



Consultation Paper

Anti-Discrimination Bill 2024 (Exposure Draft) – Affirmative measures

February 2024

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Abbreviations

Abbreviation	Definition
AD Act	<i>Anti-Discrimination Act 1991</i> (Qld)
<i>Building Belonging</i> Report	Queensland Human Rights Commission, <i>Building belonging: Review of Queensland’s Anti-Discrimination Act 1991</i> (July 2022)
CEDAW	Committee on the Elimination of Discrimination against Women
Disability Discrimination Act	<i>Disability Discrimination Act 1992</i> (Cth)
DJAG	Department of Justice and Attorney-General
Draft Bill	Anti-Discrimination Bill 2024 (Exposure Draft)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICERD Committee	Committee on the Elimination of all Forms of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
QHRC	Queensland Human Rights Commission
Racial Discrimination Act	<i>Racial Discrimination Act 1975</i> (Cth)
Commonwealth Sex Discrimination Act	<i>Sex Discrimination Act 1984</i> (Cth)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Victorian Equal Opportunity Act	<i>Equal Opportunity Act 2010</i> (Vic)

Introduction

Purpose

The Department of Justice and Attorney-General (DJAG) invites your comment on proposals to modernise Queensland's anti-discrimination laws. The purpose of the draft Anti-Discrimination Bill 2024 (the draft Bill) is to:

- promote and protect the rights to equality and non-discrimination;
- eliminate discrimination, sexual harassment, vilification and other unlawful conduct to the greatest extent possible;
- promote and facilitate the identification and elimination of systemic causes of discrimination, sexual harassment, vilification and victimisation;
- promote and facilitate voluntary compliance with the legislation; and
- establish a flexible and efficient process for resolving complaints about alleged contraventions of the legislation.

The purpose of this Consultation Paper is to seek feedback on provisions for affirmative measures in the draft Bill.

Further consultation papers, including a consultation paper seeking feedback on the entire draft Bill, and information about how to provide feedback are also available at: the DJAG [community consultation webpage](#) at be accessed via the DJAG website at www.justice.qld.gov.au/community-engagement/community-consultation/current or at Get Involved at <https://www.getinvolved.qld.gov.au/>

Why is this consultation occurring?

On 1 September 2022, the QHRC Report: *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Building Belonging Report) was tabled in the Queensland Legislative Assembly. On 3 April 2023, the Queensland Government tabled its Final Response to the report, supporting in-principle all 122 recommendations of the QHRC.

The Queensland Government recognises that there is a need for new anti-discrimination legislation to be introduced that reflects contemporary best practice and is in keeping with modern community expectations and standards of behaviour. The Queensland Government has committed to introducing a Bill to repeal and replace the *Anti-Discrimination Act 1991* (Qld) (AD Act) within the current term of government.

This represents significant law reform for the State, and it is important to carefully consider all elements of the new legislative framework to ensure it strikes the right balance between competing rights and interests, including the need to protect all people from discrimination, sexual harassment and vilification based on a contemporary understanding of equality. Importantly, the Queensland Government has committed to continuing to consult with stakeholders and the community as we work to implement these recommendations.

Relevant recommendations

This consultation paper focuses on the proposed approach to implementing the following recommendations from the Building Belonging Report:

Number	Recommendation	Clause in draft Bill
4.1	The AD Act should include a new provision called affirmative measures, contained within the part of the Act that explains the meaning of discrimination rather than in general exceptions, defined as per section 12 of the <i>Equal Opportunity Act 2010</i> (Vic) (Victorian Equal Opportunity Act). The Act should include contemporary examples to demonstrate how affirmative measures may apply in practice.	Clause 16 – Affirmative measures
4.2	The AD Act should impose a different and higher standard for measures that apply to government plans, policies, or programs in relation to minority racial groups, requiring that they are reasonable and proportionate to the scope and impact of the measures on the affected group. The Act should confirm that such measures be designed and implemented after prior consultation with affected communities, and with the active participation of the communities.	Clause 16 – Affirmative measures
4.3	Prior to the enactment of legislation, the Queensland Government should ensure that Aboriginal and Torres Strait Islander peoples are genuinely consulted about this proposed approach.	N/A

How to get involved

You may wish to comment on all the issues set out in this consultation paper, or only the issues that are of particular interest to you. You can provide comments or make a submission via email or post.

Email:

adactreview@justice.qld.gov.au

Post:

Strategic Policy and Legislation
Department of Justice and Attorney-General
GPO Box 149
Brisbane, Qld 4001

Submissions close at 5pm on 22 March 2024

Privacy Statement: Personal information in your comments or submission will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of informing reforms to anti-discrimination legislation in Queensland. DJAG may contact you for further information on the issues your comments or submission raise. Your comments or submission may also be provided to others with an interest in the reforms, for example, Parliament’s Legal Affairs and Safety Committee. Comments and submissions in relation to this consultation paper will be treated as public documents and may be published on DJAG’s website. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. **Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*.**

Summary of proposals / Consultation questions

Below is a list of all the consultation questions in the Consultation Paper. However, any comments on the proposed reforms are welcome.

General requirements for affirmative measures (clauses 13(4) and (5) and clause 16)

The following approach is proposed in relation to the general provision for affirmative measures in the draft Bill:

The draft Bill will provide that a person may take an affirmative measure to promote or realise substantive equality for members of a group with a particular protected attribute. The draft Bill will make it clear that a person does not discriminate against another person by taking an affirmative measure.

An affirmative measure must:

- a) confer a benefit on the members of the group;
- b) be taken in good faith for achieving the purpose (i.e. achieving substantive equality for members of a group with a protected attribute or particular combination of protected attributes);
- c) be reasonably likely to achieve the purpose;
- d) be proportionate to achieving the purpose; and
- e) be justified because the members of the group have a particular need for advancement or assistance.

A measure is taken for achieving the purpose if it is taken –

- a) solely for achieving the purpose; or
- b) for achieving the purpose as well as for other reasons.

The person taking the affirming measure has the onus of proving, on the balance of probabilities, that the measure is an affirmative measure.

A measure stops being an affirmative measure if the purpose is achieved.

Question for consultation:

1. Do you agree with the proposed approach to the general requirements for affirmative measures?

Affirmative measures for racial substantive equality (clause 16(3) and 16(7))

In addition to the general requirements (listed above), it is proposed that any affirmative measures for realising substantive equality for groups or individuals of a particular race, must also meet additional requirements. These additional requirements will include that the measure:

- a) is taken for the **sole purpose** of promoting or realising substantive equality for the members; and
- b) is **necessary** to promote or realise substantive equality for the members of the group.

In deciding whether a measure **confers a benefit**, the decision must be:

- decided on the basis of adequate consultation with the members of the group, or a representative body for the members of the group, in the design and implementation of the measure; and
- regularly reviewed in consultation with the members of the group.

Questions for consultation:

2. Do you agree with the additional proposed requirements for affirmative measures for realising substantive equality for groups or individuals of a particular race?
3. Should there be any further requirements?

Background

Proposed new anti-discrimination law for Queensland

Building Belonging Report

The Building Belonging Report recommends a holistic redrafting of the current AD Act.

The proposed new anti-discrimination law will fundamentally alter the operation of Queensland's discrimination legislation with a view to ensuring it is a modern and effective instrument that appropriately protects people from discrimination, sexual harassment, vilification and other objectionable/unlawful conduct.

New emphasis on substantive equality

Modern anti-discrimination laws have a greater emphasis on achieving substantive equality, not simply formal equality. Formal equality encourages neutrality of treatment. It is underpinned by the view that to achieve equality everybody must be treated alike. The first wave of anti-discrimination laws reflected this approach. This approach has been subject to criticism, including on the basis that not everyone starts on an equal footing, and so equal treatment will not address the results of systemic and historical inequalities and disadvantages for certain groups in society.

In contrast, substantive equality is focused on equalising the starting point, recognising that it may be necessary to accommodate differences, and treat various groups differently to achieve real (and substantive) equality.

Many of the recommendations of the Building Belonging Report and the reforms proposed for the new anti-discrimination law are aimed at achieving substantive equality. These include recommendations in relation to:

- the main **purposes of the draft Bill**, which include to eliminate discrimination, sexual harassment, vilification and victimisation and other unlawful conduct to the greatest extent possible (clause 8);
- the **introduction of a positive duty** to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, vilification and victimisation as far as possible (clause 19);
- the **introduction of a positive duty to make reasonable accommodation** for a person with disability (clause 18);
- provision for '**affirmative measures**' to be made for the purpose of promoting or realising substantive equality for members of a group with a protected attribute or a particular combination of protected attributes (clause 16);
- additional requirements for '**affirmative measures**' for members of a particular race (clause 16);
- new **compliance functions for the QHRC** including a new regulatory approach for promoting compliance with the new duties and obligations under the Bill (Part 10); and
- allowing for **complaints by organisations** who have an interest in promoting the interests or welfare of persons with protected attributes (interested body complaints) and representative complaints in certain circumstances (Part 9).

Affirmative Measures

Background

Substantive equality and affirmative measures

The principle of equality is central to non-discrimination. Both equality and non-discrimination also underpin the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹ The ICERD aims to eliminate discrimination and achieve equality without distinction as to race, colour, descent or national or ethnic origin. The Committee on the Elimination of Racial Discrimination has stated that the principle of equality underpinning the ICERD combines formal equality before the law with equal protection of the law, with substantive equality as the aim to be achieved by the faithful implementation of its principles.²

One of the ways that substantive equality is reflected in the ICERD, is the requirement for state parties to include 'special measures' (or affirmative measures) in their legal systems.³

Affirmative measures promote substantive equality for a group of people who have one or more protected attributes.

Affirmative measures allow proactive strategies to be taken to provide preferential treatment to a group who have been subject to historical and systematic disadvantage. As long as they meet certain criteria they are not considered discrimination.

While 'affirmative measures' are also known as other terms, including 'special measures' and 'affirmative action', the Building Belonging Report preferred the term 'affirmative measures,' given the term 'special measures' could have paternalistic connotations. The term 'affirmative measures' will be the main term used in this paper and the draft Bill (except in the case of referring to particular terms in legislation or human rights instruments).

Other jurisdictions

A number of other state and territory and Commonwealth laws provide for affirmative measures. Some provide for the ability to take affirmative measures as an exception to discrimination. These include:

- **Commonwealth:** *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act);⁴
- **Australian Capital Territory (ACT):** *Discrimination Act 1991* (ACT) (ACT Discrimination Act);⁵
- **New South Wales (NSW):** *Anti-Discrimination Act 1977* (NSW);⁶
- **Northern Territory (NT):** *Anti-Discrimination Act 1992* (NT);⁷
- **South Australia (SA):** *Equal Opportunity Act 1984* (SA).⁸

Other jurisdictions, explicitly provide for the positive ability to take affirmative measures.

These include:

¹ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), opened for signature 21 December 1965, A/RES/2106.

² Committee on the Elimination of all Forms of Racial Discrimination (ICERD Committee), *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination* (2009), 75th sess, UN Doc CERD/C/GC/32 (24 September 2009).

³ *Ibid* 5.

⁴ *Racial Discrimination Act 1975* (Cth) s 8.

⁵ *Discrimination Act 1991* (ACT) s 27.

⁶ *Anti-Discrimination Act 1977* (NSW) ss 21, 49ZYZ, 126A.

⁷ *Anti-Discrimination Act 1992* (NT) s 57.

⁸ *Equal Opportunity Act 1984* (SA).

- **Commonwealth:** *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act),⁹ *Racial Discrimination Act*,¹⁰ the *Age Discrimination Act 2004* (Cth)¹¹ and the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act);¹²
- **Victoria:** *Equal Opportunity Act 2010* (Vic) (Victorian Equal Opportunity Act);¹³

While the State and Territory anti-discrimination acts often have generic provisions (not aimed at a particular protected attribute), the relevant specific Commonwealth laws, have provisions aimed at the protected persons for whom the legislation is enacted (e.g. people with disability for the Disability Discrimination Act and racial and ethnic groups for the Racial Discrimination Act). Affirmative measures is expressed as positive duty in the Victorian Equal Opportunity Act and in the Sex Discrimination Act.

See Annexure 1 for a comparative table of affirmative measures provisions in Commonwealth and other states and territories laws.

Human rights treaties and instruments

Various international human rights treaties promote affirmative measures including those concerned with:

- racial discrimination;¹⁴
- discrimination against women;¹⁵ and the
- rights of persons with disabilities.¹⁶

Some human rights treaties, such as the Committee on the Elimination of Discrimination against Women (CEDAW), use the term ‘temporary special measures’ to denote the importance of affirmative measures only being in place until the objectives of equality of opportunity and treatment have been achieved, and not as permanent mechanisms to entrench separate rights or segregation.¹⁷ Whereas the ICERD stipulates that affirmative measures will not be considered discrimination ‘provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.¹⁸

Proposed provisions for affirmative measures in the draft Bill

The Building Belonging Report recommendations

Currently, the AD Act provides for the following two general exemptions to discrimination, whereby discrimination is not unlawful:

- **Section 104:** Welfare measures — a person does an act to benefit the member of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act;
- **Section 105:** Equal opportunity measures — a person may do an act to promote equal opportunity for a group of people with an attribute if the person of the act is not inconsistent with this Act, until the purpose of equal opportunity has been achieved.

⁹ *Disability Discrimination Act 1992* (Cth) s 45.

¹⁰ *Racial Discrimination Act 1975* (Cth) s 8.

¹¹ *Age Discrimination Act 2004* s 33.

¹² *Sex Discrimination Act 1984* (Cth) s 7D.

¹³ *Equal Opportunity Act 2010* (Vic) s 12.

¹⁴ ICERD (n 2) art 1(4).

¹⁵ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), opened for signature 23 March 2006, A/RES/60/230 art 4(1).

¹⁶ *Convention on the Rights of Persons with Disabilities* (CRPD), opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4).

¹⁷ CEDAW (n 16) art 4; ICERD (n 2).

¹⁸ ICERD (n 2) art 1(4).

The Building Belonging Report has recommended, subject to further targeted consultation, that these general exemptions are reframed into a single provision, based on section 12 of the Victorian Equal Opportunity Act — ‘Special Measures’ (but reframed as ‘affirmative measures’).

Proposed requirements for affirmative measures

There is a significant body of Australian and international law regarding affirmative measures and their requirements.¹⁹ It is recognised that the requirements for affirmative measures must be carefully applied and substantiated to ensure that only conduct which meets the criteria is considered as an affirmative measure.

The broad requirements to be considered in determining whether conduct is an affirmative measure include:

- whether the conduct is directed to members of a group with a particular attribute;
- what the purpose of the conduct is and whether it is for the purpose of promoting or realising substantial equality;
- whether the conduct is undertaken in good faith, is reasonably likely to achieve its purpose, is proportionate and justified.²⁰

If it doesn’t meet the criteria then it will be discrimination, and if a person, organisation or government wishes to pursue the measure, they will require an exemption from the tribunal.²¹ It is intended that the provisions for affirmative measures operate primarily on a self-assessment basis. That is, it is preferable that persons seeking to engage in affirmative measures make their own assessment of the matter, rather than making an application to the tribunal for a determination as to whether the measures are an affirmative measure or require an exemption. The functions of the QHRC under the new legislation will include developing guidance about the application of the AD Act, and this must include guidelines about the development of affirmative measures.

General requirements for affirmative measures (clauses 13(4) and (5) and clause 16)

The following approach is proposed in relation to the general provision for affirmative measures in the draft Bill:

The draft Bill will provide that a person may take an affirmative measure to promote or realise substantive equality for members of a group with a particular protected attribute. The draft Bill will make it clear that a person does not discriminate against another person by taking an affirmative measure.

An affirmative measure must:

- a) confer a benefit on the members of the group;
- b) be taken in good faith for achieving the purpose (i.e. achieving substantive equality for members of a group with a protected attribute or particular combination of protected attributes);
- c) be reasonably likely to achieve the purpose;
- d) be proportionate to achieving the purpose; and
- e) be justified because the members of the group have a particular need for advancement or assistance.

A measure is taken for achieving the purpose if it is taken –

¹⁹ *Gerhardy v Brown* (1985) 159 CLR 70; *Waite Group (Human Rights)* [2016] VCAT 1258; *Bropho v Western Australia*, [2007] FCA 519; *Mahoney v the Queen* [2013] HCA 28.

²⁰ *Waite Group (Human Rights)* [2016] VCAT 1258.

²¹ See section 113 of the *Anti-Discrimination Act 1991* (Qld) (AD Act) which provides for an application to be made to the tribunal for an exemption from the operation of a specified provision of the AD Act.

- a) solely for achieving the purpose; or
- b) for achieving the purpose as well as for other reasons.

The person taking the affirming measure has the onus of proving, on the balance of probabilities, that the measure is an affirmative measure.

A measure stops being an affirmative measure if the purpose is achieved.

Question for consultation:

1. Do you agree with the proposed approach to the general requirements for affirmative measures?

Affirmative measures for addressing racial substantive equality

Recommendation 4.2 of the Building Belonging Report was that there should be a different and higher standard for affirmative measures for minority racial groups. ICERD²² recognises ‘special measures’ as important for the advancement of equality and confirms that such measures are not racial discrimination.

The Racial Discrimination Act gives effect to the ICERD and the text of the ICERD is set out in the schedule of the Act. Section 8(1) of the Racial Discrimination Act provides that Part II of the Act (the part that prohibits racial discrimination), does not apply to ‘special measures’. The phrase is not defined in the Act and it takes its meaning directly from article 1(4) of the ICERD. Article 1(4) of the ICERD states:

*Special measures taken for the **sole purpose** of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures **do not, as a consequence, lead to the maintenance of separate rights for different racial groups** and that they **shall not be continued after the objectives for which they were taken to have been achieved.***

While there is an obligation under the ICERD for state parties to take affirmative measures, these measures must also meet certain requirements.

The Committee on the Elimination of all Forms of Racial Discrimination (ICERD Committee) has provided guidance on the elements of ‘special measures’ and has stated that ‘special measures’ ‘should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should also be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned’²³.

The ICERD Committee has stated that: ‘State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities’²⁴.

The importance of engagement of people impacted by measures that are designed to benefit them is also reflected in the United Nations Declaration on the Rights of Indigenous People (UNDRIP).²⁵ UNDRIP is a most comprehensive standard on human rights for Indigenous peoples.

²² ICERD (n 2).

²³ ICERD Committee (n 3) (Annex VIII) [16].

²⁴ Ibid (Annex VIII) [18].

²⁵ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), opened for signature 2 October 2007, A/RES/61/295.

Article 3 UNDRIP states:

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*²⁶.

Article 19 states:

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them*²⁷.

The right to self-determination for Indigenous peoples is also expressed more broadly in the International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Convention on Economic, Social and Cultural Rights (ICESCR)²⁹.

Requirements for affirmative measures for racial substantive equality

In the case of *Gerhardy v Brown*, Brennan J described necessary requirements for 'special measures' for achieving racial substantive equality in the following terms:

- a) the measure must confer a **benefit**;
- b) on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin;
- c) the **sole purpose** of the measure must be to secure adequate advancement of the beneficiaries so that they may equally enjoy and exercise their human rights and fundamental freedoms;
- d) the protection given to the beneficiaries must be **necessary** for them to enjoy and exercise their human rights equally with others;³⁰ and
- e) the measure must **not have yet achieved its objectives** (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).³¹

The requirement for consultation with and participation of Indigenous people in the design and implementation of affirmative measures has received mixed support however in case law in Australia.³²

The new anti-discrimination law represents an opportunity for Queensland to embed the concept of self-determination and the requirement for consultation as expressed in UNDRIP into the affirmative measures provisions.

²⁶ UNDRIP (n 26) art 3.

²⁷ Ibid art 19.

²⁸ United Nations, International Covenant on Civil and Political Rights (ICCPR), opened for signature 19 December 1966, UN Doc 999 UNTS 171 (entered into force 23 March 1976).

²⁹ United Nations, International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, UN Doc 993 UNTS 3 (entered into force 3 January 1976).

³⁰ *Gerhardy v Brown*, 133.

³¹ *Gerhardy v Brown*, 139-40.

³² In *Gerhardy v Brown*, Brennan J identified that the wishes of the beneficiaries 'are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. However, in *Bropho v Western Australia* [2007] FCA 519, Nicholson J while noting the *obiter dicta* of Brennan J in *Gerhardy v Brown*, including that the wishes of the beneficiaries of the measure are also of great importance in satisfying the element of advancement, held that "that dicta was not supported by the other justices and is not consistent with the general principles in the case." Similarly, in *Maloney v the Queen* [2013] HCA 28, the High Court held that laws and regulations restricting the possession of alcohol on Palm Island were for the benefit of Aboriginal peoples. The Court found that special measures do not require either consultation with or the informed consent of an affected community.

Affirmative measures for racial substantive equality (clause 16(3) and 16(7))

In addition to the general requirements (listed above), it is proposed that any affirmative measures for realising substantive equality for groups or individuals of a particular race, must also meet additional requirements. These additional requirements will include that the measure:

- a) is taken for the **sole purpose** of promoting or realising substantive equality for the members; and
- b) is **necessary** to promote or realise substantive equality for the members of the group.

In deciding whether a measure **confers a benefit**, the decision must be:

- decided on the basis of adequate consultation with the members of the group, or a representative body for the members of the group, in the design and implementation of the measure; and
- regularly reviewed in consultation with the members of the group.

Questions for consultation:

2. Do you agree with the additional proposed requirements for affirmative measures for realising substantive equality for grounds or individuals of a particular race?
3. Should there be any further requirements?

Annexure 1: Affirmative measures in other laws

Positive ability to take affirmative measures	
Jurisdiction	Provision
Victoria	<p><u>Equal Opportunity Act 2010 (Vic), s 12 (Special measures)</u></p> <p>(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.</p> <p>Examples</p> <p>1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.</p> <p>2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.</p> <p>3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.</p> <p>(2) A person does not discriminate against another person by taking a special measure.</p> <p>(3) A special measure must —</p> <p>(a) be undertaken in good faith for achieving the purpose set out in subsection (1); and</p> <p>(b) be reasonably likely to achieve the purpose set out in subsection (1); and</p> <p>(c) be a proportionate means of achieving the purpose set out in subsection (1); and</p> <p>(d) be justified because the members of the group have a particular need for advancement or assistance.</p> <p>(4) A measure is taken for the purpose set out in subsection (1) if it is taken—</p> <p>(a) solely for that purpose; or</p> <p>(b) for that purpose as well as other purposes.</p> <p>(5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.</p>
Cth	<p><u>Sex Discrimination Act 1984 (Cth), s 7D (Special measures intended to achieve equality)</u></p> <p>(1) A person may take special measures for the purpose of achieving substantive equality between:</p> <p>(a) men and women; or</p> <p>(aa) people who have different sexual orientations; or</p>

	<p>(ab) people who have different gender identities; or</p> <p>(ac) people who are of intersex status and people who are not; or</p> <p>(b) people who have different marital or relationship statuses; or</p> <p>(c) women who are pregnant and people who are not pregnant; or</p> <p>(d) women who are potentially pregnant and people who are not potentially pregnant; or</p> <p>(e) women who are breastfeeding and people who are not breastfeeding; or</p> <p>(f) people with family responsibilities and people without family responsibilities.</p> <p>(2) A person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1).</p> <p>(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:</p> <p>(a) solely for that purpose; or</p> <p>(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.</p> <p>(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.</p>
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Affirmative measures expressed as an exception	
Jurisdiction	Provision
Cth	<p><u>Racial Discrimination Act 1975 (Cth), s 8 (Exceptions)</u></p> <p>(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).</p> <p>Schedule – ICERD, art 1 (4)</p> <p>Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.</p>
ACT	<p><u>Discrimination Act 1991 (ACT), s 27 (Measures intended to achieve equality)</u></p> <p>(1) Part 3 does not make it unlawful to do an act if a purpose of the act is—</p> <p>(a) to ensure that members of a relevant class of people have equal opportunities with other people; or</p>

	<p>(b) to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class.</p> <p>(2) However, subsection (1) does not make it lawful to do an act for a purpose mentioned in that subsection if the act discriminates against a member of the relevant class in a way that is not reasonable for the achievement of that purpose.</p>
NSW	<p><u>Anti-Discrimination Act 1977 (NSW)</u></p> <p>s 21 Special needs programs and activities</p> <p>Nothing in this Part applies to or in respect of anything done in affording persons of a particular race access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.</p> <p>s 49ZJR Special needs programs and activities</p> <p>Nothing in this Part applies to or in respect of anything done to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.</p> <p>s 126A Exemption for special needs programs and activities</p> <p>(1) Nothing in Parts 3–4C renders unlawful anything done by a person in good faith for the purposes of or in the course of any program or activity for which certification is in force under this section as a special needs program or activity.</p> <p>(2) The Minister may certify a program or activity to be a special needs program or activity if satisfied that its purpose or primary purpose is the promotion of access, for members of a group of persons affected by any form of unlawful discrimination to which this Act applies in an area of discrimination to which this Act applies, to facilities, services or opportunities to meet their special needs or the promotion of equal or improved access for them to facilities, services and opportunities.</p> <p>(3) (Repealed)</p> <p>(4) Certification for a program or activity remains in force for the period specified in the certification or (if no period is specified) until the certification is withdrawn.</p> <p>(5) Certification may be withdrawn by the Minister at any time by giving notice in writing to the person who appears to the Minister to be the person who is in charge of the program or who has responsibility for the activity concerned.</p> <p>(6) A person who is in charge of a program or activity may apply to the Tribunal for an administrative review under the <i>Administrative Decisions Review Act 1997</i> of a decision of the Minister under this section concerning the certification of the program or activity.</p>

NT	<p><u>Anti-Discrimination Act 1992 (NT), s 57 (Special measures)</u></p> <p>(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.</p> <p>(2) Subsection (1) applies only until equality of opportunity has been achieved.</p>
SA	<p><u>Equal Opportunity Act 1984 (SA)</u></p> <p>s 47 Measures to achieve equality</p> <p>This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of a particular sex, sexual orientation, gender identity or intersex status, have equal opportunities with, respectively, all other persons, in circumstances to which this Part applies.</p> <p>s 85ZK Measures intended to achieve equality</p> <p>This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of a particular marital or domestic partnership status, persons with caring responsibilities, or persons who are, or who have been, subjected to domestic abuse, have equal opportunities with, respectively, persons of another marital or domestic partnership status, persons without caring responsibilities, or persons who are not, or who have not been, subjected to domestic abuse, in any of the circumstances to which this Part applies.</p>
Tasmania	<p><u>Anti-Discrimination Act 1998 (Tas)</u></p> <p>s 25 Disadvantaged groups and special needs</p> <p>A person may discriminate against another person in any area if it is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute.</p> <p>s 26 Equal opportunities</p> <p>A person may discriminate against another person in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.</p>