



# Consultation Guide

## Anti-Discrimination Bill 2024 (Exposure Draft)

February 2024

This document does not represent government policy

## Executive Summary

The Department of Justice and Attorney-General (DJAG) invites your comments 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.

### 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 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* 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.

The feedback from consultation will inform the further development of the draft Bill, subject to approval by Government.

## How to get involved

If you would like to provide comments or make a submission on the draft Bill, please do so by:

**Email:**

[adactreview@justice.qld.gov.au](mailto: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*.

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## Abbreviations

Abbreviation	Definition
ACT	Australian Capital Territory
AD Act	<i>Anti-Discrimination Act 1991</i> (Qld)
Age Discrimination Act	<i>Age Discrimination Act 2004</i> (Cth)
Building Belonging Report	<i>Building belonging: Review of Queensland's Anti-Discrimination Act 1991</i>
Commissioner	Queensland Human Rights Commissioner
CRPD Committee	United Nations Committee on the Rights of Persons with Disabilities
CSA	<i>Corrective Services Act 2006</i>
current AD Act	<i>Anti-Discrimination Act 1991</i>
Disability Discrimination Act	<i>Disability Discrimination Act 1992</i> (Cth)
DJAG	Department of Justice and Attorney-General
draft Bill	<i>draft Anti-Discrimination Bill 2024</i>
Human Rights Act	<i>Human Rights Act 2019</i>
IRC	Industrial Relations Commission
LASC	Legal Affairs and Safety Committee
LASC Vilification and Hate Crimes Bill Report	Legal Affairs and Safety Committee, <i>Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023</i> (Report No. 49, 57 <sup>th</sup> Parliament)
LASC Vilification Report	Legal Affairs and Safety Committee, <i>Inquiry into serious vilification and hate crime</i> (Report no. 22, 57 <sup>th</sup> Parliament)
new BDMR Act	<i>Births, Deaths and Marriages Registration Act 2023</i>
QCAT	Queensland Civil and Administrative Tribunal
QHRC	Queensland Human Rights Commission
Respect@Work Report	<i>Respect@Work: Sexual Harassment National Inquiry Report</i>
Sex Discrimination Act	<i>Sex Discrimination Act 1984</i> (Cth)
Victorian EO Act	<i>Equal Opportunity Act 2010</i> (Vic)
Vilification and Hate Crimes Act	<i>Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023</i>



# Part One – About this Guide

## Purpose of this Consultation Guide

The Department of Justice and Attorney-General (DJAG) is seeking comments from the public on the attached draft Bill to replace the current *Anti-Discrimination Act 1991* (current AD Act).

This Consultation Guide provides an overview of the draft Bill to assist stakeholders to understand the nature and scope of the proposed amendments. It is not a substitute for explanatory notes, or the draft Bill itself.

Further consultation papers are also available on the following subject areas contained in the draft Bill:

- equality and non-discrimination for persons with disabilities;
- affirmative measures; and
- key exceptions for religious bodies.

These consultation papers ask specific questions of stakeholders in these subject areas.

The consultation papers are available at: the DJAG [community consultation webpage](#), which can be accessed via the DJAG website at [www.justice.qld.gov.au/community-engagement/community-consultation/current](http://www.justice.qld.gov.au/community-engagement/community-consultation/current) or at Get Involved at <https://www.getinvolved.qld.gov.au/>

## Background

### Why are the changes in the draft Bill being considered?

The draft Bill has been informed by several independent reviews, legislative amendments, and policy initiatives.

#### Queensland Human Rights Commission – Review of the Anti-Discrimination Act 1991

On 4 May 2021, the Attorney-General requested that the QHRC undertake a review of the current AD Act. From that time until the delivery of the QHRC's final report on 30 July 2022, the QHRC conducted a broad-ranging, independent review of the current AD Act.

During its review, the QHRC held two rounds of consultations with both special interest groups and relevant government departments, published a [discussion paper](#) and received submissions over a 7-month period from August 2021 to March 2022.

The [final report](#), entitled *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Building Belonging Report) made 46 recommendations directed at modernising and strengthening Queensland's discrimination protections.

The [final Queensland Government Response](#) to the Building Belonging Report was tabled in the Legislative Assembly on 3 April 2023 supporting in-principle all recommendations and committing to the introduction of legislation in this term of government.

#### Other initiatives

In addition to the Building Belonging Report, the development of the draft Bill has been informed by the following reviews, legislative amendments, and policy initiatives:

- the *Births, Deaths and Marriages Registration Act 2023* (new BDMR Act) passed on 14 June 2023;

- the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report* (2020) (Respect@Work Report) and the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (which made changes to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) to implement recommendations in the Respect@Work report);
- the report on the *Inquiry into serious vilification and hate crime* (Report No. 22, 57<sup>th</sup> Parliament) by the Legal Affairs and Safety Committee (LASC) (LASC Vilification Report) tabled on 31 January 2022, the *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Vilification and Hate Crimes Act) assented to on 19 October 2023, and LASC's report on the *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (Report No. 49, 57<sup>th</sup> Parliament) (LASC Vilification and Hate Crimes Bill Report); and
- the Australian Law Reform Commission's review of religious educational institutions and anti-discrimination laws; and
- the Queensland Law Reform Commission's Report: *A decriminalised sex-work industry for Queensland* tabled on 24 April 2023.

## The proposed reforms and consultation

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.

The purpose of the **attached 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.

### 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).

# Part Two – Guide to Draft Bill

The draft Bill contains **18 parts**, which are addressed below.

## Part 1 - Preliminary

Part 1 of the draft Bill provides for commencement (**clause 2**); the application of the Act (**clauses 3, 4 and 5**); application of the Act to persons with disability who have support persons, assistance animals or disability aids (**clause 6**); beneficial interpretation (**clause 7**); the main purposes of the Act (**clause 8**); definitions (**clause 9**); the list of protected attributes (**clause 10**); and the definition of reasonable accommodation (**clause 12**).

### Application of Act to ships connected with Queensland

In 2001, the AD Act was amended specifically to extend the operation of the Act extra-territorially to ships which have a connection to Queensland but which are outside Queensland waters at the time of the alleged acts of sexual harassment or discrimination.<sup>1</sup>

The amendment addressed the gap arising from the interaction of the Sex Discrimination Act and the AD Act, whereby the AD Act was found not to apply to discrimination or sexual harassment which occurs outside Queensland territorial waters. In amending the legislation, the Queensland Parliament accepted the decision in *Carter v Sercombe*<sup>2</sup> that the AD Act does not operate extra-territorially.

In 2001, the Parliament enacted an express provision to extend the jurisdiction of the AD Act to a limited extent (to ships with a connection with Queensland) but did not allow for a general rule of extra-territorial application. This provision is retained in the draft Bill.

### Application to employment connected with Queensland

It is intended to supplement section 3A of the current Act with a provision that also applies the new Act to contraventions of the new Act in the area of employment that occur outside of Queensland borders where there is a connection to Queensland.

The draft Bill clarifies that the legislation applies to acts done in relation to employment connected with Queensland, regardless of where the Act is done, and provides criteria for determining whether employment is connected with Queensland (**clause 5**).

### Beneficial interpretation

In the case of *AB v WA*<sup>3</sup>, the High Court supported the statutory rule of construction that remedial legislation, such as anti-discrimination law, is beneficial legislation and that any ambiguity in interpretation should be resolved in a way that is most favourable to the people the legislation is intended to benefit.

A new interpretation provision (**clause 7**) requires the legislation to be interpreted in a way that is beneficial to a person who has a protected attribute to the extent that it is possible to do so consistently with the purposes of the new Act and the *Human Rights Act 2019* (Human Rights Act).

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<sup>1</sup> See *Anti-Discrimination Amendment Act 2001* (Qld) s 3.

<sup>2</sup> [1998] QADT 17.

<sup>3</sup> *AB v Western Australia* [2011] HCA 42, [24].

## Protected attributes

The draft Bill contains a list of protected attributes (**clause 10**). 'Protected attribute' is a key concept relevant to discrimination, and particular protected attributes are also relevant to vilification.

The list of protected attributes include:

- (a) age;
- (b) breastfeeding;
- (c) disability;
- (d) family, carer or kinship responsibilities;
- (e) gender identity;
- (f) homelessness;
- (g) irrelevant criminal record;
- (h) parental status;
- (i) physical features;
- (j) political belief or activity;
- (k) pregnancy;
- (l) race;
- (m) relationship status;
- (n) religious belief or religious activity;
- (o) sex;
- (p) sex characteristics;
- (q) sex work activity;
- (r) sexual orientation;
- (s) subject to domestic or family violence;
- (t) trade union activity;
- (u) association with, or relation to, a person identified on the basis of any of the above attributes;
- (v) a combination of 2 or more of any of the above attributes.

The definitions of certain protected attributes are in the **Schedule 1 Dictionary**.

The draft Bill maintains the existing protected attributes of **sex, relationship status, pregnancy, breastfeeding, age, religious belief or religious activity, political belief or activity** and association with, or relation to, a person with any of the other protected attributes.

Other existing attributes are to be updated in the draft Bill to reflect modernised language and definitions. For example:

- the attribute of '**race**' is amended to include immigration and migration status.
- the attribute of '**impairment**' has been re-named '**disability**', and the definition is updated to broadly align with the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act).
- the attribute of '**lawful sexual activity**' has been renamed as '**sex work activity**', and the definition is updated to make clear that the attribute includes both the provision of stated services, and the person being or having been a person who provides such services.

- the attribute of **'gender identity'** has been amended to align with the definition of the term in the new BDMR Act. The new attribute of 'gender identity' separates this concept from people with variants of sex characteristics. It aligns with international best practice understanding of 'gender identity', including the 2007 *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. It is also consistent with the definition adopted in section 213G of the *Public Health Act 2005* (Qld) as part of the 2020 reforms to prohibit the practice of conversion therapy by health service providers.
- the attribute of **'sexuality'** has been re-named **'sexual orientation'** and amended to align with terminology and definitions used in section s213E of the *Public Health Act 2005*;
- the attribute of **'family responsibilities'** has been re-named **'family, carer or kinship responsibilities'**, and its definition has been removed. This change is intended to afford equal protection to those who have responsibilities to others beyond their immediate family circle, and better reflect the relationships that exist in Queensland's multicultural society; and
- the attribute of **'trade union activity'**, which is defined include stated activities, makes it clear that it only includes such activities in respect of association of employees that are registered as an organisation under the *Industrial Relations Act 2016* and the *Fair Work (Registered Organisations) Act 2009* (Cth).

The draft Bill also introduces new protected attributes:

- **'sex characteristics'**, which is defined to align with the definition of the term in the new BDMR Act and provides specific coverage for intersex people. It aligns with international best practice understanding of 'sex characteristics', including the 2017 *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics*;
- **'irrelevant criminal record'** which is defined to mean a record, or imputation of a record, relating to an offence or alleged offence in stated circumstances. Stated offences are defined similarly to the definition in the *Discrimination Act 1991* (ACT) with the express exclusion of expunged convictions under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* and spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986* ;
- **'physical appearance'**, which is defined to mean a person's weight, size or height; or the presence of a birth mark or scar on the person's body; or anything else about the person's physical appearance other than (i) the person's chosen hairstyle; or (ii) any other part of the person's physical appearance that has been freely chosen, including, for example, by cosmetic surgery, piercing or tattooing;
- **'subject to domestic or family violence'**, for which there is no specific proposed definition; and
- **homelessness**, for which there is no specific proposed definition.

Finally, a protected attribute also includes:

- association with, or relation to, a person identified on the basis of any of the protected attributes; and
- a combination of two or more of any of the other protected attributes.

## Conduct in relation to a protected attribute

**Clause 11** specifies that engaging in conduct in relation to a protected attribute includes conduct in relation to:

- a characteristic that a person generally has; or
- a characteristic that is often imputed to a person with the protected attribute; or
- a protected attribute that a person is presumed to have, or to have had at any time, by the person engaging in the conduct; or
- a protected attribute that a person had, even if the person did not have it at the time the conduct was engaged in.

This clause also clarifies that engaging in conduct in relation to a protected attribute in relation to a person who has two or more protected attributes includes engaging in the conduct in relation to any of the protected attributes; two or more of the protected attributes; or the combined effect of two or more of the protected attributes.

This recognises cumulative (discrimination on the basis of two or more protected attributes) and intersectional discrimination (where a person experiences discrimination based on a particular combination of protected attributes).

## Reasonable accommodation

The draft Bill also provides a definition of 'reasonable accommodation' in relation to a person with a disability (**clause 12**), which is a key concept relevant to discrimination.

A 'reasonable accommodation' is an accommodation that is necessary and appropriate to be made, and effective to ensure the person is not treated unfavourably, and does not impose unjustifiable hardship on the person making the accommodation. The onus is on the person who fails to make an accommodation to prove, on the balance of probabilities, that making such an accommodation would impose an unjustifiable hardship. There are a number of stated factors which must be considered in deciding whether an accommodation would impose an unjustifiable hardship.

'Reasonable accommodations' refer to making suitable provisions or adjustments to accommodate a person's attributes to avoid discrimination and achieve substantive equality. Examples of reasonable accommodations include modified work equipment such as a workstation or providing a particular software package for a computer to a person with disability.

Reasonable accommodations have a focus on the person with disability. In some circumstances, providing reasonable accommodations may benefit other persons with disabilities, but this is not necessary. In this sense reasonable accommodations are different from affirmative measures (discussed in the next section, Part 3) which have a proactive quality. The duty to provide reasonable accommodation is a reactive duty in relation to a particular person with disability.<sup>4</sup>

## Part 2 - What is discrimination

**Part 2** of the draft Bill provides for the meaning of discrimination including: direct discrimination, indirect discrimination and affirmative measures.

Modern anti-discrimination legislation defines discrimination as either direct or indirect, based on one or more personal attributes, or combination of personal attributes, and in an area of activity or public life in which discrimination is prohibited.

There are also changes in the draft Bill to replace the burden of proof for discrimination (currently on the complainant to prove, on the balance of probabilities) with a shared burden of proof. These are discussed further in relation to Part 14.

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<sup>4</sup> CPRD Committee, *General Comment No. 6: Equality and Non-Discrimination* (n 1) 6.

## Defining Discrimination

**Clause 13** provides that **discrimination** occurs if a person directly or indirectly discriminates against the other person on the basis of a protected attribute.

It does not matter:

- whether the discrimination is direct or indirect or both direct and indirect;
- whether the person who discriminates is aware of the discrimination; or
- whether the discrimination happens because the person does an act or omits to do an act.

Also, a person's motive for discrimination is irrelevant.

This clause also makes it clear that taking **affirmative measures**, is not discrimination.

### Direct Discrimination

Under the current AD Act, discrimination means treating a person with a protected attribute less favourably than a person (whether real or hypothetical) without the attribute in the same (or relevantly the same) circumstances. The use of a comparative person is called the 'comparator test'. The protected attribute must be a substantial reason for the treatment, and the responsibility for proving why treatment occurred currently rests on the person who claims to have been discriminated against.

Under the new meaning of **direct discrimination** in **clause 14** the comparator test is removed, so that direct discrimination is simply: treating, or proposing to treat, a person with a protected attribute unfavourably because of their protected attribute.

The definition also clarifies that:

- it does not matter whether the other person's protected attribute is only one of the reasons for the unfavourable treatment;
- the existence of a protected attribute need only be a contributing reason for the unfavourable treatment, not the substantial or main reason for the unfavourable treatment;
- it does not matter whether the person who discriminates considers the treatment is unfavourable.

### Indirect Discrimination

Under the current AD Act, indirect discrimination is defined as the imposition of a condition, requirement or practice: with which a person who has a protected attribute is unable to comply; with which a higher proportion of people without the attribute are able to comply; and that is not reasonable. This test also imports the idea of a comparator, and the onus of is on the person who claims to have been discriminated against to meet the evidential burden.

**Clause 15** of the draft Bill provides that a person **indirectly discriminates** against another person if the person imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the other person because the other person has a protected attribute, and is not reasonable. The person imposing the condition, requirement or practice has the onus of proving that it was reasonable.

Under **clause 15** of the draft Bill, a person will also indirectly discriminate against a person with a disability if they:

- impose, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the person with disability because of the disability; and
- the condition, requirement or practice would not disadvantage the person with disability if a reasonable accommodation was made; and
- the person fails or refuses to make a reasonable accommodation.



The clause sets out a number of factors that may be taken into consideration when determining whether a condition, requirement or practice is reasonable, broadly consistent with section 9(3)(a)-(e) of the *Equal Opportunity Act 2010* (Vic) (Victorian EO Act).

These changes provide a similar approach to that adopted in the *Age Discrimination Act 2004* (Cth) (the Age Discrimination Act), the Sex Discrimination Act and a number of States and Territories.

## Affirmative Measures - general

The term ‘affirmative measures’ generally refers to proactive measures which aim to correct or compensate for past or present discrimination, and prevent discrimination from recurring in the future for a group of persons with a particular attribute. Affirmative measures may involve strategies to provide preferential treatment to a group with the aim of increasing the representation of these groups in the workforce, or for people with disability to exercise rights and participate in society on the same basis.

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

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’ is the term used in the draft Bill.

The current AD Act refers to these measures as ‘welfare measures’ or ‘equal opportunity measures’ and frames them as exceptions to discrimination (see sections 104 and 105 of the current AD Act). The draft Bill aims to encourage the use of these strategies by reframing them as affirmative measures which are explicitly permitted. If a measure meets the criteria of an ‘affirmative measure’ under the draft Bill, then it will not be discrimination.

### Clause 16 defines affirmative measures.

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);
- 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 affirmative 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.

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.<sup>5</sup> It is intended that the provisions for affirmative measures operate primarily on a self-assessment basis. That is, it is

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<sup>5</sup> 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.

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.

## Affirmative measures for achieving racial equality

In the Building Belonging Report, the QHRC have recommended that any drafting of provisions for affirmative measures will need to ensure it does not entrench disadvantage for marginalised racial groups, and in particular, First Nations peoples.

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 (**clause 16**) 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.

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

- a) 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
- b) **regularly reviewed** in consultation with the members of the group.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>6</sup> recognises ‘special measures’ as important for the advancement of equality and confirms that such measures are not racial discrimination. 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).<sup>7</sup>

The requirement for consultation with, and participation of, First Nations people in the design and implementation of affirmative measures has received mixed support however in case law in Australia.<sup>8</sup>

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.

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<sup>6</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), opened for signature 21 December 1965, A/RES/2106

<sup>7</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), opened for signature 2 October 2007, A/RES/61/295.

<sup>8</sup> 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.

## Part 3 – Positive duties

A key finding of the Building Belonging Report was that Queensland’s anti-discrimination framework lacked a preventative focus. Part 3 of the draft Bill is directed at addressing this gap.

The Building Belonging Report recommends shifting the focus of Queensland’s anti-discrimination law to prevention to stop discrimination and sexual harassment before it happens by placing a positive legal obligation on duty-holders to take active steps to prevent discrimination and sexual harassment and other prohibited conduct as far as possible, combined with regulatory powers for the QHRC to ensure compliance with the positive duty.

The positive duty represents a “4<sup>th</sup> generation of anti-discrimination law” which seeks to prevent discrimination, sexual harassment, vilification and victimisation from occurring before it happens and shift the onus of achieving substantive equality in society onto duty-holders, rather than rely on individuals bringing complaint to the QHRC or to a tribunal. In this way, the duty will seek to redress systemic discrimination, sexual harassment, vilification and victimisation.

### The purpose of this part

The purpose of the part, to provide for the taking of positive action to help achieve the purposes of the Act, is set out in **clause 17** of the Bill.

The QHRC must issue guidelines about how persons may comply with their duties under this part (see **clause 146**).

There are two different positive duties under this part:

- the duty to make reasonable accommodation for a person with disability (**duty to make reasonable accommodation**); and
- the duty to eliminate discrimination, sexual harassment, vilification and victimisation (**the general duty**).

There are differences in how each duty may be enforced and by whom.

### Duty to make reasonable accommodation

**Clause 18** provides for a new positive duty for a person to make reasonable accommodations to ensure that a person with disability is not treated unfavourably, where a person has a duty not to discriminate against them under Part 4 of the draft Bill.

Reasonable accommodation in relation to a person with disability is defined in **clause 12**.

As noted above, the failure to make reasonable accommodation for a person with disability may also be direct or indirect discrimination (see **clauses 14 and 15** above). This means that a person may make a complaint to the QHRC of discrimination on the ground of disability, if a person fails or refuses to make reasonable accommodation to address the needs of the person with disability and this failure or refusal has the effect that the person with disability is treated unfavourably.

### The general duty

**Clause 19** of the draft Bill provides a new positive duty, to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, vilification or victimisation as far as possible.

This duty applies to a person who must not engage in discrimination, sexual harassment, vilification or victimisation under part 4, 6 or 7 of the Bill and is:

- a) a corporation, partnership or unincorporated body that carries on a business or operations;

- b) an individual who –
  - o carries on a business or operations; and
  - o has responsibility for directing or controlling the business or operations of a person mentioned in paragraph a)

**Clause 20** provides for factors that must be taken into consideration when deciding whether a measure is reasonable and proportionate to comply with the duty. These factors are intended to balance the interests of people with a protected attribute to fully enjoy their rights to equality without placing an unduly high burden on duty holders to comply with the law.

Clauses 19 and 20 draw from existing provisions in the Victorian EO Act and the recommendations relating to the introduction of a positive duty to prevent sexual harassment recommended in the Respect@Work Report and now in section 47C of the Sex Discrimination Act.

While the general duty will place a new obligation on certain duty holders, it is not intended that an individual could bring a complaint in relation to failure to implement the general duty, but that this duty be supported by the QHRC's education, training and support functions (see Part 10 below). For serious and systemic issues, there is the possibility of an investigation by the QHRC, which in certain circumstances could lead to enforcement outcomes (see Part 12 below).

## Part 4 – Unlawful Discrimination

Modern anti-discrimination legislation defines discrimination as direct or indirect, based on one or more personal attributes, and in an **area of activity or public life** in which discrimination is prohibited.

Generally, anti-discrimination law only operates in areas of public life and therefore does not apply to all settings, including private settings.

Modern anti-discrimination also provides for **exceptions** to the prohibitions on discrimination outlined in each area of activity. This ensures that legislation strikes the appropriate balance between protecting people from discrimination on the one hand, while also protecting different rights and interests on the other.

### When is discrimination lawful discrimination

**Clause 21** provides for when discrimination is lawful discrimination. Discrimination is lawful if:

- an exception applies; or
- an exemption has been granted by the tribunal (under Part 4, division 11).

### Areas of activity in which discrimination is prohibited

Currently, discrimination is prohibited in certain areas of activity set out in Part 4 of the current AD Act. In contrast, sexual harassment is prohibited in any setting, as is vilification, which refers to public acts.

The draft Bill retains the **following areas of activity** in which discrimination is prohibited:

- work and work-related (see **clauses 22-27**);
- education (see **clauses 34**);
- goods and services (see **clause 38**);
- disposition of land (see **clause 43**);
- accommodation (see **clauses 46 and 47**);
- club membership (see **clauses 51**);
- administration of state laws and programs (see **clause 53**); and
- local government (see **clause 54**).

### Goods and services

The draft Bill does not replicate the exclusion of not-for-profit associations from the application of prohibitions on discrimination in the supply of goods and services (as currently reflected in section 46 of the AD Act). The general exclusion of not-for-profits from prohibitions on discrimination in the supply of goods and services is inconsistent with all other anti-discrimination laws in Australia. A narrower exception will apply in relation to the supply of goods and services by 'voluntary bodies', as discussed below.

### Superannuation and insurance

While the draft Bill does not replicate the specific prohibitions for the superannuation and insurance areas of activity that appear in the current AD Act, the effect of the prohibition will be maintained. Superannuation and insurance will instead be subject to relevant discrimination prohibitions in relation to work and work-related areas (see **clauses 22-27**) and the supply of goods and services (**clause 38**). The effect of the prohibitions in the superannuation and insurance areas of activity in the current AD Act would be maintained because these prohibitions mirror prohibitions in relation to work and work-related areas and the supply of goods and services. The draft Bill accordingly:

- omits provisions which exclude superannuation and insurance from discrimination prohibitions in relation to work and work-related areas and the goods and services area (sections 13 and 45 of the current AD Act); and
- provides that 'services' includes 'services relating to banking, insurance, superannuation or the provision of grants, loans, credit or finance' (definition of 'services' in **Schedule 1**).

This is more consistent with the approach to superannuation and insurance in most other Australian anti-discrimination laws, including Victorian EO Act .

There continues to be certain exceptions for the supply of superannuation and insurance. These exceptions are discussed below.

### Club membership

The other significant change to the existing areas of activity in the current AD Act is in relation to clubs.

The definition of 'club' under the AD Act currently excludes not-for-profit associations.<sup>9</sup> This is inconsistent with all other Australian anti-discrimination laws. Most other state and territory laws have adopted a definition of club modelled on the definition used in either the Disability Discrimination Act or the Sex Discrimination Act. The draft Bill adopts a definition of club (see **Schedule 1**) modelled on the Disability Discrimination Act.

A club will mean an association, whether incorporated or unincorporated, of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains facilities, in whole or in part, from the funds of the association.

This change in definition would broaden the application of the prohibitions on discrimination to some clubs that may not be subject to the current AD Act, including not-for-profit associations.

The prohibition of discrimination against members 'in connection with the membership or affairs of the club' as reflected in section 95(e) of the current AD Act has additionally been updated to refer instead to discrimination 'in connection with the membership or the management of the club' (see **clause 51(2)(e)**). The current AD Act defines 'affairs' with reference to section 53 of the *Corporations Act 2001* (Cth), which defines 'the affairs of a body corporate' for the purposes of particular provisions of that Act. However, many of the matters prescribed by section 53 of the *Corporations Act 2001* (Cth) would not be relevant to discrimination by clubs. The ordinary concept of 'management' would capture the most relevant aspects of the definition of 'affairs'.

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<sup>9</sup> *Anti-Discrimination Act 1991* (Qld), Schedule 1

## Lawful discrimination – exceptions and exemptions

As noted above, modern anti-discrimination legislation also provides for exceptions to the prohibitions on discrimination outlined in each area of activity. This ensures that the legislation strikes the appropriate balance between protecting people from discrimination on the one hand, while also protecting other rights and interests on the other.

The current AD Act contains a number of ‘exceptions’ under each area of activity, in addition to general exemptions which apply to all areas of activity under Part 5. The draft Bill will use the term ‘exception’ in accordance with the QHRC’s recommendations. In addition, a person may apply to the Tribunal under Part 4, division 11 for an exemption.

An exception or exemption is a defence to discrimination, and the person seeking to rely on the exception or exemption has the onus of proving, on the balance of probabilities, that the exception or exemption applies (**clause 21(4)**).

If the conduct constituting discrimination is captured by prohibitions in multiple areas of activity, the conduct will not constitute unlawful discrimination if it is permitted by an exception in at least one area of activity.

**While many of the same exceptions that are currently in the AD Act are adopted in the draft Bill, some outdated exceptions are not included, and some exceptions (including exceptions for religious bodies) are updated** so that they no longer allow broad-based discrimination – particularly on the basis of a person’s gender identity, sex characteristics or sexual orientation.

### Superannuation and insurance

Exceptions for **superannuation and insurance** are maintained, but the draft Bill links these exceptions for superannuation and insurance to relevant Commonwealth anti-discrimination laws rather than replicating equivalent exceptions within the Bill (see **clause 56(2)**). Discrimination in relation to insurance or superannuation will not be unlawful if it is permitted by the Age Discrimination Act, Disability Discrimination Act or Sex Discrimination Act. This is consistent with the approach under the current AD Act to discrimination in relation to superannuation and insurance on the basis of sex or relationship status (sections 59 and 73). Since the AD Act predated the Age Discrimination Act and Disability Discrimination Act, it directly provides for exceptions for discrimination on the basis of age and ‘impairment’, which are modelled on the exceptions for superannuation and insurance under the Sex Discrimination Act (sections 60-63 and 74-75). The Age Discrimination Act and Disability Discrimination Act each contain exceptions in relation to insurance and superannuation.<sup>10</sup>The draft Bill harmonises the approach to exceptions for superannuation and insurance rather than maintaining a distinction between exceptions for discrimination on the basis of sex and relationship status, compared to age and disability. This promotes the internal coherence of the Bill, as well as consistency in the application of discrimination laws to the superannuation and insurance industry on a national level.

### Unjustifiable hardship

Where a person with disability requires ‘special services or facilities’ and the supply of those facilities would impose ‘unjustifiable hardship’, the AD Act currently provides for **exceptions** that allow for people with disability to be subject to discrimination in the areas of work, education, goods and services, accommodation, and clubs.<sup>11</sup> The term ‘**unjustifiable hardship**’ also appears in the current AD Act in relation to:

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<sup>10</sup> *Age Discrimination Act 2004 (Cth) s 37; Disability Discrimination Act 1992 (Cth) s 46.*

<sup>11</sup> *Anti-Discrimination Act 1991 (Qld) ss 35, 44, 51, 92, 100.*

- an exception to the prohibition against workplace discrimination on the basis of ‘impairment’, where the circumstances of a person’s ‘impairment’ cause unjustifiable hardship for an employer, depending on the impairment and the nature of the work;<sup>12</sup> and
- an exception to the prohibition against discrimination on the basis of sex, where the supply of separate sleeping accommodation for men and women working together would cause unjustifiable hardship to the employer.<sup>13</sup>

The draft Bill replaces these unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodation (**clause 18**). **Clause 12** defines reasonable accommodation to include an accommodation that does not impose unjustifiable hardship on the person making the accommodation. A non-exhaustive list of criteria is included for assessing whether an accommodation would impose an unjustifiable hardship.

### Limiting some exceptions to discrimination or restrictions that are ‘reasonable and proportionate in the circumstances’

A number of the exceptions in the draft Bill permit certain forms of discrimination or restrictions subject to a requirement that the discrimination or restriction must be ‘reasonable and proportionate in the circumstances’. The purpose of this requirement is to ensure that an appropriate balance is struck between the legitimate objective of the discrimination within the scope of the exception and the rights and interests of individuals who would be affected by the discrimination. Assessing whether discrimination or imposing a restriction is reasonable and proportionate in a particular situation would, for example, involve consideration of:

- the purpose of the proposed conduct – why is it necessary or desirable to discriminate/impose a restriction in these circumstances? Why is this purpose important?
- the impact of the discrimination/restriction on the other person(s) – how will the discrimination/restriction affect the rights and interests of a person or persons with protected attributes? Are there other options available to the person(s) in their geographical area if they are denied access to this opportunity?
- alternative options – is there another option available which would not involve discrimination/imposing a restriction which would have less of an impact on affected persons? Would this be as effective in achieving the objective?
- whether or not the importance of achieving the purpose outweighs the harm caused by the discrimination/restriction – is there a fair balance between the rights and interests of the affected persons, and the legitimate objective of discrimination/restriction?

The draft Bill does not include a list of matters that must be considered when assessing whether discrimination is reasonable and proportionate in the circumstances. This will allow the concept of ‘reasonable and proportionate’ to be applied flexibly, having regard to the relevant circumstances of the case. It will also allow the concept to develop in conjunction with jurisprudence from other jurisdictions with equivalent exceptions.

## Exceptions – Work and work-related areas

### Genuine occupational requirements – generally

**Clause 28** provides that a person may discriminate against a person in relation to a position if the discrimination is based on a **genuine occupational requirement** for the position, and is reasonable and proportionate in the circumstances. The clause will not apply where participation in the teaching, observance or practice of a religion is a genuine occupational requirement in relation to work for a religious body. Genuine occupational requirements in relation to work for a religious body are covered by **clause 29**.

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<sup>12</sup> Ibid s 36.

<sup>13</sup> Ibid s 37.

Under current jurisprudence, genuine occupational requirements are considered synonymous with ‘inherent requirements’ which is the test found in Commonwealth discrimination law (e.g. section 21A of the Disability Discrimination Act). However, clause 28 in the draft Bill now also requires that the imposition of a genuine occupational requirement is *reasonable and proportionate*.

### Genuine occupational requirements – religious bodies

**Clause 29** provides that a person may discriminate against another person on the basis of the other person’s religious beliefs or religious activity in relation to work for a religious body.

The current AD Act allows for discrimination in relation to work for religious bodies on the basis of any protected attribute (except for age, race and impairment).<sup>14</sup>

Narrowing the grounds on which a religious body can discriminate in the area of employment to religious belief and religious activity will bring Queensland broadly in line with anti-discrimination laws in several other Australian jurisdictions, including the Australian Capital Territory (ACT),<sup>15</sup> Tasmania,<sup>16</sup> and Victoria.<sup>17</sup> The proposed approach is also broadly consistent with the proposals for amendments to the Sex Discrimination Act and the *Fair Work Act 2009* (Cth) outlined in the Australian Law Reform Commission’s *Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws*.<sup>18</sup> A more restrictive approach has been adopted in the Northern Territory, with recent amendments resulting in the complete removal of an exception for employment in religious educational institutions.<sup>19</sup>

The draft Bill will allow discrimination by a religious body on the grounds of religious belief or religious activity if:

- participation in the teaching, observance or practice of the religion concerned is a genuine occupational requirement of the work; and
- the other person cannot satisfy the genuine occupational requirement because of the other person’s religious belief or religious activity; and
- the discrimination is reasonable and proportionate in the circumstances.

The clause also makes it clear that a person cannot rely on the exception to discriminate against another person on the basis of a protected attribute other than religious belief or religious activity, such as their sexual orientation, gender identity or relationship status.

### Compulsory retirement age under an Act

**Clause 30** provides that the Act has no effect on the imposition, under an Act, of a compulsory retirement age on stated judicial and other office holders. This exception is similar to the general exception to discrimination under section 106A of the current AD Act which, in part, allows for the imposition of a compulsory retirement age on certain stated office holders imposed on or before 30 June 1994 under an Act.

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<sup>14</sup> *Anti-Discrimination Act 1991* (Qld) section 25(2)-(8)

<sup>15</sup> *Discrimination Act 1991* (ACT) ss 32(1)(e) (as amended by *Discrimination Amendment Act 2023* (ACT), 44, 46. Sections 44 and 46 provide separate exceptions in relation to work or employment in educational institutions, hospitals, or other places in which health services are provided.

<sup>16</sup> *Anti-Discrimination Act 1998* (Tas) ss 51, 52(d).

<sup>17</sup> *Equal Opportunity Act 2010* (Vic) ss 82A, 83A.

<sup>18</sup> Australian Law Reform Commission, *Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws* (January 2023) Technical Consultation Proposals 8 and 9.

<sup>19</sup> *Anti-Discrimination Amendment Act 2022* (NT) s 17. The *Anti-Discrimination Act 1992* (NT) now only provides for a general genuine occupational qualification test (s 35), which permits discrimination based on a genuine occupational qualification which the other person is required to fill.



### Domestic or personal services

**Clause 31** provides that a person may discriminate against another person, except on the basis of race, in relation to work involving the provision of domestic and personal services in the employer's home or in the home of the person to whom the services are provided at their request to the employer. The exception applies only to discrimination in stated pre-work and work areas of activity. This is similar to sections 26 and 27 of the current AD Act.

### Work involving vulnerable people

**Clause 32** provides that a person may discriminate against another person on the basis of **irrelevant criminal record (which is a new protected attribute in the draft Bill)** in relation to work principally involving the care, instruction or supervision of a child or providing care, support or assistance to a person with disability or an aged person. This is similar to exceptions provided for in the *Anti-Discrimination Act 1998* (Tas) and *Anti-Discrimination Act 1992* (NT). This exception is intended to ensure that the new protected attribute of 'irrelevant criminal record' does not undermine statutory schemes that operate to protect vulnerable people, such as the *Working with Children (Risk Management and Screening Act) 2000* and the *Disability Service Act 2006*.

### Youth wages

**Clause 33** provides that a person may remunerate a worker who is under 21 years of age according to the worker's age, consistent with section 33 of the current AD Act.

### *What is not included?*

The draft Bill does not include the following exceptions that are included in the current AD Act:

- section 28 concerning work with children, which was repealed as part of the new BDMR Act;
- section 30 concerning single sex accommodation, and section 31 concerning workers who are married couple or in specified relationships, which are considered redundant; and
- sections 32 (retiring age for partners), 34 (special terms if job capacity is restricted by impairment), 35 (special services or facilities required). and 36 (circumstances of impairment). The Bill contains an alternative approach which includes the positive duty to make reasonable accommodation for a person with disability in clause 18 (which is defined in clause 12 to include a non-exhaustive list of criteria for determining if the accommodation would impose an unjustifiable hardship on the person required to make the accommodation).

## Exceptions – Education

### Educational authority for students of a particular sex or students with disability

**Clause 35** provides for an exception, similar to section 41 of the current AD Act, in relation to the refusal to accept admission of a student by an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex, or students with disability or disability of a particular kind.

This clause will allow an educational authority that operates wholly or mainly for students of a particular sex, or students with disability or disability of a particular kind, to refuse to admit as students persons who are not of the particular sex or who do not have a general or specific disability.

The proposed exception only applies at the time of admission of students. This means, for example, that an educational authority will not be able to discriminate against a student who alters their record of sex in the relevant child register after enrolment. 'Sex' is not defined for the purposes of the draft

Bill. However, when the new BDMR Act commences, a person's sex will include a person's sex as altered on the register.<sup>20</sup>

Providing an exception for single-sex schools which applies in relation to the admission of students is consistent with anti-discrimination laws in most other Australian jurisdictions.

### Educational institution for students of a particular religion

**Clause 36** provides for an exception in relation to refusal to accept admission of a student by an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular religion.

Providing an exception in relation to enrolment at religious educational institutions promotes the right to manifest religion in community by allowing religious schools to only admit students who are of a particular religion. It also protects and promotes the right to the protection of families and children.

Most Australian anti-discrimination laws which prohibit discrimination on religious grounds provide an exception in relation to admission of students at religious educational institutions.

Educational institutions that operate wholly or mainly for students of a particular religion will be permitted to discriminate on the basis of religious belief or religious activity by refusing to admit as a student a person who is not of the particular religion.

For example, a school for Catholic students may choose to reject an applicant for admission on the basis that they are not Catholic, having regard to the applicant's religious beliefs or religious activity. However, the clause also makes it clear that the school would not be permitted to discriminate on the basis of other protected attributes, such as an applicant's gender identity or sexual orientation.

Further, discrimination would only be permitted at the time of enrolment. A school could not, for example, expel or discipline a student on the basis that the student's religious beliefs or religious activities have changed after enrolment.

'Religion' is not defined in the draft Bill but is intended to be interpreted relatively broadly so as to include mainstream and alternative religions and beliefs.

In contrast, 'religious belief' is defined in the current AD Act and the draft Bill to mean 'holding or not holding a religious belief', while 'religious activity' is defined as 'engaging in, not engaging in or refusing to engage in a lawful religious activity'.

### Age-based admission scheme

**Clause 37** provides for an exception consistent with section 43 of the current AD Act for an educational authority selecting students for an education program on the basis of an admission scheme that has a minimum qualifying age.

#### *What is not included?*

The draft Bill does not include an exception consistent with section 44 of the current AD Act concerning allowing discrimination on the basis of impairment if supply of special services or facilities required by a person would impose unjustifiable hardship on the educational authority. The draft Bill contains an alternative approach which includes the positive duty to make reasonable accommodation for a person with disability in clause 18 (which is defined in clause 12 to include a non-exhaustive list of criteria for determining if the accommodation would impose an unjustifiable hardship on the person required to make the accommodation).

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<sup>20</sup> *Births, Deaths and Marriages Registration Act 2023* (Qld) s. 47.

## Exceptions – Goods & Services

### Voluntary body

**Clause 39** provides that voluntary bodies may discriminate against a person in relation to the admission of persons as members of the body, or the provisions of benefits and services to members of the body.

Voluntary body means: an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include—

- (a) a club; or
- (b) an organisation of workers, employers, or people who carry on an industry, profession, trade or business; or
- (c) a body established by a law of the Commonwealth or a State; or
- (d) an association that provides grants, loans, credit or finance to its members.

This is a new exception, which has been included because of the not-for-profit associations are no longer excluded from the application of the prohibition against discrimination in relation to the supply of goods and services (as provided for by section 46(2) of the current AD Act). Clause 39 is based on the exception in section 39 of the Sex Discrimination Act.

### Sites of cultural or religious significance

**Clause 40** provides that a person may restrict access to land or a building of cultural or religious significance by people on the basis of a person's age, sex, race, religious belief or religious activity if the restriction:

- is in accordance with the culture concerned or is to conform to the doctrines, tenets or beliefs of the religion concerned; and
- is reasonable and proportionate in the circumstances.

This is similar to section 48 of the current AD Act but has been modified so that it applies to religious belief or religious activity rather than 'religion' and the restriction must be 'reasonable and proportionate' in the circumstances.

### Age-based benefits

**Clause 41** provides for an exception similar to section 49 of the current AD Act for age-based benefits. This exception allows a person who supplies goods or services to provide benefits and concessions on the basis of age.

This exception does not apply to insurance or superannuation (see **clause 56** for exceptions in relation to **superannuation and insurance**).

### Children to be accompanied by an adult

**Clause 42** provides for an exception similar to section 50 of the current AD Act, allowing a person, as a term of supplying goods and services to a child, to require that the child be accompanied by an adult if there would be a reasonable risk that a child may cause a disruption or endanger themselves or others if not accompanied by an adult.

### *What is not included?*

The draft Bill does not include an exception consistent with section 51 of the current AD Act concerning the supply of special services or facilities which would impose unjustifiable hardship on the person supplying the goods or services. The draft Bill contains an alternative approach which includes the positive duty to make reasonable accommodation for a person with disability in clause 18 (which is defined in clause 12 to include a non-exhaustive list of criteria for determining if the

accommodation would impose an unjustifiable hardship on the person required to make the accommodation).

## Exceptions – Disposition of land

### Disposition by will or gift

**Clause 44** provides for an exception concerning testamentary disposition or gift similar to section 79 of the current AD Act.

### Sites of cultural or religious significance

**Clause 45** provides for an exception concerning sites of cultural or religious significance similar to section 80 of the current AD Act. The provision has been modified so that it relates to religious belief or religious activity rather than 'religion' and the discrimination must be 'reasonable and proportionate' in the circumstances.

A person may discriminate on the basis of age, sex, race, religious activity or religious belief in relation to the disposition of an interest in land or a building of cultural or religious significance if the discrimination:

- is in accordance with the culture concerned or is to conform to the doctrines, tenets or beliefs of the religion concerned; and
- is reasonable and proportionate in the circumstances.

## Exceptions – Accommodation

### Shared accommodation

**Clause 48** provides for an exception similar to section 87 of the current AD Act, allowing a person to discriminate in deciding who is to reside in accommodation that:

- forms part of, and is intended to continue to form part of, the main home of the person or a near relative; and
- is for no more than 3 people, excluding the person, the near relative, another near relative of the person, or a near relative of the near relative.

'Near relative' is defined for the purposes of this exception.

### Accommodation for students of particular sex or students with disability

**Clause 49** provides for an exception concerning accommodation for students of a particular sex or students with disability, similar to section 89 of the current AD Act.

An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex, or students with disability or disability of a particular kind, may provide accommodation wholly for students of the particular sex, or students with disability or disability of the particular kind.

**Clause 50** provides for an exception concerning accommodation for students of a particular religion, similar to section 89 of the current AD Act. However, this exception has been modified so that it relates to religious belief or religious activity rather than 'religion'.

An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular religion may discriminate on the basis of religious belief or religious activity by providing accommodation wholly or mainly for students of the particular religion.

A person cannot rely on the exception to discriminate against another person on the basis of a protected attribute other than religious belief or religious activity, such as their sexual orientation or gender identity.

### *What is not included?*

The draft Bill does not include exceptions similar to the following sections of the current AD Act:

- section 88 concerning accommodation for workers, which is considered redundant and out-dated;
- section 90 concerning accommodation with religious purposes. Accommodation provided by religious bodies will be covered the general exception in **clause 62**;
- section 91 concerning accommodation with charitable purposes. It is intended that this circumstance will be appropriately covered by the affirmative measures provision in **clause 16** or the general exception for charities in **clause 63**; and
- section 92 concerning discrimination on the basis of impairment where a person would require special services or facilities. The draft Bill contains an alternative approach which includes the positive duty to make reasonable accommodation for a person with disability in clause 18 (which is defined in clause 12 to include a non-exhaustive list of criteria for determining if the accommodation would impose an unjustifiable hardship on the person required to make the accommodation).

## Exceptions – Club membership

### Club established for particular class of people

**Clause 52** provides an exception if a club is established to benefit a class of people sharing a particular protected attribute and the discrimination is occurs because the person does not have the protected attribute and is reasonable and proportionate in the circumstances. This broader provision replaces the provisions in section 97 and 98 of the current AD Act. It is modelled on a similar exception which was recently introduced in anti-discrimination legislation in the ACT.<sup>21</sup>

### *What is not included?*

The draft Bill does not include exceptions similar to the following sections of the AD Act:

- section 98 concerning discrimination on the basis of sex with respect to access to benefits arising from membership of a club, which is not considered necessary. The omission of an exception in these terms is consistent with recent reforms to anti-discrimination legislation in the ACT<sup>22</sup>;
- section 99 concerning membership to a minor if there is a reasonable risk of injury. This is not considered necessary as there are no comparable exceptions in other jurisdictions; and
- section 100 concerning discrimination on the basis of impairment where a person would require special services or facilities. The draft Bill contains an alternative approach which includes the positive duty to make reasonable accommodation for a person with disability in clause 18 (which is defined in clause 12 to include a non-exhaustive list of criteria for determining if the accommodation would impose an unjustifiable hardship on the person required to make the accommodation).

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<sup>21</sup> *Discrimination Amendment Act 2023* (ACT) s 9, inserting new s 31 of the *Discrimination Act 1991* (ACT).

<sup>22</sup> *Ibid* s 14, repealing s 40 of the *Discrimination Act 1991* (ACT).

## Exceptions – Administration of State laws & programs, and local Government

The current AD Act does not contain any exceptions for discrimination occurring in the administration of State laws and State government programs, or in the local government areas of activity. This position is retained in the draft Bill.

### General exceptions for discrimination

In addition to the specific exceptions for particular areas of activity, the draft Bill, like the current AD Act, includes general exceptions which apply in relation to any of the areas of activity covered in Part 4 of the draft Bill.

#### Compliance with legislation or court or tribunal orders

**Clause 56** provides an exception for discrimination which:

- is necessary to comply with, or authorised by, another Act or an Act of the Commonwealth; or,
- is necessary to comply with an order of a court or tribunal.

This exception will, for example, permit discrimination on the basis of immigration or migration status where necessary to comply with a law of the State or the Commonwealth regarding the regulation of immigration to Australia.

This exception will also permit discrimination that is necessary to comply with, or is authorised by, a Commonwealth Act which regulates superannuation – in line with the specific exceptions currently provided by sections 64 or 65 of the current AD Act.

#### *Superannuation and insurance*

**Clause 56(2)** also states that discrimination is permitted in relation to insurance or superannuation if the discrimination:

- is on the basis of age and is permitted under the Age Discrimination Act; or
- is on the basis of disability and is permitted under the Disability Discrimination Act ; or
- is on the basis of sex, relationship status or family, carer or kinship responsibilities and is permitted under the Sex Discrimination Act.

This ensures that exceptions for superannuation and insurance align with those in Commonwealth anti-discrimination laws. The Age Discrimination Act and Disability Discrimination Act contain exceptions which are broadly consistent with exceptions under the current AD Act which apply to discrimination on the basis of age and impairment in relation to superannuation and insurance.<sup>23</sup> Clause 64(2) is accordingly intended to generally maintain the effect of exceptions in relation to superannuation and insurance under the current AD Act. As discussed above, this promotes internal consistency in the approach to exceptions for superannuation and insurance within the draft Bill, as well as promoting alignment with Commonwealth anti-discrimination laws.

**Clause 56(3)** imposes an additional requirement for persons who discriminate against another person in relation to insurance or superannuation by relying on actuarial or statistical data or other relevant factors, in accordance with relevant exceptions under Commonwealth anti-discrimination laws. Upon request, the person relying on the exception must give the person discriminated against, within a reasonable time:

- the data relied upon or a written meaningful explanation of it, and details of the source and date of the data; or

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<sup>23</sup> See *Anti-Discrimination Act 1991 (Qld)* ss 60-63, 74-75; *Age Discrimination Act 2004 (Cth)* s 37; *Disability Discrimination Act 1992 (Cth)* s 46.

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- a meaningful explanation of the other relevant factors relied upon.

This requirement is similar to a new requirement which was recently introduced in anti-discrimination legislation in the ACT.<sup>24</sup> It is intended to ensure that people who are subject to discrimination in relation to superannuation and insurance are in a position to assess whether the discrimination against them falls within the scope of applicable exceptions.

A transitional provision has been included in **clause 258** of the draft Bill to maintain the effect of section 60 of the AD Act in relation to superannuation fund conditions which predated the AD Act.

### Citizenship or visa requirements under State government policies etc

**Clause 57** is similar to section 106B of the current AD Act. Section 106B of the current Act was inserted into the AD Act in 2012 and enables eligibility provisions that require a particular citizenship or visa status to be included in state government policies.

### Public health

**Clause 58** allows a person to discriminate against another person to do an act that is reasonably necessary to protect public health, consistent with section 107 of the current AD Act.

### Workplace health and safety

**Clause 59** allows a person to discriminate to do an act that is reasonably necessary to protect the health and safety of people at a place of work, consistent with section 108 of the current AD Act.

### Assistance animals

**Clause 60** provides that a person may require a person with disability who has an assistance animal to ensure the animal is kept under the control of that person or another person on their behalf.

### Roles in religious bodies

**Clause 61** provides that the Act will not apply in relation to the ordination or appointment of people as priests, ministers of religion or members of a religious order or to another religious role, the training or education of people seeking ordination or appointment to these roles, or the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice. This is based on section 109(a) to (c) of the current AD Act, but is expanded to include ordination or appointment, training or education and selection or appointment to perform functions of lay people. This expansion is intended to better reflect the right to freedom of religion by ensuring that these stated activities can be according to religious values and practices in respect of all people who play an important spiritual role within a religious body.

### Acts by religious bodies

**Clause 62** provides that a religious body may discriminate against a person on the basis of their religious belief or activity, other than in the work or work-related area or the education area, if the act constituting the discrimination is in accordance with the doctrines, tenets or beliefs of the religious body, and the discrimination is reasonable and proportionate in the circumstances. This clause draws from section 109(1)(d)(i) and 109(2) of the current AD Act, and also replaces the specific exemption in section 90 of the current AD Act. This will not permit discrimination on the basis of other attributes, including sexual orientation or gender identity, and only provides an exception where discrimination is in accordance with the doctrines, tenets or beliefs of the religious body concerned.

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<sup>24</sup> *Discrimination Amendment Act 2023* (ACT) s 8, substituting new section 28(3) of the *Discrimination Act 1991* (ACT).

### Charities

**Clause 63** of the draft Bill provides that a person may:

- include a provision that discriminates against a person or a group of persons in a document that provides exclusively for charitable benefits; and
- do an act required to give effect to such a provision.

This is consistent with section 110 of the current AD Act.

### Sport

**Clause 64** of the draft Bill provides that a person may restrict participation in a competitive sporting activity on stated grounds, in line with section 111 of the current AD Act. This exception permits participation in a competitive sporting activity to be restricted to:

- people who can effectively compete; or
- people of a particular age or age group; or
- people with disability or disability of a particular kind.

For competitive sporting activities for persons of 12 years of age or older, participation may be restricted on the basis of 'sex or gender identity' if the restriction is reasonable. In assessing whether a restriction is reasonable, regard must be had to: the nature and purpose of the activity (including the strength, stamina or physique requirements of the activity); the consequences of the exclusion or restriction; and, whether there are other opportunities for people of the excluded or restricted sex to participate in the activity. The inclusion of additional factors which must be considered when assessing whether a restriction is reasonable is intended to ensure that due consideration is given to the rights and interests of persons who may be excluded from a competitive sporting activity.

This clause will otherwise maintain the effect of the existing exception under section 111 of the current AD Act after relevant amendments by the BDMR Act come into force on 29 April 2024. The new BDMR Act will amend the definition of 'gender identity' in the AD Act and introduce the new protected attribute of 'sex characteristics'. These amendments are replicated in the draft Bill. The amendments made by the new BDMR Act from 29 April 2024 will affect the operation of section 111 of the AD Act by preventing reliance on the exception to discriminate against people with variations in sex characteristics (consistent with the recommendations of the Building Belonging Report).

No other state or territory anti-discrimination legislation currently permits discrimination in relation to competitive sporting activities based on a person's sex characteristics. The Victorian EO Act was recently amended to include 'sex characteristics' as a protected attributes, but no consequential amendments were made to permit discrimination on the basis of sex characteristics in relation to competitive sporting activities. The Sex Discrimination Act is the only anti-discrimination law in Australia that currently permits discrimination on the basis of sex characteristics in sport.<sup>25</sup> However, the Law Reform Commission of Western Australia recently recommended including sex characteristics in the sports exception in legislation to replace the *Equal Opportunity Act 1984 (WA)*.<sup>26</sup>

The exception in the draft Bill refers to 'competitive sporting activity' without defining that term but continues to refer to what it does not include (namely, coaching, umpiring or administration).

It is also important to note that competitive sport is not a specific area of activity in which discrimination is prohibited. Rather, clause 64 is a general exception, applying to any of the areas of activity in the draft Bill, but is most likely to apply in the area of club membership (e.g. for sporting clubs).

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<sup>25</sup> *Sex Discrimination Act 1984 (Cth)* s 42.

<sup>26</sup> Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) Recommendation 95.



### Legal incapacity

**Clause 65** of the draft Bill provides that a person may discriminate against another person because the other person is subject to a legal incapacity if the incapacity is relevant to the transaction. This is consistent with section 112 of the current AD Act.

#### *What is not included?*

The draft Bill does not include provisions similar to section 104 (welfare measures) and 105 (equal opportunity measures) of the current AD Act, as these are dealt with by the affirmative measures in **clause 16** of the Bill.

The Bill does not include provisions similar to section 106C of the current AD Act, which relates to accommodation for use in connection with work as a sex worker. This is consistent with the Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024, which proposes to repeal section 106C of the AD Act.

### Exemptions

The draft Bill allows for an application for an exemption from a provision in Part 4 to be made to the tribunal (the Industrial Relations Commission (IRC) in a work-related matter or the Queensland Civil and Administrative Tribunal (QCAT) in relation to any other matter) (**clause 66**). It specifies the role of the Commissioner in an application for an exemption (**clause 67**) and provides for the tribunal's powers to grant an exemption (**clause 68**). These clauses are based on the approach in section 113 of the current AD Act.

An application may be transferred by the IRC to QCAT if the IRC considers the exemption sought relates or includes a matter other than a work-related matter (**clause 69**), consistent with section 113AA of the current AD Act.

The Commissioner, or a person with a relevant interest, may appeal against a tribunal's decision on an application for an exemption (**clause 70**), consistent with section 113A of the current AD Act.

## Part 5 - Discrimination against residents of regional communities

Part 5 of the Bill (**clauses 71 to 77**) concerns discrimination against residents of regional communities, and is based on chapter 5B of the current AD Act. It supports the provisions in the *Strong and Sustainable Resource Community Act 2017* (SSRC Act) by prohibiting discrimination against a resident of a nearby regional community by an owner or principal contractor of a large resource project when recruiting workers for the project or by terminating a worker's employment when the worker is or becomes a resident in a nearby regional community rather a fly-in fly-out worker.

## Part 6 – Sexual harassment

Part 6 of the draft Bill defines, and prohibits, sexual harassment.

### Meaning of sexual harassment

Under the current AD Act, sexual harassment is defined as 'unwelcome sexual conduct that was done either with the intention of offending, humiliating or intimidating the complainant, or in circumstances where a reasonable person would have anticipated the possibility the complainant would be offended, humiliated or intimidated.' Queensland is the only jurisdiction in Australia which

makes sexual harassment unlawful wherever it occurs, rather than restricted to certain areas of activity.

Consistent with the recommended approach in the Building Belonging Report, the current prohibition on (**clause 78**) and meaning of sexual harassment (**clause 79**) is retained.

**Clause 79** provides that sexual harassment happens if:

- a) a person –
  - i. subjects another person to an unsolicited act of physical intimacy; or
  - ii. makes an unsolicited demand or request, whether directly or by implication, for sexual favours from the other person; or
  - iii. makes a remark, orally or in writing, with sexual connotations relating to the other person; or
  - iv. engages in any other unwelcome conduct of a sexual nature in relation to the other person; and
- b) the person engages in the conduct mentioned in paragraph (a) –
  - i. with the intention of offending, humiliating or intimidating the other person; or
  - ii. in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

The matters that must be considered in deciding whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by relevant conduct (**clause 80**) are based on section 120 of the current AD Act.

### Respect@Work Report

The Respect@Work Report recommended a new prohibition of ‘sex-based harassment’ (to cover conduct that falls short of sexual harassment in the Sex Discrimination Act), given the existing threshold for sexual harassment in the Sex Discrimination Act was so high (requiring conduct of a seriously demeaning nature). In contrast the AD Act does not have such a high threshold and the Building Belonging Report found that not only was that type of conduct already prohibited under the current AD Act, adding a new provision risked creating confusion and potentially narrowing the law. The Building Belonging Report therefore recommended retaining the current provisions as the current definition of sexual harassment is effective and operates well.

However, the draft Bill does clarify that a remark with sexual connotations relating to the other person may occur *orally or in writing*. This is intended to make it clear that the prohibition extends beyond physical acts and achieves closer consistency with section 28A of the Sex Discrimination Act.

It is considered that retaining the current prohibition on sexual harassment, with minor clarifications, along with the following provisions of the draft Bill, will achieve optimal harmonisation with the Sex Discrimination Act (without a reduction in protections):

- the purposes of the draft Bill including to eliminate discrimination, sexual harassment, vilification, victimisation and other unlawful conduct to the greatest extent possible (**clause 8**); and
- a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, vilification or victimisation as far as possible (**clause 19**) with complementary enforcement powers for the QHRC (**Part 12**).

## Part 7 – Vilification, victimisation and other unlawful conduct

In most jurisdictions around Australia, anti-discrimination laws will also prohibit certain additional behaviour beyond discrimination. The purpose of this part will be to set out, and prohibit, this other unlawful conduct.

### Background - the LASC inquiries

The LASC Report of the Inquiry into serious vilification and hate crimes (LASC Vilification Report) contained 17 recommendations for reform to Queensland's vilification laws, including recommendations for reform to both serious vilification (criminal vilification) and vilification (civil vilification) in the AD Act. The Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 responded to various recommendations in the LASC Vilification Report (including moving the offence of serious vilification to the Criminal Code, introducing circumstances of aggravation relating to vilification motivating certain criminal conduct, and prohibiting the display of hate symbols). The LASC Report No. 49: Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (LASC Vilification and Hate Crimes Bill Report) also made a number of recommendations relating to vilification.

The government response (to both the LASC Vilification Report and the LASC Vilification and Hate Crimes Bill Report) noted that some issues around vilification would be considered as part of the response to the Building Belonging Report. The recommendations from the LASC reports that are being considered as part of the draft Bill include:

- updating and expanding the list of protected attributes for both criminal and civil vilification to include race, religion, sex, sexual orientation, gender identity, sex characteristics, disability and age (recommendation 4 of the LASC Vilification Report and recommendation 2 of the LASC Vilification and Hate Crimes Bill Report);
- clarifying that the test for civil vilification does not require a complainant to show that another person was actually incited, but instead that the public act was 'reasonably likely' to incite (that is, an objective incitement test); (recommendation 5 of the LASC Vilification Report);
- introduction of new 'harm based provision' in the AD Act, which will prohibit public acts that a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons (recommendation 5 of the LASC Vilification Report); and
- a new definition of 'public act' for both criminal and civil vilification which encompasses social media and other online communication as well as conduct which occurs in closed environments, such as schools and hospitals (recommendation 6 of the LASC Vilification Report and recommendation 3 of the LASC Vilification and Hate Crimes Bill Report).

### The purpose of Part 7

The purpose of Part 7 of the draft Bill, as identified in **clause 81**, is to promote equality of opportunity for everyone by prohibiting particular conduct that is inconsistent with the purposes of the draft Bill. In general terms, the conduct captured is vilification, victimisation, unlawful advertising, unlawful requests for information and certain other types of unlawful conduct.

**Clause 82** provides that a contravention of a provision prohibiting conduct under Part 7 will generally be dealt with by a complaint by a person against the person who has engaged in the conduct. However, if a provision includes a penalty, a contravention may be dealt with either by:

- a complaint under Part 9 of the draft Bill; or
- a proceeding for an offence against the provision brought by the Commissioner against the person who has engaged in the conduct.

## Vilification

### The prohibitions

The current AD Act currently provides for a prohibition on vilification (section 124A) and an offence of serious vilification (section 131A).

The draft Bill includes:

- a prohibition on a public act that incites, or is *reasonably likely to* incite hatred, serious contempt or severe ridicule (**clause 85**) (the ‘incitement’ provision based on section 124A of the current AD Act); and
- a prohibition on engaging in a public act that a reasonable person would consider hateful, reviling, seriously contemptuous, or seriously ridiculing (**clause 84**) (a new ‘harm-based’ provision).

The ‘incitement’ provision makes it clearer that it is not necessary to show actual incitement.

The new ‘harm-based’ provision addresses recommendation 5 of the LASC Vilification Report, where the Committee recommended that the civil test under section 124A of the current AD Act be changed to reflect a focus on the impact that the vilification has on the victim. Rather than change the current ‘incitement’ based provision, an additional complementary ‘harm-based’ provision is included.

While the two provisions (the ‘incitement provision’ and the new ‘harm-based provision’) may sometimes cover the same conduct, a complainant may seek to rely on either test depending on the circumstances of the case.

This approach was also recommended by the Victorian Legal and Social Issues Parliamentary Committee (Victorian Committee) in its inquiry into vilification in 2021.<sup>27</sup> The Victorian Committee recommended two complementary approaches. The first was to clarify that it is not necessary to show actual incitement, in line with the original intent of the incitement provision. The second, complementary approach is to introduce a separate harm-based provision, which instead of focusing on the effect the conduct had on a third party, focuses on the harm that the conduct causes to the complainant. These ‘harm-based provisions’ have precedent both federally (section 18C of the Racial Discrimination Act) and in Tasmania (section 17(1) of the *Anti-Discrimination Act 1998* (Tas)), however as suggested by the Victorian Committee, the provision has been drafted to reflect the high threshold for conduct that is intended to be prohibited.

The current offence of serious vilification will be relocated to the Criminal Code from 29 April 2024 (by operation of the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023 (Vilification and Hate Crimes Act)).

### Protected attributes

The protected grounds for clauses 84 and 85 will include: age, disability, gender identity, race, religion, sex, sex characteristics or sexual orientation.

The grounds referred to in the prohibition on vilification under section 124A of the current AD Act are currently race, religion, sexuality and gender identity. The grounds under clauses 92 and 93 expand this scope to include age, disability, sex, sex characteristics, and sexual orientation (noting this term replaces ‘sexuality’). This ensures that the terminology aligns with the updated protected attributes in clause 10, and is also consistent with the intent of recommendation 4 of the LASC Vilification Report and recommendation 2 of the LASC Vilification and Hate Crimes Bill Report.

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<sup>27</sup> Parliament of Victoria, Legislative Assembly, Legal and Social Issues Committee, *Inquiry into anti-vilification protections*, March 2021

## Public act

The definition of 'public act' (**clause 83**) adopts a definition that is similar to section 93Z(5) of the *Crimes Act 1900* (NSW) in section 4A of the current AD Act, making it clear that a public act includes any form of communication to the public, including communicating through social media. This addresses recommendation 6 of the LASC Vilification Report and recommendation 4 of the LASC Vilification and Hate Crimes Bill Report.

The draft Bill also clarifies that conduct may be a public act even if it happens on private land or in a place not ordinarily accessed by the general public. This is intended to address recommendation 3 of the LASC Vilification and Hate Crimes Bill Report that further consideration be given to closed environments such as hospitals and educational institutions.

## Victimisation

The draft Bill includes a prohibition on a person victimising another person, with a criminal penalty for contravention (**clause 86**). This is consistent with section 129 of the current AD Act.

The definition of 'victimisation' (**clause 87**) is consistent with section 130 of the current AD Act.

The application and continued application of the prohibition (**clause 88**) is provided for on the same basis as section 107 of the current AD Act.

## Other conduct

The draft Bill includes prohibitions on a person:

- publishing or displaying, or authorising the publication or display of, an advertisement that indicates that a persons intended to act in a way that contravenes the Act (**clause 89**), or providing false or misleading statement to another person in order to induce the publication or display of such an advertisement (**clause 90**). These provisions are similar to sections 127 and 128 of the current AD Act;
- requesting or encouraging another person to contravene the Act (**clause 91**), with both persons being jointly and severally liable for the contravention if the request or encouragement is acted on. This is similar to sections 122 and 123 of the current AD Act; and
- asking another person to supply unnecessary information on which unlawful discrimination might be based (**clause 92**), similar to section 124 of the current AD Act.

## Part 8 – Provisions about liability

The draft Bill provides that a provision of the Act that prohibits a person from engaging in discrimination, sexual harassment, vilification, victimisation or other conduct applies to the person and each representative of the person, as defined, (**clauses 93 and 94**), and any exception, exemption, defence or excuse applying to the person also applies to a representative acting for them.

**Clause 95** specifies that partnerships and unincorporated bodies are to be treated as corporations under the Act, with duties or liabilities being imposed on each partner or each member of an unincorporated body, amounts payable being jointly and severally payable, and offences taken to have been committed by each partner or member of the unincorporated body. It is a defence for a partner or a member to prove that that they exercised reasonable diligence to ensure that the partnership or unincorporated body complied with the provision, or that they were not in a position to influence the conduct of the partnership or unincorporated body in relation to the offence.

The draft Bill also provides for joint and several civil liability of a person and their representative where the contravention was by a representative, and allows for a proceeding under the act to be

taken against either or both of them (**clause 96**). It is a defence if a respondent proves the person could not have, by the exercise of reasonable diligence, have prevented the act or omission. If it is relevant to prove a person's state of mind about a particular act or omission, it is enough to show a representative's state of mind, where they the act was within their actual or apparent authority.

## Part 9 – Complaints about contraventions

In Australia anti-discrimination law has been traditionally constructed around an individual complaints-based model. The law is enforced by individual victims of discrimination or other unlawful conduct such as sexual harassment or vilification through lodging complaints with the relevant commission.

Under the current AD Act, one of the main roles of the QHRC is to resolve complaints made under the AD Act. The QHRC attempts to resolve complaints through conciliation. In this regard the QHRC has a 'filtering' role before an unresolved complaint can be referred to IRC (for a 'work-related' matter) or QCAT (for all other matters).

While the Bill will continue the dispute resolution function for the QHRC, it is intended to provide a more flexible and efficient dispute resolution process.

it is also intended (as discussed below), in view of the shift to a focus on substantive equality, and the positive duty to prevent discrimination and other unlawful conduct, that the QHRC will also be provided with a broader suite of functions, including compliance and enforcement tools to promote equality and prevent and eliminate discrimination.

### Complaints and dispute resolution

Specific features of Part 9 of the draft Bill (**clauses 97 to 142**) include:

- **functions for the Commissioner** to consider and if appropriate, inquire into complaints about alleged contraventions of the new Act, and provide services designed to facilitate resolution of complaints about alleged contraventions of the Act accepted by the Commissioner (**clause 98**);
- **a new 'complaint period'** providing that a complaint may be made within 2 years after an alleged contravention or a person turns 18 if they were a child when the alleged contravention occurred (**clause 100**). The Commissioner will also have discretion to deal with a complaint that was not made within the complaint period if the Commissioner considers that there are exceptional circumstances and it is in the interests of justice to do so, having regard to stated matters (**clause 117**);
- **a requirement for the Commissioner to give help to a complainant to put a complaint in writing** if satisfied that the complainant needs help to do so (**clause 107**), and capacity to authorise another person to make a complaint if satisfied that a person cannot make it (**clause 101**);
- **powers for the Commissioner to make preliminary inquiries about a complaint** to decide how to deal with it (**clause 115**);
- **specific grounds on which the Commissioner must not deal or continue to deal, and may not deal or continue to deal, with a complaint** (**clauses 123 and 124**) with specific notice requirements (**clause 121**);
- **principles for dispute resolution** that include for example that dispute resolution should be provided as early as possible and that the process should be fair to all parties (**clause 128**);

- **capacity for the Commissioner to take action the Commissioner considers appropriate to try and resolve the complaint** which may include causing the complaint to be conciliated but also other action such as asking the respondent to make submissions, asking or directing the complainant or respondent give the Commissioner information, making enquiries of and discussing the complaint with the complainant and the respondent and facilitating discussions between the complainant and the respondent (**clause 129**).
- **powers for the commissioner to invite or direct a relevant person to give the Commissioner information:** for making preliminary inquiries or dealing with a complaint (**clause 124**);
- **capacity for the Commissioner to direct an entity to take part in a conciliation conference** (**clause 132**); and
- **a requirement for the Commissioner to use best endeavours to finish dealing with the complaint within 12 months after it is made** (**clause 125**).

As is the case under the current AD Act, the draft Bill contains a right to for the complainant to request a referral to QCAT or the IRC (if the complaint is or includes a work-related matter) within 28 days after being notified that a Commissioner believes the complaint cannot be resolved by dispute resolution (**clause 126**).

The Commissioner will finish dealing with a complaint in the particular circumstances specified (**clause 139**).

### Who may make a complaint

Under the draft Bill, the following persons may make a complaint about a contravention of the Act:

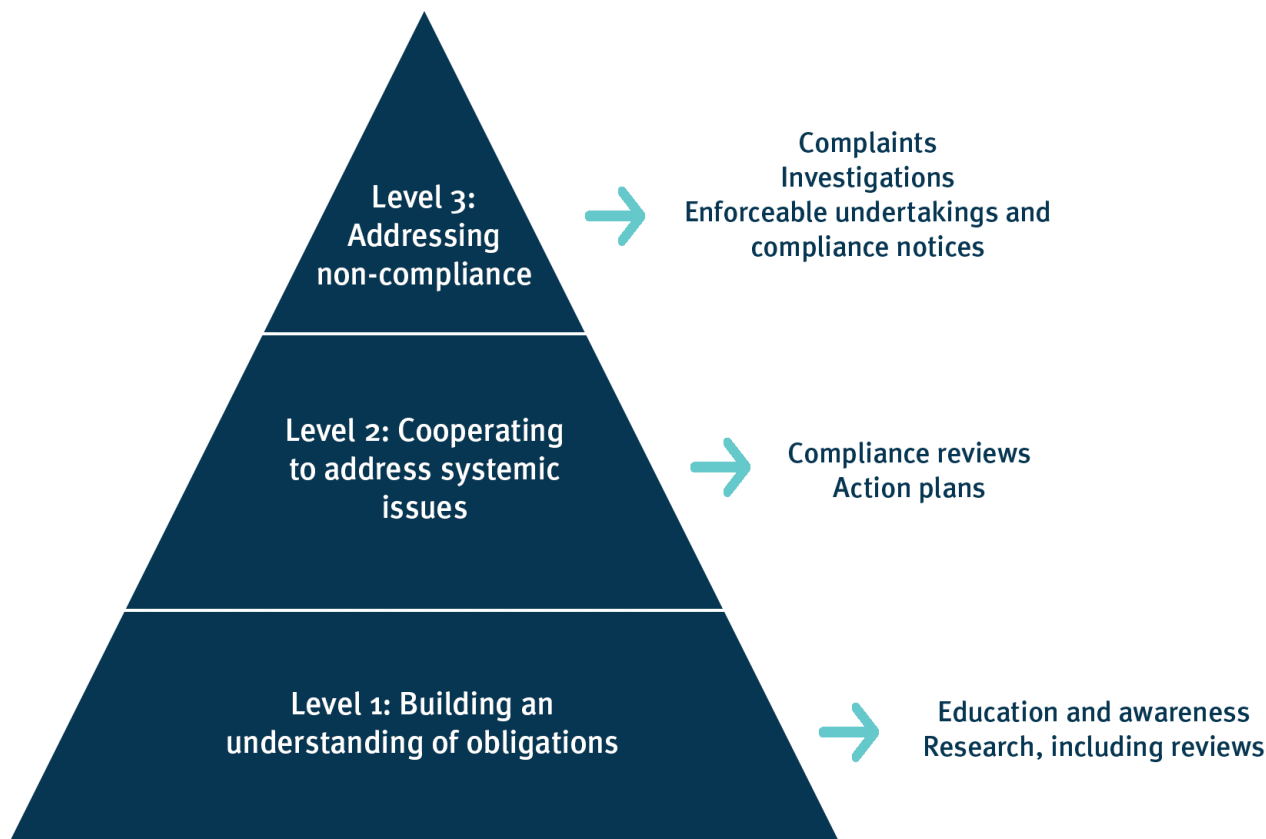
- **a person** who is the subject of the alleged contravention, which may be a child, or the child's parent (**clause 101**);
- **a child, or the child's parents** (**clause 101**);
- **an agent of the person** (**clause 101**);
- **a person** authorised in writing by the Commissioner to make a complaint for the person the subject of an alleged contravention (**clause 101**). The Commissioner may withdraw an authorisation in stated circumstances (**clause 140**);
- **a 'relevant body'** may make a complaint about an alleged contravention of the prohibitions on vilification (**101 and 103**), and this may be accepted by the Commissioner if the Commissioner is satisfied of stated matters (**clause 103**). This is similar to sections 134(3)-(5) of the current AD Act;
- **an 'interested body'** may make a complaint on behalf of one or more named persons entitled to make a complaint that have consented, provided that the entity has a sufficient interest in the complaint, as specified in the section, and if made on behalf of more than one person, the alleged contravention arises out of the same conduct (**clauses 101 and 104**);
- **a person may make a representative complaint** for an alleged contravention of the Act on behalf of a class of persons (without consent being required) who may each make an individual complaint, provided that all of the complaints relate to, or arise out of, conduct of the same person and similar or related circumstances, and give rise to a substantial common issue of fact or law (**clause 108**). A person is not precluded from bringing a complaint if they are not a class member for a representative complaint (**clause 111**), but if they are a class member they will be not entitled to make a separate complaint in relation to the conduct, unless they opt out of the representative complaint (**clause 110**). This introduces criteria similar to section 46PB of the *Australian Human Rights Commission Act 1986* (Cth). The Commissioner may give directions about the conduct of a representative complaint while it is being dealt with by the Commissioner (**clause 114**); and
- **two or more persons** may jointly make a complaint (**clause 102**).

## Part 10 – Commission’s compliance functions

As noted above, Australian anti-discrimination laws have been traditionally constructed around an individual complaints-based model. While the Bill will continue the dispute resolution function for the QHRC, as discussed above, in view of the shift to a focus on substantive equality, and the positive duty to prevent discrimination and other unlawful conduct, it is also proposed that the QHRC will be provided with a broader suite of functions, including compliance and enforcement tools to promote equality and prevent and eliminate discrimination.

The powers and functions will be consistent with a ‘regulatory pyramid approach’, beginning with persuasion and then education at its base and progressively escalating if voluntary compliance is not successful towards enforcement tools such as enforceable undertakings and compliance notices.

The levels of the pyramid will incorporate the following levels with supporting functions and powers of the Commissioner:



Part 10 of the draft Bill (**clauses 143 to 152**) contains other compliance functions for the QHRC outside of the complaints and investigation frameworks.

This is intended to provide the first and second levels of the regulatory pyramid. The first level is directed at building a level of understanding of obligations by duty holders and the community more generally, with the aim of both preventing discrimination, sexual harassment, vilification and other unlawful conduct as well as educating people about their rights to be protected from this conduct. The second level is directed at promoting and facilitating voluntary compliance by duty holders through compliance reviews and action plans. The third level compliance powers are intended for the most serious and systemic cases of unlawful conduct.



## Education and research

The draft Bill provides for the QHRC's educative functions (**clause 143**) and research functions (**clause 144**).

The draft Bill (**clause 144**) provides that the QHRC may undertake research into any matter arising from, or incidental to, the operation of the Act that it considers would help achieve the purposes of the Act. The QHRC may also conduct reviews into policies, programs, procedures, practices and services used by entity to identify non-compliance issues of systemic nature generally. The Commissioner may prepare and give to the Minister a report arising from such research or reviews, and the Minister must table it within six sitting days after receiving it (**clause 145**).

## Guidelines

The draft Bill provides that the QHRC may issue guidelines about any matter relating to the legislation (**clause 146**).

There is a requirement for the QHRC to issue and publish guidelines about how persons must comply with the positive duties in **clauses 18** (reasonable accommodation for a person with disability) and **clause 19** (the general duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, vilification and victimisation as far as possible).

The guidelines are not legally binding but a court or the tribunal may consider evidence of compliance with the guidelines if relevant to a matter before it (**clause 155**).

Guidelines are intended to be practical tools that assist with decision-making and compliance. The Building Belonging Report noted that Guidelines have educative value and can demonstrate best practice approaches, which is useful where the law is complex, difficult to apply in practice, and when case law is limited. Guidelines can be updated as the law changes and as new issues or approaches to best practice emerge.

## Compliance reviews and action plans

The draft Bill allows the QHRC to:

- enter into an agreement for a compliance review of a person's program' and practices at their request (**clause 149**);
- publish a report about the steps taken by a person to comply with the Act if they consent (**clause 150**); and
- provide advice about preparing and implementing action plans, prepared by a person that specifies steps necessary to improve compliance with the Act, and set minimum requirements for action plans (**clause 151**). Action plans may be provided to the QHRC and included in the register of action plans published by the QHRC (**clause 152**).

## Part 11 – Opinions

Part 11 of the draft Bill (**clauses 153 to 159**) deals with opinions of the IRC or QCAT. The draft Bill allows the Commissioner to ask the IRC or QCAT for an opinion about how this act applies in a specific situation, where a person has asked for advice on this (**clause 153**). A person may not make a complaint against a person acting in accordance with an opinion provided by QCAT or the IRC (**clause 157**). The Commissioner, or a person with a relevant interest, may appeal against a tribunal opinion (**clause 159**). These provisions are similar in effect to sections 228 to 233 of the current AD Act.

## Part 12 – Investigations

Part 12 of the draft Bill (**clauses 160 to 169**) includes the QHRC’s ‘third-level’ compliance powers, intended for the most serious and systemic cases of unlawful conduct. The draft Bill includes strengthened powers for the QHRC to be able to enforce the legislation.

These powers include the power for the Commissioner to conduct an investigation (**clause 160**) and after this has occurred to:

- report on the investigation (**clause 165**);
- enter into an undertaking with a person to take, to stop taking, or not to take, stated action to comply with the legislation (**clause 166**); and
- issue a compliance notice requiring a person to take, to stop taking, or not to take, stated action to comply with the legislation (**clause 167**).

An investigation may be conducted if the Commissioner believes on reasonable grounds that one or more contraventions of the Act may have happened in relation to a matter relating to the operation of the Act, the matter raises an issue that is serious in nature which relates to a class or group of persons and cannot be expected to be resolved by a complaint, and the investigation would help achieve the purposes of Act (**clause 160**).

The Commissioner will be able to direct a person that the Commissioner considers may have information relevant to an investigation to give it to the Commissioner (**clause 163**).

Compliance with an undertaking or a compliance notice may be enforced through application to the IRC or QCAT which may result in an order requiring the person to comply (**167 and 169**).

## Part 13 – Administration

Part 13 of the draft Bill (**clauses 170 to 189**) deals with the administration of the QHRC. It continues the operation of the QHRC as a statutory body and retains the general effect of chapter 9 of the current AD Act, with some modifications for alignment with the other changes in the draft Bill.

**Clause 171** provides for the QHRC’s functions, which include to promote and help achieve the purposes of the Act.

## Part 14 – Functions and powers of the tribunal

Part 14 of the draft Bill (**clauses 190 to 222**) provides for functions and powers of QCAT and the IRC.

Specific features of part 14 of the draft Bill include:

- a power for QCAT or the IRC to review decisions of the Commissioner not to deal with, or continue to deal with complaints in certain circumstances. These are limited to decisions by the Commissioner on stated grounds, and to where leave is given (**clause 218 to 222**);
- specific provisions related to representative complaints to ensure that the approach is similar to representative complaints made to the Commissioner, but also has particular features appropriate to their consideration by the IRC or QCAT (**clauses 202 to 214**);
- a shared burden of proof in a complaint proceeding (**clause 212**).

### The shared burden of proof

Clause 212 of the draft Bill provides the general principles for the burden of proof for contraventions of the Act. This clause:

- requires the complainant to prove, on the balance of probabilities, that in the absence of any other explanation, the respondent contravened the provision of the Act the subject of the alleged contravention;
- allows the tribunal to decide the respondent contravened the provision of the Act the subject of the alleged contravention, unless the respondent proves, on the balance of probabilities, that they did not.

This general principle may not apply where specific provisions specify who has the onus of proving a particular matter (for example: proving whether a term is reasonable at clause 15(4) or where relying on an exception or exemption at clause 21(4)).

## Part 15 – Miscellaneous provisions

Part 15 of the draft Bill contains a number of provisions which are comparable to existing provisions of the current AD concerning:

- directions by the Commissioner and orders by the Tribunal preserving anonymity person, with offences for non-compliance (**clauses 223 to 225**);
- prohibiting disclosure or use of personal information obtained by an officials or former officials (**clause 226**), with an offence for non-compliance;
- offences for conduct relating to the commission and officials, including providing false or misleading information, obstructing officials, and contempt of the QHRC (**clauses 227 to 229**);
- how proceedings for an offence against the Act or the Human Rights Act, and a proceedings under the Act involving an unincorporated body are dealt with (**clauses 230 to 231**);
- allowing the QHRC to intervene in stated proceedings (**clause 232**);
- how service of documents is to be dealt with (**clauses 233 to 236**);
- protecting officials or former officials from civil liability, with liability attaching to the State (**clause 250**);
- protecting persons who, acting honestly, give information to the Commissioner or another entity in relation to a compliant from liability (**clause 243**);
- a regulation-making power (**clause 245**).

**Clause 237** requires the QHRC to prepare a report about of the operation of the Act during a financial year, as soon as practicable after the end of that financial year. The report must include stated information.

**Clauses 238 and 239** require the report that the President of QCAT prepares under section 232 of the QCAT Act and that the President of the IRC prepares under section 594 of the Industrial Relations Act 2016 respectively, to included stated information.

The draft Bill provides for an independent review of the Act within five years of commencement, with a further review if recommended by the first review (**clauses 240 and 241**).

The Commissioner may direct a person to give stated information about actuarial or statistical data or other relevant factors if a person discriminate against another person in relation to superannuation or insurance, by relying on it (**clause 242**).

## Part 16 – Repeal provision

The draft Bill, when enacted, would repeal the current AD Act (**clause 246**).

## Part 17 – Transitional provisions

Part 17 draft Bill contains transitional provisions:

- providing that a person does not discriminate against a member on the basis of age or disability by retaining a superannuation fund condition that applied immediately for commencement and was permitted under section 60 of the current AD Act (**clause 248**);
- providing that the Act has no effect on the imposition of compulsory retirement ages under stated instruments as in force on or before 30 June 1994 (**clause 249**);
- continuing the effect of exemptions granted by the IRC or QCAT, applications for exemption and the hearing and deciding of appeals that were not finally dealt with immediately before the commencement, and certain orders made by the IRC or QCAT (**clauses 250 to 252 and clause 259**);
- providing how existing complaints made to the Commissioner or referred to the Tribunal, and new complaints about pre-commencement conduct, and reviews of Commissioner's decisions are to be dealt with (**clauses 253 to 258**).

Part 12 (Investigations) does not apply in relation to a contravention of the positive duty under clause 19 that happens before or within one year of commencement of section 19 (**clause 260**).

Enforceable undertakings and enforcement of compliance notices will not take effect until two years after the commencement (**clause 261**).

## Part 18 – Amendment of legislation

Part 18 of the draft Bill contains amendments to the *Corrective Service Act 2006* (CSA). The CSA currently contains a modified framework for discrimination complaints made by offenders (a prisoner or person who is subject to a community-based order). The current CSA framework:

- modifies the complaints process for prisoners, making it mandatory for an offender to first wait four months after a written complaint to the chief executive has been made about any alleged contravention of the current AD Act before making a complaint to the QHRC (section 319E CSA);
- modifies the current tests of direct and indirect discrimination for prisoners, to add a reasonableness test, so that direct and indirect discrimination is not unlawful if it is reasonable. A number of factors are included for determining whether discrimination is reasonable including (but not limited to) for example the security and good order of the facility; the costs of providing the alternative treatment; and the administrative and operational burden (section 319G CSA; section 319H CSA); and
- modifies the threshold for when compensation is payable to prisoners, so that compensation may only be awarded by the tribunal where the defendant has acted in bad faith and where no other available remedy would be effective. If compensation is awarded, the payment of money cannot be directed to the prisoner, but must be paid into a victim trust fund established under Part 12B of Chapter 6 of the CSA (section 319I CSA).

Amendments in the draft Bill to the CSA (**clauses 277 to 283 and Schedule 2**) respond to recommendations 12.1, 12.2 and 42.1 of the Building Belonging Report, to address some of the

underlying issues with the specific complaint process for prisoners and offenders. In particular, amendments are made the CSA to:

- remove the application of the modified framework to a prisoner on parole or a person subject to a community based order under the *Penalties and Sentences Act 1992*;
- modify the internal complaints process to be consistent with the internal complaint process under the Human Rights Act;
- retain the modified tests for direct and indirect discrimination but:
  - update them to reflect the concepts of direct and indirect discrimination in the draft Bill, and
  - remove a factor to be had regard to in providing that treatment is reasonable, namely, the disruption to the protected defendant that providing alternative treatment might cause.

The draft Bill contains amendments to the Criminal Code to better align the offence of serious vilification in section 52A with the approach taken for vilification in the draft Bill (**clauses 277 to 280**).

Consequential amendments to a range of other Acts are included in schedule 2 of the draft Bill.