plainly, it would be anomalous if those unfortunate enough to have suffered injury at work are able to be discriminated against both at the workplace at which they were injured and in the pursuit of future work.

It is relevant to note that an employer takes 'adverse action' under the FW Act if they refuse to employ someone on the basis the prospective employee has exercised a 'workplace right'. A 'workplace right' is relevantly defined in section 341(1) to mean an ability to initiate or participate in a process under a workplace law, and 'workplace law' is relevantly defined to mean a State law that regulates the relationship between employers and employees. The workers' compensation legislation in Western Australia regulates the relationship between employees and employers, and is a workplace law under which 'workplace rights' may be exercised to get workers' compensation.[792] It follows that if an employer refuses to employ someone on the basis that they have received workers' compensation for a work-caused injury, that may well amount to adverse action under the FW Act. However, be that as it may, that degree of protection is not equivalent to that which might be achieved through the Act if a specific Ground relating to this issue were to be incorporated. The FW Act only provides protection in the employment context, and does not apply to all Western Australians.

The Commission seeks submissions as to whether there should be a Ground included based on 'irrelevant medical record' and, if so, the scope of this Ground. Without limiting the scope of the submissions, the Commission would benefit from submissions as to whether any new Ground should include a person's workers' compensation history, as recommended by the EOC.

Question

Should irrelevant medical record be included as a Ground? Should this also extend to a person's workers' compensation history?

[791] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report, 96, May 2003) 313.

[792] *Vukovic v Myer Pty Ltd* [2014] FCCA 985, [97]; *Jackson v P/T Constructions WA Pty Ltd* [2015] FCCA 1014, [42].

Social origin / profession / trade / occupation / calling

As part of the 2007 Review of the Act, the EOC recommended the inclusion of a Ground of social origin, defined to include profession, occupation, trade or calling.[793] The EOC stated that such a Ground 'may be relevant to the Australian government's obligation under International Labour Organization ('ILO') Convention III to prohibit discrimination in employment based on 'social origin'.[794]

Discrimination on the basis of 'social origin' is, in substance, at least partially prohibited under some Commonwealth legislation. For example, section 351 of the FW Act prevents an employer from taking 'adverse action' against an employee or prospective employee based on that person's social origin. The FW Act was in fact amended based on the ILO Convention III referred to by the EOC (an international treaty which Australia has ratified, but which does not create legally binding obligations in domestic law), but litigants have apparently made little use of the provisions.[795]

Dr Capuano argues that discrimination on the basis of 'economic capital, social capital, cultural capital and locality' (that is, social origin) is likely an issue in Australia.[796] For example, in relation to discrimination on the basis of economic capital, Australian people experiencing homelessness may face discrimination. Therefore, there is scope for class discrimination principles to have relevance and apply in the Australian context.[797] By way of further example, Capuano records complaints of 'postcode' discrimination by people who live in less desirable localities in Australia'.[798] It is certainly conceivable that this kind of discrimination occurs, especially in hiring processes and practices. Capuano argues that hiring people based on a 'cultural fit' tends to be measured by certain forms of cultural capital, such as 'sports interests, musical taste and languages'.[799]

The Act does not currently protect against this discrimination. The Commission seeks submissions as to whether a new Ground should be included in the Act to provide that protection, and the proper parameters of any such provision.

Question

Should social origin or profession, trade, occupation or calling be included as a Ground?

Lawful sexual activity

Western Australians engaged in lawful sexual activities are currently not protected from discrimination under the Act, and it does not appear that any protection is provided under the Commonwealth laws. In contrast, lawful sexual activity is a protected attribute in the Queensland, Tasmanian and Victorian Acts.[800] These protections prohibit someone from treating an individual less favourably in certain areas of public life because they are a lawful sex worker. An example could be a bank manager refusing a loan to a lawful sex worker on the basis of their work, and not whether they can meet the financial and other criteria for the loan. The protections in the Queensland, Tasmanian and Victorian Acts also extend to persons associated with, or related to, the person identified on the basis of the lawful sexual activity. This means that, for example, it would be unlawful if a school refused to enrol a child because the child's parent works as a

[793] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 4.

[794] Ibid 23.

[795] Angelo Capuano, 'Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context' (2016) 39(1) *University of New South Wales Law Journal* 84, 84.

[796] Ibid 123.

[797] Ibid 123, 127.

[798] Ibid 123, 124.

[799] Ibid 123, 125 - 126.

[800] *Anti-Discrimination Act 1991* (QLD) s 7(l); *Anti-Discrimination Act 1998* (TAS), s 16(d); *Equal Opportunity Act 2010* (VIC), s 6(g).

lawful sex worker. In the absence of lawful sexual activity being included as a Ground in the Act, Western Australians are not afforded the same protections.

The Queensland and Victorian Acts each contain some exceptions to the prohibition on discrimination to reflect that in those jurisdictions there are some circumstances where such discrimination might be considered reasonable.

Pursuant to section 28(1) of the Queensland Act, it is not unlawful to discriminate on the basis of lawful sexual activity where work involves the care or instruction of minors and discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the minors. Under section 106C of the Queensland Act and section 62 of the Victorian Act, a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for lawful sexual activity. Further, by sections 82(2) and 83(3) of the Victorian Act, discrimination is permitted on the basis of lawful sexual activity by religious bodies and schools.

The Commission would benefit from submissions as to the frequency with which discrimination on the basis of lawful sexual activity is experienced and, if it is accepted that a new Ground should be included to protect against that, whether there are any circumstances where such discrimination might be reasonable such that it would warrant an express exception to the prohibition against discrimination.

Question

Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?

Spouse or domestic partner identity

Currently, South Australia is the only State that protects against discrimination based on the identity of a spouse or domestic partner.[801] This Ground is applied in the areas of work, membership of, or engagement with associations and qualifying bodies, education, and lands, goods, services and accommodation. The Ground does not apply where discrimination is reasonably necessary to preserve confidentiality, avoid conflicts of interest or nepotism or reasonably apprehended conflicts of interest or nepotism or protect the health or safety of persons.[802]

An example of the discrimination that the South Australian Act protects would be where a person is refused a service because their spouse or domestic partner is a widely disliked politician. Under the Act, there would be no such protection (including under the political conviction Ground, as it does not extend to relatives or associates of aggrieved persons).

The Commission would benefit from submissions as to whether this kind of discrimination occurs in Western Australia and therefore may require protection under the Act. As will be seen below, it may be that protection can be afforded to spouses or domestic partners under a new Ground for relatives or associates of persons with protected attributes.

Question

Should spouse or domestic partner identity be included as a Ground?

[801] *Equal Opportunity Act 1984* (SA), s 85T.
[802] Ibid s 85ZL.

Relative of / association with someone who has, or is assumed to have, specific protected attribute

As discussed in section 4.3 above, the Act partially protects relatives or associates of people who have or are assumed to have a protected attribute. The protection is partial because it is only available in the context of race, impairment, age or sexual orientation.[803] Partial protection is also afforded in New South Wales on the grounds of race, sex, transgender, marital or domestic status, disability, homosexuality and age. Similarly, South Australia offers partial protection on the grounds of sex, sexual orientation, gender identity, intersex, race, disability, age, marital or domestic status, pregnancy, child, caring responsibilities, and religious appearance or dress. By contrast, in all other Australian jurisdictions, a personal association or relation to a person identified by reference to another protected attributed is a protected attribute.[804]

An example of the kind of conduct that a provision of this kind might guide against can be seen in the context of the pregnancy Ground. A person who has a pregnant partner may miss a work opportunity because their employer considers the person may go on leave or have less time for the opportunity. Another example arises in the context of the religious or political conviction Ground, whereby an employer could decide not to promote an employee because their domestic partner is a certain religion, or has certain political views.

The question arises as to whether the Act's protections for relatives or associates of people who have or are assumed to have a protected attribute should extend to all protected attributes.

Under the Act, relative or associated protection is not afforded on the Grounds of sex, marital status, pregnancy or breast feeding, gender history grounds, family responsibility or family status, religious or political conviction, and publication of relevant details of persons on the Fines Enforcement Registrar's website. There is no clearly apparent sound policy reason to limit the protections, although it is acknowledged that the possibility exists that protection was not afforded at the time of the Act's enactment because there was no discrimination against relatives or associates of people who are protected by those Grounds. However, even to the extent that was the case at the time, it may no longer be the case.

The Commission invites submissions on the circumstances in which this type of activity occurs and whether the protections for relatives or associates should be extended to all protected attributes under the Act.

Question

Should the protections for relatives / associates be extended to relatives / associates of people who have or are assumed to have any protected attribute under the Act?

Accommodation status

The absence of a Ground in relation to accommodation status means that the Act does not accord specific protection against discrimination on the basis of, for example, being a tenant, in receipt of, or waiting to receive, housing assistance, or for being homeless. Without that protection, an individual could be denied employment on account of being, for example, homeless. The impact of such discrimination could extend well beyond simply missing a particular job opportunity and perpetuate existing social inequality.

As discussed earlier, the ACT Act does include a ground of accommodation status. However, the ACT Act also includes a number of exceptions to that ground. For example, the ACT Act recognises that such a circumstance could be in the area of providing accommodation. By section 26(2), it is not unlawful for a person to discriminate on the ground of accommodation status in relation to the provision of

[803] *Equal Opportunity Act 1984* (WA), ss 36, 66A, 66V, 35O.

[804] *Discrimination Act 1991* (ACT), s 7(1)(c); *Anti-Discrimination Act 1992* (NT), s 19(1)(r); *Anti-Discrimination Act 1991* (QLD), s 7(p); *Anti-Discrimination Act 1998* (TAS), s 16(s); *Equal Opportunity Act 2010* (Vic), s 6(q).

accommodation if 'the discrimination is reasonable, having regard to any relevant factors'. The rationale behind this exception was as follows:[805]

> *The aim of this exception is to recognise that there may be situations where a person's accommodation status is a relevant consideration in offering a person accommodation under a lease. For example an agent might look to a person's rental history as part of an assessment about the suitability of a prospective tenant for a particular offer of accommodation in a rental house.*
>
> *The exception will allow people to take into account this kind of distinction between individuals on the basis of circumstances where it is reasonable. For instance, it is unlikely to be reasonable to refused [sic] accommodation to a person only because they became homeless for a period, or because their previous accommodation was in public housing premises.*

There may be other circumstances where discrimination on the basis of accommodation status could be justifiable, at least to some extent. Further, it may be best practice to incorporate an element of reasonableness into any exception, like that in the ACT Act, to ensure that the discrimination has some reasonable basis before it is permitted under the Act. The Commission seeks submissions firstly on whether accommodation status should be included as a Ground and, if so, whether, and in what circumstances, discrimination on the Ground of accommodation status may be justifiable.

Question

Should accommodation status be included as a Ground? If so, what exceptions might be reasonable?

Immigration status

Immigration status might generally be understood to refer to such statuses as being an immigrant, a refugee or an asylum seeker, or the holder of any kind of visa under the *Migration Act 1958* (Cth) whether now or in the past. There are a number of contexts in which discrimination against a person on the basis of their immigration status could arise. For example, a real estate agent may refuse to lease a property to a person on the basis of their visa status, or a business might refuse to employ someone because their visa will require the business to complete a large amount of paperwork. The Act should, as far as possible, eliminate this kind of discrimination to ensure equality of opportunity in Western Australia, noting that some degree of protection may also be available under Commonwealth legislation.

The question thus arises whether the Act does provide some sort of protection. As noted in relation to the race Ground, a person's status of being, or having been, an immigrant may, to some extent, already be protected by the Act's definition of 'race', which includes national origin or nationality. However, 'nationality' may not extend so far as to considerations of, for example, visas. If the definition of race does not extend, and it is not extended by amendment to include 'immigration status', the introduction of a Ground may be the most appropriate form of protection.

The Commission seeks submissions on whether the Act provides sufficient protection against discrimination based on immigration status.

In seeking submissions, the Commission recognises that there are circumstances, however, where discrimination on the basis of immigration status is aimed at ensuring a more equal and inclusive society for immigrants. One example is where certain measures are put in place to afford particular immigrants access to facilities to meet their needs. There may be other circumstances where discrimination is

[805] Explanatory Memorandum, *Discrimination Amendment Bill 2016* (ACT) 13.

reasonable. By way of example an employer who refuses to hire a prospective employee because their visa does not allow them to work can only be said to have acted reasonably.

If a new Ground were introduced, it may be best practice to include specific exceptions to the Ground which specify the circumstances where discrimination is permitted. Alternatively, a general exception based on reasonableness could be incorporated. By way of example, section 57P of the ACT Act provides that it is not unlawful to discriminate against a person on the ground of immigration status if the discrimination is reasonable, having regard to any relevant factors.

The Commission seeks submissions as to whether, and in what circumstances, discrimination on the Ground of immigration status may be justifiable. If it is appropriate to include exceptions, the Commission seeks submissions on whether there may be some benefit to be gained by including specific exceptions or whether the inclusion of a general exception based on reasonableness would best achieve the objective of the Ground.

Question

Should immigration status be included as a Ground?

Subjection to domestic or family violence

Western Australians subjected to domestic or family violence are afforded some protections under existing laws. For example, section 56A(a) of the *Residential Tenancies Act 1987* (WA) prohibits discrimination against a prospective or current tenant on the ground the tenant has been or might be subjected or exposed to family violence. Further, while the FW Act does not prohibit discrimination or adverse action on the basis of domestic or family violence, it does provide employees with an entitlement to unpaid family and domestic violence leave in the National Employment Standards.[806] The Commission notes, however, that the FW Act does not have universal application to all working Western Australians.

Notwithstanding some protections under other legislation, it does not appear that victims of domestic or family violence are protected from discrimination in all relevant areas, such as in the workplace or education. The AHRC provides the following examples of this kind of discrimination (which would not be protected always under the Act):[807]

> *One, often invisible, repercussion of domestic and family violence is discrimination; individual women and men may be discriminated against because they either have been, or are currently, in a violent domestic or family situation. Discrimination against victims and survivors of domestic and family violence may occur in any area of public life, including in employment, accommodation, education and the provision of goods and services. For example, discrimination may occur where a woman's employment is terminated because her abusive partner frequents her place of work; a victim or survivor is denied access to, or evicted from, public housing because she is known to be in an abusive relationship; or a university student whose request to defer an exam so she can attend legal proceedings related to family violence is denied.*

[806] *Fair Work Act 2009* (Cth), ss 106A - 106E.

[807] Australian Human Rights Commission, Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department (23 January 2012) 4.

Australian academics Dr Orchiston and Dr Smith argue that anti-discrimination protection could empower victims of domestic or family violence in the workplace, and thereby reduce or eliminate systemic discrimination against victims of domestic or family violence:[808]

> *Financial security is a key enabler for victims of family violence to leave violent relationships. Most victims are engaged in paid work but are typically reluctant to disclose they are experiencing family violence to employers and colleagues, even when the violence is impacting on their performance, productivity or safety at work, or they desperately need workplace flexibility in order to navigate the criminal justice system or access family violence support services. Feelings of shame, embarrassment or the fear of being negatively treated by colleagues or managers are powerful barriers to disclosure: an employee experiencing family violence may even be dismissed for performance related issues or abandon their job without the underlying problem being revealed. To enable victims to get workplace adjustments and maintain the crucial financial and social support that paid work can provide, this stigma and fear of disclosure must be addressed. Anti-discrimination protection could provide the missing link in Australia's regulatory response to domestic violence, playing a normative role in discouraging negative stereotyping, and in doing so, empower victims to seek support.*
>
> *….*
>
> *Anti-discrimination laws have been traditionally used to change negative attitudes toward marginalised groups in our society. Existing anti-discrimination laws are inadequate, and as part of the current process of reforming these laws, a separate ground of protection for victims of family violence should be included. This would serve an important normative function, signalling that family violence is unacceptable and acknowledging that the harm experienced by victims can be exacerbated by negative attitudes and inflexible policies in work.*

The EOC submits that a person who is or might be exposed or subjected to family violence is not protected from discrimination under the Act by their employer, landlord, property owner or educational institute. The EOC[809] and the Department of Communities recommend that this attribute be protected in the Act.

If a new Ground were introduced, the general exceptions to the Act (such as the conferral of charitable benefits) would apply to victims of domestic or family violence, which may further promote equality of opportunity in Western Australia.

The Commission seeks submissions as to whether the Act should be amended expressly to protect against such discrimination and whether there is a justifiable basis for any or all such discrimination.

Question

Should subjection to domestic or family violence be included as a Ground?

Family responsibility and family status

Under the Act, family responsibility and family status discrimination is unlawful only in the areas of employment and education. It was recommended, as part of the 2007 Review, that coverage of the Grounds of family responsibility and family status be extended to all areas under the Act.[810]

[808] Tashina Orchiston and Belinda Smith, 'Empowering victims of family violence: Could anti-discrimination laws play a role?', *Australian Review of Public Affairs* (Web Page, March 2012) <http://www.australianreview.net/digest/2012/03/orchiston_smith.html>.

[809] Submission from the Equal Opportunity Commission, 20 November 2020, 2.

[810] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 37.

In making this recommendation, the EOC made reference to its own knowledge that discrimination of this kind occurs in the provision of goods and services, access to places and accommodation, especially among parents with children.[811]

The Commission would benefit from submissions as to the range of circumstances where less favourable treatment on the basis of family responsibility and family status is experienced, and whether there are any circumstances where that might be reasonable. As to the latter, for instance, there may be circumstances where it is appropriate to refuse to offer some types of accommodation to a person because they will need to bring a child into the accommodation as part of their family responsibility.

Question

Should coverage of family responsibility and family status be extended to all areas under the Act?

6.3 Areas of public life to which the legislation applies

Education

As set out in section 3.4.7 above, the Act prohibits an educational authority from discriminating against a person based on a relevant Ground 'by refusing or failing to accept the person's application for admission as a student' or 'in the terms or conditions on which it is prepared to admit the person as a student'.[812] However, the Act does not expressly provide for prohibitions surrounding the evaluation and selection process of student applications.

In contrast, the Northern Territory Act expressly prohibits discrimination in the evaluation and selection process in the area of education. More specifically, in addition to the protections afforded in WA in the area of education, the Northern Territory Act provides that an educational authority cannot discriminate 'in the way in which a person's application is processed', or 'in the arrangement made for, or the criteria used in, deciding who should be offered admission as a student'.[813] The Queensland Act also prevents an educational authority from discriminating 'in the way in which a person's application is processed' or 'in the arrangements made for, or the criteria used in, deciding who should be offered admission as a student'.[814] Similarly, the Victorian Act prevents discrimination 'in deciding who should be admitted as a student'.[815]

The Commission has received a preliminary submission that suggests a clearer approach be incorporated into the Act to prevent potential discrimination, namely, to include the evaluation and selection process in the area of education.[816] The Commission notes that there are competing views on the question of the extent to which the education Ground already extends to the evaluation and selection process of student applications. However, to the extent that this area of public life is one in which people experience less favourable treatment, there may be a sound argument for making that express in the Act.

The Commission seeks submissions as to whether discrimination arises in the evaluation and selection process of student applications and, if so, whether the Act should be amended expressly to protect against such discrimination.

Additionally, the Act prohibits an educational authority from discriminating against a person's religious or political conviction 'by refusing or failing to accept the person's application for admission as a student' or 'in the terms or conditions on which it is prepared to admit the person as a student'. The Act also prohibits an

[811] Ibid.
[812] See, for example, *Equal Opportunity Act 1984* (WA), s 44 (regarding the race Ground).
[813] *Anti-Discrimination Act 1992* (NT), s 29.
[814] *Anti-Discrimination Act 1991* (QLD), s 38.
[815] *Equal Opportunity Act 2010* (Vic), s 38.
[816] Submission from the Islamic Council of WA, November 2020, 3.

educational authority from discriminating against a student's religious or political conviction 'by denying the student access, or limiting the student's access, to any benefit provided by the educational authority' or 'by expelling the student or subjecting the student to any other detriment'.[817]

The Commission has received a preliminary submission that suggests relevant sections of the Act be amended to prevent students from being subjected to discrimination whereby students are not allowed to carry out their religious practices during school hours.[818]

It seems that the Act protects against discrimination where the educational institution restricts religious practices during school hours as a term or condition of admission to the institution. It is arguable, however, that once a person is a student in the educational institution, that institution is not prevented from not allowing the student to carry out religious practices during school hours. The crux of the issue is whether doing so would 'subject the student to any other detriment', and the issue is perhaps again one of clarity. Arguments might be advanced either way, but the question remains as to whether the issue is one of such significance that it ought to be put beyond doubt in the Act.

The Commission seeks submissions as to whether this kind of less favourable treatment occurs and, if so, whether there is a justifiable basis for it in any or all circumstances. As to the latter, for instance, there may be circumstances where an educational institution would consider it necessary and appropriate to require students to attend examinations during school hours that may conflict with the timing and location of their religious practices.

Questions

- *Should the area of education be extended to include the evaluation and selection of student applications?*
- *Should the area of education be extended to provide for prohibitions of the educational institution to refuse students to carry out their religious practices during school hours?*

Sports

As set out in section 3.3 above, the only Grounds that are protected in the area of sports are age or, in some instances, gender history, impairment and sex. If complainants wish to make a complaint based on another Ground, they would only be able to do so if it fell with another area of public life related to the particular sport, such as membership of a club or access to a place.

The Commission invites submissions as to whether the protection in the area of sports should extend to other Grounds. One such example where it may be appropriate to extend the protection could be if persons are discriminated against in the area of sport because they don religious attire or refuse to don sports attire for religious reasons (both of which may be protected under the religious or political conviction Ground if this area of public life was extended).

Question

- *Should protection in the area of sports be extended to further Grounds?*

[817] *Equal Opportunity Act 1984* (WA), s 61.
[818] Submission from the Islamic Council of WA, November 2020.

Local government

The Commission has received a preliminary submission that compares the Act against other States and Territories, such as Victoria, Queensland, and New South Wales, and suggests expanding the Act's coverage by adding a section for 'local government'. At present, the Act does not contain any specific prohibition against discrimination occurring in local government. Further, the extent to which industrial laws in Western Australia provide any degree of protection is limited by virtue of the fact that councillors are not employees of the council. Therefore, there may be a gap in protection that the Act needs to remedy in order to achieve its objects. In addition, extending the application of the Act to local government as an area of public life would bring the Act into line with the other States and Territories.[819]

As stated in section 4.4 above, the New South Wales, Queensland and Victorian Acts, in summary, prohibit discrimination by councillors against other councillors or committee members of the relevant council in the performance of their official functions.

Notably, section 74 of the Victorian Act provides that the prohibition against discrimination in local government does not apply if the discrimination is 'on the basis of political belief or activity'. The relevant Statement of Compatibility[820] noted that '[t]he purpose of this exception is to facilitate the efficacy of local government through democratic political affiliations, and thereby enabling councillors to interact with other councillors on the basis of their political affiliations'[821].

The Commission seeks submissions as to whether less favourable treatment on this basis occurs and, if so, whether there is any protection against that currently available to councillors or committee members (for example, in delegated legislation). Further, the Commission would benefit from submissions as to whether such treatment would be justifiable in relation to the political conviction Ground (like the exception in the Victorian Act) or in relation to any other Ground.

Question

Should local government be included as a specific area in line with the specific protections afforded in some other jurisdictions?

6.4 Key definitions

6.4.1 Defining discrimination

As set out in sections 3.4.1 and 3.4.2 above, the Act does not contain definitions of discrimination. Rather in relation to each Ground, the Act describes in similar terms two distinct forms of discrimination being known as direct discrimination and indirect discrimination. Given the difficulties in construing these different forms of discrimination (as discussed below) an issue for consideration is whether the two forms of discrimination should be defined.

Question

Should a definition of discrimination be inserted into the Act?

[819] See example from *Equal Opportunity Act 2010* (Vic), div 8; Submission by the Office of Multicultural Interests dated 20 November 2020, 2.

[820] A statement of compatibility is a statement that a Member of Parliament who introduces a Bill into Parliament is required to table prior to giving a second reading speech. The statement needs to set out whether the Bill in question is compatible with human rights or not, and the reasons why or why not as the case may be.

[821] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 777 (R.J. Hulls, Attorney-General).

6.4.2 Direct discrimination and the comparator test

Under the Act, unlawful direct discrimination is determined by applying the comparator test. The comparator test involves comparing the treatment of the complainant with the real or hypothetical treatment of a comparator person who does not have the complainant's protected attribute, in circumstances that are the same or not materially different.

The comparator test has proven difficult to apply. Accordingly, as indicated in section 4.5.1 above, the test has been removed from the ACT, Northern Territory, Tasmanian and Victorian Acts. Under those Acts, direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of the attribute.[822]

Dr Campbell and Dr Smith summarise some of the criticisms of the comparator test as follows:[823]

> *The use of a test of less favourable treatment has, however, been subject to significant criticism. The requirement that recourse be made to a comparator raises a number of difficulties. For example, in many cases, it is difficult to determine what is required to place a comparator (who does not have the protected attribute) in substantially the same circumstances as the complainant (who does have the protected attribute), whilst avoiding offensive or otherwise undesirable results. [The classic example concerns discrimination on the basis of the complainant's pregnancy. Initially, claims of this sort could not be made out, on the basis that men were unable to become pregnant and so there was no available comparator.] Furthermore, even if recourse can be made to a hypothetical comparator (as is the case in Australia), it may be difficult to ascertain how the alleged discriminator would have treated that (hypothetical) comparator. [Consider, for example, an industry or workplace where the (non-managerial) employees are all female. It is often pointed out that this makes it difficult to find an actual comparator. … The very absence of male workers in the relevant workplace or industry, in anything like a comparable position, may make it difficult to determine how a hypothetical male comparator would have been treated.] Perhaps most fundamentally, it has been argued that assessing the complaint of a member of a disadvantaged group, by comparing the treatment they have received with that which was or would be received by a member of a privileged group, reinforces the privileged status of that latter group, by treating its members as the norm by reference to which the treatment accorded to members of the disadvantaged group is judged. [Thus, it is often objected that the use of a comparator results in a female complainant's claim being assessed by reference to a male standard or norm.]*

It can be gleaned from the above summary that a key issue with the comparator test is the difficulty in finding an appropriate comparator. As was stated in relation to the removal of the test in the Victorian Act:[824]

> *[The amending Bill] removes the requirement to prove that the treatment was less favourable than the person would treat someone without the attribute or with a different attribute, in the same or similar circumstances and replaces that 'comparator test' with a new test based on unfavourable treatment. The intention of the new definition is to overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred.*

The difficulty in finding an appropriate comparator is particularly transparent in the context of impairments. By way of example, in *Purvis v New South Wales*,[825] a school student with an acquired brain injury that

[822] *Discrimination Act 1991* (ACT), s 8(2); *Anti-Discrimination Act 1992* (NT), s 20(2); *Anti-Discrimination Act 1998* (TAS), s 14(2); *Equal Opportunity Act 2010* (Vic), s 8(1).

[823] Colin Campbell and Dale Smith, 'Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43 *Federal Law Review* 91, 92.

[824] Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic), 12 - 13.

[825] (2003) 217 CLR 92.

manifested in anti-social, and, at times, violent behaviour was suspended and excluded from a State school due to his violent behaviour towards staff and other students. The student complained that they had been discriminated against under the DDA, which required the comparator test to be applied. The High Court found that the correct comparator for the purpose of the test was a hypothetical student who exhibited the same violent behaviour as the complainant but did not have the complainant's impairment. Ultimately, the High Court held that no direct discrimination had occurred because the school would have also suspended and excluded another student who behaved in the same way, but who did not have the impairment.

The application of the comparator test in *Purvis v New South Wales* involved the ascribing to comparators of manifestations of disabilities which, in reality, might only be displayed by people who actually have those disabilities. The test, at least as far as the DDA is concerned, therefore, arguably overlooks the inability of a person with a disability to control certain behaviours that are caused by their disability but are not protected by the relevant anti-discrimination legislation. While the decision in *Purvis v New South Wales* involved consideration of the DDA and not the Act, it is reflective of the struggle that arises in identifying precisely who the appropriate comparator might be in any given case.

Other criticisms of the appropriate comparator notion are that:

(a) any attempt to consider the 'hypothetical comparator… is an exercise fraught with complexity';[826]

(b) the test 'can involve a very artificial distraction from [the] central inquiry';[827] and

(c) the fact the test defends discriminatory actions on the basis the discriminator would treat another person similarly is artificial, 'as the very reasons for the discriminatory conduct is attributed to the comparator'.[828]

The alternative view, however, was advanced in the EOC's consideration of the comparator test in the 2007 Review, specifically by reference to the Act. In the 2007 Review, the EOC considered that the comparator test in the Act provided superior protection to people with impairments, in contrast to the test under the DDA considered in *Purvis v New South Wales*, for the following reasons:[829]

> *However, the test for direct discrimination in the DDA is significantly different from the test under the Act. Under the definition of disability in the DDA the relevant comparison is between the complainant and a person who does not have the complainant's disability, in the same circumstances. The DDA, however, does not provide for discrimination based on characteristics appertaining generally to persons with the same disability as the complainant, or characteristics generally imputed to persons with that disability. The [Act] does.*
>
> *The logical consequence of this difference is that had the Purvis case been decided in accordance with the Act rather than the DDA, it might be argued that the correct comparison was between the complainant and another student who did not have the complainant's disability, but who also did not have the characteristics appertaining generally to the disability, namely, a tendency for disruptive and violent behaviour. The minority judges referred to the earlier decision of the High Court in IW v City of Perth in support of this interpretation, noting that the Full Court in Purvis had earlier observed that the test under the WA Act differed to that in the DDA.*
>
> *Though the Commonwealth DDA has been amended, this is one case in which the Act provides superior protection to people with impairments. The Commission does not recommend any change to the Act.*

Notwithstanding the view of the EOC expressed in its 2007 Review, the Commission notes that the experience in other jurisdictions suggests that the comparator test is not one without difficulty in its

[826] Australian Human Rights Commission, Submission No 16 to the Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Disability and Other Human Rights Legislation Amendment Bill 2008* (16 January 2009) 16.

[827] Human Rights and Equal Opportunity Commission, *Committee Hansard,* 9 September 2008, 9.

[828] Submission from the Disability Discrimination Legal Service Inc., 29 October 2020, 12.

[829] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 5 - 6, 34 - 35.

application. In light of the above discussion, the Commission seeks submissions as to whether there are particular Grounds or contexts in respect of which it is difficult to identify an appropriate comparator and, if so, whether that difficulty is fully or partially alleviated because the Act provides that the appropriate comparator should not have the protected attribute or a characteristic that appertains generally or is generally imputed to persons having that attribute. In addition, the Commission would benefit from submissions as to whether, and in what circumstances, it is difficult to ascertain how a hypothetical comparator would have been treated.

The Commission must also consider whether the adoption of an alternative test for direct discrimination would be best practice. Having regard to the ACT, Northern Territory, Tasmanian and Victorian Acts, a test which looks solely at the unfavourable treatment of a person because of a protected attribute may be simpler in application, most notably because it does not require identification of an 'appropriate comparator'.

However, that simplification may not eliminate all of the complexity presented by the comparator test. Courts and tribunals may continue to compare groups to provide a benchmark to assist in determining what is 'unfavourable treatment'. This was discussed in the context of adverse action protections in industrial law in *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)*,[830] in which Katzmann J noted the 'real difficulty' with the 'unfavourable treatment' test was 'deciding how the comparison should be made'. In that case, however, the 'adverse action' was defined as 'an employer discriminating *between* the employee and other employees'. Therefore, the Judge held that the legislation 'require[d] that one employee is treated differently from others in the same or comparable circumstances'.[831] However, the Judge noted that '[t]he difficulty is not as acute in the anti-discrimination legislation where the various statutes provide that a person discriminates *against* another on a particular ground in defined circumstances' as opposed to 'discriminating *between* the employee and other employees'.[832]

Further, and more pertinently, it appears the removal of the express language of the comparator test from the Victorian Act has not necessarily removed its application. At times, courts in Victoria have continued to use the comparative methodology as a benchmark in determining the meaning of 'treat unfavourably' in the context of its definition. In *Aitken & Others v State of Victoria*,[833] the Court of Appeal of the Supreme Court of Victoria noted that the 'question whether a comparator group is required under the 2010 Act remains an unresolved question of law in Victoria'. Perhaps this confusion has arisen because, even if not required to do so, some complainants may still have an incentive to present their case by appealing to a comparative case. For example, if a person complains about not being promoted, the crux of that complaint may be that they have not been promoted in circumstances where their co-workers who do not have their protected attribute have been promoted.

Conversely, in *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd*,[834] the ACT Administrative Appeals Tribunal held that the 'unfavourable treatment' test in the ACT Act:

> *[d]oes not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with.*

Dr Campbell and Dr Smith consider the question of whether an unfavourable treatment test removes the need to identify an appropriate comparator and argue that the answer ultimately turns on how the test is defined or interpreted under the legislation. With reference to case law and certain legislation, they identify and analyse three possible understandings of unfavourable treatment.

[830] [2012] FCA 697.
[831] *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697, [43].
[832] Ibid [42].
[833] [2013] VSCA 28, [46].
[834] (1996) 39 ALD 729, 736.

First, one understanding may be that identified by the ACT Administrative Appeals Tribunal in *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd*:[835]

> *It is thus unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably, because of that attribute, than persons without that attribute. All that is required is whether the consequences of the dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interests, and whether the dealing has occurred because of a relevant attribute of the complainant.*

Campbell and Smith argue that, under the above 'set-back of interests' understanding of unfavourable treatment, the complainant need only establish that their treatment was adverse to their interests (financial or otherwise), which makes it a potentially over-inclusive interpretation, even if it does remove the need to identify an appropriate comparator. They note, however, that any such over-inclusiveness may be resolved due to the fact the unfavourable treatment must be accorded 'on the ground of' the complainant's protected attribute.[836]

Second, another potential understanding of the unfavourable treatment test, which is not over-inclusive, may be that the alleged discriminator treats the complainant unfavourably if a reasonable expectation, objectively determined, on the part of the complainant, is disappointed as a result of the treatment. This would require consideration of the expectations of a reasonable person who has the protected attribute in question. However, under this understanding, '[c]onsideration of the way in which other people, in positions similar to that of the complainant but lacking the complainant's protected attribute, have been treated may be essential to the application of the reasonable expectations approach'.[837]

Third, unfavourable treatment may be understood in light of the value underlying prohibitions on discrimination, such that the test of unfavourable treatment will be satisfied only in circumstances where that value is infringed by the treatment accorded to the complainant. However, ultimately, Campbell and Smith stated that 'whether it eliminates the need to rely on a comparator depends on which account of the value underlying prohibitions on discrimination is preferable'.[838]

The Commission invites submissions as to whether an unfavourable treatment test would be best practice, or at least better practice than the comparator test. Without limiting the scope of submissions, the Commission would benefit from suggestions regarding the most preferable meaning of unfavourable treatment, and whether that meaning eliminates or should eliminate the need to identify an appropriate comparator.

Question

Should the meaning of direct discrimination in the Act be amended to remove the comparator test and, if so, what test should be inserted into the Act?

6.4.3 Meaning of indirect discrimination and the use of the proportionality test

In order to establish indirect discrimination under the Act, the complainant must establish five key elements. First, that they have a protected attribute. Second, that the discriminator has imposed a requirement or condition on them. Third, that a substantially higher proportion of persons without the protected attribute comply or are able to comply with the requirement or condition. Fourth, that the requirement or condition is not reasonable in the circumstances. And fifth, that they do not or are not able to comply with the

[835] Ibid.

[836] Colin Campbell and Dale Smith, 'Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43 *Federal Law Review* 91, 100-103.

[837] Ibid 103-104.

[838] Ibid 118.

requirement or condition. In the Commission's view, there are at least five issues to consider in relation to these elements.

The first issue is whether, in relation to the first element, it should be sufficient that the aggrieved person have a characteristic which pertains to people who have a protected attribute; as opposed to that the complainant have the protected attribute.

The second issue is whether the third element, namely the proportionality test, should be removed from the Act, as has been done in the ACT, Tasmanian and Victorian Acts, and the ADA, DDA and SDA. The proportionality test requires the complainant, in part, to identify the group of persons with which they seek to be compared. In the case of *Australian Medical Council v Wilson*,[839] Heerey J held:

> *… the comparison is not strictly speaking between two groups in the sense of separate independent entities but rather between a sub-group (the complainant's group) within a larger group (all who face the same term, condition or requirement)…. It is clear that the base group is a group which is affected by the term, condition or requirement in question; … the particular section of the public 'upon whose lives the impact of the relevant requirement or condition has to be measured'.*

Thus, in order to satisfy the proportionality test, the complainant must be able to show that a requirement or condition has been imposed on a group of persons, and a substantially higher proportion of those persons without the same identifiable attribute comply or are able to comply with the requirement or condition than do the persons in the complainant's group with the same identifiable attribute.

In 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report', Julian Gardner identified the following criticisms of the test:[840]

> *The proportionality test has led to very complex evidentiary and analytical issues in some cases. For example, an allegation of sex discrimination on the basis of height would require a detailed examination of the average height of men and women with the general population or a smaller group. This can be distracting to the primary aim of establishing whether or not discrimination has occurred.*
>
> *Determining the appropriate comparator group for proportional comparison can be problematic and require time-consuming analysis and discussion. Depending on the specific circumstances, the relevant comparative group may not always be clear.*
>
> *…*
>
> *Removing the proportionality test would simplify the test for 'indirect discrimination'. It would also allow the Act to provide redress for indirect discrimination, which might otherwise fail due to an inability to satisfy the complex and unnecessary proportionality test. It would also align the [Victorian] Act with the Australian Capital Territory, Tasmania and Federal sex and age discrimination legislation.*

In the 2007 Review, the EOC recommended that the proportionality test be removed and that the Act be amended so that the test for indirect discrimination is in terms identical or similar to the SDA or the ADA, being that the alleged discriminator imposes a requirement or condition that has or is likely to have the effect of disadvantaging a person with the same protected attribute as the aggrieved person.[841] The EOC noted the significant burden placed on complainants (who often have less resources and expertise in cases of indirect discrimination) in having to overcome the extensive evidentiary, analytical and legal issues that arise in meeting the proportionality test.

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[839] (1996) 68 FCR 46, 63-64. See also *De Alwis and Commissioner for Corrective Services* [2016] WASAT 52, [119] (Sharp DP).

[840] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) Recommendation 42, 87-88.

[841] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 5.

Several preliminary submissions received by the Commission call for the removal of the proportionality test from the Act and highlight the test's difficult evidentiary requirements.[842]

Section 19 of the *Equality Act 2010* (UK) (**UK Act**) provides that a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic if the alleged discriminator applies the relevant matter to persons with whom the aggrieved person does not share the characteristic; it puts, or would put, persons with whom the aggrieved person shares the characteristic at a particular disadvantage when compared with persons who do not share it; it puts, or would put, the aggrieved person at that disadvantage; and the alleged discriminator cannot show it to be a proportionate means of achieving a legitimate aim.[843] This is an alternative formulation of indirect discrimination to be considered by the Commission.

The Commission seeks further stakeholder input into whether the proportionality test is an unnecessary criterion to establish indirect discrimination in the Act and, if so, whether there are any other tests that would be adequate. For example, without limiting the scope of stakeholder input, the test to establish indirect discrimination in the ACT, Tasmanian and Victorian Acts, and the ADA, DDA and SDA, may be adequate. That would require a complainant to prove the imposition of, or proposal to impose, a requirement or condition that has, or is likely to have, the effect of disadvantaging a person based on the relevant attribute.

The third issue relates to the fourth element of indirect discrimination in the Act, specifically whether the onus of proof ought to be reversed so that, rather than the complainant having to prove the indirect discrimination is unreasonable, if a respondent has been proven to have discriminated as alleged, they have to prove that the discrimination was reasonable.

In order to prove that indirect discrimination is reasonable or unreasonable, an objective test must be met.[844] In the case of *Department of Foreign Affairs and Trade v Styles,*[845] Bowen CJ and Gummow J held:

> *The criterion is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All circumstances of the case must be taken into account.*

The ACT, Queensland and Victorian Acts, and the SDA and the ADA, have reversed the onus of proof in relation to this reasonableness requirement. Therefore, in those jurisdictions, the burden of proof has shifted from the complainant who originally had to prove the requirement or condition was indirectly discriminatory, to the discriminator who now has to show that the requirement or condition is reasonable. If the discriminator is able to justify the discrimination on the basis of objective reasonableness, then the requirement or condition will not be considered indirect discrimination.

The ACT, Queensland and Victorian Acts, and the SDA, expressly set out matters to be taken into account in deciding whether a requirement or condition is reasonable in the circumstances, such as the nature and extent of any disadvantage and the feasibility of overcoming or mitigating the disadvantage.

The case of *Kiefel v State of Victoria*[846] provided further commentary surrounding the changes to the definition of 'indirect discrimination' found in the Victorian Act, particularly around the burden of proof. It was noted that the amendment was made 'because of the perception that a person who imposed the condition or requirement would be better placed than a complainant to explain or justify the reason for it.'[847]

[842] Submission from the Equal Opportunity Commission, 20 November 2020; Supplementary submission from the Department of Communities, 25 November 2020; submission from the Disability Discrimination Legal Services Inc, 29 October 2020.

[843] *Equality Act 2010* (UK), s 19(2).

[844] *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* (1997) 80 FCR 78 (Sackville J); *De Alwis and Commissioner for Corrective Services* [2016] WASAT 52, [130] (Sharp DP).

[845] (1989) 23 FCR 251; *De Alwis and Commissioner for Corrective Services* [2016] WASAT 52, [129] (Sharp DP).

[846] [2013] FCA 1398, [36] - [37].

[847] *Kiefel v State of Victoria* [2013] FCA 1398, [36] - [37].

In 'An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report', Julian Gardner observed that case law established it is difficult for a complainant to prove that a requirement or condition is not reasonable. Ultimately, Gardner recommended that the onus of proof be shifted '[g]iven the difficulties for a claimant in establishing unreasonableness and given that a number of jurisdictions have adopted this approach'.[848]

In the 2007 Review, the EOC stated in relation to the proportionality test and the reasonableness requirement that '[c]onsidering the significant imbalance in resources and expertise that exists between complainants and respondents in complaints of indirect discrimination, the argument in favour of amending the Act so that it is aligned with the approach adopted in the Commonwealth and some of the States is compelling'.[849]

The Commission invites submissions as to whether the Act be amended to shift the onus of proof from the complainant to the discriminator to show that a requirement or condition found to be indirectly discriminatory is reasonable in the circumstances.

The fourth issue that arises is whether the fifth element of indirect discrimination in the Act, that the complainant does not or is not able to comply with the requirement or condition, should be removed from the Act.[850] In the event the proportionality test is applied, this element would not be relevant to the inquiry because the fact that the complainant is disadvantaged would be sufficient, regardless of whether they are able to perform the requirement or condition or not. The Commission would benefit from submissions on this issue, including whether there would be any need for this element if the proportionality test is retained in the Act.

The fifth issue is whether an additional provision should be introduced into the Act that specifies that it is not necessary for the discriminator to be aware of the indirect discrimination.[851] The Act is currently silent on this matter. However, it is arguable that this may already not be required as, otherwise, contrary to the purpose and text of the Act, discriminators would be able to escape liability for indirect discrimination on the basis they are unaware of that discrimination. The Commission invites submissions from stakeholders on this issue.

Questions

- *Should it be sufficient to prove indirect discrimination that the aggrieved person has a characteristic which pertains to people who have a protected attribute; as opposed to that the complainant have the protected attribute?*
- *Should the meaning of indirect discrimination be amended to remove the proportionality test?*
- *Should the meaning of indirect discrimination be amended to shift the onus of proof from the complainant to the alleged discriminator?*
- *Should the meaning of indirect discrimination be amended to remove the requirement that the complainant does not or is not able to comply with the requirement or condition?*

[848] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) Recommendation 42, 88-89.

[849] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 32 - 33.

[850] This approach would accord with the ACT, Tasmanian and Victorian Acts.

[851] This would resemble the Queensland, Tasmanian and Victorian Acts.

Should the meaning of indirect discrimination be amended to specify that it is not necessary for the discriminator to be aware of the indirect discrimination?

6.4.4 Harassment

Sexual harassment

As set out in section 5.5.3, in contrast to the provisions regarding sexual harassment in the SDA and the anti-discrimination laws of other States and Territories, under the Act the harassed person must prove that they suffered disadvantage as a result of rejecting, refusing or objecting to the sexual harassment, or that they have a reasonable belief that rejecting, refusing or objecting to the harassment would lead to disadvantage.

An argument in favour of the retention of the current test is that it is not unreasonable to require a complainant to show that they have suffered a disadvantage of some kind as a result of sexual harassment before the eligibility for a remedy under the Act is available. That is, it is only where the behaviour is serious enough that objection to it results in a disadvantage to the complainant that goes beyond offence and hurt, that the remedial provisions of the Act ought to be engaged.

An argument in favour of removing the current test is that it fails to acknowledge that sexual harassment itself causes real and often significant disadvantage to the person being harassed. As was observed by the EOC in the 2007 Review:[852]

> *Central to the definition of sexual harassment in the Act is the requirement that the person harassed prove he or she suffered a disadvantage as a result of taking objection to the harassment, or had a reasonable belief that taking objection would result in the disadvantage. This requirement fails to recognise that experiencing unwelcome sexual advances and behaviour is in itself a disadvantage, something that the former Western Australian Equal Opportunity Tribunal has previously observed.*
>
> *The current test for sexual harassment in the Act reflects a mentality from more than 25 years ago, when the push to eradicate sexual harassment in the workplace was still in its early days, and resistance to change was strong. Today, there would be few who would insist that a person must demonstrate disadvantage as a consequence of taking objection to being sexually harassed, when the real disadvantage was in the harassment itself. The SDA did away with this notion years ago and now so must the Act.*

If the current test were removed, the Commission would need to consider inserting another test which better achieves the purpose of the sexual harassment provision in the Act.

In the 2007 Review, the EOC recommended that the current definition in the Act be repealed and replaced with the definition in section 28A of the SDA, namely:

> *For the purposes of this Division, a person sexually harasses another person (the person harassed) if:*
>
> *(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
>
> *(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*
>
> *in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*

[852] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 5, 27 - 28.

This definition accords with the definitions in the NSW, South Australian, Tasmanian and Victorian Acts. On one view, the definition may be too wide in scope. Another view, however, is that the definition correctly shifts the focus from the experience or reasonable perceptions of the sexually harassed person to the actions and reasonable perceptions of the harasser. In doing so, the actions *themselves* are prevented under the Act, which could better serve the aim of the Act 'to eliminate, as far as is possible, sexual harassment'.

As stated in section 4.5.3 above, the Queensland Act adopts the above definition and adds an intention element. The relevant inquiry is thus whether the harasser engaged in the conduct 'with the intention of offending, humiliating or intimidating the person' or 'in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct'. This definition is wider in scope because, in effect, it creates an alternative circumstance in which sexual harassment may arise where the harasser intended to offend, humiliate or intimidate the harassed person. An argument could be made that this test goes beyond what is required to prevent sexual harassment in Western Australia. However, the purpose of the Act may be best achieved by reducing or eliminating intentional actions of harassers, regardless of their actual or potential impact on the harassed person.

The Commission seeks submissions regarding whether the definition of sexual harassment should be amended to remove the current test for disadvantage and, if so, whether there is a more suitable test that should be incorporated into the definition.

Another issue is whether sexual harassment should be prohibited from all areas of public life, as in the SDA and some other Australian jurisdictions, rather than being limited to employment, education, and accommodation under the Act. In the 2007 Review, the EOC recommended that the Act should be amended to make harassment unlawful in all areas.[853]

The Commission invites submissions in relation to whether the protections from sexual harassment should be extended to all areas under the Act and, if not, whether and why certain areas should remain untouched by the protections.

Questions

- *Should the definition of sexual harassment remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced?*
- *Should the protections from sexual harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?*

Another related issue that arises for the Commission to consider is whether the protections from sexual harassment should extend to prohibit members of Parliament from sexually harassing their staff, another member of Parliament or their staff, or other persons that carry out duties at Parliament House.

Currently, the Act requires that the sexual harassment must occur, relevantly, in an employment context. There is often no direct employment relationship between members of Parliament and staff, the Act does not apply to interactions between a member of Parliament and their staff, nor between a member of Parliament and other staff in Parliament House and, consequently, the elements of the sexual harassment provisions are very difficult to make out in those circumstances. As discussed in section 1.2 above, two

[853] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 5, 28.

bills have been introduced to amend the Act to extend the coverage of the Act to expressly include sexual harassment by members of Parliament, but the proposed amendments have not been enacted.[854]

In the Commonwealth Parliament, there have been allegations of widespread sexual harassment which precipitated an independent review by the AHRC.[855] Relevantly, the Australian Government has recently committed to clarifying that the scope of the SDA extends to judges and members of Parliament[856] and, in June, introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) which followed a private member's Bill in March to amend the SDA to provide a general prohibition on sexual harassment in any setting or circumstance.[857] If enacted, the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) will extend the operation of the SDA to Federal, State and Territory judicial officers and members of Parliament, State employees (including public servants), public authorities and administrative offices of a State, amongst other amendments.[858]

The key question for consideration is whether the Act should be amended to protect those employed to work or carry out duties at Parliament House in WA from being sexually harassed by members of Parliament.[859] An argument in favour of extending the prohibition against sexual harassment to members of Parliament is that there is currently the anomalous situation of Parliament passing laws and communicating a strong message that sexual harassment in the workplace is unacceptable while Parliament itself is not subject to those laws.

Against this position, there may be some objection to extending the laws on the basis that they could impact parliamentary privilege. Parliamentary privilege is an important principle, as it ensures that members of Parliament are not inhibited from raising issues, debating and legislating in the interests of people, principally, in parliamentary debates and proceedings. Therefore, there is an argument to be made any extension of the protections should not apply in relation to anything said or done by a member of Parliament in the course of Parliamentary proceedings. For instance, the recent South Australian reforms included section 97(6d) which provides that the prohibition against sexual harassment 'does not apply in relation to anything said or done by a member of Parliament in the course of parliamentary proceedings'.

Another argument against extending the laws may be that any complaints made under the laws would attract great public interest and media attention, which in turn could cause undue damage to the member of Parliament concerned and also the person harassed. This damage could be alleviated, possibly to a significant extent, if there is a special mechanism that deals with the complaints on a confidential basis.

Further, it could be argued that there is a more appropriate authority within Parliament that could deal with any complaints or be given the power to do so (for example, the speaker of the House or the Procedures and Privileges Committee). In South Australia, for example, complaints must be referred to the 'appropriate authority' (defined to include the Speaker of the House of Assembly or the President of the Legislative Council). If the appropriate authority is of the opinion that dealing with the complaint under the South Australian Act could impinge on parliamentary privilege, the appropriate authority is to give the Commissioner written notice of that and no further action can be taken under the Act. Conversely, if the appropriate authority gives the Commissioner written notice that a complaint will not be dealt with by the authority, the Commission may proceed to deal with the complaint under the Act and conduct an investigation.

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[854] Equal Opportunity Amendment Bill 2008 (WA); Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA).

[855] Australian Human Rights Commission, 'Independent Review into Commonwealth Parliamentary Workplaces' (Web Page, 5 March 2021) <https://humanrights.gov.au/CPWReview>.

[856] Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.

[857] Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill 2021 (Cth).

[858] See also the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) Report*, 6 August 2021 (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/RespectatWork/Report>.

[859] Tess Ingram, 'Why sexual harassment is not unlawful at work in WA unless the victims meet test', WA Today (online, 17 March 2021) < https://www.watoday.com.au/politics/western-australia/why-sexual-harassment-is-not-unlawful-at-work-in-wa-unless-the-victims-meet-test-20210309-p5793k.html>.

The Commission invites submissions on whether the sexual harassment prohibitions should be extended to members of Parliament and, if so, whether there should be any conditions on or exceptions to those protections (for example, to preserve parliamentary privilege or confidentiality). Without limiting the scope of submissions, they may detail whether there are other complaint mechanisms for victims of sexual harassment that are more appropriate than the Act.

Another issue that arises for the Commission to consider is whether the sexual harassment prohibitions should extend to judicial officers. In recent times, in addition to members of Parliament, judges have been accused of sexually harassing staff in their workplace. However, similar to the relationship between a member of Parliament and their staff, the existing protections under the Act may not extend to prevent a judicial officer from sexually harassing their staff, another judicial officer or their staff, or any other person who performs duties at the court of which the judicial officer is a member.

In relation to the proposed reform of the SDA, the national association for judges has stated there is 'no reason' to treat them differently from other members of the community.[860] Further, as noted earlier, the Australian Government has committed to clarifying that the scope of the SDA extends to judges[861] and recently introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) which would seek to apply to a 'State judicial office', including State magistrates and judges.

Again, an argument could be made that there is a more appropriate authority within each court that could deal with any complaints (for example, the Chief Justice).

The South Australian Act's recent reforms also extended to judicial officers. Section 87(6a) prohibits a judicial officer from subjecting to sexual harassment 'a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member'. The section does not apply, however, 'in relation to anything said or done by a judicial officer in court or in chambers in the exercise, or purported exercise, of judicial powers or functions or in the discharge, or purported discharge, of judicial duties (but conduct occurring in such circumstances may be the subject of a complaint under the *Judicial Conduct Commissioner Act 2015*)'.

The Commission invites submissions on whether the sexual harassment prohibitions should be extended to judicial officers and, if so, whether there should be any applicable conditions or exceptions. Without limiting the scope of submissions, they may detail whether there are other complaint mechanisms for victims of sexual harassment that are more appropriate.

Questions

- *Should the Act be amended to expressly prohibit members of Parliament from sexually harassing their staff or those who carry out duties at Parliament House?*
- *Should the Act be amended to expressly prohibit judicial officers from sexually harassing their staff or those who carry out duties at the court of which the judicial officer is a member? To what extent should the Act be amended in light of the amendments proposed by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth)?*

Unpaid or volunteer workers are protected from sexual harassment under the NSW and Victorian Acts (as unpaid or volunteer workers) and under the ACT, Queensland and South Australian Acts (as employees).

[860] Michael Pelly, 'About Time: judges welcome end to sex complaints exemption', *Australian Financial Review* (online, 8 April 2021) < https://www.afr.com/politics/about-time-judges-welcome-end-to-sex-complaints-exemption-20210408-p57hki>.

[861] Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.

They are also included within the scope of the recent Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth).

The Commission refers to its discussion below at 6.4.7 in relation to extending the definition of employee to unpaid or volunteer workers, and the arguments for and against that proposition therein.

In light of that discussion, the Commission would benefit from submissions as to whether there would be a sound policy rationale for not extending the sexual harassment protections to unpaid or volunteer workers, either by characterising those workers as employees or creating a separate prohibition.

Question

Should the Act be amended to expressly prohibit duty holders from sexually harassing unpaid or volunteer workers?

Racial harassment

As set out in section 3.4.3, under the Act, to establish racial harassment the harassed person must prove that they suffered disadvantage as a result of objecting to the relevant threat, abuse, insult or taunt, or that they had a reasonable belief that objecting to the relevant threat, abuse, insult or taunt would lead to disadvantage.

The criticisms that can be levelled at this test are similar to those in respect of the meaning of sexual harassment above (for example, it ignores the inherent disadvantage that results from the threat, abuse, insult or taunt).

As part of the 2007 Review, the EOC recommended that racial harassment under the Act adopt a similar test as was proposed for sexual harassment 'to remove the additional burden of a complainant having to show disadvantage going beyond the offensive conduct itself'. The EOC further recommended that racial harassment be unlawful in all areas available under the Act, rather than being limited to employment, education, and accommodation.[862]

The Commission seeks submissions regarding whether the definition of racial harassment should be amended to remove the current test for disadvantage and, if so, whether there is a more suitable test that should be incorporated into the definition.

The Commission also invites submissions in relation to whether the protections from racial harassment should be extended to all areas under the Act and, if not, whether and why certain areas should remain untouched by the protections.

Questions

Should the definition of racial harassment be amended to remove the requirement that it results, or the harassed person reasonably believes that it will result, in disadvantage and, if so, should a new requirement be introduced?

Should the protections from racial harassment be extended to all areas under the Act? If not, should certain areas remain untouched by the protections?

[862] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 5.

6.4.5 Impairment (including a requirement to make reasonable adjustments for persons with an impairment)

The Act does not currently impose any express positive duty to make reasonable adjustments for persons with impairments. By way of overview, the impairment Ground applies where the discriminator treats a person with an impairment less favourably than an unimpaired person in the same circumstances, or in circumstances that are not materially different. The Act does, however, permit impairment discrimination if a person with an impairment, in order to carry out work, will 'require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer, principal or person'.[863]

Prior to reform in 2009, the DDA contained similar wording to that of the Act, and there was contention as to whether it contained an implied obligation to make reasonable adjustments for persons with disabilities.[864] On this issue, McHugh and Kirby JJ in *Purvis v New South Wales* stated:[865]

> *It is not accurate, however, to say that [the section of the SDA] imposes an obligation to provide accommodation. No matter how important a particular accommodation may be for a disabled person or disabled persons generally, failure to provide it is not a breach of the Act per se. Rather, [the section] has the effect that a discriminator does not necessarily escape a finding of discrimination by asserting that the actual circumstances involved applied equally to those with or without disabilities. No doubt as a practical matter the discriminator may have to take steps to provide the accommodation to escape a finding of discrimination. But that is different from asserting that the Act imposes an obligation to provide accommodation for the disabled.*

In its review of the DDA for the purposes of the 2009 reform, the Australian Government Productivity Commission noted that the DDA appeared to only enforce a duty to make reasonable adjustments if a person were found to be in breach of the DDA and could not rely upon the 'unjustifiable hardship' defence.[866]

The question arises as to whether the current protection under the Act is sufficient. On one view, the Act provides sufficient protection as, picking up what was said in *Purvis v New South Wales*, as a practical matter the discriminator still needs to take steps to provide the accommodations or services (except where to do so would impose unjustifiable hardship). However, this reading of the relevant sections is arguably strained and may need to be amended or even strengthened by the express imposition of an obligation to provide accommodations or services.

The Commission invites submissions as to whether the current protections in the Act are sufficient and, if not, whether they should be amended or clarified.

Question

> *Does the Act protect against discrimination on the Ground of impairment where the discriminator does not make reasonable accommodation for the impairment? If not, should the current protections in the Act be amended or clarified?*

The Commission raises the prospect of amending the Act to accord with the definitions in the South Australian and Northern Territory Acts, or the DDA, or to impose a positive obligation on duty holders to make reasonable adjustments for persons with impairments like in the Victorian Act.[867]

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[863] *Equal Opportunity Act 1984* (WA), s 66Q(1).
[864] Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992* (April 2004), XL, 51-52, 186-189.
[865] (2003) 217 CLR 92, 127 [104].
[866] Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992* (April 2004), 187-189.
[867] See generally, 4.5.4 and 5.5.4 of this Discussion Paper.

The Commission has received preliminary submissions on whether a positive obligation or duty should be incorporated into the Act. The Council on the Ageing (WA) identifies that the creation of a duty to make reasonable adjustments is 'important for removing barriers to participation'; however, the approach to this duty must not be 'one size fits all' and appropriate consultation is required.[868] Overall, the Council is in favour of creating a statutory positive duty to make reasonable adjustments, particularly for persons with an impairment.[869]

The DDLS emphasises that the Act does not include 'a prohibition against the denial of reasonable adjustments'[870] and that reasonable adjustments are vital in addressing disability discrimination, but there is still relevance for these types of adjustments to cover other attributes. The particular example raised by the DDLS is for carers (who are most commonly women) to be able to access reasonable adjustments for their employment, which take into consideration their carer responsibilities.[871]

In case it assists stakeholders, the Commission notes the following arguments that were made in favour of introducing a positive obligation or duty in other jurisdictions.

In its review of the DDA, the Australian Government Productivity Commission noted that a positive duty to make reasonable adjustments for persons with disabilities would assist with 'creating more substantive equality between people with and without disabilities'[872] and place the responsibility on specific groups (i.e. employers, clubs, organisations etc.) to ensure they are facilitating substantive equality and being proactive in eliminating discrimination.[873] The Australian Government Productivity Commission further noted that a positive duty to make reasonable adjustments does not create an advantage for a person with a disability over another person without that disability, in contrast to an 'affirmative action' approach which is 'explicitly based on assigning preferences to one group at the expense of another'.[874]

In addition, prior to the revised Victorian Act, that Act only had an implied duty to make reasonable adjustments, similar to the approach under the Act. The Victorian Department of Justice reviewed the Act and concluded that a clear and explicitly defined positive duty for persons to make reasonable adjustments for another person with a disability should be added. They argued that the inclusion of a positive duty to make reasonable adjustments would 'provide clarity, and thereby greater certainty, about the obligations and entitlements of all parties.'[875]

In its submission to a review of the ACT Act by the ACT Law Reform Advisory Council, People with Disabilities ACT argued that a positive duty to make reasonable adjustments:[876]

> *recognises in most situations employers and service providers are in a more powerful position than a person with a disability and are better placed than the person with a disability to take the action which would turn a potential situation of discrimination into one of non-discrimination … [T]his would reduce discrimination and reduce the need for people with disabilities to make discrimination complaints.*

Each of ACT Disability, the ACT Disability, Aged and Carer Advocacy Service (**ADACAS**) and Council on the Ageing (ACT) recommended that there should be an explicit and clearer duty to make reasonable adjustments under the ACT Act. ADACAS' main reasoning behind the need to have an explicit duty was that people with a disability are often excluded from society, because of 'the failure of others to include them or make reasonable adjustments to cater for their needs'. Further to this, the ACT HRC argued that

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[868] Submission from the Council on the Ageing Western Australia, October 2020, 4.
[869] Ibid 4 - 5.
[870] Disability Discrimination Legal Service, *Submission to the Law Reform Commission of Western Australia - Review of the Equal Opportunity Act 1984 (WA)*, October 2020, 5.
[871] Ibid 6.
[872] Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, April 2004, 193-195.
[873] Ibid XL-XLII, 22, 185-231.
[874] Ibid 194.
[875] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008), 90-91.
[876] ACT Law Reform Advisory Council, *ACT Law Reform Advisory Council Inquiry into the Discrimination Act 1991 (ACT): Final Report* (March 2015) 36.

an explicit duty would 'bring greater certainty and clarity to this issue, and would harmonise ACT discrimination law with Commonwealth law.'[877]

In its review, the ACT Law Reform Advisory Council noted that a duty to make reasonable adjustments would assist Australia to meet its obligations under the CRPD, which includes provisions regarding the duty to make reasonable adjustments for their citizens.[878] In particular, the creation of an explicit duty could be designed to give effect to a more social model of disability, where the societal and environmental barriers that impair an individual with a disability are recognised and accommodated.[879]

The Commission seeks submissions as to whether a positive obligation or duty should be imposed on duty holders to make reasonable adjustments for persons with impairments, or other persons protected under the Act, and, if so, how that obligation or duty should be framed.

Questions

- *Should the Act include positive obligations to make reasonable adjustments for persons with impairment?*
- *Should any positive obligations be framed as stand-alone obligations or included within the discrimination definitions?*

The Commission notes that there is a trade-off between the need for the adjustment, and the expense or effort involved in affording the adjustment. That is why, if a positive obligation or duty is imposed to make adjustments for impairments, it may need to be 'reasonable'. Otherwise, the obligation or duty on employers and the like could be too onerous.

The Victorian Act sets out a number of relevant facts and circumstances to determine whether an adjustment is 'reasonable', including the employer's financial status, and the effect of making adjustments to the employer's workplace and business.

Under the DDA, reasonableness is linked to the "unjustifiable hardship' defence, which appears in the Act to some extent already. The facts and circumstances that must be taken into account under the DDA in determining whether the defence has been established are similar to the facts and circumstances listed in the Victorian Act in relation to whether adjustments are reasonable.

As regards 'unjustifiable hardship', in its review of the DDA, the Australian Government Productivity Commission stated:[880]

> *The unjustifiable hardship defence has the effect of capping the obligation to make adjustments so that the response is reasonably proportionate to the circumstances of the case. Thus, the benefits and detriments to all persons concerned must be considered, but even if this comes out favourably, a court could find that unjustifiable hardship existed because of the financial effects on the person who has to provide the adjustments.*

The Australian Government Productivity Commission also indicated that there are equivalent provisions to the 'unjustifiable hardship' defence in other parts of the world: in America, the *Disabilities Act 1990* includes an 'undue hardship' defence, which is 'an action requiring significant difficulty or expense'; in Canada, the *Employment Equity Act 1995* imposes a duty to make 'efforts to accommodate' a person with

[877] Ibid.

[878] *United Nations Convention on the Rights of Persons with Disabilities*, Arts 2, 5(3), 24, 27.

[879] ACT Law Reform Advisory Council, *ACT Law Reform Advisory Council Inquiry into the Discrimination Act 1991 (ACT): Final Report* (March 2015) 37, 58-59.

[880] Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992* (April 2004), 203.

a disability, 'up to the point where the person or organization attempting to provide accommodation would suffer undue hardship'.[881]

The Commission would benefit from submissions as to the matters that should be included in the Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'. These matters may include, but are not limited to, the matters set out in section 4.5.4 above.

The meaning of 'adjustment' may also need to be defined. The phrase 'reasonable adjustments' is derived from the definition of 'reasonable accommodation' in the CRPD.[882] In *Izzo v State of Victoria (Department of Education and Training)*,[883] the Federal Court held that the term 'adjustment' should be interpreted narrowly, and will only cover the actual 'reasonable adjustment' being implemented. The term 'reasonable adjustment' will not cover the planning for or other alternative ideas for making any such adjustment, and the duty will only cover the final arrangements for that adjustment.[884] For example, it was held that a 'Functional Behavioural Assessment' itself would not be included as a 'reasonable adjustment', as it was 'a tool of analysis that may recommend the making of certain adjustments'.[885]

The Commission would benefit from submissions as to whether the Act will need to define what constitutes 'adjustments' and their 'reasonable' scope, and whether an 'unjustifiable hardship' defence should also be incorporated and defined.

Questions

- *What matters should be included in the Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'?*
- *What parameters or definitions are required for the scope of any positive obligation or duty?*

6.4.6 Victimisation

Under section 67 of the Act, it is unlawful to subject, or threaten to subject, another person to any detriment on the ground that that person has been involved in, or proposes to be involved in, proceedings commenced under the Act, such as making a complaint, commencing proceedings, providing information or appearing as a witness. The protections against victimisation included in the Act are consistent with the other jurisdictions. Additional protections may be available to whistle-blowers under the *Corporations Act 2001* (Cth).

In the 2007 Review, the EOC recommended that a reference to section 67 should be inserted into section 5 of the Act, which provides that a reference in the Grounds to the doing of an act on the Ground of a particular matter includes a reference to the doing of an act on the ground of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act. The EOC reasoned:[886]

> *The effect of this section is that a person complaining of victimisation, as defined under the Act, must establish that the dominant or substantial reason for the doing of the act or acts was to victimise that person. The Commission accepts that acts of victimisation are usually*

[881] Ibid 204.

[882] *Munday v Commonwealth of Australia (No 2)* (2014) 320 ALR 98, 126 [146]; *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 257 [34] - [35].

[883] [2020] FCA 770, [18].

[884] *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770, [17] – [22].

[885] Ibid [50].

[886] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 35.

intended to cause disadvantage, whereas acts of discrimination can be unintentional, so it is a more serious claim to allege that one has been victimised. However, the seriousness of victimisation can be addressed through conciliation and, if required, the remedies available to the SAT under the Act. A complainant should not have to carry the burden of proving victimisation to a higher standard than discrimination.

The Commission seeks input into whether the victimisation protections of the Act require reform, including but not limited to whether the definition in section 5 of the Act should be amended as recommended by the EOC.

Question

Do the victimisation protections or related provisions in the Act require reform?

6.4.7 Services

As discussed at section 3.4.7 of this Discussion Paper, the High Court has held that, when a State government agency is bound to carry out statutory functions, or when the nature of the activity is coercive rather than beneficial, then the activity cannot generally be described as a 'service' under the Act.[887] This means that protections from discrimination under the Act do not extend to services of these types, even if there is clear evidence of discrimination.[888]

It was recommended as part of the 2007 Review that the definition of 'services' in the Act should be extended to include those regulatory and compliance functions of government.[889] The EOC further suggests, as part of its initial stakeholder submission to the Commission, that all activities of government agencies should be within the scope of services under the Act.[890]

The Commission would benefit from submissions as to whether the definition of 'services' should be expanded, and whether some activities of government agencies should not constitute a 'service' within the meaning of the Act. Noting, however, even if any change to the definition is made, discriminatory conduct will still remain subject to the exception for acts done under statutory authority (see further section 3.7.2 of this Discussion Paper).

Question

Should the definition of 'services' in the Act be extended to expressly include statutory functions that a State government agency is bound to carry out, or activities of a coercive nature?

Employment

Unpaid or volunteer work is not recognised as a type of employment in the Act. Consequently, unpaid or volunteer workers are not protected by the relevant Grounds in the area of work under the Act. By

[887] *High Court in IW v City of Perth* (1997) 146 ALR 696.
[888] Submission from the Equal Opportunity Commission, 20 November 2020, 4.
[889] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 37.
[890] Submission from the Equal Opportunity Commission, 20 November 2020, 4.

contrast, this type of work is recognised as a type of employment in the ACT, Queensland and South Australian Acts.

An argument in favour of extending the definition is that the relationship between unpaid or volunteer workers and the person in charge of them is, in substance, an employment relationship. Accordingly, the Act should protect the employee in that relationship, as it does in relation to all other employment relationships. The extension would also recognise that a person can experience discrimination or sexual harassment in the workplace, regardless of whether or not they receive a wage.

The EOC in its 2007 Review recommended that the definition of employment be amended to include unpaid and voluntary workers, and people doing work under an education, vocational or training arrangement. The EOC reasoned thus:[891]

> *The Commission receives complaints of discrimination and harassment from unpaid workers, volunteers and high school students, but cannot usually investigate such complaints because they do not come under the area of employment or the other areas of the Act which give the Commission jurisdiction.*
>
> *It is apparent to the Commission that the arrangement under which these people work for others is, in all important respects, the same as any employment relationship.*

In its preliminary submission to the Commission, the EOC again communicates its opinion that the definition of employment or work should be amended to include unpaid and voluntary workers.[892]

Against this position is the argument that the protections are afforded under the Act in acknowledgement of the power imbalance between an employer and their employee. By contrast, an employer may have less power or control over an unpaid volunteer worker, because the latter may be in the position to leave their work with little to no notice and would not suffer financial detriment as a result. However, the Commonwealth Parliament recently introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) which expands the protections against sexual harassment to include interns and volunteers to 'reflec[t] the evolving world of work'.[893]

The Commission seeks submissions in relation to whether the definition of employment in the Act should be extended to include unpaid and voluntary workers.

Notably, as has been identified at section 6.4.3 above, unpaid or volunteer workers are protected from sexual harassment under the NSW and Victorian Acts (as unpaid or volunteer workers). One option for the Commission to consider is whether, in the event the definition of employment is not extended, the sexual harassment provisions should extend to apply in relation to unpaid or volunteer workers. The Commission would also benefit from submissions on this issue.

Questions

- *Should the definition of employment in the Act be extended to include unpaid and voluntary workers?*
- *In the event the definition of employment in the Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?*

[891] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 36.

[892] Submission from the Equal Opportunity Commission, 20 November 2020, 4.

[893] Commonwealth Parliament, Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), 32.

6.5 Vilification

As set out in section 3.5 of this paper, the Act does not include any prohibitions in relation to vilification. However, racial harassment is prevented under the Act, and Western Australians may be protected against racial vilification under the RDA. Further, criminal sanctions apply in Western Australia against select instances of racial vilification.

All other States and Territories except the Northern Territory include vilification provisions in their anti-discrimination or anti-vilification legislation (such as the *Racial Vilification Act 1996* (SA) or the RRTA). It can be seen at section 4.6 above that the legislation protects against vilification on the basis of a number of attributes, including race, religion, disability, gender identity, HIV/AIDS status and intersex status.

The question arises as to whether the protections in Western Australia against vilification are adequate and, if not, whether the Act should be amended to include such protections.

It must first be observed that vilification can lead to violent activity with devastating consequences. In its report 'Inquiry into Anti-vilification protections' (the Victorian Report), the Victorian Legislative Assembly (Legal and Social Issues Committee) observed that 'vilification can lead to some of the most grievous forms of violence' and '[i]n light of the potential for the escalation of violent activity, however small that risk may be, it is imperative to focus on preventing hate speech and vilifying conduct before it occurs'.[894]

To an extent, the dangers of vilification have been recognised by the legislature by applying criminal sanctions in Western Australia in respect of racial vilification. Therefore, an argument could be made that there is sufficient protection in Western Australia against racial vilification because it is prohibited under the criminal law. However, because there are no civil sanctions in respect of racial vilification, this means that a person may vilify another based on race without sanction unless they are charged and convicted under the *Criminal Code Act 1913* (WA). The process of charging and convicting a person under criminal law is lengthy, and a much higher standard of proof must be met. In the result, this could mean that only people who engage in extreme cases of racial vilification are reprimanded for that conduct, leaving many others permitted to racially vilify with no consequences.

The Commission welcomes submissions detailing whether there is sufficient protection in Western Australia against racial vilification, either at criminal law or under other legislation.

In addition, as other States and Territories have recognised, vilification is not limited to racial grounds. It appears that neither the Act nor other Western Australian legislation protects against vilification on any other grounds. The Victorian Report considered the types of vilification that can occur, and noted that 'the most urgent areas of protection are people with disability, the LGBTIQ community and women'.[895] Ultimately, it was recommended that 'anti-vilification protections should be as inclusive as possible for women and gender diverse persons in order to provide adequate protection from harm for these groups', and anti-vilification provisions should cover the attributes of race and religion, gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDS status, and personal association.[896]

In the 2007 Review, the EOC recommended that 'vilification laws should be limited to those groups particularly vulnerable to the silencing and intimidating effects of vilification, being the groups who have a history of or currently are at risk of being vilified or victimised and therefore may be in need of specific protection, and that this form part of the definition of vilification in the Act'.[897] On the understanding that racial vilification was to be incorporated into the Act that year, the EOC recommended that a person should have redress for public acts of vilification on the ground of their sexual orientation, religion and impairment.[898]

[894] Parliament of Victoria, 'Inquiry into Anti-vilification Protections', (3 March 2021) 61.
[895] Ibid 54.
[896] Ibid 58.
[897] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 17.
[898] Ibid19 - 20.

The Commission has received submissions in favour of racial and religious vilification provisions,[899] as well as submissions in support of vilification laws on the grounds of impairment and sexual orientation.[900] It has been noted people who identify as transgender can be subject to severe abuse and vilification.[901] The Commission would benefit greatly from further submissions as to whether and why any anti-vilification provisions incorporated into the Act should be limited to certain types of vilification (such as racial vilification). Without limiting the scope of these submissions, it would be helpful to the Commission if they outline or illustrate particular instances of vilification that ostensibly did not give rise to any redress under the Act or any other legislation in Western Australia.

If vilification protections were introduced, the Commission would need to consider whether further protection would need to be incorporated into the Act (like the provisions in the ACT, NSW, Queensland and Tasmanian Acts) or whether further protection would be best afforded under anti-vilification legislation (like in South Australia and Victoria).

It may be that separate legislation will give rise to inconsistencies and the power of the EOC may be limited under other legislation. Similar issues arose in relation to the RRTA. As noted in the Victorian Report, the RRTA had been underutilised since it was enacted and had 'failed to deliver on its purpose of promoting racial and religious tolerance due to limited legal effectiveness, and issues regarding accessibility and enforcement'. In brief, the principal barriers were that there was a greater burden on individuals to enforce the law because the VEOHRC had fewer powers in regulating vilification matters, and incidents arising from the same factual matrix had to be reported under both the Victorian Act and the RRTA. Therefore, it was recommended that the anti-vilification provisions be moved to the Victorian Act for the sake of clarity and consistency, and to give the VEOHRC greater powers in regulating vilification matters so as to remove the greater burden on individuals to enforce the law.[902]

The Commission seeks submissions on whether there is any reason further protection should be afforded under anti-vilification legislation rather than under the Act, or vice versa.

Questions

- *Should anti-vilification provisions be included in the Act?*
- *If anti-vilification provisions are included in the Act, should they cover only racial vilification or extend to other types of vilification?*

The Commission notes two issues that may arise in relation to the introduction of anti-vilification provisions in the Act.

First, some submissions may make the point that anti-vilification provisions may impact on other rights or exemptions afforded under the Act. For example, if such provisions extended to protect vilification against gender identity and sexual orientation, arguably, that has the capacity to interfere with the exemptions in the Act relating to religious opinions and beliefs. In the 2007 Review, the EOC expressed the view that these exemptions are not absolute and must be balanced with the objectives of the Act:[903]

> *There is clearly a strong body of opinion among certain religious bodies and groups that is opposed to any limitation of the rights of persons holding religious beliefs to express views about persons holding different religious beliefs, even if the objects of those opinions feel*

[899] Submission from the Office of Multicultural Interests, November 2020.
[900] Submission from the Equal Opportunity Commission, 20 November 2020, 8.
[901] Submission from the Ethnic Communities Council of WA, 4 December 2020, 2.
[902] Parliament of Victoria, 'Inquiry into Anti-vilification Protections', (3 March 2021) 129, 134.
[903] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 18.

themselves to be vilified. The unique position of exemptions to protect the religious beliefs and practices of persons and groups established to promote religion is a policy position in all anti-discrimination law but is not absolute, and these principles must be balanced with the objectives of the Act in promoting equality of opportunity and community cohesion.

In the EOC's view, 'vilification stands out as a uniquely harmful activity, and the [EOC] considers that it and discrimination or harassment or exemptions for religious bodies should not be conflated'.[904]

The Commission invites submissions as to whether the introduction of anti-vilification provisions could impact on other rights or exemptions under the Act and, if so, whether that impact is or is not justified by reference to the objectives of the Act.

Second, submissions may suggest that anti-vilification provisions would impede freedom of speech. Typically, freedom of speech is the most common argument against the introduction of vilification provisions, and this is reflected in the preliminary submissions received by the Commission to date. In the Victorian Report, it was noted that during the debate on the Bill for the RRTA, 'there was significant discussion around the appropriate balancing of rights with regard to freedom of speech and freedom from vilification'.[905]

Australia does not have explicit freedom of speech laws, although there is an implied freedom of political communication derived from the Australian Constitution[906] and which also can be derived from the *Constitution Act 1889* (WA).[907] Although the subject of some division across the High Court, this may mean that insults[908] and even offensive communications[909] can in some cases be compatible with the constitutional freedom. As a comparison, in the USA, free speech is enshrined within the First Amendment to its Constitution. Although not all speech is protected by the First Amendment, it has been interpreted so broadly that there is only a narrow scope for vilification provisions to be enacted. Examples of speech that is not protected in America includes speech that incites imminent lawless action (that is speech that incites violence)[910] as well as speech that will incite actions that will harm others.[911] These protections have been recently widely discussed in the context of the impeachment trial of former President Donald Trump in relation to allegations of his incitement of an insurrection at the US Capitol in January 2021.

There has been concern that anti-vilification provisions have been used in other jurisdictions for political purposes to target unpopular ideas.[912] One preliminary submission proposes that it would be possible to consider inclusions to any definition of 'vilify' to extend beyond offending feelings, in line with the definition of vilify proposed in the Second Exposure Draft of the Religious Discrimination Bill 2019 (Cth), which provides that 'vilify, in relation to a person or group of persons, means incite hatred or violence towards the person or group'.[913] Another preliminary submission, strongly in support of the inclusion of vilification provisions, says that it is 'long past' time for vilification laws to be introduced, and that 'there is no free speech issue, because vilification is a danger to society as a whole'.[914]

Further, as was noted in section 5.5 above in relation to the RDA, the Parliamentary Joint Committee on Human Rights found that the case law demonstrated that the relevant section provided limited but important protections against vilification, and that the conduct had to be more than merely offensive or insulting.

[904] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 19.
[905] Parliament of Victoria, 'Inquiry into Anti-vilification Protections', (3 March 2021) 13.
[906] *McCloy v New South Wales* (2015) 257 CLR 178.
[907] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
[908] *Coleman v Power* (2004) 220 CLR 1.
[909] *Monis v The Queen* (2013) 249 CLR 92.
[910] *Brandenburg v Ohio* (1969) 395 US 444.
[911] *Schenck v United States* (1919) 249 US 47.
[912] Submission from the Human Rights Law Alliance, 30 November 2020, 2.
[913] Submission from Christian Schools Australia, 4 November 2020, 8.
[914] Submission from UnionsWA, 19 November 2020, 3.

There may be an argument to be made that some limitations on freedom of speech may be justified in order to protect individuals, particularly in the context of vilification which can give rise to violent acts. In other jurisdictions, a number of exceptions have been introduced into the relevant law to balance freedom from vilification with freedom of speech. For example, under the ACT Act, an act that would otherwise be unlawful vilification is exempt if it is done 'reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes and in the public interest, including discussion or debate about and presentations of any matter'. Similar exemptions are found in the NSW, Queensland and Tasmanian Acts.

The Commission seeks submissions as to whether the introduction of anti-vilification provisions could impact any perceived right to freedom of speech and, if so, whether there are any exceptions that could be incorporated into the Act to alleviate that impact.

Questions

- Should or how may vilification provisions address concerns about the impact on other rights and exemptions under the Act?
- Should or how may vilification provisions address concerns around the loss of freedom of speech?

Concerns may arise as to the accessibility of vilification laws, and reporting vilification, under the Act. By way of example, the Commission has received a preliminary submission that reporting vilification may be too daunting for complainants if it has to be made to the Police or the AHRC.[915]

Relevantly, the Victorian Report found that vilification had been under-reported under the RRTA to the VEOHRC, VCAT and Victoria Police. This was for a number of reasons, including due to a lack of awareness of legislative provisions and the availability of culturally-appropriate support services to assist individuals to make a complaint.[916] In addition, it was observed that there is a great onus on individuals because the complaint process requires the vilified individual to have the resources, knowledge and time to be able to enforce their rights.[917] Accordingly, it was recommended that the Victorian Government fund services to provide support to impacted communities who experience vilification, including providing counselling and legal information and assistance to navigate the system for reporting vilification. In addition, it was recommended that the Victorian Government enable a representative complaint to be made to the VEOHRC without the need to name an individual complainant, and implement third party (community-led) reporting mechanisms.[918]

If vilification provisions were incorporated into the Act, complaints would be made to the EOC. To ensure that the anti-vilification provisions are utilised, and the same problems are not faced as under the RRTA, the Equal Opportunity Commissioner may need to educate the community and provide resources to assist persons in bringing vilification claims. This would reduce the burden on individuals in making complaints under the Act. Notably, the Commissioner has wide powers under the Act to do so. Specifically, under section 80 of the Act, the Commissioner has the power to 'carry out investigations, research and inquiries relating to discrimination or sexual or racial harassment of the kinds rendered unlawful under this Act', 'acquire and disseminate knowledge' on various matters pertaining to the objects of the Act, and 'consult with governmental, business, industrial and community groups in order to ascertain means of improving services and conditions affecting a person or persons' who are subject to discrimination under the Act.

[915] Submission from the Ethnic Communities Council of WA, 4 December 2020, 2.
[916] Parliament of Victoria, 'Inquiry into Anti-vilification Protections' (3 March 2021) 187.
[917] Ibid 105.
[918] Ibid xxvii.

The Commission would benefit from submissions as to whether there may be any issues relating to the accessibility of vilification laws, or reporting vilification, under the Act. These submissions may include a different model for reporting vilification as compared to reporting discrimination under the Act.

Questions

- *Would there be any issues in accessing vilification law and reporting vilification under the Act?*
- *Would a different model for reporting vilification assist in protections?*

6.6 Positive duty

As explained in sections 3.6 and 4.7, Victoria is the only jurisdiction which imposes a positive duty on duty holders to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation, as far as possible.

Further, in its report 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces', the AHRC has recommended that a positive duty be introduced into the SDA, requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. It was recommended that the SDA should prescribe the factors that should be considered in determining whether the duty has been fulfilled, including but not limited to the size of the person's business or operations; the nature and circumstances of the person's business or operations; the person's resources; the person's business and operational priorities; the practicability and the cost of the measures; and all other relevant facts and circumstances.[919] The Australian Government has not yet committed to amending the SDA on the basis that model work health and safety laws already include such a duty, which could cause confusion for victims and employers.[920]

The issue arises as to whether the Act should include a positive duty.

There are several perceived benefits of a positive duty to eliminate discrimination.

First, it is suggested that the introduction of a positive duty would encourage compliance with the law even in the absence of a complaint.[921] This is because, with the implementation of a positive duty, the focus would be on the creation of institutional mechanisms for eliminating discrimination and therefore, there will be less of a need to prove a breach of the law or name a perpetrator.[922] In the same vein, the Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic) relevantly stated:[923]

> *The duty is aimed at overcoming the limitations of a complaints-based system in addressing entrenched and systemic discrimination. A complaints-based system only makes an assessment of whether there has been compliance with the Bill after a complaint has been lodged. This means that if no complaints are lodged, compliance is taken for granted (often erroneously). The complaints-based system places the burden on the individual to complain and not on the organisation to comply.*
>
> *The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. …*

[919] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (29 January 2020) 44.
[920] Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.
[921] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) 39.
[922] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed. 2011) 299 - 302.
[923] Explanatory Memorandum, Equal Opportunity Amendment Bill 2010 (Vic) 16-17.

Second, the implementation of a positive duty would allow the EOC to step away from merely having a reactive function, allowing it to address systemic discrimination more actively and effectively.[924] Again in the same vein, the Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic) stated:[925]

> *It is intended that, by stating the existing obligations in a positive and explicit way that does not rely on an individual dispute being brought, this duty will promote proactive compliance with the Bill and provide the Commission with a platform to facilitate compliance in the absence of a dispute.*

Third, Professor Fredman writes that a positive duty allows change to be systemic. The institutional and structural causes of inequality could be diagnosed and addressed collectively, instead of on an ad hoc basis in response to individual complaints.[926]

Fourth, it can be very difficult for a complainant to make out the grounds of a discrimination claim. An example of this is people requiring wheelchair accessible taxis experience greater levels of delay in dispatch than other taxi users. It would be difficult to show that a series of late taxis is grounds for a discrimination claim. In that example, the problems are deeply rooted in systems that have not taken active steps to make accommodations for needs.[927]

Evidence shows that as a result of the difficulty in making out a claim, although people may be treated less favourably, few individual complaints are received. For example, although one in five workers reported experiencing sexual harassment in the 2018 AHRC survey, only 17% of them made a formal report and only 1% made a legal complaint.[928]

Fifth, there is a concern that the resolution of an individual complaint by making reparation to the complainant may be seen by a respondent as a cost of doing business and not as a catalyst to change the discriminatory business practice.

Finally, the introduction of a positive duty may work to distribute the responsibility for ensuring or enforcing compliance more evenly.[929] Currently, under the Act, the responsibility lies with complainants to report discrimination. By introducing a positive duty, the responsibility would lie with policy makers, service providers, employers and others, thereby relieving individual victims of the burden and expense of litigation.[930]

Preliminary submissions received by initial stakeholders support the inclusion of a positive duty.[931] In particular, the EOC has confirmed its support for the inclusion of such a duty, and in doing so gave consideration to the context in Victoria and the United Kingdom.

UnionsWA consider that the Act would benefit from having a positive objective to promote the achievement of substantive equality.[932] They state that this should amount to an explicit obligation for employers to take reasonable and appropriate measures, and that a simple declaration is not enough in the absence of evidence of active steps.[933]

Circle Green Community Legal is also supportive of the inclusion of a positive duty in the Act, noting that its inclusion would bring the Act in line with the Victorian Act and would encourage proactive compliance and best practice.[934]

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[924] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) 40-41.
[925] Explanatory Memorandum, Equal Opportunity Amendment Bill 2010 (Vic) 16-17.
[926] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed. 2011) 299 - 302.
[927] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) 39.
[928] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*, 2018, AHRC, Sydney, 67, 69.
[929] State of Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (June 2008) 41.
[930] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed. 2011) 299 - 302.
[931] Submission from the Equal Opportunity Commission, 20 November 2020, 8.
[932] Submission from UnionsWA, 19 November 2020, 3.
[933] Submission from UnionsWA, 19 November 2020, 3.
[934] Submission from Circle Green Community Legal, 20 November 2020, 4.

The Workplace Gender Equality Agency (WGEA) further supports the inclusion of a positive duty not to discriminate, noting that positive duties are often referred to as 'preventative' and they 'attempt to achieve equality by requiring conduct'[935] which can act as a supplement to anti-discrimination law that may be more reactive to situations of inequality.[936] The WGEA submits that structural discrimination extends beyond individual acts of prejudice and calls for positive duties which promote equality among groups.[937] A focus on positive duties encourages the responsibility for challenging norms from the individual to the institution.[938]

The DDLS is also supportive of the inclusion of a positive duty not to discriminate and states that such a duty is particularly important as it encourages public and private actors to take meaningful positive action to eliminate discrimination.[939]

The Commission invites submissions on whether a positive duty should be incorporated into the Act.

One implication of the positive duty is that duty holders need to be more proactive in relation to their compliance with the Act. This may cause greater expense and increased management time for duty holders. If the legislation lacks specificity surrounding its application, it risks overburdening and negatively affecting duty holders, particularly smaller organisations.

In order to mitigate any potential practical difficulties, it would be important to ensure that the Act clearly and thoroughly stipulates both the content of the duty and when it arises.

This was exemplified in the United Kingdom. A positive duty was first introduced in the *Race Relations Act 1976* (UK).[940] However, due to its vague expression and the notable lack of enforcement measures, the duty was proven to be ineffective.[941] Subsequently, to address these issues, the UK Act introduced a strengthened positive duty for public authorities, which is supplemented by specific duties detailing how those authorities should perform their obligations.[942]

The Victorian Act has taken a similar approach by specifying factors that must be considered in determining whether a measure taken to eliminate discrimination is reasonable and proportionate (as summarised in section 4.7 of this Discussion Paper). The Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic) relevantly stated:[943]

> *The duty is to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The words 'as far as possible', combined with the assessment of whether measures are reasonable and proportionate, will ensure that compliance with the duty is appropriate and proportionate to the size and operations of the duty holder. Subclause (6) sets out specific considerations that are relevant in assessing whether a measure is reasonable and proportionate.*

The Commission would benefit from submissions as to whether a positive duty should be limited and, if so, whether that limitation would be best formulated as a duty to take 'reasonable and proportionate' measures. The Commission invites submissions on whether there would be a more preferable formulation that limits the duty. In addition, the Commission seeks submissions as to whether this duty should not apply in respect of any Grounds or prohibitions under the Act.

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[935] Submission from WGEA, 3 December 2020, 2, quoting S Rice, 'And Which 'Equality Act' Would that Be?', in Thornton, M (ed), *Sex Discrimination in Uncertain Times,* (2010, ANU E-Press) 197-234.

[936] Submission from WGEA, 3 December 2020, 2.

[937] Submission from WGEA, 3 December 2020, 2 quoting Fredman, S (2008), *Human Rights Transformed: Positive Rights and Positive Duties,* Oxford: Oxford University Press.

[938] Submission from WGEA, 3 December 2020, 3; quoting C O'Cinneide, 'Positive duties and gender equality' (2005) 8(1-2) *International Journal of Discrimination and the Law* 91-119.

[939] Submission from the Disability Discrimination Legal Service, 29 October 2020, 9.

[940] Section 71 of the *Race Relations Act 1976* (UK) imposed a duty on local authorities to 'make appropriate arrangements with a view to securing their various functions are carried out with due regard to the need a) to eliminate unlawful racial discrimination; and b) to promote equality of opportunity and good relations, between persons of different racial groups'.

[941] W Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (1999).

[942] Neil Rees et al, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 4.26.

[943] Explanatory Memorandum, Equal Opportunity Amendment Bill 2010 (Vic) 16-17.

If a positive duty were imposed, the question will arise as to how the duty will be enforced.

The enforcement structure of the duty to eliminate discrimination in the Victorian Act has been criticised as being weak by some commentators.[944] This criticism is on the basis that the consequences of contravention of the positive duty are limited to an investigation by the VEOHRC. Further, an individual cannot lodge a complaint about a breach, rather the VEOHRC must initiate an investigation into potential breaches.[945] Thus, the effectiveness of the duty is contingent on the threat of the VEOHRC making an inquiry. As the VEOHRC has only exercised this function once in nine years, to investigate mental health discrimination in travel insurance,[946] this threat may be perceived as low.

The decision in *Collins v Smith*[947] confirmed the limited ability for the judiciary to enforce the positive duty to eliminate sexual harassment and victimisation under section 15 of the Victorian Act. Although it was agreed that the respondent was subject to the positive duty in section 15 of the Victorian Act, the VCAT confirmed that it lacked the jurisdiction to hear applications for the contravention of section 15.[948] Section 15 would not apply when there was a more specific prohibition on the conduct itself provided elsewhere in the Victorian Act.[949] Ultimately, it was held that the complaints brought by the applicant in contravention of sections 92 and 93 for sexual harassment and victimisation were proven, but the complaint as it related to the positive duty in section 15 was dismissed for being misconceived.

The decision therefore confirmed that the positive duty is effectively unenforceable, which as the DDLS observes in its preliminary submission, severely limits its practical effectiveness.[950]

In light of those factors, there has been minimal substantive judicial consideration of the positive duty since its introduction in Victoria. Any consideration that has arisen has overwhelmingly been supplementary to alleged discriminatory acts, rather than a standalone attempt at enforcement of the positive duty itself.[951]

Additionally, it is apparent that when alleged discrimination is not proven on the evidence, there will not be a failure to eliminate discrimination under the positive duty. In *Eroglu v The Royal Dental Hospital of Melbourne*[952], because the claim of discrimination was dismissed, the judge reasoned that there could be no claim of a failure to eliminate discrimination.[953]

There is therefore no clear indication that the introduction of the positive duty in Victoria has increased complaints. In the two years prior to the introduction of the positive duty, 2009/2010 and 2010/2011, the relevant commission lodged 900 and 1000 complaints respectively, under both the Victorian Act and RRTA. Those complaint numbers are consistent with recent years. In the Victorian Report it was recommended that a positive duty for duty holders to prevent vilification be included in the RRTA.[954] The Legislative Assembly Legal and Social Services Issues Committee referred to submissions which detailed examples of the successful implementation of a positive duty in the Victorian Act, such as the positive impact it has had on the Australian Women's Football League.[955]

The EOC's preliminary submission to this Commission draws on the 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces' report which recommended that the AHRC be given the

[944] Dominique Allen, 'Victoria Paves the Way to Eliminating Discrimination' (2010) 23 *Australian Journal of Labour Law* 318.

[945] Ibid 323.

[946] Victorian Equal Opportunity and Human Rights Commission, *Victorian Equal Opportunity and Human Rights Commission Annual Report 2018/2019* (Annual Report, October 2019) 28.

[947] *Collins v Smith* [2015] VCAT 1029.

[948] Ibid [46].

[949] Ibid [47(b)].

[950] Submission from the Disability Discrimination Legal Service, 29 October 2020, 9.

[951] *Rigioni v Carnival PLC (Human Rights)* [2019] VCAT 995; *Eroglu v The Royal Dental Hospital of Melbourne (HR)* [2018] VCAT 1082; *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507.

[952] [2018] VCAT 1082.

[953] *Eroglu v The Royal Dental Hospital of Melbourne (HR)* [2018] VCAT 1082, [90].

[954] Parliament of Victoria, 'Inquiry into Anti-vilification Protections' (3 March 2021), 142. <https://www.parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_AntiVilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf>

[955] Parliament of Victoria, 'Inquiry into Anti-vilification Protections' (3 March 2021), 143. <https://www.parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_AntiVilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf>

function of assessing compliance with the positive duty, as well as enforcement.[956] The EOC submits that notwithstanding this recommendation was made in relation to the AHRC, and specifically in relation to sexual harassment, it is equally relevant for State discrimination bodies and other grounds of discrimination.[957]

The DDLS's preliminary submission notes that while the Victorian Act includes a positive duty, it cannot be enforced, which has a significant impact on its effectiveness.[958] The DDLS states that a discrimination framework can only truly claim to be protective, preventative and prophylactic if a positive duty can be enforced.[959] Without this, they state that the system is simply focused on compensation and redress, and any positive change to the community is a secondary by-product.[960] Its submission refers to the UK Act which contains a positive equality duty that applies to all public sector organisations[961] and all grounds covered by the UK Act,[962] and submits that, in contrast to the Victorian Act, the UK Equality and Human Rights Commission (**EHRC**) is actively involved in monitoring and regulating compliance.[963] The UK Act recognises that public authorities might need to treat some people more favourably in order to achieve substantive equality as opposed to formal equality.[964] Further, under the UK Act, public authorities are required to annually publish information in relation to their compliance with this duty. The EHRC can then investigate an authority and issue a compliance notice.

The Commission seeks submissions on whether individual complainants should have the ability to make a complaint for a breach of the positive duty, or whether any breach may only be investigated at the initiative of the EOC. The Commission also invites submissions on whether the SAT should have jurisdiction in relation to breaches of the duty. An argument in favour of permitting individuals to complain of breaches of the duty, and granting the SAT jurisdiction in respect of breaches, is that the positive duty would have practical effectiveness. Therefore, unlike in Victoria, the Act would encourage proactive compliance with the duty and ultimately lead to a reduction in discrimination.

The Commission also invites submissions as to whether, like in the UK, duty holders should be required to publish information in relation to their compliance with the duty. On one view, this would ensure duty holders are proactive in making necessary change. On another view, such a requirement would be unduly onerous and unnecessary if enforcement practices and procedures work effectively.

Questions

- *Should a positive duty to eliminate discrimination, other than the requirement to make reasonable adjustments, be included in the Act?*
- *If a positive duty is included, what measures must be fulfilled by duty holders that are reasonable and proportionate?*
- *If a positive duty is included, should it apply in respect of all Grounds and prohibitions and, if not, what Grounds or prohibitions should be exempt?*

[956] Australian Human Rights Commission, *'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces'* (2020), 44.
[957] Submission from the Equal Opportunity Commission, 20 November 2020, 9.
[958] Submission from the Disability Discrimination Legal Service, 29 October 2020, 9.
[959] Ibid.
[960] Ibid.
[961] *Equality Act 2010* (UK), c.15, s 149.
[962] Ibid.
[963] Equality and Human Rights Commission, '*Public Sector Equality Duty*', (Website, 20 April 2020) <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty#:~:text=The%20equality%20duty,-The%20equality%20duty&text=Eliminate%20unlawful%20discrimination%2C%20harassment%20and,and%20those%20who%20do%20not>
[964] *Equality Act 2010* (UK), c.15, s 149(6).

Questions

- *Should an individual complainant have the ability to make a complaint for breach of the positive duty by a duty holder, or should powers be limited to investigation at the initiative of the EOC?*
- *Should the SAT have the power to hear an application for breach of the positive duty by a duty holder, or should powers be limited to investigation and recommendations by the EOC?*
- *Should duty holders be required to publish information in relation to their compliance with this duty and, if so, which duty holders?*

6.7 Exceptions

Acts done under statutory authority

Section 69 of the Act provides an exception for acts done under statutory authority. If any person does an act that is necessary to comply with the requirement of an order of the SAT or a court, the act will not be found to be unlawful.

The exception contained in section 69 of the Act came into force over 25 years ago. It has subsequently been amended and narrowed in scope. In its current form, the exception is more limited than the equivalent exceptions in other Australian anti-discrimination legislation.

The exception in section 69 is arguably already more aligned with the Terms of Reference than its comparators in other jurisdictions, given its limited scope and operation. In this regard, it may be considered 'best practice', at least within Australia, in the sense that it has the least scope to permit discriminatory behaviour by placing narrow limits on the exception.

It is also important to note that courts and the SAT are bound not to make an order which would contravene the Act because they are required to apply all relevant laws, including anti-discrimination legislation.

Further, section 66ZS of the Act provides that it is not unlawful to discriminate on the Ground of age if a person must comply with a statute in force at the time the legislation came into operation. On this basis, under the Act, acts which are done to comply with the relevant laws are excluded from a discrimination assessment on the Ground of age.

The Commission welcomes submissions as to whether the exceptions in sections 66ZS and 69 should be amended and, if so, how.

Questions

- *Should the exception contained in section 69 (exception for acts done under statutory authority) of the Act be amended, and if so, how?*
- *Should the exception contained in section 66ZS (exception for acts done under statutory authority) of the Act be amended, and if so, how?*

Charities

The Commission has received three preliminary submissions about the scope of the charities exception.

One organisation supports the retention of the exception in its current form, on the basis that some charities could not continue to exist without the capacity to prioritise or give preference to a specific class of persons.

Another organisation also supports the retention of the exception but suggests that it be amended only to allow discrimination on specific grounds required to meet the charity's stated purpose. The organisation also submits that removing the exception would mean charities were unable to ensure that funding and resources were directed towards the special class of persons which they aspire to support.

The third preliminary submission expresses concern in relation to the interaction of the exception and the increasing trend for governments to outsource the provision of 'human care services' to charitable organisations. The author suggests that the charities exception limits the protection workers in and consumers of these 'human care services' (such as housing services and drug and alcohol care services) have from discrimination by these charities. Therefore, there may be utility in providing that the charities exception does not apply where the charity is acting as agent for a State or Commonwealth government in the provision of services for the ultimate benefit of all the community.

The Act currently does not define 'charitable benefits' or 'charity'. A question for the Commission is whether the Act should adopt statutory definitions similar to that in the Commonwealth laws. As is noted in section 5.8 above, the charities exception was amended across all applicable pieces of Commonwealth legislation in 2013 to modernise and provide greater clarity and certainty to the meaning of 'charity' and 'charitable purpose'. In particular, 'charity' and 'charitable purpose' have been given their respective meanings in the *Charities Act 2013* (Cth). In summary, under that Act, 'charity' means an entity 'that is a not-for-profit entity'; 'all of the purposes of which are charitable purposes' or 'purposes that are incidental or ancillary to' charitable purposes; 'none of the purposes of which are disqualifying purposes'; and 'that is not an individual, a political party or a government entity'. 'Charitable purposes' is further defined to mean a range of purposes, including to advance religion, culture, health and education. It may be desirable to incorporate these definitions into the Act to ensure that a uniform approach is adopted across jurisdictions.

Alternatively, it may be desirable to define 'charity' or 'charitable benefits' in accordance with other Western Australian legislative regimes. For example, the *Charitable Collections Act 1946* (WA) defines 'charitable purpose' to mean, among other things, 'the affording of relief to diseased, sick, infirm, incurable, poor, destitute, helpless or unemployed persons'. The Commission notes that section 150 of the NZ Act, which is similar in operation to section 70 of the Act, provides a statutory definition of 'charitable purpose'.

There is no material known to the Commission to suggest that the charities exception contained in section 70 of the Act (including the lack of a definition of 'charitable benefits') has caused any difficulties or been the source of controversy in Western Australia. Given the lack of contention in relation to this exception, the charities exception provision may not need amendment. The Commission invites submissions in relation to any opposing views in relation to the scope of the charities exception, particularly in regard to whether Western Australia should define 'charitable benefits' within the Act to provide consistency and bring the Act in line with the Commonwealth anti-discrimination legislation or other Western Australian legislative regimes.

Questions

- *Should the scope of the exception contained in section 70 of the Act (exception for charities) be amended, and if so, how?*
- *Should a statutory definition of 'charity' be inserted into the Act, and if so, how should 'charity' be defined?*

Voluntary bodies

The Act is one of only three Australian jurisdictions to provide an exception to discrimination by voluntary bodies. This invites the question of whether such an exception is necessary or justified as a matter of public policy.

The Commission received two preliminary submissions which specifically address the 'voluntary bodies' exception. The Commission did not receive any submissions suggesting that the voluntary bodies exception in section 71 of the Act should be removed.

The first preliminary submission was from the Jewish Community Council of Western Australia (Inc), which supports the retention of the exception, with no amendments, on the basis that it is necessary for voluntary bodies to be able to give preference to members of the Jewish community in services they provide, as such services are vital for the social cohesion and cultural identity of the Jewish community.

The second preliminary submission was from the Ministerial Youth Advisory Council, which suggests that the exception should be amended to only allow voluntary bodies to discriminate in connection with the admission of persons as members of the body on the basis of a Ground which is a core principle of the voluntary body. By way of example, an ethnic community organisation should be permitted to discriminate on the basis of ethnicity, but not on any other Grounds. The Ministerial Youth Advisory Council also suggests that voluntary bodies should be required to demonstrate the need for the exception and its relevance to the body's core purpose. There is a further argument that if a voluntary body receives government funds or financial benefits such as exemptions from full taxes, charges or rates, such bodies should, as a matter of public policy, comply with the generally accepted standards such as non-discrimination. In light of this, it has been recommended that the NSW Act specifically prohibit discrimination in relation to membership and access to benefits by all incorporated associations whose membership is open to the public or to a section of the public.[965] The Commission will need to consider whether the exception in the Act should be so limited.

There are certain sporting associations in Western Australia whose membership is limited to one gender to which the exception can be applied if those associations are 'voluntary bodies' within the meaning of section 4 of the Act. The Commission would benefit from submissions as to whether the voluntary bodies exception should allow gender discrimination in sporting associations, or whether the exception should be further narrowed in some way.

The Commission would benefit from submissions as to whether the exception for voluntary bodies should be amended and, if so, how. The Commission especially welcomes submissions as to whether the Ministerial Youth Advisory Council's suggestion that the exception, where it applies, should be limited to the discrimination on a Ground which is associated with the core business of the voluntary body.

Question

Should the scope of the exception contained in section 71 of the Act (exception for voluntary bodies) be amended, and if so, how?

Religious bodies

Prior reviews and proposed reform in relation to religious exceptions

In the 2007 Review, the EOC recommended that a number of exceptions in the Act be amended. The EOC noted that the greatest number of submissions came from persons concerned with the maintenance of the religious exceptions, finding that: 'there is clearly a strong body of opinion among certain religious

[965] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (n 129) cl 6.88.

bodies and groups that is opposed to any change in the religious exemptions and exceptions, which must be balanced with the objectives of the Act in promoting equality of opportunity and community cohesion'.[966]

A number of submissions received at the time of the 2007 Review strongly objected to the continued practice of religious discrimination against employees, particularly where the employees were not engaged in the teaching of religion. Several submissions suggested that the exception in section 73 of the Act should only apply where the employee's duties are primarily religious education, training or instruction. It was also suggested that the necessity of that exception be reviewed within five years, since it was asserted that there was no longer public support for such 'broad ranging exemptions for religious bodies'.[967] The EOC received complaints about religious educational institutions from employees (and applicants for employment) in which they claimed they had been refused employment on a range of grounds, particularly because of their marital status or religious conviction.[968]

The recommendations from the 2007 Review were that sections 73(1) and (2) of the Act be amended so that the exception to the requirement not to discriminate on religious grounds in employment by religious institutions be confined to employees and contract workers with relevant educational, teaching or pastoral responsibilities.[969] This recommendation has, to date, not been adopted.

In June 2018, the *Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill 2018* (WA) (**EO Bill**) was introduced into the Western Australian Parliament by the Honourable Alison Xamon MLC, Member for North Metropolitan Region (Greens (WA)) as a private member's bill. When Parliament was prorogued for the 2020-2021 election, the EO Bill lapsed.

Currently, the exception provided by section 73 of the Act allows educational institutions to discriminate in the employment of staff, where this is done in accordance with the doctrines, tenets, beliefs or teachings of the religion, and is done in good faith. Educational institutions may also discriminate (other than on grounds of race, impairment or age) in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed and where it is done in good faith. Clearly, this provision has the scope to be very wide-reaching.

The EO Bill intended to narrow substantially the scope of section 73 of the Act to only allow educational institutions to discriminate against students in relation to their enrolment on the basis of religious beliefs, teachings, principles or practices.

The comments made by the EOC in the 2007 Review and the Religious Freedom Review commissioned by the Commonwealth Government in 2017 highlight the continued tension between balancing the rights of individuals to remain free from discrimination on the basis of a number of attributes, and the rights of religious organisations to observe practices in conformity with the beliefs of those organisations.

Subject to consideration of further submissions from interested parties, questions for consideration concerning the exceptions to grounds of discrimination including (but not limited to) those for religious institutions in light of preliminary submissions received so far are set out below.

Religious Personnel Exception

As discussed in section 3.7.5 above, section 72(a)-(c) provides that the Act does not apply in relation to the ordination or appointment, or training or education of, priests, ministers of religion or members of any religious order, or the selection or appointment of persons to perform duties or functions for the purposes of participating in any religious observance or practice. The anti-discrimination legislation in all other States and Territories contain a similar exception, as does the SDA.

[966] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 41.
[967] Ibid 42.
[968] Ibid.
[969] Ibid.

The Commission has received a number of preliminary submissions from stakeholders. Amongst the preliminary submissions received, most favour the retention of the Religious Personnel Exception.

A number of religious bodies assert that retaining the Religious Personnel Exception is vital, on the basis that some religious requirements may contravene the Act unless excepted under the Act. An example given is the requirement for certain religious leaders to be a particular gender.

Other stakeholders advocate for the retention of the Religious Personnel Exception on the basis that its removal would constitute an unacceptable interference in the freedom of religion.

On one view, the Religious Personnel Exception is necessary because a priest, minister or the like has duties to guide and lead religious worship, practice, observance and teaching. On this view, it would be inappropriate for the Act to make it unlawful for adherents of a religion to ensure, by the selection, training and appointment of persons, that they receive religious teaching and be led in the observance of religious rituals by a person who shares the tenets of their faith and whose attributes are consistent with those tenets.

Another view, however, is that the use of the exception could cause disaffection in the ranks of the faithful of the religion. This view was expressed by Rogers CJ of the Supreme Court of New South Wales in *Laurence Alan Scandrett v Right Reverend Owen Dowling*[970] as follows:

> *Failure by the [Anglican] Church to end discrimination and thereby to be faithful to the Gospel has to my knowledge caused many women and some men to leave the Church or to withdraw support of all kinds (including financial). The inability to ordain women priests and enable them to exercise full ministry to congregations that earnestly want them has serious harmful spiritual consequences.*

Another suggestion is that the exception should be narrowed, for example, by limiting it to acts (of ordination, training, selection etc.) which conform to the 'doctrines, tenets or beliefs of that religion' or are 'necessary to avoid injury to the religious susceptibilities of adherents to that religion', as in the Religious Bodies Doctrine Exception. If this is effected, it would mean that religious bodies would have to examine the relevant act closely in order to determine whether the otherwise discriminatory act was necessary in order to avoid religious offence and such a decision would be susceptible to review.

A further consideration is whether the exception should apply to all the Grounds or only some of them. For example, the Commission will have to determine whether it should be lawful for a religious body to discriminate in the appointment of a person to perform religious rituals simply on the ground of age, as it is lawful to do so now. The justification for the very broad exception which applies now must be that it is inappropriate for religious bodies to be subject to any anti-discrimination law that may affect their selection, training and appointment of the persons who are to guide or lead the faithful or administer religious rituals.

The Commission welcomes further submissions and input from stakeholders in relation to the Religious Personnel Exception. The Commission also welcomes input regarding the breadth of the Religious Personnel Exception, and whether this exception should apply to all protected attributes, or whether it should be narrowed.

Question

Should the scope of the exception contained in section 72(a)-(c) of the Act (exception for religious personnel) be amended, and if so, how?

[970] (1992) NSWSC 1170.

Religious Bodies Doctrine Exception

Section 72(d) provides that the Act does not apply to any other act of a religious body where the act conforms to the 'doctrines, tenets or beliefs' of the religion or is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'. As stated in section 4.8 above, the Religious Bodies Doctrine Exception appears in the anti-discrimination legislation of all States and Territories, and is effectively a 'catch all' to the Religious Personnel Exception as it covers any acts or practices that conform to the doctrines, tenets or beliefs of the relevant religion. There are some key differences, however, across the jurisdictions. Elphick summarises the differences between other Australian jurisdictions in the following way:[971]

> *Some variants exist in the legislation: for example, the South Australian Act refers to religious 'precepts' while the Victorian Act refers to 'principles'. These differences are terminological and largely immaterial. However, more critical differences in the legislation create substantial inconsistencies. The Victorian Act, for example, adds the requirement that the necessity to avoid injury to religious susceptibilities be 'reasonable', enshrining a more rigid objective test. Victoria and Tasmania also provide a general religious exemption to individuals, utilising the same two-limb test. Tasmania's individual religious exemption does not, however, apply to sexual orientation. The NSW Act requires that the body be 'established to propagate religion', which is more narrow than the usual requirement. Contrastingly, the Northern Territory Act's exemption is broader, requiring only that the act is done 'as part of any religious observance or practice'. Tasmania, the ACT and Queensland require that an act both conforms to the beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents, rather than only requiring one of these two limbs. Finally, Queensland's exemption does not apply in regard to employment or education, while the Commonwealth's exemption does not apply to Commonwealth-funded aged care facilities.*

At least two issues must be considered in relation to the Religious Bodies Doctrine Exception. First, whether the Exception should be retained in the Act? Second, if the Exception is retained, whether and how its scope should be amended? Both of these issues turn on ascertaining the best way to strike the difficult balance between freedom of religion, and freedom from discrimination.

In relation to the first issue, as above, some stakeholders assert that the effect of the Religious Bodies Doctrine Exception is to largely place religious groups outside the remit of the Act.[972] One stakeholder submitted that the Religious Bodies Doctrine Exception as currently worded gives religious persons or organisations a special license to practice otherwise unlawful discrimination.[973]

It may be argued that the Religious Bodies Doctrine Exception should not be retained, as the other exceptions that apply to religious bodies carve out the necessary exceptions, and any exceptions beyond these unduly override individuals' freedom from discrimination. In relation to the second issue, if the Religious Bodies Doctrine Exception is retained, it may be argued that it is too broad in scope, at least as it is currently worded, and unjustifiably overrides the protections against discrimination contained elsewhere in the Act. It is possible to narrow it by limiting the number of the Grounds to which it applies or by introducing more stringent subjective or objective tests to be met before it can apply. Conversely, the Commission has received a number of preliminary submissions from religious organisations which assert that retaining the Religious Bodies Doctrine Exception is essential for the maintenance of religious freedom, on the basis that some religious practices may contravene the Act unless otherwise excepted. That is, there may be religious practices that do not fall within the other religious exceptions but nevertheless ought to be exempt under the Act.

In its preliminary submission, Christian Schools Australia (CSA) submits that rather than relying on exceptions to protect religious freedoms, the Act should have a clearer definition of discrimination which

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[971] Liam Elphick, 'Sexual Orientation and 'Gay Wedding Cake' Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 159 - 160.

[972] Submission from TransFolk of WA, 29 October 2020, 1.

[973] Submission from the Human Rights Law Alliance, 30 October 2020, 3.

protects religions freedoms. If that submission is not successful it submits that the Religious Bodies Doctrine Exception and other religious exceptions in the Act should be replaced by 'balancing provisions', which specify that individuals, religious bodies or organisations bound by a religious ethos, expressing their sincere religious convictions or acting in accordance with those convictions, do not discriminate for the purposes of the Act where they hold such convictions or engage in such activities in accordance with their beliefs.[974] The CSA submits that the present formulation as an exception suggests that those with religious convictions are granted special anomalous rights in an otherwise consistent framework of legislative protections to a person's right to equal treatment.[975] It says that correctly describing these provisions as 'balancing provisions' also 'leads to a greater focus on proportionality of consequences'. It illustrates this submission with the example that a religious school denied the opportunity to employ teachers who share the school's values and beliefs undermines a person's right to a religious education. Whereas a teacher who is unable to obtain employment at a religious school for the same reason is able to seek employment elsewhere.[976] The inference is that the balancing exercise leans towards allowing religious schools to rely on a 'balancing provision' to employ teachers who share their beliefs.

CSA submits that new 'balancing provisions' should require the organisation to 'genuinely believe' that the otherwise discriminatory act met the requirements of the balance.[977] This test is arguably less onerous than that in section 72(d), which requires proof that the conduct conforms with religious convictions *and* was reasonably necessary to prevent injury to the religious susceptibilities of adherents of the religion. However it is arguably stricter than the test in sections 72(a)-(c), which requires the religious body to prove that the act was of the specified kind but does not explicitly require either the person or organisation who is performing the act to have a subjective belief about the necessity of their act, or any person reviewing compliance with the provisions to form a view as to the reasonableness of the act.

The Commission notes that any proposal to change the formulation from exception to balancing provision would need to consider whether the new provisions should change the present burden of proof. Currently the religious body bears the burden of proving that the exception applies in the circumstances. If an exception is replaced with positive provisions, it may shift the burden of proving a contravention of the Act to the complainant.

Some stakeholders advocated for the retention of the Religious Bodies Doctrine Exception on the basis that it was consistent with section 116 of the Australian Constitution and its removal would be an unacceptable interference with the freedom of religion.[978] The Commission notes, however, that section 116 of the Australian Constitution does not apply to limit State Parliaments.[979]

An argument against the Religious Bodies Doctrine Exception relies on its form. Dr Moulds suggests that 'the interaction between these general exceptions for religious bodies and the more specific exceptions for religious educational authorities gives rise to complexities both for those seeking to rely upon the provisions to defend or assert claims of unlawful discrimination, and for those seeking to understand the implications of proposed reforms in this area'.[980]

The Commission welcomes submissions regarding whether the Religious Bodies Doctrine Exception should be removed from or retained in the Act and, if so, why. If it is to be retained, the Commission welcomes further submissions in relation to whether the scope of the Religious Bodies Doctrine Exception

[974] Submission from Christian Schools Australia, 4 November 2020, 10.

[975] Ibid 9.

[976] Ibid 9 - 10.

[977] Ibid 10.

[978] Section 16 of the Australian Constitution provides that 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

[979] The proscription against the Commonwealth making laws 'for prohibiting the free exercise of any religion' has been interpreted restrictively by early High Court authority so as to only target laws 'for' or directed at 'prohibiting the practise of religion' (*Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ); *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ)). This narrow interpretation has been subject to criticism that s 116 should apply 'to provisions which authorize acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise': *Kruger v Commonwealth* (1997) 190 CLR 1, 132 (Gaudron J).

[980] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 112, 120.

needs to be amended and, if so, how. One stakeholder notes that many community service providers (particularly those that provide emergency relief) are affiliated or run by religious institutions and suggested that there may be a need to ensure that the Act does not interfere with such community service providers providing essential services to people.[981] This submission is beyond the Terms of Reference.

Questions

- *Should the exception contained in section 72(d) of the Act (exception for religious bodies) be removed or retained?*
- *Should the scope of the exception contained in section 72(d) of the Act (exception for religious bodies) be amended, and if so, how?*

Educational institutions established for religious purposes

The Commission notes that the heading to section 73, 'Educational institutions established for religious purposes' may not reflect the substance of the provision. This is because the heading suggests that the provision is intended to apply only to educational institutions established for religious purposes. However, the section appears to have a broader application to educational institutions that may not have been established for religious purposes, but are operated by religious institutions.

Religious Educational Bodies Employment Exception

The Religious Educational Bodies Employment Exception is contained in section 73(1) and (2) of the Act, which provides that nothing in the Act renders it unlawful for a person to discriminate against another person on any one or more of the Grounds in connection with employment as a member of the staff of, or a position as a contract worker that involves the doing of work in, an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. This is provided the discrimination occurs in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. As can be seen in section 4.8 above, the specific exceptions for religious educational authorities in anti-discrimination legislation across Australian jurisdictions vary in scope.

As to whether the Religious Educational Bodies Employment Exception should be retained, a number of stakeholders operating religious schools or educational institutions advocate for the retention of the Exception citing, among other things, the importance of employing staff who support and display their religious ethos. A number of stakeholders also consider that the exception is necessary to ensure that religious educational institutions can continue to provide an education which reflects the religious mission and identity that parents and caregivers have specifically chosen for their children.

Some preliminary submissions consider the Religious Educational Bodies Employment Exception to be unnecessary, arguing instead that acts contrary to the ethos and fundamental principles of a religious school or educational institution could be effectively dealt with through contractual and common law requirements, such as those requiring employees to exhibit fidelity and good faith towards their employers. Consistent with this, a common theme in preliminary submissions received by the Commission is that employees and contractors at religious educational institutions are expected to commit to support, and comply with, the religious ethos and susceptibilities of the educational institution at which they are employed. Stakeholders cited a necessary requirement for employees to refrain from acting (other than in private) in a manner that is contrary to the school's religion or ethos. However, these contractual and common law requirements do not mean that most staff members are required to practice the specific

[981] Submission from People with Disabilities (WA), 30 October 2020, 2.

religion of the religious educational institution at which they are employed. One stakeholder submits that the majority of employers in faith-based schools in Western Australia do not need and never utilise provisions in the Act enabling them to discriminate against their employees.

A possible further argument against retaining the Religious Educational Bodies Employment Exception is that the discrimination permitted by the Exception can be, by its nature, very harmful (particularly to LGBTIQA+ persons) and is not justified, necessary and proportionate to the religious freedoms that religious schools are trying to protect.[982]

The Commission invites submissions as to whether the Religious Educational Bodies Employment Exception should be retained in or removed from the Act.

If the Religious Educational Bodies Employment Exception is retained, the question arises as to whether it should be narrowed. Currently, the Exception can be applied regardless of the nature of the employment or the position held. This means that, for example, a cleaner may be dismissed by a religious school because of their sexual orientation or religious conviction. In addition, the Exception applies in respect of all the Grounds. By contrast, the ACT and Tasmanian Acts limit the exception to religious conviction grounds. Perhaps unsurprisingly, Dr Moulds characterises the Exception as 'broad' and 'the most generous in scope when it comes to excluding religious bodies from what would otherwise constitute unlawful discrimination'.[983]

Some religious educational organisations in their preliminary submissions suggest that the exception should distinguish between particular categories of employees or contract workers in determining whether discrimination is lawful. By way of example, distinguishing between those employees or workers teaching secular subjects and those involved in religious education, or alternatively, employees or workers having direct contact with students (such as teachers) and those who do not (such as administration workers and non-teaching service providers).

Based on the preliminary submissions received from stakeholders, it appears that the breadth of the Religious Educational Bodies Employment Exception is not relied on in practice. For example, a number of stakeholders submit that the exception is relied upon for the employment of persons, who are required to provide direction and leadership in the values and ethos of the religious educational organisation - such as principals, employees employed in direct leadership and religious leadership positions, chaplains, and staff who teach religious education so as to ensure that those employees share the religious doctrines of the religious educational organisation, but not otherwise.[984]

In the 2007 Review, the EOC recommended that the Religious Educational Bodies Employment Exception be amended so that the Exception 'is confined to employees and contract workers with educational or teaching or pastoral responsibilities'. The EOC considered that '[a]t most' the Exception 'should extend only to employees and contract workers who have a direct role to play in the teaching and care of students'.[985]

The Commission also referred to the NZ Act, which provides that only 'employers'[986] and 'qualifying bodies'[987] in certain circumstances can discriminate. Section 28(1) of the NZ Act permits discrimination in employment on the basis of sex where the position is for an organised religion and the position is limited to one sex in order to comply with the doctrines, rules or customs of the religion. Further, section 28(2) permits discrimination on the basis of religious or ethical belief where:

(a) part of the position involves taking part in religious instruction at a State integrated school; or

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[982] Law Council of Australia, Final Submission to Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (21 November 2018) 25.

[983] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 112, 121, 134.

[984] For example, submission from the Anglican Schools Commission, 7 May 2019, 1.

[985] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 42.

[986] *Human Rights Act 1993* (NZ), s 28.

[987] Ibid s 39.

(b) the sole or principal duties of the position are those of:

(a) a clergyman, priest, pastor, officer or teacher of adherents of a particular religious belief;

(b) a teacher in a private school; or

(c) a social worker who is acting on behalf of an organisation whose members are comprised solely or principally of adherents of a particular religious belief.

Some preliminary submissions suggest narrowing the exception in a similar manner to how the exception is framed in some other jurisdictions, such as section 25 of the Queensland Act, which is framed around 'genuine occupational requirements'. That section does not provide a general exception for employment by religious bodies. Rather, it provides that any employer may impose 'genuine occupational requirements' for a position, including with respect to work in a religious educational institution or any other work for a body established for religious purposes if the work 'genuinely and necessarily involves adhering to and communicating the body's religious beliefs'. In such cases, it is not unlawful for an employer to discriminate if the staff member 'openly acts' in a way that the staff member 'knows or ought reasonably to know' is contrary to the employer's religious belief and 'it is a genuine occupational requirement' that the staff member act in a way consistent with the employer's religious beliefs.

On one view, a 'genuine occupational requirements' formulation would limit the ability of a religious educational institution to discriminate, because discrimination is only permitted where the person 'openly acts' in a way that is contrary to the genuine occupational requirement. However, as Dr Moulds states, 'the Queensland provisions can be described as 'don't ask, don't tell' provisions, where gay or transgender staff members are effectively asked to 'hide' their sexual or gender identity'. Accordingly, it is arguable the 'genuine occupational requirements' approach provides religious educational organisations with scope to discriminate in a manner which is not consistent with the objects of the Act or not necessary to protect the right to freedom of religion.[988]

A number of preliminary submissions suggest that the Religious Educational Bodies Employment Exception be maintained, but with the additional requirement that each religious educational organisation maintain a publicly available policy outlining their position or a code of conduct for staff. A number of preliminary submissions assert that religious educational institutions should be permitted to implement a code of conduct or policy for employees which constrains, for example, what employees are able to say to students about religious topics, without the risk of the code of conduct being considered discriminatory under the Act. Another preliminary submission from a religious education institution advocates that religious educational organisations must have the ability to operate in accordance with their values and beliefs, but that it was also incumbent on such institutions to clearly articulate their values and beliefs (for example, through a mission or vision statement) in order to allow potential employees and parents to make an informed choice when considering joining that institution.

Similarly, some preliminary submissions advance a view similar to Recommendation 5 of the Religious Freedom Review.[989] Recommendation 5 proposed that the SDA be amended to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status, provided that:

(a) the discrimination is founded in the precepts of the religion;

(b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced; and

(c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

These preliminary submissions appear to draw upon the formulation of the exception in the South Australian Act, which, in summary, requires the adoption and publication of a policy to support the

[988] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 112, 127.

[989] Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 2.

exception. Although the formulation promotes transparency, Dr Moulds notes that this exception 'has been criticised as providing a 'blank cheque' for religious organisations to discriminate'.[990]

Further, as has been discussed, the Religious Educational Bodies Employment Exception applies in respect of all Grounds, and thereby permits religious educational institutions to discriminate against potential and existing staff on the Grounds of sexual orientation and gender identity. A number of preliminary submissions from, or on behalf of, religious educational organisations submit that sexual orientation is not presently a consideration in the employment of teachers or support staff.

The Commission invites submissions in relation to whether the Religious Educational Bodies Employment Exception should be retained or removed. If it is to be retained, the Commission invites submissions as to whether it should be retained in its current form or narrowed and, if so, how. Without limiting the scope of submissions, the Commission would benefit from submissions as to whether the Exception should be reformulated, like in the Queensland or South Australian Acts, or should be limited to certain Grounds, like under the ACT and Tasmanian Acts.

Questions

- *Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed?*
- *If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how?*
- *If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds?*
- *Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff?*

Provision of Education Exception

The Provision of Education Exception contained in section 73(3) of the Act provides that nothing in the Act renders it unlawful for a person to discriminate against another person on any one or more of the Grounds, other than the grounds of race, impairment or age, in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.

Although the Provision of Education Exception is not directed to excepting discrimination by religious schools against students (for example, on the basis of their sexuality) per se, it has been commented that the Provision of Education Exception is drafted in extremely broad terms, and would plainly permit such discrimination.[991] As noted in section 3.7.6 above, the EOT applied the Exception in respect of discrimination against a student in *Goldberg*.

[990] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 112, 128.

[991] Phoebe Wearne, 'Outdated equal opportunity laws to be reviewed by WA Government', *The West Australian* (online, 11 October 2018), < https://thewest.com.au/news/wa/outdated-equal-opportunity-laws-to-be-reviewed-by-wa-government-ng-b88986444z>.

Most of the preliminary submissions received by the Commission were in favour of removing the Provision of Education Exception or limiting the exception to permit this type of discrimination only on the Grounds of sex or religious conviction.

As regards removing the Provision of Education Exception, some preliminary submissions express the view that religious educational institutions should not be able to discriminate against students on any ground on the basis that any laws that permit discrimination are not in the best interests of children, and the best interests of children should be given higher priority and greater weight than other considerations.[992]

However, there are also preliminary submissions received in favour of maintaining the Provision of Education Exception but most of these submissions were qualified to some extent. These preliminary submissions suggest that the exception be limited to only the Grounds of sex or religious conviction, or alternatively, support the adoption of the exception formulation contained in the EO Bill, which would significantly narrow the scope of the Exception to only allow religious educational institutions to discriminate against students in relation to their enrolment on the basis of religious beliefs, teachings, principles or practices.

In justifying the Provision of Education Exception on this more limited basis, some preliminary submissions emphasise the importance of the right of religious educational institutions to operate a 'closed' enrolment policy for children from religious families and to operate in a manner consistent with the doctrines, tenets and beliefs on which such institutions may be founded, including teachings in relation to gender and sexual relations. Some preliminary submissions also emphasise that parents whose values do not align with the doctrines, tenets and beliefs of a religious school are still able to send their children to a non-religious school, while parents who wish to send their children to a religious school rely on the Provision of Education Exception to ensure that they are able to do so. A preliminary submission received from the Jewish Community Council of Western Australia (Inc) supports the retention of the exception, but notes that no Jewish religious educational institution would refuse to enrol a student on the basis of sexual orientation.

The Law Council of Australia has previously noted that discrimination in an educational context on the basis of sex, sexual orientation, gender identity or intersex status has the potential to cause lasting damage to a child's self-esteem, dignity and self-worth. By contrast, discrimination on the basis of religion or religious beliefs does not carry that same risk of damage because religion and religious beliefs are choices. Therefore, arguably, the Provision of Education Exception may be justified but on the more limited basis as suggested by the above-mentioned stakeholders because discrimination on the basis of religion does not carry as much risk of harm to a child's mental health.[993] On the other hand, the Law Council of Australia's view contains a value judgement about the discretionary nature of a person's religious beliefs and that judgement would not be accepted by everyone.

In addition, some preliminary submissions suggest that in practice, the Provision of Education Exception is rarely relied upon in order to refuse enrolment or to otherwise subject students to adverse treatment (such as expulsion, on the basis of the student's sexuality). In circumstances where the full scope of this exception is rarely relied upon, there may be scope to narrow the exception or, alternatively, remove it. On this point, the Law Council of Australia has stated:[994]

> *The Law Council notes arguments by religious schools that such exemptions should remain available, even though they are infrequently used. However, it submits that such exemptions are, by their very nature, harmful, noting the important role played by legislation in norm-setting amongst the community.*

The Commission welcomes further submissions in relation to whether the Provision of Education Exception should be removed or retained and, if retained, whether and how it should be narrowed in scope.

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[992] Law Council of Australia, Final Submission to Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (21 November 2018) 19.

[993] Ibid 19-20.

[994] Ibid.

Questions

- *Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed?*
- *If the exception contained in section 73(3) of the Act is retained, should it be narrowed and if so, how?*

Establishments providing housing accommodation for aged persons

Section 74 of the Act provides that nothing in the Act affects the ability of an establishment which provides housing accommodation for aged persons to have any rule or practice which restricts admission to applicants of any class, type, sex, race, age or religious or political conviction, or provide benefits, facilities, or services to such admitted persons.[995]

A similar, but narrower, exception also applies in New South Wales, as is explained in section 4.8. The appropriateness of the exception must be considered since the majority of States and Territories do not provide for a similar exception.

An argument in favour of retaining the exception is that aged care establishments should be able to discriminate in order to create an environment where persons who move to aged care accommodation have the company and support of persons of similar cultural, racial and religious backgrounds. Further, that they are provided with services by people who are more likely to have knowledge of, and experience in providing, the services that they need when at a vulnerable time in their lives. As has been noted by the NSW Commission, 'widows, people of various cultural or linguistic groups and some religious groups are examples of people who may be said to benefit from such protection'.[996] However, the Aged Care RC Report, noted that people from many diverse backgrounds have difficulty accessing non-discriminatory aged care accommodation:[997]

> *Many people who come from diverse backgrounds and have had varied life experiences have problems accessing aged care services that meet their particular needs. This includes people from culturally and linguistically diverse backgrounds, veterans, people who are homeless or at risk of becoming homeless, care leavers, and people from the lesbian, gay, bisexual, transgender and/or intersex (LGBTI) communities. The existing aged care system is not well equipped to provide care that is non-discriminatory and appropriate for people's identity and experience. We heard about aged care providers that do not provide culturally safe care, that is, care that acknowledges, respects and values people's diverse needs. Across the aged care system, staff are often poorly trained in culturally safe practices, with little understanding of the additional needs of people from diverse backgrounds.*

A question for the Commission is whether the need to provide appropriate aged care accommodation is best met by permitting aged care accommodation providers to discriminate in favour of people from diverse backgrounds or by preventing them from discriminating against those people?

Other anti-discrimination legislation in Australia answers this question by permitting applications for exemptions from the operation of specific provisions in the relevant anti-discrimination legislation. Those statutory frameworks prohibit discrimination against people from diverse backgrounds in the area of aged

[995] *Equal Opportunity Act 1984* (WA), s 74(2).
[996] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, 6.95.
[997] *Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) vol 1, 67.

care accommodation but permit applications to allow discrimination in favour of them, if the individual circumstances warrant it.

The Commission notes that Western Australia has such a mechanism under section 135 of the Act, whereby a person may apply for an exemption from the operation of a specified provision in the Act which may be granted for a period of up to five years. However, given the exception contained in section 74, it has not been necessary to rely on this provision in relation to providing aged care accommodation in Western Australia.

An argument could be made that the blanket exception in section 74 is not appropriate, and that the general exemption in section 135 is more appropriate and in accordance with the objects of the Act because establishments that wish to discriminate in order to provide accommodation for special groups may do so but they must justify their discrimination on application for the exception. As the NSW Commission stated in relation to the comparable general exemption in the NSW Act:[998]

> *[T]he original idea of permitting specific exemptions for aged person homes under [the general exception section] remains. This would allow for a general non-discriminatory policy for aged housing, but still allow those who wish to cater for special groups to provide for the benefit of that group, whilst being accountable for and being required to justify the bases of exclusion or preference.*

The Commission welcomes submissions as to the utility and necessity of this exception, particularly because providers of housing accommodation for aged persons have the option of applying for an exemption from provisions of the Act. This mechanism is utilised in other States and Territories to deal with the provision of housing accommodation for aged persons.

Another matter for consideration is whether it is appropriate to grant this blanket exemption for aged care accommodation providers, but not for providers of accommodation services for other vulnerable persons, such as persons with a disability, hospice residents and persons with a mental illness.

One preliminary submission received raises concern about how the AHRC determines applications for exemptions pursuant to section 55 of the DDA, which is the equivalent mechanism to that contained in section 135 of the Act. The stakeholder advocates that exemptions should be conservatively granted in only truly exceptional cases, where compliance is not practically achievable in the immediate future.

The Commission also invites submissions as to whether, if the general exception in section 74 were repealed and aged care accommodation providers were required to apply under section 135 for exemption from provisions of the Act, the Act should specify how the exception in section 135 should be applied, including, for example, whether the Act should stipulate specific criteria to be considered when determining whether to grant an exemption. This issue may also be relevant to the discussion below regarding other exceptions.

Questions

- *Should section 74 of the Act (exception for establishments providing housing accommodation for aged persons) be retained or removed?*
- *Should providers of housing accommodation for aged persons who rely on the exception in section 74 of the Act be permitted to instead apply for an exception from the provisions of the Act pursuant to section 135 of the Act?*

[998] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, 6.96.

Should the Act stipulate specific criteria to be considered when determining whether to grant an exception from the provisions of the Act to providers of housing accommodation for aged persons?

Goods and services

There is no exception in the Act to permit discrimination on the Ground of religious conviction, or any other of the Grounds, in relation to the provision of goods and services under the Act, or any other anti-discrimination legislation in Australia.

As was explained in section 3.7.8 above, such discrimination does occur. By way of example, in 2018 a sexual orientation discrimination complaint was made in respect of a photographer who refused to provide his services to a same-sex couple because he had a 'conflict of belief' on the issue of same-sex marriage which related to his Christian religion.

This example raises the question: should a provider of goods or services be permitted to discriminate on the Ground of religion, or another of the Grounds, such as sexual orientation, in the exercise of their right to freedom of religion (or another right)?

This issue was considered in the Religious Freedom Review discussed in section 5.8 above. The Religious Freedom Review Report recorded, relevantly, that:[999]

> *A number of stakeholders suggested to the Panel that people of faith should be able to refuse to provide goods and services if doing so would be contrary to their personal religious beliefs. It was put that such a right is necessary to recognise fully the right to freedom of religion under international law.*
>
> *Some stakeholders cited high-profile cases in other countries in which service providers have been the subject of legal proceedings as a result, for example, of their refusal to provide services for same-sex marriages. In particular, some drew a distinction between the provision of goods and services and being asked to express support for same-sex marriage through the exercise of artistic or expressive skills.*

The Religious Freedom Review Panel received a range of proposals to address this issue, including:[1000]

(a) expanding the exceptions provided to religious bodies in the SDA to include a general exception for people to act in accordance with their religious beliefs;

(b) extending to the general public the rights conferred on religious ministers and religious marriage celebrants by the *Marriage Act 1961* (Cth) to refuse their services in same-sex marriage ceremonies;

(c) enshrining a 'conscience clause' or 'reasonable accommodation' provision in legislation; and

(d) allowing businesses to register as objectors to same-sex marriage.

In the Religious Freedom Review Report, the Panel concluded that it did not accept any of the arguments in support of the proposition that a right to discriminate in the provision of goods and services was required or proportionate to ensure the free and full enjoyment of Australians' rights to freedom of religion under international law. Rather, the Panel found that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and could cause significant harm to vulnerable groups in the community.[1001]

The Commission would benefit from submissions as to whether an exception should be enacted which would allow individuals or businesses to discriminate in the provision of goods or services on the Ground of religious conviction, or any other Ground. Such submissions may, for example, address the question of whether it is necessary and appropriate or not that the Act permit some individuals or businesses to

[999] Religious Freedom Review Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, 18 May 2018) 48.
[1000] Ibid 48.
[1001] Ibid 49.

discriminate in the provision of goods or services in order properly to exercise certain rights (such as the right to freedom of religion), despite the Act's aim of preventing discrimination.

Question

Should an exception allowing individuals or businesses to discriminate in the provision of goods or services on certain Grounds be introduced into the Act?

Other exceptions

As was noted in sections 4.8 and 5.8, there is no special needs 'general exception' in the Act equivalent to those contained in the ACT, Queensland, Tasmanian and Victorian Acts, and the ADA. However, there are a number of exceptions contained throughout the Act, which apply to specific Grounds, and have a similar (albeit more limited) effect. For example, section 35K of the Act provides that it is not unlawful 'to do an act a purpose of which is to afford a person with a particular family responsibility or of a particular family status access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare, or any ancillary benefits'. Further, section 35ZD(b) provides that it is not unlawful 'to afford persons of a particular sexual orientation access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare'.

The Commission would benefit from submissions as to whether a special needs 'general exception' should be incorporated into the Act. In addition, the Commission seeks submissions as to whether any such exception should apply in specified circumstances, like under the ADA, where the discrimination must provide a bona fide benefit to persons of a particular age, be intended to meet a need that arises out of the age of persons of a particular age, or be intended to reduce a disadvantage experienced by people of a particular age.

Further, there is no pensions 'general exception' in the Act equivalent to those contained in the Victorian Act and the ADA. The purpose of those exceptions appears to be that because entitlements to pensions are often linked to the way in which certain attributes are defined under other statutes (such as marital status, sex and impairment), pension entitlements may be discriminatory.[1002]

The Commission seeks submissions on whether a pensions 'general exception' should be incorporated into the Act.

One preliminary submission proposed that the scope for exceptions generally under the Act should be clear and consistent with the special measures expressed in the *International Convention on the Elimination of all forms of Racial Discrimination*. This broadly provides that necessary special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection shall not be deemed racial discrimination, provided that such measures do not lead to the maintaining of separate rights for different racial groups and are discontinued once the objectives for which they were taken are achieved.

Arguably, this sort of exception (at least in part) exists under section 51 of the Act, which provides that it is not unlawful to do an act 'to ensure that persons of a particular race have equal opportunities with other persons in circumstances in relation to which provision is made by this Act' or 'to afford persons of a particular race access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare, or any ancillary benefits'. The Commission would be grateful for submissions on this issue.

Preliminary submissions were also received from the Ethnic Communities Council of Western Australia Inc regarding section 135 of the Act, which permits a person to apply for an exemption from the operation of a

[1002] See Victorian Parliamentary Debates, Legislative Assembly, 10 March 2010, 778 (R.J. Hulls, Attorney-General).

specified provision in the Act. It suggests that, in view of insufficient controls and the lack of policing or accountability, the 'exemptions' enable the masking of racial discrimination in some situations, mainly employment. It proposes that section 135 be amended to allow exemptions to be granted in exceptional circumstances only with detailed reasons for the granting of any exemption required to be provided by the SAT.

However, the Commission notes that the power to grant an exemption under section 135 is not entirely unrestrained. Case law has established that the discretion under section 135 is constrained by the objects, scope and purpose of the Act and, as such, any factors plainly relevant to that constraint must be considered in determining an application for exemption under section 135.[1003] In *Bae Systems Australia Ltd v Commissioner for Equal Opportunity*,[1004] it was held that relevant factors to be assessed in determining whether the proposed exemption should be granted may include the following five questions:

(a) Is the proposed exemption sought necessary?

(b) Is the proposed exemption appropriate and reasonable in light of the reasons for which it is necessary?

(c) Is it in the public interest that the proposed exemption be granted?

(d) Have the applicants taken, and will they continue to take steps to mitigate the potential adverse effects of the proposed exemption?

(e) Are there any non-discriminatory ways of achieving the objects and purposes for which the proposed exemption is sought?

The Commission has been advised by the EOC that between 1985-2021 there have been 33 applications for an exemption under section 135 of the Act. Of these, 16 were granted; 4 were dismissed; 12 were withdrawn and one is pending hearing.

The Commission invites submissions on whether the general power to grant an exemption in section 135 should be amended. Submissions may, for example, suggest that the section contain certain criteria that must be satisfied for an exemption to be granted.

Questions

Should any additional general exceptions be included in Part VI of the Act?

Should section 135 of the Act be amended, for example by specifying criteria that must be satisfied before an exemption may be granted?

6.8 Burden and standard of proof

Under the Act, the responsibility lies with the complainant to prove their case of direct or indirect discrimination. The complainant must establish each element of their complaint on the balance of probabilities. For example, if a complainant alleges that their employment was terminated because of their race, they must prove that the relevant act occurred (that is, the employer terminated their employment) and that the reason for the act was because of their race.

In contrast, as discussed in section 6.4.2 above, the ACT, Queensland and Victorian Acts, and the SDA and the ADA, reverse the burden of proof in indirect discrimination cases. This means that rather than the complainant having to prove that the imposition of a requirement or condition is indirectly discriminatory, the respondent must prove that the requirement or condition is reasonable. In Victoria, this reversal of the

[1003] *Commission for Equal Opportunity v ADI Ltd* [2007] WASCA 261, [43]-[54] per Martin CJ (Wheeler and Pullin JJA agreeing).
[1004] [2019] WASAT 79, [24].

burden of proof was made, at least in part, 'because of the perception that a person who imposed the condition or requirement would be better placed than a complainant to explain or justify the reason for it.'[1005]

Further, as discussed in section 4.9 above, the general protections of the FW Act operate with a reverse burden of proof. While a complainant must still prove that the relevant adverse action occurred (that is, they must prove that their employment was terminated), section 361 of the FW Act provides that there is a presumption that the adverse action was taken for a prohibited reason unless the employer can prove otherwise. As such, the employer bears the burden of proving that the termination was not for a prohibited reason.

The ALRC has previously received a submission against a respondent bearing the burden of proof from the Church and Nation Committee, Presbyterian Church of Australia. It asserted that there were two issues with the reversal of the burden of proof, being:[1006]

> *Firstly, the person accused of discrimination is called 'the discriminator' ie the title itself proceeds from an assumption of guilt rather than innocence. Secondly, the alleged discriminator must prove—in the first instance—that s/he did not discriminate. This is a reversal of the procedure in criminal law where the burden of proof rests on the prosecution to 'make a case' that the defendant committed the act. The alleged discriminator should not have to prove—in the first instance—that they did not commit the act. The burden of proof should rest on the person bringing the claim of discrimination. Otherwise … the process itself becomes the punishment and vexatious litigation ensues.*

Conversely, a number of preliminary submissions made to the Commission refer to the difficulty for complainants to discharge the burden of proof as the law currently operates.[1007] The EOC raises in its submission the often impossibility of producing evidence that reveals the state of mind of a respondent at the time that discrimination was alleged to have occurred.[1008] Similarly, other preliminary submissions support the proposition that the burden of proof should not lie wholly on the complainant with respect to discrimination, sexual harassment and victimisation complaints as it is difficult to establish the reason for the respondent's behaviour.[1009] These evidentiary difficulties arise, in part, because the respondent is not under any obligation to explain their impugned decision-making and so much of the information and evidence pertaining to that decision is not made available to the complainant.[1010] A possible further argument in support of reversing the burden of proof is that there is often an imbalance in resources and expertise between complainants and respondents, which may exacerbate the evidentiary difficulties already faced by complainants.

The reverse burden of proof provisions of the FW Act were reviewed in 2012 as part of the post-implementation review of the FW Act.[1011] That report noted that the anti-discrimination provisions of the FW Act worked differently from other Commonwealth anti-discrimination legislation in terms of the burden of proof, and noted that an alignment of the burden of proof provisions in Commonwealth anti-discrimination legislation would enable a body of consistent case law to develop. Perhaps more persuasively, it could be said that complainants and respondents in all parts of Australia should have the same obligations in this respect. So, it could be said that it is desirable that anti-discrimination legislation Australia wide should have consistent burden of proof provisions.

The post-implementation review of the FW Act ultimately did not recommend any changes to the reverse burden of proof. The review panel noted that many employer organisations' submissions to the review

[1005] *Kiefel v State of Victoria* [2013] FCA 1398, [36] - [37].

[1006] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report, 127, July 2015) 332.

[1007] Submission from UnionsWA, 19 November 2020, 3; Submission from State School Teachers Union, 21 November 2020, 3.

[1008] Submission from the Equal Opportunity Commission, 20 November 2020, 2.

[1009] Submission from Circle Green Community Legal, 20 November 2020, 5 from the Northern Suburbs Community Legal Centre and Older Person's Rights Group, 24 October 2020, 4; and from People with Disabilities (WA) Inc, 30 October 2020, 2.

[1010] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 583.

[1011] *Fair Work Act* Review Panel, *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation* (Post-implementation Review Final Report, 15 June 2012).

sought to have the reverse burden of proof removed from the FW Act, or to have it not apply to certain classes of employers, such as small businesses. However, the review panel found no evidence that the reverse burden of proof was generating unanticipated results and therefore declined to make any recommendations to change it.

The Commission invites submissions as to whether the Act should place the burden of proof on a respondent and, if so, in what circumstances.

Several submissions made a distinction between the *evidential burden* and the *persuasive burden*. The evidential burden requires a person to produce evidence sufficient to prove that their allegation of discrimination is a legitimate explanation for the unfavourable treatment they have experienced. The persuasive burden is the requirement to convince the decision maker to the requisite standard of proof that discrimination did, or did not, occur. Arguably, this distinction would alleviate, at least to some extent, the issues arising from the information asymmetry between a complainant and respondent. A number of overseas jurisdictions separate the evidential and persuasive elements of the burden of proof, including the United Kingdom, Canada and some jurisdictions within the United States. For example, the UK Act requires a complainant to establish a *prima facie* case which must then be disproved by the respondent on the balance of probabilities. More specifically, section 136 of the UK Act provides that 'If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision, the court must hold that the contravention occurred… [but that] does not apply if A shows that A did not contravene the provision'. Allen argues that 'shifting the evidentiary burden of proof to the respondent once the complainant establishes a prima facie case of direct or indirect discrimination' would bring anti-discrimination law closer to achieving its statutory objectives.[1012]

The Commission welcomes submissions regarding whether separate evidential and persuasive burdens of proof should be adopted in the Act.

Questions

- Should the Act place the burden of proof on the alleged discriminator to provide that no discrimination occurred and, if so, in what circumstances?
- Should the Act be amended to impose an evidential burden on a complainant and a persuasive burden on a respondent?

6.9 Functions and investigative powers of the Equal Opportunity Commissioner

Investigative and complaint handling function

By section 80(a) of the Act, the Equal Opportunity Commissioner may 'carry out investigations, research and inquiries relating to discrimination or sexual or racial harassment of the kinds rendered unlawful under this Act'. Further, by section 84, the Equal Opportunity Commissioner 'shall investigate each complaint lodged with the Commissioner'. In carrying out such investigations, the Equal Opportunity Commissioner has the power to obtain information and documents under section 86.

The EOC suggests that there is a need to update the investigation powers of the Equal Opportunity Commissioner and the complaint handling process under the Act concordant with the powers of the President and the process under the NSW Act.[1013] This position was advocated for in the 2007 Review in

[1012] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 604 - 605.
[1013] Submission from the Equal Opportunity Commission, 20 November 2020, 9.

light of the reforms that were made to the NSW system that took effect in May 2005.[1014] The reform modified the process of receiving and investigating complaints by incorporating a new model of complaint handling into the NSW Act. In the 2007 Review, the EOC stated that the NSW model created 'more certainty and precision than the WA Act', and identified the following features of the NSW model:[1015]

(a) express recognition of complaints lodged by a parent or guardian on behalf of a person who lacks legal capacity;

(b) complaints able to be lodged by agents, including a legal practitioner;

(c) complaints able to be lodged by representative bodies;

(d) the ability of the Equal Opportunity Commissioner to assist a person to make a complaint;

(e) complaints as lodged not having to establish a prima facie case (as the EOC is able to seek further information and evidence as part of its investigation);

(f) power to refer serious vilification complaints to the Attorney General for prosecution as an offence;

(g) a single system for attempting to resolve complaints by conciliation;

(h) the requirement to prepare a written record of any agreement reached, at the request of either party;

(i) the entitlement of a party to a complaint to seek to have the agreement registered in the SAT, to the extent that the terms could have been the subject of an order by the SAT, and the provisions of the agreement once registered are enforceable;

(j) a clear rule that no party in conciliation proceedings can be represented by any other person, except by leave of the Equal Opportunity Commissioner;

(k) a more transparent process by which complaints can be amended before they are referred to the SAT or dismissed, so that it is clear what allegations were being investigated by the Equal Opportunity Commissioner;

(l) An expansion of the options for dismissing complaints to include the following:

  (a) complaints the nature of which is such that no further action by the Equal Opportunity Commissioner is warranted;

  (b) complaints the subject matter of which has been, is being, or should be, dealt with by another body;

  (c) where the respondent has taken appropriate steps to remedy or redress the conduct complained of;

  (d) when it is not in the public interest to take any further action in respect of the complaint; or

  (e) when the Equal Opportunity Commissioner is satisfied that for any other reason no further action should be taken in respect of the complaint;

(m) recognition that the death of a complainant or respondent does not terminate a complaint, and the legal personal representative of a complainant is able to continue with the complaint;

(n) referral by a party of unresolved complaints to the SAT after 18 months, if the complaint has not been dismissed, referred or otherwise resolved by the Equal Opportunity Commissioner; and

(o) calculation of time when notice given by post, so that notice is taken to have occurred at time fixed after the date the notice was posted.

These include substantial changes to the Act and thus require careful consideration by the Commission.

The Human Rights Law Alliance also supports reform of the Equal Opportunity Commissioner's functions and powers consistent with the recommendations by the *Commonwealth Parliamentary Joint Committee on*

[1014] Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984*, Report May 2007, 50; amendments were made to the NSW Act under the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004* (NSW).

[1015] Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984*, Report May 2007, 50 - 51.

Human Rights Inquiry into Freedom of Speech in Australia. The changes considered by that Inquiry included:

(a) a requirement for a complaint lodgement fee;

(b) a requirement for the EOC to bundle multiple complaints into one proceeding where the complainant lodges multiple complaints against the same respondent, and to require the EOC to decline complaints that are of the same substance and subject matter as earlier complaints from the same complainant;

(c) a limit on the assistance that the EOC can give to a serial complainant under section 93A and a requirement for the EOC to give equal assistance to respondents; and

(d) a requirement on the EOC to terminate a complaint if it is determined that it is vexatious, misconceived or lacking in substance or if there are no reasonable prospects or success, or if the EOC is satisfied in the circumstance of the case that further inquiry is not warranted.

The Commission invites submissions regarding whether the investigative powers of the Equal Opportunity Commissioner or the complaints handling process under the Act should be updated or expanded and, if so, how.

In its preliminary submission, the Office of Multicultural Interests supports expanding the advocacy role of the Equal Opportunity Commissioner so that it is consistent with its greater power to investigate systemic issues and instigate legal action.[1016] This has been suggested in light of the limited ability for the Equal Opportunity Commissioner to investigate and prosecute discrimination without relying on individual complaints.[1017] The Office of Multicultural Interests suggests that the Equal Opportunity Commissioner's power to instigate complaints is critical for 'combating systemic discrimination, establishing legal precedent through test cases and responding to situations where no individual has standing, or where the persons affected lack the resources and initiative to make a complaint on their own behalf'. The Equal Opportunity Commissioner has the power to carry out investigations relating to discrimination or sexual or racial harassment of the kinds rendered unlawful by the Act.[1018] The issue is whether this power is sufficiently broad.

One preliminary submission observes that the Equal Opportunity Commissioner's powers to investigate complaints, particularly in cases of systemic abuse, has been underutilised.[1019] The Ethnic Communities Council of WA has indicated that they frequently receive individual complaints that point to systemic abuse, however where there is no discriminator readily identifiable, complainants lack the confidence or the evidence to lodge an individual complaint.[1020]

Circle Green Community Legal supports expanding the EOC's powers to investigate complaints and commence proceedings on behalf of complainants, which would be more in line with the powers of a body such as the Fair Work Ombudsman. It considers the existing powers of the Equal Opportunity Commissioner do not extend far enough and that the burden is still largely on complainants to commence and progress matters under the Act.[1021]

The Office of Multicultural Interests also encourages the Commission to consider both the Canadian and British legislation in this context.

In the United Kingdom, the EHRC is the regulatory body responsible for enforcing the UK Act. As part of its regulatory function, the EHRC is empowered with enforcement functions under the UK Act, including to carry out an investigation to identify whether an organisation has committed, or is committing, an unlawful act. Such an investigation is only permitted where there is a suspicion that the organisation has committed

[1016] Submission from the Office of Multicultural Interests, November 2020, 5.
[1017] Ibid.
[1018] *Equal Opportunity Act 1984* (WA), s 80(a).
[1019] Submission from the Ethnic Communities Council of WA, 4 December 2020, 3.
[1020] Ibid.
[1021] Submission from Circle Green Community Legal, 20 November 2020, 5.

an unlawful act.[1022] Following an investigation, the EHRC can prepare a final report publishing whether an organisation has committed an unlawful act or not. The report will include recommendations based on the EHRC's findings, and the organisation's failure to act on the recommendations can result in receiving an unlawful act notice. An unlawful act notice will detail the breach, recommend necessary action to be taken and may also require an action plan be prepared.[1023]

One recent investigation performed by the EHRC was into the suspected past pay discrimination against women at the British Broadcasting Corporation (the BBC). This investigation followed complaints that female employees were not receiving equal pay for equal work. In conducting the investigation, the BBC cooperated by voluntarily providing the EHRC with information. The EHRC looked at a sample of pay complaints from January 2016 as well as the systems and processes used by the BBC. Ultimately, there was no unlawful pay discrimination identified by the EHRC, however the investigation highlighted areas of improvement within the BBC. The final report and findings were published on the EHRC website on 12 November 2020.[1024] Other examples of investigations performed by the EHRC concerned the UK Labour Party, the criminal justice system and the Metropolitan Police Service.

In Canada, the relevant commission deals with both individual and systemic complaints, brought by individuals or groups. Following receipt of a complaint, the relevant commission may designate an investigator to investigate a complaint. The investigator may be issued with a warrant by a judge of the Federal Court to enter and search premises in order to carry out inquiries that are reasonably necessary for the investigation.[1025] In searching a premises, the investigator may require any individual found in the premises to produce for inspection or to make copies, of any documents relevant to the investigation.[1026] On the conclusion of an investigation, the investigator must produce a report containing the relevant findings.[1027] Following receipt of the report, the relevant commission will refer the complainant to an appropriate authority if it is satisfied that the complainant should exhaust review procedures available or the matter could be more appropriately dealt with under another Act.[1028] Alternatively, the commission may request the relevant tribunal to institute an inquiry or dismiss the complaint.[1029]

Whilst there may be persuasive arguments for expanding the investigative powers of the EOC, the reality is that such powers may be underutilised unless the EOC has the resources to exercise them. The issue of resourcing is beyond the Commission's control. Recommendations made by the Commission in this area must be cognisant of this limitation. The Commission would be grateful for submissions as to whether the Act should be amended to confer on the Equal Opportunity Commissioner a power to initiate and investigate complaints.

Question

Should the investigative powers of the Equal Opportunity Commissioner or complaints handling process under the Act be updated or expanded and, if so, how?

Dismissal powers

Section 89(1) of the Act contains power for the Equal Opportunity Commissioner to dismiss a complaint 'where, at any stage of an investigation, the Commissioner is satisfied that a complaint is frivolous,

[1022] *Equality Act 2006* (UK), s 20(2).
[1023] *Equality Act 2006* (UK), s 21.
[1024] Equality and Human Rights Commission, *'Investigation: does the BBC pay women and men equally for equal work?'*, 5 January 2021 <https://www.equalityhumanrights.com/en/inquiries-and-investigations/investigation-does-bbc-pay-women-and-men-equally-equal-work>.
[1025] *Canadian Human Rights Act,* RSC 1985, c 43, s 2.1; c 43, s 2.2.
[1026] Ibid s 2.4.
[1027] Ibid c 44, s 1.
[1028] Ibid c 44, s 2.
[1029] Ibid c 44, 3.

vexatious, misconceived, lacking in substance or relates to an act that is not unlawful by reason of a provision of this Act'.

The EOC has identified the dismissal powers of section 89 of the Act as requiring expansion to allow the Equal Opportunity Commissioner to dismiss complaints where the complainant refuses a reasonable settlement sum or refuses to settle based on unrealistic settlement expectations.[1030] The question of whether a settlement sum is reasonable, or settlement expectations are unrealistic, are multifactorial concepts which are often incapable of proper exposition. Any such difficulty in making these assessments could be ameliorated by including a provision that prescribes the factors the Equal Opportunity Commissioner should consider in making a determination.

CSA submits that section 89 should be replaced with the following grounds for dismissal:[1031]

(a) *no part of the conduct complained of could amount to a contravention of a provision of this Act or the regulations;*

(b) *the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint;*

(c) *the Commissioner is not satisfied that the complaint was made by or on behalf of the complainant named in the complaint;*

(d) *the Commissioner is of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance;*

(e) *the Commissioner is of the opinion there is another more appropriate remedy that should be pursued in relation to the complaint or part of the complaint;*

(f) *the subject-matter of the complaint has been dealt with by the Commissioner, an authority of the State or the Commonwealth;*

(g) *the Commissioner is of the opinion that the subject-matter of the complaint may be more effectively or conveniently dealt with by an authority of the State or the Commonwealth;*

(h) *one or more of the respondents is an individual who has made a public statement to which the complaint relates and, at the time of making the statement, was—*

  (i) *a resident of another State or Territory as evidenced by the individual's address on the electoral roll, and*

  (ii) *not in Western Australia, or*

  (iii) *the complaint falls within a balancing provision [exception] to the unlawful discrimination concerned, or*

  (iv) *the respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint.*

To clarify the operation of the proposed sub-section, CSA submits that the following additional sub-sections should be inserted:

(a) *For the purposes of excluding the application of subsection 1(h), the onus of establishing that the respondent was in Western Australia lies with the complainant.*

(b) *The Commissioner is to consider the following matters before determining that a complaint is frivolous, vexatious, misconceived or lacking in substance—*

  (i) *the number of complaints lodged by the complainant;*

  (ii) *the number of complaints lodged in respect of the same respondent;*

  (iii) *the number of complaints lodged in respect of the same or similar conduct;*

[1030] Submission from the Equal Opportunity Commission, 20 November 2020, 9.
[1031] Submission from Christian Schools Australia, 4 November 2020, 11-12.

(iv) *if the complainant has lodged more than one complaint in respect of the same respondent—any similarity in the conduct that is the subject of the complaint;*

(v) *any evidence that the complainant is not acting in the interests of justice.*

Section 89(1) of the Act already confers some of the dismissal powers of the suggested provision. However, section 89(1) does not, at least explicitly, confer some of the other powers, such as those in subsection (g)-(h).

The Commission invites submissions as to whether the dismissal powers of the Equal Opportunity Commissioner should be amended and expanded. In particular, the Commission would benefit from submissions as to whether the current power in section 89(1) of the Act is insufficient to dismiss certain cases that on any reasonable view ought to be dismissed.

Question

Should the dismissal powers of the Equal Opportunity Commissioner be amended and expanded?

Assistance

As discussed in section 3.9.4 above, section 93(2) of the Act provides that, where a complaint is referred to the SAT, the Equal Opportunity Commissioner shall, if the complainant requests, 'assist the complainant in the presentation of the case' to the SAT and may, if requested to do so and the Commissioner considers it appropriate, 'make such contribution towards the cost of witness and other expenses as is necessary'.

Circle Green Community Legal submits that in their experience, vulnerable complainants who have been discriminated against or sexually harassed often lack the means and the ability to progress complaints by themselves. It therefore considers that this assistance is a positive feature of the Act.[1032]

The EOC suggests incorporating a provision for determining the scope and extent of the Equal Opportunity Commissioner's assistance to provide representation similar to section 95C of the South Australian Act.

Unlike the Act, section 95C of the South Australian Act does not impose an obligation on the South Australian Commissioner to provide assistance. Rather, section 95C provides that the South Australian Commissioner 'must apply available public funds judiciously' and take into account 'the capacity of the complainant or respondent to represent themselves or provide their own representation', 'the nature and circumstances of the alleged contravention', and 'any other matter considered relevant'. Section 95C further provides that, where representation is provided, the representative of the complainant (or respondent) has an obligation to 'disclose any information reasonably required by the Commissioner to determine whether the Commissioner should cease to provide representation', and 'may disclose to the Commissioner information that the person considers relevant to the question of whether the Commissioner should cease to provide representation'.

Arguably, imposing a similar obligation on the Equal Opportunity Commissioner only to provide assistance 'judiciously', and permitting the Commissioner to cease to provide representation where appropriate, may safeguard against assistance being provided to complainants who have the financial and/or personal resources to competently present their case to the SAT without assistance. From a resourcing perspective, this may be desirable as it would allow resources to be diverted to more meritorious functions of the EOC.

Again, the utility of recommendations in this area depends largely on the resourcing of the EOC.

The Commission welcomes submissions regarding whether the Equal Opportunity Commissioner's assistance function should be amended and expanded.

[1032] Submission from Circle Green Community Legal, 20 November 2020, 5.

Question

Should the Equal Opportunity Commissioner's assistance function be amended and expanded?

Management plans

Under section 145 of the Act, an authority is required to 'prepare and implement an equal opportunity management plan'. The plan must include provisions relating to, among other matters, 'the devising of policies and programmes' and 'the review of personnel practices within the authority … with a view to the identification of any discriminatory practices'.

An authority is defined in section 138 of the Act to include the Western Australian Public Service and all State trading concerns, State instrumentalities, State agencies, or any public statutory body, corporate or unincorporate established by or under a law of the State.

The DDLS suggests that the effectiveness of the enforcement of such a process is limited. The DDLS says that the process needs to be successfully enforced and monitored to be effective. Presently, the Act does not provide the EOC powers to investigate and monitor the implementation of management plans, nor does it allow the EOC the power to require action or punish.[1033]

However, arguably, the Act confers powers and processes that ensure management plans are effectively implemented. Section 145(6) requires each authority to send a copy of its management plan to the Director of Equal Opportunity in Public Employment as soon as practicable after the management plan has been prepared, and section 146(1) requires each authority to report to the Director at least once in each year after the date on which the implementation of its management plan commenced. Section 147(1) further provides that '[w]here the Director is dissatisfied with any matter relating to the preparation or implementation of a management plan by an authority or any failure or omission of an authority with respect to the preparation or implementation of a management plan, the Director may hold an investigation into the matter'. By section 152, at the conclusion of any investigation, the Director may 'make recommendations to the authority' and 'furnish a report, with or without recommendations, to the Minister'. Section 153(1) provides that the Minister may then 'direct an authority to amend its management plan'.

The Director of Equal Opportunity in Public Employment is appointed pursuant to section 142 of the Act. They are an independent statutory officer appointed by the Governor to perform functions defined in Part IX of the Act. The current Director is also an executive director at the Western Australian Public Sector Commission.[1034] The Director's Annual Report 2019-20 does not indicate that in that year any action was taken pursuant to section 147(1) or section 152.

Issues which arise for consideration in relation to management plans include whether there is an effective means of auditing and enforcing them and whether there is sufficient publication of the results of the audit and enforcement process. There is also an issue as to whether the Director of Equal Opportunity in Public Employment is the appropriate person to review the management plans or whether this role should be given to the Equal Opportunity Commissioner. The Commission welcomes submissions regarding whether management plans have been effective under the Act, and whether the current process for monitoring and enforcing them needs to be amended.

[1033] Submission from the Disability Discrimination Legal Service Inc, 29 October 2020, 7.
[1034] *Annual Report 2019-20*, Director of Equal Opportunity in Public Employment.

Question

Are management plans effective? Should the process be amended to make it more effective?

The EOC submits that the Commission consider whether Part IX should continue to be part of the Act or be incorporated into the *Public Sector Management Act 1994* (WA) given the Director is now located within the Public Sector Commission.[1035]

The Commission welcomes submissions as to whether Part IX of the Act should be removed and placed in the *Public Sector Management Act 1994 (WA)*.

Question

Should Part IX be moved from the Act into the Public Sector Management Act 1994 (WA)?

Regulator involvement in compliance

The DDLS suggests that under the current framework, the Equal Opportunity Commissioner cannot play an active role in monitoring and regulating compliance with anti-discrimination legislation or preventing discrimination.[1036] The DDLS considers that the statutory framework focuses instead on compensation based remedies, and fails to utilise the extensive knowledge and experience that human rights agencies have of discrimination issues facing the community.[1037]

The DDLS refers to the Australian Securities and Investments Commission (**ASIC**) and the Australian Competition and Consumer Commission (**ACCC**) as two examples of regulators that play an active role in monitoring and enforcing compliance.[1038] It further submits that both ASIC and the ACCC have considerably more powers under their legislation to assist in performing this function.[1039]

This preliminary submission raises the very important question as to whether the statutory framework should be changed so that the EOC's focus moves to, or is widened to include, regulating employers, service providers and others to prevent discrimination.

A question to be answered in considering this issue is whether the Act already gives the EOC sufficient powers?

As noted in 3.9.3, in addition to the investigative, conciliative and educational powers of the Equal Opportunity Commissioner, for the purposes of eliminating discrimination, the Equal Opportunity Commissioner may also review the laws of Western Australia, consult with governmental and non-governmental groups in order to ascertain means of improving services and conditions affecting a person or persons who are subject to discrimination and develop programmes and policies promoting equality between people. Although these powers are not insubstantial, they do not include the usual powers which a statutory regulator would have of investigation (independent of a complaint being made to it) and prosecution. Neither is the Act framed in the manner usual in a regulatory Act. That is, it does not impose

[1035] Submission from the Equal Opportunity Commission, 20 November 2020, 10.
[1036] Submission from the Disability Discrimination Legal Service Inc, 29 October 2020, 10.
[1037] Ibid.
[1038] Ibid.
[1039] Submission from the Disability Discrimination Legal Service Inc, 29 October 2020, 10; *Australian Securities and Investments Commission Act 2001* (Cth); *Competition and Consumer Act 2010* (Cth).

obligations on persons or groups and give the Equal Opportunity Commissioner or the EOC the duty to administer the Act and obligations within it.

The Commission would benefit from submissions as to whether and why the EOC should play a greater role in monitoring and regulating compliance with the Act or preventing discrimination in the community.

Question

Should the statutory framework be changed to require the EOC to play a greater role in monitoring and regulating compliance with anti-discrimination legislation or preventing discrimination?

6.10 Requirements for the referral of complaints to the SAT

Section 90(1) of the Act provides that, where the Equal Opportunity Commissioner has dismissed a complaint, the complainant may require the Commissioner to refer the complaint to the SAT.

It may be argued that the Equal Opportunity Commissioner should have the power to refuse a complainant's request for a referral to ensure that the SAT does not have to consider unmeritorious, vexatious or frivolous complaints. Conversely, in preliminary submissions to the Commission, there is support for complainants to retain their option to request a referral of their dismissed complaint to the SAT, subject to the SAT's powers to grant leave to hear and determine complaints that have been dismissed.[1040] That is, the SAT's powers to refuse leave to hear a referred complaint may be sufficient to efficiently to dispose of unmeritorious, vexatious or frivolous complaints referred to it by the Equal Opportunity Commissioner.

The Commission invites submissions as to whether complainants should be able to require the Equal Opportunity Commissioner to refer their dismissed complaints to the SAT.

Question

Should the complainant's option to request the Equal Opportunity Commissioner to refer a dismissed complaint to the SAT be retained?

6.11 Role and jurisdiction of the SAT

A stakeholder suggests that where a complainant persists in the pursuit of a claim that has already been determined as vexatious or lacking in substance by both the Equal Opportunity Commissioner and SAT, the SAT should have the power to award costs against the complainant.[1041] However, it appears the SAT does have that power. Relevantly, in substance and effect, section 87(1) of the *State Administrative Tribunal Act 2004* (WA) provides that parties bear their own costs in a proceeding of the SAT unless the enabling Act specifies otherwise. Section 87(2) of the *State Administrative Tribunal Act 2004* (WA), confers a discretion on the SAT to 'make an order for the payment by a party of all or any of the costs of another party' unless otherwise specified in the Act. As the Act does not contain any provision regarding the costs jurisdiction of the SAT, the SAT therefore retains its direction to make a costs order against a party in

[1040] Submission from the Equal Opportunity Commission, 20 November 2020, 9.
[1041] Submission from the Human Rights Law Alliance, 30 October 2020, 6.

respect of a claim under the Act. Notably, however, this discretion is rarely to be exercised, as was stated in *Commission for Equal Opportunity v Alcoa of Australia Ltd*:[1042]

> *[The SAT] should not generally make an award for costs in proceedings bought under the Act unless a party has conducted itself in such a way as to unnecessarily prolong the hearing; has acted unreasonably or inappropriately in its conduct of the proceedings; has been capricious; or the proceedings in some other way constitute an abuse of process. The [SAT] might also make an order for costs where a matter has been brought vexatiously or for improper purposes.*

The reluctance of the SAT to make costs orders may be another factor which encourages parties to conciliate complaints even when they do not think that the agreed resolution reflects the merits of the application. That is, complainants may agree to conciliate a complaint because of the fear that even if they are successful at the SAT, their legal costs will exceed the compensation they receive and respondents may agree to conciliate a complaint because they fear that even if they are successful at the SAT their legal costs will far exceed any amount they agree to pay at conciliation.

In its preliminary submission, the EOC suggests that the Act be amended to empower the SAT to compel parties to comply with their obligations during an investigation or conciliation of complaints by the Equal Opportunity Commissioner. In particular, where parties breach their obligations during investigation or conciliation, they should be referred to the SAT for enforcement and the SAT should have the power to compel breaching parties to comply.[1043]

At present, such breaches are only enforced by way of prosecution under the offence provisions in Part X (Miscellaneous) of the Act. Relevantly Part X includes offences of:

(a) obstruction of the Equal Opportunity Commissioner, an officer of the Commissioner, the Director or an officer of the Director in the exercise or the performance of a function under the Act;

(b) without reasonable excuse, refusing or failing —

  (i) to furnish information; or

  (ii) to produce a document,

  when so required pursuant to section 86; and

(c) furnishing information or making a statement to the Equal Opportunity Commissioner or to any other person exercising or performing functions under the Act, knowing that the information or statement is false or misleading in a material particular.

The EOC suggests that the provisions in Part X should remain in place to process penalties, but the Act should be amended to allow the SAT to have the power to compel parties to comply with the Equal Opportunity Commissioner's investigatory powers and requirements.[1044] It may be that if issues with non-compliance arise under the Act, those issues would be more efficiently and expeditiously resolved by the SAT rather than by prosecution under Part X of the Act.

The Commission welcomes submissions as to whether the Act should be amended to enlarge the SAT's powers to enforce the obligations of the parties during the investigation and conciliation phase of a complaint.

[1042] [2007] WASAT 317, [47].
[1043] Submission from the Equal Opportunity Commission, 20 November 2020, 9.
[1044] Ibid.

Questions

Should the Act be amended to enlarge the SAT's powers to enforce the obligations of the parties during the investigation and conciliation phase of a complaint?

Should the Act be amended to provide the SAT with the power to order that costs follow the event or order costs in a broader range of circumstances than currently?

6.12 Interaction with relevant Commonwealth laws or proposed laws

As explained at section 3.12 above, the interaction between the Act and Commonwealth laws can lead to confusion for parties to a complaint. The practical effect of concurrent State and Commonwealth anti-discrimination regimes is that if a particular Ground is protected at both State and Federal levels, a complainant may choose which laws to rely on when lodging a complaint. The Commission notes that there is no express provision in the Act which prevents a complainant from lodging a complaint under the Act if they have already done so under the Commonwealth Acts or FW Act in relation to the same matter. In contrast, the Commonwealth Acts each contain provisions which prevent a complainant from lodging a complaint under them if the complainant has already done so under a State law in relation to the same matter. Rees, Rice and Allen noted that the 'reasons for the lack of mandatory 'double dipping provisions in State and Territory legislation are difficult to fathom […]'.[1045]

The Commission welcomes submissions regarding whether the Act should be amended to prohibit complainants from making a complaint to the EOC in respect of the same conduct which has been the subject of a complaint determined pursuant to the Commonwealth Acts or the FW Act.

It is possible that the Commonwealth, States and Territories could seek to agree to uniform model anti-discrimination laws, similar to the recent harmonisation of laws that has given rise to the Workplace Health and Safety Acts across State and Territory jurisdictions. There have been proposals to move towards a harmonised anti-discrimination regime across Australia. The matter was raised by the Law Council of Australia in 2019, which noted that the process was commenced by the Standing Committee of Attorneys-General in 2009-2010 but not pursued.[1046] However, the Commission notes that further consideration of such reform is beyond the scope of this Discussion Paper.

As regards the CMA Act, some of its exclusions, and the comments contained in the Religious Freedom Review commissioned by the Commonwealth government in 2017, highlight the continued tension between balancing the rights of individuals to remain free from discrimination, and the rights of religious organisations to observe or practice in conformity with the beliefs of that religion. That balance has been discussed in relation to whether there should be amendments to protections for religious conviction and in relation to the exceptions contained in the Act.

Question

Should the Act be amended to clarify that a person is prevented from lodging a claim under the Act if they have already made a complaint under Commonwealth anti-discrimination legislation in relation to the same conduct?

[1045] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination & Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 800.
[1046] Law Council of Australia, *Response to Discussion Paper: Priorities for Federal Discrimination Law Reform*, (December 2019), 15.

6.13 Other issues

6.13.1 Compensation cap

Since its enactment in 1984, the compensation cap under the Act has been $40,000.[1047] As part of its 2007 Review, the EOC stated that '[c]learly, the maximum amount of compensation is inadequate, if only from the point of view of inflation'. It recommended that the compensation cap be removed and replaced with a compensation regime commensurate with the range of options available to superior courts in civil awards of damages.[1048] The EOC has reaffirmed this recommendation in relation to the present review.[1049]

UnionsWA suggests that $40,000 is too low to act as a deterrent against discrimination. They argue that the compensation cap may not facilitate action at all because the cost incurred to eliminate discrimination may be greater than the cap itself.[1050]

An alternative to increasing the compensation cap is to remove the compensation cap altogether. It is suggested that this would empower the SAT to order compensation reflecting the full amount of any loss suffered by a person because of unlawful discriminatory acts.[1051]

A low compensation cap may tempt respondents to take the approach that paying an award of compensation is preferable to remedying a discriminatory practice or system, either because of the cost of remediation or because the respondent does not see a benefit to them in altering the discriminatory practice or system. Alternatively, a cap which is too high or a non-existent cap may tempt complainants who do not have a meritorious complaint to make a complaint in the hope that the respondent will agree to pay some compensation rather than risk a large award of compensation.

It is clear from a jurisdictional comparison that the Act is not in line with the compensation amounts that can be awarded in other State and Territory jurisdictions. As discussed above in section 4.14, New South Wales and the Northern Territory have compensation caps of $100,000 and $60,000 respectively. The other States have the discretion to award damages in the amount the relevant tribunal deems appropriate.[1052]

The Commission welcomes submissions on whether the cap should be retained, increased or removed.

Question

Should the $40,000 compensation cap be retained, increased or removed?

The EOC recommended in the 2007 Review that the Act include a provision expressly allowing the SAT to order the payment of interest on compensation amounts, consistent with the approach in NSW and Queensland.[1053] While it is arguable that a party can already be ordered to pay interest under section 127 of the Act, the EOC recommended that there should be a specific provision allowing the SAT to order the payment of interest.[1054]

[1047] *Equal Opportunity Act 1984* (WA), s 127(b)(i).
[1048] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 54.
[1049] Submission from the Equal Opportunity Commission, 20 November 2020, 11.
[1050] Submission from UnionsWA, 19 November 2020, 4.
[1051] Submission from Circle Green Community Legal, 20 November 2020, 6.
[1052] *Anti-Discrimination Act 1998* (TAS), s 89(1)(d); *Equal Opportunity Act 2010* (Vic), s 125(a)(ii); *Anti-Discrimination Act 1991* (QLD), s 209(1)(b).
[1053] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 54.
[1054] Ibid 10.

The Commission invites submissions as to whether the Act should be amended to clarify that an order may be made for the payment of interest on compensation amounts.

Question

Should the Act be amended to clarify that an order may be made for the payment of interest on compensation amounts?

6.13.2 Intersectionality or multidimensional complaints

Australian anti-discrimination law is structured around the identification of attributes or characteristics that must be protected, referred to in this Discussion Paper as the Grounds. A complaint may be made under the Act which alleges discriminatory conduct involving two or more of the Grounds. For example, a complainant may claim they have suffered discrimination on the Grounds of gender and religious conviction, or age and race.[1055] However, the complainant must still prove that the discriminatory act occurred by reason of each separate Ground, rather than a combination of Grounds, which individually may not have resulted in the discriminatory act.

In its preliminary submission, the EOC observes that the Act does not currently reflect all experiences of discrimination in Australia and recommends that the Act be amended to recognise complaints of discrimination on overlapping Grounds by making discrimination caused by two or more overlapping Grounds unlawful.[1056]

The EOC submits that people may experience discrimination by reason of an overlap of more than one of the Grounds, rather than by reason of a combination of multiple Grounds. This is consistent with Blackham and Temple's observation that, in practice, discrimination is 'multiple, overlapping and complex'.[1057] In particular, people may experience intersectional discrimination whereby 'protected characteristics interact to produce disadvantage which is unique and distinct from discrimination based on any one individual ground'. This is to be distinguished from the idea of multiple protected characteristics producing disadvantage that is additive.[1058] Blackham and Temple argue that anti-discrimination laws, like the Act, do not protect against intersectional discrimination, and that 'it is likely that this represents a significant black hole in legal protection'.[1059] They argue that there is an urgent need for recognition of intersectionality in the legal framework 'which is consistent with the lived reality of impacted groups in society'.[1060]

The ACT is the only Australian jurisdiction with explicit recognition of multiple discrimination, as claims may be made where an act allegedly occurs 'because the other person has 1 or more protected attributes'.[1061] The UK Act also recognises discrimination on the ground of a combination of two relevant protected characteristics.[1062]

Blackham and Temple consider that the above formulations are not sufficient to protect against intersectional discrimination, and suggest that tests for anti-discrimination should explicitly state that 'reference to a protected attribute is a reference to one or more protected attributes' as this would direct the attention of practitioners, policy-makers and equality agencies to the challenges facing those experiencing

[1055] Submission from the Equal Opportunity Commission, 20 November 2020, 3.
[1056] Ibid.
[1057] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal*, 773, 796.
[1058] Ibid 776 - 777.
[1059] Ibid 773, 786.
[1060] Ibid 796, 800.
[1061] *Discrimination Act 1991* (ACT), s 8(2).
[1062] *Equality Act 2010* (UK), s 14.

intersectional discrimination.[1063] Alternatively, they suggest that laws should be amended to reflect the position in Canada that 'a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'.[1064]

An argument against implementing the above suggestions is that there is no practical injustice to individuals who experience intersectional discrimination provided they can prove at least one Ground. Another argument could be that it may be difficult to apply the comparator and proportionality tests for discrimination detailed above if these suggestions were implemented. However, as discussed at 6.4.1 and 6.4.2 above, it is possible for those tests be changed or removed.

The Commission would be grateful for submissions regarding whether the Act should be amended to make discrimination based on two or more overlapping Grounds unlawful. Without limiting the scope of submissions, it would assist the Commission if submissions raised examples of intersectional discrimination that have not adequately been protected against under the Act.

Question

Should the Act be amended to make discrimination based on two or more overlapping Grounds unlawful?

6.13.3 Drafting form and style

In the 2007 Review, the EOC observed that other States and Territories have benefited from more modern drafting.[1065] This sentiment is echoed by multiple stakeholders that were consulted in the preliminary stage of the consultation process.[1066] It has been suggested that a less repetitious and wordy drafting style would be easier for the reader to follow although the Commission acknowledges the complexity of the matters with which the Act deals.[1067]

These matters are, however important to all Western Australians, and so the Act must be easy to navigate and understand. Statutory rights, obligations, consequences and remedies must be clearly articulated and comprehensible by the average lay person. The Parliamentary Counsel's Office would undertake detailed drafting of new provisions.

Question

Should the Act adopt a modern drafting style that is easier to follow?

6.13.4 Complaints by representative organisations

As stated in section 3.13.4 above, section 83 of the Act provides that a person, or two or more persons, may lodge a complaint on their own behalf or on behalf of other persons. However, there is no express statutory grant of standing for representative organisations to make complaints on behalf of more than one

[1063] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 786, 797.

[1064] Ibid 782, 797.

[1065] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 2.

[1066] Submission from the Equal Opportunity Commission, 20 November 2020, 10; submission from Christian Schools Australia, received 4 November 2020, page 2; submission from the WA Aids Council, 29 October 2020, 16.

[1067] Submission from the Equal Opportunity Commission, 20 November 2020, 10.

allegedly disadvantaged person or group. The EOC submits that complaints on behalf of groups of persons are uncommon because a complainant must commence the process and attempt to resolve the complaint themselves, often against large organisations.[1068]

In the 2007 Review, the EOC recommended that the complaints procedure be clarified to enable a representative of a disadvantaged group to make a complaint of discrimination on behalf of that group. Consistent with anti-discrimination legislation in some other jurisdictions, which are canvassed in section 4.14.4 above, the EOC considered that the power to authorise a representative to participate in the progress of a complaint should remain in the discretion of the Equal Opportunity Commissioner, having regard to the need to ensure adequate advocacy on behalf of the complainants.[1069] The EOC has reaffirmed this recommendation in its preliminary submission to the Commission.

The EOC submits that there are many advocacy organisations that represent a diverse range of people with attributes reflected by the Grounds.[1070] Lawyers and law firms could also be included in the class of people or organisations who can lodge complaints on behalf of their clients (as is the case with trade unions, who also have standing under section 83).[1071]

The Ethnic Communities Council of WA is also in favour of making amendments to the Act to authorise advocacy bodies to complain to the EOC on behalf of a number of complainants who have complaints against the same entity, pointing to systemic discrimination.[1072]

One argument against permitting representative organisations to bring complaints under the Act is that such organisations may advocate for positions that are not in the best interests of individuals within the group of persons they purport to represent. However, if the Equal Opportunity Commissioner must exercise discretion to permit representative organisations to have standing (in conformity with the recommendation in the 2007 Review), then the Commissioner could act to avoid this possibility occurring. This is because, as discussed in section 4.14.4 above, the Act could require the Commissioner expressly to consider whether the organisation is acting in good faith and has the consent of its members in exercising its discretion.

The Commission invites submissions regarding whether the Act should allow a complaint to be made by a representative organisation, including lawyers and advocacy bodies, on behalf of more than one person or a group of persons who have the same or similar complaint against a respondent.

Question

Should the Act include clarification that a complaint may be made by a representative organisation, including lawyers and advocacy bodies, on behalf of more than one person or a group of persons who have the same or similar complaint against a respondent?

6.13.5 Timeframe for lodging complaints

As explained in section 3.13.5 above, the timeframe for lodging a complaint with the EOC is 12 months from the date of the alleged discriminatory act. However, the Equal Opportunity Commissioner has discretion to accept a complaint outside the 12-month period 'on good cause being shown'.

[1068] Ibid.

[1069] Equal Opportunity Commissioner, *Review of the Equal Opportunity Act 1984* (Report of Equal Opportunity Commission Western Australia, May 2007) 47.

[1070] Submission from the Equal Opportunity Commission, 20 November 2020, 10.

[1071] Ibid.

[1072] Submission from the Ethnic Communities Council of WA, 4 December 2020, 3.

Preliminary submissions have been received by the Commission that the timeframe deters people from making a complaint or pursuing legal action where they have experienced discrimination or sexual harassment but are outside the timeframe.[1073] Circle Green Community Legal observes that people who have experienced discrimination, sexual harassment or victimisation often wait longer than 12 months to pursue complaints.[1074] Circle Green Community Legal use the recent #MeToo movement as an example of how people may not take action in relation to sexual harassment for a number of years after it takes place.[1075]

Further, it submits that delay in making a complaint is likely to be even more pronounced for vulnerable and disadvantaged complainants, as their primary and immediate concern is often their physical, mental and financial wellbeing. Consequently, they submit that the time limit for lodging a complaint should be extended to six years.[1076]

An argument against amending the timeframe is that the Equal Opportunity Commissioner's discretion to accept a complaint made out of time 'on good cause being shown' is sufficient to ensure that the above instances of discrimination or harassment are protected against under the Act. Further, there is a public interest in the timely resolution of complaints so that both complainants and respondents can have the closure required to move forward.

Alternatively, the Act could be amended to include certain factors that the Commissioner must consider in determining whether good cause is shown; these could include consideration of whether it was difficult for the complainant to bring the action within 12 months of the alleged contravention due to, for example, concerns about their physical wellbeing or because of their physical or mental capacity. The Act could also be amended to provide that the Equal Opportunity Commissioner must grant an extension of time to make a complaint between 12 months and 6 years unless there is no good cause to do so.

The Commission would benefit from further submissions as to whether the timeframe for lodging a complaint should be increased from the current 12-month period and if so whether there should be a right to make a complaint within a greater period of time or whether the Equal Opportunity Commissioner should retain a discretion to accept or reject a complaint made beyond the current 12 month period.

Questions

- *Should the timeframe for lodging a complaint be increased from the current 12 months?*
- *Should the current discretion for the Equal Opportunity Commissioner to accept a complaint made out of time on good cause being shown be changed?*

6.13.6 Use of technology in the EOC

As discussed in section 3.9.2 above, the Equal Opportunity Commissioner performs an investigative function in relation to complaints which includes directing a complainant and respondent to attend a conciliation conference in an effort to resolve the matter.[1077] The Act currently provides that the Commissioner may require the complainant and the respondent to appear before the Equal Opportunity Commissioner either separately or together at the conciliation conference. The Act does not expressly

[1073] Submission from Circle Green Community Legal, 20 November 2020, 6.
[1074] Ibid.
[1075] Ibid.
[1076] Ibid.
[1077] *Equal Opportunity Act 1984* (WA), ss 87(1), 91.

contemplate the opportunity or ability for either party to appear at the conciliation virtually, either via telephone or audio and/or video link.

However, a virtual conciliation conference may be necessary in certain circumstances, such as where restrictions on daily life have been imposed as a result of the COVID-19 pandemic; where parties live regionally; or when a complainant does not feel comfortable being physically present in the same room as the respondent.

Further, the Act and the *Equal Opportunity Regulations 1986* (WA) do not expressly provide that the Equal Opportunity Commissioner can receive documents from parties electronically.[1078] Given technological advancements, it is now common for parties to send and receive documents to and from the Equal Opportunity Commissioner electronically.

The Commission invites submissions in relation to the use of technology in the EOC and how the processes can be modernised to assist parties and the EOC.

Question

How can the Act best facilitate the just and efficient disposition of complaints using technology?

6.13.7 Prohibiting conversion practices

As set out in section 4.14.4 above, Victoria, Queensland and the ACT have legislation in place to denounce and prohibit conversion practices which seek to change or suppress an individual's sexual orientation or gender identity. Victoria's very recent legislation, the Prohibition Act, is the first to prohibit such practices in religious settings, including but not limited to a prayer-based practice, a deliverance practice or an exorcism.[1079]

The State Government has recently announced that it is considering introducing legislation to ban conversion practices in Western Australia.[1080] Similar to the Prohibition Act, it is anticipated that any conversion prohibition laws in Western Australia would be contained in legislation separate to the Act. Given the complexity of the Prohibition Act, there is scope to argue that a separate statute is necessary.

In their preliminary submissions to the Commission, the Australian Christian Lobby and other Christian groups oppose the conversion prohibition laws on the basis that people should be free to engage services that individuals feel may be helpful to them. Proponents of conversion prohibition laws in Western Australia argue that the non-existent Federal framework is ineffective and specific legislation is required in Western Australia to protect vulnerable LGBTIQA+ individuals from conversion practices.[1081]

The Commission invites submissions as to whether prohibitions on conversion practices should be included in the Act, or whether any such prohibitions would best be the subject of separate consideration and introduced in separate legislation.

[1078] *Equal Opportunity Act 1984* (WA), s 83; *Equal Opportunity Regulations 1986* (WA), Reg 3.

[1079] *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), s 5(3)(b).

[1080] Hamish Hastie, 'McGowan commits to gay conversion therapy ban', *WA Today* (online, 12 March 2021) < https://www.watoday.com.au/politics/western-australia/mcgowan-commits-to-gay-conversion-therapy-ban-20210312-p57aak.html>.

[1081] Unknown, 'Did WA Labor commit to banning conversion therapy?', *OUTinPerth* (online, 12 March 2021) < https://www.outinperth.com/did-wa-labor-commit-to-banning-conversion-therapy/>.

Question

Should prohibitions on conversion practices be included in the Act?

APPENDIX 1 – STAKEHOLDERS CONSULTED ON A PRELIMINARY BASIS

Stakeholders from whom the Commission received a preliminary written submission

Anglican Schools Commission

Anonymous submission

Archbishop Catholic Archdiocese of Perth

Australian Christian Lobby

Buddhist Council of WA

Chamber of Commerce and Industry WA Chamber of Minerals and Energy

Christian Schools Australia

Circle Green Community Legal WA

Council on the Ageing

Department of Communities

Disability Discrimination Legal Centre (Vic)

Equal Opportunity Commission of WA

Ethnic Communities Council of WA

Free Reformed School Association

Health and Disability Services Complaints Office

Hindu Council of WA

Human Rights Law Alliance

Independent Education Union of Australia (IEU)

Islamic Council of WA

Jewish Community Council of WA

Michael Walder

Ministerial Youth Advisory Council

Northern Suburbs Community Legal Centre

Office of Multicultural Interests

People with Disabilities Australia

State School Teachers Union of WA

Swan Christian Education Association

TransFolk of WA

UnionsWA

WA Aids Council

WA Feminist Lobby Network

WA for Human Rights Act

Workplace Gender Equality Agency

Youth Pride Network

Yvonne Henderson

APPENDIX 2 – LIST OF DEFINED TERMS

2007 Review	The review of the Act undertaken by the EOC in 2007
ACAT	Australian Capital Territory Civil and Administrative Tribunal
ACCC	Australian Competition and Consumer Commission
Act	*Equal Opportunity Act 1984* (WA)
ACT Act	*Discrimination Act 1991* (ACT)
ACT HRC	ACT Human Rights Commission
ADA	*Age Discrimination Act 2004* (Cth)
ADACAS	ACT Disability, Aged and Carer Advocacy Service
ADNSW	Anti-Discrimination Board NSW
Aged Care RC Report	Royal Commission into Aged Care Quality and Safety Final Report: Care, Dignity and Respect tabled on 1 March 2021
AHRC	Australian Human Rights Commission
AHRCA	*Australian Human Rights Commission Act 1986* Cth)
AHRCR	Australian Human Rights Commission Regulations 2019 (Cth)
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
CEDAW	*Convention on the Elimination of all forms of Discrimination against Women*
CERD	*International Convention on the Elimination of all forms of Racial Discrimination*
CMA Act	*Commonwealth Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth)
COAG	Council of Australian Governments
Commission	Law Reform Commission of Western Australia
Commonwealth Acts	The AHRCA, ADA, DDA, RDA and the SDA
CRPD	*Convention on the Rights of Persons with Disabilities*
DDA	*Disability Discrimination Act 1992* (Cth)
EHRC	Equality and Human Rights Commission (UK)
EOC	Equal Opportunity Commission of Western Australia
EOT	Equal Opportunity Tribunal of Western Australia
Equal Opportunity Commissioner	The Commissioner for Equal Opportunity appointed under s 75 of the Act

FW Act	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
Gender Reassignment Act	*Gender Reassignment Act 2000* (WA)
Grounds	Each of the grounds of discrimination under the Act
LGBTIQA+	Lesbian, gay, bisexual, transgender, intersex, queer, asexual, and other diverse sexual orientations and gender identities
NCAT	New South Wales Civil and Administrative Tribunal
Northern Territory Act	*Anti-Discrimination Act 1992* (NT)
NSW Act	*Anti-Discrimination Act 1977* (NSW)
NSW ADB	Anti-Discrimination Board of NSW
NSW Commission	Law Reform Commission of NSW
NTADC	Northern Territory Anti-Discrimination Commission
NTCAT	Northern Territory Civil and Administrative Tribunal
NZ Act	*Human Rights Act 1993* (NZ)
Prohibition Act	*Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)
Prohibition Bill	Change or Suppression (Conversion) Practices Prohibition Bill 2020 (Vic)
Provision of Education Exception	The exception contained in s 73(3) of the Act
QCAT	Queensland Civil and Administrative Tribunal
QHRC	Queensland Human Rights Commission
Queensland Act	*Anti-Discrimination Act 1991* (QLD)
RDA	*Racial Discrimination Act 1975* (Cth)
Religious Discrimination Bill	Religious Discrimination Bill 2019 (Cth)
Religious Bodies Doctrine Exception	The exception contained in s 72(d) of the Act
Religious Educational Bodies Employment Exception	The exception contained in s 73(2) of the Act
Religious Freedom Bills	The Religious Discrimination Bill, Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth)
Religious Personnel Exception	The exception contained in s 72(a)-(c) of the Act

RRTA	*Racial and Religious Tolerance Act 2001* (Vic)
SACAT	South Australian Civil and Administrative Tribunal
SAT	State Administrative Tribunal
SAT Act	*State Administrative Tribunal Act 2004* (WA)
SDA	*Sex Discrimination Act 1984* (Cth)
South Australian Act	*Equal Opportunity Act 1984* (SA)
Tasmanian Act	*Anti-Discrimination Act 1998* (TAS)
TCAT	Tasmanian Civil and Administrative Tribunal
Terms of Reference	The Terms of Reference set by the Attorney General for Western Australia in order to determine the area of potential reform
UK Act	*Equality Act 2010* (UK)
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
Victorian Act	*Equal Opportunity Act 2010* (Vic)
Victorian Report	The report of the Victorian Legislative Assembly Legal and Social Issues Committee of their Inquiry into Anti-vilification Protections
WGEA	Workplace Gender Equality Agency

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