

EXCEPTIONS RELATING TO WORK



The Government is aiming to modernise our *Discrimination Act 1991* (Discrimination Act) and put the ACT at the forefront of best practice in promoting equal opportunity, respect for diversity and social inclusion in our community.

You can find out more about the background to this project at the Pathway to Discrimination Law Reform website: <https://justice.act.gov.au/justice-programs-and-initiatives/canberra-inclusive-progressive-equal>

Protection from discrimination

Discrimination occurs when a person is treated differently to other people because of something about them (called **protected attributes** in ACT law). The **protected attributes** in the ACT are:

- > accommodation status (e.g. homelessness)
- > age
- > association with a person who is identified by reference to another protected attribute
- > breastfeeding
- > disability
- > employment status
- > gender identity
- > genetic information
- > immigration status
- > industrial activity
- > irrelevant criminal record
- > parent, family, carer or kinship responsibilities
- > physical features
- > political conviction
- > pregnancy
- > profession, trade, occupation or calling
- > race
- > record of a person's sex having been altered on an official register
- > relationship status
- > religious conviction
- > sex
- > sex characteristics
- > sexuality
- > experience of domestic or family violence.

In the ACT, it is against the law to discriminate against a person:

- > at work;
- > in education;
- > when allowing access to premises;
- > when providing goods, services and facilities;
- > when providing accommodation; and
- > when clubs make membership decisions or offer benefits to members.

For more information about the Discrimination Act see the **Discussion Paper** on the Discrimination Law Reform Project website: <https://justice.act.gov.au/justice-programs-and-initiatives/canberra-inclusive-progressive-equal>.

What are exceptions?

There are some situations where it is not against the law to discriminate. In the Discrimination Act, these are called **exceptions**.

There are over 50 exceptions in the Discrimination Act. The Government is looking at whether these exceptions need to be updated to make sure the ACT continues to protect people who are vulnerable and promote diversity and inclusion.

What are the exceptions relating to work?

Employment

Employers can discriminate where a “**genuine occupational qualification**” exists for a job that makes it necessary to hire someone based on their **race, sex, age, disability or physical features**. An example of this is hiring only women for a job that involves fitting women’s underwear.

Employers can also discriminate where a person cannot perform the **inherent requirements of a job because of their disability**. Employers are required to make reasonable adjustments to enable a person with disability to perform in a role, but not if this would **impose unjustifiable hardship** on the employer.

Work in private homes

People hiring workers to perform domestic duties or provide childcare in **private homes** can discriminate for any reason in deciding whom to hire.

What are the reform options?

The Government is considering whether these exceptions should be kept or changed. Considerations include:

Should the exceptions focus on ‘inherent requirements’ instead of ‘genuine occupational qualifications’?

The ‘genuine occupational qualification’ test focuses on what is culturally or commercially desirable, rather than what is necessary.

The Government is considering whether the ‘genuine occupational qualification’ test should be replaced with a test that focuses more on the **inherent requirements** of the role. This would apply to all protected attributes under the Act, not just disability. An inherent requirements test would focus more on the core duties of the role without which the role cannot be performed.

Should more groups of people be protected by the work exceptions?

The Government is considering whether there are broader groups of people who should benefit from these exceptions but currently do not. For example, it may be more authentic in a play for a character who is intersex to be performed by a person born with variations in their sex characteristics.

Should there be a duty to make reasonable adjustments to enable persons to perform a role?

At the moment, while employers have to make reasonable adjustments for persons with disability, there isn’t a duty to make reasonable adjustments in relation to any other protected attributes (or grounds) in employment.

The Government is considering whether there should be a **positive duty** to make reasonable adjustments in employment. This would require employers to properly consider the circumstances of each case, including the duties of the job that are genuinely essential, the person's capabilities and the nature of any adjustments that may be made.

Should the exceptions relating to work in private homes be narrower?

The exceptions relating to work in private homes are currently very broad. They could permit discrimination for any reason, even where there is no real connection between the types of persons preferred and the duties of the job.

The Government is considering whether the exceptions relating to work in private homes could be changed to prevent a hirer from preferring people of a particular gender, age or racial background (for example) if this were irrelevant to the duties of the position. This is appropriate as such conduct may reflect prejudice.

Should the exceptions be repealed?

The Government is considering whether the employment exceptions could be removed entirely and people who rely on them would be required to instead apply for exemptions.

Making a submission

Submissions on any of the issues raised here are invited by **midnight Sunday 9 January 2022**.

Submissions or questions can be sent to civilconsultation@act.gov.au.

If you require this document in an alternative, accessible format, or if you require assistance in making a submission, please contact us so we can help.

Submissions will be published on the ACT Government's Justice and Community Safety Directorate website unless you tell us that you would like your submission to be confidential.

The options here are intended to promote informed public debate. They are not the Government's final proposals. All submissions received will inform the final reform proposals.