

2022

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

DISCRIMINATION AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Minister for Human Rights**

DISCRIMINATION AMENDMENT BILL 2022

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

OVERVIEW OF THE BILL

The *Discrimination Amendment Bill 2022* (the Bill) will amend the *Discrimination Act 1991* (the Discrimination Act) to modernise discrimination law protections and ensure they align with the *Human Rights Act 2004* (HR Act) and support best practice in promoting equal opportunity, respect for diversity and social inclusion in the community.

The Bill expands protections by amending Part 3 and Part 5 of the Discrimination Act to include formally organised sporting activities, formally organised competitions and the administration of Territory laws and ACT Government policies and programs as areas of public life where discrimination and sexual harassment is unlawful.

The Bill also refines exceptions to unlawful discrimination to better align with the *Human Rights Act 2004* and to ensure that the right to equality and other human rights are protected as far as possible. It modifies Part 4 of the Discrimination Act to:

- only permit discrimination in the employment of a person for domestic duties if the discrimination is reasonable, proportionate and justifiable in the circumstances (section 24).
- narrow the exception for the provision of insurance and superannuation services to only permit discrimination if (section 28):
 - the discrimination is based on statistical or actuarial data or if no data is available, other relevant documents; and
 - it is reasonable to rely on the data or other documents; and
 - the discrimination is reasonable, proportionate and justifiable in the circumstances.
- combine the clubs and voluntary bodies exceptions to only permit discrimination against a person if (section 31):
 - the club or body is established to benefit people sharing a protected attribute; and
 - the discrimination relates to the provision of membership, benefits, facilities or services to the person and occurs because the excluded person does not have the relevant protected attribute; and
 - the discrimination is reasonable, proportionate and justifiable in the circumstances.
- refine the exceptions for religious bodies to (section 32):

- retain the existing exceptions permitting discrimination on any ground in the ordination or appointment, training or education and selection of clergy.
- only permit a religious body to discriminate in employment or provision of goods and services to the public if the discrimination is on the grounds of religious conviction, conforms to the doctrines, tenets and beliefs of the body's religion, is necessary to avoid injury to the religious susceptibilities of adherents of the religion and the body has a publicly accessible policy in relation to the matter.
- provide that a religious body may only discriminate in any other act or practice if the discrimination conforms to the doctrines, tenets and beliefs of the body's religion and is necessary to avoid injury to the religious susceptibilities of adherents of the religion.
- incorporate the existing exception for a religious body providing accommodation (previously section 26 (1)(b)).
- amend the exception for discrimination in employment on the basis of genuine occupational qualifications to (section 33B):
 - apply to all protected attributes except religious conviction; and
 - require the discrimination be reasonable, proportionate and justifiable in the circumstances.
- refine the exception for discrimination in employment on the basis of the inherent requirements of a position to (section 33C):
 - apply to all protected attributes; and
 - only permit discrimination if an individual, because of their protected attribute and despite any reasonable adjustments, is unable to carry out the inherent requirements of a position; and
 - require the discrimination be reasonable, proportionate and justifiable in the circumstances.
- include a new exception permitting discrimination in formally organised competitions on the ground of age (section 33D).
- narrow the existing exceptions for competitive formally organised sporting activities to require that discrimination on the basis of sex and disability also be reasonable, proportionate and justifiable in the circumstances (section 41 and 57).
- limit the exception for discrimination on the basis of sex in competitive formally organised sporting activities to only apply to individuals aged 12 years and older (section 41).
- update the language in the exception for discrimination on the basis of disability in a competitive formally organised sporting activity to align with the

equivalent provision in the *Disability Discrimination Act 1992* (Cth) (section 57).

- narrow the exception for the employment of religious workers by educational institutions and religious bodies providing health services to only apply where the duties involve the teaching or practice of the relevant religion (section 44).
- incorporate gender-neutral language in sections 36, 37, and 57M of the *Discrimination Act*.

The Bill also updates the definition of clubs to no longer differentiate between clubs with and without a liquor licence and instead adopt the definition in the Dictionary of the *Disability Discrimination Act 1992* (Cth).

To address some of the limitations of a reactive complaints-based discrimination framework, the Bill inserts new Part 9 which provides two positive duties:

- A duty to make reasonable adjustments to accommodate a person's particular need arising from a protected attribute (section 74); and
- A duty for organisations and businesses and persons with organisational management responsibility within these entities to take reasonable and proportionate steps to eliminate discrimination, sexual harassment and unlawful vilification (section 75).

Additionally, the Bill empowers the Human Rights Commission and ACT Civil and Administrative Tribunal (ACAT) to consider whether an entity has met their positive duty to eliminate discrimination, sexual harassment and unlawful vilification when considering with a discrimination complaint.

The Bill also amends the *Children and Young People Act 2008* and the *Human Rights Commission Act 2005* to provide a mechanism to manage situations where the consideration of a discrimination complaint about a child protection matter would interfere with a related court proceeding.

As part of this mechanism, the court may make a declaration, on application or on its own initiative, if satisfied that the Human Rights Commission or ACAT dealing with the discrimination complaint would interfere in the related court proceeding. If a declaration is made the Human Rights Commission and ACAT must suspend dealing with the complaint until the court revokes the declaration or the related court proceedings are finalised.

To ensure the proper and efficient administration of a discrimination complaint is protected, the Bill prescribes that an applicant must notify the Human Rights Commission or ACAT of their intention to make an application as soon as practicable and empowers the court to make orders requiring a party to notify the Human Rights Commission or ACAT of an application for, issue of or revocation of a declaration.

The Discrimination Commissioner, on leave of the Court, may also make a submission in an application for a declaration.

CONSULTATION ON THE PROPOSED APPROACH

In 2015, the ACT Law Reform Advisory Council (LRAC) released their *Final Report into the Review of the Discrimination Act 1991 (ACT)* (LRAC Report). The LRAC Report made a series of recommendations for reforming the Discrimination Act to address instances of discriminatory conduct in a human-rights compliant manner. The majority of the LRAC Report's recommendations have been implemented as part of earlier reform processes, however, recommendations in the areas of coverage of the Discrimination Act, exceptions and introduction of a positive duty remained outstanding.

The ACT Government committed to considering options for discrimination law reform as part of the *Parliamentary and Governing Agreement for the 10th Legislative Assembly* and the *Capital of Equality Strategy 2019-2023*.

The proposed amendments are the result of extensive consultation with the Canberra community and ACT Government Directorates on the outstanding LRAC Report recommendations. This engagement targeted the whole of the ACT, as the proposed amendments have the potential to impact everyone in the Territory.

During October 2021 to January 2022, a Discussion Paper proposing options for reform based on the LRAC Report recommendations was released for public comment. Community members were invited to make a written submission, provide an oral submission by leaving voicemail or complete a short survey. During this consultation, the Government also facilitated three virtual roundtables including two with community organisations and one with religious bodies. A Listening Report outlining the key themes of this consultation is available on the YourSay website.

The ACT Government developed an Exposure Draft of the Discrimination Amendment Bill based on the community feedback on the Discussion Paper. The Exposure Draft Bill was released for public consultation from 1 June 2022 to 1 July 2022. During this period, 1148 submissions were received on the Exposure Draft Bill with the majority being from religious organisations and people of faith. A Listening Report summarising the feedback received on the Exposure Draft Bill is available on the YourSay website.

Input and feedback from all stakeholders on the Discussion Paper and Exposure Draft Bill has been used to inform the amendments proposed in this Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill engages the following rights under the HR Act:

- Section 8 - Right to equality and non-discrimination (*promoted and limited*)
- Section 9 - Right to life (*promoted*)
- Section 11 – Right to protection of the family and child (*promoted and limited*)
- Section 12 - Right to privacy (*limited*)
- Section 14 – Right to freedom of thought, conscience and religion or belief (*limited*)
- Section 15 – Right to freedom of assembly and association (*limited*)
- Section 21 – Rights to fair trial and fair hearing (*limited*)
- Section 27 (1) – Cultural rights of other minorities (*limited*)
- Section 27B - Right to work and other work-related rights (*promoted and limited*)

Rights Promoted

Section 8 - Right to equality and non-discrimination

Section 8 of the HR Act provides that everyone is entitled to enjoy their rights without discrimination of any kind and that everyone is equal before the law and entitled to the equal protection of the law without discrimination.

The *Discrimination Act 1991* gives effect to the right to equality and non-discrimination in the Territory and protects people from unlawful direct or indirect discrimination. The Bill further promotes this right by strengthening protections against unlawful conduct and better aligning the Discrimination Act with the HR Act. This is achieved by:

- Expanding the areas of public life in which discrimination and sexual harassment is unlawful (clauses 5 and 29).
- Narrowing the exceptions to unlawful discrimination for workers providing domestic duties, insurance and superannuation, clubs and voluntary bodies, religious bodies, work and sport to circumstances where it is reasonable and justifiable to do so in accordance with section 28 of the HR Act (clauses 6, 8, 9, 10, 15 and 20).
- Incorporating gender-neutral language to clarify that protections apply to persons of all gender identifies and signal that Canberra is a welcoming and inclusive community (clauses 12, 13 and 24).
- Promoting greater social inclusion for all persons with a protected attribute through the introduction of a positive duty to make reasonable adjustments to accommodate a person's particular need arising from a protected attribute (clause 30).
- Encouraging proactive prevention of discrimination through the introduction of a positive duty to eliminate discrimination, sexual harassment and unlawful vilification (clause 30).

Section 9 - Right to life

Everyone has the right to life including the right to not be arbitrarily deprived of life. Notably, research has found that LGBTIQ+ people have increased risk of self-harming and suicidal thoughts and health outcomes for LGBTIQ+ Canberrans have been found to be significantly worse than their peers in Canberra.¹ Discrimination and prejudice towards LGBTIQ+ people are key factors in increasing the risk of mental illness and poor wellbeing outcomes.

The Bill will promote the right to life for LGBTIQ+ people and other persons with a protected attribute by helping reduce stigmatisation of these groups and encouraging greater social inclusion through the measures noted above in relation to the right to equality.

Section 11 - Right to protection of the family and children

The family is the natural and basic group unit of society and is entitled to be protected by society. Children due to their particular vulnerabilities have special rights under human rights law. This right to protection is in addition to all other rights, which children enjoy as individuals.

Section 23C will expand the areas of public life covered by discrimination protections to capture more areas of government decision-making and activity. This measure engages and promotes the right to family and children as it will allow families who experience discrimination in the context of government decision-making to bring a discrimination complaint. Whereas previously a person would not be able to make a complaint in circumstances where they were not directly in receipt of a 'service' being provided by government (for example where child protection action is taken against a parent), these areas of government action will now fall within the scope of public life.

Section 27B - Rights to work and other work-related rights

Everyone has the right to work, including the right to choose their occupation and profession freely and the right not to be unfairly deprived of work including on a discriminatory ground. This right is promoted by the imposition of positive duties on relevant duty holders, including employers, to eliminate discrimination, sexual harassment and vilification in the workplace and make reasonable adjustments to accommodate workers.

Rights Limited

Exceptions

Section 8 - Right to equality and non-discrimination

¹ Capital of Equality Strategy Second Action Plan (2022 – 2023), https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0006/1975218/Second-Action-Plan-April-2022.pdf

1. *Nature of the right and the limitation (ss 28(2)(a) and (c))*

These exceptions acknowledge an established principle that treating people differently, which results in a limitation on their right to equality and non-discrimination, may be justifiable in certain circumstances provided the limitation is in pursuit of a legitimate aim and is reasonable and proportionate. The exceptions to unlawful discrimination provided in the Bill may limit the right to equality and non-discrimination as they allow differential treatment in certain circumstances. These include exceptions for workers providing domestic duties, insurance and superannuation, clubs and voluntary bodies, religious bodies, work, competitions and sporting activities.

2. *Legitimate purpose (s 28(2)(b)) and rational connection between the limitation and the legitimate purpose (s 28 (d))*

The exceptions provided in the Bill allow for differential treatment where this is justifiable to protect another right or to fulfil another legitimate purpose. Details of the legitimate purpose of each exception and the rational connection between the purpose and the limitation on the right to equality and non-discrimination are provided in Table 1.

Table 1: Legitimate purpose of each exception and the rational connection between the purpose and the limitation

Exception	Legitimate purpose and rational connection between the limitation and the legitimate purpose
Exception for workers providing domestic duties (clause 6, section 24)	The exception is for the legitimate purposes of protecting a person's right to privacy in their home and their right to freedom of contract. This limitation is necessary to ensure that a person retains the discretionary right to choose who may enter their home.
Exception for insurance and superannuation (clause 8, section 28)	The limitation on the right to equality is for the legitimate purpose of ensuring that insurance and superannuation providers can appropriately respond to risk. There is a rational connection between the limitation on the right to equality and the objective as the exception will permit a provider to make evidenced based decisions concerning the terms on which an insurance or superannuation product is offered. By permitting providers to differentiate between people based on their risk profile, including in relation to protected attributes such as age, sex or disability, products and offerings can be tailored to address the associated risk.
Exception for clubs and voluntary bodies (clause 9, section 31)	The legitimate purpose of the limitation is to promote the interests of the class of persons sharing a protected attribute for which the club or body is established.

	<p>The exception is rationally connected to the legitimate purpose as the exception is constrained to only apply to clubs or voluntary bodies which are established for the benefit of a class of person sharing a protected attribute and where the discrimination is in relation to the provision of membership, benefits, facilities or services to the person and occurs because the person does not have the protected attribute.</p>
<p>Exception for religious bodies (clause 9, section 32)</p>	<p>Section 32 limits the right to equality and non-discrimination in pursuit of protecting the right to freedom of thought, conscience, religion and belief and related rights of other minorities to culture. Religion is essential in the lives of many members of the diverse Canberra community and respect for religious belief and practice is a key component of building an inclusive and accepting society.</p> <p>The limitation is rationally connected to the legitimate purpose as section 32 will provide an effective measure for supporting a religious body to demonstrate and manifest their religion or belief as part of a faith community and exclude individuals who do not share their faith. Specifically, subsections (1) (a) to (c) facilitate religious bodies to discriminate on any ground in relation to the arrangement of religious observances including the training, appointment and selection of clergy reflecting that religious bodies should be permitted latitude to conduct internal matters as deemed appropriate by the religious body. Subsections (1) (d) and (e) allow for religious bodies to practice their religion as it permits discrimination in employment and provision of goods and services if it is on the basis of religious conviction, conforms to the relevant religion's doctrines and is necessary to avoid injury to religious susceptibilities. This means a Jewish health service provider who provides personal care services would be permitted to preference the provision of services to Jewish faith. Subsection (1) (f) allows a religious body to preference individuals who share their beliefs by permitting discrimination concerning any other act or practice of the body that conforms with doctrines, tenets or beliefs and is necessary to avoid injury to the religious susceptibilities of adherents of the religion.</p>
<p>Exception for genuine occupational qualifications (clause 10, section 33B)</p>	<p>The legitimate purpose of the limitation is to accommodate circumstances where it may be desirable for employers to preference employees based on particular attributes necessary for the performance of the position. Legitimate reasons for differential treatment based on a genuine occupational qualification may include authenticity, tradition or aesthetics (e.g., casting a person of a particular race in a play), modesty (e.g. someone of the same gender providing personal care) or to better serve protected groups (e.g. peer support worker in a women's crisis centre having lived experience of family or domestic violence).</p> <p>The limitation is rationally connected to the legitimate purpose as section 33B will provide an effective means for an employer to select</p>

	<p>applicants who have the necessary protected attribute to fulfil the requirements of the position.</p>
<p>Exception for inherent requirements of employment (clause 10, section 33C)</p>	<p>Certain jobs may have inherent requirements that are essential components of the position that cannot be allocated elsewhere. If they cannot be completed, then there may be negative consequences including compromising the operations and functionality of an employer's business. The legitimate purpose of the limitation on the right to equality and non-discrimination is to accommodate these circumstances.</p> <p>The limitation posed by section 33C is rationally connected to the legitimate purpose as the exception facilitates an employer to lawfully refuse employment to a person if they are unable to carry out the inherent requirements of the position.</p>
<p>Exception for competitions (clause 10, section 33D)</p>	<p>The purpose of providing an exception for discrimination on the basis of age in competitions is to maintain the integrity of the competition.</p> <p>Age provides a general measure of a person's skill and capability. While it is not necessarily always an accurate alignment, it is reasonable to presume that there may be vastly different skill levels between an adult and a child. Consequently, the limitation is rationally connected to the legitimate purpose as it provides an effective mechanism for dividing or restricting a competition to ensure that competitors are of relatively even standards of ability. For example, the exception will allow for a drawing competition to be restricted to children under 10 years of age and not result in young children and teenagers who may have significantly different levels of skill competing against each other.</p>
<p>Exception for competitive sporting activities (clause 15, section 41 and clause 20, section 57)</p>	<p>The legitimate purpose of the limitation is to protect the safety of players and the integrity of the sporting activity.</p> <p>The limitation is rationally connected to the legitimate purpose, as the exceptions at section 41 and 57 allow for lawful differential treatment in formally organised competitive sporting activities to ensure that players are of relatively even standards of skill and ability.</p>

3. *Proportionality (s 28(2)(e))*

The approach chosen in the Bill is the least restrictive means possible for achieving the legitimate objective of each exception.

The exceptions for domestic duties, insurance and superannuation, genuine occupational qualifications, inherent requirements of employment and sporting activities require the discrimination to be 'reasonable, proportionate and justifiable'. The inherent flexibility of this test safeguards the proportionality of the limitation by allowing for the interests of both parties and any unique circumstances of a matter to be considered.

Additional safeguards have been included in the exception for the provision of insurance and superannuation. Firstly, the provision has been drafted to include a tiered test which requires a provider to firstly consider whether statistical and actuarial data is available. A provider cannot rely on other documents if there is relevant statistical data available. Secondly, section 28 (3) provides consumers with the power to request access to or receive a reasonable explanation of the data or documents relied on by a provider. The power to request information will help address any inherent informational power imbalances, encourage greater transparency and support consumers to challenge decisions if necessary.

The Bill also includes a requirement for religious bodies to publish a publicly accessible policy in relation to their processes for employment and the provision of goods, services and facilities (section 32 (1) (d) and (e)). This approach aligns with the existing exceptions for religious educational institutions (section 46). Requiring religious bodies to publish a policy that sets out the circumstances in which they discriminate on religious grounds will promote greater transparency and support both the community and government to make an informed decision about whether to contract or engage with a religious body.

Section 27B - Right to work and work-related rights

The limitation on the right to work is closely linked to the right to equality and non-discrimination. Both rights are limited by measures in section 33B and section 33C which allow differential treatment in employment and impact the interest of persons to not be unfairly deprived of work including on a discriminatory ground.

Any limitations on the right to work are considered reasonable and proportionate given the safeguards discussed in relation to the right to equality above. In particular, the inherent flexibility of the 'reasonable, proportionate and justifiable' test ensures that the legitimate objective of the exceptions is achieved through the least restrictive means possible.

Section 14 - Right to freedom of thought, conscience, religion and belief & Section 27 (1) - Cultural rights of other minorities

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 14 provides that everyone has the right to freedom of thought, conscience, religion and belief. While the right to have or adopt a religion or belief is recognised as an absolute right under international law where no limitation is reasonable, the right to manifest or demonstrate this belief may be limited in certain circumstances including to protect the fundamental rights and freedom of others.

The cultural rights of other minorities are closely intertwined with the right to freedom of thought, conscience, religion and belief as section 27(1) explicitly provides that anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to practise their religion.

Currently, under existing section 32 (1) (d) religious bodies are permitted to discriminate on the ground of any protected attribute in employment and the provision of goods and services if the discrimination conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid religious susceptibilities of adherents of that religion. The Bill narrows this exception by providing that discrimination is only permitted on the grounds of the religious conviction of a person, and not on other grounds. This narrowing of the exception engages and potentially limits the right to religious freedom as it constrains the way in which a religious body conducts employment or provides goods and services

Legitimate purpose (s 28(2)(b))

The limitation is in pursuit of promoting the right to equality and non-discrimination of people who receive services from religious bodies or are employed by religious bodies.

2. Rational connection between the limitation and the purpose (s 28(2)(d))

Stigma and harm caused by discrimination can have significant consequences for individuals, particularly those who experience disadvantage in several different areas. Religious bodies interact with the broader community in a range of ways including the provision of essential goods, services and facilities and employment. Notably, vulnerable persons often rely on essential services provided by religious bodies and may experience discrimination and further disadvantage as a result of actions taken by organisations in these contexts.

The limitation on section 14 and section 27(1) rights is rationally connected to the legitimate purpose of reducing discrimination in employment or service provision by prohibiting discrimination by a religious body on the grounds of protected attributes other than religious conviction, including on the basis of sexuality, sex and relationship status. This will have the effect of increasing discrimination protections for the LGBTIQ +community and others with protected attributes.

3. Proportionality (s 28(2)(e))

The limitations on section 14 and section 27(1) rights are considered proportionate to the legitimate aim of promoting the right to equality and non-discrimination under section 8. In determining proportionality, finding an appropriate balance between competing rights does not require an even compromise but must be the least restrictive approach to achieve the overall purpose.

The limitation on these rights is considered the least restrictive approach reasonably available because religious bodies retain the right to select staff and discriminate in the provision of goods and services on the basis of a person's religious belief, provided such discrimination conforms with the religious doctrines and is necessary to avoid injury to the religious susceptibilities of adherents of the relevant religion.

Additionally, these amendments do not impact on religious bodies' ability to access other exceptions or exemptions under the Discrimination Act. For example:

- If applicable a religious body may discriminate in accordance with a special measure to achieve equality (section 27)
- Sections 32 (1) (a) to (c) permit religious bodies to discriminate on any ground in relation to the ordination, appointment, training or clergy and the selection or appointment of people to exercise functions in relation to religious observance or practice of the religious body.
- Existing section 46 also permits religious educational institutions to discriminate in the employment of staff and enrolment of students on the basis of religious conviction if it is intended to enable the institution to operate in accordance with doctrines of a particular religion and there is a relevant publicly accessible policy.
- A religious body may apply to the Human Rights Commission for a temporary exemption to allow conduct that may otherwise be considered unlawful discrimination (section 109).

Section 12 - Right to privacy

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 12 of the HR Act protects individuals from unlawful or arbitrary interference with privacy, family, home or correspondence. The amendment to section 24 will engage and limit the right to privacy as it constrains a person's ability to choose who will be employed in their home.

2. Legitimate purpose (s 28(2)(b))

The legitimate purpose of the limitation is to promote the right to equality and non-discrimination for domestic workers who are an inherently vulnerable group prone to exploitation. Domestic work is highly gendered and domestic workers often experience a myriad of problems at work including undervaluing of labour, failure to comply with existing work agreements, income insecurity and risk of unfair dismissal.²

3. Rational connection between the limitation and the purpose (s 28(2)(d))

This amendment is rationally connected to the legitimate purpose as it provides an effective means of preventing a person from discriminating against domestic workers by requiring a person to consider whether their employment decision is 'reasonable, proportionate and justifiable' including with regard to the purpose, nature and impacts of their decision. For example, an individual may reasonably preference hiring a person of the same gender to provide intimate personal care, however, it

² 2018) 41(3) Melbourne University Law Review, available at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbULawRw/2018/4.html>.

may not be 'reasonable, proportionate and justifiable' to refuse to hire someone based on prejudice against a particular race.

4. Proportionality (s 28(2)(e))

The exception applies only to formal arrangements for employment which are typically subject to discrimination protections.

The measure is considered the least rights restrictive means available for promoting the right to equality and non-discrimination for domestic workers. This is achieved by the inherent flexibility of the 'reasonable, proportionate and justifiable' test which allows for the interests of both parties and any unique circumstances of the matter to be considered. It does not prevent an individual from preferencing a person with a particular attribute if there is a legitimate reason to do so.

A person may also apply to the Human Rights Commission to seek a temporary exemption to allow conduct that would otherwise amount to unlawful discrimination (section 109). In considering the application, the Human Rights Commission must have regard to human rights including the right to privacy and the objectives of the Discrimination Act.

Section 15 - Right to peaceful assembly and freedom of association

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association. Currently voluntary bodies may discriminate on the basis of any protected attribute when admitting members. Clubs are permitted to refuse membership or offer it on different terms to people of a particular sex, race, disability or age if the principal reason for the club's existence is the benefit of that group.

Section 31 narrows this exception by restricting the basis on which a voluntary body and club may discriminate. The exception will only apply when providing membership to people with a protected attribute where the organisation's reason for existence is to promote the interests of that group of people and the discrimination is reasonable, proportionate and justifiable in the circumstances. This amendment may limit the right to freedom of association as it restricts a club and voluntary body's ability to set and determine rules for their membership.

2. Legitimate purpose (s 28(2)(b))

This measure is intended to promote the right to equality and non-discrimination for people seeking to join or participate in clubs or voluntary bodies.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

The legitimate objective will be achieved by preventing voluntary bodies from refusing membership arbitrarily on the basis of any protected attribute (e.g. race, religious conviction, sexuality) where this refusal is unconnected to the organisation's purpose. The inclusion of the 'reasonable, proportionate and justifiable' test will prompt voluntary bodies and clubs to consider the nature and purpose of their actions and the impact on both the organisation and the prospective member before deciding to refuse membership.

4. *Proportionality (s 28(2)(e))*

The 'reasonable, proportionate and justifiable' test ensures that the legitimate purpose is achieved through the least restrictive means reasonably available. If an association wishes to discriminate in membership on a ground outside of the scope of the exception, they may apply to the Human Rights Commission for a temporary exemption. If applicable, a club or voluntary body may also rely on the exceptions for special measures (section 27) or for acts done under statutory authority (section 30).

Positive duty to eliminate discrimination, sexual harassment and unlawful vilification ('positive duty')

As noted above, the introduction of a positive duty is aimed at promoting and furthering the right to equality and non-discrimination.

Section 76 clarifies that the positive duty does not impose duties to eliminate discrimination of a kind that falls within an exception under part 4 or an exemption that authorises specific forms of discrimination under part 10. If an exception or exemption applies, a person is not required to take steps that would conflict with these provisions. For example, religious schools are permitted to lawfully discriminate on the grounds of religious conviction under section 46. Consequently, a Catholic school would not be required to take steps to encourage greater religious diversity within its school community but may have a positive duty to eliminate discrimination concerning other protected attributes. These exceptions and exemptions recognise that there are circumstances where it is reasonable to treat people differently in pursuit of a legitimate purpose such as to promote human rights.

Court declaration powers for discriminate complaints related to care and protection matters

1. *Nature of the right and the limitation (ss 28(2)(a) and (c))*

Section 21 of the HR Act establishes that everyone has the right to have any rights and obligations recognised by law decided by a competent, independent, and impartial court or tribunal after a fair and public hearing.

The Bill requires the Human Rights Commission or ACAT to pause their consideration of a discrimination complaint about a care and protection matter if the court has made a declaration under section 727AA of the *Children and Young*

People Act 2008. This mechanism may engage and limit the right to fair trial (section 21), the rights to the protection of family and children (section 11) and the right to equality and non-discrimination (section 8) of the complainant as it may result in a delay to the consideration of a discrimination complaint by the Human Rights Commission and also hinder the timeliness of a complainant's access to the ACAT to seek remedies in response to their complaint.

2. *Legitimate purpose (s 28(2)(b))*

The legitimate purpose of the limitation is to protect the prompt and proper consideration of a court proceeding concerning a care and protection matter under the *Children and Young People Act 2008*.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

The limitation on the right to fair trial is rationally connected to the legitimate purpose as the Court's declaration enables the Court to consider care and protection matters without disruption.

4. *Proportionality (s 28(2)(e))*

The proposed measure has been crafted to ensure that the limitations on human rights are proportionate to the legitimate purpose and the least rights restrictive means of ensuring a prompt consideration of care and protection matters aimed at protecting the best interests of the child.

Firstly, the declaratory mechanism does not remove a parent's ability to bring a complaint about a care and protection matter, it only defers its consideration.

Additionally, the power to make a declaration has been provided to the Court which is best placed to consider whether the conduct of a discrimination complaint would interfere with its proceedings. Accordingly, this will allow for the question of interference to be adjudicated through the court processes.

While the Court has wide discretion to determine what matters would constitute interference, this broadness is necessary to ensure the Court can have regard to any unique circumstances of the matter.

The power to issue a declaration has been provided to the Court as it allows for the determination to be considered in an impartial setting as part of the Court process.

Safeguards have been included to support the appropriate application of the declaration process. Section 727AB supports the Court to make an informed decision about possible interference in the proceedings by facilitating the Discrimination Commissioner with the power, on leave of the Court, to provide a submission in response to an application for a declaration.

The Bill also includes notifications requirements to ensure the Human Rights Commission and the ACAT can recommence dealing with a complaint as soon as

practicable after the declaration is revoked or the relevant court proceedings are finalised.

Discrimination Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Discrimination Amendment Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Discrimination Amendment Act 2022* (the Act).

Clause 2 Commencement

This clause provides for the Act to be commenced six months after the Act's notification day.

Clause 3 Legislation amended

This clause identifies that the Act will amend the *Discrimination Act 1991*, *Children and Young People Act 2008* and *Human Rights Commission Act 2005*.

Clause 4 New section 5B

This clause inserts new 5B which sets out what factors must be considered when determining what constitutes unjustifiable hardship.

This clause replaces section 47 that sets out the existing test for unjustifiable hardship in relation to an accommodation for a person with a disability in division 4.5.

Similarly to previous section 47, the test is non-exhaustive and allows for the unique facts and circumstances of each case to be taken into account when determining whether an accommodation will result in unjustifiable hardship. In considering the relevant circumstances of each matter, explicit regard must be had to:

- the nature of the benefit or detriment likely to be received or experience by each person;
- the protected attributes of the relevant person; and
- the estimated costs to, and financial circumstances of, the person claiming unjustifiable hardship.

Clause 5 New sections 23A to 23C

This clause amends Part 3 of the Discrimination Act to insert new sections 23A, 23B and 23C. The intention of this amendment is to expand the areas of public life in which discrimination is prohibited.

Section 23A Sporting activities

New section 23A provides that it is unlawful for the person responsible for organising or administering a formally organised sporting activity to discriminate against another person in the activity.

The intention of this clause is to make it clear that discrimination protections apply in relation to formally organised sporting activities. Currently discrimination protections in sport are only implied to be covered by the Discrimination Act through the inclusion of exceptions related to sport.

Examples are included in section 23A to support the interpretation of 'formally organised sporting activities.' 'Formally organised' is intended to capture sporting activities which are subject to a degree of formal organisational structure. This may include activities dictated by a set of written rules or organised by a sporting club, church group, workplace, social club or voluntary body.

Sporting activities covers a wide range of physical activities including but not limited to sports such as netball, football, soccer, cricket, gymnastics, dodgeball, martial arts, swimming and roller derby.

As such, a weekly netball competition that is governed by written rules and overseen by a church group or social club may be considered to be a formally organised sporting activity; whereas a weekly social football match between friends is considered to be an informally organised sporting activity and would not be subject to the Discrimination Act.

Section 23B Competitions

New section 23B provides that it is unlawful for a person responsible for organising or administering a formally organised competition to discriminate against another person participating in the competition. Examples are included as part of section 23B to support the interpretation of 'formally organised competition'.

The purpose of this provision is to make it clear that formally organised competitions are covered by the Discrimination Act. Currently, participants in competitions have limited discrimination protections. The Discrimination Act only provides protections against discrimination where organisers of a competition are providing a service to participants or organisers are in an employment relationship with the participants and these circumstances. These circumstances can be difficult to prove.

Section 23C Administration of territory laws etc.

New section 23C (1) provides that it is unlawful for a public authority to discriminate against a person when administering a territory law or an ACT Government program or policy.

An ACT Government program or policy is a broad term that is intended to capture government functions and decision-making that go beyond the provision of services to an individual. For example, the conduct of child protection officer with respect to biological parents is intended to fall within scope of this section.

Subsection (2) provides the matters which are not captured within the scope of subsection (1). Subsection (2) (a) specifies that subsection (1) does not affect a law

relating to the privileges of the Legislative Assembly. Subsection (2) (b) notes that subsection (1) does not apply to:

- the Office of the Legislative Assembly concerning an act or practice engaged in when exercising a function relating to a proceeding of the Legislative Assembly.
- an ACT Court concerning an act or practice, other than in relation to a matter of an administrative nature.
- the doing of an act mentioned in section 18 whether or not the act is done by an educational authority.

Section 18 provides broad protections against unlawful discrimination in the provision of education. This includes protections against unlawful discrimination concerning the admission of a student, denying or limiting a student's access to any benefit, expulsion of a student and subjecting a student to any other detriment. In some circumstances these activities could be considered as being related to the administration of a Territory law or ACT Government program or policy. The purpose of the exclusion of acts mentioned in section 18 is to mitigate against confusion and clarify that protections against discrimination for these activities are provided by section 18. This exclusion does not impact or have any flow on effects to the application of section 18 or other relevant educational setting provisions (e.g. sections 36, 39, 44, 46 and 51).

Subsection (3) sets out the definitions for this section.

ACT court is defined for this section to mean the Supreme Court, Magistrates Court, Coroner's Court or a tribunal and includes a judge, magistrate, tribunal member or any other person exercising a function of the court or tribunal in relation to the hearing or determination of a proceeding before the court or tribunal.

Administering in relation to a Territory law or ACT Government program or policy is defined to include exercising a function under the law or carrying out the program or policy.

Function of a public nature is defined in section 40A of the *Human Rights Act 2004*

Public authority is defined to mean (a) an administrative unit; (b) a territory authority; (c) a territory instrumentality; (d) a Minister; (e) a public employee; (f) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory, or an entity mentioned in paragraph (a) to (e) whether under contract or not.

Government activities are currently only covered by discrimination law when they relate to employment, education, accommodation, access to premises and the provision of goods, services and facilities. It can unclear when the Government is providing a service to the public and there may be some activities that are not captured under these areas. The purpose of this amendment is to address these

gaps and clarify that the performance of an ACT Government activity or function by a public authority is subject to discrimination protections.

Clause 6 Domestic Duties

Section 24

This clause provides that a person may discriminate against someone in the position as an employee or contract worker if the duties involve domestic duties in the first person's premises and the discrimination is reasonable, proportionate and justifiable in the circumstances.

Domestic work in Australia is often highly gendered and domestic workers experience a myriad of problems at work including undervaluing of labour, failure to comply with existing agreements for work, income insecurity and risk of unfair dismissal.³ The intention of this provision is to respond to these inherent vulnerabilities by providing stronger protections for domestic workers.

Determining whether discrimination is reasonable, proportionate and justifiable in circumstances under subsection (2) may involve consideration of a range of factors including whether an action is harsh or unjust and the consequences for both the employer and employee. The test does not intend to prevent an individual from preferencing a person with a particular protected attribute if there is a genuine reason to do so.

For example, it may be reasonable, proportionate and justifiable for:

- a female identifying person to preference a female care attendant for modesty reasons.
- an Orthodox Jewish family who keeps kosher to preference hiring a Jewish person who also keeps kosher to assist in household duties.
- a Christian family to preference hiring a person of Christian faith to provide domestic duties on the basis that they are seeking to raise their children and organise their home in accordance with certain religious values and practices.

However, it is likely not reasonable, proportionate or justifiable for a person to discriminate against another person for a position as a domestic worker on the basis that they are of Aboriginal or Torres Strait Islander descent where this reflects a preference based on prejudice.

Clause 7 Domestic accommodation etc

Section 26 (1) (b)

This clause omits section 26 (1) (b) as the exception for the provision of accommodation by a religious body has been incorporated into section 32 (3). The

³ (2018) 41(3) Melbourne University Law Review, available at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbULawRw/2018/4.html>.

purpose of this relocation is to improve readability and navigation of the Discrimination Act.

Clause 8 Sections 28 and 29

This clause substitutes sections 28 and 29 for new section 28 which provides a combined exception permitting lawful discrimination in the provision of insurance or superannuation services in narrow and limited circumstances.

New subsection (1) identifies that the exception applies to an insurance or superannuation service provider who discriminates against a consumer in relation to the terms on which an insurance policy is offered or provided or the terms on which membership to a superannuation scheme or fund is offered.

New subsection (2) (a) provides a tiered two limbed test specifying that insurance and superannuation service providers may only discriminate based on statistical or actuarial data or if no statistical or actuarial data is available then other relevant documents. The tiered approach is intended to accommodate circumstances where a provider needs to make an informed decision in relation to a matter where there is no relevant statistical or actuarial data available due rarity, or the matter being related to an unexpected event or activity. In these circumstances, it may be reasonable for a provider to rely on other relevant documents. For example, it may be reasonable for a life insurance provider to rely on a peer reviewed medical journal to inform a decision to offer their product on a differential basis to a person with a rare medical condition.

Subsections (2) (b) and (c) provide that the exception is only available if it is reasonable for the provider to rely on the data or other documents and the discrimination is reasonable, proportionate and justifiable in the circumstances.

In determining whether differential treatment is reasonable, proportionate and justifiable, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both the consumer and provider, the legitimate and valid interests of the consumer, provider and pool of insurers or superannuation members and availability of options or choices that can be offered to a consumer.

The purpose of this clause is to strike a better balance between allowing providers to make evidenced based decisions and the right to protection from discrimination especially where differential conduct has no legitimate basis. The exception recognises that while there are legitimate reasons for a provider to adjust the products offered to levels of need and risk, the denial of insurance can significantly affect a person's ability to participate in life and providers should not be permitted to make assumptions that unfairly impact individuals and that are not evidence-based.

New subsection (3) provides that if a consumer requests access to the data or other documents used by a provider to make a decision, the provider must:

- give the consumer a copy of the data or other documents; or
- provide a meaningful explanation of the data or other documents; or
- make the data or other documents available for inspection at a reasonable time and place.

The intention subsection (3) is to address the inherent power imbalances between providers and consumers and encourage greater transparency in decision-making.

If a consumer requests access to the data or documents and the provider seeks to provide a meaningful explanation of these materials, it is not sufficient to provide an outline of reasons for the discriminatory decision. The meaningful explanation should explain the data or document itself, including any key insights or outcomes contained in, or drawn from, the data. The explanation should be provided in plain English where possible.

Clause 9 Sections 31 and 32

This clause substitutes new section 31 which provides a combined exception to unlawful discrimination by clubs and voluntary bodies and new section 32 which provides exceptions to unlawful discrimination by religious bodies.

Section 31 Clubs and voluntary bodies

New section 31 provides an exception in relation to discrimination by clubs and voluntary bodies where the club or voluntary body is established for the benefit of a class of persons sharing a protected attribute and the discrimination:

- relates to the provision of membership, benefits, facilities or services; and
- occurs because the person does not have the protected attribute; and
- is reasonable, proportionate and justifiable in the circumstances.

In determining whether differential treatment is reasonable, proportionate and justifiable, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both parties.

The intention of the amendment is to address the overly broad exceptions for clubs and voluntary bodies and create a more comprehensive and consistent discrimination law framework.

Section 32 Religious bodies

New section 32 provides exceptions to unlawful discrimination by religious bodies.

Subsections (1) (a) – (c) retain the existing exceptions permitting a religious body to discriminate in the ordination, training or education and selection or appointment of clergy. This exception recognises that these activities are internal matters for a religious body.

Subsection (1) (d) provides an exception for the provision of goods, services and facilities by religious bodies. Subsection (1) (d) (i) provides that a religious body may only discriminate in the provision of goods and services where the discrimination is on the ground of religious conviction, conforms to the doctrines, tenets or beliefs of the body's religion and is necessary to avoid injury to the religious susceptibilities of adherents of the religion. Subsections (1) (d) (ii) and (iii) insert an additional requirement that the religious body must have a policy in relation to the provision of goods, services or facilities that is readily accessible to the public. The policy must be published and readily available to persons who might wish to access goods and services, for example the policy might be made available in hard copy form or published on the website of the body.

Subsection (1) (e) provides an exception for employment discrimination by religious bodies. Subsection (1) (e) (i) prescribes that a religious body may only discriminate in employment where the discrimination is on the ground of religious conviction, conforms to the doctrines, tenets or beliefs of the body's religion and is necessary to avoid injury to the religious susceptibilities of adherents of the religion. Subsections (1) (e) (ii) and (iii) insert an additional requirement that the religious body must have a policy in relation to employment that is readily accessible to the public. The policy must be published and readily available to any prospective employees, for example the policy might be made available in hard copy form or published on the website of the body.

Subsection (1) (f) provides that discrimination in relation to any other act or practice of the body must conform to the doctrines, tenets or beliefs of the body's religion and be necessary to avoid injury to the religious susceptibilities of adherents of the religion.

Subsections (2) (a) and (b) provide that subsection (1) does not apply to discrimination in relation to employment of a person or enrolment of a student in a religious educational institution as these matters are covered by existing section 46. Subsection 2 (c) makes it clear that religious bodies whose sole or main purpose is commercial cannot rely on the exceptions in subsection (1).

Subsection (3) relocates existing section 26 (1) (b) to section 32.

The intention of this section is to balance the right to equality and non-discrimination and the right to freedom of thought, conscience, religion or belief. In doing so, the exceptions seek provide greater protections against discrimination where actions of religious bodies intersect with the general public while still allowing religious bodies greater latitude in activities which relate to the administration of religious groups.

Further, freedom of thought, conscience, religion and belief has relevance for all individuals including individuals whose religious convictions differ in some way from those of a religious body who is providing goods, services or facilities or offering employment. These amendments recognise that where a religious body is providing

external functions which intersect with the broader community, the public should be able to make an informed choice about whether to engage with the religious body as a service provider or employer.

Clause 10 New sections 33B to 33D

This clause inserts new sections 33B, 33C and 33D.

Section 33B Genuine occupational qualifications

New section 33B provides an updated exception to unlawful discrimination relating to genuine occupational qualifications.

Subsection (1) provides that it is not unlawful to discriminate against a person in relation to employment if it is a genuine occupational qualification that the position be filled by a person having a particular protected attribute and the discrimination is reasonable, proportionate and justifiable in the circumstances. Examples of circumstances where possessing a particular protected attribute constitutes a genuine occupational qualification are included below subsection (1).

Subsection (2) provides that the exception does not apply to discrimination on the grounds of religious conviction. This exclusion recognises that exceptions to unlawful discrimination on the basis of religious conviction in employment are provided in new section 32 (1) (e) (employment by a religious body) and section 44 (employment of religious workers).

In determining whether differential treatment is reasonable, proportionate and justifiable, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both parties.

This provision recognises that there are certain types of roles that may be better done by someone with a protected attribute. The intention of this provision is to allow organisations to preference the employment of persons with a protected attribute where there is a legitimate reason to do so including for purposes of authenticity, modesty or peer support.

Section 33C Inherent requirements of employment

Section 33C creates a new exception to unlawful discrimination in the employment of a person if the prospective employee is unable to carry out the inherent requirements of the position:

- because of the prospective employee's protected attribute; and
- regardless of any reasonable adjustments able to be made by the employer in accordance with section 74; and
- the discrimination is reasonable, proportionate and justifiable in the circumstances.

In determining whether differential treatment is reasonable, proportionate and justifiable, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both parties.

The inherent requirements of a role concern the duties which cannot be accommodated or removed. This provision recognises that some roles have essential tasks and if an individual is unable to fulfil these requirements, then this may compromise the operations of a business.

Section 33D Competitions – age

New section 33D inserts a new exception to unlawful discrimination in competitions. This section provides that it is lawful to discriminate on the ground of age in limiting participation in a competition to people belonging to a particular age group.

This provision recognises that there may be circumstances where it is necessary to restrict participants in a competition to individuals from a certain age group in order to ensure the integrity of the competition or due to sensitivities associated with the content of the competition. For example, this exception permits a drawing competition to be restricted to children aged 8 to 10 years old to ensure that the integrity and fairness of the competition is protected. Similarly, the exception would permit a film festival focused on mature content to restrict a competition to individuals aged 18 years old and over.

Clause 11 Genuine occupational qualifications – sex Section 34

This clause omits section 34 and is consequential to new section 33B that provides a consolidated exception to unlawful discrimination relating to genuine occupational qualifications.

Clause 12 Educational institutions for members of one sex Section 36

This clause substitutes the ‘the opposite sex’ with a ‘a different sex.’

The intention of this amendment is to incorporate gender-neutral language.

Clause 13 Section 37

The clause substitutes existing section 37 to include gender neutral language in the provision.

This amendment will increase protections for vulnerable people by making it clear the exception applies to all people whose bodies are capable of carrying, giving birth to or feeding children.

Clause 14 Clubs for members of one sex etc

Section 40

This clause omits section 40 and is consequential to new section 31 that provides a consolidated exception to unlawful discrimination by clubs.

Clause 15 Section 41

This clause substitutes the current section 41 heading to clarify that the provision relates to discrimination in sporting activities on the ground of sex. The new heading is: Sporting activities – sex.

This clause also substitutes current section 41 (1) to provide that discrimination on the ground of sex in a formally organised competitive sporting activity is only permitted if strength, stamina or physique of the competitors is relevant and the discrimination is reasonable, proportionate and justifiable in the circumstances.

In contrast to section 23C, this exception is constrained to competitive formally organised sporting activities. 'Competitive' intends to capture activities which involve a contest with a focus on athletic achievement, breaking a record or winning.

In determining whether differential treatment is reasonable, proportionate and justifiable in the circumstances, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both parties. Consideration may also be given to the availability of other opportunities for participation and options for reasonable adjustments.

Subsection (2) provides that subsection (1) does not apply to discrimination relating to the exclusion of a person participating in coaching, umpiring, refereeing or administering a sporting activity or any other formally organised sporting activity prescribed by legislation.

This clause also inserts subsection (3) which disapplies this exception for children under 12 years of age. Removing this exception for children under 12 years of age recognises that sport for younger children is primarily a social and health activity where physical differences among players are less likely to be critical to the safety, fairness and competitiveness of a sporting activity. This exclusion will align the ACT with the *Sex Discrimination Act 1984* (Cth) which contains an equivalent protection for children under 12 years of age.

The operation of subsection (3) does not prevent sporting activities for children under 12 being organised by sex. It is intended to allow flexibility for children who might require a particular accommodation such as allowing a girl to play in a boys' team where this would allow her to compete a higher level to reflect her ability. The special measure exception at existing section 27 which allows for a team to be established for the benefit of a particular group who would otherwise be disadvantaged is also available for children under 12 years old.

Clause 16 Exceptions relating to race

Division 4.3

This clause omits division 4.3 as it is redundant due to new consolidated exception for genuine occupational requirements at section 33B and new exception for clubs at section 31.

Clause 17 Religious workers

Section 44

This clause omits 'observance' from section 44 to provide that an educational authority or a religious body who operates a hospital or provides health services may only discriminate in the employment of a person on the basis of religious conviction if the duties involve or would involve the teaching or practice of the relevant religion.

The intention of this provision is to allow educational authorities and religious bodies providing health care services to discriminate in the employment of workers such as religious educational teachers or chaplains.

Clause 18 Sections 47 to 49 and 55

This clause omits section 47 as it is now redundant due to the updated definition of 'unjustifiable hardship' at section 5B.

This clause omits section 48 as it is redundant due to the new combined exception for genuine occupational requirements at section 33B.

This clause omits section 49 as it has been incorporated into the new exception for discrimination on the basis of the inherent requirements of employment at section 33C.

This clause omits section 55 as it is redundant due to the new combined exception for clubs at section 31.

Clause 19 Section 57 heading

This clause substitutes the current section 57 heading to clarify that the provision relates to discrimination in sporting activities on the ground of disability. The new heading is: Sporting activities – disability.

Clause 20 Section 57 (1)

This clause substitutes current section 57 (1) (a) to provide that discrimination on the ground of disability in a competitive formally organised sporting activity is only permitted if the excluded person is not reasonably capable of performing the actions reasonably required for the sporting activity or the participants are selected by a method which is reasonable on the basis of their skills and abilities relevant to the

sporting activity and relative to each other and the discrimination is reasonable, proportionate and justifiable in the circumstances.

The language in subsection (1) (a) has been updated to be align with the equivalent provision in the *Disability Discrimination Act 1992* (Cth).

Subsection (1) (b) provides that discrimination on the grounds of disability is permitted if the activity is conducted for, or mainly for, people who have a particular kind of disability and the person does not have that kind of disability

This exception is qualified to only apply to organised sporting activities which are also 'competitive'. 'Competitive' intends to capture activities which involve a contest with a focus on athletic achievement, breaking a record or winning.

In determining whether differential treatment is reasonable, proportionate and justifiable, regard may be had to a range of factors including whether an action is harsh or unjust and the consequences for both parties. Consideration may also be given to the availability of other opportunities for participation and options for reasonable adjustments.

The intention of this clause is to promote the right to equality and non-discrimination for persons with a disability and encourage greater social inclusion.

Clause 21 Section 57 (2) (d)

This clause substitutes 'sporting activity' with 'formally organised sporting activity' in subsection (2) (d).

Clause 22 Sections 57A and 57L

This clause omits section 57A as this exception has been incorporated into the combined exception for genuine occupational qualifications at section 33B.

This clause also omits section 57L as this exception has been incorporated into the combined exception for clubs at section 31.

Clause 23 Section 57M heading

This clause substitutes the current section 57M heading to clarify that the provision relates to discrimination in sporting activities on the ground of age. The new heading is: Sporting activities – age.

Clause 24 Section 57M (1)

This clause amends section 57M (1) to incorporate gender-neutral language.

Clause 25 Section 57M (2) (d)

This clause substitutes 'sporting activity' with 'formally organised sporting activity' in subsection (2) (d).

Clause 26 Discrimination relating to employment status

Section 57O

This clause amends section 57O to insert 'or (2)' after the words 'section 10 (1)'. Section 57O currently only applies to discrimination in relation to prospective employees, the intention of this clause is to expand the exception to also apply to current employees.

Clause 27 Division 4.10 heading

This clause substitutes the current Division 4.10 heading and is consequential to clause 28. The new heading is: Exception relating to physical features.

Clause 28 Section 57Q

This clause omits section 57Q as it is now redundant as the provision has been incorporated into the combined exception for genuine occupational qualifications at section 33B.

Clause 29 New sections 65 to 67

This clause inserts new sections 65, 66 and 67 into Part 5 of the Discrimination Act.

The purpose of this clause is to expand the areas in public life where sexual harassment is unlawful.

Section 65 Sporting activities – sexual harassment

New section 65 provides that it is unlawful for a person organising, administering or participating in a sporting activity to subject another person organising, administering or participating in the sporting activity to sexual harassment.

Section 66 Competitions – sexual harassment

New section 66 provides that it is unlawful for a person organising, administering or participating in a competition to subject another person organising, administering or participating in the competition to sexual harassment.

Section 67 Administration of territory laws etc – sexual harassment

New section 67 (1) provides that it is unlawful for a person to subject another person to sexual harassment when administering a Territory law or ACT Government program or policy.

New section 67 (2) defines *administering* in relation to a Territory law or ACT Government program or policy to include exercising a function under the law or carrying out the program or policy.

Clause 30 New part 9

This clause inserts new Part 9 ‘Positive duties’.

Section 74 Positive duty to make reasonable adjustments

Section 74 (1) provides that a person must make reasonable adjustments to accommodate another person’s particular need arising from a protected attribute if the discrimination on the ground of the attribute is unlawful under of the Discrimination Act.

Subsection (2) provides that an adjustment is not reasonable if it would cause unjustifiable hardship to the person making the adjustment. The test for ‘unjustifiable hardship’ is provided in new section 5B.

Subsection (3) provides that failure to make reasonable adjustments in accordance with this section is an unlawful act.

A person has a ‘particular need’ if the person due to their protected attribute requires specific services, facilities, or other adjustments to facilitate their inclusion and participation in an area of public life. For example, reasonable adjustments to accommodate a person’s particular need because of their protected attribute may include:

- providing a student with a uniform that corresponds with their gender identity.
- providing an Aboriginal and Torres Strait Islander employee with time off work for Sorry Business.
- providing a student with a disability with access to materials through assistive technologies such as screen readers.
- providing flexible working hours for employees with parental or caring responsibilities.

The purpose of this provision is to encourage greater social inclusion for persons with a protected attribute.

Section 75 Duty to eliminate discrimination, sexual harassment and unlawful vilification

New section 75 inserts a positive duty to take steps to eliminate discrimination, sexual harassment and unlawful vilification.

Subsection (1) provides that the duty applies to organisations or businesses, including any individual with organisational management responsibility for an organisation or business. Examples are inserted below subsection (1) to support the interpretation of ‘organisation’ and ‘organisational management responsibility’.

‘Organisational management responsibility’ as defined in subsection (6) means individuals who have responsibility for controlling or directing an organisation or

business. This is intended to capture the individuals who are able to set or determine the overall direction of the entity. For example, 'organisational management responsibility' is likely to capture the Chancellor, Vice-Chancellor and other executive staff in a university, the CEO of a community organisation and sole traders. The duty is not intended to apply to lower or middle level managers or general employees.

Subsection (2) provides that a relevant duty holder must take reasonable and proportionate steps to eliminate discrimination, sexual harassment and unlawful vilification.

Section (3) prescribes a non-exhaustive list of factors to be considered in determining whether the steps taken by a duty holder are reasonable and proportionate. These measures allow for the duty to be scaled depending on the size, resources and priorities of the entity and practicability of the proposed steps. As the test is non-exhaustive any factors unique to a particular duty holder can also be taken into account when determining the extent of the positive duty. It is intended that larger organisations would have a greater duty and be expected to undertake more extensive actions than smaller organisations.

The steps taken by a duty holder could include:

- assessing current practices to identify areas of non-compliance.
- reviewing policies and procedures to ensure processes are compliant with obligations under the Discrimination Act.
- preparing and implementing an action plan to address a particular concern.
- conducting targeted training on a particular topic.

Subsection (4) provides that the positive duty does not apply to an administrative unit, territory authority or territory instrumentality and persons with organisational management responsibility within these entities until 12 months after the commencement day and to all other duty holders until 3 years after the commencement day.

The purpose of the staggered commencement is to provide duty holders with sufficient time to build their awareness and understanding of the positive duty and adjust their policies, procedures and processes as necessary. The positive duty commences earlier for an administrative unit, territory authority and territory instrumentality in recognition of their existing obligations under section 40B of the HR Act to act consistently with human rights.

Subsection (5) provides that subsection (4) and the definition of *commencement day* in subsection (6) expire 3 years after the commencement day.

Subsection (6) defines *commencement day* and *organisational management responsibility* for this section.

Commencement day is defined as the day the *Discrimination Amendment Act 2022*, section 3 commences.

Organisational management responsibility in relation to an organisation or business, means responsibility for controlling or directing the organisation or business.

The purpose of the positive duty is to encourage duty holders to think proactively about their compliance obligations under the Discrimination Act and address instances of systematic discrimination within an organisation or business. It is envisioned that that this approach will facilitate greater respect for diversity and social inclusion in the community by:

- encouraging duty holders to prevent unlawful behaviour before it happens.
- making it clear that addressing unlawful conduct is a shared responsibility and that complainants should not bear the sole burden for enforcing the protections outlined in the Discrimination Act.
- encouraging organisations and other duty holders to consider the causes and impacts of discrimination.

Section 76 Exception or exemption for positive duties

Section 76 provides that the positive duties in sections 74 and 75 do not apply to the extent that a duty holder can rely on a valid exception under Part 4 or an exemption under Part 10.

For example, as a religious educational institution has an exception under section 46 allowing discrimination in employment on the basis of religious conviction, a religious school would not be required to take steps under section 75 to address a lack of religious diversity in their staff but may have a duty to take steps to eliminate discrimination relating to other protected attributes.

Clause 31 Dictionary, definition of *carer*, example

This clause substitutes the phrase ‘suffers from multiple sclerosis’ with the term ‘has multiple sclerosis’ in the example for the definition of carer. The intention of this clause is to incorporate neutral language into the example.

Clause 32 Dictionary, definition of *club*

This clause substitutes a new definition of *club* in the Discrimination Act. The intention of this clause is to align the definition with the term used in the *Disability Discrimination Act 1992* (Cth) and no longer differentiate between clubs with and without a liquor licence.

Clause 33 Dictionary, definition of *club licence*

This clause omits the definition of *club licence* as this term is subsequently no longer required due to the updated definition of *club*.

Clause 34 Dictionary, definition of *committee of management*

This clause substitutes the definition of *committee of management* in the Discrimination Act. *Committee of management* is defined in relation to a club, organisation or voluntary body, to mean the group or body of body people (however described) that manages the affairs of the club, organisation or voluntary body.

Schedule 1 Other amendments

Part 1.1 Children and Young People Act 2008

Clause 1.1 New part 19.7 Proceedings related to discrimination complaints

Clause 1.1 inserts new Part 19.7 in the *Children and Young People Act 2008*.

Section 727AA Declaration in relation to discrimination complaint

New section 727AA inserts a mechanism for managing circumstances where there is a discrimination complaint about a care and protection decision under the *Children and Young People Act 2008* and a related court proceeding simultaneously on foot.

Subsection (1) provides that section 727AA only applies if a proceeding before a court involves a matter arising under care and protection chapters of the *Children and Young People Act 2008* and the matter is also the subject of a discrimination complaint under section 23C of the Discrimination Act that is made by a party to the court proceeding.

Subsection (2) provides that the Court may, on application by a party to the proceeding or its own initiative, by order make a conflict declaration, if satisfied, that the ACAT or Human Rights Commission dealing with a discrimination complaint would interfere with the court proceeding. A note is inserted below subsection (2) which clarifies that a declaration suspends the complaint process under the *Human Rights Commission Act 2005*.

Subsection (3) requires that an applicant for a declaration must serve notice on each affected entity as soon as practicable before the application is made.

Subsection (4) empowers the court to make orders requiring a party to the proceeding to notify an affected entity about the outcome of an application, the making of a declaration or the revocation of a declaration.

Subsection (5) defines *affected entity* to mean the Human Rights Commission and the ACAT if the matter has been referred to ACAT for consideration.

Subsection (6) inserts the definition of *discrimination complaint* as defined in section 42 (1) (c) of the *Human Rights Commission Act 2005*.

The purpose of this provision is to provide a clear process for managing court proceedings and discrimination complaints which concern a related care and protection matter. The declaration process supports the appropriate administration of a discrimination complaint and also protects the prompt and proper consideration of a court proceeding which is aimed at ensuring the best interests of the child remain at the centre of all care and protection decisions.

Section 727AB Discrimination Commissioner may make submission

This section provides that with leave of the court the Discrimination Commissioner may make a submission in an application under section 727AA. The court may also grant leave subject to conditions.

The purpose of this provision is to facilitate the Discrimination Commissioner to provide visibility on the key issues in the relevant discrimination complaint to ultimately support the court to make an informed decision about whether a declaration is needed.

Part 1.2 Human Rights Commission Act 2005

Clause 1.2 New section 52 (3)

This clause inserts new section 52 (3) to provide that when considering a discrimination complaint, the commissioner may also consider whether the positive duty at section 75 has been met.

A note under this provision indicates that the Human Rights Commission may exercise their existing information gathering powers under section 73 when considering whether the positive duty has been met.

Clause 1.3 New section 52C

This clause inserts new section 52C and is consequential to clause 1.1.

This clause provides that if the Court has made a conflict declaration under section 727AA of the *Children and Young People Act 2008*, the Human Rights Commission must suspend dealing with the relevant discrimination complaint until the court either revokes the declaration or the related court proceeding is finalised.

Clause 1.4 New section 53DB

This clause inserts new section 53DB to provide that when considering a discrimination complaint, the ACAT may also consider whether the positive duty at section 75 has been met.

Clause 1.5 New section 53EA

This clause inserts new section 53EA and is consequential to clause 1.1.

This clause provides that if the Court has made a conflict declaration under section 727AA of the *Children and Young People Act 2008*, the ACAT must suspend dealing with the relevant discrimination complaint until the court either revokes the declaration or the related court proceeding is finalised.