ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Civil Law Section
Legislation, Policy and Programs Branch
Justice and Community Safety Directorate
Via civilconsultation@act.gov.au

31 January 2022

Dear review team

***Discrimination Act 1991* Law Reform**

Thank you for inviting the ACT Human Rights Commission to provide feedback in relation to the consultation paper on reforms to the *Discrimination Act 1991*. The Commission provides the following comments:

General intent of the Discussion Paper

The Human Rights Commission welcomes the release of the *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1* (the 'Discussion Paper') for community consultation.[1] The Commission works daily with members of the public and organisations across the ACT to prevent discrimination in the terms of the Discrimination Act throughout public life and to consider and conciliate complaints under the *Human Rights Commission Act 2005*. These functions are supported by the general mandate to protect and promote the rights of all Canberrans to have equal and effective protection from discrimination under s 8 of the *Human Rights Act 2004* (HRA).

The Commission has considerable insight into both the very real benefit of the Discrimination Act in setting standards for fair and inclusive treatment of all members of our diverse Canberra community, but also the complexities of developing and applying a simple, clear, consistent, and certain legislative framework to help balance competing rights and interests. The Commission supports the adoption of the guiding principles in the Discussion Paper, which reflect these sometimes competing considerations underpinning the reform work in this space.

The Commission notes that in the three decades since the Discrimination Act was introduced there have been significant social changes and law reform efforts to better recognise and protect the rights of individuals in our community, particularly those from groups whose particular needs may not have historically been considered in developing the legislative frameworks that shape our society.

Extending the coverage of the Discrimination Act following the Law Reform Advisory Council's (LRAC) review of the Discrimination Act has provided better legal recognition and protection of

[1] ACT Government, *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1* (22 October 2021) available at ACT Government

these groups by protecting their particular attributes, but the policy response of adding protected attributes and carving out suitable exceptions has made the Discrimination Act framework necessarily complex.

In other aspects, the areas of public life covered, and the broad ranging exceptions have not been utilised frequently or at all, and not substantially reviewed or refined since the introduction of the HRA and may not be consistent with the scope of the right to equal and effective protection against discrimination contained in the HRA, or with current community expectations. The Australian Human Rights Commission's recent Free and Equal issues paper on reforms to federal discrimination laws identifies similar themes that it considers warrants significant reform.[2]

At the core of the current law reform proposals is a desire to clearly state that the Canberra community does not accept discrimination in public life, and wants equal protection for the whole of the community. The choice is whether to:

- further that protection by expanding the areas of life in which discrimination is unlawful and refining the exceptions to those which are reasonable, proportionate, and justifiable limitations on the right to non-discrimination; or
- reconceptualise the whole framework of the Act to protect against discrimination which is not private conduct and require parties who propose to or do discriminate to be able to show a reasonable justification defence for that discrimination.

Summary of framework recommended by the Commission

For the reasons outlined in the comments against the consultation paper questions below, the Commission supports expanding the Discrimination Act protections to cover more aspects of public life and reviewing, refining, and limiting the exceptions to achieve more balanced and consistent coverage.

The Commission generally favours exceptions that are specific to sectors, rather than an approach that creates particular exceptions for specific protected attributes.[3] A sector-based approach focuses on the particular circumstances of both individuals and organisations in the context of an area of public life, rather than emphasising the protected attribute as a point of difference or disadvantage. This approach is about considering where across different areas of society differential treatment may have a legitimate public policy imperative that is reasonable, proportionate, and justifiable, and where it may not in fact be necessary to discriminate on any ground. In our view this is consistent with social, intersectional, systems thinking perspectives which highlight that the primary driver of discrimination are the public systems and structures, rather than any inherent, essentialist differences between people with protected attributes and the general community necessitating specific protection.

The Commission also proposes in some circumstances, additional consideration of whether the outcome of proposed conduct when relying on an exception is reasonable, proportionate, and justifiable in all the circumstances. This hybrid exception/justification approach brings in additional

[2] Australian Human Rights Commission (AHRC), *Free and Equal: A reform agenda for federal discrimination laws* (2021) available at Free and Equal: A reform agenda for federal discrimination laws (2021) | Australian Human Rights Commission, p 21.
[3] With reference to the distinction drawn in the discussion paper, *Ibid*, p 24.

proportionality assessment of the outcome of relying on an exception in the individual circumstances, but also retains the established and explicit exceptions as a presumptive starting point that acknowledges there are some legitimate policy rationales for allowing differential treatment in certain areas of life. A formative version of this hybrid approach was adopted by Government in the last set of reforms where new exceptions were created to allow discrimination in particular areas only where it was reasonable having regard to all relevant factors.[4] The benefit of a hybrid approach is that it doesn't require a single, one-size fits all approach to exceptions, but still incorporates a greater level of testing exceptions against human rights principles that require limitations to be rational, balanced, evidence based and responsive to individual circumstance through the 'reasonable, proportionate and justifiable' test.

The Commission also strongly supports the introduction of a positive duty on organisations to take reasonable steps to eliminate discrimination, similar to that operating in Victoria since 2010 and as recommended in the Respect@Work: National inquiry into Sexual Harassment in Australian Workplaces,[5] and the Free and Equal reports of the Australian Human Rights Commission (AHRC).[6] The Commission also notes the recent *Gender Equality Act 2020* (Vic) that imposes duties on public authority entities to protect and promote gender equality in their operations.[7] The Commission supports backing such a duty with a direct complaints mechanism, particularly where it applies to public authorities or entities undertaking functions of a public nature, in order that this positive duty has real 'teeth'. This would be an Australian first reform and make the ACT the leading jurisdiction in its proactive response to tackling discrimination and creating an inclusive, progressive and equal society.

The ACT Human Rights Commission also notes its support for a reasonable adjustments provision which would assist duty holders in considering the implementation of the positive duty and potential indirect discrimination issues. The reference to reasonable adjustments and reasonable accommodation in the objects of the Discrimination Act,[8] is not specific enough to assist duty holders in their understanding of their obligations, or to assist people with a protected attribute to articulate their requirements in terms clearly articulated in the legislation. A reasonable adjustment provision would also relieve the legislation of references to services being provided in a 'special way',[9] or the need for the provision of 'special services',[10] instead focusing on what organisations could reasonably be doing to support all members of the public to access services, goods and facilities as equals.

[4] See e.g. s 57O *Discrimination Act 1991*.
[5] AHRC, *Respect@Work: National inquiry into Sexual Harassment in Australian Workplaces* (2020), available at Respect@Work: Sexual Harassment National Inquiry Report (2020) | Australian Human Rights Commission, Recommendation 17.
[6] AHRC, *Free and Equal* (2021) p 55-56.
[7] Section 7 *Gender Equality Act 2020* (Vic).
[8] Section 4(d)(iii) *Discrimination Act 1991.*
[9] Section 53(1)(b) *Discrimination Act 1991.*
[10] Section 54 *Discrimination Act 1991.*

Coverage of the Discrimination Act

1. **What concerns or considerations would be required in extending coverage to areas of public life including organised sport, competitions open to the public and government functions?**

The Commission has consistently supported broad coverage of discrimination in public life, but currently considers that this is best achieved by including new areas of public life into Part 3 of the Act. These new areas should include those identified by LRAC as gaps in the current coverage, including organised sport, the conduct of competitions, and in government functions/functions of a public nature. In particular, coverage of discrimination that may occur in undertaking functions of a public nature would cover entities engaged in the public sphere, align with the tested definition in s 40A of the HRA and pick up directly relevant jurisprudence from the ACT courts and tribunal.

The Commission currently prefers this approach over the alternative recommendation of prohibiting discrimination in public life with an exception for private conduct,[11] for the following reasons:

a. there would be considerable difficulty in drafting a workable and appropriate definition of 'public life' and 'private conduct'

b. even with a well-drafted definition there is likely be significant litigation about whether acts or decisions fall within those definitions, making the law less user friendly

c. a sharp distinction between what is public and what is private risks the ability of the law to respond to novel and emerging areas of life that do not sit neatly in either public or private spheres and which would likely require specific legislation to clarify whether they fall within or outside the definitions in order to provide certainty or respond to case law – these novel areas should be grappled with primarily as policy issues by the Assembly, not as legal disputes in the courts

d. new concepts of public life or private conduct may minimise the value of existing case law principles and guidance about the coverage of specific areas of life, and lead to additional uncertainty for organisations, and re-litigation

e. such a reform would be outside the current scope of comparable anti-discrimination frameworks across Australia meaning that organisations operating in the ACT and other jurisdictions may need to comply with conceptually differing regulatory frameworks.[12]

All Australian state level anti-discrimination legislation employ the approach of prohibiting discrimination in particular areas of public life and setting out particular exceptions that respond to the specific policy considerations of those areas of public life. There are some variances where legislation attempts to generally prohibit specific conduct, such as sexual harassment,[13] or where it considers whether the act was intended to be private and whether it could have been reasonably expected to be heard by a member of the public. However, these are in relation to small subsets of conduct (such as vilification) or protected attributes (such as race and religion).

[11] Recommendation 6.1, ACT Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT) Final Report* (2015) available at LRAC Report.
[12] AHRC, *Free and Equal* (2021) p 31.
[13] Sections 117-120 *Anti-Discrimination Act 1991* (Qld).

Australian state level discrimination laws generally do not attempt to define what is 'public life' explicitly or exhaustively, instead, these laws conceptualise of what is considered to be public life by applying discrimination protections to specific areas where decisions or actions taken by private individuals or organisations can affect the ability of others to participate in public life.

The Discrimination Act does define public facilities and public premises as places "that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not)",[14] but these definitions apply to physical spaces, while what is being proposed is to determine which kinds of interpersonal acts or decisions are of a 'public' nature and what constitutes 'private conduct'. Similarly, the vilification provisions in the Discrimination turn on whether a vilifying communication 'other than in private' and provide examples of what communication would be other than in private,[15] but conceptually vilification differs in its focus on expression that can incite the public against an individual or class of individuals. Where there is no clear expression or communication, an intent that an act is 'public' or 'private' may be more difficult to identify.

While seemingly simple to do, constructing a definition that successfully demarcates between public and private spheres in relation to discrimination, is likely to be very difficult in practice and just as likely to lead to litigation as occurs currently in determining whether a particular matter falls within an area of life or one of the specific exceptions. For example, strata bodies exist to manage affairs of privately owned unit titles in commonly shared unit blocks and there has been some uncertainty about whether strata bodies provide services or access to public common areas such that they are required to comply with discrimination protections, and if not, whether it is appropriate that they should.[16] Many areas of life that involve private individuals acting in public spaces would likely cause similar confusion unless explicitly excepted.

One space in which there is a model for some distinction of the 'public sphere' that would align with the general intent of prohibiting discrimination in public life is in the application of human rights obligations to public authorities, which include entities undertaking functions of a public nature which are exercised on behalf of the Territory or a public authority.[17] Section 40A of the HRA establishes a relatively clear, yet flexible definition of when an entity will be undertaking functions of a public nature. The Commission notes that this definition turns on factors such as whether the entity is performing functions under legislation, whether they are regulatory or are government funded,[18] and explicitly includes services such as public health and education to be functions of a public nature.[19] The Commission submits that such a definition would likely capture the entities that Canberra citizens would most likely consider should be covered by the discrimination protections, with very limited exceptions, irrespective of whether they are operating in 'private' areas of life. This definition may also offer an avenue towards scaling the obligations required of organisations of different natures, as may be necessary in applying a positive duty to take reasonable steps to eliminate discrimination, with entities undertaking public functions expected to employ best practice in their operations.

[14] Section 19 *Discrimination Act 1991.*
[15] Section 67A *Discrimination Act 1991.*
[16] See discussion of application of discrimination protections to strata bodies in Sherry, C, "Does Discrimination Law Apply to Residential Strata Schemes?" [2020] UNSWLawJl 11 available at austlii.edu.au
[17] s 40(1)(g) *Human Rights Act 2004.*
[18] s 40A(1) *Human Rights Act 2004.*
[19] s 40A(3) *Human Rights Act 2004.*

As discussed below the Commission considers that this distinction forms a useful starting point for the refinement and in some cases removal of exceptions for any entity performing functions of a public nature.

The Commission would be open to further consideration of moving to a general prohibition of discrimination in public actions or decisions, informed by comparable federal and state developments, in future tranches of reform.

2. **What areas of private conduct should not be covered by discrimination law? How would these areas be defined?**

As noted above the Commission would support including new areas of public life of organised sports, competitions open to the public and government functions (including) functions of a public nature, rather than carving out areas of private conduct that should not be covered by the prohibition on discrimination in public life generally.

Single justification defence

3. **Should the exceptions in the Discrimination Act:**
   a. **be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable, or**
   b. **be refined to make them simpler, stronger, and better aligned with our human rights framework?**

While the single justification defence proposed by LRAC that allows for discriminatory conduct that is reasonably justifiable might align with the HRA reasonable, proportionate, and justifiable test,[20] changing away from specific exceptions throughout the community would risk increased litigation and uncertainty about the types of conduct that is unlawful.

As noted in the discussion paper disadvantages of such an approach might include increased uncertainty and litigation about whether discrimination is reasonably justifiable. This may have the result of lessening effective protections at the front end of the system because there would be a potentially more scope for organisations to assert their discriminatory conduct is reasonably justifiable, and greater pressure on the HRC and ACT Civil and Administrative Tribunal to resolve complaints that conduct was not in fact reasonably justifiable.

In this case a seemingly simpler single justification defence may actually be more complex, and less user-friendly to apply, noting also that the obligation to act and make decisions consistently with the Human Rights Act applies only to public authorities, rather than generally to private businesses and individuals.[21] While the criteria for assessing whether a limit on human rights is reasonable, proportionate, and justifiable is relatively established, there has had to have been significant judicial interpretation of the proper way the factors should be balanced and applied and considerable training and education for public authorities to understand this test. Small organisations and individuals may not have the same understanding in the short term, without a significantly resourced public education campaign and considerable guidance materials being developed if the Discrimination framework is reformed so that all existing exceptions are replaced with the single justification test of whether the discrimination is reasonable.

[20] We use 'reasonable, proportionate and justifiable' as a shorthand for the s 28 *Human Rights Act 2004* assessment for determining whether limits on human rights are reasonable and demonstrably justifiable.
[21] Section 40B *Human Rights Act 2004.*

Instead, the Human Rights Commission would support further consideration of all existing exceptions from a reasonable, proportionate, justifiable analysis that aligns with the Human Rights Act to determine whether existing exceptions are in fact warranted and necessary. Those that are not reasonable limitations on the right to equal and effective protection against discrimination should be narrowed, amended, or removed.

In addition, the Human Rights Commission would support including a 'reasonable, proportionate, and justifiable in all the circumstances' test as an additional threshold within particular existing exceptions, with a rebuttable presumption that conduct which sits within the scope of the exception is reasonable, proportionate, and justifiable.

This would have the effect of requiring some consideration of whether it is reasonable, proportionate, and justifiable in all the circumstances to rely on a specific exception when the organisation is considering an action or decision that would engage that exception, and at the point of a complaint being conciliated and considered.

This additional safeguard would require some level of engagement with the impacts of the discrimination where an exception is relied upon, and provide, for a complainant a mechanism of establishing that the manner and substance of the discrimination was not justifiable in all the circumstances of the individual case, even if the general exception contemplated discrimination as having some policy rationale. This would bring in some fact-based consideration of whether there would be unjustifiable hardship without the exception, or whether there are alternative approaches to relying on the exception for example. This would also draw on existing discrimination law jurisprudence around issues like 'reasonableness' in the context of indirect discrimination,[22] 'unjustifiable hardship' and 'reasonable adjustments' as well as human rights case law around 'proportionality' and 'least restrictive measures'.

This would represent a hybrid approach that would integrate a balancing of human rights, progressively moving towards a simple and clear 'justification defence' while still retaining the starting point of clear, specific exceptions and the case law that supports their application.

4. **What concerns or considerations would be required in introducing a single justification defence to replace existing exceptions as applicable to:**
    a. **Religious bodies**
    b. **Voluntary bodies**
    c. **Licenced clubs**
    d. **Sports**
    e. **Employment**
    f. **Workers in private homes**
    g. **Insurance and superannuation companies**

As noted above, the Commission does not currently favour a single justification defence. Rather it considers that exceptions should be assessed as to whether they are reasonable, proportionate, and justifiable and amended or removed if they are not. In relation to specific exceptions discussed below, such as for discrimination by religious bodies in alignment with genuinely held in good faith religious doctrine, the Commission considers that an additional threshold test that the relying on the exception is reasonable, proportionate and justifiable in all the circumstances should be included. This represents the hybrid approach.

[22] Section 8(5) *Discrimination Act 1991.*

Statutory authority exceptions

5. **Should the Discrimination Act be amended to remove the exception permitting acts done under statutory authority?**
6. **Should the Act keep a narrower exception to permit acts done directly to comply with a specific court or tribunal order?**

The Commission supports refining the exception permitting acts done under statutory authority, with a narrower exception to permit acts done directly to comply with a specific court or tribunal order. However, there should be a progressive move to transition away from this exception.

While in principle laws should not require discriminatory conduct, there is a similar provision excepting acts or decisions from the public authority requirements where "the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right" under the HRA.[23] This recognises that in particular legacy laws may require acts or decisions that are inconsistent with the right to protection from discrimination. In such a case, the conflict between the laws requires systemic reform, rather than leaving the complaints process to determine the proper course of action in navigating the contradictory legislative requirements.

As noted in the Discussion Paper this exception was intended to be temporary, but further systemic work to identify and remove provisions from the statue book requiring discrimination is required.

In order to promote systemic change, it may be useful to insert a provision for entities undertaking functions of a public nature which rely on the statutory authority exception to notify the Commission of the reasons why they seek to rely on that provision, so that the Commission has data to inform Government about development of suitable amendments of the offending statutory provisions. This would enable intervention at the source of the problem, rather than addressing the symptoms of outdated or unjustified legislation which may in fact put people in the situation of having to choose which law to comply with, and complaints handlers in situation of needing to determine whether a legislative provision authorises discrimination, in which case it may be incompatible with the HRA. Where discriminatory treatment is authorised or directed under a court or tribunal order, such as in relation to court ordered mental health treatment no report would be required.

Religious body exceptions

7. **Should the exception protecting religious observances (e.g. appointment of ministers etc) be refined so that discrimination is only permitted where necessary to conform with the doctrines of the relevant religion?**

The Commission supports refining the religious observances exception so that discrimination is only permitted where necessary to conform with the doctrines of the relevant religion. This would represent a better balanced exception, that protects the freedom to manifest religious belief where it is necessary to align with genuinely held (in good faith) religious doctrine, but does not except conduct which has no link to religious belief or conviction. Discrimination that is not required by clear, demonstrable doctrines should not be excepted where there is no clear link to manifestation of the religious belief or conviction. The provision should be included to also require

[23] s40B(2)(a) *Human Rights Act 2004*.

that the outcome of the discriminatory conduct excepted is also reasonable, proportionate and justifiable in all the circumstances.

8. **Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when conducting commercial (for-profit) activities?**

The Commission supports refining the religious bodies exception in s 32(d) so that religious bodies cannot lawfully discriminate when conducting commercial activities, or undertaking functions of a public nature.

As noted in the Human Rights and Discrimination Commissioner's submission to the first round of consultation on amendments responding to the LRAC report, "religious bodies operate in the public sphere. Their activities and operations often extend to persons who are not adherents of the religion. This situation is exacerbated by the increasing use of non-government bodies, often religious, to provide services previously provided by Government".[24]

The Commission believes that limiting the ability for religious bodies to discriminate on any ground when conducting commercial activities is reasonable, proportionate and justifiable given that this activity may well affect people beyond their own religious cohort, who do not share the same religious beliefs, and who may have minimal choice to seek goods or services from other non-religious providers.

9. **Should the religious bodies exception be changed so that religious bodies cannot lawfully discriminate when providing goods or services to members of the public?**

Further, the Commission considers that religious bodies that undertake functions of a public nature, within the meaning of the definition in s 40A of the HRA should not be permitted to discriminate on any ground in the course of undertaking that function. This would represent a sector-based approach that responds to the element of whether the religious body moves from undertaking internal functions to external functions of a public nature.

Other religious bodies that provide services or functions that are not of a public nature within the scope of s 40A would not be subject to the same prohibition on discrimination in the delivery of their services or operations. If this approach is adopted the Commission would support an exception that permits discrimination that aligns with genuinely held (in good faith) religious doctrine, where the proposed outcome of the discrimination is reasonable, proportionate and justifiable.

10. **Should religious health care providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?**

As discussed above the Commission supports generally applying discrimination protections to organisations undertaking functions of a public nature. This may cover religious health care providers that are subsidised by government. This change would not permit religious bodies undertaking functions of a public nature to discriminate on any ground. If this approach is adopted the Commission would support an exception that permits discrimination in employment decisions only where a specific religious conviction is an inherent requirement of the role, and the proposed outcome of the discrimination is reasonable, proportionate, and justifiable in all the circumstances.

[24] ACT Human Rights and Discrimination Commissioner, Submission to the Law Reform Advisory Council Review of the ACT Discrimination Act 1991 (June 2014) available at Submission E (act.gov.au), p 30.

11. **Should any other religious service providers only be permitted to discriminate on the ground of religion in employment decisions where the duties are of a religious nature?**

The proposed approach of the Commission would limit the ability of religious bodies undertaking functions of a public nature, from discriminating generally in relation to employment.

Other religious bodies that provide services or functions that are not of a public nature within the scope of s 40A might be able to discriminate in employment grounds.

In this case the Commission suggests that discrimination in employment decisions on the grounds of religion should be reasonable, proportionate, and justifiable in all the circumstances.

12. **Are there any other circumstances in which religious bodies should be permitted to discriminate in employment decisions?**

The Commission does not consider that there are any other circumstances in which religious bodies should be permitted to discriminate in employment decisions.

13. **Should some sectors or types of organisations be prevented from relying on the general religious bodies exception? For example, organisations that receive a certain proportion of public funding?**

As discussed above, the Commission considers that religious bodies that undertake functions of a public nature, within the meaning of the definition in s 40A of the HRA should not be permitted to discriminate on any ground in the course of undertaking that function. This would represent a sector-based approach that responds to the element of whether the religious body moves from undertaking internal functions to external functions of a public nature.

The benefit of applying the functions of a public nature test that applies the matrix of factors set out in s 40A rather based on solely on an arbitrary threshold of public funding is that it may cover a broader range of organisations that undertake public functions even if not directly funded by the ACT Government and may prevent organisational or financial structuring to avoid coverage of the Discrimination Act requirements.

14. **Should religious bodies only be permitted to discriminate against members of the public on some grounds, and not others? If so, which grounds should be permissible?**

The Commission favours a sector based approach over a attribute approach, given the general intent of the reforms to protect against discrimination consistently in public life.

If it is considered necessary to except particular grounds, the Commission would only support an exception allowing discrimination against members of the public on grounds of religious conviction and only if the outcome of that discrimination is reasonable, proportionate and justifiable in all the circumstances.

Voluntary body exceptions

15. **Should voluntary bodies be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law where the organisation's reason for existence is to promote the interests of that group of people?**

The Commission has received many complaints about discrimination by voluntary bodies that is not related to advancing the core interests of the members of the voluntary body.

The NSW and Australian law reform commissions have recommended the repeal of voluntary body exceptions in various anti-discrimination legislation.[25]

Voluntary bodies operate across many areas of public life – and many Canberrans will volunteer or be a member of a voluntary body, so it is important to ensure that access to the benefits and services that voluntary bodies provide are accessible generally.

The Commission considers that voluntary bodies which undertake functions of a public nature within the meaning of section 40A of the HRA must not be permitted to discriminate.

For voluntary bodies that do not undertake functions of a public nature, the Commission supports removing this broad exception, or alternatively limiting it, to only allow voluntary bodies to discriminate in limiting their membership or services to groups of people with a protected attribute, and only if that conduct furthers the organisation's primary purpose in providing benefit to/promoting the interests of that relevant class of people. The reasonable, proportionate and justifiable test should also apply to the outcome of the proposed conduct in all the circumstances.

16. **Should voluntary bodies only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?**

IF the voluntary bodies exception is limited as outlined above, the Commission does not consider that further restricting the ability for voluntary bodies to discriminate only in relation to the provision of special measures is required.

17. **Alternatively, should the exception for voluntary bodies be removed**

The Commission would also support removing the exception entirely if this was supported by the community, on the basis that voluntary bodies can still provide valuable benefits to their members and the community without discriminating. Other relevant exceptions and the special measures provisions would also apply to voluntary bodies.

Clubs exceptions

18. **Should licenced clubs only be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law as a special measure (that is, in order to ensure that those people have equal opportunities with other people and/or meet their special needs)?**

The Commission considers that club requirements be refined to apply to any club, not just those that are licenced.

The Commission considers that like voluntary bodies (which may encompass unlicenced clubs), clubs which undertake functions of a public nature within the meaning of section 40A of the HRA must not be permitted to discriminate.

For clubs that do not undertake functions of a public nature, the Commission supports removing the broad exception, or alternatively limiting it, to only allow clubs to discriminate in limiting their membership or services to groups of people with a protected attribute, and only if that conduct furthers the organisation's primary purpose in providing benefit to/promoting the interests of that

[25] See discussion in ACT Human Rights and Discrimination Commissioner, Submission to the Law Reform Advisory Council Review of the ACT Discrimination Act 1991 (June 2014) available at Submission E (act.gov.au), p 33-34.

relevant class of people. The reasonable, proportionate and justifiable test should also apply to the outcome of the proposed conduct in all the circumstances.

19. **Should the exceptions relating to licenced clubs protect any of the groups protected under the Discrimination Act, not just race, sex, disability, or age?**

The Commission prefers a refined exception for clubs as outlined above.

20. **Alternatively, should the exceptions for licenced clubs be repealed?**

The Commission considers that there are circumstances when clubs should be able to provide membership only to people of a relevant class with a protected attribute. Arguably indirect discrimination for reasonable purposes of enabling the club to serve a particular membership is may already be permitted under the Discrimination Act, and so the exceptions could potentially be repealed, but it may be simpler for them to be refined as outlined above.

Sport

21. **Should the exceptions permit people to be excluded from sport on the basis of their sex, sex characteristics, gender identity, or disability only where this is necessary for fair, safe, and effective competition?**

The Commission supports exceptions on the basis of any protected attribute only where this is necessary for fair, safe and effective competition, and where the outcome of the proposed discrimination is reasonable, proportionate and justifiable in all the circumstances.

22. **Should discrimination against people in sport be prohibited entirely for children under 12 (except for permitting age-segregated teams?)**

Yes the Commission would support a provision that prohibits discrimination in sport for children under 12 with an exception for age-segregated teams.

23. **Should the exception for sport apply a wider range of protected attributes under the Discrimination Act?**

Yes, the exception for sport should apply to all protected attributes but only where that 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.

Work

24. **Should the genuine occupational qualifications test be replaced with a single inherent requirements test?**

The Commission supports changing the genuine occupational qualifications test with a single inherent requirements test applying to all protected attributes across all areas of life covered by the discrimination act. This would be supported by a general test that the discriminatory conduct is reasonable, proportionate, and justified in all the circumstances.

Changing to inherent requirements focuses on what is essential and necessary for the performance of the work role, rather than what might be set as the desirable qualifications or characteristics of a person sought for the role. This emphasises the need for employers to consider and make reasonable adjustments to support a worker to meet the inherent requirements of a role.

25. Should the employment exceptions be extended to apply to a wider range of protected attributes?

The Commission supports the employment coverage being extended to apply to all protected attributes, as this would make the employment exceptions more consistent.

26. Should the law impose a duty to make reasonable adjustments not just for people with disabilities, but for people with any protected attribute?

Yes, consistent with the Commission's support for a general duty to eliminate discrimination, discussed below, the Commission considers that there should be a general obligation to make reasonable adjustments to allow a person with any protected attribute to participate in the workplace. Potentially what is a reasonable adjustment could be assessed in the terms of the 'reasonable, proportionate and justifiable' test which the Commission considers could be applied elsewhere in the amended Discrimination Act.

This is also consistent with the right of individuals in the ACT to enjoy just and favourable conditions of work,[26] and to enjoy work rights without discrimination,[27] noting that aspects of the right to work are subject to the obligation of progressive realisation.

28. Should the duty apply only to employers, or to all people and organisations with obligations not to discriminate?

The Commission considers the duty should apply to all people and organisations with obligations not to discriminate, regardless of the nature or employment or whether the person is a volunteer. The nature of the individual or organisation or employer would be taken into account in the process of determining what adjustments they could reasonably be expected to make, so that there is a recognition of the scope of the entity to change practice or culture to support people with protected attributes to be included and what may result in 'unjustifiable hardship'.

29. Should the provisions allowing jobs to be declared in regulations as having genuine occupational qualifications be removed?

Yes, the Commission would support omitting these declared jobs provisions, which have never been utilised, and instead relying on the exemption process where employers seek certainty over what constitutes an inherent requirement of a particular role or class or roles.

30. What limitations should apply to people hiring workers to perform domestic duties or provide childcare in private homes?

The Commission does not consider it appropriate or workable to change the provisions relating to the private hiring of workers to perform domestic duties, or provision of care in private homes, as this exception promotes the legitimate right of individuals to maintain their privacy, family and home life,[28] in controlling who enters their home to provide private services.

Where the worker is engaged to work in a private house through a service provider (such as an NDIS registered organisation), labour-hire or mediating employer, or under a scheme that has functions of a public nature, the Commission considers that the employer should not have the ability to allow or facilitate discrimination in domestic duties or care. In these cases, the service provider would have existing duties to provide the employer with just and favourable conditions of work and take steps to protect its employees from discrimination within the workplace.

[26] s 27B(2) *Human Rights Act 2004.*
[27] s 27B(5) *Human Rights Act 2004.*
[28] s 12 *Human Rights Act 2004.*

Insurance and superannuation

31. Should insurance and superannuation providers only be permitted to discriminate where their decisions are based on actuarial or statistical data?

The Commission would support refining the insurance and superannuation exceptions so that only discrimination, which is reasonable, proportionate, and justifiable (having regard on relevant actuarial or statistical data) is excepted. This would provide a better balance between the benefits of idealised, evidence-based policies or contracts, and the rights to protection from discrimination, especially where differential conduct has no relevant or reasonable basis in fact, or relies on untested cultural assumptions about relevant classes of people with protected attributes.

32. Should insurance and superannuation providers be required to provide consumers with the data on which decisions about them are based (or a meaningful explanation of that data)

The Commission would support a requirement that where requested by a consumer who is a customer or proposes to be a customer, the superannuation or insurance provider give the induvial consumer a meaningful explanation of the statistical or actuarial data that supports discriminatory treatment on the basis of a particular protected attribute.

Positive duty

The Commission supports the introduction of a positive duty into the Discrimination Act 1991 to require organisations to take steps to eliminate discrimination as a duty holder under the Act. A positive duty was introduced in the Victorian *Equal Opportunity Act 2010* following the Gardner inquiry.[29] The rationale for the introduction of a positive duty was that individual complaints provided a remedy for people who alleged they had been discriminated against but did not always lead to the elimination of systemic discrimination. After decades of having discrimination laws enacted in Victoria it was understood that the introduction of a positive duty to eliminate discrimination would adjust the balance from individuals who have experienced discrimination having to take individual action, to requiring duty holders to take steps proportionate to their size and capability to eliminate discrimination in their service provision, workplaces, schools, community organisations covered by the discrimination act provisions.

The ACT Discrimination Act has been in effect since 1991 and we would anticipate that 30 years is sufficient time for duty holders under the Act to have considered their obligations to eliminate discrimination from their practices. The positive duty makes explicit the implicit requirements in the legislation that organisations take steps to ensure they are preventing occurrences of discrimination, sexual harassment and vilification and will have the effects of making the Act a safer and more inclusive community.

33. Should a positive duty to eliminate discrimination be introduced into the Discrimination Act?

The Commission supports the introduction of a positive duty to take reasonable, proportionate and justifiable steps to eliminate discrimination as far as possible.

This duty is consistent with the obligations of public authorities to act consistently with human rights, including the right to equal and effective protection from discrimination.

[29] Department of Justice (Vic), *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008).

34. Should be duty apply to public bodies, or private businesses and organisations, or both, and how should this be implemented?

The Commission supports applying the duty to every person or entity that have duties under the Discrimination Act, noting that those duties have applied for many decades under territory and Commonwealth discrimination laws.

A positive duty to act in accordance with the right to non-discrimination, by making decisions and taking actions that protect and promote that right, arguably already exists for public authorities, including entities performing functions of a public nature.

For entities operating in the public space, including those providing goods or services or access to accommodation or facilities for example, there is already an understanding of the mechanics and requirements of the anti-discrimination framework which has applied for three decades at a Territory and Federal level. So, there is unlikely to be difficulty re-emphasising that all organisations or entities are required to take steps to actively work to remove discrimination or address the factors that might lead to discrimination, as long as the test for whether that duty is being met incorporates an element of reasonableness, proportionality and justification in its ability to respond in a balanced way to the circumstances of individual organisations.

The Commission would support a duty that distinguishes between public authority entities, including entities undertaking functions of a public nature having requirements to plan for and report on measures to meet the duty. Those organisations not falling within the public authority definition would not be required to document and evidence the same level of specific planning and actions, and report on that and might only be required to provide outlines of measures taken to meet the duty if requested by the Commission.

The Commission notes the Victorian model where a person cannot complain directly about a failure to meet the duty, but rather point to that fact if they have a complaint about a particular act of discrimination that has affected them may be a transitional step towards an enforceable duty for smaller, non-public authority entities. It is also proposed that representative organisations also be permitted to raise these issues when assisting a person to make a complaint.[30] The Commission considers that ultimately amendments would be needed to make breach of the duty a ground for complaint in its own right applying to all organisations, as commentators have noted that without an enforcement mechanism, the impact of the positive duty in Victoria has been largely symbolic.[31] The Commission would therefore support an enforceable obligation and direct complaints mechanism applying to public authority entities immediately with amendments to extend that complaints mechanism to non-public authority entities over time.

[30] As described in ACT Government, *Inclusive, Progressive, Equal: Discrimination Law Reform Discussion Paper 1* (22 October 2021) available at ACT Government p 45.

[31] Allen, D. "An Evaluation Of The Mechanisms Designed To Promote Substantive Equality In The Equal Opportunity Act 2010 (Vic)" (2020) Volume 44(2) *Melbourne University Law Review* 459 at p 498-499.

35. How would the duty be applied to organisations of different sizes and with different levels of available resources?

The Commission supports the Victorian model of the duty which includes an explicit reference to a person taking reasonable and proportionate measures to eliminate discrimination, sexual harassment, and vilification, as far as possible.

If the reasonable, proportionate, and justifiable test is applied to determine what measures or steps contribute to meeting the duty to eliminate discrimination there is scope for the duty to be responsive to the operational and logistical pressures that may apply to small organisations or individuals.

36. How would organisations be supported to meet the positive duty?

The Commission considers that the duty would not impose significant or onerous requirements on small organisations. Support would be provided in the form of resources and training addressing the scope of the duty and providing guidance on what types of measures would be reasonable for organisations of various sizes in various sectors to take.

37. What additional functions and powers would the Human Rights Commission need to monitor organisations to ensure they are meeting the positive duty?

The Commission may need to be given additional powers to require an organisation or class of organisations to demonstrate the steps they have taken to meet the duty.

38. What resources would be necessary to inform organisations of steps necessary to comply with the positive duty?

As noted above the Commission would need to be resourced to provide additional guidance materials to support different types and sizes of entities to comply with the positive duty. We note that Victoria has developed a range of guidelines and material to assist organisations to comply with the duty which have proven helpful in achieving the objective of identification and elimination of discrimination.

Should you wish to discuss this matter further or provide feedback regarding our advice, the contact for the Commission is Alex Jorgensen-Hull who may be reached on 6205 1408 or Karen Toohey on 6207 1045.

Yours sincerely

Dr Helen Watchirs OAM

President and Human Rights Commissioner

Karen Toohey

Discrimination Commissioner