



# Discrimination Law Reform

## REPORT ON WHAT WE HEARD:

**The ACT Government wants to modernise discrimination law to support best practice in promoting equal opportunity, respect for diversity and social inclusion.**

The *Discrimination Act 1991* is now over 30 years old. One of the ACT Government's priorities is to reduce inequality and the ACT Government is considering how the Discrimination Act can be changed so it is more user-friendly and better aligned with human rights.

Canberrans were invited to have their say about ideas for reform from the ACT Law Reform Advisory Council's (LRAC) 2015 Final Report into the *Review of the Discrimination Act 1991 (ACT)*.

Discrimination law reform is a commitment under the the Parliamentary and Governing Agreement of the 10<sup>th</sup> ACT Legislative Assembly, and as a key part of the ACT Government's Capital of Equality Strategy 2019 - 2023.

## THE CONVERSATION:

**The conversation took place from 22 October 2021 to 30 January 2022.**

To support the community's consideration of key issues around discrimination law reform, the ACT Government released a Discussion Paper on 22 October 2021. Following community feedback about the timeframes for submissions during the COVID-19 pandemic, the closure date was extended by three weeks from 9 January 2022 to 30 January 2022.

To help facilitate the conversation, the ACT Government released a series of short consultation guides about specific topics covered in the Discussion Paper. This included coverage of the Discrimination Act 1991; insurance and superannuation exceptions; licenced club exceptions; positive duty; religious bodies exceptions; sports exceptions; voluntary bodies exceptions; and work exceptions

Canberrans were invited to make submissions by sending an email or making an oral submission by leaving a voice message. Canberrans also had the option to complete a short survey with 15 key questions arising from the Discussion Paper.

The ACT Government facilitated three virtual roundtables: two with community organisations and one with religious bodies on 23 November 2021, 30 November 2021, and 7 December 2021.

The ACT Government also provided **14** tailored briefings to government and non-government organisations.

## WHO WE ENGAGED:

**The conversation was with peak bodies, government advisory groups, community legal centres, academics, advocacy groups and members of the community.**



We received **25** written submissions to the Discussion Paper.

We received submissions from:

Category of Respondent	Number of Submissions
ACT Community Service Providers	6
Peak Bodies and Advocacy Groups	5
Education Associations	4
Individuals	4
Community Legal Centres and Charitable Law Firms	4
Voluntary Bodies	1
Insurance Providers	1
<b>TOTAL</b>	<b>25</b>

We also received 17 responses to the online survey. The majority of respondents were completing the survey as individuals rather than on behalf of an organisation or business. The largest number came from people aged 25 to 34 years. 71% identified as female, 21% as male and one respondent did not wish to identify a gender.



## Key insights from the community

The Discussion Paper invited members of the community to comment on four broad areas of reform: expanding the coverage of the Discrimination Act, replacing the exceptions with a new ‘single justification defence’ to unlawful discrimination, refining the existing exceptions and introducing a positive duty to prevent discrimination. The community had lots of valuable suggestions and creative ideas about how discrimination law can be improved in the ACT.

### Topic 1: Coverage of the Act

There is almost universal support for expanding the coverage of the Discrimination Act. The Discussion Paper noted that there are some areas of public life that are not clearly covered by discrimination law such as sports, competitions and certain government functions and there was strong agreement for these areas to be covered, especially government functions.

Many of the submissions and comments during the roundtables identified ‘grey areas’ where it is not clear whether discrimination law applies, and areas that the ACT Civil and Administrative Tribunal has found to not be covered.

**Example: If a customer is sexually harassed by someone who is providing a service, that is covered under the Act, but if a customer sexually harasses a service provider, that may not be covered.**

**Example: An Aboriginal mother cannot make a discrimination complaint about the removal of a child by Child and Youth Protection Services because she is not ‘receiving a service’ from the agency.**

**Example: Does a strata body provide a service or provide access to public common areas? Should a strata body have to comply with discrimination law?**

We heard that while there is strong support for expanding the coverage of the Act to all areas of public life, there needs to be a clear definition of what is private and what is public. Defining what is private life is a challenging and complex concept, and many of the submissions and comments raised questions about whether or not certain activities should be considered private.

**Example: Online abuse and trolling via private message on social media.**

**Example: Independent supported living arrangements and discrimination between housemates in the disability sector.**

**Example: Vilification and harassment from a neighbour.**

To help manage that complexity, some submissions suggested that instead of applying discrimination law to all areas of public life that specific additional areas of public life should be created to make it clear what discrimination law is supposed to cover.

One survey response said, “I think you need to give greater thought to whether extending the Act to all areas of public life is practically useful as opposed to adding additional defined areas”.



While there was almost unanimous agreement that ‘private life’ should be clearly defined with clear examples, there were few specific suggestions of what that definition should be. Several submissions raised concerns that without a clear definition of ‘private life’ there will be a significant increase in litigation, resulting in more pressure on the judicial system and more costs to complainants and respondents.

Survey respondents were asked whether there are examples of private conduct they think should be excluded from the Discrimination Act, and suggestions included decisions about personal relationships (e.g. who you date or marry) and things involving family and friends. Respondents suggested that other conduct such as compelling family members to undertake specific roles due to their sex or gender and the conduct of religious organisations should be covered by the Discrimination Act.

## Topic 2: Single Justification Defence

Although 44.4% of survey respondents agreed with having one general rule for all situations to determine when organisations and individuals can legally discriminate, among the submissions and roundtables there was almost no support for completely removing all the exceptions in the Discrimination Act and replacing them instead with a ‘single justification defence’ to all discrimination that aligns with the human rights framework.

Many comments and submissions acknowledged the benefits of a test that aligns with the *Human Rights Act 2004* and that it appears to be a more streamlined approach than the current exceptions. However, there was almost universal concern that introducing a single justification defence would make discrimination law less certain for both complainants and respondents, would create more situations where discrimination may be lawful and would likely result in more litigation, adding to the pressure on the judicial system and increasing costs to complainants and respondents.

Some submissions noted that introducing a completely new approach to discrimination law in the ACT could have the unintended effect of making ACT discrimination law inconsistent with Federal discrimination law, increasing confusion, and making compliance more difficult for different types of organisations. Many submissions noted that it would make it more difficult for complainants to understand their rights and know whether or not something was likely to be discrimination, discouraging them from making complaints. Many submissions also raised concerns that requiring organisations to instead apply to the ACT Human Rights Commission for exemptions would involve considerable financial and other resource commitments which may be too great for smaller organisations.

Several submissions provided suggestions for ways that discrimination law could be better aligned with human rights but remain clear by partly including a single justification defence.

### **Idea: Introducing a single justification defence as an additional test within certain existing exceptions.**

This idea would incorporate the ‘reasonable, proportionate and justifiable’ test in the Human Rights Act to help organisations consider human rights when considering an action or decision that relates to the exception, and for parties to consider human rights when a complaint is being considered and conciliated by the Human Rights Commission. This idea could represent a first step towards a single justification defence, including developing some case law on applying a human



rights test in discrimination matters without overwhelming the Tribunal, while still maintaining specific, clear exceptions and the body of case law that supports them.

**Idea: Introducing a single justification defence for indirect discrimination only.**

**Idea: Introducing a single justification defence but maintaining certain existing exceptions.**

**Idea: Introducing a sunset clause for existing exceptions so they can be reviewed again in future.**

### Topic 3: Exceptions

#### A. Acts Done to Comply with the Law

Under the current law, it is not unlawful to discriminate when complying with an ACT law or an order of an ACT court or tribunal. The Discussion Paper proposed that this exception be removed, and of the nine submissions that addressed this specific proposal, eight agreed with the proposal.

The survey asked respondents whether it should still be legal to discriminate when following laws or court orders, and 11.76% strongly disagreed, 35.29% disagreed, 29.41% felt neutral about the question and 23.53% agreed.

Several submissions noted that laws introduced after 2004 should be compatible with the right to non-discrimination in the Human Rights Act, and that older laws that may be discriminatory should be dealt with through systemic reform rather than individual complaints. Most submissions were supportive of retaining the exception for acts necessary to comply with a specific court or tribunal order to acknowledge there may be circumstances where differential treatment is required (e.g. court-ordered mental health treatment). However, several submissions recommended creating a mechanism to audit ACT legislation that might be discriminatory and informing the ACT Government of potential amendments and reforms.

The one submission that was not supportive pointed to the use of public health directions throughout the COVID-19 Pandemic as an example of the need for an exception for actions taken in compliance with the law.

#### B. Religious Bodies

One of LRAC's recommendations was that the Discrimination Act should be amended so that exceptions for religious bodies should only be available for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination. The Discussion Paper included seven proposals to either limit or remove exceptions relating to religious bodies.



### *i. Religious observances*

This exception currently allows religious bodies to discriminate when arranging religious observances, (e.g. ordaining priests), on any ground. One proposal in the Discussion Paper is to limit the exception so religious bodies may only discriminate in arranging religious observances when their religion requires this differential treatment.

Of the nine submissions that addressed this proposal, six were supportive of the exception being limited in this way. One submission noted that the closer conduct is to religious worship, observance, practice, and teaching, the stronger the argument for privileging the interests of a religious collective over the individual with a different religious conviction. Two submissions identified that this would be an appropriate exception to include the test of reasonable, proportionate, and justifiable in all the circumstances.

The two submissions that were not supportive of this proposal raised concerns that it would unfairly prioritise the right to non-discrimination over the right to religious freedom, with one submission raising concerns about the appropriateness of the judicial system in assessing matters that should be left to religious communities.

### *ii. Religious teachings and injury to religious sensibilities*

The exception currently allows religious bodies to discriminate on any ground if their actions conform to the teachings of the religion and are necessary to avoid injury to the religious susceptibilities of people adhering to that religion. The Discussion Paper proposed removing this exception because the right to freedom of religion does include protection from having susceptibilities injured.

Of the eight submissions that addressed this proposal, one was supportive, three were not supportive and the remaining four were partially supportive. The submissions that were partially supportive of removing the exception noted that the exception is currently very broad and allows discrimination on any ground and provided suggestions for how the exception could be narrowed without removing it altogether.

**Idea: Limit the exception so discrimination only be permitted on the grounds of religious conviction**

**Idea: Limit the exception so the conduct has to be reasonable, proportionate and justifiable in the circumstances.**

The submissions that were not supportive of this proposal raised concerns that any amendment to this exception would be an unacceptable limit on the right to freedom of religion and prioritises the right to non-discrimination over the right to religious freedom.

### *iii. Primarily commercial purpose*

Religious bodies established for religious purposes is not defined under the Discrimination Act, and the Discussion Paper proposes making it clear that the religious bodies exception does not apply to organisations whose sole or main purpose is commercial. Ten submissions commented on this proposal with eight supporting and two partially supporting that the exception exclude religious bodies whose purpose is primarily commercial.





Similarly, when asked the question whether ‘for-profit’ religious bodies should be able to discriminate on religious grounds, 68.75% of survey respondents strongly disagreed, and 12% disagreed with only 6.25% of respondents feeling neutral and 12.5% strongly agreeing.

In the additional comments section, one survey respondent stated that if a “company is publicly presented as being operated based on Christian values, then it is reasonable that the company can preference hiring people who demonstrably share and adhere to those values they are meant to be promoting”.

Several submissions highlighted the importance of having a clear definition of the meaning of ‘religious bodies established for religious purposes’ with one suggestion arising from one of the ACT Government briefings:

**Idea: Align the definition of ‘commercial activities’ with national definitions of businesses and registered charities.**

#### *iv. Goods and services to members of the public*

The proposal in the Discussion Paper is to amend the religious bodies exception so that religious bodies cannot lawfully discriminate when providing goods and services to members of the public. Ten submissions addressed this proposal with three supporting the proposal, four partially supporting the proposal and three not supporting the proposal.

There were diverse views in the survey question asking whether religious bodies should be allowed to discriminate in providing goods or services to the public: 61.11% disagreed, 5.56% felt neutral, 5.56% agreed and 27.78% strongly agreed.

One survey response said, “Religious bodies should not be able to discriminate with respect to providing goods and services, employment or schooling”.

While several submissions did not consider that religious bodies should be able to discriminate on any grounds when providing goods or services to members of the public, several submissions supported a modified exception that allowed discrimination on the grounds of religious conviction only where the outcome of the discrimination was reasonable, proportionate and justified.

One submission that did not support the proposal at all considered that it is disproportionate to limit the ability of religious believers to exercise their faith through the provision of assistance to others. Another noted that some religious bodies should be able to discriminate in the provision of services (e.g. a Jewish care provider that runs a rest home for people of Jewish faith).

One survey response said, “The only exceptions I can think of would be where the service requested explicitly contradicts the religious principles (and therefore the entire moral compass and worldview) of the person or organisation having to provide it – most obviously in healthcare, dealing with issues around abortion or euthanasia. Where there is an alternative provider for these services, it’s reasonable to expect ‘customers’ to use that provider instead. No provider genuinely holding opposing beliefs should be compelled to provide a service”.



#### *v. Duties of a religious nature*

The next proposal was to extend stronger protections to employees so service providers (including health care providers) may only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature. Eleven submissions addressed this proposal with eight supportive of limiting the exception, and three against.

Two submissions suggested that religious bodies should have to consider the connection between the doctrines of the relevant religion and the nature of the work being performed (e.g. a cleaner should not have to be of a certain religion). Another three submissions suggested using the test of whether religious belief is an inherent requirement of the role, while a fourth proposed the genuine occupational requirement test. Another two submissions noted that it is individuals, not organisations, who hold the right to freedom of thought, conscience and religion and the right not to be discriminated against, and considered that while these rights need to be balanced, they are not mutually exclusive. Two submissions suggested using the reasonable and proportionate test to determine whether the discrimination is justifiable.

One of the three submissions that were not supportive of this proposal stated that religious organisations should be able to prefer or exclusively hire staff of the same religion to ensure that the ethos of the organisation is maintained. Two submissions raised concerns that despite the existing exception in relation to schools, the proposal may nevertheless impact schools. One submission stated that for Christian schools, faith is an inherent requirement of the job for all staff regardless of the role, and that as parents have entrusted their children's care to schools on the basis that they are wholly Christian environments, all staff are expected to participate in the spiritual development of students and in religious observance.

While survey respondents were not asked specifically about this proposal, one respondent said they "believe it is vital that any religions organisation (for-profit, non-profit or any other category) is able to maintain and uphold its stated values and beliefs by discriminating against people who do not share those beliefs (or, depending on the situation, are not willing to commit to upholding them regardless of their own beliefs) when hiring staff".

#### *vi. Public funding*

This proposal is about preventing some types of religious bodies from being able to rely on this exception where those organisations receive a certain proportion of public funding.

Three submissions were supportive of the proposal and agreed that religious bodies that receive public funding to undertake services for government should not be able to rely on exceptions under the Discrimination Act.

Three submissions were partially supportive of the exception being limited in some way, and one considered that a 'reasonable and proportionate in all the circumstances' test would allow considerations of public funding to be weighed up. Another submission recommended considering whether the religious body undertakes functions of a public nature within the meaning of section 40A of the Human Rights Act rather than whether it receives public funding, which would cover a broader range of organisations regardless of whether they are funded directly by the ACT Government and would distinguish between internal functions and external functions.





One submission was not supportive of this proposal and raised concerns that it could appear punitive and affect the education sector by distinguishing between schools based on whether they receive public funding.

*vii. Discrimination on some grounds only*

Currently the exception allows religious bodies to discriminate on any ground, and the proposal in the Discussion Paper is to limit the exception to only some grounds.

The four submissions that addressed this proposal agreed that religious bodies should be limited in the grounds they are able to discriminate on. Three suggested that religious bodies should only be permitted to discriminate on the ground of religious conviction only, and two raised specific concerns about religious bodies currently being able to discriminate on the basis of protected attributes such as sexual orientation, gender identity, marital status and positive HIV status. One submission recommended incorporating a reasonable, proportionate, and justifiable in the circumstances test.

C. Voluntary (Not-For-Profit) Organisations

Currently voluntary bodies (non-for-profit organisations) can discriminate on any grounds in the admission of people as members or in the provision of benefits, facilities, or services to people regardless of whether they are members. LRAC recommended that this exception be reviewed, and the Discussion Paper provided three suggestions.

The survey asked respondents to select which areas voluntary bodies should be able to discriminate in, and respondents could select more than one answer. 73.33% of respondents selected no areas, 26.67% selected deciding their membership, 20% selected board or governance roles and 13.33% selected delivering services to the public.

*i. Groups of people for whose benefit the organisation was established*

The first proposal is to limit the exception so voluntary bodies can only discriminate in providing membership or services to groups of people, protected by discrimination law, for whose benefit the organisation was established.

There were diverse views in the seven submissions that wrote about this proposal. Three submissions agreed that a voluntary body should be able to discriminate in membership where the organisation is set up for the benefit groups who share a protected attribute, and the person does not share the protected attribute. One submission discussed religious associations who have additional requirements for candidates such as age and a conscientious public profession of faith and requested further consultation. Another noted that if this exception is limited in this way, there should be no limit to the protected attributes it applies to.

Two submissions were partially supportive of this proposal and noted that a broad range of organisations might fall within the current definition of a voluntary body such as small groups that meet to advance particular hobbies or interests, or organisations who may provide services to the public. They provided some suggestions about how to manage this complexity:

**Idea: Audit the types of groups likely to fall within this category to ascertain how to narrow the exception.**



**Idea: Apply the reasonable, proportionate, and justifiable test to the outcome of the proposed conduct in all circumstances.**

Two submissions preferred that the exception be removed altogether, as addressed below, while one submission from the only voluntary body who participated in the review preferred that the exception remained as it stands.

*ii. Groups of people as a special measure*

Another proposal in the Discussion Paper was to limit the voluntary bodies exception so that organisations may only discriminate by limiting membership or services to groups of people protected by discrimination law as a special measure to either ensure they have equal opportunities with other people or meet their special needs.

Only two submissions addressed this proposal. One was from a voluntary body which advised that they already restrict membership to support balancing the sexes and ensuring that they provide equal opportunity for women to obtain leadership positions. The voluntary body also advised that do not permit unaccompanied children due to safety reasons, however that may be considered discriminate on the grounds of age.

The other submission noted that they did not think this limitation is required if the exception is limited to groups of people for whose benefit the organisation was established as above.

*iii. Remove the exception*

The final proposal in relation to the voluntary bodies exception is to remove it altogether.

Six submissions addressed this proposal with four agreeing with the exception being removed. One of these submissions noted that other relevant exceptions and special measures provisions would also apply to voluntary bodies.

One submission was partially supportive of the exception being removed if, for example, there was a general single justification defence or a human rights test instead. One submission was not supportive at all and raised concerns about school associations no longer being able to ensure strict membership criteria or unity of members' convictions in educating children in accordance with their shared faith.

**D. Licensed Clubs**

Under the Discrimination Act, clubs holding liquor licenses are prohibited from discriminating in decisions about membership. However, there are exceptions where the licensed club is established for specific groups (sex, race, disability, or age), where the discriminate is to offer different benefits to members of different sexes or where giving a member with a disability the same benefits as other members would result in unjustifiable hardship to the licensed club.

LRAC recommended that the exceptions be repealed, and the Discussion Paper considered other options to amend the exception.



The survey respondents were asked in which areas licensed clubs should be able to discriminate and were able to choose more than one option. 64.29% said no areas, 35.71% said deciding on membership, 14.29% said providing benefits to members and 7.14% said board or governance rules.

In providing feedback, several submissions noted the complicating factor of the area of public life exceptions relating to clubs with liquor licenses only, acknowledging that there may be overlap between voluntary bodies and clubs without liquor licenses established for shared interests or minority groups and that a broader definition would capture incorporated and unincorporated clubs.

**Idea: Apply the club requirements to any club, not just clubs with liquor licenses.**

*i. Discrimination as a special measure*

One proposal was to only allow licensed clubs to discriminate in limiting their membership or services to groups of people protected by discrimination law as a special measure to bring it in line with the special measures protections in the Act.

The four submissions that addressed this proposal were either supportive or partially supportive of this approach. Several noted the importance of allowing a club to discriminate in terms of membership on the basis of a protected attribute (e.g. race) where the club's main purpose is to promote the interests of that group. For example, ethnic-based clubs that favour ethnic members in areas such as eligibility for board positions, access to funding support for sporting and cultural activities and access to club facilities for ethnic-based activities and projects. One submission suggested this exception could benefit from including a human rights test and consideration of whether or not the club's functions are of a public nature.

**Idea: Apply a reasonable, proportionate, and justifiable test that applies to the outcome of the proposed conduct in all circumstances.**

*ii. Expand protection to all protected attributes*

Currently the licensed clubs exception can only be used where the licensed club was established to promote the interests of a particular race, sex, disability or age. The proposal in the Discussion Paper is to expand this exception so licensed clubs may be formed to protect the interests of any group of people sharing a protected attribute under the Act.

Only two submissions addressed this proposal. One agreed with the proposal and stated that any exceptions should protect all groups protected under the Discrimination Act. The second partially agreed but preferred that the exception be limited so that discrimination is only by special measure.

*iii. Remove the exception*

Four submissions addressed the proposal that the exception be removed altogether. Two were supportive, with one suggesting clubs can apply to the Human Rights Commission for exemptions and another suggesting clubs still be permitted to adopt special measures.



One submission was partially supportive noting that indirect discrimination by licensed clubs may already be permitted under the Act but agreed there may be circumstances where clubs should be able to provide membership only to people who share a particular protected attribute.

The fourth submission was not supportive and raised concerns about the uncertainty and financial burden of having to apply for exemptions for smaller clubs with limited resources. This submission also raised concerns about the impact on Canberra's multicultural community and unsuccessful exemptions undermining the viability of ethnic-based clubs.

### E. Sport

Although sport is not listed as an area of public life covered by the Discrimination Act, there are exceptions under the Act that relate to sport.

#### *i. Fair, safe and effective competition*

The current exceptions allow discrimination on the basis of sex, age and disability without taking into account a person's individual circumstances. The Discussion Paper put forward a proposal to amend the exceptions to only permit people to be excluded from sport on the basis of their sex, sex characteristics, gender identity or disability only where it is necessary for fair, safe and effective competition.

Survey respondents were asked whether the law should be changed so that it would only be legal to discriminate in competitive sport where it is necessary for safety or competitiveness. 62.5% of respondents strongly agreed, 18.75% agreed, 6.25% were neutral, 6.25% disagreed and 6.25% strongly disagreed.

Four submissions addressed this proposal, with two supportive of the changes and two unsupportive. The two submissions that were supportive recommended also applying the reasonable, proportionate, and justifiable test to ensure cases are dealt with on individual circumstances.

One of the submissions that was not supportive raised concerns that expanding the exception to sex characteristics or gender identity would make discrimination lawful against people with these protected attributes and considered that the definition of discrimination already permits sports to impose reasonable conditions or requirements even where they disadvantage a protected group. The other submission noted that many sporting organisations are volunteer-based and be consistent with national sporting organisations and codes and suggested instead that sporting organisations have discretion at the Territory and community club level.

In one of the briefings, participants noted that there can be circumstances where separating sports by sexes can create safe environments (e.g. women's sports).



### *ii. No discrimination for children under 12*

The next proposal was to prohibit discrimination for children under the age of 12 entirely, except for permitting age-segregated teams.

Two submissions were supportive of this proposal, and one was not supportive. The submission that was not supportive raised concerns that there was insufficient evidence to suggest this was a reasonable threshold and that it may have a detrimental influence on the development at both ends of the talent spectrum e.g. the less talented and the highly talented.

Participants in one of the briefings raised concerns that children with disability may be bullied by able-bodied children if required to compete together.

### *iii. Apply exception to all protected attributes*

The final sports proposal was to apply the sports exceptions to wider range of protected attributes under the Act.

Two submissions responded to this proposal and agreed that the exceptions should apply to any attribute, with one suggesting that only where it can be shown to be necessary for fair, safe, and effective competition and the proposed discrimination is reasonable, proportionate and justifiable in all the circumstances.

## F. Work

There are several exceptions under the Discrimination Act that relate to work. Genuine occupational qualifications exceptions recognise that there are types of jobs where an employer may want to choose someone based on their race, sex, age, disability or physical features e.g. casting a person of a particular race in a play. The inherent requirements exception applies where someone may not be able to carry out work essential to their job due to having a disability. The Discussion Paper proposes several changes to these exceptions.

### *i. Replace genuine occupational qualifications test with a single inherent requirements test*

One proposal is to replace the genuine occupational qualifications test with a single inherent requirements test, which may be narrower.

Survey respondents were asked whether the exception should be changed and simplified so that it is only legal to discriminate in work where it is an inherent requirement of the job. 50% strongly agreed, 18.75% agreed, 6.75% were neutral, 18.75% disagreed and 6.25% strongly disagreed.

Five submissions addressed this proposal with three partially supportive and two not supportive. One submission that was supportive acknowledged that while the tests are not the same in purpose or principle, an overarching inherent requirement test could address some of the current ambiguity in practice. The second recommended a general test that the discriminatory conduct is reasonable, proportionate, and justifiable in all the circumstance and that focusing on inherent





requirements would change the focus to what is essential and necessary for the performance of the work rather than the desirable qualifications or characteristics of the person sought for the role.

The three submissions that were not supportive did not agree that the tests were the same in purpose or principle and that one could effectively replace the other. One submission raised concerns that employers often use the inherent requirements test more broadly to terminate an individual's employment without adequate consideration of reasonable adjustments. Two submissions recommended that the genuine occupational qualifications defences being removed and replaced with an exemption process. One submission stated that the two tests are used for different issues (ie whether the work is better done by someone with a particular attribute as compared to a person's individual ability to do the work) and recommended that the two issues continue to be treated separately.

#### *ii. Apply exceptions to all protected attributes*

The next proposal was to expand the employment exceptions to all protected attributes.

Three submissions were supportive of this proposal and agreed that applying employment exceptions to all protected attributes would improve consistency. Two submissions noted the importance of peer workers, such as workers with lived experience of addiction to alcohol and other drugs or case workers for women escaping family violence. One submission also noted that a principled approach would not be to imply by singling out people with disability that they may be less capable of fulfilling requirements than people with other attributes.

However, one submission was not supportive and considered that there were already a number of exceptions under the Act, and that the onus should be on employers to apply for exemptions in respect of additional attributes as required.

#### *iii. Duty to make reasonable adjustments for any protected attribute*

Another proposal is to introduce an explicit duty for employers to make reasonable adjustments and for that duty to apply to people with any protected attributes.

Survey respondents were asked whether employers should have a duty to make reasonable changes to a job, or a workplace, to accommodate any attribute of a person to help them do their work. 56.25% of respondents strongly agreed, 25% agreed, 18.75% were neutral, 0% disagreed, and 0% strongly disagreed.

Six submissions addressed this proposal with four supportive and two not supportive. The submissions that were supportive of this duty considered that the duty should apply to all people and organisations with obligations not to discriminate, for example regardless of the nature of the employment or whether or not the person is a volunteer. One submission proposed that reasonable adjustments could be assessed in terms of the reasonable, proportionate, and justifiable test.

One submission that was not supportive considered that a duty to make reasonable adjustments was already implied under the definition of 'indirect discrimination' and is therefore unnecessary, particularly if the Act is amended to introduce a positive duty. The second submission that was not supportive raised concerns that extending duties to make reasonable





adjustments beyond the employment relationship would result in uncertain obligations and unfair burdens in the healthcare space.

#### *iv. Remove provision to declare jobs*

The genuine occupational qualifications provisions in relation to race and sex allow for regulations to be made declaring certain types of jobs as having genuine occupational qualifications. These provisions have never been used and the proposal is to remove it.

Four submissions addressed this proposal and agreed that it should be removed because it has never been used, employers can rely on exemptions and streamlining the Act will make it more accessible.

#### G. Employing Workers in Private Homes

Currently, a person can discriminate against a worker doing domestic duties on the premises of that person's home for any reason. The Discussion Paper proposes introducing a reasonable limitations test that aligns with the Human Rights Act.

Only three submissions addressed this proposal. One submission proposed removing the exception altogether and raised concerns that excluding work in private homes particularly disadvantages women who perform the bulk of this type of work and who already experience issues such as undervalued labour, failure to comply with existing agreements for work, income insecurity and risk of unfair dismissal.

The other two submissions did not agree to this provision being changed and raised concerns that any changes would impact someone's right to privacy and family home interfered with in any way under the Human Rights Act. However, one submission did consider that workers engaged to work in a private house through a service provider (e.g. NDIS-registered organisation), the employer should not have the ability to facilitate discrimination in domestic duties or care and would have to take steps to protect its employees from discrimination within the workplace.

#### H. Insurance and Superannuation Companies

Currently, insurers may discriminate against people on any ground in relation to offering or obtaining an insurance policy if the discrimination is reasonable in the circumstances having regard to any actuarial or statistical data. Similarly, superannuation providers may discriminate against people on the ground of age if it is reasonable having regard to any actuarial or statistical data and can discriminate on any other ground with no reasonableness or data requirement at all.

#### *i. Decisions based on actuarial or statistical data*

The first proposal is to amend this exception so that insurance and superannuation providers are only permitted to discriminate where their decisions are based on actuarial or statistical data.



Six submissions addressed this proposal and all six were supportive. Several submissions noted that this would ensure that providers must conduct thorough data analysis and assess claims on a case-by-case basis instead of making decisions based on stereotypes.

#### *ii. Provide consumers with data*

The second proposal is to require insurance and superannuation providers to provide consumers with data on which decisions about them are based or, alternatively, a meaningful explanation of that data.

Five submissions addressed this proposal and all five were supportive of consumers being provided with data. However, two submissions recommended that in the interests of transparency and clarity for consumers, the providers should not have the option of providing a meaningful explanation of the data only.

### **Topic 4: Positive Duty**

There was very strong support for introducing a positive duty to eliminate discrimination into the Discrimination Act.

66.67% of survey respondents strongly agreed that there should be a positive duty requiring organisations to take action to eliminate discrimination, while 16.67% agreed, 5.56% were neutral, 11.11% disagreed and 0% strongly disagreed.

One of the survey responses said, “Even if nothing else in the Act is change[d], it would be an amazing step forward to add a positive duty to prevent discrimination. I hope this happens”.

Participants in the briefings and roundtables were broadly very supportive of a positive duty, and of the fifteen submissions that addressed this proposal, eleven were supportive, three were not supportive and one was non-committal until further information about the proposed scope of the positive duty is available.

Among the submissions that were supportive of a positive duty, there were lots of ideas about how it could be implemented. Several recommended using the Victorian model as a starting point. Most submissions agreed that the duty should apply to both public and private organisations, with some suggesting that there could be a staged approach to allow businesses and community organisations time to transition. Many agreed that the duty should be proportionate to the size, nature, and resources of the organisation and that there should be resources so organisations can understand their obligations. There were different views on how the duty should be regulated and enforced, with some organisations suggesting that the ACT Human Rights Commission’s role range from education-only to being able request information, monitor compliance, consider complaints, issue notices, and escalate complaints to the ACT Civil and Administrative Tribunal. Many submissions noted that the ACT Human Rights Commission would require additional resourcing to undertake this work.

Of the three submissions that did not support this proposal, one raised concerns that it could result in uncertainty and unfair burdens on health care providers, one raised concerns that it could force religious bodies to act in a way contrary to their



religious beliefs and one raised concerns that a positive duty would be onerous on small organisations such as religious schools.

## Other Ideas for Reform

In addition to providing feedback on the issues raised in the Discussion Paper, the survey respondents and submissions also included lots of other ideas about how discrimination law in the ACT can be improved.

### 1. Definitions, Language and Name

There were ideas about how the language and definitions of the Discrimination Act could be changed, including broadening the definition of discrimination to cover hate-based conduct, making the language more gender-inclusive and renaming the Act to the Equality Act.

There was also a suggestion that the definition of 'clubs' be changed to match the expanded definition in the *Disability Discrimination Act 1992* (Cth).

### 2. Coverage of the Act and Discrimination Issues

Participants raised concerns about certain discrimination issues identified in the community such as unequal pay and prize money in sporting competitions for women, age discrimination for young people in work, the ongoing issue of sexual harassment and sex discrimination in the workplace, vaccination status and COVID-19, and people living with HIV by religious medical providers.

Participants noted that it was not clear whether companies who procure for government services or lobby groups are covered by discrimination law, and several participants called for ACT Policing to be covered by ACT discrimination law.

One suggestion was to make a specific provision in the Act for reasonable adjustments to cover all areas of public life and complement the positive duty.

### 3. Protected Attributes

There were several suggestions about increasing and expanding the protected attributes under the Act, including adding socio-economic status, making it clear that accommodation status includes people in places of detention such as prisons and secure mental health facilities and use or perceived use of drugs and/or alcohol.

### 4. Religious Discrimination

There were a lot of concerns raised about how the Federal Religious Discrimination Bills would interact with any proposed changes to ACT discrimination law.



Some suggestions proposed introducing a presumption that some types of conduct by religious bodies are not discrimination, and while it was not covered by the Discussion Paper, several submissions raised concerns that the exceptions in relation to religious schools either went too far or did not go far enough.

Two submissions addressed balancing the right to religious freedom against the right to protection from discrimination with one proposing religious freedom be strengthened and another proposing religious body exceptions all include a 'reasonable and proportionate' test to better balance human rights principles.

## **5. Discrimination Complaints**

There were several suggestions and concerns raised about how discrimination complaints are currently managed. Participants in one briefing raised concerns about the secrecy around outcomes to discrimination complaints due to the confidential conciliation process. One submission raised concerns about the time limits for making complaints were too narrow and another recommended giving ACAT specific powers to award compensation. There was also a suggestion that there should be a clear burden of proof for respondents to complaints of indirect discrimination to demonstrate that a condition or requirement was reasonable.

One submission called for higher thresholds to make a discrimination complaint and for there to be sanctions of the complaint was found to be lacking in substance.

## **6. Exceptions**

There were lots of suggestions about exceptions. One submission suggested that all exceptions should be subject to regular review and should include a sunset clause to require necessary exceptions to be actively reinstated.

One submission noted that the language of 'exceptions' and 'exemptions' is confusing and suggested that it would be better to change the term 'exception' to 'defence' to make the legislation more user-friendly.

Another submission suggested that instead of arranging exceptions by protected attribute, it would be better to focus instead on the area of public life which would shift focus away from the point of different or disadvantage, acknowledge that discrimination can be intersectional and that the primary drivers of discrimination are public systems and structures.

It was also suggested that in some circumstances, respondents should have to consider whether the outcome of the proposed conduct when relying on an exception is reasonable, proportionate, and justifiable in the circumstances.

## **7. Exemptions**

There was one suggestion about reviewing the process for applying for exemptions, including making approval automatic for voluntary bodies which can be subject to revocation if it is not consistent with the Human Rights Act, and using existing infrastructure for managing incorporated associations in the ACT.



## 8. Culture and Education

There were several suggestions about improving culture and education to better protect against discrimination, including investing in more education and guidelines and improving the accessibility of legislation for members of the public with augmentative, alternative and multi-modal communication.

## 9. Legal Assistance

Several submissions addressed the issue of legal assistance, recommending additional funding for legal assistance for people with autism and their advocates, expanding the grounds of discrimination that funding is available for people on low incomes to more than just disability and race, and making legal advice more accessible for small businesses.

## 10. Discrimination against Aboriginal and Torres Strait Islander People

Two submissions specifically addressed ongoing systemic discrimination faced by Aboriginal and Torres Strait Islander people and called for an independent and targeted review or inquiry that is separate to this discrimination law reform project.

## 11. Consultation

Finally, one submission noted the importance of consultation with vulnerable or disadvantaged people as they are more likely to experience discrimination and need to have their views seriously considered. The submission suggested an independent body made up of vulnerable community members be established so they could use lived experience to inform areas of discrimination law where it may be subjective or difficult to prove.

## WHAT'S NEXT?

**The next step is to take the feedback and suggestions and develop an Exposure Draft Bill to be circulated for further consultation and community feedback.**

To keep up to date on Discrimination Law Reform, please visit the project page on the [Justice website here](#).

To find out about other initiatives, policies and projects in Canberra, please visit [www.yoursay.act.gov.au](http://www.yoursay.act.gov.au).

You can also connect with us on [Facebook](#), [LinkedIn](#), and [Twitter](#) .



## Key Timings

**Community Consultation on Discussion Paper Opened – October 2021**

**Virtual Roundtables Held – November and December 2021**

**Community Consultation on Discussion Paper Closed – January 2022**

**Listening Report Published – March 2022 - We are here**

**Consultation on Exposure Draft Bill Opens – May 2022**

## THANK YOU FOR YOUR FEEDBACK

**520**

people visited the YourSay page

**507**

The number of times the Discussion paper was downloaded from YourSay

**14**

presentations were delivered to organisations

**17**

people completed the online survey through YourSay

**61**

organisations and groups were contacted by email as part of the engagement

**8**

short consultation guides were released through YourSay to help explain the Discussion Paper

**25**

submissions were received from organisations and individuals

**3**

virtual roundtable discussions were held as part of the engagement in late 2021