Discussion paper

# AGD SA Review of SA's anti-vilification and anti-discrimination frameworks



Government of South Australia
Attorney-General's Department

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# Part A - Introduction

## Acknowledgement of Country

The Attorney-General's Department acknowledges and respects Aboriginal peoples as the State's first peoples and nations and recognise them as traditional owners and occupants of land and waters in South Australia. Further, we acknowledge that the spiritual, social, cultural, and economic practices of Aboriginal peoples come from their traditional lands and waters, that they maintain their cultural and heritage beliefs, languages and laws which are of ongoing importance, and that they have made and continue to make a unique and irreplaceable contribution to the State.

We acknowledge that Aboriginal peoples have endured past injustice and dispossession of their traditional lands and waters.

## 1. Review process and opportunity to comment

This review of South Australia's (SA's) anti-discrimination and anti-vilification frameworks is being undertaken by the Attorney-General's Department (SA) (AGD SA).

## Submissions and confidentiality

Submissions in response to this discussion paper can be made until **28 February 2027**.

Individuals and organisations can make a submission (confidentially if desired) by email to LLPsubmissions@sa.gov.au.

The discussion paper poses a number of questions, or options for discussion, which are set out in Appendix A.

You may respond to all questions, or only those that are of interest to you. While this paper focuses on opportunities for law reform, you may raise any additional issues and provide comments on non-legislative matters. You can also complete our survey on YourSAy – the survey is a simplified way to respond to the discussion questions posed in this paper. Visit www.yoursay.sa.gov.au.

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* and, while efforts will be made to keep the material confidential, in some circumstances, it may be disclosed under that Act.

Where the disclosure of information may identify you, attempts will be made to consult with you under the *Freedom of Information Act 1991* before the documents are disclosed.

## Abbreviations and Acronyms

A comprehensive list of the abbreviations and acronyms used in the Discussion Paper is contained at Appendix B.

## Support services

Some content in this document may be distressing for some readers.

For support, please reach out to the following services:

- Lifeline – a 24/7 personal crisis service – 13 11 14
- 1800Respect – a 24/7 domestic, family and sexual violence service – 1800 737 732
- Women's Safety Services SA – a 24/7 domestic violence crisis line – 1800 800 098
- Yarrow Place– a 24/7 rape and sexual assault service – 1800 817 421
- QLife – a 3pm to midnight LGBTQIA+ support service – 1800 184 527
- 13YARN – a 24/7 culturally safe helpline for Aboriginal and Torres Strait Islander people – 13 92 76
- BeyondBlue – a 24/7 depression, anxiety and suicide prevention service – 1300 224 636
- MensLine Australia – a 24/7 men's support service – 1300 789 978.

## 2. Background to this review

This review arises from a recommendation of the South Australian Royal Commission into Domestic, Family and Sexual Violence (RCDFSV).

The RCDFSV published its report *With courage: South Australia's vision beyond violence* (RCDFSV Report) on 19 August 2025.

Recommendation 136 of the RCDFSV Report is that 'the Attorney-General resource and undertake a comprehensive review of South Australia's anti-discrimination and anti-vilification frameworks, with a view to modernising the frameworks to ensure that they provide robust and future-focused protections against all forms of discrimination and vilification'.[1]

The context for this recommendation was information accepted by the RCDFSV:

- Certain groups are disproportionately affected by family violence due to intersecting forms of discrimination and structural inequality, such as racism, colonialism, ableism2, ageism, homophobia and religious discrimination.
- Violence against women and girls is a manifestation of inequality and discrimination based on gender, race and other power imbalances.
- The Australian government and state and territory governments have a role to play in ending violence, including through state and territory human rights and anti-discrimination bodies.

The RCDFSV undertook an analysis to determine whether SA has adequate anti-vilification laws to address gender-based hate speech. It found that SA's laws in this area are inadequate and that 'South Australia's entire anti-discrimination and anti-vilification framework is outdated, fragmented and not remotely equipped to proactively address the intersecting forms of discrimination and vilification that contribute to domestic, family and sexual violence'.

In December 2025, the SA Government published its comprehensive response to the RCDFSV Report, accepting recommendation 136.[3]

[1] https://www.royalcommissiondfsv.sa.gov.au/__data/assets/pdf_file/0012/1175997/RCDFSV-recommendations.pdf.
[2] Discrimination on the basis of disability.
[3] *Building Safer Futures*: South Australia's whole-of-government response to the RCDFSV, p 46. Further to this Government response, the South Australian Government has published a 5-year Implementation Plan 2026–2030

# 3. Scope of this review

This review considers existing anti-discrimination laws, and criminal and civil anti-vilification laws in SA and options for addressing identified gaps and deficiencies in those laws to ensure they are adequate to prevent and address discrimination and vilification in SA.

## 3.1. Anti-vilification laws

Anti-vilification laws, also called hate speech and hate crime or hate conduct laws, include both criminal offences and civil protections to deter, punish and/or provide redress for harm caused by hate speech and hate crime/conduct.

### *3.1.1. Criminal vilification*

Criminal vilification or hate speech and hate crime/conduct laws are generally reserved for the most serious incidents of vilification and as such these offences are often also called "serious vilification offences".

SA's current principal anti-vilification offence is set out in the *Racial Vilification Act 1996* (Racial Vilification Act) which criminalises vilification on the grounds of race[4] (only).

### *3.1.2. Civil vilification*

Civil vilification laws, in contrast to criminal vilification laws, afford an opportunity for individuals harmed by vilifying conduct to seek damages against a perpetrator to compensate the vilified party for the harm caused to them, in the absence of any criminal prosecution for that conduct.[5] In that way, they do not rely on prosecution authorities taking on, or approving, prosecution action.[6]

SA has civil vilification provisions, again limited to vilification on the grounds of race, contained in *Civil Liability Act 1936* (Civil Liability Act) s 73 (titled 'racial victimisation').

Part B of this paper discusses anti-vilification laws in SA.

## 3.2. Anti-discrimination laws

Anti-discrimination laws, also termed equal opportunity laws, protect people from unfair treatment on the grounds of certain characteristics, or attributes, they possess (for example, their race, disability, sex and/or gender identity). Protections under anti-discrimination laws are generally targeted towards unfair treatment in specified sectors or areas of public life, including in particular employment, education and provision of accommodation and other services

SA's principal anti-discrimination law is set out in the *Equal Opportunity Act 1984* (EO Act).

Part C of this paper discusses SA's EO Act and other applicable anti-discrimination laws.

committing to the release of this paper in 2026: https://dpc.sa.gov.au/resources-and-publications/building-safer-futures-sa-government-response-to-the-royal-commission-into-domestic-family-and-sexual-violence.

[4] 'Race' is defined in both the Racial Vilification Act s 3 and Civil Liability Act s 73 as 'nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates'.

[5] There is also a power in the Racial Vilification Act for a court to award damages of up to $40,000 against a defendant as an additional order on convicting the defendant of criminal vilification: s 6.

[6] Prosecution of SA's racial vilification offence requires the approval of the Director of Public Prosecutions: s 5.

# Part B - Anti-vilification

## 4. Criminal vilification (hate speech and hate crime/conduct) laws

### 4.1. Existing SA criminal laws applicable to hate speech/conduct

In addition to SA's existing criminal vilification offence in the Racial Vilification Act (discussed at 4.8.1), there are a number of other criminal laws in SA that offer some protection against hate speech and/or hate-motivated conduct, including where this takes the form of public marches. These offences and their effectiveness are discussed below at 4.1.1 to 4.1.5.

#### *4.1.1. Prohibition against public display of Nazi symbols or salute*

To address antisemitism, SA is one of many Australian jurisdictions to have enacted offences for public displays of Nazi symbols and the Nazi salute. Part 6A of the *Summary Offences Act 1953* (Summary Offences Act) creates offences for performing a Nazi salute or publishing a Nazi symbol, with effect from 5 August 2024. The symbols of self-professed and accepted (but reportedly disbanded) neo-Nazi groups the National Socialist Network and European Australian Movement, are prescribed by regulation also as prohibited Nazi symbols under Part 6A. The maximum penalty for this offence is $20,000 or imprisonment for 12 months.

The second reading speech for the legislation introducing the Nazi symbols offences explained that that legislation is intended to address concerns that these symbols:

> *…are associated with genocide and racial hatred and widely recognised by the general public as symbols of hate, violence and intolerance.*
>
> *This promotion of Neo-Nazi extreme far-right, or white supremacist political ideology has inherent power to invoke trauma and fear in not only the Jewish community but also other cultural groups, LGBTIQ+ communities and people with disabilities. It is also used to attempt to recruit or radicalise vulnerable individuals, with fears of further spread and escalation of harassment and, ultimately, violence.*

#### *4.1.2. Hate motivation as sentencing aggravation factor*

Section 11 of the *Sentencing Act 2017* (Sentencing Act) provides that a court must, in sentencing a defendant for a criminal offence, take into account whether the offence was wholly or partly motivated by hatred for, or prejudice against, a group of people to which the defendant believed the victim belonged (including people of a particular race, religion, sex, sexual orientation, gender identity or age, having an intersex variation or a particular disability). This is one aspect of SA's criminal vilification framework that is not limited to vilification on the grounds of race.

#### *4.1.3. Extremist material offence*

Section 37 of the Summary Offences Act creates an offence to possess, produce or distribute extremist material without reasonable excuse. 'Extremist material' means material a reasonable person would understand to be directly or indirectly encouraging or promoting terrorist acts, and material that a reasonable person would suspect has been produced or distributed by a terrorist

organisation. The penalty for this offence is a fine of up to $10 000 or imprisonment for up to 2 years.

#### *4.1.4. Offensive language/conduct*

The Summary Offences Act contains offences of behaving in an offensive manner or using offensive language (s 7) and intentionally obstructing or disturbing a religious service or persons proceeding to or from a religious service (s 7A). The latter offence attracts a maximum penalty of $10 000 or imprisonment for 2 years.

#### *4.1.5. Declared public precinct controls to protect public order*

Section 66N of the Summary Offences Act gives the Attorney-General the power to declare a defined area a declared public precinct if satisfied there is a reasonable likelihood of conduct in the area posing a risk to public order and safety. Police can exercise powers within a declared public precinct to order a person or group to leave the precinct if the police officer suspects that an offence that may pose a risk to public order and safety has, or is about to be, committed, or if the presence of the person or group poses a risk to public order and safety.

Additionally, Summary Offences Act s 58(1) creates an offence to intentionally obstruct the free passage of a public place.

### 4.2. Non-legislative SA measures against hate speech/conduct

In addition to legislative frameworks, numerous non-legislative initiatives to address vilification and discrimination are being progressed by non-justice portfolios in SA, including but not limited to:

- SA Department of Human Services Kick Out Hate Metro and Regional Community Soccer Tournaments promoting social cohesion, and other programs aimed at countering violent extremism
- Equal Opportunity SA's WE'RE EQUAL initiative directed at helping organisations and businesses create and sustain anti-discrimination environments for workers and consumers
- SA Department for Education's Safe and Supportive Learning Environments Plan of Action 2024-26, Anti-Racism Action Plan, embedding tools and frameworks to support anti-racist education across the SA education curriculum
- South Australian Public Sector Anti-Racism Strategy 2023-28 and South Australian Public Sector's Anti-Racism Action Plan 2023-28
- South Australian State Disability Inclusion Plan 2025-2029 – a whole-of-government strategy to promote inclusion, improve access to services and support the rights and participation of people with disability.

### 4.3. Recent national vilification reforms and reviews

#### *4.3.1. Responses to antisemitism*

In recent years there has been an observed increase in antisemitic incidents and hate crimes in Australia. Australian governments have been moved to address these incidents, through both legislative and non-legislative measures. This received a marked increase in focus and urgency following the fatal attack on members of the Jewish community at Bondi Beach on 14 December 2025.

### 4.3.2. Broadening coverage of vilification protections

Measures to respond to antisemitism also followed a number of comprehensive reviews of anti-vilification laws more broadly, and reforms in several Australian states arising from those reviews. Those broader reforms addressed concerns about hate speech and conduct targeting vulnerable groups more broadly, including LGBTIQA+ communities, women and disabled persons.

This growing national consensus towards improving and broadening protections against hate speech and hate conduct is underpinned also by recent independent reviews of Australian jurisdictions' vilification laws.

The RCDFSV identified the current limitation of SA's vilification law in covering vilification on the grounds of race only. It discussed research that:

- 'draws a connection between "spreading and reinforcing views of women as legitimate objects of hostility" and "other forms of gender-based harm", noting that particular groups of women are more likely to be targeted with hate speech, including Indigenous women and lesbians, and that online forms of sexist speech and harassment are increasingly being recognised as a serious problem'
- 'the "kind of harm inflicted by racial hate speech" can be caused by speech directed at other attributes, such as "gender, sexuality, disability, religion or ethnicity".'[7]

The RCDFSV also noted that alternative protections against similar conduct that might be available under anti-discrimination provisions in the EO Act, including conduct targeting a person on the basis of their gender, are limited to discrimination occurring in specified areas of public life, namely discrimination by employers, qualifying bodies, education authorities, providers of goods or services or accommodation providers. Those EO Act anti-discrimination provisions do not provide protection outside such contexts. Anti-vilification protections, in comparison, apply to all areas of public life.

A March 2026 report published by the Australian Human Rights Commission (AHRC) on its human rights review of the experience of gender diverse people in Australia found:[8]

- 'a range of research reports and scholarly articles highlight the growing threats of harassment, intimidation and abuse directed to trans and gender diverse people in Australia. Multiple submissions described a climate where many trans and gender diverse people live with fear and insecurity about personal safety'
- 'there is a direct correlation between exposure to violence and harassment and an adverse effect on health and wellbeing'.

The AHRC recommended in this report that 'Federal, state and territory governments should introduce consistent legislation to protect LGBTIQA+ people and their associates from vilification, incitement of hatred and threats of physical harm'.[9]

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission): Final Report discussed receiving evidence that people with disability are frequently subjected to abuse in public in relation to their disability and recommended that the Commonwealth *Disability Discrimination Act 1992* (Cth) (DDA) be amended to strengthen

[7] RCDFSV Final Report p 625.
[8] *Equal identities: A human rights review of the experiences of trans and gender diverse people in Australia*, AHRC pp 34-35.
[9] Ibid p 31 (Recommendation 1). Recommendations for legislative reform in Victoria to better protect against anti-LGBTIQA+ hate crime were also recently made in a September 2026 report of the Legal and Social Issues Standing Committee of the Victorian Parliament's "Inquiry into anti-LGBTIQA+ hate crimes in Victoria": https://www.parliament.vic.gov.au/get-involved/inquiries/antilgbtqiahatecrimes/reports/.

civil protection against vilification on the grounds of disability.[10] That report in turn also referred to a 2021 Report of the Victorian Legislative Assembly Legal and Social Issues Committee *Inquiry into Anti-vilification Protections*, which found persons with disability face ongoing harassment and hate conduct.[11]

The Law Reform Commission of Western Australia's (LRCWA's) 2022 final report on its review of the WA *Equal Opportunity Act 1984* (LRCWA Report**)** recommended reforms to WA's vilification laws, including to:

- broaden existing criminal vilification offences to encompass protection of a broader range of vulnerable groups, i.e. to apply to characteristics beyond race
- legislate civil, as well as criminal, protections against vilification and to locate civil vilification provisions in WA's general anti-discrimination legislation, the *Equal Opportunity Act 1984* (WA), rather than stand-alone civil vilification legislation.[12]

In 2023, the NSW Law Reform Commission (NSWLRC) commenced a review of the *Anti-Discrimination Act 1977* (NSW) (NSWLRC Review). The first consultation paper in that review canvassed possible areas of change to civil anti-vilification provisions in that legislation, including: whether these NSW provisions should be broadened to prohibit vilification on a wider range of characteristics/attributes than those already covered, such as disability and gender identity; the appropriate test for civil vilification; and the adequacy of the scope of religious vilification protections.[13]

## 4.4. SCAG national work to address antisemitism and vilification

On 21 January 2025, following a wave of antisemitic incidents including firebombing and otherwise damaging synagogues, National Cabinet met to discuss antisemitism and agreed:

- to establish a National Database of Hate Crimes and Incidents (National Database)[14]
- that Commonwealth, State and Territory Attorneys-General, under the Standing Council of Attorneys-General (SCAG) will 'work together to share best practice across jurisdictions'.

Following agreement at the 21 February 2025 SCAG meeting, Australia's Special Envoy to Combat Antisemitism (Special Envoy), Ms Jillian Segal AO was invited to attend a special meeting of SCAG Senior Officials on 20 March 2025 to discuss her proposals for reform to address antisemitism.

The Special Envoy and the eSafety Commissioner, Ms Julie Inman Grant PSM, also delivered a presentation to the SCAG meeting on 27 February 2026 regarding measures to address online antisemitism. Participants at this meeting discussed measures to prevent and mitigate hate speech on social media and online platforms, and opportunities for further national collaboration.

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[10] https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Volume%204%2C%20Realising%20the%20human%20rights%20of%20people%20with%20disability.pdf at p 93.
[11] Ibid pp 320-321.
[12] LRCWA, *Review of the Equal Opportunity Act 1984 (WA), Project 111 Final Report*, May 2022, Recs.111 to 116. On 21 October 2026, the WA Government introduced the Equal Opportunity Bill 2026 to modernise its anti-discrimination legislation, including to allow a person to make a complaint to the Equal Opportunity Commissioner for vilification based on disability, race, religion, sexual orientation, gender identity, or sex.
[13] NSW Law Reform Commission, Unlawful Conduct Consultation Paper 24 (NSWLRC) https://lawreform.nsw.gov.au/projects/anti-discrimination-act-review.html. This NSWLRC project followed a completed project in 2024 to review and report on the effectiveness of the serious vilification offence in s 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW.
[14] Launched on 24 December 2025 by the Australian Institute of Criminology: https://www.aic.gov.au/statistics/national-hate-crimes-database.

States and territories continue to work together to share best practice information and experiences with legislative responses to antisemitism.

## 4.5. Calls for further action to address antisemitism and vilification

### *4.5.1. Special Envoy's Plan*

On 10 July 2025, the Special Envoy published the *Special Envoy's Plan to Combat Antisemitism* (Special Envoy's Plan).[15] The Special Envoy's Plan recommended, among other matters, that the Special Envoy, with the support of government, review, and where appropriate, strengthen federal, state and territory legislation addressing antisemitic and other hateful or intimidating conduct.

In response to these proposals as well as antisemitic incidents in their particular states, and more recently as urgent responses to the Bondi attack, several Australian jurisdictions have recently amended their anti-vilification legislation (in many cases applicable to hate speech and hate crimes generally, and not only antisemitic conduct) (see detailed discussion at 4.6).

### *4.5.2. RCDFSV*

As discussed earlier in this paper, in SA the RCDFSV recommended a comprehensive review of SA's anti-discrimination and anti-vilification frameworks, with a view to modernising the frameworks to ensure that they provide robust and future-focused protections against all forms of discrimination and vilification.[16] In respect of vilification protections, the RCDFSV found that:[17]

- SA's anti-vilification laws are outdated, fragmented and too narrow in relating to race only, whereas laws are needed to protect against harm caused by speech directed at other attributes such as sexuality, disability, religion or ethnicity
- SA's anti-vilification laws under the Racial Vilification Act have not been 'engaged in the nearly 25 years since their enactment' and, according to submissions received by the RCDFSV, are limited in enforceability as well as scope.

### *4.5.3. Royal Commission on Antisemitism and Social Cohesion*

On 9 January 2026, the Royal Commission on Antisemitism and Social Cohesion (Antisemitism Royal Commission) was established, with the Hon Virginia Bell AC SC appointed as the Royal Commissioner. The Antisemitism Royal Commission published an interim report on 30 April 2026[18] and is due to hand down a final report by 18 December 2026. Evidence given in public to the Antisemitism Royal Commission included reports of widespread and increasing incidents of antisemitism experienced by members of the Jewish community in Australia in recent years.[19]

### *4.5.4. Inquiry into racism and violence towards First Nations people*

The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs commenced an inquiry in March 2026 into 'racism, hate and violence' targeting Australia's First Nations people.[20] This inquiry follows a referral from the Indigenous Australians Minister in the wake of the alleged attempted terrorist attack at this year's Invasion Day Rally in Perth, and last year's attack on

[15] https://www.aseca.gov.au/sites/default/files/2025-07/2025-aseca-plan.pdf.
[16] RCDFSV Final Report Recommendation 136.
[17] RCDFSV Final Report p 625.
[18] That interim report, considering any issues requiring urgent attention, did not identify need for urgent legislative amendment: https://asc.royalcommission.gov.au/publications/royal-commission-antisemitism-and-social-cohesion-interim-report.
[19] Website of the Royal Commission on Antisemitism and Social Cohesion: https://asc.royalcommission.gov.au/.
[20]https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/Responsestoracism.

Indigenous protest camp, Camp Sovereignty by members of the neo-Nazi National Socialist Network. This inquiry received written submissions to June 2026 and held public hearings through May to August 2026.

## 4.6. Recent interstate anti-vilification reforms

Recent Commonwealth and interstate reforms directed at addressing hate speech and hate crime/conduct are discussed and considered below.

### *4.6.1. Prohibiting antisemitic phrases*

The Queensland Government recently enacted legislation to ban the public use and recitation of the phrases 'globalise the intifada' and 'from the River to the Sea'.[21] This followed calls from the local Jewish community in the wake of the Bondi attack and other antisemitic attacks and incidents and referral of a similar proposal by the NSW Government to the NSW Legislative Assembly Committee on Law and Safety for inquiry.[22]

### *4.6.2. Prohibiting flags and symbols of 'hate groups'*

Several Australian jurisdictions have recently enacted laws to ban public displays of the flags and symbols of listed terrorist organisations as part of measures to combat hate speech:

- Commonwealth Criminal Code (Cth Criminal Code) ss 80.2H-80.2JA create offences for the public display or trade of prohibited symbols in certain circumstances. This includes symbols used by terrorist organisations, state sponsors of terrorism and listed hate groups as well as the making of the Nazi salute and the display or trade of specified Nazi symbols. The maximum penalty for the public display of a prohibited terrorist organisation symbol is 5 years imprisonment. These Cth Criminal Code offences apply to conduct in SA and can be enforced by South Australia Police (SAPOL) pursuant to powers contained in the *Crimes Act 1914* (Cth).

  Part 5.3B of the Cth Criminal Code provides a framework to list organisations as prohibited hate groups where they engage in or advocate hate crimes on the basis of race, or national or ethnic origin. A hate crime is defined for this part as conduct engaged in because the targeted person or group is distinguished by race or national or ethnic origin, and the conduct would constitute an offence under subdivision C of division 80 of the Cth Criminal Code (other than ss 80.2, 80.2C or 80.2D), or involve publicly inciting hatred of another person where that conduct would constitute an offence against a provision of Commonwealth, state or territory law, or the conduct would cause serious harm, serious damage to property, death, endangerment to life or serious risk to the health or safety of the public. Once an organisation is listed, it is a criminal offence to direct the activities, be a member, recruit for, train, provide or receive funds, or provide support, for a prohibited hate group. The maximum penalty for these offences ranges from 7 to 15 years imprisonment. On 6 March 2026, the Australian Government listed radical international Islamist group Hizb ut-Tahrir as the first prohibited hate group.

[21] *Criminal Code Act 1899* (Qld) s 52DA, inserted March 2026 by *Fighting Antisemitism and Keeping Guns out of the Hands of Terrorists and Criminals Amendment Act 2026* (Qld).
[22] 'River to the Sea' Chant Outlawed, *The Australian*, 9 February 2026. The NSW Legislative Assembly Committee on Law and Safety in relation to its 'Inquiry into Measures to prohibit slogans that incite hatred': https://www.parliament.nsw.gov.au/parliamentary-business/committees/inquiry-details?committeeInquiryId=3167.

On 15 May 2026, the Australian Government listed self-professed neo-Nazi group, White Australia, formerly known as the National Socialist Network, NSN, European Australia Movement and EAM, as a prohibited hate group.[23]

- Queensland Criminal Code s 52D provides that a person who publicly distributes, publishes or publicly displays a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, commits an offence, unless the person has a reasonable excuse (maximum penalty: 70 penalty units or 6 months imprisonment).

  Under s 52C, a 'prohibited symbol' is a symbol or image prescribed by regulation or that so nearly resembles a symbol or image prescribed by regulation that it is likely to be confused with or mistaken for that symbol. The *Criminal Code (Prohibited Symbols) Regulation 2024* (Qld) prescribes a number of Nazi and terrorist organisation related symbols as prohibited symbols, having been amended on 13 February 2026 to include several Nazi symbols in addition to the previously prescribed Hakenkreuz as well as 10 symbols linked to groups listed by the federal government as terrorist organisations or as a state sponsor of terrorism, including Hezbollah, Islamic State, Hamas, and the Islamic Revolutionary Guard Corps.

- Victorian *Summary Offences Act 1966* (Vic) Part 1 Div 4D - since 4 March 2026 - prohibits public display of terrorist organisation symbols (where 'terrorist organisation' is a 'listed terrorist organisation' in Part 5.3 of Chapter 5 of the Cth Criminal Code) with maximum penalties of 120 penalty units or 12 months or both.

- NSW *Crimes Act 1900* (NSW) s 93ZB makes it an offence to knowingly display by public act and without reasonable excuse a prohibited terrorist organisation symbol. The maximum penalty for an individual is 200 penalty units or 2 years imprisonment or both. **'**Prohibited terrorist organisation symbol' has the same meaning as in the Cth Criminal Code, s 80.2E(3) (prohibited symbols – which refers in turn to listed terrorist organisations under Part 5.3 of Chapter 5 of the Cth Criminal Code).

## 4.7. Consideration of reforms to prohibit phrases, flags, symbols

### *4.7.1. Prohibition of phrases*

The Jewish community has expressed concerns about recent sustained incidents of protestors and others publicly reciting phrases such as 'globalise the intifada'. The concern is that the sustained public use of these slogans has the capacity to incite violence and other antisemitic incidents against Jewish people in Australia.

Legislating to prohibit specified phrases widely argued to be antisemitic, such as 'globalise the intifada', is however recognised as carrying risks. Aside from political criticism about limiting free speech, such legislation could give rise to constitutional challenge for impermissibly burdening the implied freedom of political communication under Australia's Constitution, including on the basis that there are existing laws that could achieve the same purpose but are less burdensome on the implied freedom.

[23] A High Court challenge to the validity of Part 5.3B of the Cth Criminal Code by the White Australia Party Inc. is currently awaiting judgment.

The Constitution implicitly protects the freedom of communication about matters of government and politics, and in doing so places a limit on legislative power. The freedom of political communication is an implication arising from the system of both representative and responsible government, which the Constitution creates.

A law which effectively burdens the freedom of political communication will be invalid if it is not imposed for a legitimate purpose, or if it is imposed for a legitimate purpose but is not justified or, finally, if the law is not reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This latter proportionality test asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary' in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom.

Legal experts have commented that in any constitutional challenge to legislation banning phrases, a law banning particular political slogans or chants may not be regarded as 'reasonably necessary' as part of the proportionality test if there are existing laws that achieve the same purpose but are less burdensome on the implied freedom.[24] The constitutional risks of legislating to prohibit phrases were highlighted in submissions published by the NSW Legislative Assembly Committee on Law and Safety in relation to its Inquiry into Measures to Prohibit Slogans that Incite Hatred, referred to the committee by the NSW Government as part of that government's response to the Bondi Attack. The validity of a recently introduced Queensland law banning the use of prescribed prohibited expressions in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended has been challenged in the High Court.[25]

The use of the phrase 'globalise the intifada' may already be contrary to the criminal law in both South Australia and the Commonwealth, depending on the factual circumstances in which the phrase is used, for example, the offence of racial vilification in s 4 of the Racial Vilification Act, the disorderly or offensive conduct or language offence in s 7(1) of the Summary Offences Act, or the indecent or offensive material offence in s 33 of the Summary Offences Act.

There are other offences that could apply to conduct involving the making of threats however, generally the offences require specificity in the threat and not merely conduct amounting to 'sounding off'.[26] Section 19 of the *Criminal Law Consolidation Act 1935* (CLCA) provides for offences of unlawful threats. It is an offence for a person to threaten to kill or endanger the life of another, intending to arouse fear that the threat will be, or is likely to be, carried out or being recklessly indifferent to whether that fear is aroused. The maximum penalty is 10 years for a basic offence or 12 years for an aggravated offence.

### *4.7.2. Prohibition of flags and terror symbols, protest restrictions*

Moving beyond now widely adopted legislation to prohibit well recognised Nazi symbols, several Australian jurisdictions have recently enacted laws to ban public displays of the flags and symbols of listed terrorist organisations as part of measures to combat hate speech. Several jurisdictions have also moved to legislate restrictions on protest activities, including to disrupt the public activities of neo-Nazi groups.[27]

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[24] For example, see constitutional law expert, Prof. Anne Twomey's submission to the NSW Legislative Assembly Committee on Law and Safety in relation to its 'Inquiry into Measures to prohibit slogans that incite hatred': https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=3167#tab-reportsandgovernmentresponses.
[25] *Ismail & Ors v State of Queensland*, No B55/2026 (High Court of Australia).
[26] *Carter v R* [1994] SASC 4498.
[27] E.g. in Victoria the *Justice Legislation Amendment (Police and Other Matters) Act 2025* (Vic) to create offences for failing to comply with a police direction to remove a face covering and for disturbing, or assaulting or harassing a person attending or leaving, a religious worship meeting) and NSW *Terrorism and Other Legislation Amendment Act 2025*

Prohibiting the display of flags and symbols arguably carries similar political risks of criticism for limiting free speech and similar legal risks of invalidity due to impermissibly burdening the implied freedom of political communication in the Constitution as discussed in relation to prohibiting phrases (see 4.7.1 above).

The ability of other content-neutral laws to address the relevant concerning conduct may also be relevant to an assessment of the constitutional risks of this measure, as with any proposal to ban phrases. Without carefully crafted defences, innocent use of prohibited symbols, including for genuine/legitimate political discussion, education, religious and artistic purposes, etc would be caught by any ban.

A further risk of prohibiting phrases, and further symbols, is that such measures may have the result of further degrading, rather than improving, social cohesion. Blunt measures such as these may fuel resentment within sectors of the community and increase the risks of radicalisation and violence.

Noting the application and enforceability in SA of the Cth Criminal Code offences for the public display of prohibited terrorist organisation symbols, and that neither such a measure, nor laws prohibiting certain phrases, are strictly within the scope of this Review, this paper does not directly seek to solicit discussion on those measures.

## 4.8. Criminal/serious vilification law - scope and enforceability

### *4.8.1. Racial Vilification Act*

Section 4 of the Racial Vilification Act provides that:

> *a person must not, by public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by threatening physical harm to the person, or members of the group, or to property of the person or members of the group, or by inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.*

The maximum penalty for this criminal vilification offence is $25,000 for a body corporate; $5,000, or imprisonment for 3 years, or both for an individual.

The RCDFSV observed a lack of any past prosecution of SA's existing racial vilification offence.[28] Public comments by SA Jewish community leader, Norman Schueler indicate that the Jewish community seeks for the bar to prosecution of this offence to be lowered for it to function as an effective deterrent to antisemitic vilification.[29]

Several Australian jurisdictions have recently implemented reforms to their serious vilification offences to respond to antisemitism, including on the basis that anti-vilification offences in the form such as that contained in SA's Racial Vilification Act are rarely if ever successfully prosecuted.

(NSW) (noting that certain of these were declared invalid by the NSW Court of Appeal on 16 April 2026 in *Jarrett v State of New South Wales* [2026] NSWCA 62).

[28] RCDFSV Final Report p 625. Although the National Hate Crimes Database records one charge for racial vilification was since laid in 2025.

[29] Mr Schueler is reported to have stated: 'the bar "has to be brought down" to make prosecution easier. I think that has been a problem in the past, a frustration for the authorities from my experience': 'Liberal Party vows to ban 'globalise Intifada' slogans in SA', *Advertiser*, 12.1.26.

### *4.8.2. Lower proof threshold for vilification offences*

As is the case in several other jurisdictions, the existing SA Racial Vilification Act offence requires proof of a threat of, or incitement of others to commit, violence or property damage towards a person or group on the grounds of their race.

Some jurisdictions now criminalise at a lower bar of incitement to hatred, rather than, or as well as, threat or incitement of violence.

Some jurisdictions incorporate lower proof thresholds (e.g. recklessness) for elements of their offences (or as alternative forms of their offences and attracting lower penalties).

The concern about enforceability, and hence strength of existing legislative protection, appears to have prompted the NSW (since 25 August 2025) and Victorian (since 20 September 2025) governments to introduce new anti-vilification offences that do not require incitement of violence against a racial group (or other protected groups in the case of Victoria), but rather incitement of hatred against (or serious contempt for, revulsion towards or severe ridicule of, in the case of Victoria) that group.

That form of 'incitement of hatred' offence, with a very severe maximum penalty of 14 years imprisonment, has existed in the WA Criminal Code since 2004, apparently introduced in response to a wave in racism targeting the Arab and Muslim communities in that State after the events of the '9/11' 2001 attacks on the World Trade Centre in New York.[30]

However, notwithstanding these interstate precedents, such laws have been the subject of significant criticism, particularly about their potential to negatively impact freedom of speech. That criticism reportedly contributed to the Australian Government abandoning the inclusion of an incitement to hatred offence in its post-Bondi Combatting Antisemitism, Hate and Extremism Bill passed in December 2025.

Aside from criticism centred on risks to free speech, other past criticisms of an 'incitement of hatred' offence include:

- risk that expanded vilification offences could capture interactions between First Nations people and the police. Analogies were drawn with the disproportionate impact of offensive language offences on this cohort
- the criminal law is a "blunt instrument" for combatting vilification and for achieving or maintaining social cohesion. Better, non-legal mechanisms for preventing and addressing serious vilification could include: media regulation and/or social media regulation; community education and engagement; government investment in anti-racism strategies; targeted police training and education; and bench books on vilification to guide judicial officers
- criminalisation should be a "last resort", reserved for the most serious instances of vilification.[31]

It has also been argued that creating a new offence may misdiagnose the problem with the existing vilification offence and that a lack of prosecutions are potentially instead attributable to:

[30] Criminal Code Amendment (Racial Vilification) Bill 2004 Second Reading speech (Dr GI Gallop, WA Hansard 18/8/04). According to this second reading speech, those reforms followed 1989 reforms to introduce the still-in-operation WA offences of dissemination of threatening or abusive written or pictorial material, which were introduced in response to a racist and antisemitic poster campaign by the Australian Nationalists Movement.
[31] NSW Law Reform Commission, *Serious Racial and Religious Vilification*, *Report 151*, September 2024.

- there being a range of other offences that already cover hate-based conduct, including offences of intimidation, assault, and the Commonwealth carriage service offences, which police may be charging in preference to anti-vilification offences, including because they have a higher maximum penalty and may be more familiar and simpler to prove
- victims being reluctant to report or support prosecution, including out of fear of being further victimised and/or
- inadequate public education and awareness about hate crime, and inadequate training for police officers to recognise, record and investigate potential instances of serious vilification.

### *4.8.3. Alternative or additional criminal law options*

Consistent with the argument that lack of enforcement of the existing racial vilification offence could be due to a preference for charging other existing offences such as intimidation and assault offences, an alternative measure to increase protection against hate conduct could be to provide for aggravation of existing offences where they are proven to have a hate motivation. Under this approach aggravated, or alternative, forms of relevant existing offences (such as assault and property damage offences) would be enacted, for which higher maximum penalties would apply where proved that the offence was motivated by hatred towards a racial group.

This option also has the benefit of prompting police to be alive to, and gather evidence of, any hate motivation at the time of investigating those offences, which should increase the prospects of securing a conviction for the aggravated form of the offence. Under this option, also, the prevalence of hate motivated offences could be recorded and tracked, including in the new National Database (discussed above at 4.4).

The creation of aggravated offences where motivated by hatred was recommended by a recent report of the Legal and Social Issues Standing Committee of the Victorian Parliament's "Inquiry into anti-LGBTIQA+ hate crimes in Victoria", including in the wake of findings by the Inquiry about insufficient reporting and data about the prevalence of anti-LGBTIQA+ hate crimes.[32]

This option would not, however, overcome the challenge of proving beyond reasonable doubt that conduct is hate-motivated.

Both the Special Envoy and the Islamic Society of South Australia (ISSA) have referenced awareness of incidents of Antisemitism and Islamophobia in which incidents that were plausibly hate-motivated were charged as generic offences.

ISSA cited an incident in which a Syrian woman wearing the hijab and her seven children were racially abused and threatened. The incident was classified as a traffic incident.

Further options to address concerns about lack of enforcement of the racial vilification offence could include:

- reducing the fault element for the result of an act to recklessness, such that a person merely needs to be reckless as to whether force or violence against a racial group would be carried out as a result of their actions, rather than proving that the defendant intended for it to occur. Western Australia (WA) has separate offences for engaging in public conduct *intended* to create, promote or increase animosity (*Criminal Code Act 1913* (WA) s 77) and

[32] Finding 7 and recommendation 17 in Report of the Legal and Social Issues Standing Committee of the Victorian Parliament's "Inquiry into anti-LGBTIQA+ hate crimes in Victoria": https://www.parliament.vic.gov.au/get-involved/inquiries/antilgbtqiahatecrimes/reports/.

engaging in conduct *likely* to create, promote or increase animosity (s 78). Several other jurisdictions have recklessness as a fault element in their equivalent offences[33]; and/or

- creating a new offence with that recklessness element – and a lower maximum penalty – while retaining a higher penalty form of the offence for where there is intent to incite, similar to the WA approach.[34]

If proceeding with any of the above discussed vilification offence reforms, care will need to be taken with drafting to guard against risks of constitutional invalidity for impermissibly burdening the implied freedom of political communication. Further, consideration should be given to whether any new offence not requiring proof of intent should be accompanied by carefully crafted defences, including for genuine/legitimate political discussion, education, religious and artistic expression, etc.[35]

It is anticipated that the Antisemitism Royal Commission, established by the Australian Government on 9 January 2026, and potentially also the federal parliamentary inquiry launched in March 2026 into racism, hate and violence towards First Nations people, may examine legislative options. Recommendations arising from that Royal Commission and federal parliamentary inquiry could also inform the development of legislation following this review.[36]

### *4.8.4. Extending scope beyond racial vilification*

In any reforms to criminal vilification laws as discussed above, consideration should also be given to broadening the application of these protections to vulnerable groups with characteristics beyond only race, particularly in view of existing broader vilification provisions in other Australian jurisdictions and recent arguments arising from:

- the RCDFSV and AHRC *Equal Identities Report* - for vilification laws to be extended to cover vilification on the basis of gender, gender identity and sexuality.[37]
- the Disability Royal Commission recommendation to expand state criminal vilification laws to cover disability.[38]

The Commonwealth and several other Australian jurisdictions have serious vilification offences that apply to a wide range of groups, including groups distinguished by religious belief, disability, sex and gender identity, and not only on the grounds of race.[39]

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[33] Criminal Code (Cth) ss 80.2A, 80.2B, 80.2BA, 80.2BB (person may commit an offence of advocating violence if they intentionally advocate the use of force or violence against a group and they are reckless as to whether the force or violence would occur); *Crimes Act 1900* (NSW) s 93Z makes it an offence for a person to, by public act, intentionally or recklessly threaten or incite violence towards a protected person/ group; Criminal Code (Qld) s 52A provides that a person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a protected person or group; *Criminal Code 2002* (ACT) s 750 makes it an offence for a person to intentionally carry out a threatening act and be reckless about whether the act incites…etc.

[34] WA has lower-level/lower penalty forms of its anti-vilification offences for where conduct is 'likely' to promote animosity, or 'likely to harass' as well as higher penalty versions of those offences requiring 'intent': *Criminal Code Act 1913* (WA) ss 77, 78.

[35] See discussion below at 4.8.5.

[36] See discussion of these inquires above at 4.5.3 and 4.5.4.

[37] RCDFSV Final Report p 625; AHRC *Equal Identities* Rec. 1. See also media stories of concern about inadequate protections in SA against vilification targeting the LGBTIQA+ community: https://www.indailysa.com.au/news/opinion/2026/03/10/couple-bashed-gay-marriage-and-beastiality-comments-reflect-daily-hate-in-sa.

[38] Rec. 4.30(b).

[39] Criminal Code (Cth) ss 80.2A, 80.2B, 80.2BA, 80.2BB (race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin, political opinion); *Crimes Act 1900* (NSW) s 93Z (race, specific religious belief or affiliation, sexual orientation, gender identity, intersex status, HIV/ AIDS status), Criminal Code (Qld) s 52A (race, religion, sexuality, gender identity); *Crimes Act 1958* (Vic) ss 195N, 195O (race, religious belief or activity, disability, gender identity, sex, sex characteristics, sexual orientation, association with person with protected attribute);

A wider construction that includes religion as a protected attribute for the purposes of serious criminal vilification could also overcome arguments that race does not adequately cover Muslims and protect against Islamophobia.[40] ISSA has documented a recent rise in incidents of Islamophobia and attacks on mosques and other Islamic community property in SA.[41] The Commonwealth, NSW, Queensland, Victorian and ACT vilification offences apply to vilification on the grounds of religion (or 'religious belief or activity' or 'religious conviction').

The NSW approach is to have separate offences for:

- incitement of hatred, which applies to the ground of race only and attracts a maximum penalty of 2 years imprisonment and/or a fine[42]
- incitement of violence, which applies to a broader range of protected attributes, or characteristics: race, specific religious belief or affiliation, sexual orientation, gender identity, intersex status, HIV/AIDS status, and attracts a maximum penalty of 3 years imprisonment and/or a fine.

Conversely, in Victoria, which now criminalises incitement of hatred (with a lower maximum 3 years imprisonment penalty) as well as a separate offence of threatening physical harm or property damage (with a higher maximum 5 years imprisonment penalty), both offences apply to the same broader list of protected groups.

### *4.8.5. Need for defences or exclusions?*

If looking at reforming SA's criminal vilification laws, consideration should be given to exemption provisions to allow for religious, political and artistic expression as necessary to ensure that the provisions do not impinge on the implied freedom of political communication. In that respect it is noted that the NSW incitement of hatred offence specifies that that offence 'does not apply to an act that consists only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion'.[43] WA applies a defence for fair reporting and genuine academic, artistic, religious, scientific or other public interest expression to its *reckless* incitement of hatred offence.[44]

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*Criminal Code 2002* (ACT) s 750 (disability, gender identity, HIV/AIDS status, race, religious conviction, sex, sex characteristics, sexuality, association with person/group with protected attribute).

[40] In the Federal Court case of *Faruqi v Hanson* [2024] FCA 1264, Stewart J found that Senator Pauline Hanson's tweet: 'piss off back to Pakistan' directed towards Senator Mehreen Faruqi had violated s 18C of the *Racial Discrimination Act 1975* (Cth), providing it is unlawful to publicly engage in conduct that is likely to 'offend, insult, humiliate or intimidate based on race, colour or national or ethnic origin'. Stewart J was unable on the available evidence to make a finding that Muslims in Australia are an ethnic or ethno-racial group [278], nor that they are protected on that basis [280], separately from where race or national or ethnic origin is found to ground the conduct complained of, as was found in this case [286]. This decision was affirmed on 27 July 2026 by the Full Court of the Federal Court in an appeal by Senator Hanson: *Hanson v Faruqi* [2026] FCAFC 96. Special leave has been granted by the High Court to appeal that decision.

[41] ISSA identified 13 incidents documented by the media between 2013 and 2026 and data collected by the Muslim community indicating a further 80 Islamophobia incidents recorded between June 2022 and March 2026 alone — rising from 2 incidents in 2022 to 41 in 2025, with 15 incidents in the first quarter of 2026.

[42] *Crimes Act 1900* (NSW) s 93ZAA. A recent review of NSW criminal law hate speech protections by former NSW Supreme Court Justice, Hon. John Sackar AM KC, recommended expansion of NSW's racial hatred offence to other protected attributes. However, the NSW Government's 4 August 2026 response to this review declined to accept that recommendation, stating "the Government's view is that expanding the racial hatred offence to cover other attributes raises complex questions about freedom of expression, freedom of religion, and the consistent application of the criminal law across the community": https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/review-of-criminal-law-protections-against-incitement-of-hate.html.

[43] *Crimes Act 1900* (NSW) s 93ZAA(2).

[44] *Criminal Code Act 1913* (WA) s 80G, noting similar defences are contained in SA's existing civil racial victimisation ("inciting hatred") provision in s 73 of the Civil Liability Act.

### 4.8.6. Increase penalties for serious vilification offence(s)?

A comparison with interstate serious vilification offences also suggests that higher maximum penalties may be warranted for this offence in SA, including as part of restructuring serious vilification offences to include incitement of hatred offences and/or separate offences with lower proof thresholds such as recklessness for elements of the offence(s). For example, the Commonwealth and Victoria have enacted forms of serious vilification offences that attract a maximum penalty of five years imprisonment.[45]

### 4.8.7. Options for Discussion



1. Should SA introduce a form of vilification offence with a reduced fault element for the result of an act, such that a person merely needs to be reckless as to whether force or violence against a protected group would be carried out as a result of their actions, rather than proving that the defendant intended for violence to occur?

2. Should SA introduce an offence of inciting hatred, as distinct from inciting and/or threatening violence?

3. If SA introduces either an offence of inciting hatred and/or a recklessness element to vilification offences as queried above, are new exclusions or defences required to protect against free speech? For example, is a defence required for acts that consist only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion? Is a wider defence required for fair reporting and genuine academic, artistic, religious, scientific or other public interest expression?

4. Should anti-vilification offences, including any new incitement of hatred offence, apply to incitement of violence and/or hatred on the basis of a broader range of characteristics/attributes, including:
    a. race
    b. religion
    c. disability
    d. gender identity
    e. sex
    f. sex characteristics
    g. sexual orientation?

5. Should any broader vilification offences be inserted into the *Criminal Law Consolidation Act 1935* rather than retaining standalone anti-vilification legislation?

6. Should SA introduce 'aggravated forms' of existing criminal offences, such as intimidation, assault and property damage offences, so that higher maximum penalties apply for those offences where it is proved that commission of the offence was motivated

[45] Criminal Code (Cth) ss 80.2A, 80.2B, 80.2BA, 80.2BB and 80.2BE (maximum penalty of 5 years imprisonment, or 7 years if the conduct would also threaten the peace, order and good government of the Commonwealth); *Crimes Act 1958* (Vic) s 195O.

by hatred towards a protected group? Could this lead to more successful prosecutions of incidents of hate crime/conduct and/or better investigation and reporting of their prevalence?

7. Do the maximum penalties for serious vilification need to be increased above the existing 3 years imprisonment and why? Should any increase only apply where the offence comprises intentional incitement or threats of violence towards a protected group?

# 5. Civil vilification laws

## 5.1. SA's civil racial vilification provisions

Civil vilification remedies can be more accessible to members of the public as they have a lower standard of proof, cover conduct in public that is derogatory but does not incite violence, and complaints can be brought by individuals rather than needing police to charge and prosecute the conduct and the Director of Public Prosecutions to approve criminal charges (as is currently required by s 5 of the Racial Vilification Act).

Civil vilification laws also provide an opportunity for civil compensation in relation to public vilification against certain groups of people that does not necessarily amount to discrimination against a particular person (although it may). For example, SA's civil racial victimisation provisions may apply to a person who, at a public rally, makes highly derogatory or incendiary remarks about persons of a particular race generally, although the conduct is unlikely to allow a discrimination complaint to be made to the Commissioner for Equal Opportunity (the Commissioner) under the EO Act.

SA's civil racial vilification provisions are in the *Civil Liability Act 1936* under s 73 (titled racial victimisation).[46]

The s 73 civil liability protection against racial victimisation applies to:

> *a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—*
>
> *a) publication of a fair report of the act of another person; or*
>
> *b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege[47] in proceedings for defamation; or*
>
> *c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions).*

## 5.2. Approach to civil vilification as stand-alone tort

SA is the only Australian jurisdiction that treats vilification as a stand-alone tort. This means that in SA persons claiming to have been harmed by vilification must take legal action to sue the alleged perpetrator in the courts.[48]

All other Australian jurisdictions with civil vilification protections[49] include these within their anti-discrimination legislation (i.e. their equivalent to SA's EO Act). This means that complaints about vilification can be made to interstate equivalents of SA's Commissioner for Equal

[46] Noting that a court is also able to award damages up to $40,000 against a defendant in criminal proceedings for racial vilification under s 6 of SA's Racial Vilification Act.
[47] Absolute privilege protects individuals who reveal personal information about another person in the course of public forums such as parliament and proceedings in a court or tribunal.
[48] Given the $40,000 cap on damages in s 73 these actions would be taken in the Magistrates Court.
[49] WA's vilification protections are currently limited to criminal vilification offences. However, the LRCWA Final Report on the Review of the EO Act, recommended that the EO Act include anti-vilification provisions (rec. 111). The Cook Government is reported to be working on legislation to implement recommendations of the LRCWA Report: https://rationalist.com.au/redrafting-of-wa-equal-opportunity-laws-continuing-as-matter-of-priority-says-attorney-general/#:~:text=In%20October%20last%20year%2C%20your,exemptions%20to%20anti%2Ddiscrimination%20laws.

Opportunity. As with complaints of discrimination, those statutory bodies will conciliate and attempt to resolve vilification complaints. If those statutory bodies are unable to resolve a vilification complaint, they can refer it to their civil and administrative tribunals which can make binding orders, generally orders including:

- compensation
- orders to refrain from the vilifying conduct complained of
- orders to take certain remedial actions
- orders for publication of an apology or a retraction.

Requiring people who have suffered vilification to take private legal action in court to resolve their complaint likely means many people are left without protection since they cannot afford the costs of going to court. In comparison, complaints to the Commissioner for Equal Opportunity and equivalent interstate statutory bodies do not require payment of a fee by the complainant.

This current requirement in SA to take private legal action under our civil vilification provisions also reduces the opportunity for systemic change to offending behaviours, for example, to address repeated conduct by an organisation, or repeated targeting of a particular group of vulnerable people, that is not limited to an isolated incident of vilification.

There can be difficulty identifying the appropriate litigant for the vilification claim as every person in the relevant class cannot practically sue and be compensated. Currently, the SA racial victimisation provisions allow action by a person who suffers 'detriment' as a result of the act, which means injury, damage, loss, intimidation, harassment or humiliation. It does not allow representative actions by groups. Before a court awards damages for an act of racial victimisation under these provisions, the court must take reasonable steps to ensure that 'all persons who may have been harmed by the act are given a reasonable opportunity to claim damages in the proceedings, or take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court'.[50]

Other jurisdictions allow representative complaints to various extents (because their vilification regime is under their discrimination complaints regime).

## 5.3. Complaint under *Racial Discrimination Act 1975* (Cth)

In practice, people in SA who have been harmed by racial vilification may be able to make a complaint to the AHRC under s 18C of the *Racial Discrimination Act 1975* (Cth) (RDA), which provides that it is unlawful for someone to do an act that is reasonably likely to 'offend, insult, humiliate or intimidate' someone because of their race, colour or national or ethnic origin.[51]

Even if there is the possibility of taking civil action for vilification under Commonwealth law by complaint to the AHRC, Commonwealth civil vilification protection is limited, as in SA, to vilification on the grounds of race.[52]

## 5.4. Broaden beyond ground of race to other attributes

Other Australian jurisdictions with civil vilification provisions protect against vilification on the grounds of a broader range of characteristics, or attributes, and not just race (and, in the case of

[50] Civil Liability Act s 73(6).
[51] The AHRC has the power to investigate and attempt to resolve the issue via a conciliation process. If the complainant is not satisfied with the outcome from the conciliation process, they can take the matter to the Federal Court of Australia or the Federal Circuit and Family Court of Australia.
[52] Race, colour or national or ethnic origin under RDA s18C; 'Race' defined in Civil Liability Act s 73 as 'nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates'.

Victoria's new provisions, and in the Northern Territory, on the basis of having an association with a targeted person or group):

| Jurisdiction | Primary civil vilification provision | Protected attributes (civil) |
|---|---|---|
| SA | *Civil Liability Act 1936* (SA) s 73 | Race (nationality, country of origin, colour, ethnic origin) |
| ACT | *Discrimination Act 1991* (ACT) s 67A | Disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics or sexuality |
| CTH | *Racial Discrimination Act 1975* (Cth) s18C | Race, colour or national or ethnic origin |
| NSW | *Anti-Discrimination Act 1977* (NSW) Pts 3A & 4BA | Race, religion, homosexuality, transgender status, HIV/AIDS status |
| NT | *Anti-Discrimination Act 1992* (NT) s 20A | Broad range of attributes including race; language, including signed language; sex; gender identity; sexual orientation; age; relationship status. |
| Queensland | *Anti-Discrimination Act 1991* (Qld) s 124A | Race, religion, sexuality, gender identity, sex characteristics |
| TAS | *Anti-Discrimination Act 1998* (TAS) s19 | Race, disability, sexual orientation or lawful sexual activity, religious belief or affiliation or religious activity, or gender identity or sex characteristics |
| Victoria | *Equal Opportunity Act 2010* (Vic) | Expanded April 2026 beyond race and religion to include disability, gender identity, sex, sex characteristics, sexual orientation and personal association with a person who has a protected attribute |
| WA | No civil vilification currently but see 4.3.2 above (WA Bill introduced 21 October 2026) | |

Although the Disability Royal Commission recommended that states and territories extend their criminal vilification protections to apply to cover disability, it limited its recommendation to expand civil protections to the Commonwealth legislation (the DDA).

Nevertheless, the ACT, Tasmanian and Victorian civil vilification provisions extend to disability. The LRCWA's Final Report recommended adopting anti-vilification provisions to prohibit vilification on the grounds of disability, as well as a number of other characteristics.[53]

Arguments typically made against expanding the scope of anti-vilification provisions centre on freedom of speech. It is argued that freedom against discrimination does not include freedom from hearing ideas a person might find offensive and that separate additional protections against hate speech are not needed where no individual has been shown to be directly discriminated against,

[53] LRCWA Final Report Rec.114 (recommending that civil vilification provisions should apply to vilification on the grounds of disability, gender identity, sex, sex characteristics, race, religious conviction and sexual orientation). On 21 October 2026, the WA Government introduced the Equal Opportunity Bill 2026 to modernise its anti-discrimination legislation, including to allow a person to make a complaint to the Equal Opportunity Commissioner for vilification based on disability, race, religion, sexual orientation, gender identity, or sex.

for example in their employment, education or access to services or accommodation, as is currently protected against under the EO Act.

The LRCWA received submissions in its review to the effect that work health and safety laws and the *Fair Work Act 2009* (Cth) anti-bullying jurisdiction already provide sufficient protections against psychosocial hazards at work, including hazards that arise from vilifying conduct, and that anti-vilification provisions could create unnecessary regulatory duplication and complexity.

Concerns about negative impacts on freedom of speech can arguably be mitigated by the exclusions commonly contained in vilification provisions, including exclusions for fair reporting and for comments made for academic, artistic, scientific or research purposes, or for other purposes in the public interest.[54]

## 5.5. Incitement-based or harm-based test

Separate to questions about whether to expand the characteristics protected by SA's civil vilification provisions and move those provisions into the EO Act so that civil vilification complaints can be dealt with by the Commissioner for Equal Opportunity, it is also apparent that there are different ways of defining what amounts to civil vilification amongst Australian jurisdictions.

Currently SA's civil racial victimisation provisions define an 'act of racial victimisation' as conduct that would 'incite hatred, serious contempt or severe ridicule of' a person or group of persons on the ground of their race.

Similar incitement-based test formulations apply in several other jurisdictions.[55]

However, the Victorian civil vilification provisions were recently amended (including widening their scope and moving them from the standalone *Racial and Religious Tolerance Act 2001* (repealed) into the *Equal Opportunity Act 2010* (Vic), to adopt a harm-based definition that focuses on the likely effect on, or harm to, a reasonable person with the protected characteristic/attribute:

> *A person must not engage in public conduct…that would, in all the circumstances, be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful or seriously contemptuous, or reviling or severely ridiculing…*[56]

in addition to retaining an incitement-based prohibition:

> *A person must not engage in public conduct that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons.*[57]

The RDA uses the harms-based test for racial vilification, referring to acts against a person or group on the basis of their race that are likely to offend, etc the person/group.[58]

[54] This argument was made in the LRCWA's Final Report at [6.5.4], and discussed in the more recent NSW Law Reform Commission: Review of the *Anti-Discrimination Act 1977* (NSW) *Unlawful Conduct 24 Consultation Paper* from p 188.
[55] *Anti-Discrimination Act 1977* (NSW) Pts 3A & 4BA; *Anti-Discrimination Act 1991* (Qld) s 124A; *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1998* (TAS) s19.
[56] *Equal Opportunity Act 2010* (Vic) s 102D.
[57] *Equal Opportunity Act 2010* (Vic) s 102E. *Anti-Discrimination Act 1998* (TAS) also contains both tests: ss 17, 19.
[58] RDA s 18C (and *Anti-Discrimination Act 1992* (NT) s 20A also uses a harms-based test).

In its 2022 final report on a review of the *Equal Opportunity Act 1984* (WA), the LRCWA recommended the adoption of a hybrid harm-based and incitement-based civil vilification provision, the test for which 'should focus on the likely effects of the vilifying conduct' and make it 'unlawful to engage in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or threaten, seriously abuse or severely ridicule, a group, or a person as a member of a group'. The LRCWA was concerned not to recommend a lower threshold for this test on the basis that to do so 'would unjustifiably restrict free speech and prevent criticisms of religion'.[59] In that respect it is relevant to note that the harm-based test is not as broad as it appears on a plain reading; courts have interpreted it as requiring the likely effect of the conduct to be 'profound and serious' and not 'mere slights'.[60]

It is not clear that formulations that explicitly refer to an outcome as being 'likely' materially depart from the interpretation given by the courts to the existing SA formulation, that is, the courts have held that to 'incite' hatred etc does not require proof of a third party response i.e. that the conduct did cause other people to exhibit hatred towards the person or group with the protected characteristic or attribute, rather the conduct need only be capable of inciting that response.[61]

In view of recent interstate reforms, the best practice approach to ensuring the greatest level of protection without unreasonably infringing on freedom of speech would appear to entail providing for both a harm and incitement-based test for vilification, retaining existing exclusions for fair and accurate reporting and for statements/conduct for genuine academic, artistic, public interest, religious or scientific purposes.

[59] LRCWA, 'Review of the *Equal Opportunity Act 1984* (WA)' Rec. 113 and [6.3.2] and [6.5.2].
[60] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16]; *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307 at [65]-[76]; Eatock v Bolt [2011] FCA 1103 at [268].
[61] *Catch The Fire Ministries Inc And Others V Islamic Council of Victoria Inc (2006)* 235 ALR 750 at [14], [154], [160]; Sunol v Collier (No 2) [2012] NSWCA 44 at [41].

### *5.5.1. Options for Discussion*



8. Should civil vilification protection in SA be extended beyond race to other characteristics commonly protected under interstate legislation? For example, to:
    a. religion
    b. disability
    c. gender identity
    d. sex
    e. sex characteristics
    f. sexual orientation?

9. Are any concerns about potential negative impacts on freedom of speech adequately addressed by maintaining the current exclusions to civil vilification for:
    a. publication of a fair report of the act of another person
    b. publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation
    c. a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions)?

10. Should SA's civil vilification provisions be removed from the Civil Liability Act and subsumed instead into the EO Act, consistent with the approach in other Australian jurisdictions, so that complaints of vilification can be made to, and dealt with, by the Commissioner for Equal Opportunity and the South Australian Civil and Administrative Tribunal (SACAT) (noting that these bodies are not currently resourced to deal with vilification complaints)?

11. Should the test for civil vilification be modified to include a "harm-based test" in addition to the existing incitement-based test? If so, what would be the comparative benefits and risks of that approach (as adopted in Tasmania and Victoria and recommended by the LRCWA) as opposed to adopting a harm-based test only (as under the RDA), or retaining SA's existing incitement-based test only?

# Part C - Anti-discrimination

## 6. Context and operation of the *Equal Opportunity Act 1984*

### 6.1. History of the Equal Opportunity Act

The *Equal Opportunity Act 1984* (EO Act) was passed over 40 years ago in December 1984, with the bulk of the Act commencing operation in March 1986.

The purpose of the EO Act is to promote equality of opportunity for all South Australians by preventing discrimination and ensuring people are afforded a fair chance to take part in economic and community life.

The last comprehensive suite of changes to the EO Act were made in 2009. However, there have been some notable amendments in more recent years.

The EO Act was amended in 2023 to add domestic abuse as a protected attribute, that is, to provide that it is unlawful to treat someone unfavourably (in employment, provision of education, accommodation and other services, etc[62]) because they, or their relative or associate, has been or is being subject to domestic abuse.[63]

Other recent amendments include replacing the outdated terms of 'sexuality' and 'chosen gender' in Part 3 of the EO Act with the attributes of 'sexual orientation', 'gender identity' and 'intersex status'[64] and making it unlawful to provide conversion practices.[65]

### 6.2. Links to human rights laws

There are international human rights underpinnings to Australia's anti-discrimination, or equal opportunity, laws. Australia is a party to multiple international human rights treaties, including, relevantly the:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Rights of the Child; and
- Convention on the Rights of Persons with Disabilities.

The Commonwealth anti-discrimination laws (see discussion at 7.1) are expressed, in objects clauses in those laws, to give effect to relevant international human rights instruments, including to demonstrate a constitutional head of power for the Commonwealth to legislate. For example, the *Sex Discrimination Act 1984* (Cth) (SDA) includes in its 'objects' at s 3: 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments'.

The overlapping application of SA's EO Act and the Commonwealth anti-discrimination laws is discussed at 7.1.

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[62] See discussion of areas of public life to which the EO Act applies at 6.5.
[63] Amendments inserted by *Equal Opportunity (Domestic Abuse) Amendment Act 2023.*
[64] *Discrimination on the grounds of sexual orientation, gender identity and intersex status in South Australian legislation*, South Australian Law Reform Institute, September 2015.
[65] Amendments inserted by *Conversion Practices Prohibition Act 2024* (conversion practices are directed at an individual and intended to cause a change to that individual's sexual orientation or gender identity).

## 6.3. Interstate equivalent laws

All of the Australian states and territories have enacted anti-discrimination laws (some titled 'equal opportunity' acts and others titled 'anti-discrimination' acts) that are broadly similar to the EO Act:

- *Discrimination Act 1991* (ACT) – (**ACT**)
- *Anti-Discrimination Act 1977* (NSW) – (**NSW**)
- *Anti-Discrimination Act 1992* (NT) – (**NT**)
- *Anti-Discrimination Act 1991* (Qld) – (**QLD**)
- *Anti-Discrimination Act 1998* (Tas) – (**TAS**)
- *Equal Opportunity Act 2010* (Vic) – (**VIC**)
- *Equal Opportunity Act 1984* (WA) – (**WA**)

This paper discusses comparisons with different features of these interstate laws. The paper takes the approach of referring to the relevant interstate law by the abbreviated state or territory name (ACT, NSW, and so on). Unless the contrary intention appears, a reference in the remainder of the body of this paper to an abbreviated state or territory name is a reference to that state or territory's above-listed anti-discrimination legislation.

## 6.4. Grounds of discrimination covered (protected attributes)

The EO Act makes it unlawful to discriminate on the grounds of a person's:

- sex (part 3)
- gender identity (part 3)
- sexual orientation (part 3)
- intersex status (part 3)
- race (part 4)
- disability (part 5). Also, requiring separation from an assistance animal is a criminal offence (s 88) and unfavourable treatment (in provision of accommodation) for keeping a therapeutic animal is unlawful: s 88A.
- age (part 5A) (which also voids any compulsory retirement provision in an award, determination or agreement made or approved under the *Fair Work Act 1994*: s 85EA)

and (in part 5B):

- marital or domestic partnership status
- spouse or partner's identity
- pregnancy
- association with a child (in provision of goods or services and provision of accommodation where shared with a child: s 87A)
- caring responsibilities
- religious appearance or dress (in work or study)
- experience of domestic and family violence.

These grounds of discrimination are often called 'protected attributes'.

Part 6 of the EO Act also makes the following conduct unlawful and grounds for making a complaint to the Commissioner for Equal Opportunity:

- victimisation for making a complaint under the Act: s 86
- sexual harassment (in the areas of work, education and qualifications, provision of goods and services or accommodation, or by a judicial officer, member of Parliament, council member or member of association governing body): s 87
- imposition of requirements or conditions on a person that would separate them from their 'assistance animal' (s 88) or refusal of accommodation to a person on the ground that they intend to keep a 'therapeutic animal': s 88A and
- certain other discriminatory acts in certain areas of life: ss 87A (sharing accommodation with a child) and 87B (student breastfeeding infant).

## 6.5. Areas of life to which anti-discrimination protections apply

The EO Act applies to discrimination in public life, making it unlawful to discriminate in the following areas:

- work, including volunteer and contract work
- provision of goods and services
- accommodation (e.g. in leasing rental accommodation) and selling land
- clubs and associations (membership, rights and benefits) and
- education and granting qualifications.

Some grounds of discrimination apply only in a subset of the above areas of public life:

- association with a child - only in the provision of goods or services (for example due to breastfeeding a child), provision of accommodation where shared with a child or in education because a student is breast-feeding.
- religious appearance or dress (only in the areas of work or study).

## 6.6. When discrimination is unlawful

Discrimination is treating a person unfairly because of particular personal characteristics or because they belong to a certain group, for example, where as a result of discrimination someone:

- feels humiliated or denigrated
- is denied access or refused services or
- loses an opportunity or income.

Discrimination occurs when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics (or 'protected attributes'). This is known as 'direct discrimination'.

It is also discrimination when a rule or policy applies to everyone but has the effect of disadvantaging some people because of a personal characteristic they share. This is known as 'indirect discrimination'.

An example of direct (racial) discrimination is an employer refusing to hire a suitably qualified person as a shop assistant because they are Aboriginal, and instead hiring a less qualified person of a different racial background. An example of indirect discrimination is a policy that only full-time workers will get access to professional development. This could discriminate against women who are more likely to work part-time to accommodate their family responsibilities.

The definition of discrimination is discussed in further detail at 8.1.

## 6.7. Exemptions

The EO Act provides for some exceptions or exemptions to discrimination in specific areas and activities.

In respect of discrimination against workers it is not unlawful to discriminate:

- on the ground of sex, sexual orientation, gender identity or intersex status in employment for which it is a genuine occupational requirement that a person be a person of a particular sex, sexual orientation, gender identity or intersex status
- on the ground of sexual orientation, gender identity or intersex status in relation to employment in religious schools or educational institutions where the discrimination is founded on the precepts of that religion and is in accordance with a publicly available written policy
- on the ground of gender identity if the discrimination is for the purposes of enforcing standards of appearance and dress reasonably required for the employment;[66]
- on the grounds of race[67] or age[68] where it is a genuine occupational requirement that a person be of a particular race or age.
- on the grounds of disability:

> *if the person suffering from the disability is not, or would not be, able to perform adequately, and without endangering himself or herself or other persons, the work genuinely and reasonably required for the employment or position in question or to respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment.*[69]

There are exemptions from the prohibition on discrimination on the grounds of sex, sexual orientation or gender identity, including:[70]

- sporting competitions are able to exclude persons on the ground of sex in specified circumstances
- religious bodies can discriminate in relation to the training, ordination or appointment of priests, ministers of religion or members of a religious order; the administration of a body established for religious purposes in accordance with the precepts of that religion; or any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[71]

There are exemptions from the prohibition on discriminating on the grounds of disability, including in respect of exclusion from sporting activities if the activity requires physical or intellectual

[66] Section 34.
[67] Section 56.
[68] Section 85F
[69] Section 71(2).
[70] Part 3 Division 7.
[71] A similar 'religious exception' also applies in these circumstances to discrimination against same sex domestic partners on the ground of marital or domestic partnership status: s 85Z.

attributes that the person does not possess or if the sporting activity is restricted to persons of a particular kind of disability.[72]

There is also an exemption from discrimination against a person on the grounds of disability in relation to the provision of access to or use of a place or facilities if the provision of access or use would impose unjustifiable hardship in the circumstances, including due to the costs of providing disabled access and the financial circumstances of the provider of the place or facilities.[73]

Under the EO Act, organisations can discriminate in favour of a certain group if it helps address past discrimination ('special measures').[74]

Organisations can also apply to the SACAT for a temporary exemption from the application of provision(s) of the EO Act under s 92 of the Act.

## 6.8. Other features of the Equal Opportunity Act

Other features of the EO Act include:

- provision of vicarious liability of employers and principals for the discriminatory or unlawful acts contravening the Act committed by their employees or agents in the course of their employment or agency: s 91
- making it an offence to publish a discriminatory advertisement: s 103.

## 6.9. Complaints and enforcement

Contravention of the EO Act is not a criminal offence attracting a criminal penalty, nor does breach of the EO Act ground a civil right of action.[75] Rather, under the EO Act a complaint can be made to the Commissioner for Equal Opportunity about a claimed breach of the Act. On receipt of a complaint, the Commissioner will investigate the complaint and attempt to resolve the dispute by conciliating between the parties to the complaint.[76]

If the conciliation does not succeed in resolving the complaint, the Commissioner can refer the case to SACAT. SACAT is then empowered to make certain orders, including:[77]:

- payment of compensation
- requiring the respondent to refrain from further contravention of the EO Act and
- requiring the respondent or any other party to the proceedings to perform specified acts with a view to redressing loss or damage arising from the contravention of the EO Act or remedying discriminatory or unlawful conduct.

[72] Section 81.
[73] Section 84.
[74] For the benefit of persons of a particular: sex, sexual orientation, gender identity or intersex status (s 47); race (s 65); disability (s 82); marital or domestic partnership status; of persons with caring responsibilities, or persons who are, or who have been, subjected to domestic abuse (s 85ZK), and various exemptions for reasonable or beneficial exemptions on the grounds of age, race or for charities for the benefit of particular groups.
[75] Section 99.
[76] Part 8 Division 1.
[77] Section 96.

# 7. Overlap with Commonwealth and work safety laws

## 7.1. Overlap with Commonwealth laws

South Australians are also protected by Commonwealth anti-discrimination laws, including the:

- *Sex Discrimination Act 1984* (Cth) (SDA)
- *Racial Discrimination Act 1975* (Cth) (RDA)
- *Age Discrimination Act 2004* (Cth) (ADA)
- *Disability Discrimination Act 1992* (Cth) (DDA)
- *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

Under these Commonwealth anti-discrimination laws, complaints about discrimination can be made to the AHRC, which has functions and powers to investigate and conciliate those complaints. If AHRC conciliation is unsuccessful, a complainant may then apply to the Federal Court under the SDA, RDA, ADA or DDA.[78]

There is overlap between the EO Act and these Commonwealth anti-discrimination laws - the main difference being in the types of discrimination covered.

The Commonwealth laws also impose a positive duty on employers to prevent certain unlawful acts (discussed at 8.6).

Under s 109 of the Australian Constitution, the Commonwealth laws will override the EO Act to the extent of any inconsistency. The RDA s 6A, SDA ss 10 and 11, DDA s 13 and ADA s 12 all state that where a law of a state or territory is capable of operating concurrently, the Commonwealth Act will not exclude or limit the operation of that state law. Each of these provisions in the Commonwealth anti-discrimination laws also provides the option of initiating an action under either Commonwealth, or state or territory, anti-discrimination laws.

Notwithstanding these statements of intended concurrent operation of state and Commonwealth anti-discrimination laws, concerns have been raised that exceptions in the Commonwealth anti-discrimination laws may have the effect of overriding protections afforded under state laws. This is discussed further at 8.2.1 and page 40.

## 7.2. Overlap with workplace laws

The EO Act operates alongside workplace safety and equality legislation, including the *Fair Work Act 2009* (Cth) (Fair Work Act) and *Work Health and Safety Act 2012* (SA) (WHS Act), as well as the *Workplace Gender Equality Act 2012* (Cth).

The Fair Work Act applies to many workplaces in SA and protects against 'adverse action'[79] against employees, in the area of employment:

- on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin;[80]

[78] Changes made from October 2024 mean that unsuccessful Federal Court applicants are no longer required to pay the other party's costs of the proceedings, except where the Court is satisfied that the application was frivolous or vexatious or that the proceedings were delayed by unreasonable actions by the applicant.
[79] Defined as including dismissal, altering their position to their detriment, discriminating between them and other employees, refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers.
[80] Fair Work Act s 351(1).

- because they engage in, or choose not to engage in, industrial activity.[81]

The Fair Work Act also prohibits sexual harassment at work (irrespective of the characteristics of the person harassed) and provides that a person or company may be liable for sexual harassment committed by an employee or agent in connection with work, including if they were involved in the employer's contravention. This applies unless the person or company can prove that they took all reasonable steps to prevent the sexual harassment.[82]

Under the Fair Work Act employees can make a complaint to the Fair Work Commission, which investigates allegations of unlawful workplace discrimination and may initiate litigation against a national system employer for contravening the Fair Work Act.

The interplay between federal workplace law and the EO Act is discussed in this paper at 8.2.1.

Duties to prevent sexual harassment and other 'psychosocial hazards' also apply to many employers under national work health and safety legislation, including in SA the WHS Act. Psychosocial hazards are recognised as including discriminatory or inequitable conduct or decisions.[83] SafeWork SA can investigate allegations relating to the management of psychosocial hazards in the workplace and take action against employers.

# 8. Overall operation, structure & language

## 8.1. Definition of discrimination

The EO Act covers direct and indirect discrimination.

### *8.1.1. Direct discrimination, 'comparator test' and causation*

Under the EO Act, direct discrimination[84] occurs when one person treats another 'unfavourably' because of:

- that person's 'protected attribute' (for example, their race, disability or sex)
- a characteristic that appertains generally to persons with a particular protected attribute
- a characteristic that is generally imputed to persons with a particular protected attribute or
- the attribute of a relative or associate of the person.

'Unfavourable' treatment under the EO Act currently requires the use of a 'comparator test': if the discriminator treats that other person *less favourably* than the discriminator, in identical or similar circumstances, treats or would treat a person who does not have that attribute or is not affected by that circumstance.[85]

[81] Fair Work Act s 346.
[82] Fair Work Act ss 527D, 527E.
[83] See: https://www.safework.sa.gov.au/workplaces/psychosocial-hazards/what-are-psychosocial-hazards.
[84] The words 'direct discrimination' are not used in the Act but this is the phrase generally used for this type of discrimination.
[85] Section 6(3).

There can be difficulties employing the comparator test, which were canvassed in the recent LRCWA and Queensland Human Rights Commission (QHRC) Report of its review of Queensland's *Anti-Discrimination Act 1991* (QHRC Report), for example:[86]

- the need to identify and prove the comparator, including where 'constructing a hypothetical comparator is artificial, contrived, and creates barriers to accessing justice particularly for unrepresented parties'
- the test is technical and uncertain, making it difficult for parties and enforcement bodies to apply
- 'because of unconscious biases, fair comparisons can never be made about matters involving historical disadvantage e.g. First Nations peoples and people with cognitive disability'.

Not all jurisdictions employ a comparator test. ACT and VIC each contain an 'unfavourable' treatment test rather than comparator test. This test looks at whether the complainant has been treated unfavourably due to their protected attribute or protected attributes, without needing to provide a comparator.

The LRCWA and QHRC both recommended moving to an 'unfavourable' treatment approach in their respective reports.[87] The QHRC Report discusses an evaluation of the operation of the 'unfavourable' treatment test in Victoria after 10 years, which concluded that it was more accessible (that is, easier for parties to apply) and had 'led to more certain and predicable outcomes for both complainants and respondents'.[88]

The 2025 NSWLRC Review Consultation Paper canvasses the question of moving from the comparator test to the unfavourable treatment test.[89]

In terms of defining discrimination, the EO Act further provides that:

> *a person acts on a particular ground referred to in this Act if the person in fact acts on a number of grounds, one of which is the ground so referred to, and that ground is a substantial reason for the act.*[90]

The QHRC Report recommended that the equivalent QLD test be amended so that the protected attribute need only have been 'a' reason, but not the dominant reason or a substantial reason, for the unfavourable treatment.[91] The Commonwealth, NSW and the ACT take this approach.[92] However, the LRCWA Report expressly recommended the 'substantial reason' test and VIC also requires it to be a substantial reason, although the LRCWA considered this could be expressed more clearly. [93] NT and TAS state the attribute need not be the 'sole or dominant' ground but leave open whether it must be a substantial reason.[94]

[86] Building Belonging: https://www.qhrc.qld.gov.au/our-work/major-reviews2/review-of-queenslands-anti-discrimination-act, July 2022, p89.
[87] Amendments to reform Queensland's anti-discrimination legislation and to adopt the unfavourable treatment test were passed in 2024 but their commencement has been delayed to conduct further consultation: https://statements.qld.gov.au/statements/102168.
[88] QHRC Report p 93.
[89] NSWLRC Consultation Paper pp 24-25.
[90] Section 6(2).
[91] QHRC Report p 96.
[92] ACT s 4A, NSW s 4A, e.g. SDA s 8.
[93] LRCWA Report p 57.
[94] *Anti-Discrimination Act 1998* (TAS) s 14(3), *Anti-Discrimination Act 1992* (NT) s 20(3).

Whether or not the EO Act is amended to provide that the protected attribute need only be 'a' reason (and not a substantial reason) for the unfavourable treatment, there is arguably scope to state the applicable causation test more clearly in the EO Act.

The TAS Act, for example, provides:

> *For direct discrimination to take place, it is not necessary –*
>
> *(a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or*
>
> *(b) that the person who discriminates regards the treatment as unfavourable; or*
>
> *(c) that the person who discriminates has any particular motive in discriminating.*[95]

Limb (c) of the TAS provision also prompts consideration of how the EO Act should deal with the issue of the intentions of the discriminator.

The LRCWA Report discussed this issue. It compared approaches in the VIC[96] and TAS legislation and favoured the TAS approach outlined above.

### 8.1.2. Indirect discrimination and proportionality test

Under the EO Act, indirect discrimination occurs if someone is treated less favourably because they do not, or cannot, comply with a requirement imposed by the alleged discriminator, and the requirement is such that 'a substantially higher proportion of persons' without the relevant attribute would be able to comply[97] (described as the 'proportionality test').

As with the test for direct discrimination, arguably the test should instead require consideration of whether the requirement 'disadvantages' someone because of their protected attribute, rather than by comparing proportions of persons able to comply from different groups. The LRCWA and QHRC Reports both recommended this change.

Inability to comply with requirements (for example, employment or education requirements) may be hard to demonstrate for people who can technically comply, but for whom compliance is more difficult or burdensome, or detrimental or harmful to them or their dependants. For example, a deaf student may be able to cope with lessons taught in spoken English as opposed to Auslan, though they would suffer significant educational disadvantage as a result.

The ACT, TAS and VIC laws do not require proof of inability to comply with a relevant requirement. The LRCWA Report recommended this approach, noting that 'inability to comply may still be relevant to the extent that it may assist in establishing that the conduct has a disadvantageous effect'.[98]

The burden of proof for establishing unlawful discrimination differs also between jurisdictions. This is discussed in the context of tribunal proceedings at 8.11.3.

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[95] *Anti-Discrimination Act 1998* (TAS) s 14(3). *Anti-Discrimination Act 1992* (NT) s 20(3) is similar.

[96] *Equal Opportunity Act 2010* (VIC) ss 8-10 adopt the approach of stating that "*it is irrelevant whether or not [the discriminator] is aware of the discrimination or considers the treatment to be unfavourable; and whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason*" and also: "*In determining whether or not a person discriminates, the person's motive is irrelevant*".

[97] E.g. ss 29(2)(b)(i) (sex), 66(b)(i) (disability). The words 'indirect discrimination' are not used in the Act but this is the phrase generally used for this type of discrimination.

[98] LRCWA Report p 61.

#### *8.1.3. Options for Discussion*



12. Should the 'unfavourable treatment' test for direct discrimination be adopted instead of the 'less favourable' comparator test?

13. Should it be required that the protected attribute only be 'a' reason (and not a 'substantial reason') for the less/unfavourable treatment?

14. Should the EO Act expressly address the intentions of a discriminator by stating that: 'it is not necessary that the person who discriminates regards the treatment as unfavourable or that the person who discriminates has any particular motive in discriminating'?

15. Should the test for indirect discrimination be whether a requirement 'disadvantages' someone because of their attribute, rather than whether it does so in comparison with proportion(s) of persons able to comply?

## 8.2. Language and scope of protected attributes

### *8.2.1. Scope of protected attributes*

Currently the EO Act makes it unlawful to discriminate on the basis of the following characteristics, or attributes ('protected attributes' or 'grounds' are used interchangeably in this paper) in various specified areas of public life, namely:

- sex
- gender identity
- sexual orientation
- intersex status
- race
- disability
- age
- marital or domestic partnership status
- spouse or partner's identity
- pregnancy
- association with a child (in provision of goods or services - for example due to breast-feeding a child)
- caring responsibilities
- religious appearance or dress
- experience of domestic and family violence

(discussed in more detail above at 6.4).

The below table illustrates potential areas of expansion for the EO Act based on broader coverage of protected attributes under equivalent Australian laws.

| Attribute | Jurisdictions covering | Notes |
|---|---|---|
| Religious belief or activity | ACT, NT, QLD, TAS, VIC, WA | 'Religious belief' only in WA. The LRCWA Report recommended inclusion of 'religious activity'.<br>NSW defines 'race' to include 'ethno-religious origin'. |
| Political conviction or activity | ACT, NT, QLD, TAS, VIC, WA | LRCWA Report recommends separation into distinct attributes of the current WA protected attribute: "*political and religious conviction*". |
| Irrelevant criminal record/spent convictions | ACT, NT, TAS, VIC, WA | In VIC and WA this covers only spent or expunged convictions. In NT, TAS, ACT, and as recommended by QHRC and LRCWA Reports, this attribute is broader, typically covering both spent/expunged convictions and dismissed/withdrawn charges, acquittals, pardons and convictions not relevant to the situation.[99] |
| Trade union/industrial activity | NT, QLD, TAS, VIC | |
| Parental/family status | NT[100], QLD, VIC, TAS, WA | Protects against discrimination based on whether or not the person is a parent. Therefore, distinct from 'caring responsibilities' in the EO Act as it covers the fact of having children (as opposed to having caring responsibility for them) and also covers not being a parent. WA is much broader and covers the status of being any relative. |
| Physical features | ACT, VIC | In ACT this means 'a person's height, weight, size or other bodily features' and VIC has essentially the same definition. This appears to be relatively narrow and to deal with body type.<br>Both the LRCWA and QHRC have recommended wider definitions: e.g. height, shape, facial features, weight, natural hair colour, alopecia, hirsutism and birthmarks but to exclude voluntarily obtained piercings, tattoos and bodily modifications. |
| Accommodation status/homelessness | ACT, NT | This covers things such as being a tenant, being homeless or living in disability accommodation. It is broader in NT as it also includes living in aged care.<br>The QHRC Report recommended covering homelessness (only). |
| Lawful sexual activity | VIC, TAS | Some sexual activity is not currently covered by 'sexual orientation'. LRCWA also recommended inclusion in WA. |

Any of these attributes might arguably be desirable for inclusion in the EO Act to widen access to the protections against discrimination available under the Act to cover other vulnerable groups.

[99] The QLD Government has since expressed concerns about inclusion of this attribute in the QLD legislation: 'Crisafulli Government to consult on anti-discrimination laws - Ministerial Media Statements' 14 March 2025.
[100] Covered under 'carer responsibilities' in NT.

However, SA appears to now be particularly out of step with other Australian jurisdictions, and also with international law[101], in not protecting against discrimination on the grounds of:

- religious belief or activity
- political conviction or activity
- irrelevant criminal record/spent convictions
- trade union/industrial activity; and
- parental/family status.

In some cases, other existing legislation such as employment legislation might already provide sufficient protection against discrimination on these grounds.

The Fair Work Act protects against 'adverse action'[102] against employees, in the area of employment:

- on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin;[103] or
- because they engage in, or choose not to engage in, industrial activity.[104]

The NSWLRC Consultation Paper discusses a potential gap that arises from the interplay between the Fair Work Act and Commonwealth and state anti-discrimination laws. The Fair Work Act protects against 'adverse action' in employment based on a broader range of personal attributes than the EO Act or Commonwealth discrimination laws. However, the Fair Work Act also provides that this protection does not apply to 'action that is not unlawful under any anti-discrimination law in force in the place where the action is taken'.[105] Decisions by the Fair Work Commission and Federal Court have found that this exclusion could apply when the relevant state or territory law did not prohibit a particular type of discrimination in the first place.[106] This would appear to mean that groups listed in the Fair Work Act anti-discrimination provision, but not listed in the EO Act or covered under the Commonwealth anti-discrimination laws (SDA, RDA, ADA and DDA), are denied the Fair Work Act protections against forms of employee discrimination.[107] In SA, that would include, for example, where discrimination is based on religion, political opinion and social origin.

A decision by the Federal Circuit Court came to a different conclusion, finding that the Fair Work Act defence would only excuse discrimination if the relevant state anti-discrimination law prohibited the discrimination generally but then provided a specific *exception* for those circumstances.[108] Due to the conflicting case law, the scope of the defence appears uncertain, however there is a risk that the Fair Work Act does not broadly protect against employment discrimination on the grounds of religion, political opinion and social origin, although the more narrow Fair Work Act protection against unlawful termination of employment on those grounds should still apply.[109]

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[101] See discussion about international human rights framework above at 6.2.
[102] Defined as including dismissal, altering their position to their detriment, discriminating between them and other employees, refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers.
[103] Fair Work Act s 351(1).
[104] Fair Work Act s 346.
[105] Fair Work Act s 351(2). They would have to rely on the much narrower laws in s 772 which only relate to dismissal from employment (and so would not cover a failure to hire or promote someone, or subjecting them to some other detriment based on their religion).
[106] *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768 at [27]–[37]; *Rumble v The Partnership* [2019] FCA 1409 at [141]–[143].
[107] 'Adverse action', as defined in Fair Work Act s 342.
[108] *Cameron v Goldwind Australia Pty Ltd* [2019] FCCA 1541 (6 June 2019) [44].
[109] The same defence does not apply to s 772 of the Fair Work Act, which prohibits employee termination, including on the grounds of "race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or

*Religious belief/activity*

There have been numerous judicial decisions affirming that Jewish people in Australia comprise a group of people with an 'ethnic origin' for the purposes of the RDA (and hence protection and remedies are available in respect of discrimination on the grounds of being Jewish).[110] However, there is some question about the extent to which the EO Act currently protects against discrimination against Muslims, or acts of Islamophobia.

The EO Act currently prohibits direct discrimination based on 'religious dress or appearance' in work or educational settings. This provision does not protect against religion, religious belief, or religious practice more broadly. Therefore, for example, a Muslim South Australian who is refused a tenancy or denied access to a service on the basis of their religion has no clear legal remedy under the EO Act.

'Race' is defined for the purposes of the EO Act as including '"nationality (current, past or proposed), country of origin, colour or ancestry'.[111]

The RDA protections against discrimination are on the grounds of 'race, colour, descent or national or ethnic origin'.

In the Federal Court case of *Faruqi v Hanson* [2024] FCA 1264, Stewart J found that Senator Pauline Hanson's tweet: 'piss off back to Pakistan' directed towards Senator Mehreen Faruqi had violated s 18C of the RDA (which provides that it is unlawful to publicly engage in conduct that is likely to 'offend, insult, humiliate or intimidate based on race, colour or national or ethnic origin'). Stewart J was unable on the available evidence to make a finding that Muslims in Australia are an ethnic or ethno-racial group [278], nor that they are protected on that basis [280], separately from where race or national or ethnic origin is found to ground the conduct complained of, as was found in this case [286]. This decision was affirmed by the Full Court of the Federal Court on an appeal by Senator Hanson.[112]

Prohibiting discrimination on the basis of religious belief or activity is consistent with international law (International Covenant on Civil and Political Rights Article 18).

Every other Australian jurisdiction except NSW and the Commonwealth prohibits religious discrimination. There is a significant amount of common ground across jurisdictions, representing overall policy consensus. In most cases, the prohibition covers both religious beliefs and activity,[113] extends to persons who *do not* hold a belief or engage in an activity (e.g. atheism),[114] and the discrimination is prohibited in a broad range of areas of public life.

The 2018 *Expert Panel Report: Religious Freedom Review* (the Ruddock Review) recommended that SA and NSW, in addition to the Commonwealth, should amend their anti-discrimination laws to protect against discrimination on religious grounds.[115]

In 2021 the former NSW Government announced that it would amend the *Anti-Discrimination Act 1977* (NSW) to include religion as a protected attribute – but would first await then planned

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mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin".

[110] See *Faruqi v Hanson* [2024] FCA 1264 at [272] (affirmed on appeal: *Hanson v Faruqi* [2026] FCAFC 96); *Wertheim v Haddad* [2025] FCA 720 at [164], [211].

[111] Section 5.

[112] [2026] FCAFC 96.

[113] Except in WA, which only covers religious beliefs, although the recent report of the LRCWA recommended expansion to religious activities.

[114] Except in the NT.

[115] https://www.ag.gov.au/rights-and-protections/publications/expert-panel-report-religious-freedom-review, Recs 15-16.

Commonwealth religious discrimination legislation 'to enable it to consider the interaction of Commonwealth law with NSW reforms and to avoid constitutional inconsistency'.[116]

Ultimately the Commonwealth Religious Discrimination Bill attracted controversy and was abandoned by the former Commonwealth Government before the 2022 federal election.

Potential constitutional limitations on the EO Act protecting against religious discrimination are discussed in this Paper in the context of religious exemptions from unlawful discrimination – at 8.4.2.

The current Commonwealth Government has deferred legislating against religious discrimination and to address current religious exceptions from discriminating under the SDA, including due to concerns about the divisive nature of such legislation in the current climate of concerns about degrading social cohesion.[117]

The NSWLRC Consultation Paper points out that the NSW Anti-Discrimination Act was amended to ensure that ethno-religious groups, such as members of the Jewish, Islamic and Sikh faiths, are protected against vilification and discrimination by expanding racial discrimination to encompass discrimination based on 'ethno-religious origin'. 'Ethno-religious origin' is also a ground of discrimination under the TAS law.

A similar change to the EO Act may address concerns that the EO Act does not currently adequately protect against discrimination against Muslims[118], however the NSWLRC Consultation Paper discusses inconsistent interpretations of the term 'ethno-religious origin' that cast doubt on whether such an amendment would in practice add to existing protection under the EO Act.[119]

### *Guardianship status*

Concerns have been raised about practices of accommodation and other youth services providers discriminating against children under guardianship by refusing those children accommodation or other services on the basis of their guardianship status. This area of discrimination would not appear to be covered presently under the EO Act and may warrant consideration of being added to the grounds of discrimination under the Act.

### *Irrelevant criminal record*

Although not protected under the EO Act, protection from discrimination on the basis of irrelevant criminal record may already be adequate under other existing laws, such as the AHRC Act, which protects against discrimination in employment on this ground[120] coupled with SA legislation governing spent convictions and when a criminal record can be required to be disclosed.

The QLD Government has reported concerns about commencing past legislative amendments to include irrelevant criminal record as a ground of discrimination in QLD, in particular questions

[116] https://nswliberal.org.au/news/new-laws-set-to-tackle-religious-discrimination.
[117] https://www.abc.net.au/news/2024-03-21/albanese-religious-discrimination-act-bipartisan-support/103611564.
[118] Noting that multiple Tribunal decisions have held that Muslims are not a race: *Alchin v Rail Corp NSW* (2012) 225 IR 171; *Khan v Cmr, Dept of Corrective Services* [2002] NSWADT 131; *Toll Pty Ltd (t/as Toll Express) v Abdulrahman* (2008) EOC 93-482.
[119] NSWLRC p 79. Tribunal interpretations have been inconsistent, with one interpretation being that the term protects against discrimination based on being a Muslim from a particular national grouping, but not against discrimination based on being a member of that religion generally. That interpretation may not advance protections beyond those found to apply under the existing RDA in *Faruqi v Hanson*.
[120] AHRC Act (Cth) s 3 (definition of 'discrimination'), *Australian Human Rights Commission Regulations 2019* (Cth).

about whether this could undermine certain high-risk discretionary administrative decisions in relation to firearms or security provider licensing.[121]

*Other grounds?*

Responses to this paper may help to identify whether other vulnerable groups not currently covered are, in practice, in need of protection against discrimination under the EO Act.

### 8.2.2. Language of protected attributes

*Intersex status*

Some rights advocacy bodies advocate for the term 'sex characteristics' as a protected attribute instead of 'intersex'. Most Australian jurisdictions have adopted or have been recommended to adopt this terminology.

There are a range of variations of sex characteristics under the intersex umbrella and 'sex characteristics' may better reflect this.

*Sexual orientation*

SA is the only jurisdiction not to define sexual orientation in some way.[122] For example, in VIC and NT, and as recommended by QHRC and LRCWA,[123] 'sexual orientation' is defined as a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender. The TAS and ACT laws define 'sexual orientation' as including homosexuality, heterosexuality and bisexuality.

Alternatively, it may be preferable to leave the term undefined to assist with evolving understandings of sexual orientation.

*Caring/family responsibilities*

Currently under the EO Act, 'caring responsibilities' only covers caring for dependent children or another 'immediate family member in need of care and support'. 'Immediate family member' in turn covers:

- a current or former spouse or domestic partner of the carer; or
- an adult child, parent, grandparent, grandchild, or sibling of the carer or the carer's spouse.

The EO Act also expressly includes family according to Aboriginal kinship relationships.

This may not appropriately cover evolving conceptions of family, and conceptions of family and caring responsibilities in various cultures. Some other jurisdictions have broader coverage, for example:

- WA: 'having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment'
- ACT: 'parent, family, carer or kinship responsibilities' - only 'carer' is defined, with 'parent' or 'family' left to interpretation

[121] https://statements.qld.gov.au/statements/102168#:~:text=Crisafulli%20Government%20delivers%20election%20commitment,certain%20statutory%20decision%2Dmaking%20schemes.' 14 March 2025.
[122] Other than NSW, which does not protect against sexual orientation discrimination generally, instead only protecting against discrimination on the basis of homosexuality.
[123] QLD and WA Governments have both accepted recommendations to adopt this definition.

- VIC: 'carer' means a person on whom another person is wholly or substantially dependent for ongoing care and attention.

The QHRC Report recommended that family, carer or kinship responsibilities not be defined.[124]

*Association with a child*

Currently, the EO Act includes a protected attribute of 'association with a child', which is specified to involve being treated unfavourably due to breastfeeding or bottle feeding an infant or being accompanied by a child.

Most jurisdictions have breastfeeding as a specific attribute, as opposed to calling it 'association with a child'. This may be clearer for public awareness purposes.

Alternatively, it is not immediately clear why breastfeeding or bottle feeding could not be covered under the existing attribute of 'caring responsibilities'.

It may be preferable to streamline the various caring, child and infant-related attributes. For example, EO Act ss 87A and 87B contain provisions prohibiting a) discrimination in relation to accommodation on the ground that the person intends to share accommodation with a child and b) discrimination against students breastfeeding infants. These may now be redundant following modernisation of care responsibilities and breastfeeding discrimination provisions generally.

*Race*

Under the EO Act, 'race' means a person's 'nationality (current, past or proposed), country of origin, colour or ancestry'. This definition is currently exhaustive. It may be preferable to incorporate some flexibility by making this an inclusive definition in line with all other jurisdictions.

Other relevant matters for consideration in respect of the definition of 'race' include:

- other jurisdictions refer to the concept of 'ethnicity' in their definition of race
- NT and TAS cover immigration or migration status (current or former) under race, and the QHRC Report recommended this
- WA provides: '… the fact that a race may comprise two or more distinct races does not prevent it being a race for the purposes of this Act'. VIC and the ACT also contemplate two different races.

*Disability*

The EO Act defines 'disability', in relation to a person, as:

> *(a) total or partial loss of the person's bodily or mental functions; or*
>
> *(b) total or partial loss of a part of the body; or*
>
> *(c) the presence in the body of organisms causing disease or illness; or*
>
> *(d) the presence in the body of organisms capable of causing disease or illness; or*
>
> *(e) the malfunction, malformation or disfigurement of a part of the person's body; or*
>
> *(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*

[124] QHRC rec 26.1.

> *(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.*[125]

This language may not be consistent with current best practices to describe persons with disability. For example, the QHRC Report recommended that the definition should be aligned with the definition in the DDA and not use 'outdated' language such as 'disfigurement', 'malformation' or 'malfunction'. 'Disturbed' behaviour may also be an example of outdated language.

Another consideration is whether reliance on support persons or disability aids should be covered as part of the definition of disability. The DDA and the ACT, NSW, NT, QLD and TAS all cover this to some degree either in their definition of 'disability' or description of discrimination on the grounds of disability, although some only cover remedial and therapeutic devices, not support persons.

*Association with a person with a protected attribute*

Other jurisdictions protect against discrimination because an 'associated' person has a protected attribute (for example, it is unlawful to discriminate against someone because their spouse is of a certain race).

However, SA appears to be the only jurisdiction that protects against discrimination based on the identity of a spouse or partner, regardless of whether that spouse has a protected attribute.[126] For example, if an employer did not like a particular politician, it would be unlawful to discriminate against a spouse of that politician seeking a job. Consideration could be given to whether this unique protected attribute is still required.

#### *8.2.3. Options for Discussion*

16. Should the EO Act be expanded to cover discrimination on additional grounds (i.e. additional types of protected attributes), including on the basis that existing alternative protections under other laws do not provide adequate protection?

17. Should changes be made to the definitions or language used in respect of any existing protected attributes in the Act?

18. Can any existing protected attributes be removed from the Act?

## 8.3. Areas of public life covered

6.5 above describes the areas of life to which anti-discrimination protections apply under the EO Act. Generally the Act provides protection against discrimination in the areas of:

- work, including volunteer and contract work
- provision of goods and services
- accommodation (e.g. in leasing rental accommodation) and selling land
- clubs and associations (membership, rights and benefits)
- education and granting qualifications.

[125] Section s 5(1) (definition of 'disability').
[126] Section 85T(3).

### 8.3.1. Goods and services

In respect of provision of goods and services, currently the definition of 'services' to which the Act applies[127] is limited to:

(a) access to or use of a place or facilities that members of the public are permitted to enter or use
(b) services provided by an employment agency
(c) services provided in the course of a banking business (within the meaning of the *Banking Act 1959* of the Commonwealth), the provision of credit, or insurance
(d) the provision of a scholarship, prize or award
(e) entertainment, recreation or refreshment
(f) services provided by an introduction agency
(g) the provision of coaching or umpiring in a sport
(h) services connected with transportation or travel
(i) services of a profession or trade or
(j) services provided by a government department, instrumentality or agency or a council.

This definition is exhaustive, which means services not on the above list are not covered. The term 'goods' is not limited in this way. Many other jurisdictions have non-exhaustive definitions of services. For example, the RDA, which provides that it is unlawful to discriminate on the grounds of race in the supply of goods or services, only defines 'services' to the extent that it states that services 'includes services consisting of the provision of facilities by way of banking or insurance or of facilities for grants, loans, credit or finance'.[128]

### 8.3.2. Membership of associations

The EO Act protects members of 'associations' from discrimination in relation to membership matters. 'Associations' is not defined, however this has been interpreted to only cover incorporated associations. The EO Act therefore does not cover unincorporated associations or clubs, other than to the extent they might provide 'services'.[129]

Other jurisdictions cover unincorporated clubs and associations as well as incorporated associations. The SDA and NT, TAS and WA define 'club', as an 'incorporated or unincorporated association of 30 or more members established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or any other similar lawful purpose'.[130] The DDA and ACT adopt this definition but without the requirement for a certain number of members.[131]

Some jurisdictions apply a narrower definition. VIC defines a club as having a liquor licence, and the NSW Act only applies to 'registered clubs under the *Registered Clubs Act 1976* (NSW)'.[132]

In view of these different approaches, consideration might be given to how formal a club should be before it is subject to anti-discrimination law.

[127] Section 5 ('services to which this Act applies')
[128] RDA ss 3(1), 13.
[129] *Loxton v Fischer* [2022] SACAT 117 (7 December 2022) and *Loxton v Healy* [2023] SACAT 43 (16 May 2023).
[130] SDA s 4(1), NT s 4, TAS s 3, WA s 4.
[131] ACT Dictionary, DDA s 4.
[132] VIC s 4, NSW s 4.

### 8.3.3. Superannuation

Superannuation schemes and provident funds are only expressly covered under the EO Act as areas of public life in relation to race and disability. They are not considered a 'service to which this Act applies' due to the exhaustive definition and therefore not covered under goods and services.

It is not clear why superannuation schemes are not covered for other attributes such as sex and sexual orientation. The EO Act contains an exception allowing superannuation discrimination based on age (see s 85R), even though it is not an expressly covered area of public life for age. Other jurisdictions cover superannuation for all attributes, either as a specific area of public life (NT, QLD), expressly under the definition of services (WA, TAS) or impliedly through the list of services being non-exhaustive and inclusion of age discrimination exemptions for superannuation (NSW, ACT, Vic).

It is argued that, since the SDA and *Life Insurance Act 1995* (Cth) have provided extensive coverage of the fields of sex discrimination and insurance, it is doubtful whether state legislation will prevail where there is any inconsistency. This has already been found to be the case in relation to the application of state disability discrimination legislation.[133]

### 8.3.4. Strata corporation coverage

A strata or community corporation is the body comprised of all unit owners in a strata or community titled development and collectively owns and controls the common property of the development, which includes areas such as communal parking or driveways, any communal recreation facilities and any communal stairways.

It would not appear that a strata or community corporation provides accommodation to a lot owner such that the owner could have a claim for discrimination in relation to accommodation. However, the EO Act may apply to claimed discrimination by a strata or community corporation as a provider of goods and services.

The 'services' to which the EO Act applies are defined to include, relevantly, 'access to or use of a place or facilities that members of the public are permitted to enter or use'.

The Victorian Supreme Court has held an owners' corporation, equivalent to a strata or community corporation, to be a provider of services in relation to provision of access to or use of a place.[134] This was on grounds including that the common property can encompass places to which there is public access.

Accordingly, it appears that a strata or community corporation could be held to be a provider of services and hence liable to a claim of unlawful discrimination in relation to the provision of that service – i.e. giving access to common property/facilities. In respect of discrimination on the grounds of disability, the corporation may be exempt if the provision of access (or equal access) to the place for persons with a disability would impose unjustified hardship on the community corporation under s 84 of the EO Act. However, the prohibition on discrimination should arguably extend to other grounds, for example banning breastfeeding on common property or banning owners from displaying a gay pride flag on common property.

The NSWLRC discusses this issue and notes that no state, territory or federal discrimination law provides a general protection against discrimination by strata committees or owners' corporations.[135]

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[133] *Halsbury's Laws of Australia* at [80-625]. See also discussion of superannuation exceptions under EO Act at 8.4.2.
[134] *Owners Corporation OC1-POS539033E v Black* [2018] 56 VR 1.
[135] NSWLRC Consultation Paper p 126.

### *8.3.5. Options for Discussion*



19. Should changes be made to the definition of 'services'?

20. Should changes be made to the definition and scope of associations and clubs subject to the Act's prohibition on discrimination?

21. Can and should prohibitions on discrimination in relation to superannuation be extended?

22. Are there other desirable changes to the areas of public life to which the anti-discrimination protections in the EO Act apply?

## 8.4. Exemptions and special measures

As with Commonwealth and interstate anti-discrimination laws, the EO Act contains a number of exemptions (or exceptions) from the prohibitions on unlawful discrimination. Some of these exemptions are wider exemptions that apply to several protected attributes and areas of public life, and some exemptions are specific to a particular protected attribute and/or area of public life. Some of these exemptions are in the nature of 'positive discrimination', which allow discrimination for the purposes of addressing past disadvantage and achieving equality (also termed 'special measures').

### *8.4.1. Wider exemptions*

Widely applicable exemptions in the EO Act include:

- discrimination in relation to employment in domestic settings (exemption to discrimination on the grounds of sex[136], race, disability, age, marital or domestic partnership status, spouse or partner's identity, pregnancy, association with a child, caring responsibilities, religious appearance or dress and experience of domestic abuse)
- discrimination in relation to employment where there is a genuine occupational requirement that a person have a particular attribute (exemption to discrimination on the grounds of sex[137], race, age). This is distinct from where there is an exemption from discrimination on the basis that a person with a protected attribute (disability or religious appearance or dress[138]) could not comply with a genuine occupational requirement, or not perform the work without endangering themself
- discrimination in the form of charities benefitting wholly or mainly people with a particular protected attribute (exemption to discrimination on the grounds of sex[139], race, disability, age, marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and experience of domestic abuse)

[136] And also sexual orientation, gender identity.
[137] And also sexual orientation, gender identity and intersex status.
[138] Expressed as where the person would "not be able to perform adequately, and without endangering himself or herself or other persons, the work genuinely and reasonably required for the employment or position in question; or to respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment or position in question": s 85F(3) (disability), 85Z(4) (religious appearance or dress).
[139] And also sexual orientation, gender identity and intersex status.

- special measures (exemption to discrimination on the grounds of sex[140], race, disability, marital or domestic partnership status, caring responsibilities and experience of domestic abuse).

*Domestic settings exemptions*

The widely applicable work in domestic settings exemption for 'employing a person for purposes not connected with a business carried on by the employer' applies to employing people in a person's own home, for example as a home cleaner or nanny.

The NSWLRC Consultation Paper discusses the objective of this exception being to uphold privacy and the rights of residents to determine who enters their home.

Many interstate Acts contain similar exemptions, some expressed more clearly, such as 'employment in a person's home'. Recent amendments in the ACT provide that discrimination in employment for 'domestic duties on the premises where the first person lives' is only allowed if 'reasonable, proportionate, and justifiable in the circumstances'.[141] The TAS Act does not appear to exempt discrimination in this scenario at all.

*Genuine occupational requirements exemption*

In respect of the 'genuine occupational requirements' exemption, the NSWLRC Consultation Report discusses the model in the ACT, in which a single broad exception covers genuine occupational qualifications and applies to discrimination based on any protected attribute except religious conviction.[142] It provides that discrimination is not unlawful 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. The ACT exemption includes the following examples of a genuine occupational qualification:

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- *employing a female carer to provide personal care services for a woman due to privacy or modesty;*
- *selecting someone of a particular race for a role in a theatrical performance based on authenticity, aesthetics or tradition, and*
- *preferencing people with lived experience of family and domestic violence for peer support positions in a women's crisis centre.*

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Requiring employers to show the discrimination is 'reasonable, proportionate and justifiable' could provide more protection under the EO Act. Also, a single exception could be easier to apply.

Unlike some interstate Acts, the EO Act does not include a genuine occupational requirements exception that applies in respect of disability. This has resulted in uncertainty about whether the 'special measures in respect of disability' exemption in s 82 could be relied on to preference a job candidate with a particular disability for a role in an agency working on programs for that particular disability. A more certain outcome, and avoidance of the need for application to SACAT for an exemption under s 92, might be achieved if there were a broadly applicable genuine occupational requirement exemption like that in the ACT, also applying to discriminating in favour of a person with a particular disability.

[140] And also sexual orientation, gender identity and intersex status.
[141] ACT s 24.
[142] NSWLRC p 101; ACT s 33B.

The ACT has a separate generally applicable exemption for 'inherent requirements of employment', which provides it is not unlawful for an employer to discriminate against another person in relation to a position of employment if—

> *(a) the prospective employee is, or would be, unable to carry out the inherent requirements of the position—*
>
> *(i) because of the prospective employee's protected attribute; and*
>
> *(ii) regardless of any reasonable adjustments able to be made by the employer in accordance with section 74; and*
>
> *(b) the discrimination is reasonable, proportionate and justifiable in the circumstances*

The EO Act also contains several 'inherent requirements of employment'-type exemptions:

- in respect of disability discrimination: s 71(2)
- in respect of age: s 85F(2)
- in respect of pregnancy: s 85Z(3) (qualified where arises out of dismissal)
- in respect of religious appearance and dress: s 85Z(4).

Unlike the ACT provision, these exemptions in most cases (other than in circumstances of dismissal from employment on grounds of pregnancy) are not linked to any requirements to make reasonable adjustments (discussed below at 8.5), nor is there a requirement that the discrimination be reasonable, proportionate and justifiable. Such changes might increase protections under the EO Act.

### *Accommodation where a person resides*

The EO Act contains exemptions allowing discrimination on various grounds in the provision of accommodation in a place where the person (discriminator) or their near relative resides.[143] This exemption respects the privacy of the homeowner, however it is arguably too broad.

Many other jurisdictions place caveats on their equivalent exemption. The ACT and NSW Acts only apply this exemption when the accommodation is provided for no more than 6 persons at a time (e.g. if you operate a large bed and breakfast you are considered a business even if you live on premises). TAS caps this at 5 guests and WA has the same rule but even stricter, capping at 3 guests. TAS does not appear to allow this kind of discrimination in any circumstance.[144]

### *Acts done to comply with court order or statutory authority*

The DDA and all interstate Acts appear to have a general exemption for acts done to comply with a court or tribunal order, or done with statutory authority.[145] The EO Act does not contain such a general exemption but may benefit from its inclusion, for example, as discussed in the LRCWA Report, this may help balance the application of the EO Act in respect of acts undertaken by government agencies, such as child protection authorities removing and placing children in care.[146]

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[143] On the grounds of sex, sexual orientation, gender identity or intersex status (s 40(3)), race (s 62(2a)), disability (s 77(2a)), age (s 85L(5)(b)), marital or domestic partnership status, identity of spouse or domestic partner, pregnancy, caring responsibilities or being, or having been, subjected to domestic abuse (s 85ZH(4)), intention to share accommodation with a child (s 87A(2)(b)).
[144] ACT s 26; NSW ss 20, 34(3), 38N(3), 48(3), 49(3), 49ZQ(3), 49ZYO(3); TAS s 27(1)(e); WA ss 21(3), 35Z(3), 47(3), 63(3), 66L(3), 66ZG(3), 67I(3).
[145] E.g. DDA s 47, ACT s 30, NSW s 54, NT s 53, TAS s 24, VIC ss 75, 76, WA s 69 (only court or Tribunal orders).
[146] LRCWA p 134. Although a specific exemption may also be desirable, such as the ACT's s 25A exemption providing it is not unlawful for adoption authorities to discriminate in placement of a child for adoption.

### 8.4.2. Specific/ limited exemptions

*Religious exemptions*

The EO Act contains the following exemptions that relate to religious bodies and educational institutions established for religious purposes:

- religious schools and educational institutions employment exemption - allowing discrimination by religious educational institutions in connection with the employment of staff or contract workers in the religious educational institution[147]: ss 34(3) (on grounds of sex, sexual orientation, gender identity, intersex status discrimination) and 85Z(2) (discrimination against same sex domestic partners on the ground of marital or domestic partnership status)
- religious schools and educational institutions appearance or dress exemption - allowing discrimination by religious educational institutions against a student or potential student because the student appears or dresses, or wishes to appear or dress, in a manner required by, or symbolic of, a different religion: s 85ZE(5)
- religious bodies exemptions - allowing discrimination in the ordination or appointment of priests, ministers of religion or members of any religious order; the training or education of people seeking such ordination or appointment, or the selection or appointment of people to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice: s 50 (on the grounds of sex, sexual orientation, gender identity, intersex status) and s 85ZM (on the grounds of marital or domestic partnership status).

There are also exemptions for religious associations, such as health providers, aged care accommodation providers and other community service providers, allowing them to discriminate on the ground of sexual orientation, gender identity or intersex status (s 35(2b)) or against same sex domestic partners on the ground of marital or domestic partnership status (s 85ZB(3)) if the association is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.

These exemptions are generally argued to be justified in order to protect freedom of religion and belief.[148]

[147] The religious school must publish a written policy about this hiring approach.
[148] The international human rights principles in respect of freedom of religion and thought are discussed at length in the LRCWA Report from p 169.

The Australian jurisdictions take different approaches to the breadth of religious exceptions to discrimination:

| | Religious personnel (priests, church officials etc) exception<br><br>Engagement of church personnel | Religious bodies exception<br><br>For acts conforming with doctrines, beliefs or tenets of the religion in specified circumstances | Religious schools employment exception<br><br>Employment of staff, contract workers | Provision of services by religious bodies exception<br><br>Exclude persons from the institution or its programs on grounds of attributes |
|---|---|---|---|---|
| **SA** | Yes – EO Act s 50 (on the grounds of sex, sexual orientation, gender identity, intersex status) and s 85ZM (on the grounds of marital or domestic partnership status) | Yes - s 50 (on the grounds of sex, sexual orientation, gender identity, intersex status) and s 85ZM (on the grounds of marital or domestic partnership status) | Yes – s 34(3) (on grounds of sex, sexual orientation, gender identity, intersex status discrimination) and s 85Z(2) (same sex domestic partners on the ground of marital or domestic partnership status) | Yes – religious: health providers, aged care accommodation providers and other community service providers (on grounds of sexual orientation, gender identity or intersex status (s 35(2b)) or against same sex domestic partners on the ground of marital or domestic partnership status (s 85ZB(3)). |
| **VIC** | Yes – VIC s 82 | Yes but limited | Yes - on grounds of religious belief only – must also be reasonable, proportionate | Yes – on grounds of religious belief only<br><br>s 39 – in provision of education/ training by religious school<br><br>s 60 – welfare measures for persons of particular religious belief<br><br>s 61 in provision of education/ training by religious school<br><br>s 82B provision of Govt funded goods or services– must also be reasonable, proportionate |
| **TAS** | Yes – TAS s 52 | Yes – s 52<br><br>S 27 on grounds of gender if required by the doctrines of the religion | Yes s 51 – on grounds of religious belief (only) if genuine occupational qualification or requirement | Yes – s 51A on grounds religious belief<br><br>S 27 on grounds of gender if required by the doctrines of the religion |

| | | | | |
|---|---|---|---|---|
| **ACT** | Yes – ACT s 32 | Yes – s 32 | No - s 32(2) | Yes – s 32 on grounds of religious belief only (other than in education), must have published policy, provision of accommodation<br><br>Not where provision is for commercial purpose. |
| **NT** | Yes – NT s 51 | Yes – s 51 | Yes – s 35B on ground of religious belief or activity only and must be published policy and in good faith. | |
| **WA** | Yes – WA s 72 | Yes – s 72 | Yes – s 73 – but must be in good faith | Yes s 73 – in provision of education/ training by religious school– but must be in good faith |
| **QLD** | Yes – QLD s 109 | Yes s 109 | Yes – but must be reasonable | Yes – on the basis of any protected attribute when providing accommodation |
| **NSW** | Yes – NSW s 56 – exempt from all grounds | Yes s 56 – exempt from all grounds | | |
| **CTH** | Yes – eg SDA s 37(1) | Yes – s 37(1) | Yes – eg exempt from discrimination on grounds including sex, sexual orientation, gender identity, marital or relationship status or pregnancy: SDA s 38(1) | Yes<br><br>in provision of education/ training by religious school eg SDA s 28(3)<br><br>In provision of accommodation eg SDA s 23(3)(b) |

The wider religious exemptions have been widely criticised. In contrast, the ACT for example limits the application of its exemption to religious education and health institutions, and to where the duties of the employment or work would involve the participation by the employee or worker in the teaching or practice of the relevant religion.

The LRCWA Report recommended that the WA religious bodies exemption (other than in respect of government-funded and for-profit services - see below), should be tightened somewhat so that, to be allowed, the discrimination must *both* conform with the precepts of that religion *and* be necessary to avoid injury to the religious susceptibilities of the adherents of that religion (rather than either of these, as in the EO Act s 50(1)(c)). The LRCWA Report, and the QHRC Report,

further recommended that, as in VIC, the discrimination should be required to be 'reasonable and proportionate in the circumstances' to attract the exemption.[149]

The LRCWA Report further recommended the approach in VIC that, in the case of government-funded services and for-profit provision of goods and/or services, by religious bodies, those bodies ought only be able to discriminate on the basis of a person's religious conviction, and not any other protected attribute such as sexual orientation or marital or domestic partnership status.

The LRCWA Report contains a comprehensive discussion of the arguments for and against the religious schools and educational institutions employment exemption.[150] It presents the arguments:

- advanced by opponents of the exemption, that the work of a school maths teacher or gardener ought to be able to be undertaken without need for conformity to religious doctrine
- advanced by proponents of the exemption, that all school staff in both teaching and non-teaching roles act as role models and examples to students of the religious ethos of the school and as such need to conform to its religious doctrine.

The LRCWA Report recommended retaining the religious schools employment exemption. It discussed re-shaping the exemption consistently with the approaches in TAS and VIC, where religious educational institutions can only discriminate in employment where conformity with religious doctrine, tenets or beliefs is an inherent requirement of the role, and the person discriminated against cannot meet that inherent requirement because of their religious belief or activity. In VIC the discrimination also needs to be reasonable and proportionate in the circumstances.[151]

A recent report by the AHRC examining the human rights experiences of gender diverse people in Australia has discussed arguments that the broader religious bodies exemption in s 38 of the Commonwealth SDA may override the narrower religious exemptions operating in Tasmania and Victoria due to inconsistency.[152] The AHRC refers to representatives of religious educational institutions in Tasmania and Victoria having made this argument publicly.

This AHRC report also refers to legal action being taken against Melbourne Archdiocese Catholic Schools which raises this constitutional argument.[153] The AHRC report states: 'amending or repealing s 38 of the SDA could resolve the inconsistencies. Otherwise, it will be up to a court to determine which law applies'.[154]

### *Sex/gender identity in sporting activities*

Section 48 of the EO Act allows for sex-segregation in competitive sporting activities where strength, stamina or physique are relevant to the activity and in specified circumstances.

There are a range of community views on this subject. Proponents of strict segregation according to biological sex argue that it is necessary to protect the competitive integrity of female sporting competitions. Opponents argue that it is not necessary and that it excludes transgender participants from being able to compete according to their identified gender. Many people have

[149] LRCWA rec 76, QHRC Report rec 39.1–39.2. On 21 October 2026, the WA Government introduced the Equal Opportunity Bill 2026 to modernise its anti-discrimination legislation, including to update and narrow the employment exemption for religious educational institutions.
[150] LRCWA from p 178.
[151] VIC s 83A.
[152] AHRC, 'Equal identities: A human rights review of the experiences of trans and gender diverse people in Australia', p 122.
[153] AHRC 'Equal Identities' p 122. Also discussed in an article by the Human Rights Law Alliance at https://www.hrla.org.au/legal-protections-tested-as-christian-school-sued-over-pronoun-policy.
[154] AHRC 'Equal Identities' p 122.

views somewhere in between (i.e. that it should be considered on a sport-by-sport or case-by-case basis).

The SDA allows sex discrimination in sport if strength and stamina are relevant to success in the sport but the exemption does not apply to[155]:

- the coaching of persons engaged in any sporting activity
- the umpiring or refereeing of any sporting activity
- the administration of any sporting activity
- any prescribed sporting activity
- sporting activities by children under 12 years.

The ACT allows sex discrimination in sport (for people 12 years and over) if strength and stamina are relevant to success in the sport *and* the discrimination is reasonable, proportionate and justifiable in the circumstances. The LRCWA Report recommended a similar approach. [156]

### *Disability in sporting activities*

Section 81 of the EO Act allows discrimination against persons with disability in relation to sporting activities if the sport 'requires physical or intellectual attributes that the person does not possess'.

The language is arguably outdated and disrespectful of persons with disability. Possible alternative wording could be closer to the test for employment exclusion: 'unable to satisfactorily and safely play the sport by reason of the disability'. The sport exemption in the DDA applies if:[157]

> - *the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity; or*
> - *the persons who participate or are to participate in the sporting activities 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; or*
> - *a sporting activity is conducted only for persons who have a particular disability and the first-mentioned person does not have that disability.*

### *Sex discrimination in provision of goods and services*

Section 39(2) of the EO Act allows discrimination in the provision of services on the grounds of sex, sexual orientation, gender identity or intersex status 'if the nature of a skill varies according to whether it is exercised in relation to men or to women'. Under this exemption, a person does not unlawfully discriminate by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice.

This wording should potentially be updated in relation to interaction with gender identity and sex characteristics. For example, in relation to intimate waxing or piercing services, the skill differs between different genitalia (sex characteristics) not between different gender identities and so the exemption may not operate as intended in this area.

[155] SDA s 42.
[156] ACT s 41, LRCWA rec 95.
[157] DDA s 28(3).

### *Discrimination by superannuation and insurance bodies*

The EO Act allows insurance companies to discriminate on the basis of sex, disability and age.[158] Other jurisdictions vary in terms of which attributes are covered by exemptions:[159]

- QLD only allows discrimination on the basis of age or disability, and QHRC recommended this position continue
- The Commonwealth anti-discrimination laws and NSW allow discrimination in respect of age, disability and sex
- NSW, TAS and WA cover all these, plus marital status.

Other jurisdictions allow discrimination on any attribute if the relevant criteria are met (ACT, NT and VIC).

If sex discrimination is allowed for insurance purposes, this is one area in which the definition of 'sex' and its relationship to gender identity may be relevant. For the purposes of sex-based insurance exemptions, insurance companies may not be certain whether they should consider a transgender woman with a legal sex of female to be male or female for the purposes of matters such as health insurance (noting different health conditions are relevant depending on birth sex characteristics). The insurance industry may have existing policies in place to approach the issue.

The EO Act currently applies several different tests in this area. Life insurance and superannuation discrimination based on age is unrestricted, however sex discrimination must be based on 'actuarial or statistical data from a source on which it is reasonable to rely', and disability discrimination should also be based on such data, but may also be based on 'other relevant factors' if such data is not available.[160]

It is not clear whether there is a sound policy basis for having different tests. The ACT, for example, applies a central test for all discrimination by insurance and superannuation, i.e. where the discrimination is based on:[161]

> - *actuarial or statistical data; or*
> - *when actuarial and statistical data is unavailable—other relevant documents; and*
> - *it is reasonable for the insurance or superannuation services provider to rely on the data or other documents; and*
> - *the discrimination is reasonable, proportionate and justifiable in the circumstances.*

### *Association membership exemptions*

The EO Act contains various exceptions for membership of associations for persons of a particular sex, gender identity, sexual orientation, age group, etc.[162] There are some drafting differences between them. For example, there is a requirement for the group to be for 'social intercourse' when it is for persons of a particular race or ethnic group, but not in relation to other attributes.

[158] Superannuation companies only have one exemption, for age (noting that there are other issues about how the EO Act deals with Superannuation - see 8.3.3 under 'Areas of coverage').
[159] See *Halsbury's Laws of Australia* [80-445].
[160] Sections 49 (sex), 78 (disability).
[161] ACT s 28.
[162] Sections 35(2)-(2b) (sex etc), 57(2) (race), 85G(2)-(4) (age), 85ZB(2) (other grounds).

It may be clearer to group these 'associations' exemptions together into a general exemption allowing associations (and clubs if expanded – see 8.3.2 above) for persons of a particular attribute – possibly consistent with the ACT approach[163] and as recommended by the LRCWA.

*Special measures exemptions*

Exemptions apply under the EO Act for measures to benefit persons with the protected attribute ('special measures').

Exemptions from race discrimination apply to charities to benefit persons of a particular race[164] and schemes or undertakings for the benefit of persons of a particular race.[165]

Exemptions from disability discrimination apply to charities[166] and schemes or undertakings for the benefit of persons who have a particular disability.[167]

Exemptions from sex discrimination apply to acts done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of a particular sex, sexual orientation, gender identity or intersex status, have equal opportunities with, respectively, all other persons.[168]

Exemptions from discrimination on other grounds apply to acts done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of a particular marital or domestic partnership status, persons with caring responsibilities, or persons who are, or who have been, subjected to domestic abuse, have equal opportunities with, respectively, persons of another marital or domestic partnership status, persons without caring responsibilities, or persons who are not, or who have not been, subjected to domestic abuse.[169]

In addition to these statutory exemptions, the EO Act provides that the Commissioner for Equal Opportunity or any other person can apply to SACAT under s 92 of the EO Act for the grant of an exemption for a person, class of persons, activity or specified circumstances in respect of a proposal to provide special measures.

Several interstate review reports have discussed arguments that special measures exemptions should either be combined into a single new general exemption from discrimination for measures intended to achieve equality[170] or, alternatively, that the definition of discrimination for the purposes of the Act be expressed to preclude positive equal opportunity measures.[171] The latter approach is argued to potentially reduce the numbers of exemption applications that are made to tribunals as a risk-avoidance strategy against complaints of discrimination being made notwithstanding the apparent application of a statutory exemption in the Act, and consequent need to prove that a special measures exemption applies to what otherwise constitutes an act of unlawful discrimination. VIC s 12 provides an example of this approach:

[163] See ACT s 31.
[164] Section 64.
[165] Section 65.
[166] EO Act s 80.
[167] EO Act s 82.
[168] EO Act s 47.
[169] EO Act s 85ZK.
[170] E.g. LRCWA from p 189.
[171] E.g. QHRC from p 110; NSWLRC from p 232.

***12 Special measures***

*(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.*

***Examples***

*1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.*

*2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.*

*3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.*

*(2) A person does not discriminate against another person by taking a special measure.*

*(3) A special measure must—*

*(a) be undertaken in good faith for achieving the purpose set out in subsection (1); and*
*(b) be reasonably likely to achieve the purpose set out in subsection (1); and*
*(c) be a proportionate means of achieving the purpose set out in subsection (1); and*
*(d) be justified because the members of the group have a particular need for advancement or assistance.*

*(4) A measure is taken for the purpose set out in subsection (1) if it is taken—*

*(a) solely for that purpose; or*
*(b) for that purpose as well as other purposes.*

*(5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.*

***Example***

*It may be reasonable to restrict eligibility for a special measure to people with the attribute who are of a particular age.*

*(6) A person who undertakes a special measure has the burden of proving that the measure is a special measure.*

*(7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure.*

### *8.4.3. Options for Discussion*



23. Are the exemptions from unlawful discrimination discussed at 8.4.1 and 8.4.2 still justified in their current form?
24. Should any further general exemptions be included, including for inherent requirements of employment or acts done to comply with a court or tribunal order, or done with statutory authority?
25. Do the various exemptions for special measures operate as intended? Could these be simplified into a single overarching provision, potentially expressed to be excluded from the definition(s) of discrimination for the purposes of the EO Act?
26. Are any other changes needed to the exemptions from discrimination in the EO Act?

## 8.5. Reasonable adjustments

Not all Australian jurisdictions' legislation currently imposes requirements for reasonable adjustments.[172]

Reasonable adjustments are covered in the EO Act in relation to disability. Discrimination on the grounds of disability is defined to include:

- failing to provide access to or use of a place or facilities, such as providing a ramp, elevator or other disabled access to a frequented public building, in circumstances where it is unreasonable to do so
- failing to provide special assistance or equipment required by a person in consequence of the person's disability, in circumstances where it is unreasonable to do so
- failing to provide a safe and proper means of access to, or use of, a place or facilities

with an exemption then applying 'if the provision of access or use would impose unjustifiable hardship'.[173]

Similarly, the DDA also expresses failure to provide reasonable adjustments for a person with a disability as part of the definition of discrimination on the ground of disability.[174]

However, in the ACT, NT and VIC 'reasonable adjustments' are expressed as a separate positive duty. Failure to make reasonable adjustments in accordance with this duty is an unlawful act (noting that these unlawful acts are not criminal offences and do not found a right of legal action by a private individual,[175] rather an ability to make a complaint to that jurisdiction's Equal Opportunity Commission-equivalent and ultimately an avenue for remedial orders by their tribunal equivalent of SACAT).

In VIC, failing to make reasonable adjustments in respect of disability in relevant circumstances is unlawful discrimination unless certain exemptions apply, for example, that the adjustments would be unreasonable in the circumstances (e.g. the adjustments would be very expensive relative to the number of people who would benefit).[176]

[172] See discussions LRCWA from p 146; NSWLRC Consultation Paper from p 224.
[173] Sections 66, 84.
[174] DDA s 5(2).
[175] See EO Act s 99.
[176] VIC ss 20, 20A, 33 (in employment), 40 (in education), 45 (in provision of services).

VIC also has positive duties for an employer to not unreasonably refuse to accommodate a person's responsibilities as a parent or carer.[177]

The ACT and NT have legislated a broad positive duty to make reasonable adjustments to accommodate another person's particular needs arising from any of the attributes protected under their anti-discrimination laws, unless an exemption to discrimination applies.[178]

The QHRC and LRCWA both recommended the enactment of a standalone positive duty to make reasonable adjustments, or accommodations. The QHRC recommended this be limited to disability. The LRCWA recommended that such a duty extend to accommodating special needs that another person has because of, at a minimum, disability, pregnancy, breastfeeding or family or carer responsibilities but also that consideration should be given to creating a duty that extends to all protected attributes and all areas of life.[179]

#### *8.5.1. Options for Discussion*



27. Should the EO Act make further provision for making reasonable adjustments such as a standalone duty?
28. What should be the scope of any duty to make reasonable adjustments – i.e. to which protected attributes and areas of public life should any such duty apply?

## 8.6. Positive duty to eliminate discrimination, etc

Several jurisdictions have legislated to impose a positive duty on applicable bodies to take steps to eliminate discrimination, as well as sexual harassment, vilification and victimisation.

The Australian Government has adopted such a duty under the SDA for employers and organisations undertaking a business or undertaking (PCBUs) to 'take reasonable and proportionate measures to eliminate, as far as possible' sex discrimination and sexual harassment in the work context, as recommended by the AHRC's *Respect@Work* Report.[180] PCBUs include sole traders, not-for-profit organisations that engage and pay staff, government departments and companies. This duty applies to PCBUs in SA.

Duties to prevent sexual harassment also apply to PCBUs under SA's WHS Act - in the context of the broad duty to eliminate or manage hazards and risks to a worker's health, which includes psychological health. Psychosocial hazards are recognised as including discriminatory or inequitable conduct or decisions as well as sexual harassment.[181]

The ACT, NT, and VIC all impose a broad positive duty to eliminate discrimination, sexual harassment and unlawful vilification that applies to all protected attributes and areas of public life covered under their anti-discrimination laws (not just to sex discrimination in a work context).[182] The paused amendments to the QLD Act would have imposed a comparable positive duty.[183]

The QHRC and LRCWA both recommend adopting a broad positive duty similar to VIC. The LRCWA noted that the general equal opportunity legislative approach, under which individuals

[177] VIC ss 17, 19, 22, 32.
[178] ACT s 74; NT s 24.
[179] QHRC rec 5, LRCWA rec 66.
[180] SDA s 47C; https://humanrights.gov.au/resource-hub/by-resource-type/publications/sex-and-gender-rights/sex-and-gender-rights/respectwork-sexual-harassment-national-inquiry-report-2020 (2020) rec 17.
[181] See https://www.safework.sa.gov.au/workplaces/psychosocial-hazards/what-are-psychosocial-hazards.
[182] ACT s 75; NT s 18B; VIC s 15.
[183] https://www.qhrc.qld.gov.au/our-work/news-and-events/news/news-anti-discrimination-act-reforms-delayed.

make complaints of discrimination or harassment, only addresses individual cases and so has limited scope to address systemic discrimination or to ensure steps are taken to prevent future unlawful activity.

An Equal Opportunity SA *Review of Harassment in the South Australian Parliament Workplace* (EO Parliament Report) recommended consideration of the potential benefits of imposing a positive obligation on employers to prevent workplace sexual harassment and that the Commissioner for Equal Opportunity is provided with powers to enforce that obligation and inquire into systemic unlawful discrimination.[184] An Equal Opportunity SA *Review of Harassment in the South Australian Legal Profession* (EO Legal Profession Report) also recommended that consideration be given to imposing this duty.[185]

On the one hand, imposition of a positive duty may reduce the burden on individuals to protect their rights through bringing complaints under the EO Act, as well as facilitate systemic improvements to human rights.

On the other hand, such a duty in the EO Act may duplicate and/or conflict with existing duties, such as those under the SDA and WHS Act as discussed above, albeit those duties are confined to PCBUs and not other organisations, and to rights in an employment context only.

Compliance could also increase costs for businesses, for example, as a result of developing and implementing policies, providing training and keeping records and collecting data to comply with a new duty under the EO Act. The extent of such costs will be reduced to the extent of existing compliance with requirements already in place under the SDA and WHS Act, as well as measures already implemented by employers to reduce their risk of being found vicariously liable under the EO Act for discrimination or other unlawful conduct by their employees.[186]

#### *8.6.1. Options for Discussion*



29. Should the EO Act include a positive duty to take steps to eliminate discrimination, sexual harassment, vilification and victimisation?
30. What should be the scope of any such duty – to which bodies and areas of public life should any such duty apply?

## 8.7. Sexual harassment test and scope

'Sexual harassment' is a prohibited act under the EO Act. Under s 87, a person sexually harasses another (the person harassed) if:

- *the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
- *engages in other unwelcome conduct of a sexual nature in relation to the person harassed*

[184] https://www.equalopportunity.sa.gov.au/documents/reviews/Report-Review-of-Harassment-SA-Parliament-Workplace.pdf rec 15.
[185] https://www.equalopportunity.sa.gov.au/documents/reviews/Final-Report-of-the-Review-of-Harassment-in-the-South-Australian-Legal-Profession.pdf rec 3.
[186] Section 91 provides that "a person is…vicariously liable for a discriminatory or unlawful act of an agent or employee of the person committed while acting in the course of their agency or employment" but "It is a defence to prove that the person took reasonable steps to ensure that the agent or employee would not act in contravention of this Act".

> *in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.*[187]

The prohibition on sexual harassment applies in work, education, provision of goods and services or accommodation, conferring qualifications and joining a club or association. There are also specific prohibitions on sexual harassment by judicial officers, members of Parliament and members of local government councils, in recognition that restriction to an employment relationship could otherwise leave some workers without protection.

This is another area of overlap with federal laws. Sexual harassment is prohibited under the SDA at work, in education and in the provision of goods or services.[188] A complaint about sexual harassment in these situations can be made to the AHRC, which can investigate the complaint and try to resolve it by conciliation.

Sexual harassment in connection with work is also prohibited under the Fair Work Act. The prohibition applies between workers, people seeking to become workers and people conducting businesses or undertakings. The Fair Work Act definition of 'workers' extends beyond 'employees' and includes other volunteers, contractors, sub-contractors, outworkers, labour hire workers, work experience students and trainees. The Fair Work Commission has the jurisdiction to deal with a sexual harassment dispute under the Fair Work Act, and can make an order to stop sexual harassment in the workplace if there is an ongoing risk to the worker.[189]

The SDA definition of sexual harassment (applicable also to the Fair Work Act prohibition) is similar to the EO Act, although the reasonable person test is differently expressed as 'circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.

The EO Act test for sexual harassment is an objective test and does not require proof that the person intended the person harassed to feel offended, humiliated or intimidated. The NT and QLD prohibitions on sexual harassment incorporate both a subjective intentional test and an objective reasonable person test.[190]

Consideration could be given to adding a subjective test as an alternative, so that if actual intent is proved findings can be made that the harasser was acting deliberately, which could impact damages awarded in any SACAT proceedings. Against this option is a concern that this approach could create a hierarchy of harassment that may downgrade the experiences of persons subject to careless sexual harassment.

In respect of the objective test, the NSWLRC discusses that the SDA was amended to include reference to 'the possibility that a person would be offended', etc because the previous test (as still in the EO Act) was considered too narrow and 'could allow a person to "run the risk" of causing offence, humiliation or intimidation'.[191]

The SDA[192] (and NT and QLD) spell out circumstances which may be relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated, including:

[187] EO Act s 87(9).
[188] SDA s 28A.
[189] Fair Work Act s 527D, part 3-5A ('sexually harass' is defined as under SDA s 28D).
[190] NT s 22.
[191] NSWLRC p 198.
[192] SDA s 28A(1A).

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct
- any disability of the person harassed.

Including a similar provision in the EO Act may assist in its application.

#### *8.7.1. Options for Discussion*



31. Are there arguments to improve s 87 in prohibiting sexual harassment, for example, by adding reference to the 'possibility that the person harassed would be offended, humiliated or intimidated' in the objective test, by adding an alternative subjective test and/or by setting out circumstances to be considered in applying the test?

## 8.8. Other harassment

The SDA prohibits 'sex-based conduct', which is demeaning conduct on the ground of sex that is not necessarily sexual in nature (such as derogatory comments about women). While this overlaps with sex discrimination, it goes further as the discrimination provisions only apply to an employer (e.g. firing, not promoting) whereas sex-based harassment covers employee-to-employee harassment. The LRCWA recommended that WA adopt something similar.[193]

The SDA also contains provisions prohibiting workplaces that are 'hostile' on the basis of sex. However, the QHRC Report considered both the sex-based harassment and 'hostile work environment' measures and recommended that QLD not include them.[194]

The DDA provides that it is unlawful, in relation to a disability:[195]

- for a person to harass an employee, an applicant for employment, or a contract worker
- for a member of staff to harass a student at, or applicant to, an educational institution
- for a provider of goods, services or facilities to harass a person seeking to acquire or use them.

The DDA also provides that it is unlawful to harass in those areas a person who has an associate with a disability, in relation to a disability of the associate.[196]

TAS prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a wide range of protected attributes, including race, disability, sexual orientation, gender identity, intersex variations, etc.[197]

NT includes harassment on the basis of any attribute within its definition of discrimination.[198]

[193] SDA s 28AA; LRCWA rec 110.
[194] QHRC rec 6.2.
[195] DDA ss 35-39.
[196] DDA s 7.
[197] TAS s 17.
[198] NT s 20(1)(b).

WA prohibits racial harassment in employment, education or accommodation. The LRCWA recommended an expansion of the test of racial harassment, and an expansion of this prohibition to all areas of public life.[199]

#### *8.8.1. Options for Discussion*



32. Should the EO Act cover other types of harassment?

## 8.9. Accessorial/Vicarious liability

Under s 90 of the EO Act any person who caused, instructed, induced, aided or permitted another person to do an act that is unlawful under the Act is jointly and severally liable.

Under s 91 of the EO Act, a principal or employer is vicariously liable for contraventions of the Act by their agent or employee committed during the course of agency or employment, unless they can show that they took reasonable steps to ensure the agent or employee would not act in contravention of the Act. Reasonable steps may include having an appropriate policy in place (e.g. an anti-discrimination/ harassment policy), and taking reasonable steps to enforce the policy, including prompt investigation of alleged acts in contravention.

Vicarious employer liability also applies under the SDA and Fair Work Act. The defence to vicarious liability in the SDA and Fair Work Act (and in the ACT, NT, NSW and WA), requires the employer to take 'all reasonable steps'.[200] That requirement might be considered also for the EO Act.

It could also be useful to include more detail in s 91 about how to consider if an employer has taken all reasonable steps, for example a list of mandatory considerations. The NT Act contains this.[201] Further, the NT Act provides that if a person took some steps but not enough to avoid liability, the steps they did take can be taken into account to mitigate damages.

#### *8.9.1. Options for Discussion*



33. Are there any deficiencies in the operation of ss 90 (accessorial liability) or 91 (vicarious liability)? For example, should the defence to vicarious liability require showing that all reasonable steps were taken and/or should a list of mandatory considerations be included to determine whether all reasonable steps have been taken?

## 8.10. Complaints process and procedure

### *8.10.1. Time limit*

Currently complaints under the EO Act must be made within 12 months of the alleged contravention of the Act. However, this can be extended by the Commissioner for Equal

[199] LRCWA recs 104 to 109.
[200] SDA s 106(2); Fair Work Act s 527E(2); NT s 105; NSW s 53; WA s 161.
[201] NT s 105(3) (matters to be considered are: the provision of anti-discrimination training; the development and implementation of an equal employment opportunity management plan; the publication of an anti-discrimination policy; the financial circumstances of the person; and the number of workers and agents of the person).

Opportunity if there is 'good reason' why the complaint was not made within the time limit and it is 'just and equitable' to accept the claim.[202]

The EO Legal Profession Report had recommended the time limit be increased to three years.

Under the AHRC Act, and in the ACT, NSW and VIC, there is no time limit imposed for lodging a complaint. Instead, their legislation provides a discretionary power to dismiss a complaint that is lodged *after* a certain period (12-24 months depending on jurisdiction and type of claim).[203] The QHRC Report recommended a similar approach.[204]

The remaining jurisdictions are generally consistent with the EO Act's current default 12 month time limit.

### *8.10.2. Representative complaints*

Currently, the EO Act is very strict in who it allows to make a complaint – it must be a person aggrieved by the relevant act. A claim can only be made on a person's behalf by a 'suitable representative' if they are a child or a person with an intellectual disability.[205]

All other Australian jurisdictions provide in some form for third party complaints. The other jurisdictions all differ in terms of matters such as:

- whether consent is required from individual aggrieved parties to the bringing of the representative complaint (NSW, VIC)[206] - or whether the commissioner needs to be satisfied that a majority of members of the third-party reporting organisation are likely to consent (TAS)[207]
- whether representative organisations are empowered to bring representative complaints (unions only under AHRC Act and in WA[208], broader elsewhere)
- whether the commissioner needs to first authorise the third party (NT)[209]
- whether the complaint must relate to systemic discrimination (QLD, NT).[210]

A requirement for consent of aggrieved person(s) may not address fear of victimisation concerns. The LRCWA and QHRC recommended that representative bodies be allowed to lodge complaints without consent and without specifying a specific person aggrieved, in order to seek structural or systemic remedies.[211]

### *8.10.3. Complaints other than in writing*

Currently EO Act s 93(1c) states that a complaint must be made in writing to the Commissioner for Equal Opportunity. The QHRC recommended modifications to this requirement, including for their Commission to provide assistance to reduce a complaint to writing or to take a complaint orally and transcribe it.

[202] Section 93(2), (2a).
[203] AHRC Act ss 20(2)(c)(i); 46PH(1)(b); ACT s 78(1)(a); NSW s 89B; VIC s 116(a).
[204] QHRC rec 8.1.
[205] Section 93(1)-(1b).
[206] NSW s 87C, VIC s 114.
[207] TAS s 60(1).
[208] AHRC Act s 46P(2)(c); WA s 83.
[209] NT s 60(b).
[210] NT s 60(c); QLD s 146.
[211] QHRC recs 10, 11; LRCWA rec 136.

A complaint can be made orally in the ACT.[212]

The AHRC Act and TAS and ACT legislation provides that their relevant commissions can give assistance to a person to make a complaint.[213]

### 8.10.4. Service of complaints

Section 93(3) of the EO Act requires that a written summary of a complaint be served on the respondent immediately after the complaint is lodged.

Under s 95A the Commissioner has the discretion to decline to proceed with a complaint on grounds including that the complaint is frivolous, vexatious, misconceived or lacking in substance.

Consideration could be given to whether the Commissioner should have the discretion to postpone service of the complaint summary until after the Commissioner has determined whether the complaint will be dismissed under s 95A(1)(a) (to avoid respondents being concerned with frivolous or vexatious claims).

### 8.10.5. Amending a complaint

Under the current Act, the Commissioner for Equal Opportunity does not have the express power to require or permit the amendment of a complaint.

NSW and NT allow the commissioner to permit a complainant to amend a complaint at any time, or, in NT, the commissioner may amend the complaint based on information from the complainant to ensure "any alleged contravention of this Act is identified in a concise manner, or efficient resolution of the complaint is facilitated".[214]

### 8.10.6. Commissioner power to compel oral evidence and information

The Commissioner for Equal Opportunity has the power to require parties to provide books, papers or documents but not information generally, including orally.[215]

The NT commission has power to require sworn evidence.[216] Most jurisdictions appear to allow for information (beyond merely books, papers or documents and including orally) to be compelled by their commission.[217] Conversely the VIC legislation requires a tribunal order for someone to be compelled to produce anything to the commission, whether oral or written.[218]

*Formalisation of successful conciliation*

Currently, the EO Act does not contain any provisions on what should happen if a complaint is successfully conciliated.

[212] *Human Rights Commission Act 2005* (ACT) s 44(4) (if the commission is satisfied on reasonable grounds that exceptional circumstances justify action without a written complaint).
[213] AHRC Act s 20(5); *Human Rights Commission Act 2005* (ACT) s 44(3); TAS s 62(2).
[214] NSW s 91C, NT s 64(2),(3).
[215] Sections 94 (2a)-(7) subject to restrictions, including on types of documents, and subject to privilege against self-incrimination, etc.
[216] NT s 85.
[217] ACT s 74; NSW s 90B; TAS s 97; QLD s 156; WA s 86.
[218] VIC s 131.

By contrast, most other jurisdictions have provisions for either mandatory or optional formalisation of the agreement,[219] and in some jurisdictions, the formalised agreement has or can be given the force of an order of the relevant tribunal.[220]

#### *8.10.7. Options for Discussion*



34. Should the timeframe for making a complaint under the EO Act be extended? Or should the default position in relation to accepting late claims be reversed, consistent with the AHRC Act and in some other jurisdictions?
35. Should the scope of persons who can make complaints of discrimination and other unlawful conduct under the EO Act be broadened, including in relation to representative complaints?
36. Should there be scope for the Commissioner for Equal Opportunity to take complaints other than in writing (for example, from persons with communication difficulties) or to otherwise give assistance to a person to make a complaint?
37. Should the Commissioner for Equal Opportunity have discretion not to serve written summary of a complaint on the respondent immediately after the complaint is lodged until after the Commissioner has determined whether the complaint will be declined under s 95A(1)(a)?
38. Should there be an express power for the Commissioner to allow a complainant to amend a complaint?
39. Should the Commissioner have the power to compel parties to provide information and answer questions orally?
40. Should the EO Act contain formal requirements in relation to successfully conciliated matters?

## 8.11. Tribunal proceedings

### *8.11.1. Automatic referral to SACAT*

Currently, a complaint on which the Commissioner for Equal Opportunity declines to take action under s 95A of the EO Act must nonetheless be referred to SACAT at the request of the complainant.[221]

This has led to a number of applications to SACAT that are without merit or are vexatious, which negatively impacts SACAT's resources and efficiency.

One option to remedy this could be to provide that a complaint on which the Commissioner determined to take no action requires leave from SACAT to progress to tribunal proceedings.

NSW and the AHRC Act have provisions to this effect, and the LRCWA Report recommended that a similar provision be adopted in WA - with the tribunal able to deal with the permission application without hearing 'on the papers'.[222] QLD does not appear to allow rejected complaints to go to QCAT in any circumstance.

[219] *Human Rights Commission Act 2005* (ACT) s 62; NT s 81; NSW s 91A(5)-(9); QLD s 164; VIC s 119; TAS s 76.
[220] TAS s 76; NSW s 91A(5)-(9), QLD s 164, VIC s 119.
[221] Section 95B(1)(c).
[222] NSW s 96(1); AHRC Act s 46PO(3a); LRCWA rec 152.

### 8.11.2. Power for SACAT to amend complaint

The legislation in NSW, QLD and TAS allows their tribunals to amend a complaint.[223] The LRCWA recommended the WA State Administrative Tribunal have the ability to amend complaints on application by the complainant or on the Tribunal's own motion.[224]

### 8.11.3. Burden of proof in SACAT hearings

Currently, the EO Act does not contain any provisions about the burden of proof for discrimination disputes in SACAT. The NT, NSW, ACT, WA and QLD laws all legislate the general rule that the substantive discrimination must be proved by the complainant, but any exemption must be proved by the respondent seeking to rely on it.

It is likely this is already how the EO Act is interpreted, however this could be legislated to make it clear.

Alternatively, the burden of proof for substantive complaints could be changed.

Both the QHRC and LRCWA recommended a 'shared burden of proof' approach based on the *Equality Act 2010* (UK) in which the burden to disprove discrimination shifts to the respondent once the complainant establishes a prima facie case.[225]

### 8.11.4. Remedies available from SACAT

Under s 96 of the EO Act, SACAT is able to order the following remedies for contravention of the Act:

- payment of compensation for loss or damage arising from the contravention
- order the respondent to refrain from further contravention or
- order the respondent or any other party to the proceedings to perform specified acts with a view to redressing loss or damage arising from the contravention or remedying a discriminatory or unlawful act.

Remedy options for unlawful discrimination available in other jurisdictions, that are not currently available under the EO Act, include orders:[226]

- that damages be paid to a person other than the complainant (NT, QLD)
- that interest be paid on damages (QLD, recommended by the LRCWA Report)
- declaring a contract void in whole or in part, or varying a contract (QLD, NSW, WA, NT, TAS)
- for apologies and retractions (public and private) (NT, QLD, NSW, TAS), although in some jurisdictions, including VIC and SA, this may be covered in a non-express way – e.g. under an order to 'perform specified acts with a view to redressing loss or damage'
- for promotion or re-employment of a complainant (NT, TAS). Again, however, this might be covered in by the EO Act's existing more general remedial provision
- to implement programs to eliminate unlawful discrimination (QLD, NSW (vilification only))
- for payment of a fine (TAS) (although such a power is usually reserved to courts).

[223] NSW s 103; QLD s 178; TAS s 84.
[224] LRCWA rec 156.
[225] QHRC rec 13; LRCWA rec 97.
[226] NSW s 108; NT s 88; QLD s 209; TAS s 89(1); WA s 127; LRCWA rec 158.

#### *8.11.5. Options for Discussion*



41. Should complainants have an automatic right to have a matter referred to SACAT if the EOC dismisses it for being frivolous, vexatious etc?
42. Should SACAT have an express power to allow complaints to be amended?
43. How should the burden of proof in SACAT hearings for discrimination and sexual harassment matters under the EO Act be allocated?
44. Are the remedies SACAT can order for contravention of the EO Act sufficient? Should any other remedies be added?

## 8.12. Commissioner's functions

### *8.12.1. Education functions*

In addition to the Commissioner for Equal Opportunity's function of receiving, investigating and attempting to resolve complaints under the EO Act, s 11 of the EO Act provides that the functions of the Commissioner include:

- to foster and encourage amongst members of the public informed and unprejudiced attitudes with a view to eliminating discrimination on the grounds to which this Act applies (anti-discrimination education function)
- to institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination on the grounds to which this Act applies (anti-discrimination research and information function)
- to make recommendations to the Minister as to reforms, whether of a legislative nature or otherwise, that the Commissioner believes will further the objects of this Act (government advisory function).

These current functions of the Commissioner in community education refer to eliminating discrimination, with no reference to sexual harassment or other unlawful conduct under the Act. The functions of the Commissioner should arguably at least refer to education about sexual harassment.

### *8.12.2. Own motion investigation power*

Under s 94 of the EO Act, the Commissioner for Equal Opportunity has powers to investigate a complaint, by an aggrieved person, of an alleged contravention of the EO Act.

If concerns about contravention of the EO Act come to the attention of the Commissioner through other means (e.g. through hearsay or a report in the media), the Commissioner may only formally investigate the matter pursuant to a process set out in s 93A of the EO Act. The s 93A process involves the Commissioner obtaining the approval of the Minister to make an application to SACAT. Upon that application, SACAT may then refer the matter to the Commissioner for investigation. Therefore, where the Commissioner wishes to investigate a potential contravention of the EO Act in respect of which no complaint has been received, the Commissioner may only do so after obtaining the approval of the Minister and SACAT.

One concern about this limitation on the Commissioner's 'own motion' investigation power is that, without being empowered to investigate a potential contravention the Commissioner's investigatory

powers are not enlivened so the Commissioner lacks, for example, the power to compel information or a response from the alleged perpetrator in order to form a prima facie view on whether the contravention occurred. It is argued that without that evidence, SACAT may be unable under s 93A to be sufficiently satisfied that the person may have contravened the EO Act and so to refer the matter to the Commissioner for investigation. On another interpretation, SACAT might be satisfied that a person may have contravened the Act based on information contained in a media report or similar alleging the contravention. This does not appear to have been tested as yet.

In several other jurisdictions their equivalent commission has power to conduct investigations into suspected breaches of the relevant legislation on its own motion. Different thresholds and tests apply to this power. In QLD and VIC the own-motion investigation power is limited to serious and/or systemic breaches affecting a class or group of people and in QLD the agreement of the Minister is also required. Other jurisdictions, particularly those with broader human rights commissions, have a broader own-motion investigation power.[227]

Other jurisdictions also differ in terms of the potential outcomes for own motion investigations, i.e. whether there is an ability to refer the complaint to the relevant tribunal with the Commissioner-equivalent acting as the complainant, or only to conciliate with the alleged offender, educate the alleged offender or the community more broadly about the unlawful practice, disseminate information about the unlawful practice and/or formally report on the outcome of the investigation.

Arguably the EO Act should at least confer on the Commissioner an own-motion investigation power in respect of systemic breaches affecting a group or class of people, with the ability to publish a report on the unlawful practice, publish material educating about the unlawful practice and/or develop programs designed to eliminate the unlawful practice. Broader proactive enforcement powers could have the effect of shifting the Commissioner's role from promoting equality and fostering and encouraging members of the public to be informed, with the view of eliminating discrimination,[228] towards an enforcement role for which Equal Opportunity SA is not currently equipped.

#### *8.12.3. Options for Discussion*



45. Should the EOC have any additional statutory functions, for example an education function in respect of sexual harassment as well as discrimination, or to conduct 'own motion' investigations into suspected systemic contraventions of the EO Act?

## 8.13. Complaints against MPs and judicial officers

Section 87(6a) of the EO Act provides that it is unlawful for a judicial officer to subject to sexual harassment a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member.

Section 87(6c) of the EO Act provides that it is unlawful for a for a Member of Parliament (MP) to sexually harass their staff, another MP, staff of other MPs, officers or members of the staff of the Parliament or any person performing employment duties at Parliament House.

These separate prohibitions on sexual harassment recognise situations that arise outside of usual employment circumstances.

[227] QLD s 155 (with agreement of Minister); VIC s 127. Compare e.g. *Human Rights Commission Act 2005* (ACT) s 48.
[228] See long title to EO Act.

While a complaint may be lodged with the Commissioner for Equal Opportunity about sexual harassment by a judicial officer or MP, s 93AA of the EO Act provides an alternate process for dealing with complaints about judicial officers or MPs.

If a complaint alleging a judicial officer or MP has acted in contravention of the EO Act is lodged with the Commissioner, the complaint must be referred to the appropriate authority. In the case of a complaint against an MP, the appropriate authority is the Speaker of the House of Assembly or President of the Legislative Council, as relevant (the Presiding Officer). In the case of a judicial officer, the appropriate authority is the Chief Justice.[229]

For complaints against a judicial officer or MP:

- If the Chief Justice or Presiding Officer is of the opinion that dealing with the complaint under the EO Act could impinge on judicial independence or parliamentary privilege, respectively, the Chief Justice or Presiding Officer will investigate and may deal with the matter as they think fit. If a complaint is to be dealt with in this manner, no further action is taken by the Commissioner. The Commissioner may be requested by the Chief Justice or Presiding Officer to assist in investigating the complaint or conducting a conciliation.
- If after investigating the complaint against a judicial officer or MP the Chief Justice or Presiding Officer, respectively, considers the complaint can be dealt with without impinging on judicial independence or parliamentary privilege, the Commissioner may proceed to deal with the complaint under the EO Act.

In respect of complaints against MPs, the EO Parliament Report noted that questions of parliamentary privilege *may* arise in the context of a complaint against an MP under the EO Act, but that the current provisions do not adequately recognise the following:

- there will be circumstances where parliamentary privilege will not impinge on the process
- the respondent MP may not make a claim of privilege
- the victim may not wish to proceed if privilege is claimed due to concerns about confidentiality or that the MP will not enter the conciliation in good faith
- the process may act as a deterrent to victims making complaints
- it is not appropriate that sexual harassment is dealt with by a Presiding Officer (for reasons of lack of independence, expertise and powers).

Recommendation 11 of the EO Parliament Report was to amend the EO Act to:

- provide that a complaint alleging sexual harassment by a MP is only to be referred by EOSA to the Presiding Officer where the MP claims parliamentary privilege and the complainant consents to the referral at that point
- remove provisions allowing the Presiding Officer to investigate and deal with complaints against MPs where the Presiding Officer considers that dealing with the complaint could impinge on parliamentary privilege.

While not spelled out in the recommendation, it is understood that the referral to the Presiding Officer is for the purpose of determining whether parliamentary privilege applies to the complaint.

Under this approach, if an MP claims parliamentary privilege and the Presiding Officer agrees, the complaint will not be able to be dealt with by either the Presiding Officer or the Commissioner. Also, the determination of whether claimed parliamentary privilege applies, and therefore that a

[229] Section 93AA(8) (or the deputy presiding officer or another Supreme Court judge if the Presiding Officer or Chief Justice is the respondent or otherwise does not consider it appropriate that they investigate the complaint).

complaint cannot proceed, is still made by the Presiding Officer, which may lead to concerns about perceived or actual impartiality.

Parliamentary privilege is a basic constitutional principle that ensures MPs are not inhibited from raising issues and acting in the interests of the people. The current provisions of the EO Act take parliamentary privilege into account by the mechanism in s 93AA.

Parliamentary privilege only attaches to things said or done during parliamentary proceedings (e.g. in houses of parliament and parliamentary committee proceedings). It does not extend to all aspects of MPs' functions (such as electorate business and functions) nor is it a blanket immunity for any comment or action by an MP including in parliamentary offices, bathrooms or dining rooms. The circumstances in which privilege and allegations of sexual harassment intersect are likely to be few. In theory parliamentary privilege should not often inhibit the sexual harassment provisions in the EO Act applying to MPs such that the Commissioner could investigate in the usual course once the Presiding Officer has considered any issues of privilege, if in fact raised.

Amendments to the SDA now provide that state MPs (among others) are subject to the SD Act.[230] Complainants can therefore make a complaint of sexual harassment to the AHRC. Although, as above, in the absence of any express abolition of the privilege, the AHRC is also likely constrained by parliamentary privilege. The AHRC's *2021 Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* noted that, in rare circumstances, parliamentary privilege may bar action under federal workplace laws, including under the SDA.[231]

The balance of the interests of complainants with the observance of parliamentary privilege in the EO Act is complex. Therefore, a modified proposal might be explored. Presently, the EO Act requires a complaint lodged with the Commissioner that an MP has acted in contravention of s 87 must be referred directly to the Presiding Officer in the first instance. Another option could be to allow the Commissioner to investigate complaints of sexual harassment by an MP, unless a claim of privilege is made. Although not a perfect solution, it may strike a better balance and give greater confidence to complainants in pursuing complaints against MPs under the EO Act.

It is possible that claims of privilege might be made at any stage of the complaint or at multiple points in time, which could lead to significant delay or even the inability of the Commissioner to proceed with the complaint at all, causing difficulty for complainants. However, this approach would retain options for complainants who wish to pursue a complaint under the EO Act.

#### *8.13.1. Options for Discussion*



46. What are the appropriate process requirements for complaints of sexual harassment by judicial officers and MPs?

## 8.14. Victimisation

Section 86 of the EO Act prohibits a person victimising, or treating another person (the victim) unfavourably, on the grounds that the victim or some other person has made, or proposes to make, a complaint that they have been discriminated against.

Contravention of s 86 is not an offence, rather, as with other unlawful discriminatory acts in the EO Act, a complaint may be made to the Commissioner for Equal Opportunity who may then seek to conciliate a resolution. If the Commissioner is unable to resolve the dispute by conciliation, the

[230] SDA s 4 (definition of 'State employee').
[231] https://humanrights.gov.au/__data/assets/file/0022/46633/Ahrc_set_the_standard_2021.pdf p 250.

Commissioner may refer it to SACAT or, if the dispute relates to experiences at work or when applying for work, to the South Australian Employment Tribunal (SAET). SACAT or SAET is then empowered to make orders to resolve the dispute, for example to order the respondent to pay compensation for loss or damage arising from the contravention of the EO Act, or that the respondent refrain from further contravention or undertake remedial or other redress actions.

Section 86 only appears to apply to retaliatory action against the person who makes the complaint. For example, it would not appear to protect against a school taking some kind of retaliatory action against a parent directly, in response to the parent making a complaint that the school had discriminated against their disabled child, as opposed to where the school retaliates against the child.

In some cases taking retaliatory against a child in response to a complaint made by their parent might be considered to treat the parent unfavourably also (and therefore breach s 86), but there will be cases where the relationship between the person making the complaint under the EO Act and the person alleged to have been discriminated against will not be so close that unfavourable treatment/victimisation of the person claimed to have been discriminated against will amount to unfavourable treatment/victimisation of the complainant in breach of s 86.

Several other jurisdictions define victimisation under their anti-discrimination legislation as including where retaliation is against 'a person associated with or related to' the person who makes the allegation of discrimination.[232]

The DDA and QLD legislation also makes victimisation a criminal offence, as well as subject to complaint to commissions/tribunals for civil remedies.[233]

#### *8.14.1. Options for Discussion*



47. Should unlawful victimisation be extended to treating a person unfavourably because an associate of the person made or proposes to make, a complaint under the EO Act?
48. Should victimisation also be a criminal offence under the Act?

## 8.15. Miscellaneous

### *8.15.1. Insert 'Objects' clause to aid interpretation?*

Currently the EO Act does not have an objects or purpose clause. The Commonwealth laws and most equivalent legislation have an objects or purposes clause. These can aid in interpretation of the legislation.[234]

In the case of the Commonwealth anti-discrimination laws their objects clauses serve a function of demonstrating a constitutional head of power for the Commonwealth to legislate - to give effect to relevant international human rights instruments to which Australia is a party. For example, the SDA includes in its 'objects' at s 3: 'to give effect to certain provisions of the Convention on the

[232] ACT s 68; NT s 23; QLD s 130; TAS s 18; VIC Pt 7.
[233] DDA s 42; QLD s 129.
[234] Discussed by the Full Federal Court in *Giggle for Girls Pty Ltd v Tickle* [2026] FCAFC 64 at [41]. In the absence of an objects clause, the 'preamble' in the QLD Act has been relied upon by the judiciary to guide the interpretation of the Act: QHRC at p 81.
The long title and preamble affirm the right to equality and equal protection and benefit of the law.

Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments'.

Jurisdictions with overarching human rights statutes refer to those in their Acts' objects sections.[235]

The recent LRCWA[236] and QHRC[237] Reports into reviews of the equivalent legislation in those states discuss objects for consideration in anti-discrimination legislation. For example, the LRCWA recommended the following objects, based on provisions in ACT and VIC, for inclusion in the WA Act:

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- *to eliminate discrimination, harassment, vilification and victimisation, to the greatest possible extent;*
- *to promote community education about principles of equality and the elimination of discrimination, harassment, vilification and victimisation;*
- *to promote and protect equality including through protecting:*
  - *enjoyment of equality without distinction or discrimination of any kind;*
  - *equal protection of the law without discrimination; and*
  - *equal and effective protection against discrimination on any ground;*
- *to encourage the identification and elimination of systemic causes of discrimination, harassment, vilification and victimisation;*
- *to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—*
  - *discrimination, harassment, vilification and victimisation can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;*
  - *equal application of a rule can have unequal results or outcomes; and*
  - *the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;*
- *to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.*[238]

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### *8.15.2. Modernisation of language*

Some terminology in the EO Act is arguably now outdated and has fallen out of line with equivalent interstate legislation, for example, the SDA was amended in 2013 to refer to 'different sex' rather than 'opposite sex'.[239]

[235] ACT s 4
[236] LRCWA from p 43.
[237] QHRC from p 77, rec 2.3.
[238] LRCWA rec 2
[239] See e.g. SDA s 5.

### 8.15.3. Structure of EO Act

The EO Act currently re-defines discrimination, and provides for applicable exemptions, in relation to every individual protected attribute (race, sex, disability, age, etc). NSW and WA also do this, however the LRCWA recommended changes.[240]

By re-defining discrimination separately in relation to each attribute, the EO Act becomes repetitive as, in the overwhelming majority of cases, the definition of discrimination is the same but for the reference to the relevant attribute, and multiple exemptions are set out in full in respect of each attribute to which they apply.

Conversely, the drafting approach in EO Act s 85T (which groups together discrimination on various 'other grounds') is arguably confusing and leads to difficulty in interpreting the provisions in that section.

NT, VIC, ACT, QLD and TAS have one provision listing protected attributes, and then one definition for each area of discrimination that can be based on any listed protected attributes (with some exceptions or exemptions, as in the EO Act). Those exceptions are often also grouped together, with each stating which type of discrimination each exemption applies to.[241]

The LRCWA received submissions arguing that such a modernised approach could better support intersectionality of complaints.[242]

### 8.15.4. Assistance and therapeutic animals

The EO Act prohibits treating someone unfavourably in all areas of public life because they possess or are accompanied by an assistance animal. This covers accredited assistance dogs under the *Dog and Cat Management Act 1995*. There may be issues with the recognition of assistance animals accredited in other jurisdictions that might disadvantage persons travelling in SA with their assistance animals.

The EO Act contains a separate provision that it is unlawful to refuse accommodation based on someone's intention to keep a 'therapeutic animal' at the premises (unless the refusal was reasonable in the circumstances). A therapeutic animal is broader than an assistance animal and merely needs to be certified by a medical practitioner as being required to assist a person as a consequence of their disability.

Protection for accompaniment by a therapeutic animal could be broadened to other areas than accommodation, for example, to public spaces. Further, 'medical practitioner' for this purpose is defined to mean a medical practitioner registered as such in SA. This may cause limitations to persons who have therapeutic animals certified by interstate medical practitioners.

[240] LRCWA rec 69.
[241] For example, the ACT Act sets out in s 8 what is "discrimination" in respect of protected attributes (sex, race, age, etc listed in ss 7 and 8) and then contains provisions prohibiting discrimination in different specified areas of public life – e.g. s 10 provides "it is unlawful for an employer to discriminate against a person in the arrangements made for the purpose of deciding who should be offered employment" etc; s 18 provides "it is unlawful for an educational authority to discriminate against a person by failing to accept the person's application for admission as a student", etc and so on. Exemptions (exceptions) are then all grouped together in Part 4 of the Act, divided into general exceptions and exceptions from specific listed attributes.
[242] LRCWA p 40.

### *8.15.5. Options for Discussion*



49. Should the EO Act have an objects/purposes clause and what should the objects/purposes be?
50. Should the EO Act be re-structured, including so that the list of protected attributes is contained in a single provision?
51. Should the definitions of 'assistance animal' and 'therapeutic animal' be broadened to allow for interstate accreditation or certification, respectively?
52. Should accompaniment by a therapeutic animal be broadened to other areas than accommodation, for example, to public spaces?

# Appendix A

## Options for discussion

### Anti-vilification

#### Criminal vilification laws

1. Should SA introduce a form of vilification offence with a reduced fault element for the result of an act, such that a person merely needs to be reckless as to whether force or violence against a protected group would be carried out as a result of their actions, rather than proving that the defendant intended for violence to occur?

2. Should SA introduce an offence of inciting hatred, as distinct from inciting and/or threatening violence?

3. If SA introduces either an offence of inciting hatred and/or a recklessness element to vilification offences as queried above, are new exclusions or defences required to protect against free speech? For example, is a defence required for acts that consist only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion? Is a wider defence required for fair reporting and genuine academic, artistic, religious, scientific or other public interest expression?

4. Should anti-vilification offences, including any new incitement of hatred offence, apply to incitement of violence and/or hatred on the basis of a broader range of characteristics/attributes, including:
    a. race
    b. religion
    c. disability
    d. gender identity
    e. sex
    f. sex characteristics
    g. sexual orientation?

5. Should any broader vilification offences be inserted into the CLCA rather than retaining standalone anti-vilification legislation?

6. Should SA introduce 'aggravated forms' of existing criminal offences, such as intimidation, assault and property damage offences, so that higher maximum penalties apply for those offences where it is proved that commission of the offence was motivated by hatred towards a protected group? Could this lead to more successful prosecutions of incidents of hate crime/conduct and/or better reporting of their prevalence?

7. Do the maximum penalties for serious vilification need to be increased above the existing 3 years imprisonment and why? Should any increase only apply where the offence comprises intentional incitement or threats of violence towards a protected group?

## Civil vilification laws

8. Should civil vilification protection in SA be extended beyond race to other characteristics commonly protected under interstate legislation? For example, to:
    a. religion
    b. disability
    c. gender identity
    d. sex
    e. sex characteristics
    f. sexual orientation?

9. Are any concerns about potential negative impacts on freedom of speech adequately addressed by maintaining the current exclusions to civil vilification for:
    a. publication of a fair report of the act of another person
    b. publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation
    c. a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions)?

10. Should SA's civil vilification provisions be removed from the Civil Liability Act and subsumed instead into the EO Act, consistent with the approach in other Australian jurisdictions, so that complaints of vilification can be made to, and dealt with, by the Commissioner for Equal Opportunity and the South Australian Civil and Administrative Tribunal (SACAT) (noting that these bodies are not currently resourced to deal with vilification complaints)?

11. Should the test for civil vilification be modified to include a 'harm-based test' in addition to the existing incitement-based test? If so, what would be the comparative benefits and risks of that approach (as adopted in Tasmania and Victoria and recommended by the LRCWA) as opposed to adopting a harm-based test only (as under the RDA), or retaining SA's existing incitement-based test only?

# Anti-discrimination

## Definition

12. Should the 'unfavourable treatment' test for direct discrimination be adopted instead of the 'less favourable' comparator test?

13. Should it be required that the protected attribute only be 'a' reason (and not a 'substantial reason') for the less/unfavourable treatment?

14. Should the EO Act expressly address the intentions of a discriminator by stating that: 'it is not necessary that the person who discriminates regards the treatment as unfavourable or that the person who discriminates has any particular motive in discriminating'?

15. Should the test for indirect discrimination be whether a requirement 'disadvantages' someone because of their attribute, rather than whether it does so in comparison with proportion(s) of persons able to comply?

## Language and scope of protected attributes

16. Should the EO Act be expanded to cover discrimination on additional grounds (i.e. additional types of protected attributes), including on the basis that existing alternative protections under other laws do not provide adequate protection?

17. Should changes be made to the definitions or language used in respect of any existing protected attributes in the Act?

18. Can any existing protected attributes be removed from the Act?

## Areas of public life covered

19. Should changes be made to the definition of 'services'?

20. Should changes be made to the definition and scope of associations and clubs subject to the Act's prohibition on discrimination?

21. Can and should prohibitions on discrimination in relation to superannuation be extended?

22. Are there other desirable changes to the areas of public life to which the anti-discrimination protections in the EO Act apply?

## Exemptions and special measures

23. Are the exemptions from unlawful discrimination discussed at 8.4.1 and 8.4.2 still justified in their current form?

24. Should any further general exemptions be included, including for inherent requirements of employment or acts done to comply with a court or tribunal order, or done with statutory authority?

25. Do the various exemptions for special measures operate as intended? Could these be simplified into a single overarching provision, potentially expressed to be excluded from the definition(s) of discrimination for the purposes of the EO Act?

26. Are any other changes needed to the exemptions from discrimination in the EO Act?

## Reasonable adjustments

27. Should the EO Act make further provision for making reasonable adjustments such as a standalone duty?

28. What should be the scope of any duty to make reasonable adjustments – i.e. to which protected attributes and areas of public life should any such duty apply?

## Positive duty to eliminate discrimination

29. Should the EO Act include a positive duty to take steps to eliminate discrimination, sexual harassment, vilification and victimisation?

30. What should be the scope of any such duty – to which bodies and areas of public life should any such duty apply?

## Sexual harassment test and scope

31. Are there arguments to improve s 87 in prohibiting sexual harassment, for example, by adding reference to the 'possibility that the person harassed would be offended, humiliated or intimidated' in the objective test, by adding an alternative subjective test and/or by setting out circumstances to be considered in applying the test?

## Other harassment

32. Should the EO Act cover other types of harassment?

## Accessorial/Vicarious liability

33. Are there any deficiencies in the operation of ss 90 (accessorial liability) or 91 (vicarious liability)? For example, should the defence to vicarious liability require showing that *all* reasonable steps were taken and/or should a list of mandatory considerations be included to determine whether all reasonable steps have been taken?

## Complaints process and procedure

34. Should the timeframe for making a complaint under the EO Act be extended? Or should the default position in relation to accepting late claims be reversed, consistent with the AHRC Act and in some other jurisdictions?

35. Should the scope of persons who can make complaints of discrimination and other unlawful conduct under the EO Act be broadened, including in relation to representative complaints?

36. Should there be scope for the Commissioner for Equal Opportunity to take complaints other than in writing (for example, from persons with communication difficulties) or to otherwise give assistance to a person to make a complaint?

37. Should the Commissioner for Equal Opportunity have discretion not to serve written summary of a complaint on the respondent immediately after the complaint is lodged until after the Commissioner has determined whether the complaint will be declined under s 95A(1)(a)?

38. Should there be an express power for the Commissioner to allow a complainant to amend a complaint?

39. Should the Commissioner have the power to compel parties to provide information and answer questions orally?

40. Should the EO Act contain formal requirements in relation to successfully conciliated matters?

## Tribunal proceedings

41. Should complainants have an automatic right to have a matter referred to SACAT if the EOC dismisses it for being frivolous, vexatious etc?

42. Should SACAT have an express power to allow complaints to be amended?

43. How should the burden of proof in SACAT hearings for discrimination and sexual harassment matters under the EO Act be allocated?

44. Are the remedies SACAT can order for contravention of the EO Act sufficient? Should any other remedies be added?

## Commissioner's functions

45. Should the EOC have any additional statutory functions, for example an education function in respect of sexual harassment as well as discrimination, or to conduct 'own motion' investigations into suspected systemic contraventions of the EO Act?

## Complaints against MPs and judicial officers

46. What are the appropriate process requirements for complaints of sexual harassment by judicial officers and MPs?

## Victimisation

47. Should unlawful victimisation be extended to treating a person unfavourably because an associate of the person made or proposes to make, a complaint under the EO Act?

48. Should victimisation also be a criminal offence under the Act?

## Miscellaneous

49. Should the EO Act have an objects/purposes clause and what should the objects/purposes be?

50. Should the EO Act be re-structured, including so that the list of protected attributes is contained in a single provision?

51. Should the definitions of 'assistance animal' and 'therapeutic animal' be broadened to allow for interstate accreditation or certification, respectively?

52. Should accompaniment by a therapeutic animal be broadened to other areas than accommodation, for example, to public spaces?

# Appendix B

## Abbreviations and Acronyms

| | |
|---|---|
| ACT | Australian Capital Territory |
| AGD SA | Attorney-General's Department South Australia |
| ADA | *Age Discrimination Act 2004* (Cth) |
| AHRC | Australian Human Rights Commission |
| AHRC Act | *Australian Human Rights Commission Act 1986* (Cth) |
| Antisemitism Royal Commission | The Royal Commission on Antisemitism and Social Cohesion |
| Civil Liability Act | *Civil Liability Act 1936* |
| CLCA | *Criminal Law Consolidation Act 1935* |
| Cth Criminal Code | Commonwealth Criminal Code |
| DDA | *Disability Discrimination Act 1992* (Cth) |
| Disability Royal Commission | The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability |
| EO Act | *Equal Opportunity Act 1984* |
| EO Legal Profession Report | Equal Opportunity' SA's Review of Harassment in the South Australian Legal Profession |
| EO Parliament Report | Equal Opportunity SA's Review of Harassment in the South Australian Parliament Workplace |
| Fair Work Act | *Fair Work Act 2009* (Cth) |
| ISSA | Islamic Society of South Australia |
| LRCWA | Law Reform Commission of Western Australia |
| LRCWA Final Report | Final Report of LRCWA's review of WA Equal Opportunity Act 1984 |
| MP | Member of Parliament |
| National Database | National Database of Hate Crimes and Incidents |

| | |
|---|---|
| NSWLRC | New South Wales Law Reform Commission |
| NSWLRC Review | New South Wales Law Reform Commission's Review of the Anti-Discrimination Act 1977 |
| NSW Inquiry | NSW Inquiry into Measures to Prohibit Slogans that Incite Hatred |
| PCBU | Person Conducting a Business or Undertaking |
| Protected attribute | Characteristic of a person that is protected from discrimination under equal opportunity or anti-discrimination laws i.e. where it is unlawful to discriminate against a person on the grounds of that characteristic (or 'protected attribute'). Examples of protected attributes include age, disability, race and sex, sexual orientation or gender identity. |
| QHRC | Queensland Human Rights Commission |
| QHRC Report | Queensland Human Rights Commission report of its review of Qld's *Anti-Discrimination Act 1991* |
| RDA | *Racial Discrimination Act 1975* (Cth) |
| Racial Vilification Act | *Racial Vilification Act 1996* |
| RCDFSV | Royal Commission into Domestic, Family and Sexual Violence |
| RCDFSV Report | Report released by the Royal Commission into Domestic, Family and Sexual Violence |
| Ruddock Review | Expert Panel Report: Religious Freedom Review |
| SA | South Australia |
| SAET | South Australian Employment Tribunal |
| SAPOL | South Australia Police |
| SACAT | South Australian Civil and Administrative Tribunal |
| SCAG | Standing Council of Attorneys-General |
| SDA | *Sex Discrimination Act 1984* (Cth) |
| Special Envoy | Australia's Special Envoy to Combat Antisemitism |
| Special Envoy's Plan | Special Envoy's Plan to Combat Antisemitism |
| Sentencing Act | *Sentencing Act 2017* |

| | |
|---|---|
| Summary Offences Act | *Summary Offences Act 1953* |
| TAS Act | *Anti-Discrimination Act 1998* (TAS) |
| The Commissioner | The Commissioner for Equal Opportunity (SA) |
| VIC | Victoria |
| WA | Western Australia |
| WHS Act | *Work Health and Safety Act 2012* (SA) |