



Consultation Paper

Anti-Discrimination Bill 2024 (Exposure Draft) – Equality and non-discrimination for people with disability

February 2024

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Abbreviations

Abbreviation	Definition
ACT	Australian Capital Territory
AD Act	<i>Anti-Discrimination Act 1991 (Qld)</i>
AHRC	Australian Human Rights Commission
Building Belonging Report	Queensland Human Rights Commission, <i>Building belonging: Review of Queensland's Anti-Discrimination Act 1991</i> (July 2022)
CEDAW	Committee on the Elimination of Discrimination against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of Racial Discrimination
Disability Discrimination Act	<i>Disability Discrimination Act 1992 (Cth)</i>
CRPD	Convention on the Rights of People with disability
CRPD Committee	United Nations Committee on the Rights of People with disability
DJAG	Department of Justice and Attorney-General
Draft Bill	Anti-Discrimination Bill 2024 (Exposure Draft)
GHAD Act	<i>Guide, Hearing and Assistance Dogs Act 2009 (Qld)</i>
NSW	New South Wales
NT	Northern Territory
QHRC	Queensland Human Rights Commission
Racial Discrimination Act	<i>Racial Discrimination Act 1975 (Cth)</i>
Sex Discrimination Act	<i>Sex Discrimination Act 1984 (Cth)</i>
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Victorian Equal Opportunity Act	<i>Equal Opportunity Act 2010 (Vic)</i>
WA	Western Australia

Introduction

Purpose

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

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

The purpose of this Consultation Paper is to seek feedback on provisions of the draft Bill that address equality and non-discrimination for people with disability including:

- the definition of disability;
- the extension of the protected attribute of disability to include reliance on an assistance animal, carer or disability aid;
- affirmative measures; and
- reasonable accommodations.

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

Why is this consultation occurring?

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

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

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

Relevant recommendations

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

Number	Recommendation	Clause in draft Bill
4.1	The Act should include a new provision called affirmative measures, contained within the part of the Act that explains the meaning of discrimination rather than in general exceptions, defined as per section 12 of the <i>Equal Opportunity Act 2010</i> (Vic). The Act should include contemporary examples to demonstrate how affirmative measures may apply in practice.	Clause 16 – Affirmative measures
5.1	The Act should replace unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodations for a person with disability which applies to all areas of activity in which the Act operates.	Clause 18 – Duty to make reasonable accommodation for person with disability
5.2	<p>A non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the AD Act including:</p> <ul style="list-style-type: none"> • the person’s circumstances, including the nature of the disability; • the nature of the accommodation; • the consequences for the person with a disability if the accommodation is not made; • the financial circumstances of the person required to provide the accommodation; • the consequences for the person required to provide the accommodation, including any financial impact; • the consequences for other people affected by the accommodation, including numbers of people advantaged or disadvantaged; • balancing the consequences of providing the accommodation against the disadvantage that would be imposed upon the person with disability and others if the accommodation is not made. 	Clause 12 – What is a reasonable accommodation in relation to person with disability
21.1	The term ‘impairment’ should be replaced with ‘disability’.	Clause 10 – Protected attributes
21.2	The definition of disability should be aligned with the <i>Disability Discrimination Act 1992</i> (Cth) but should remove references to outdated or inappropriate language such as ‘disfigurement’, ‘malformation’ or ‘malfunction’.	Schedule 1 -- Dictionary
21.3	The Act should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.	Clause 6 – Application of Act to persons with disability who have support persons,

		assistance animals
21.4	To remove any doubt, the Act should confirm that people with addiction are covered by the attribute of disability.	Schedule 1 -- Dictionary

How to get involved

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

Email:

adactreview@justice.qld.gov.au

Post:

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

Submissions close at 5pm on 22 March 2024

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

Summary of proposals / Consultation questions

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

Definition of disability (Schedule 1 Dictionary)

It is proposed to adopt the following definition of disability (which is similar to the definition in the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act), but has been updated to remove references to outdated or inappropriate language such as ‘disfigurement’, ‘malformation’ or ‘malfunction’):

Disability in relation to a person means –

- a) total or partial loss of the person’s bodily or mental functions; or
- b) total or partial loss of a part of the person’s body; or
- c) the presence in the person’s body of organisms causing, or capable of causing, disease or illness; or
- d) an impairment or disturbance in the structure or functioning of the person’s body or a part of the person’s body; or
- e) a disorder or condition that results in the person learning differently from a person without the disorder or condition; or
- f) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

Disability, in relation to a person, includes a disability mentioned in paragraph 1 that—

- a) presently exists; or
- b) previously existed but no longer exists; or
- c) may exist in the future, including, for example, because of a genetic predisposition to the disability; or
- d) is imputed to a person.

Also, **disability**, in relation to a person, includes behaviour that is a symptom or manifestation of a disability mentioned in paragraph 1.

Questions for consultation:

1. Should the new legislation include:
 - a. Option One: the current definition of disability in the Disability Discrimination Act; or
 - b. Option Two: the updated definition of disability above, adapted from the definition of disability in the Disability Discrimination Act?
2. Do you have any other comments on the definition of disability?

Support person, assistance animals, and disability aids (clause 6)

It is proposed that the Bill will apply in relation to having a support person, assistance animal or disability aid in the same way as it applies in relation to having a disability. That is, it is proposed to replicate the approach in the Disability Discrimination Act that discrimination against a person with a disability who relies on a carer, assistant, assistance animal or disability aid, because of their disability, is the same as discrimination against a person on the grounds of disability.

A person with disability has a support person if the person –

- a) is presently accompanied by the support person; or
- b) was previously accompanied by the support person; or
- c) may be accompanied by the support person in the future; or
- d) is imputed to be accompanied by the support person.

A **support person**, in relation to a person with disability, means a person who provides paid or unpaid assistance or services to the person, because of the disability, including, for example, as an assistant; a carer, interpreter or reader.

A person with disability has an **assistance animal** or **disability aid** if the person—

- a) is presently accompanied by, or possesses, the assistance animal or disability aid; or
- b) was previously accompanied by, or possessed, the assistance animal or disability aid; or
- c) may be accompanied by, or possess, the assistance animal or disability aid in the future; or
- d) is imputed to be accompanied by, or possess, the assistance animal or disability aid.

Assistance animal, in relation to a person with disability, means—

- a) an assistance dog, guide dog or hearing dog as defined under the *Guide, Hearing and Assistance Dogs Act 2009* (Qld), schedule 4; or
- b) a dog or other animal accredited under a law of another State that provides for the accreditation of animals trained to assist persons with disability to alleviate the effect of the disability; or
- c) a dog or other animal trained—
 - i. to assist a person with disability to alleviate the effect of the disability; and
 - ii. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Disability aid, in relation to a person with disability, means equipment, including a palliative or therapeutic device, that—

- a) is used by the person; and
- b) provides assistance to alleviate the effect of the disability.

Questions for consultation:

- 3. Do you agree with the proposed approach to assistance animals, carer and disability aids?
- 4. Do you have any feedback about the definitions of: assistance animal, carer or disability aid?

Reasonable accommodation (clauses 12, 14, 15, 18)

The draft Bill will provide for a **standalone positive duty** for a person who otherwise has a duty under the draft Bill not to discriminate against a person with disability, to make reasonable accommodations to ensure the person with disability is not treated unfavourably because of the disability.

The draft Bill will provide that **direct discrimination** against a person with disability occurs if:

- a) a person fails or refuses to make a **reasonable accommodation** to address the needs of a person with disability to ensure the person with disability is not treated unfavourably; and

- b) the failure or refusal has the effect that the person with disability is treated unfavourably.

The draft Bill will also provide that **indirect discrimination** against a person with disability occurs if –

- a) the person imposes, 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
- b) the condition, requirement or practice would not disadvantage the person with disability if a reasonable accommodation was made; and
- c) the person fails or refuses to make a reasonable accommodation.

A **reasonable accommodation** in relation to a person with disability is an accommodation that –

- a) is necessary and appropriate to be made, and effective, to ensure the person is not treated unfavourably; and
- b) does not impose unjustifiable hardship on the person making the accommodation.

A person who fails or refuses to make an accommodation on the grounds that making the accommodation would impose an unjustifiable hardship on the person has the onus of proving the matter, on the balance of probabilities.

In deciding whether an accommodation in relation to a person with disability would impose an unjustifiable hardship on a person, the following matters must be considered –

- a) the nature of the person's disability;
- b) the nature of the accommodation that would be needed to ensure the person with disability is not treated unfavourably;
- c) the feasibility and effectiveness of the accommodation;
- d) the effect on the person with disability if the accommodation were made;
- e) the effect on the person with disability if the accommodation were not made;
- f) the cost of the accommodation;
- g) the nature of any detriment, including financial detriment, to the person making the accommodation; and
- h) any other relevant matter.

Questions for consultation:

- 5. Do you agree with the proposed approach to providing for reasonable accommodation?
- 6. Are the factors for determining whether an accommodation is reasonable appropriate?

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

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

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

An affirmative measure must:

- a) confer a benefit on the members of the group;

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

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

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

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

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

Question for consultation:

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

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

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

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

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

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

Questions for consultation:

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

Background

Human rights, equality and people with disability

Equality and non-discrimination are among the most fundamental principles and rights of international human rights law. They are interconnected with human dignity and are the cornerstones of all human rights.¹

From the 1960s until the present day, the disability rights movement has exposed the continuing levels of inequality and discrimination experienced by people with disability.²

In 2008, Australia ratified the Convention on the Rights of People with disability (CRPD).³ The catalyst for the CRPD was the years of advocacy by the disability rights movement as well as the shift in thinking about disability to a social model of disability. That is, locating the experience of disability, including inequality and discrimination, in social barriers people with disability experience, rather than particular 'impairments'.⁴ The CRPD also repositions people with disability as rights-bearers, rather than objects of protection and charity,⁵ and provides that impairment may not be used as a justification for denial or restrictions of human rights.⁶

The United Nations Committee on the Rights of People with disability (CRPD Committee) has stated that equality and non-discrimination are 'at the heart' of the CRPD.⁷ The CRPD Committee's Report, Concluding Observations on Australia,⁸ highlighted the continuing importance of effective legislative frameworks to protect people with disability from systemic, intersectional and multiple forms of discrimination.⁹

Proposed new anti-discrimination law for Queensland

Building Belonging Report

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

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

New emphasis on substantive equality

Modern anti-discrimination laws have a greater emphasis on achieving substantive equality, not simply formal equality. Formal equality encourages neutrality of treatment. It is underpinned by the view that to achieve equality everybody must be treated alike. The first wave of anti-discrimination laws reflected this approach. This approach has been subject to criticism, including on the basis

¹ Committee on the Rights of People with disability (CRPD Committee), *General Comment No 6: Equality and Non-Discrimination* (2018), 17th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 1.

² Rosemary Kayess and Therese Sands, 'Convention on the Rights of Persons with Disability: Shining a Light on Social Transformation' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020).

³ *Convention on the Rights of People with disability* (CRPD), opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁴ Kayess and Sands, 'Convention on the Rights of Persons with Disability: Shining a Light on Social Transformation' (n 2) 35.

⁵ *Ibid* 3.

⁶ Theresia Degener, 'Disability in a Human Rights Context' (2010) 5(3) *Laws* 35.

⁷ CRPD Committee, *General Comment No 6: Equality and Non-Discrimination* (n 1) 2.

⁸ CRPD Committee, *Concluding Observations on the Combined Second and Third Reports of Australia* (2019), 499th and 500th meetings, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019).

⁹ *Ibid*.

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).

Issue One: Definition of Disability

Background

Current definition – Impairment

Impairment is currently one of the protected attributes for discrimination in the AD Act. This means it is unlawful to discriminate against a person on grounds of impairment.

Impairment, in relation to a person, is currently defined in the AD Act as:

- a) the total or partial loss of the person’s bodily functions, including the loss of a part of the person’s body; or
- b) the malfunction, malformation or disfigurement of a part of the person’s body; or
- c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
- d) a condition, illness or disease that impairs a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
- e) the presence in the body of organisms capable of causing illness or disease; or
- f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;

whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—

- g) presently exists; or
- h) previously existed but no longer exists.¹⁰

Building Belonging Report Recommendations

The Building Belonging Report has recommended (**recommendation 21.1**) replacing the term ‘impairment’ with ‘disability’. A number of submissions to the review of the AD Act considered that the term ‘disability’ was a more modern and contemporary term, with less negative and stigmatising connotations and importantly, consistent with the terminology used in the CRPD. The Building Belonging Report also recommended (**recommendation 21.2**) adopting the definition in the Disability Discrimination Act as it would ensure consistency, and reduce complexity for duty holders, as well as potentially increasing protection.

However, the Building Belonging Report did recommend modernising the language used in the definition — in particular, terms such as ‘malfunction’, ‘malformation’ and ‘disfigurement’ — but without creating inconsistency between the scope of the protection between state and federal jurisdictions.

The definition of disability in the Disability Discrimination Act

In the Disability Discrimination Act, **disability**, in relation to a person, means:

- a) total or partial loss of the person’s bodily or mental functions; or
- b) total or partial loss of a part of the body; or
- c) the presence in the body of organisms causing disease or illness; or
- d) the presence in the body of organisms capable of causing disease or illness; or

¹⁰ *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of ‘impairment’).

- e) the **malfunction, malformation** or disfigurement of a part of the person's body; or
- f) a disorder or **malfunction** that results in the person learning differently from a person without the disorder or **malfunction**; or
- g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:
 - h) presently exists; or
 - i) previously existed but no longer exists; or
 - j) may exist in the future (including because of a genetic predisposition to that disability)
 - k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

In addition to consistency, the benefits of adopting the definition of 'disability' from the Disability Discrimination Act also include that there is established case law about the definition, including clarification that it includes, for example, HIV/AIDs,¹¹ addiction,¹² mental illness and other mental health conditions.¹³ It would also extend the protection to disability which:

- presently exists; or
- previously existed but no longer exists; or
- may exist in the future (including because of a genetic predisposition to that disability); or
- is imputed to a person.

Other Jurisdictions

Most other Australian jurisdictions (except for Queensland, the Northern Territory (NT) and Western Australia (WA)) use the term 'disability'.¹⁴ **Annexure 1** provides a comparison of the definition of 'disability' and 'impairment' in Commonwealth, other state and territory anti-discrimination laws.

Proposed approach

It is proposed to adopt the definition of disability in the Disability Discrimination Act. However, careful consideration must be given to the issue of how to 'modernise' the language without losing the benefits of consistency with federal and other state and territory anti-discrimination laws, including the benefits of case law that has established the meaning of the term.

There are two 'limbs' of the definition of 'disability' that use terms such as 'malformation' and 'malfunction' that stakeholders have said can be demeaning and negative.

The two 'limbs' of the definition that use these terms are:

- limb e) — the **malfunction, malformation** or disfigurement of a part of the person's body; or

¹¹ *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Another* (1998) 152 ALR 182; *X v Commonwealth of Australia and Another* (1999) 167 ALR 529 [20].

¹² *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* [2000] FCA 1619.

¹³ *Zhang v University of Tasmania* [2008] FCA 516 [16].

¹⁴ *Equal Opportunity Act 1984* (WA) s 4 (definition of 'impairment'); *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'impairment').

- limb f) — a disorder or **malfunction** that results in the person learning differently from a person without the disorder or **malfunction**.

Limb e) relates to the structure or functioning of a person's body, whereas limb f) relates to learning and applying knowledge.¹⁵

There are two options:

- **Option one:** maintain the current definition of 'disability' as it is defined for the Disability Discrimination Act; or
- **Option two:** update the definition (as little as possible) to 'modernise' some of the terms used in the definition as follows.

Definition of disability (Schedule 1 Dictionary)

It is proposed to adopt the following definition of disability (which is similar to the definition in the Disability Discrimination Act, but has been updated to remove references to outdated or inappropriate language such as 'disfigurement', 'malformation' or 'malfunction'):

Disability in relation to a person means –

- a) total or partial loss of the person's bodily or mental functions; or (**current subclause a) of the Disability Discrimination Act definition**)
- b) total or partial loss of a part of the person's body; or (**current subclause b) of the Disability Discrimination Act definition**)
- c) the presence in the person's body of organisms causing, or capable of causing, disease or illness; or (**combined current subclauses c) and d) of the Disability Discrimination Act definition**)
- d) an **impairment or disturbance in the structure or functioning of the person's body or a part of the person's body**; or (**adapted from current subclause e) of the Disability Discrimination Act definition**)
- e) a **disorder or condition that results in the person learning differently from a person without the disorder or condition**; or (**adapted from current subclause f) of the Disability Discrimination Act definition**)
- f) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

Disability, in relation to a person, includes a disability mentioned in paragraph 1 that—

- e) presently exists; or
- f) previously existed but no longer exists; or
- g) may exist in the future, including, for example, because of a genetic predisposition to the disability; or
- h) is imputed to a person.

Also, **disability**, in relation to a person, includes behaviour that is a symptom or manifestation of a disability mentioned in paragraph 1.

¹⁵ World Health Organisation, 'ICF Beginner's Guide: Towards a Common Language for Functioning, Disability and Health' (Web Page, 1 January 2002) <<https://www.who.int/publications/m/item/icf-beginner-s-guide-towards-a-common-language-for-functioning-disability-and-health>>.

Questions for consultation:

1. Should the new legislation include;
 - a. Option One: the current definition of disability in the Disability Discrimination Act; or
 - b. Option Two: the updated definition of disability above, adapted from the definition disability in the Disability Discrimination Act?
2. Do you have any other comments on the definition of disability?

Issue Two: Reliance on assistance animals, aids or carer

Background

Where a person with disability relies on an assistance animal, an aid or carer, this can be protected from discrimination on the same basis as the attribute (i.e disability). There can be a number of approaches to providing this protection. Sometimes the term ‘disability’ or ‘impairment’ includes reliance on an assistance animal, an aid or carer. Another approach, as occurs under the Disability Discrimination Act, is that the Act applies to relying on an assistance animal, an aid or carer in the same way as it applies to having a disability.¹⁶

Current approach in the AD Act

In the current AD Act, the definition of ‘impairment’ includes ‘reliance on a guide, hearing or assistance dog, wheelchair or other remedial device’.¹⁷

The AD Act also makes it unlawful to discriminate by:

- a) refusing to rent accommodation because the person relies on a guide, hearing or assistance dog;
- b) requiring the person to keep the dog elsewhere; or
- c) charging extra because the dog lives at the accommodation.¹⁸

A guide, hearing or assistance dog is a dog trained to be used as an aid by a person with vision or hearing impairment or trained to assist a person with a disability to reduce their need for support.¹⁹ The definition of guide, hearing or assistance dog links to the definition in the *Guide, Hearing and Assistance Dogs Act 2009* (Qld) (GHAD Act) so that:

- a **guide dog** means a dog trained to be an effective guide for a person with disability attributable to a vision impairment; and
- a **hearing dog** means a dog trained to be used as an aid by a person with disability attributable to a hearing impairment.²⁰

The issues relating to the use and regulation of assistance animals for people with disability can raise complex issues with regard to training, regulation, certification and accreditation. Each state and territory has their own regulatory regime for assistance animals. However, the scheme for regulating these issues is provided under the GHAD Act as well as other state and territory legislation.

The regulatory schemes in the AD Act (in relation to unlawful discrimination) and the GHAD Act (in relation to making it an offence to deny the same rights of access by others to people who rely on a certified guide, hearing or assistance dog to public places and public passenger vehicles) currently coexist, with ‘less stringent’ requirements to benefit from the protection against discrimination on the basis of assistance dogs in the AD Act.²¹ The offences in the GHAD Act only apply to guide, hearing or assistance dogs that have been certified under Part 4 of the GHAD Act.

¹⁶ *Disability Discrimination Act 1992* (Cth) ss 8,9.

¹⁷ *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of ‘impairment’ para (f)).

¹⁸ *Ibid* s 85.

¹⁹ *Anti-Discrimination Act 1991* (Qld) sch 1 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’); *Guide, Hearing and Assistance Dogs Act 2009* (Qld) sch 4 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’).

²⁰ *Guide, Hearing and Assistance Dogs Act 2009* (Qld) sch 4 (definition of ‘hearing dog’).

²¹ *Jackson v Ocean Blue Queensland Pty Ltd & Ors* [2020] QCAAT 23 paras [27-32].

The protection against discrimination under the AD Act applies on the basis of the the broader definitions of guide and hearing dogs (as described above).²²

Building Belonging Report

Recommendation 21.3 of the Building Belonging Report was that the AD Act should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.

Other jurisdictions

The Disability Discrimination Act provides that the Act applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability.²³ That is, discrimination against a person with disability who has a carer, assistant, assistance animal or disability aid, because of their reliance on the carer, assistant, assistance animal or disability aid is the same as discrimination against a person on the grounds of disability.

Proposed approach

Consistent with the Disability Discrimination Act, it is proposed that the draft Bill will apply in relation to having a carer or assistant, assistance animal (which would include a guide, hearing or assistance dog) or disability aid in the same way that it applies in relation to having a disability.

This would provide broader protection than is currently provided under the AD Act which is currently restricted to guide, hearing and assistance dogs for persons with visual or hearing impairment.

Support person, assistance animals, and disability aids (clause 6)

It is proposed that the Bill will apply in relation to having a support person, assistance animal or disability aid in the same way as it applies in relation to having a disability. That is, it is proposed to replicate the approach in the Disability Discrimination Act that discrimination against a person with disability who relies on a carer, assistant, assistance animal or disability aid, because of their disability, is the same as discrimination against a person on the grounds of disability.

A person with disability has a support person if the person –

- a) is presently accompanied by the support person; or
- b) was previously accompanied by the support person; or
- c) may be accompanied by the support person in the future; or
- d) is imputed to be accompanied by the support person.

A **support person**, in relation to a person with disability, means a person who provides paid or unpaid assistance or services to the person, because of the disability, including, for example, as an assistant; a carer, interpreter or reader.

A person with disability has an **assistance animal** or **disability aid** if the person—

- a) is presently accompanied by, or possesses, the assistance animal or disability aid;
- or

²² Ibid.

²³ *Disability Discrimination Act 1992* (Cth) s 8.

- b) was previously accompanied by, or possessed, the assistance animal or disability aid; or
- c) may be accompanied by, or possess, the assistance animal or disability aid in the future; or
- d) is imputed to be accompanied by, or possess, the assistance animal or disability aid.

Assistance animal, in relation to a person with disability, means—

- a) an assistance dog, guide dog or hearing dog as defined under the *Guide, Hearing and Assistance Dogs Act 2009* (Qld), schedule 4; or
- b) a dog or other animal accredited under a law of another State that provides for the accreditation of animals trained to assist persons with disability to alleviate the effect of the disability; or
- c) a dog or other animal trained—
 - a. to assist a person with disability to alleviate the effect of the disability; and
 - b. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Disability aid, in relation to a person with disability, means equipment, including a palliative or therapeutic device, that—

- a) is used by the person; and
- b) provides assistance to alleviate the effect of the disability.

Consultation Questions:

- 3. Do you agree with the proposed approach to assistance animals, carers and disability aids?
- 4. Do you have any feedback about the definitions of: assistance animal, carer or disability aid?

Issue Three: Reasonable accommodations

Background

'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 work station 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 people with disability, but this is not necessary. In this sense reasonable accommodations are different from affirmative measures (discussed in the next section, Issue Four) which have a proactive quality. The duty to provide reasonable accommodation is a reactive duty in relation to a particular person with disability.²⁴ While both reasonable accommodations and affirmative measures are aimed at substantive equality, reasonable accommodations is a non-discrimination duty, while affirmative measures is 'preferential' treatment aimed at addressing historic and/or systemic exclusion from the enjoyment of rights.²⁵

The CRPD defines discrimination as including the 'denial of reasonable accommodation', and specifically provides that '[i]n order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.²⁶ Importantly, reasonable accommodations are expressed as a positive duty.

Current approach in the AD Act

The AD Act implicitly provides for 'reasonable accommodations' in the current definition of indirect discrimination. The definition of **direct discrimination** currently provides that: 'in determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person...the fact that the person with the impairment may require special services or facilities is irrelevant'.²⁷ **Indirect discrimination** occurs if a term is imposed, which a person cannot comply with because of their attribute, and the term is not reasonable.²⁸ However, where a person with disability requires 'special services or facilities' and the supply of those facilities would impose 'unjustifiable hardship', the Act also 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.²⁹ The term '**unjustifiable hardship**' also appears in the current Act in relation to:

- 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;³⁰ 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.³¹

The current expression of 'reasonable accommodations' in the AD Act, however, is not expressed in terms of a positive duty.

²⁴ CPRD Committee, *General Comment No. 6: Equality and Non-Discrimination* (n 1) 6.

²⁵ *Ibid.*

²⁶ United Nations (UN) General Assembly, Convention on the Rights of People with disability (CRPD), 61st sess, UN Doc A/ RES/61/106 (12 December 2006) arts 2 and 5(3).

²⁷ *Anti-Discrimination Act 1991* (Qld) s 10(5).

²⁸ *Ibid* s 11.

²⁹ *Ibid* ss 35, 44, 51, 92, 100.

³⁰ *Ibid* s 36.

³¹ *Ibid* s 37.

The Building Belonging Report

The Building Belonging Report recommended (**recommendations 5.1 and 5.2**) that the new AD Act should replace unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodations and that a non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the Act. The Report also considered that referring to ‘reasonable adjustments’ or ‘reasonable accommodations’, rather than ‘special services and facilities’, is consistent with the language of the Disability Discrimination Act, and is a term better understood by the community and could assist with raising awareness.

Other jurisdictions

Under the Disability Discrimination Act, direct discrimination occurs if a person ‘does not make, or proposes not to make, reasonable adjustments’ that has the effect that the person ‘because of the disability, [is] treated less favourably than a person without the disability would be treated in circumstances that are not materially different’.³²

In *Sklavos v Australasian College of Dermatologists*,³³ however, the court held that the reason for not making the adjustment must still be ‘because of’ the person’s disability for direct discrimination to occur. As the Australian Human Rights Commission (AHRC) has commented, this means that a person with disability will be unable to enforce the duty to make reasonable adjustments under s 5(2) unless they can show that the discriminator was motivated not to make reasonable adjustments because the person had a disability.³⁴ To address this, the AHRC has recommended that the Australian Government amend federal legislation by creating a new standalone provision that provides for a positive duty to make reasonable adjustments unless doing so would involve unjustifiable hardship.³⁵

In addition to the Disability Discrimination Act, anti-discrimination laws in a number of states and territories also provide for reasonable adjustments.

Victorian, NT and Australian Capital Territory (ACT) anti-discrimination laws create a positive duty to make reasonable adjustments. In Victoria, the duty is specifically and separately provided for in relation to particular areas of discrimination. For example, an employer has a duty to make reasonable adjustments for employees with disabilities who require adjustments to perform the genuine and reasonable requirements of their employment.³⁶ In education, the duty is for educational authorities to make reasonable adjustments for a person with disability so that they can participate in or derive substantial benefit from an educational program.³⁷ Each provision contains a list of relevant factors to determine if the adjustment is reasonable.

The *Anti-Discrimination Act 1992* (NT) provides that failure to accommodate a special need (on the basis of any attribute) is prohibited conduct under the Act.³⁸ The Act also provides for a list of relevant factors to determine whether a person has unreasonably failed to provide for the special

³² *Disability Discrimination Act 1992* (Cth) s 5(2); See also the definition of indirect discrimination in section 6(2) of the *Disability Discrimination Act 1992* (Cth) which provides indirect discrimination occurs if a person can only comply with a requirement or condition if reasonable adjustments are given, and the failure to make reasonable adjustments has the effect of disadvantaging a person with disability.

³³ *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

³⁴ Australian Human Rights Commission, ‘Free and Equal: A Reform Agenda for Federal Discrimination Laws’ (2021) 290.

³⁵ *Ibid*; Australian Human Rights Commission, ‘Information concerning Australia’s compliance with the Convention on the Rights of People with disability’, Submission to the UN Committee on the Rights of People with disability (25 July 2019).

³⁶ *Equal Opportunity Act 2010* (Vic) s 20. See also sections 22A (in relation to contract workers with disability) and 33 (in relation to partners in a firm with disability).

³⁷ *Ibid* s 40.

³⁸ *Anti-Discrimination Act 1992* (NT) s 24.

need of another person.³⁹ A similar approach will be introduced in the ACT when the *Discrimination Amendment Act 2023* (ACT) commences.⁴⁰

Proposed approach

Consistent with the recommendations in the Building Belonging Report (**recommendations 5.1 and 5.2**) it is proposed to include a positive duty to make reasonable accommodations in the Bill. It is proposed that the duty should apply in all areas in which the Bill operates.

In the CRPD, ‘reasonable accommodations’ are defined as:

*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to people with disability the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*⁴¹

The CRPD Committee has explained that there are two parts to this definition. The first part imposes a positive duty to provide relevant, appropriate and effective accommodations to a person with disability. The second part ensures that the requirement to make these accommodations does not impose an undue burden on the duty holder. The undue burden sets the limit on the duty.⁴²

Therefore, in addition to the positive obligation to provide accommodations, it is also proposed to include a non-exhaustive list of factors for assessing if the accommodation is reasonable. The ‘unjustifiable hardship’ provisions in the AD Act, which currently operate as exceptions, will not be retained.

A failure to make reasonable adjustments, for a person with disability, would have the effect that the person with disability has been subject to unlawful discrimination.

Reasonable accommodation (clauses 12, 14, 15, 19)

The Bill (clause 19) will provide for a **standalone positive duty** for a person who otherwise has a duty under the Bill not to discriminate against a person with disability, to make reasonable accommodations to ensure the person with disability is not treated unfavourably because of the disability.

The Bill (clause 14) will provide that **direct discrimination** against a person with disability occurs if:

- a) a person fails or refuses to make a **reasonable accommodation** to address the needs of a the person with disability to ensure the person with disability is not treated unfavourably; and
- b) the failure or refusal has the effect that the person with disability is treated unfavourably.

The Bill (clause 15) will also provide that **indirect discrimination** against a person with disability occurs if –

- a) the person imposes, 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

³⁹ Ibid.

⁴⁰ *Discrimination Amendment Act 2023* (ACT).

⁴¹ United Nations General Assembly, CRPD (n 26) art 2.

⁴² CPRD Committee, *General Comment No 6: Equality and Non-Discrimination* (n 1) 7.

- b) the condition, requirement or practice would not disadvantage the person with disability if a reasonable accommodation was made; and
- c) the person fails or refuses to make a reasonable accommodation.

A **reasonable accommodation** (clause 12) in relation to a person with disability is an accommodation that –

- a) is necessary and appropriate to be made, and effective, to ensure the person is not treated unfavourably; and
- b) does not impose unjustifiable hardship on the person making the accommodation.

A person who fails or refuses to make an accommodation on the grounds that making the accommodation would impose an unjustifiable hardship on the person has the onus of proving the matter, on the balance of probabilities.

In deciding whether an accommodation in relation to a person with disability would impose an unjustifiable hardship on a person, the following matters must be considered -

- a) the nature of the person's disability;
- b) the nature of the accommodation that would be needed to ensure the person with disability is not treated unfavourably;
- c) the feasibility and effectiveness of the accommodation;
- d) the effect on the person with disability if the accommodation were made;
- e) the effect on the person with disability if the accommodation were not made;
- f) the cost of the accommodation;
- g) the nature of any detriment, including financial detriment, to the person making the accommodation; and
- h) any other relevant matter.

Questions for consultation:

- 5. Do you agree with the proposed approach to providing for reasonable accommodation?
- 6. Are the factors for determining whether an accommodation is reasonable appropriate?

Issue Four: Affirmative Measures

Background

To achieve equality for people with disability, the CRPD recognises that ‘specific measures which are necessary to accelerate or achieve de facto equality of people with disability shall not be considered discrimination under the terms of the present Convention’.⁴³

Affirmative measures allow proactive strategies to be taken to provide preferential treatment to a group who have been subject to historical and systematic disadvantage. The taking of affirmative measures may sometimes be necessary to achieve substantive equality. As long as they meet certain criteria they are not considered discrimination.

Various international human rights treaties promote affirmative measures including those concerned with racial discrimination;⁴⁴ discrimination against women;⁴⁵ and, the rights of people with disability.⁴⁶

Some human rights treaties, such as the Committee on the Elimination of Discrimination against Women (CEDAW), use the term ‘temporary special measures’ to denote the importance of affirmative measures only being in place until the objectives of equality of opportunity and treatment have been achieved, and not as permanent mechanisms to entrench separate rights or segregation.⁴⁷ The Committee on the Elimination of Racial Discrimination (CERD Committee) stipulates that affirmative measures will not be considered discrimination ‘provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.⁴⁸

Current approach

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

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

Building Belonging Recommendation

The Building Belonging Report has recommended (**recommendation 4.1**), subject to further targeted consultation, that these general exemptions are reframed into a single provision, based on s 12 of the Victorian Equal Opportunity Act – ‘Special Measures’. While ‘affirmative measures’ are also known as other terms, including ‘special measures’ and ‘affirmative action’, the Building Belonging Report preferred the term ‘affirmative measures,’ given the term ‘special measures’ could have paternalistic connotations. The term ‘affirmative measures’ will be the main term used in this paper and the draft Bill (except in the case of referring to particular terms in legislation or human rights instruments).

⁴³ UN General Assembly, CRPD (n 26) art 5(4).

⁴⁴ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), opened for signature 21 December 1965, A/RES/2106 art 1(4).

⁴⁵ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), opened for signature 23 March 2006, A/RES/60/230 art 4(1).

⁴⁶ CRPD (n 3) art 5(4).

⁴⁷ CEDAW (n 46) art 4; ICERD (n 45).

⁴⁸ ICERD (n 45) art 1(4).

Other jurisdictions

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

- **Commonwealth:** *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act);⁴⁹
- **ACT:** *Discrimination Act 1991* (ACT);⁵⁰
- **New South Wales (NSW):** *Anti-Discrimination Act 1977* (NSW);⁵¹
- **NT:** NT Anti-Discrimination Act;⁵²
- **South Australia (SA):** *Equal Opportunity Act 1984* (SA).⁵³

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

These include:

- **Commonwealth:** Disability Discrimination Act,⁵⁴ Racial Discrimination Act,⁵⁵ *Age Discrimination Act 2004* (Cth)⁵⁶ and the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act);⁵⁷
- **Victoria:** Victorian Equal Opportunity Act;

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

See **Annexure 2** for a comparative table of affirmative measures provisions in Commonwealth and other states and territories laws.

Human rights treaties and instruments

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

- racial discrimination;⁵⁸
- discrimination against women;⁵⁹ and
- rights of people with disability.⁶⁰

Some human rights treaties, such as the CEDAW, use the term ‘temporary special measures’ to denote the importance of affirmative measures only being in place until the objectives of equality of opportunity and treatment have been achieved, and not as permanent mechanisms to entrench separate rights or segregation.⁶¹ Whereas the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) stipulates that affirmative measures will not be considered

⁴⁹ *Racial Discrimination Act 1975* (Cth) s 8.

⁵⁰ *Discrimination Act 1991* (ACT) s 27.

⁵¹ *Anti-Discrimination Act 1977* (NSW) ss 21, 49ZYR, 126A.

⁵² *Anti-Discrimination Act 1992* (NT) s 57.

⁵³ *Equal Opportunity Act 1984* (SA).

⁵⁴ *Disability Discrimination Act 1992* (Cth) s 45.

⁵⁵ *Racial Discrimination Act 1975* (Cth) s 8.

⁵⁶ *Age Discrimination Act 2004* (Cth) s 33.

⁵⁷ *Sex Discrimination Act 1984* (Cth) s 7D.

⁵⁸ ICERD (n 45) art 1(4).

⁵⁹ CEDAW (n 46) art 4(1).

⁶⁰ CRPD (n 3) art 5(4).

⁶¹ CEDAW (n 46) art 4; ICERD (n 45).

discrimination 'provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.⁶²

Proposed approach

There is a significant body of Australian and international law regarding affirmative measures and their requirements⁶³. It is recognised that the requirements for special measures must be carefully applied and substantiated to ensure that only conduct which meets the criteria is considered as an affirmative measure.

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

- whether the conduct is directed to members of a group with a particular attribute;
- what the purpose of the conduct is and whether it is for the purpose of promoting or realising substantial equality;
- whether the conduct is undertaken in good faith, is reasonably likely to achieve its purpose, is proportionate and justified.⁶⁴

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.⁶⁵ It is intended that the provisions for affirmative measures operate primarily on a self-assessment basis. That is, it is preferable that persons seeking to engage in affirmative measures make their own assessment of the matter, rather than making an application to the tribunal for a determination as to whether the measures are an affirmative measure or require an exemption. The functions of the QHRC under the new legislation will include developing guidance about the application of the AD Act, and this must include guidelines about the development of affirmative measures.

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

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

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

An affirmative measure must:

- a) confer a benefit on the members of the group;
- b) be taken in good faith for achieving the purpose (i.e. achieving substantive equality for members of a group with a protected attribute);
- c) be reasonably likely to achieve the purpose;
- d) be proportionate to achieving the purpose; and

⁶² ICERD (n 45) art 1(4).

⁶³ *Gerhardy v Brown* (1985) 159 CLR 70; *Waite Group (Human Rights)* [2016] VCAT 1258; *Bropho v Western Australia* [2007] FCA 519; *Mahoney v the Queen* [2013] HCA 28.

⁶⁴ *Waite Group (Human Rights)* [2016] VCAT 1258.

⁶⁵ See section 113 of the 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.

- e) be justified because the members of the group have a particular need for advancement or assistance.

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

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

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

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

Question for consultation:

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

Affirmative measures for addressing racial substantive 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. CERD recognises special measures as important for the advancement of equality and confirms that such measures are not racial discrimination.⁶⁶

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

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

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

The CERD Committee has provided guidance on the elements of ‘special measures’ and has stated that special measures ‘should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should also be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned’.⁶⁷

The CERD Committee has stated that: ‘State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities’.⁶⁸

⁶⁶ ICERD (n 45).

⁶⁷ CERD, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (2009), 75th sess, UN Doc A/64/18 (Annex VIII) (26 September 2009).

⁶⁸ *Ibid* [18].

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).⁶⁹ UNDRIP is a most comprehensive standard on human rights for Indigenous peoples.

Article 3 of UNDRIP states:

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*⁷⁰

Article 19 states:

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them.*⁷¹

The right to self-determination for Indigenous peoples is also expressed more broadly in the International Covenant on Civil and Political Rights⁷² and the International Convention on Economic, Social and Cultural Rights.⁷³

Requirements for affirmative measures for racial substantive equality

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

- a) the measure must confer a **benefit**;
- b) on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin;
- c) the **sole purpose** of the measure must be to secure adequate advancement of the beneficiaries so that they may equally enjoy and exercise their human rights and fundamental freedoms;
- d) the protection given to the beneficiaries must be **necessary** for them to enjoy and exercise their human rights equally with others;⁷⁴ and
- e) the measure must **not have yet achieved its objectives** (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).⁷⁵

The requirement for consultation with and participation of Indigenous people in the design and implementation of affirmative measures has, however, received mixed support in case law in Australia.⁷⁶

⁶⁹ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), opened for signature 2 October 2007, A/RES/61/295.

⁷⁰ UNDRIP (n 73) art 3.

⁷¹ Ibid art 19.

⁷² United Nations, International Covenant on Civil and Political Rights, opened for signature 19 December 1966, UN Doc 999 UNTS 171 (entered into force 23 March 1976).

⁷³ United Nations, International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, UN Doc 993 UNTS 3 (entered into force 3 January 1976).

⁷⁴ *Gerhardy v Brown* (1985) 159 CLR 70, 133.

⁷⁵ Ibid 139-40.

⁷⁶ In *Gerhardy v Brown* (1985) 159 CLR 70, 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." [570] Similarly in *Maloney v the Queen* [2013] HCA 28 the High Court held that laws and regulations restricting the possession of alcohol

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.

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

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

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

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

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

Questions for consultation:

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

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.

Annexure 1: Definition of ‘disability’ or ‘impairment’

Definition of ‘disability’	
Jurisdiction	Provision
Commonwealth	<p><u>Disability Discrimination Act 1992 (Cth), s 4 (Interpretation)</u></p> <p>disability, in relation to a person, means:</p> <ul style="list-style-type: none"> (a) total or partial loss of the person’s bodily or mental functions; or (b) total or partial loss of a part of the body; or (c) the presence in the body of organisms causing disease or illness; or (d) the presence in the body of organisms capable of causing disease or illness; or (e) the malfunction, malformation or disfigurement of a part of the person’s body; or (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; <p>and includes a disability that:</p> <ul style="list-style-type: none"> (h) presently exists; or (i) previously existed but no longer exists; or (j) may exist in the future (including because of a genetic predisposition to that disability); or (k) is imputed to a person. <p>To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.</p>
NSW	<p><u>Anti-Discrimination Act 1977 (NSW), s 4 (Definitions)</u></p> <p><i>disability</i> means—</p> <ul style="list-style-type: none"> (a) total or partial loss of a person’s bodily or mental functions or of a part of a person’s body, or

	<p>(b) the presence in a person’s body of organisms causing or capable of causing disease or illness, or</p> <p>(c) the malfunction, malformation or disfigurement of a part of a person’s body, or</p> <p>(d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or</p> <p>(e) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.</p>
<p>ACT</p>	<p><u>Discrimination Act 1991 (ACT), s 5AA (Meaning of disability)</u></p> <p>(1) In this Act: <i>disability</i> means—</p> <p>(a) total or partial loss of a bodily or mental function; or</p> <p>(b) total or partial loss of a part of the body; or</p> <p>(c) the presence in the body of organisms that cause disease or illness; or</p> <p>(d) the presence in the body of organisms that are capable of causing disease or illness; or</p> <p>(e) the malfunction, malformation or disfigurement of a part of the body; or</p> <p>(f) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or</p> <p>(g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or</p> <p>(h) any other condition prescribed by regulation.</p> <p>(2) For this Act, disability includes—</p> <p>(a) behaviour that is a symptom or manifestation of the disability; and</p> <p>(b) a disability that a person may have in the future, including because of a genetic disposition to the disability; and</p> <p>(c) a disability that it is thought a person may have in the future, whether or not—</p> <p>(i) the person has a genetic disposition to the disability; or</p> <p>(ii) there is anything else to indicate the person may have the disability in the future; and</p>

	<p>Note Disability also includes a disability that the person has or is thought to have, and a disability that the person has had in the past, or is thought to have had in the past (see s 7 (2)).</p> <p>(d) reliance on—</p> <p>(i) a support person; or</p> <p>(ii) a disability aid; or</p> <p>(iii) an assistance animal.</p>
Tasmania	<p><u>Anti-Discrimination Act 1998 (Tas), s 3 (Interpretation)</u></p> <p><i>disability</i> means any of the following that presently exists, previously existed but no longer exists, may exist in the future, whether or not arising from an illness, disease or injury or from a condition subsisting at birth:</p> <p>(a) a total or partial loss of the person's bodily or mental functions;</p> <p>(b) total or partial loss of a part of the body;</p> <p>(c) the presence in the body of organisms causing or capable of causing disease or illness;</p> <p>(d) the malfunction, malformation or disfigurement of a part of a person's body;</p> <p>(e) disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;</p> <p>(f) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour;</p> <p>(g) reliance on a guide-dog, wheelchair or other remedial or therapeutic device.</p>
SA	<p><u>Equal Opportunity Act 1984 (SA), s 5 (Interpretation)</u></p> <p><i>disability</i>, in relation to a person, means—</p> <p>(a) total or partial loss of the person's bodily or mental functions; or</p> <p>(b) total or partial loss of a part of the body; or</p> <p>(c) the presence in the body of organisms causing disease or illness; or</p> <p>(d) the presence in the body of organisms capable of causing disease or illness; or</p> <p>(e) the malfunction, malformation or disfigurement of a part of the person's body;</p> <p>or</p> <p>(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or</p> <p>(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.</p>
NT	<p><u>Anti-Discrimination Act 1992 (NT), s 4 (Interpretation)</u></p>

	<p><i>disability</i> includes the following:</p> <ul style="list-style-type: none"> (a) the total or partial loss of a bodily function; (b) the presence in the body of: <ul style="list-style-type: none"> (i) an organism that has caused or is capable of causing disease; or (ii) organisms impeding, capable of impeding or that may impede the capacity of the body to combat disease; (c) total or partial loss of a part of the body; (d) the malfunction or dysfunction of a part of the body; (e) the malformation or disfigurement of a part of the body; (f) a reliance on any of the following: <ul style="list-style-type: none"> (i) a support person; (ii) a disability aid; (iii) an assistance animal; (g) psychiatric or psychological disease or disorder, whether permanent or temporary; (h) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; (i) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.
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Definition of 'impairment'	
Jurisdiction	Provision
Queensland (Current)	<p><u>Anti-Discrimination Act 1991, sch 1 (Dictionary)</u></p> <p><i>impairment</i>, in relation to a person, means—</p> <ul style="list-style-type: none"> (a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or (b) the malfunction, malformation or disfigurement of a part of the person's body; or (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or (e) the presence in the body of organisms capable of causing illness or disease; or (f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;

	<p>whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—</p> <p>(g) presently exists; or</p> <p>(h) previously existed but no longer exists.</p>
<p>WA</p>	<p><u>Equal Opportunity Act 1984 (WA), s 4 (Terms used)</u></p> <p><i>impairment</i> in relation to a person, means one or more of the following conditions —</p> <p>(a) any defect or disturbance in the normal structure or functioning of a person’s body; or</p> <p>(b) any defect or disturbance in the normal structure or functioning of a person’s brain; or</p> <p>(c) any illness or condition which impairs a person’s thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour, whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment —</p> <p>(d) which presently exists or existed in the past but has now ceased to exist; or</p> <p>(e) which is imputed to the person.</p>

Annexure 2: ‘Affirmative measures’ in other laws

Positive ability to take affirmative measures	
Jurisdiction	Provision
Commonwealth	<p><u>Sex Discrimination Act 1984 (Cth), s 7D (Special measures intended to achieve equality)</u></p> <p>(1) A person may take special measures for the purpose of achieving substantive equality between:</p> <p>(a) men and women; or</p> <p>(aa) people who have different sexual orientations; or</p> <p>(ab) people who have different gender identities; or</p> <p>(ac) people who are of intersex status and people who are not; or</p> <p>(b) people who have different marital or relationship statuses; or</p> <p>(c) women who are pregnant and people who are not pregnant; or</p> <p>(d) women who are potentially pregnant and people who are not potentially pregnant; or</p> <p>(e) women who are breastfeeding and people who are not breastfeeding; or</p> <p>(f) people with family responsibilities and people without family responsibilities.</p> <p>(2) A person does not discriminate against another person under section 5, 5A, 5B, 5C, 6, 7, 7AA or 7A by taking special measures authorised by subsection (1).</p> <p>(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:</p> <p>(a) solely for that purpose; or</p> <p>(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.</p> <p>(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.</p>
Victoria	<p><u>Equal Opportunity Act 2010 (Vic), s 12 (Special measures)</u></p> <p>(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.</p> <p>Examples</p>

	<p>1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.</p> <p>2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.</p> <p>3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.</p> <p>(2) A person does not discriminate against another person by taking a special measure.</p> <p>(3) A special measure must —</p> <p>(a) be undertaken in good faith for achieving the purpose set out in subsection (1); and</p> <p>(b) be reasonably likely to achieve the purpose set out in subsection (1); and</p> <p>(c) be a proportionate means of achieving the purpose set out in subsection (1); and</p> <p>(d) be justified because the members of the group have a particular need for advancement or assistance.</p> <p>(4) A measure is taken for the purpose set out in subsection (1) if it is taken—</p> <p>(a) solely for that purpose; or</p> <p>(b) for that purpose as well as other purposes.</p> <p>(5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.</p>
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Affirmative measures expressed as an exception	
Jurisdiction	Provision
Commonwealth	<p><u>Racial Discrimination Act 1975 (Cth), s 8 (Exceptions)</u></p> <p>(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).</p> <p>Schedule – ICERD, Article 1 (4)</p> <p>Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of</p>

	<p>separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.</p>
NSW	<p><u>Anti-Discrimination Act 1977 (NSW)</u></p> <p>21 Special needs programs and activities</p> <p>Nothing in this Part applies to or in respect of anything done in affording persons of a particular race access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.</p> <p>49ZYR Special needs programs and activities</p> <p>Nothing in this Part applies to or in respect of anything done to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.</p> <p>126A Exemption for special needs programs and activities</p> <p>(1) Nothing in Parts 3–4C renders unlawful anything done by a person in good faith for the purposes of or in the course of any program or activity for which certification is in force under this section as a special needs program or activity.</p> <p>(2) The Minister may certify a program or activity to be a special needs program or activity if satisfied that its purpose or primary purpose is the promotion of access, for members of a group of persons affected by any form of unlawful discrimination to which this Act applies in an area of discrimination to which this Act applies, to facilities, services or opportunities to meet their special needs or the promotion of equal or improved access for them to facilities, services and opportunities.</p> <p>(3) (Repealed)</p> <p>(4) Certification for a program or activity remains in force for the period specified in the certification or (if no period is specified) until the certification is withdrawn.</p> <p>(5) Certification may be withdrawn by the Minister at any time by giving notice in writing to the person who appears to the Minister to be the person who is in charge of the program or who has responsibility for the activity concerned.</p> <p>(6) A person who is in charge of a program or activity may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision of the Minister under this section concerning the certification of the program or activity.</p>
ACT	<p><u>Discrimination Act 1991 (Act) s 27 (Measures intended to achieve equality)</u></p> <p>(1) Part 3 does not make it unlawful to do an act if a purpose of the act is—</p> <p>(a) to ensure that members of a relevant class of people have equal opportunities with other people; or</p>

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

	<p>(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.</p> <p>(2) Subsection (1) applies only until equality of opportunity has been achieved.</p>
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