



## ***UNSW Law & Justice Research Series***

# **State and territory discrimination legislation**

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[2024] *UNSWLRS* 24

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# Research Paper 5: State and territory discrimination legislation

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## Contents

1. Introduction
2. State and territory anti-discrimination and equal opportunity statutes
  - 2.1. An overview of the structure of the anti-discrimination statutes
  - 2.2. The protected attributes
  - 2.3. Areas covered
  - 2.4. Direct and indirect discrimination
    - 2.4.1. *Direct discrimination*
    - 2.4.2. *Indirect discrimination*
  - 2.5. Exceptions
    - 2.5.1. *General exceptions*
    - 2.5.2. *Specific exceptions*
  - 2.6. Other unlawful conduct
    - 2.6.1. *Harassment*
    - 2.6.2. *Vilification*
    - 2.6.3. *Victimisation*
    - 2.6.4. *Other forms of unlawful conduct*
  - 2.7. Exemptions
  - 2.8. Liability
  - 2.9. Complaint-handling procedures
  - 2.10. Remedies

## **Appendix A:** Areas of unlawful discrimination in state and territory anti-discrimination legislation

### **1. Introduction**

Within Australia's federal structure, a significant role for the protection and promotion of human rights is played by state and territory governments. This is the focus of the present and following research papers.

The powers of Australian state and territory governments are constrained to differing degrees by the rights protected in the Commonwealth *Constitution*. As discussed in research paper 3, within its constitutional competence, the Commonwealth Parliament can also enact legislation that overrides state or territory legislation to the extent of any inconsistency.<sup>1</sup>

In addition, some state constitutions contain select rights protections, as does the Commonwealth legislation establishing the Australian Capital Territory ('ACT') and the Northern

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<sup>1</sup> Australian *Constitution* s 109. See also the territories power in s 122.

Territory ('NT').<sup>2</sup> For example, among other political guarantees, s 48 of the *South Australian Constitution* guarantees equal franchise for women.<sup>3</sup> S 73(2)(c) of the *Western Australian Constitution* entrenches the requirement that the people directly elect the State Legislative Assembly and Legislative Council.<sup>4</sup> The *Tasmanian Constitution* guarantees 'freedom of conscience and the free profession and practice of religion' and religious equality in public office, although this protection is not entrenched.<sup>5</sup> The current Commonwealth legislation providing for self-government of the ACT and the NT prohibits the legislatures of the territories from unjust acquisition of property.<sup>6</sup>

Subject to those limitations under their constitutions, Australian state constitutions confer plenary legislative powers. The legislative competence of the Commonwealth Parliament is confined to the heads of power enumerated in 51 of the *Australian Constitution*, as well as by other constitutional limitations. In particular, the power of states to enact legislation giving effect to international human rights treaties is not limited by any constitutional equivalent of the Commonwealth's external affairs power.<sup>7</sup>

In a step towards a more comprehensive legal framework for human rights protection in Australia, three state and territory jurisdictions – the ACT, Victoria and Queensland - now have statutory human rights legislation imposing human rights protective obligations and procedures on each branch of government. Each of those statutes require parliament to scrutinise and consider draft legislation for its human rights compatibility. Courts and tribunals must interpret legislation compatibly with human rights so far as consistent with its purpose. The Supreme Court of each jurisdiction can also notify parliament that legislation is inconsistent with human rights through a declaration of incompatibility, without impacting the legislation's validity.

'Public authorities' or 'public entities' - terms comprehensively defined in the human rights statutes – must also comply with human rights in their administrative decision-making and conduct. For example, in Victoria, the legal obligation on public authorities in s 38(1) of the *Charter* is that public authorities must properly consider human rights when making decision and acting compatible with human rights. Courts and tribunals are defined not to be public authorities, except when acting in an administrative capacity. Under s 38(1) of the *Charter* there is no specific distinction regarding 'administrative' decision making.

While damages are not available in any of the three jurisdictions for breaches of those obligations,<sup>8</sup> other remedies may be available, for example through inherent powers of the

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<sup>2</sup> For further description and analysis of the protections for human rights in the state Constitutions, see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 12 - 13.

<sup>3</sup> *South Australia Constitution Act 1934* (SA), s 48. Section 77 also provides for a level of voter equality, by requiring that in the event of an electoral redistribution, the number of electors should not deviate by more than ten per cent from the electoral quota.

<sup>4</sup> *Constitution Act 1889* (WA), s 73(2)(c).

<sup>5</sup> *Constitution Act 1934* (Tas) s 46. .

<sup>6</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth), s 50.

<sup>7</sup> George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 8.

<sup>8</sup> For example, in Victoria see s 39(3) of the *Charter*.

courts.<sup>9</sup> In Queensland, a human rights complaint procedure is also available through the recently established Queensland Human Rights Commission. We examine in some detail statutes in the following research paper.

The elimination of discrimination and equal treatment are principles enshrined in international human rights law (as discussed in research paper 4). Each of the states and territories has now enacted anti-discrimination or equal opportunity legislation imposing obligations not to treat individuals or groups unfavourably or disadvantageously in defined areas of public activity on the basis of protected attributes such as race or sex. The protections in some state and territory jurisdictions go beyond those in the equivalent Commonwealth anti-discrimination legislation. This is an important consideration in determining the appropriate jurisdiction in which to pursue remedies for discriminatory treatment.

Other than Victoria, all state and territory anti-discrimination legislation provides a mandatory two-stage system to resolve complaints of unlawful discrimination. In those jurisdictions, access to legal proceedings is subject to a requirement to make a complaint to the relevant anti-discrimination body and to attempt its resolution by conciliation. Access to state and territory civil and administrative tribunals is only possible where the complaint cannot be resolved by conciliation.

With some jurisdictional differences as to what conduct is proscribed, state and territory anti-discrimination and equal opportunity legislation also makes other attribute-based harmful activity unlawful: for example, sexual harassment, victimisation and racial vilification.

In Victoria, religious and racial vilification is protected under the *Racial and Religious Tolerance Act 2001* (Vic). It is possible the legislation may be amended to expand the attributes protected from vilification.<sup>10</sup>

While more limited than the right to privacy as defined in international law, state and territory statutes also impose privacy protection responsibilities on public authorities in handling personal information. At the state and territory level, these protections often operate in concert with statutory regimes that enable individuals, in defined circumstances, access to government information and amendment of personal information held by public authorities.<sup>11</sup>

Statutory Ombudsman and police accountability regimes also provide for oversight and complaint mechanisms in respect of the conduct of state and territory public authorities. While not 'human rights' legislation as understood within the Australian legal system per se, these statutes provide additional complaints and dispute settlement mechanisms through which to hold public authorities accountable for conduct breaching human rights, as they are understood in international law.<sup>12</sup>

Discrimination and equal opportunity legislation can also play an important role in addressing systemic conditions or general societal/policy conditions that have led to discrimination against

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<sup>9</sup> Note, however, that under s 23(2) of the *Human Rights Act 2004* (ACT), there is a right to compensation for wrongful conviction. See: *Eastman v The Australian Capital Territory* (2019) 348 FLR 251.

<sup>10</sup> See the report of the Victorian Equal Opportunity and Human Rights Commission: *Creating stronger laws to protect Victorians from hate conduct* at <https://www.humanrights.vic.gov.au/legal-and-policy/advocacy-and-law-reform/creating-stronger-laws-to-protect-victorians-from-hate-conduct/>.

<sup>11</sup> See, e.g., *Government Information (Public Access) Act 2009* (NSW).

<sup>12</sup> A detailed examination of these regimes is beyond the scope of the present paper.

particular classes of people and the call for substantive equality/equity not just formal equality. Positive duties imposed by legislation are one way of encouraging organisations to make reasonable adjustments to advance inclusion of specific classes of people, beyond discreet special measures.

For example, the objects of the *Discrimination Act 1991* (ACT) at s 4(c-d) state that “the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures”.

In view of the wide range of statutory provisions across the various Australian jurisdictions and the ongoing process of legislative reform, readers should check directly with the electronic sources of applicable law so as to confirm the law in force at the relevant time.

## 1. State and territory anti-discrimination and equal opportunity statutes

### 1.1 An overview of the structure of the anti-discrimination statutes

As we have discussed in research paper 4, non-discrimination and equality of treatment are basic principles of international human rights law. The rights to freedom from discrimination and equal treatment are enshrined in many of the international human rights treaties to which Australia is a party, including the *ICCPR*, *ICESCR*, *CERD*, *CEDAW* and the *CRPD*. However, as Rees, Rice and Allen observe, the common law in Australia has not developed an equivalent means of ‘protecting people against unfair treatment on the basis of attributes such as their race, sex or disability.’<sup>13</sup> Instead, Australian Parliaments at the federal and state and territory levels have legislated to give effect to those human rights principles through legislation at both the Commonwealth and state and territory levels. As discussed in research paper 3, these regimes operate concurrently to the extent that there is no inconsistency.<sup>14</sup>

The first state and territory anti-discrimination statute was the South Australian *Prohibition of Discrimination Act 1966* which criminalised discrimination on the basis of race, country of origin or skin colour, in limited areas of activity. Subsequently, each Australian state and territory legislature has enacted and amended statutes which provide for rights not to be subject of discrimination and other forms of harmful attribute-based conduct, as well as remedies. We refer to these statutes collectively in this paper as ‘anti-discrimination statutes’ or ‘anti-discrimination legislation’.

They are the:

- *Anti-Discrimination Act 1977* (NSW)
- *Equal Opportunity Act 1984* (SA)
- *Equal Opportunity Act 1984* (WA)
- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1991* (Qld)<sup>15</sup>

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<sup>13</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 1.

<sup>14</sup> Adam McBeth, Justine Nolan, Simon Rice, *The international law of human rights* (Oxford University Press, 2011) 368.

<sup>15</sup> At the time of writing new anti-discrimination legislation was under consideration in Queensland: *Anti-Discrimination Bill 2024*. See: <https://www.justice.qld.gov.au/community-engagement/community-consultation/past/anti-discrimination-bill->

- *Anti-Discrimination Act 1992* (NT)
- *Anti-Discrimination Act 1998* (Tas) and
- *Equal Opportunity Act 2010* (Vic).

The statutes follow a similar model in protecting the right to be free from discrimination. Each impose obligations not to discriminate against others in specified areas of public activity (such as in education, employment, accommodation or provision of goods, services and facilities) on the ground of a wide range of attributes (such as race, sex or disability).

The protected attributes in state and territory legislation are more extensive than those in the Commonwealth anti-discrimination legislation. In general, the Commonwealth statutes proscribe both indirect and direct discrimination.<sup>16</sup> While this core model is similar between state and territory jurisdictions, the statutes diverge in their structure, and in terms of which attributes are protected and where discrimination is unlawful in specific areas of public activity.<sup>17</sup>

The statutes establish complaints mechanisms through state and territory equal opportunity and anti-discrimination agencies. Through this means one or more individuals or groups can attempt to conciliate their complaint and obtain accountability for discrimination they have experienced. Where conciliation is unsuccessful, the statutes provide for recourse to relevant state and territory tribunals for the pursuit of available civil remedies.

The statutes also provide for exceptions and exemptions.<sup>18</sup> Where an exception or exemption applies, the discrimination is not unlawful.

Some statutory exceptions are common between states and territories, particularly those in the nature of special measures, or discrimination designed to benefit disadvantaged groups. However, many exceptions reflect jurisdiction specific concerns. Due to this, there is considerable variation between state and territory anti-discrimination statutes in respect of: exceptions that apply generally; protected attributes and areas of activity regulated by the anti-discrimination statute and specific attributes or activities.<sup>19</sup> Exceptions in anti-discrimination legislation are

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2024#:~:text=The%20proposed%20new%20anti%2Ddiscrimination,and%20other%20objectionable%2Funlawful%20conduct.

<sup>16</sup> As discussed in research paper 4, the concept of direct discrimination is not expressly mentioned in the *Racial Discrimination Act 1975* (Cth), however ss 9 and 10 of that statute have been interpreted as prohibiting direct discrimination.

<sup>17</sup> Note that both direct and indirect forms of discrimination are unlawful in each state and territory jurisdiction, with the exception of the *Anti-Discrimination Act 1992* (NT), which does not expressly refer to a concept of indirect discrimination, as we discuss further below at part 3.4.

<sup>18</sup> There is no uniformity in the use of the terminology of ‘exceptions’ and ‘exemptions’ between state and territory statutes, but we follow Rees, Rice and Allen in how we distinguish between and use the two terms (See Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 161-162). We use ‘exception’ to mean provisions that recognise that specified discriminatory conduct is not unlawful under the statute (the legislation in Queensland, the Northern Territory and South Australia describe these as ‘exemptions’ instead). Exceptions operate effectively as defences to discrimination complaints. We use ‘exemption’ to refer to the temporary exemptions from the operation of anti-discrimination provisions can be granted, on application to the relevant decision-making authority in a given jurisdiction, usually an anti-discrimination authority or civil and administrative tribunal. Exemptions apply to conduct or activities which would otherwise contravene the legislation and are for statutorily limited periods only. The designated decision-making authority differs between jurisdictions, as do the factors relevant to an exemption decision.

<sup>19</sup> Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5<sup>th</sup> ed, 2019) 145.

notoriously complex (see further part 3.5 below). Exemptions are discussed in greater detail at part 3.7 below.

In addition to prohibiting discrimination, state and territory anti-discrimination statutes extend to make other forms of harmful attribute-based conduct unlawful in circumstances where those forms of conduct may also constitute discrimination within the statutory definition. For example, all state and territory statutes make sexual harassment unlawful. Some statutes make racial or religious vilification unlawful. Anti-discrimination legislation in some jurisdictions makes serious vilification on the ground of certain attributes an offence.<sup>20</sup> The prohibitions on other forms of harmful attribute-based conduct differ between jurisdictions.

In addition, all state and territory anti-discrimination statutes prohibit victimisation, that is reprisal against a person for making a complaint about or otherwise participating in the statutory complaint procedures.

The Victorian statute imposes a positive duty to take reasonable and proportionate steps to eliminate discrimination, sexual harassment and victimisation as far as possible.<sup>21</sup>

In the ACT following two rounds of public consultation the *Discrimination Amendment Bill 2022* was introduced into the Legislative Assembly on 30 October 2022 and passed on 23 March 2023. As announced by the ACT Government, the reforms will:

- introduce a positive duty on organisations, businesses, and individuals with organisational management responsibility to eliminate discrimination, sexual harassment and unlawful vilification. This reduces the burden on individual complainants and is another way to stop systemic discrimination.
- expand the coverage of the Act to more areas of public life where discrimination and sexual harassment are unlawful. The Act will now cover discrimination in formally organised sporting activities, formally organised competitions and the administration of ACT laws or government program or policy.
- refine and narrow the exceptions in the Act or situations where it is not against the law to discriminate, relating to employment, workers in private homes, sport, clubs and voluntary bodies, insurance and superannuation providers and religious bodies.<sup>22</sup>

The reforms will be phased in over a three-year period from notification of the legislation in order to provide the community and businesses with sufficient time to become familiar with the changes and understand their new obligations.

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<sup>20</sup> This may also be an offence under other state legislation, such as crime statutes or other statutory regimes specifically addressing vilification.

<sup>21</sup> S 15. A contravention of this duty may be the subject of an investigation by the Commission. The Victorian Equal Opportunity and Human Rights Commission has published a report following an investigation into the positive duty in Victoria: *Investigation: Preventing sexual harassment in retail franchises*, August 2022.

<sup>22</sup> <https://www.justice.act.gov.au/justice-programs-and-initiatives/canberra.-inclusive.-progressive.-equal>.

In Appendix A, we set out provisions applying in the different state and territory anti-discrimination statutes. As is evident from the tables, there are, broadly, two distinctions in drafting models between jurisdictions.<sup>23</sup>

The ‘older’<sup>24</sup> model operates in New South Wales, South Australia and Western Australia. In those statutes, each ground of discrimination (including a description of the areas in which that form of discrimination is unlawful and a list of exceptions) is described in a separate part of the statute.<sup>25</sup> As Rees, Rice and Allen observe, this enables stakeholders easily to differentiate between the scope of protections for each ground.<sup>26</sup> However, introducing new grounds of discrimination requires the insertion of a new, comprehensive, part to the statute.

In the ‘newer’ drafting model, one provision sets out the protected attributes, such as race and disability, and others describe the areas in which they operate, with specific provisions addressing exceptions for different attributes across different areas.<sup>27</sup> New prescribed attributes and regulated areas can, therefore, be added progressively to the legislation by a simple amendment.<sup>28</sup> As has been noted elsewhere, inconsistency between jurisdictions can give rise to problems.<sup>29</sup>

Despite variations in their drafting models, all state and territory anti-discrimination statutes follow a common pattern, founded on two key features. Broadly, the legislation makes it unlawful to discriminate:

- *on the basis of prescribed grounds or attributes*, which define *what kind* of discrimination is prohibited, such as race, gender, disability status, sexuality and age; and
- *in prescribed realms of public activity*, which define in *what areas* discrimination is prohibited, such as in employment, goods and services, accommodation and education.

We provide an overview of anti-discrimination legislation in each state and territory in this paper. It is a summary only and is not intended to be comprehensive.<sup>30</sup> Its purpose is to assist the reader

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<sup>23</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 43.

<sup>24</sup> As described by Rees, Rice and Allen, *ibid*.

<sup>25</sup> For example, in the *Equal Opportunity Act 1984* (WA), discrimination on the ground of sex, marital status, pregnancy or breastfeeding is provided for in Part II of the Act. Part II also provides that discrimination on those grounds is, for example, unlawful in respect of employees and applicants for employment, with an exception - among others - for circumstances where the sex of an employee is a genuine occupational qualification.

<sup>26</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 43.

<sup>27</sup> See, for example, the structure of the *Discrimination Act 1991* (ACT): 7(1)(a)-(x) (protected attributes), Divisions 3.1 – 3.2, Part 3 (Unlawful discrimination in work and in other areas, respectively), Part 4 (Exceptions to unlawful discrimination).

<sup>28</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 43.

<sup>29</sup> Anne Hewitt, ‘Can a theoretical consideration of Australia’s anti-discrimination laws inform law reform?’ (2013) 41 *Federal Law Review* 35, 67.

<sup>30</sup> Comprehensive analysis of anti-discrimination case law and statutory provisions is beyond the scope of this text. Australian anti-discrimination law is well-covered in detail in other publications, such as Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018); Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5<sup>th</sup> ed, 2019); Beth Glaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017). However, the relevant statutes have been



in identifying potential avenues of redress for discriminatory and other unlawful attribute-based conduct in their jurisdiction. We address statutory exceptions to conduct which would otherwise constitute unlawful discrimination, as well as procedures for obtaining exemptions under the various anti-discrimination acts.

## 1.2 The protected attributes

Table 1 below describes the protected attributes (or ‘grounds’ on which discrimination is prohibited) in each state and territory. As noted above, these grounds (and the ways in which they are defined) differ between jurisdictions, although there is greater commonality between states and territories in prescribed areas of activity. In addition, in some jurisdictions, not all forms of discrimination are prohibited in respect of all regulated areas.

Early state anti-discrimination legislation protected against discrimination on grounds of race and sex only. As evident in Table 1, the attributes protected by anti-discrimination legislation have expanded over time and are now quite extensive, sometimes going beyond the targeted protections in the core international human rights treaties to which Australia is a party (for example, *CEDAW* and the *CRPD*).<sup>31</sup> The ACT, Victorian and Tasmanian statutes, for instance, each contain over twenty protected attributes. It has been suggested elsewhere that the ‘expanding range of attributes attracts controversy and warrants discussion, as it raises questions about the policy aims of anti-discrimination law.’<sup>32</sup>

Conversely, it might be argued that this allows the statute to be applied flexibly and to reflect the diversity of Australian society (and the many attributes which are in need of protection), rather than the restrictive requirement to fit a person’s experience of discrimination or identity into narrower, perhaps anachronistic, definitions or standards. The comprehensive ACT approach is arguably preferable. People who have experienced discrimination, and are understandably aggrieved, are better able to find a remedy. When compared to, for example, the NSW statute, the coverage of the ACT statute leaves fewer people without access to a remedy.<sup>33</sup>

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amended subsequently. In NSW, slight changes have been made to the notice periods for receipt of decisions under Division 2 (s 94B). In the ACT, inter alia, there have been changes made to clarify the meaning of a disability assistance animal; changes to the dictionary in relation to gender identity, sexuality and ‘sex characteristics’, with the removal of intersex as a separate status; and changes to sections relating to religious bodies and sentiments and unlawful discrimination. In Tasmania, changes have been made to the definitions of gender expression, transgender, and intersex. In South Australia, amongst numerous procedural changes, including the penalty provisions for failure to comply with a tribunal order under s 96, and some substantive changes to unlawful sexual harassment by judicial officers or parliamentarians, it is now stipulated that the Commissioner must not proceed with a complaint concerning an active criminal investigation (s 93(4)). Most notably, the Queensland procedure has been altered to provide that functions and powers under the Act are to be carried out by new Human Rights Commission, to replace the Anti-Discrimination Commission. There have also been changes to provisions relating to out of time complaints, and per s 263C, complaints may leave an email address as an address for service.

<sup>31</sup> In some statutes, protections are extended to those who experience discrimination because of their association with a person that has, or is believed to have, a prescribed attribute.

<sup>32</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 41. Such policy questions are beyond the scope of the present paper.

<sup>33</sup> For example, the former does not extend to physical features (such as where someone is refused work or otherwise is discriminated against because of their height), religious beliefs, or political opinions. In the

Some attributes protected in state and territory anti-discrimination legislation can be understood as inherent, such as race and sex. One of the legislative purposes of proscribing discrimination on those grounds is to protect groups in Australian society who have been historically disadvantaged or marginalised (such as racial minorities and women).

Other attributes, such as adherence to political belief or engagement in union or industrial activity, are not inherent, but are protected under the statutes because legislatures have determined that such activity is ancillary to participation in different areas of public life. As Bailey observes, some prescribed grounds reflect express legislative recognition of a status connected to another attribute.<sup>34</sup> This is to address disadvantage where members sharing a status associated with the broader group suffered disadvantage because courts did not recognise it as relevant to discrimination in the broader group context.<sup>35</sup> For example, in New South Wales, pregnancy and breastfeeding are expressly described as characteristics relevant to women and discrimination in respect of them is, therefore, captured by the prohibition on sex discrimination.<sup>36</sup> In other jurisdictions, such as the ACT and Tasmania, pregnancy is recognised as a specific protected attribute. As discussed below, this latter approach provides stronger protection for pregnant women, as through the 'characteristic extension' mechanism, discrimination on the basis of characteristics of pregnancy, such as morning sickness are also unlawful.<sup>37</sup>

Protections to advance equal treatment of lesbian, gay, bisexual, transgender, queer and intersex ('LGBTQI') people (and their relatives and associates) have also expanded (albeit at a glacial pace). Most state and territory jurisdictions prohibit discrimination on the grounds of each or some of sexual orientation, gender identity or intersex status.

However, gaps in protections in some jurisdictions remain, and some laws require significant reform in order to include all forms of (lawful) sexuality. Under the *Anti-Discrimination Act 1991* (NSW), for example, discrimination on the ground of 'homosexuality' is unlawful with 'homosexual' defined to mean 'male or female homosexual'. The statute's protections, therefore, do not extend to people with non-binary sexualities, such as bisexuality.<sup>38</sup> There is also no separate prohibition in New South Wales of discrimination against persons with intersex variations.<sup>39</sup> The Tasmanian law was changed to update the definitions for intersex, transgender,

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absence of a ground under the state act, individuals are limited to pathways such as the Commonwealth Fair Work framework or state industrial relations law.

<sup>34</sup> Peter Bailey, *Human Rights Law* (Thomson Reuters, 2012) 121.

<sup>35</sup> *Ibid*, 121.

<sup>36</sup> *Anti-Discrimination Act 1977* (NSW) s 24(1B)-(1C). The individual is covered only to the extent that discrimination relates to the homosexual aspects of their life, or any imputed or assumed homosexuality. NSW is an anomaly in this regard.

<sup>37</sup> *Discrimination Act 1991* (ACT) ss 7(1)(o), 7(2)(a); *Anti-Discrimination Act 1998* (Tas) ss 14(2), 15(1)(b) and 16(g).

<sup>38</sup> *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'homosexual'). It also signifies that heterosexuality is not a protected ground.

<sup>39</sup> Note, however, that discrimination on transgender grounds includes a person 'who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex (s 38A(c)). See also *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) 84 NSWLR 697, [120].

transexual, gender expression and sex characteristics.<sup>40</sup> Victoria recently updated the definitions of gender identity, sexual orientation and introduced a new attribute of sex characteristics.<sup>41</sup>

The NT Act adopts a different approach, prohibiting discrimination on the ground of 'sexuality'.<sup>42</sup> However, 'sexuality' is defined to mean 'the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality.'<sup>43</sup>

As observed in a 2018 Public Interest Advocacy Centre submission to the Northern Territory Government, exclusively listing the forms of sexuality against which discrimination is proscribed potentially excludes other sexualities from protection.<sup>44</sup> The definition also conflates gender identity, transsexuality, with sexuality.<sup>45</sup> Following the 2018 discussion paper and submissions on the need to modernise the law, no changes have been made to date.

However, the definition of 'sexuality' in the ACT statute has been amended. The Dictionary to the Act had previously provided that 'sexuality *means* heterosexuality, homosexuality (including lesbianism) or bisexuality.' In its new form, the dictionary entry reads: 'sexuality *includes* heterosexuality, homosexuality and bisexuality.'<sup>46</sup> The new definition can be seen as more flexible and inclusive, as it does not exclusively list sexualities covered by the legislation.

In some jurisdictions, anti-discrimination statutes directly protect attributes that can result in social exclusion. For example, in the ACT, discrimination on both the basis of accommodation status, including homelessness, and subjection to family or domestic violence are unlawful.<sup>47</sup> In addition, each of the Queensland, Tasmanian and Victorian statutes protect against discrimination on the ground of 'lawful sexual activity' (encompassing lawful sex work).<sup>48</sup> In Victoria, the new protected attribute of 'profession, trade or occupation' was introduced and protects sex workers from discrimination.<sup>49</sup>

No formal membership is required for an individual to be subject of the protection from unlawful discrimination, only that they hold the prescribed attribute or status.<sup>50</sup> In addition, all state and territory anti-discrimination laws expand protections against discrimination to include

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<sup>40</sup> *Anti-Discrimination Act 1998* (Tas) ss 3, 16, 19. The previous intersex ground in s 16(eb) is now 'intersex variations of sex characteristics'. Changes to the ACT law in 2020 included the removal of 'intersex status' as a protected attribute in s 7(1)(k) definition of gender identity, which appears to fall within the new attribute of 'sex characteristics' in s 7(1)(v).

<sup>41</sup> 'Sex characteristics' has now been added to the *Equal Opportunity Act*. See: <https://www.humanrights.vic.gov.au/news/public-statement-sex-characteristics-now-a-protected-attribute-in-the-equal-opportunity-act/>.

<sup>42</sup> *Anti-Discrimination Act 1992* (NT) s 19(1)(c).

<sup>43</sup> *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'sexuality').

<sup>44</sup> Public Interest Advocacy Centre, Submission to Department of the Attorney-General and Justice Northern Territory Government, *Modernisation of the Northern Territory Anti-Discrimination Act: Discussion Paper* (31 January 2018) 2 -5.

<sup>45</sup> Public Interest Advocacy Centre, Submission to Department of the Attorney-General and Justice Northern Territory Government, *Modernisation of the Northern Territory Anti-Discrimination Act: Discussion Paper* (31 January 2018) 2-5.

<sup>46</sup> As amended by the *Justice Legislation Amendment Act 2020* (ACT).

<sup>47</sup> *Discrimination Act 1991* (ACT) s 7(1)(a) and (x).

<sup>48</sup> *Anti-Discrimination Act 1991* (Qld) s 7(l); *Anti-Discrimination Act 1998* (Tas) s 16(d); *Equal Opportunity Act 2010* (Vic) s 6(g).

<sup>49</sup> See the document published by the Victorian Equal Opportunity and Human Rights Commission: <https://www.humanrights.vic.gov.au/for-individuals/profession-trade-occupation/>.

<sup>50</sup> Peter Bailey, *Human Rights Law* (Thomson Reuters, 2012) 121.

discrimination on the ground of characteristics generally held, or imputed, to prescribed attributes. This is generally known as the ‘characteristic extension’.<sup>51</sup>

Chapman observes that the characteristic extension mechanism ‘has played an important role in filling gaps in legislative coverage’ and that ‘it continues to play a central role in many complaints’.<sup>52</sup> Rees, Rice and Allen have suggested that if there is a requirement that a discriminator actually knew whether a characteristic (forming the basis on which they acted) generally applied to or was imputed to people with that relevant attribute, then it ‘actually serves no useful purpose’.<sup>53</sup>

In the newer model statutes, the characteristic extension applies to all attributes by a general provision.<sup>54</sup> In the older model statutes (New South Wales, South Australia and Western Australia), the characteristic extension is covered in respect of specific attributes only. Reference must be had to the provisions prohibiting different forms of discrimination to determine whether the characteristic extension applies. For example, s 36(1) of the *Equal Opportunity Act 1984 (WA)* provides that conduct will be discrimination against another (‘the aggrieved person’) on the ground of race where it is on the ground of:

- (a) the race of the aggrieved person; or
- (b) a characteristic that appertains generally to persons of the race of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the race of the aggrieved person.

In some cases, other statutes deem specific matters to be characteristics associated with particular attributes.<sup>55</sup>

In addition to the characteristic extension, the legislation in some jurisdictions covers past or presumed attributes to different extents. For example, the Northern Territory statute applies to discrimination where a person ‘has or had, or is believed to have or had’ an attribute.<sup>56</sup> The coverage of the ACT statute is similar.<sup>57</sup> The Tasmanian statute covers ‘imputed prescribed attributes’ in direct discrimination.<sup>58</sup> In New South Wales, for homosexuality, transgender, caring responsibility and disability grounds, discrimination on the basis of that attributes is defined to

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<sup>51</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 41.

<sup>52</sup> Anna Chapman, ‘Australian Anti-Discrimination Law, Work, Care And Family’ (Working Paper No. 51, Centre for Employment & Labour Relations Law, January 2012) 27.  
<[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0005/1649021/WP-No-51-FINAL.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1649021/WP-No-51-FINAL.pdf)>.

<sup>53</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 48-9.

<sup>54</sup> See: *Anti-Discrimination Act 1998* (Tas) s 14(2) (‘Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or characteristic imputed to that attribute less favourably than a person without that attribute’) and s 15(1)(b) (characteristic extension in respect of indirect discrimination); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 2010* (Vic) s 7(2).

<sup>55</sup> For example, ss 24(1B) and (1C) of the New South Wales statute provide that breastfeeding and pregnancy are characteristics generally appertaining to women (referred to above).

<sup>56</sup> *Anti-Discrimination Act 1992* (NT) s 20(2)(a).

<sup>57</sup> *Discrimination Act 1991* (ACT) s 7(2)(c)-(f).

<sup>58</sup> *Anti-Discrimination Act 1998* (Tas) ss 14(2), 15(1)(a)-(b).

include discrimination where a person is ‘thought’ to have that attribute, whether or not they do., in fact, have it.<sup>59</sup>

As is apparent from Table 1 below, different grounds of prohibited discrimination are prescribed between jurisdictions, with some protected in one state or territory but not in others. In some instances, this inconsistency is also compounded by variation in the definitions of protected attributes. For example, in the Northern Territory and Tasmania the definition of ‘race’ includes ‘that a person is or has been an immigrant’.<sup>60</sup> Immigration status is not included in the definition of ‘race’ in other state and territory jurisdictions. However, being or having been an immigrant is protected as a specific ground in the ACT.<sup>61</sup> In each jurisdiction it is necessary to read the legislation closely to ascertain the precise coverage of protected attributes.

**Table 1: Grounds or attributes of unlawful discrimination in state and territory anti-discrimination legislation**

State or territory statute	Grounds on which discrimination is unlawful
<i>Discrimination Act 1991</i> (ACT)	<p>Discrimination on the basis of: accommodation status; age; breastfeeding; disability; employment status; gender identity; genetic information; immigration status; industrial activity; irrelevant criminal record; parent, family, carer or kinship responsibilities; physical features; political conviction; pregnancy; profession, trade, occupation or calling; race; record of a person’s sex having been altered under the <i>Births, Deaths and Marriages Registration Act 1997</i> (Cth) or under a corresponding or substantially corresponding law of another jurisdiction; relationship status; religious conviction; sex; sex characteristics; sexuality; or subjection to domestic or family violence (s 7(1)(a)-(x)). The Act also prohibits discrimination on the basis of an association (whether as a relative or otherwise) with a person who is identified by reference one of the above protected attributes.</p> <p>See also the <i>Discrimination Act 1991</i> (ACT) Dictionary for definitions of terms not defined in the provisions noted above.</p>
<i>Anti-Discrimination Act 1977</i> (NSW)	<p>Discrimination on the basis of: race, including colour, nationality, descent and ethnic, ethno-religious or national origin (s 7); sex, including pregnancy or breastfeeding (s 24); transgender status (ss 38A-38B); marital or domestic status (s 39); disability (ss 49A-49B); carer’s responsibilities (s 49S-49T); homosexuality (s 49ZG); and age (s 49ZYA). Discrimination is also unlawful on the basis of a relative or associate’s race (s 7(1)); marital or domestic status (s 39(1)); disability (s 49B(1)); homosexuality (s 49ZG(1)); transgender status (s 38B(1)); or age (s 49ZYA(1)).</p>

<sup>59</sup> *Anti-Discrimination Act 1977* (NSW) ss 38A, 49A, 49S, 49ZF. See also s 49ZX on HIV/Aids vilification. The NSW statute covers past caring responsibilities and disability only (ss 49A, 49S(2)).

<sup>60</sup> *Anti-Discrimination Act 1992* (NT) s 4; *Anti-Discrimination Act 1998* (Tas) s 3.

<sup>61</sup> *Discrimination Act 1991* (ACT) s 7(1)(i).

	See also s 4(1) for definitions of terms not defined in the provisions noted above. 'Relative' and 'associate of a person' are defined generally at s 4(1), but are given a distinct definition in the context of age discrimination (s 49ZYA(3)).
<i>Anti-Discrimination Act 1992</i> (NT)	Discrimination on the basis of: race; sex; sexuality; age; marital status; pregnancy; parenthood; breastfeeding; impairment; trade union or employer association activity; religious belief or activity; political opinion, affiliation or activity; irrelevant medical record; irrelevant criminal record; the person's details being published under section 66M of the <i>Fines and Penalties (Recovery) Act 2001</i> (NT); and association with a person who has, or is believed to have, a protected attribute (s 19(1)(a)-(r)).  See also s 4 for definitions of terms not defined in the provisions noted above.
<i>Discrimination Act 1991</i> (Qld)	Discrimination on the basis of: sex; relationship status; pregnancy; parental status; breastfeeding; age; race; impairment; religious belief or religious activity; political belief or activity; trade union activity; lawful sexual activity; gender identity; sexuality; family responsibilities; and association with, or relation to, a person identified on the basis of any other protected attributes (s 7(a)-(p)). See also Chapter 5B on discrimination against residents of regional communities.  See also the <i>Anti-Discrimination Act 1991</i> (Qld) Dictionary for definitions of terms not defined in the provisions noted above.
<i>Equal Opportunity Act 1984</i> (SA)	Discrimination on the basis of: sex, sexual orientation, gender identity or intersex status (s 29); race (s 51); disability (s 66); age (s 85A); marital or domestic partnership status (s 85T(2)); spouse or partner's identity (s 85T(3)); pregnancy (s 85T(4)); association with a child (including breastfeeding or bottle feeding) (s 85T(5)); caring responsibilities (s 85T(6)) and religious appearance or dress (s 85T(7)).  In addition, discrimination is unlawful on the basis of a relative or associate's: sex (s 29(2)(d)); gender identity (s 29(2a)(e)); sexual orientation (s 29(3)(d)); intersex status (s 29(4)(c)); race (s 51(d)); disability (s 66(f)); age (s 85A(d)); marital or domestic partnership status (s 85T(2)(c)); pregnancy (s 85T(4)(c)); association with a child (s 85T(5)(b)); caring responsibilities (s 85T(6)(d)); and religious appearance or dress (s 85T(7)(c)).  See also s 5 for definitions of terms not defined in the provisions noted above.
<i>Anti-Discrimination Act 1998</i> (Tas)	Discrimination on the basis of: race; age; sexual orientation; lawful sexual activity; gender; gender identity; intersex variations of sex characteristics; marital status; relationship status; pregnancy; breastfeeding; parental status; family

	<p>responsibilities; disability; industrial activity; political belief or affiliation; political activity; religious belief or affiliation; religious activity; irrelevant criminal record; irrelevant medical record; and association with a person who has, or is believed to have, any of these attributes (s 16(a)-(s)).</p> <p>See also s 3 for definitions of terms not defined in the provisions noted above.</p>
<i>Equal Opportunity Act 2010</i> (Vic)	<p>Discrimination on the basis of: age; breastfeeding; employment activity; gender identity; disability; industrial activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sex characteristics (added in October 2021); sexual orientation; profession, trade or occupation (added on 10 May 2022)<sup>62</sup>; an expunged homosexual conviction; spent conviction (added on 1 December 2021)<sup>63</sup> and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes (s 6(a)-(q)).</p> <p>See also s 3 for definitions of terms not defined in the provisions noted above.</p>
<i>Equal Opportunity Act 1984</i> (WA)	<p>Discrimination on the basis of: sex (s 8); marital status (s 9); pregnancy (s 10); breastfeeding (s 10A); gender history (s 35AB); family responsibility or family status (s 35A); sexual orientation (including by association) (s 35O); race (s 36); religious or political conviction (s 53); impairment (including by association) (s 66A); age (including by association) (s 66V)); and publication of relevant details on Fines Enforcement Registrar’s website (s 67A).</p>

<sup>62</sup> The change was part of reforms to decriminalise sex work in Victoria and reduce discrimination and harm to sex workers. Although the new attribute of ‘profession, trade or occupation’ does not apply exclusively to sex work, the Explanatory Memorandum explains that the new attribute is: [i]ntended to address discrimination against sex workers and other persons based on their participation in sex work as a profession, trade or occupation, protect sex workers from discrimination in the future, and de-stigmatise the sex work industry (page 9). Sex workers were previously only protected from discrimination on the basis of ‘lawful sexual activity’. However, the protected attribute of ‘lawful sexual activity’ only protected sex workers from discrimination where sexual services were provided ‘lawfully’ (that is, conducted by a licenced sex worker in licenced premises). As a result, the attribute did not protect the majority of sex workers who engaged in street-based sex work or other unlicensed sex work.

<sup>63</sup> The purpose of introducing this protected attribute was to ensure that people are not unfairly discriminated against in any area of life on the basis of minor historical offending. The amendments to the EO Act accompanied the establishment of a scheme under the *Spent Convictions Act 2021*, that enables eligible convictions to become protected from disclosure on a person’s criminal record after a period without re-offending. ‘Spent conviction’ in the *Equal Opportunity Act* has the same meaning as in the *Spent Convictions Act 2021*.

	See also s 4 for definitions of terms not defined in the provisions noted above. 'Gender history' is defined in s 35AA.
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### 1.3 Areas covered

In all state and territory jurisdictions, subject to relevant exceptions or exemptions, discriminatory conduct is unlawful only in defined areas of activity. As described by Rees, Rice and Allen, broadly, anti-discrimination legislation in Australia applies by obliging people:

...in particular relationships or when engaging in specified activities, not to discriminate against people on the basis of nominated attributes, either generally or within those relationships. For instance, all of the relevant legislation makes it unlawful for an employer to discriminate against job applicants on the basis of race when hiring people for work. Usually, the obligation not to discriminate is placed on the person in the dominance position in a particular relationship, such as an employer, an educational institution or a provider of goods and services.<sup>64</sup>

As with the coverage of Commonwealth anti-discrimination legislation, while the term is not used, the areas of activity regulated by state and territory anti-discrimination legislation are best understood as aspects of 'public life'.

The areas of activity covered by the legislation in each jurisdiction are set out in Appendix A. All state and territory jurisdictions currently prohibit discrimination on the ground of prescribed attributes in the following four main common areas:

- work (encompassing employment and other work-associated relationships, such as partnerships and contract work, as well as work-associated areas such as professional, trade or occupational qualifying bodies or employment agencies);
- education;
- accommodation; and
- the provision of goods, services and facilities.<sup>65</sup>

In all states and territories, regulated areas extend beyond these core categories to other aspects of public life. What other categories are regulated differs greatly between jurisdictions. Moreover, not all forms of discrimination are prohibited in all regulated areas in all jurisdictions.

By way of illustration, discrimination in certain dealings with land is prohibited in Queensland and Victoria (on the basis of all attributes prescribed by the statutes) in the Northern Territory (in relation to selling and leasing an interest in land on the basis all attributes, as part of the definition of services) and in South Australia and Western Australia (in relation to certain attributes only).<sup>66</sup>

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<sup>64</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 566.

<sup>65</sup> In respect of this last area, each of the ACT, Northern Territory, Tasmanian and Western Australian statutes prohibit discrimination on the ground of protected attributes in respect of 'goods, services and facilities' together. The New South Wales, Queensland, South Australian and Victorian anti-discrimination statutes each define 'services' to encompass access and use of facilities.

<sup>66</sup> *Anti-Discrimination Act 1991* (Qld) s 77; *Equal Opportunity Act 2010* (Vic) s 50; *Anti-Discrimination Act 1992* (NT) ss 4, 28(d); *Equal Opportunity Act 1984* (SA) ss38 (sex, sexual orientation or gender identity discrimination), 60 (race), 75 (disability), 85K (age), 85ZF (discrimination on grounds of marital or domestic partnership status, spouse or partner's identity, pregnancy or caring responsibilities); *Equal*



Discrimination in respect of participation in sport is prohibited in Victoria (in respect of all prescribed attributes, with some defined exceptions) and Western Australia (in respect of certain attributes only).<sup>67</sup> Anti-discrimination statutes in all state and territory jurisdictions, including Victoria and Western Australia, include exceptions to otherwise prohibited forms of discrimination - such as gender or disability discrimination - in sport.<sup>68</sup>

The drafting structure and text of area-regulating provisions differ between state and territory jurisdictions, including in respect of the scope of coverage. This is the case even in those four main areas of regulation described above. The differences between statutes can be illustrated by the regulation of the area of 'work'. All jurisdictions take a broad approach that captures different forms of paid work, not limited to the common law relationship of employment<sup>69</sup> (including, in some cases, unpaid or volunteer work).<sup>70</sup>

As noted above, coverage diverges between jurisdictions in the *type* of discriminatory conduct which is prohibited in a given area. Most jurisdictions specify precisely which activities are prohibited in covered areas. For example, in New South Wales, the prohibition on discrimination against employees applies specifically to the following: (a) the terms or conditions on which employment is offered, (b) in opportunities for promotion, transfer or training or any other benefits associated with employment and (c) in dismissal or subjection to other detriment.<sup>71</sup> In

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*Opportunity Act 1984* (WA) ss 21A (sex, marital status, pregnancy or breast feeding), 35AN (gender history), 35ZA (sexual orientation), 47A (race), 66ZH (age).

<sup>67</sup> *Equal Opportunity Act 2010* (Vic) s 71; *Equal Opportunity Act 1984* (WA) ss 35AP (gender history), s 66N (impairment), s 66ZJ (age).

<sup>68</sup> For example, see s 29 *Anti-Discrimination Act 1991* (Tas).

<sup>69</sup> See *Anti-Discrimination Act 1977* (NSW) Part 2 Division 2 (race grounds), Part 3 Division 2 (sex grounds), Part 3A Division 2 (transgender grounds), Part 4 Division 2 (marital or domestic status grounds), Part 4A Division 2 (disability grounds), Part 4B Division 2 (carer responsibilities grounds), Part 4C Division 2 (homosexuality grounds), and Parts 4E and 4G Division 2 on age grounds, including provisions relating to compulsory retirement; *Equal Opportunity Act 1984* (SA) Part 3 Division 2 (sex, sexual orientation or gender identity), Part 4 Division 2 (race), Part 5 Division 2 (disability), Part 5A Division 2 (age), and Part 5B Division 2 ('other grounds'), with employee including an unpaid worker in s 5; *Equal Opportunity Act 1984* (WA) Part II Division 2 (sex, marital status, pregnancy or breast feeding), Part IIAA Division 2 (gender history), Part IIA Division 2 (family status), Part IIB Division 2 (sexual orientation), Part III Division 2 (race), Part IV Division 2 (religious or political conviction), Part IVA Division 2 (impairment), Part IVB Division 2 (age), Part IVC Division 2 (publication of details on the Fines Enforcement Registrar's website); *Discrimination Act 1991* (ACT) Part 3, Division 3.1, with separate provision for contract workers (s 13), and extending the definition of employment to unpaid work; *Anti-Discrimination Act 1991* (Qld) Part 4, Division 2, with a broad definition of work including voluntary or unpaid work; *Anti-Discrimination Act 1992* (NT) s 28(b), with a broad definition of work in s 4 including full-time, part-time, casual, permanent and temporary employment, service contracts, those paid on a commission basis, and trainees; *Anti-Discrimination Act 1998* (Tas) s 22(1)(a), where the Dictionary in s 3 provides the broadest definition of employment, including 'employment or occupation in any capacity, with or without remuneration'; and *Equal Opportunity Act 2010* (Vic) Part 4, Division 1, including separate sections addressing contract workers specifically, and a broad definition in s 4 which does not extend to voluntary or unpaid work for the purposes of Part 4. The Victorian statute also requires that employers not unreasonably refuse to accommodate caring or parental responsibilities (s 17) or to make reasonable adjustments for a person with a disability (s 20).

<sup>70</sup> In Tasmania, South Australia, Queensland and the ACT, but expressly not included under unlawful discrimination in employment in Victoria, per the definition in s 4.

<sup>71</sup> See, for example, the prohibition on sex discrimination: *Anti-Discrimination Act 1977* (NSW) s 25(2)(a)-(c). 'Employment' is defined at s 4(1); see also s 4B (References to certain employers).

these jurisdictions, the statutes set out in detail the work activities which they regulate and can extend to work-related activities.<sup>72</sup>

In Tasmania, a slightly different structural approach is taken, whereby the prohibition on discrimination in the Act 'by or against a person engaged in, or undertaking any, activity in connection with' any one of an itemised list of activities in s 22 (including 'employment', defined in s 3). While various exceptions are set out, no further detail is given in the statute as to the details of what discrimination in employment might look like. The drafting of s 22 is much broader and, interpreted beneficially, is capable of extending beyond the specific activities listed in relation to a given area in other statutes. The opening words of s 22 apply in respect of all areas covered by the Tasmanian legislation.

Given that joining the workplace in the first place is often the most formidable barrier for marginalised groups, all statutes provide that discrimination is not lawful in relation to deciding who should be offered work, what the terms of work are, and the failure or refusal to offer work or guidance or vocational training to people seeking work.<sup>73</sup>

In some jurisdictions, this includes an express prohibition on discrimination in the development of policy or general arrangements used for deciding hiring decisions.<sup>74</sup> Discrimination is also prohibited in relation to those who are already in a working relationship, including discriminatory promotion or dismissal actions.<sup>75</sup> The phrasing of this prohibition in respect of discrimination once a working relationship is in existence, in all jurisdictions except Tasmania, includes a catch-all phrase, to capture a wide range of potential discriminatory action in a work relationship.<sup>76</sup> Some statutes also include an additional prohibition on discrimination against employees by refusing to allow them permission to carry out certain religious practices during work hours.<sup>77</sup>

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<sup>72</sup> See *Anti-Discrimination Act 1991* (Qld) s 13(1).

<sup>73</sup> See e.g., *Anti-Discrimination Act 1977* (NSW) (for example, in relation to race) s 8(1); *Equal Opportunity Act 1984* (SA) (for example, in relation to race) s 52(1); *Equal Opportunity Act 1984* (WA) (for example, in relation to race) s 37(1); *Discrimination Act 1991* (ACT) s 10(1); *Anti-Discrimination Act 1991* (Qld) s 14; *Anti-Discrimination Act 1992* (NT) s 31(1); *Equal Opportunity Act 2010* (Vic) s 16; and as covered by the broad activity category of employment in *Anti-Discrimination Act 1998* (Tas) s 22(1)(a).

<sup>74</sup> See *Anti-Discrimination Act 1977* (NSW) (for example, in relation to race) s 8(1)(a); *Equal Opportunity Act 1984* (WA) (for example, in relation to race) s 37(1)(a); *Discrimination Act 1991* (ACT) s 10(1)(a); and *Anti-Discrimination Act 1991* (Qld) s 14(a).

<sup>75</sup> *Anti-Discrimination Act 1977* (NSW) (for example, in relation to race) s 8(2); *Equal Opportunity Act 1984* (SA) (for example, in relation to race) s 52(2); *Equal Opportunity Act 1984* (WA) (for example, in relation to race) s 37(2); *Discrimination Act 1991* (ACT) s 10(2); *Anti-Discrimination Act 1991* (Qld) s 15; *Anti-Discrimination Act 1992* (NT) s 31(2); *Equal Opportunity Act 2010* (Vic) s 18; and as covered by the broad activity category of employment in *Anti-Discrimination Act 1998* (Tas) s 22(1)(a).

<sup>76</sup> See the requirement not to discriminate 'by treating a worker less favourably in any way in connection with work' in s 31(2)(d) *Anti-Discrimination Act 1992* (NT); 'by subjecting the employee to any other detriment' in s 10(2)(d) *Discrimination Act 1991* (ACT); 'by treating a worker unfavourably in any way in connection with work' in s 15(1)(f) *Anti-Discrimination Act 1991* (Qld); 'by subjecting the employee to any other detriment' in *Equal Opportunity Act 2010* (Vic) s 18(d); or in relation to the older statutes, by way of example, in relation to race: 'by subjecting the employee to any other detriment' in *Equal Opportunity Act 1984* (WA) s 37(2)(d); 'by subjecting the employee to other detriment' in *Equal Opportunity Act 1984* (SA) s 52(2)(e); or 'by... subjecting the employee to any other detriment' in *Anti-Discrimination Act 1977* (NSW) s 8(2)(c). As noted above, the same breadth is achieved in the Tasmanian statute by the opening words of s 22.

<sup>77</sup> See, e.g., *Discrimination Act 1991* (ACT) s 11.

As illustrated in relation to work, the exact protections available in relation to a particular activity can vary significantly across jurisdictions. An understanding of the scope of the coverage in a particular statute requires close study of the wording of the provisions, as well as relevant jurisprudence. Typically, courts and tribunals take an expansive approach to interpretation of the areas of activity regulated, consistent with the beneficial purpose of anti-discrimination legislation.<sup>78</sup> However, the question of whether an activity is regulated is rendered more complex by the possible application of statutory exceptions (discussed below in part 2.5).

Victoria also has protections against discrimination by clubs and club members<sup>79</sup> and in local government<sup>80</sup>

#### 1.4 Direct and indirect discrimination

As noted above, all state and territory anti-discrimination statutes (except for the Northern Territory) prohibit both 'direct' and 'indirect' forms of discrimination.

Each of the New South Wales, South Australian and Western Australian anti-discrimination statutes follow a model in which they define discrimination in both its direct and indirect forms in each part of the statute that makes discrimination on a particular ground unlawful (e.g., race or sex discrimination).

The other state and territory statutes contain a section or sections defining 'discrimination' for the purpose of the statute.<sup>81</sup> With the exception of the ACT and NT<sup>82</sup> legislation, direct and indirect discrimination are dealt with in separate provisions and, thus, are treated as mutually exclusive forms of conduct which must be argued in the alternative.<sup>83</sup> In contrast, the *Discrimination Act 1991* (ACT) states that 'discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else.'<sup>84</sup> The two concepts are, therefore, not necessarily mutually exclusive according to the wording of the statute.<sup>85</sup> As noted by Ronalds

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<sup>78</sup> For discussion of relevant cases up to 2018 and 2019, we refer the reader to the following comprehensive scholarly texts on discrimination law: Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) and Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5<sup>th</sup> ed, 2019).

<sup>79</sup> Division 6, *Equal Opportunity Act 2010* (Vic).

<sup>80</sup> Division 8, *Equal Opportunity Act 2010* (Vic).

<sup>81</sup> *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT) s 20; *Anti-Discrimination Act 1991* (Qld) ss 10-11; *Anti-Discrimination Act 1998* (Tas) ss 14-15; *Equal Opportunity Act 2010* (Vic) ss 8-9.

<sup>82</sup> The Northern Territory legislation (s 20) does not expressly proscribe the elements of indirect discrimination. See: Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3<sup>rd</sup> ed, 2018) who suggest that 'it is possible to argue that the language in s 20 ... is sufficiently broad to cover the notion of indirect discrimination', at 143.

<sup>83</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 400 (McHugh J); *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 170-1 (Brennan and Dawson JJ). See, e.g., the discussion of those authorities in *Edgley v Federal Capital Press of Australia Pty Ltd* (2001) 108 FCR 1.

<sup>84</sup> s 8(1). Direct and indirect discrimination are defined in subsections 8(2) and (3), respectively.

<sup>85</sup> See, e.g., *Andreopoulos v University of Canberra (Discrimination)* [2020] ACAT 95, [14]. Under the prior wording of the statute, the Civil and Administrative Tribunal had considered itself to be 'compelled by authority to accept that categories of 'direct' and 'indirect' discrimination are mutually exclusive': *Wang v Australian Capital Territory (Discrimination)* [2016] ACAT 71, [157]. The approach taken was the same as that under the other newer model statutes: a plaintiff could plead both direct and indirect discrimination, which will be considered in turn. If direct discrimination is made out, then indirect discrimination need not

and Raper, indirect discrimination ‘requires a substantially different approach to presenting the factual material in a complaint’,<sup>86</sup> such that plaintiffs will still need to consider carefully how the material best supports either, or both, forms of discrimination.

#### 1.4.1 *Direct discrimination*

Generally speaking, direct discrimination is where a person treats or proposes to treat another person unfavourably or less favourably than a third person in comparable circumstances because the person has one or more attributes protected by the anti-discrimination legislation (such as sex or race) or a characteristic associated with an attribute. Broadly speaking, in the case of direct discrimination, ‘the treatment is on its face less favourable.’<sup>87</sup>

State and territory anti-discrimination statutes adopt two approaches in describing direct discrimination. The first, which Rees, Rice and Allen describe as the ‘standard approach’, focuses on a person’s ‘less favourable treatment’ in comparison with another who does not have a protected attribute in comparable circumstances.<sup>88</sup> For example, section 10(1) of the *Anti-Discrimination Act 1991* (Qld) describes ‘direct discrimination’ as follows:

Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.<sup>89</sup>

Similar provisions are contained at s 7(1)(a) of the *Anti-Discrimination Act 1977* (NSW) in respect of racial discrimination and in other parts of the New South Wales statute applying to all other grounds of discrimination; s 20(2) of the *Anti-Discrimination Act 1992* (NT); s 6(3) of the *Equal Opportunity Act 1984* (SA); s 14 of the *Anti-Discrimination Act 1993* (Tas); and s 8 of the *Equal Opportunity Act 1984* (WA) in respect of sex discrimination, and in other parts of the Western Australian statute applying to all other grounds of discrimination.<sup>90</sup>

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be considered. Because of this approach, the Human Rights Commissioner argued in an amicus submission in that case that the question of whether the categories were mutually exclusive was ‘moot’, at [50]. On appeal in 2019, it was clarified that the Tribunal was, indeed, bound to treat the categories as mutually exclusive (by judicial authority and by the prior wording of the statute) and that any conflation of the two constituted an error: *Australian Capital Territory v Wang* (Appeal) [2019] ACAT 65, [157], [159]-[160].

<sup>86</sup> Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5<sup>th</sup> ed, 2019) 40.

<sup>87</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ).

<sup>88</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 92.

<sup>89</sup> See also the note to s 10(1), which provides the example of direct discrimination where landlord R refuses to rent a flat to C because C is English (or because C has a friend who is English) and R either doesn’t like English people or believes that English people are unreliable tenants, irrespective of whether or not R’s belief in C’s (or C’s friend’s) nationality or about the characteristics of people with that nationality are correct.

<sup>90</sup> See Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 92 - 129 (for detailed discussion of the elements of direct discrimination, as developed by the courts). *Anti-Discrimination Act 1977* (NSW) s 7(1)(a) (race), s 24(1)(a) (sex), s 38B(1)(a) (transgender grounds), s 39(1)(a) (marital or domestic status), s 49B(1)(a) (disability), s 49T(1)(a) (carer’s responsibilities), s 49ZG(1)(a) (homosexuality), s 49ZYA(1)(b) (age); *Equal Opportunity Act 1984* (SA) s 6(3) (while s 6(3) refers to ‘unfavourable’ treatment, it defines that term to mean treating ‘that

This approach to direct discrimination requires the complainant to prove two elements. The first is that less favourable treatment has occurred, with reference to a real or hypothetical comparator without the complainant's prescribed attribute, in circumstances that are the same or not materially different from those of the complainant.<sup>91</sup>

The reasons for detrimental treatment are irrelevant if it can be shown that the treatment was less favourably differential.<sup>92</sup>

The second element requires consideration of the reasons for the treatment,<sup>93</sup> that is, whether the less favourable treatment occurred because of the protected attribute of the complainant.<sup>94</sup> The assessment is objective, without regard to the respondent's subjective characterisation of their reasons for the conduct. It is also unnecessary for the respondent to have intended to engage in discriminatory conduct or, in fact, to have been aware that they were engaging in less favourable treatment.<sup>95</sup> This is expressly recognised, in different degrees, in provisions of each of the Queensland, Northern Territory and Tasmanian anti-discrimination statutes.<sup>96</sup>

The real basis for a complainant's less favourable treatment is a matter of fact, to be proven on the balance of probabilities.<sup>97</sup> This can be a difficult threshold for complainants to reach.<sup>98</sup> For example, as Hunyor notes in respect of direct discrimination on the ground of race:

In the absence of a clear statement of bias or expression of a discriminatory intention, there may be no direct evidence to support an allegation of discrimination and a complainant may have to rely on inferences from the surrounding circumstances – often

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other person less favourably than in identical or similar circumstances'); *Equal Opportunity Act 1984* (WA) s 8(1) (sex), s 9(1) (marital status), s 10(1) (pregnancy), s 10A (breast feeding), s 35AB(1) (gender history grounds), s 35A(1) (family responsibility or family status), s 35O(1) (sexual orientation), s 36(1)-(1a) (race), s 53(1) (religious or political conviction), s 66A(1)-(1a) (impairment), s 66V(1)-(2) (age), s 67A(a) (publication of relevant details of persons on Fines Enforcement Registrar's website).

<sup>91</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 93.

<sup>92</sup> *Haines v Leves* (1987) 8 NSWLR 442, 471 (Kirby P), citing *Clay Cross (Quarry Services) Ltd v Fletcher* [1978] 1 WLR 1429; [1979] 1 All ER 474 (Eng CA), cited in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 95.

<sup>93</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 93.

<sup>94</sup> For detailed discussion of the element of causation, see Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 108 - 126.

<sup>95</sup> See Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535, 536-537 (writing in respect of motive and intention).

<sup>96</sup> *Anti-Discrimination Act 1991* (Qld) ss 10(2)-(3); *Anti-Discrimination Act 1992* (NT) s 20(4); *Anti-Discrimination Act 1998* (Tas) s 14(3)(b)-(c).

<sup>97</sup> It can be found in either direct evidence or by proper reliance on inferences available from circumstantial evidence before the relevant court or tribunal. See, for example, *Sharma v Legal Aid Queensland* [2002] FCAFC 196, cited in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 117.

<sup>98</sup> See, for example, *Sharma v Legal Aid Queensland* [2002] FCAFC 196, cited in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 117.

expressed in terms such as ‘there could be no other reason for the decision other than my race.’<sup>99</sup>

The ACT and Victoria adopt a different approach to other jurisdictions by applying a standard of ‘unfavourable treatment’ for direct discrimination (instead of a ‘less favourable’ treatment test). S 8(2) of the *Discrimination Act 1991* (ACT) provides, ‘a person *directly* discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.’ Because the standard does not refer to ‘less’ favourable and thereby differential treatment, there is no need to construct a comparator.<sup>100</sup> Rather, the focus is upon determining whether the complainant was treated disadvantageously and, if so, because of the complainant’s protected attribute or attributes.<sup>101</sup>

Section 8(1) of the *Equal Opportunity Act 2010* (Vic) provides, similarly: ‘Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.’ While reference to a comparator is not necessary to show unfavourable treatment under the ACT and Victorian statutes, evidence of how a comparator was treated may be relevant to causation in establishing that a person was treated detrimentally *because* they hold a protected attribute.

In *Tsikos v Austin Health*<sup>102</sup> Richards J of the Supreme Court of Victoria endorsed the decision in *Slattery v Manningham City Council*<sup>103</sup>, noting that although the Tribunal is no longer required to make a comparison, in many cases ‘a comparison will provide evidence that is probative of whether a person was treated unfavourably, and whether the treatment was because of a particular attribute’ [47]. The *Anti-Discrimination Act 1992* (NT) contains a direct discrimination provision that is drafted differently from the other state and territory anti-discrimination statutes, although in part it adopts the standard approach to describing direct discrimination discussed above. It is modelled, in part, on s 9(1) of the *Racial Discrimination Act 1975* (Cth). Section 20 states:

- (1) For the purposes of this Act, discrimination includes:
  - a. any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity
  - ...
- (2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had:
  - a. an attribute ...less favourably than a person who has not, or is believed not to have, such an attribute.

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<sup>99</sup> Jonathon Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535, referring (in a footnote) to the remarks of Einfeld J in *Bennett v Everitt* (1988) EOC 77, 261 at 77,271.

<sup>100</sup> See, for example, *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, discussed in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 130 – 131.

<sup>101</sup> See, for example, *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, discussed in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 130 – 131.

<sup>102</sup> [2022] VSC 174.

<sup>103</sup> [2013] VCAT 1869.

Section 20(2) is clearly akin to the standard approach in adopting a ‘less favourable’ treatment standard.

Less favourable or unfavourable treatment can often occur for more than one reason. State and territory anti-discrimination statutes grapple with this in two ways. Each of s 10(4) of the *Anti-Discrimination Act 1991* (Qld), s 6(2) of the *Equal Opportunity Act 1984* (SA) and s 8(2)(b) of the *Equal Opportunity Act 2010* (Vic) provide that if there are a number of reasons why a person is treated less favourably or unfavourably, the prescribed attribute must be a ‘substantial reason’ for the treatment to be on the basis of the attribute, therefore amounting to direct discrimination. For example, s 10(4) of the *Anti-Discrimination Act 1991* (Qld) provides:

If there are two or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.

Each of the other state and territory anti-discrimination statutes provide that an act will be done on the ground of a protected attribute where the attribute is one reason for the conduct subject of the complaint.<sup>104</sup>

#### 1.4.2 Indirect discrimination

In addition to proscribing direct discrimination, all state and territory anti-discrimination statutes clearly prohibit indirect discrimination, other than the *Anti-Discrimination Act 1992* (NT).<sup>105</sup>

Prohibitions on indirect discrimination can be understood as directed at addressing systemic disadvantage resulting from policies or practices that are structured in such a way that, while impartial in form, in their impact favour a dominant group and create barriers for other groups.<sup>106</sup> As described by Dawson and Toohey JJ in *Waters v Public Transport Corporation*, broadly speaking,

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<sup>104</sup> For example, s 4A(2) of the *Discrimination Act 1991* (ACT) states that ‘a reference to doing an act because of a particular matter includes a reference to doing an act because of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for doing the act.’ See also *Anti-Discrimination Act 1977* (NSW) s 4A; *Anti-Discrimination Act 1992* (NT) s 20(3); *Anti-Discrimination Act 1998* (Tas) s 14(3)(a); *Equal Opportunity Act 1984* (WA) s 5.

<sup>105</sup> *Discrimination Act 1991* (ACT) s 8(3); *Anti-Discrimination Act 1977* (NSW) s 7(1)(c) (race), s 24(1)(b) (sex), s 38B(1)(b)-(c) (transgender grounds), s 39(1)(b) (marital or domestic status), s 49B(1)(b) (disability), s 49T(1)(b) (carer responsibilities discrimination), s 49ZG(1)(b) (homosexuality discrimination), s 49ZYA(1)(b) (age discrimination); *Anti-Discrimination Act 1991* (Qld) ss 11(1), (4); *Equal Opportunity Act 1984* (SA) s 29(2)(b) (sex), s 29(2a)(b) (gender identity), s 29(3)(b) (sexual orientation), s 51(b) (race discrimination), s 66(b) (disability discrimination), s 85A(b) (age discrimination), s 85T(2)(b) marital or domestic partnership status discrimination), s 85T(4)(b) (pregnancy discrimination), s 85T(6) (caring responsibilities discrimination); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Equal Opportunity Act 1984* (WA) s 8(2) (sex discrimination), s 9(2) (marital status discrimination), s 10(2) (pregnancy discrimination), s 10A(2) (breast feeding discrimination), s 35AB(2) (gender history discrimination), s 35A(2) (family responsibility or family status discrimination), s 35O(2) (sexual orientation discrimination), s 36(1a) (race discrimination), s 53(2) (religious or political conviction discrimination), s 66A(3) (impairment discrimination), s 66V(3) (age discrimination), s 67A(b) (Fines Enforcement Registrar’s website discrimination).

<sup>106</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392, cited in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 87.

‘in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.’<sup>107</sup>

State and territory jurisdictions diverge in how provisions define indirect discrimination and how courts and tribunals have interpreted them. However, broadly, indirect discrimination occurs where a person imposes, or proposes to impose, an unreasonable condition or requirement that disadvantages or is likely to disadvantage a person because they have one or more protected attributes.<sup>108</sup>

The disparate wording of ‘indirect discrimination’ provisions is such that generalisation may not be practicable or useful.<sup>109</sup> However, there are some common elements of indirect discrimination prohibitions in different jurisdictions. First, each statute specifies that a requirement or condition must exist that a person is required to comply with. This is described, with limited practical difference, as a ‘condition or requirement’ (ACT),<sup>110</sup> a ‘requirement or condition’ (New South Wales and Western Australia),<sup>111</sup> a ‘term’ including a ‘condition, requirement or practice, whether or not written’ (Queensland),<sup>112</sup> a ‘particular requirement’ (South Australia),<sup>113</sup> a ‘condition, requirement or practice’ (Tasmania),<sup>114</sup> and a ‘requirement, condition or practice’ (Victoria).<sup>115</sup>

The starting point of an indirect discrimination analysis is, as a matter of fact, identifying the condition or requirement.<sup>116</sup> In *Australian Iron & Steel Pty Ltd v Banovic*, Dawson J observed that the terms ‘requirement’ or ‘condition’ should, ‘be construed broadly so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision.’<sup>117</sup>

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<sup>107</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ).

<sup>108</sup> See, for example, s 11(1) of the *Anti-Discrimination Act 1991* (Qld). A note to s 11 provides an illustration of indirect discrimination: ‘An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headdress’.

<sup>109</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 144.

<sup>110</sup> *Discrimination Act 1991* (ACT) s 8(3).

<sup>111</sup> *Anti-Discrimination Act 1977* (NSW) s 7(1)(c) (race), s 24(1)(b) (sex), s 38B(1)(b)-(c) (transgender grounds), s 39(1)(b) (marital or domestic status), s 49B(1)(b) (disability), s 49T(1)(b) (carer’s responsibilities), s 49ZG(1)(b) (homosexuality), s 49ZYA(1)(b) (age); *Equal Opportunity Act 1984* (WA) s 8(2) (sex), s 9(2) (marital status), s 10(2) (pregnancy), s 10A(2) (breast feeding), s 35AB(2) (gender history), s 35A(2) (family responsibility or family status), s 35O(2) (sexual orientation), s 36(1a) (race), s 53(2) (religious or political conviction), s 66A(3) (impairment), s 66V(3) (age), s 67A(b) (Fines Enforcement Registrar’s website).

<sup>112</sup> *Anti-Discrimination Act 1991* (Qld) ss 11(1), (4).

<sup>113</sup> *Equal Opportunity Act 1984* (SA) s 29(2)(b) (sex discrimination), s 29(2a)(b) (gender identity discrimination), s 29(3)(b) (sexual orientation), s 51(b) (race discrimination), s 66(b) (disability discrimination), s 85A(b) (age discrimination), s 85T(2)(b) marital or domestic partnership status discrimination, s 85T(4)(b) (pregnancy discrimination), s 85T(6) (caring responsibilities discrimination).

<sup>114</sup> *Anti-Discrimination Act 1998* (Tas) s 15(1).

<sup>115</sup> *Equal Opportunity Act 2010* (Vic) s 9(1).

<sup>116</sup> For further analysis, see Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992).

<sup>117</sup> *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 185 (Dawson J).



Nevertheless, care is required in properly determining the relevant condition or requirement. For example, in the majority judgment of the High Court in *New South Wales v Amery*, lesser pay to casual teachers vis-à-vis permanent teachers was characterised as a result of the structure of their employment rather than within the meaning of indirect discrimination, a ‘condition’ or ‘requirement’ with which casual teachers were required to comply in the terms of their employment itself.<sup>118</sup>

Second, each of the New South Wales, Queensland, South Australian and Western Australian statutes, in addition, expressly require, as a matter of fact, that the condition or requirement is one that the aggrieved person does not or is unable to comply with to establish the unlawfulness of the conduct.<sup>119</sup> The ACT, Tasmanian and Victorian anti-discrimination statutes do not require that analysis.

Third, indirect discrimination requires that the effect of the condition or requirement be disparate or disproportionate (as described in the New South Wales, Queensland, South Australia and Western Australia legislation) or disadvantageous (as described in the ACT, Tasmanian and Victorian legislation).

In those state and territory jurisdictions applying the disparate impact standard, the assessment of whether the condition or requirement is disparate is determined by reference to whether it is more easily met by a substantially higher proportion of people without the complainant’s protected attribute than by people with the attribute.<sup>120</sup> A base group, without the complainant’s protected attribute, to whom the condition or requirement applies is identified for comparison to reveal whether the protected attribute is significant to compliance with the condition or requirement. The relevant base group will differ according to the context.<sup>121</sup> In contrast, the disadvantageous requirement does not require such a relative or statistical analysis and may be a matter of judicial notice.<sup>122</sup>

Fourth, the requirement or condition must not be reasonable in the circumstances. Some state and territory statutes set out a non-exhaustive set of factors to be considered in determining what is ‘reasonable’ in the circumstances in the context of indirect discrimination including, for example, the consequences of a failure to comply with the term and the costs of alternative

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<sup>118</sup> *New South Wales v Amery* (2006) 230 CLR 174, 199 at [81]-[82] (Gummow, Hayne and Crennan JJ).

<sup>119</sup> The courts’ approach to an ‘inability to comply’ is broad or liberal, see *Mandla v Dowell Lee* [1983] 2 AC 548, and the cases referring to it in *Hurst v State of Queensland* (2006) 151 FCR 562, [60]. However, a ‘non-trivial’ disadvantage will not be sufficient, at [120].

<sup>120</sup> For example, s 8(1)(2)(a) of the *Equal Opportunity Act 1984* (WA) in respect of indirect sex discrimination requires that the impugned requirement or condition be one ‘which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply.’

<sup>121</sup> *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 185, [178]-[179].

<sup>122</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 154-5. They highlight that the wording of the ACT provision requires consideration of the disadvantage to the aggrieved person, rather than the disadvantage to people with that attribute more generally, importing a causation requirement.

terms.<sup>123</sup> Rees, Rice and Allen consider that ‘the current law of indirect discrimination delegates too much unstructured responsibility to the courts to determine broad issues of social policy.’<sup>124</sup>

In Victoria and Queensland, the person imposing the requirement or condition (the respondent) has the burden of proving that said requirement or condition is reasonable.<sup>125</sup>

Where the burden of proof falls in the case of the ACT statute is less clear on its face, providing that ‘a condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.’<sup>126</sup> According to s 70, where ‘apart from an exception, exemption, excuse, qualification or justification under this Act, conduct would be an unlawful act, the onus of establishing the exception, exemption, excuse, qualification or justification lies on the person seeking to rely on it’. As the requirement or condition can be considered such an exception, exemption, excuse, qualification or justification under the Act, the onus is on the respondent to prove that it is reasonable.<sup>127</sup>

In all other jurisdictions, the burden is on the complainant to prove that the requirement or condition imposed was ‘not reasonable’ or ‘unreasonable’.<sup>128</sup>

### 1.5 Exceptions

State and territory anti-discrimination statutes contain many exceptions to the obligation not to discriminate.<sup>129</sup> Exceptions, as we use the term, operate to exclude either certain activities or entities from compliance with obligations not to discriminate under the statute. Typically, they are raised as defences, once discriminatory conduct or activities have occurred and an action is brought in relation to the conduct or activities.

There is significant variation in what exceptions apply both between state and territory jurisdictions and within anti-discrimination statutes.<sup>130</sup> Exceptions are notoriously complex, even as a task of basic statutory interpretation. Within some statutes – for instance, the *Anti-Discrimination Act 1977* (NSW) - exceptions are found throughout different Parts of the Act. In

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<sup>123</sup> *Discrimination Act 1991* (ACT) s 8(5), which also requires consideration of proportionality; *Anti-Discrimination Act 1991* (Qld) s 11(2); *Equal Opportunity Act 2010* (Vic) s 9(3). See the comments of members of the High Court on reasonableness in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 378, 395-6 cited in Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 156-7.

<sup>124</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 158, citing *Victoria v Schou* (No 2) (2004) 8 VR 120, in which the consideration of reasonableness did not involve consideration of alternative requirements or conditions. See also Anna Chapman, ‘Reasonable accommodation, adverse action and the case of Deborah Schou’ (2012 33(1) *Adelaide Law Review* 39.

<sup>125</sup> *Equal Opportunity Act 2010* (Vic) s 9(2); *Anti-Discrimination Act 1991* (Qld) ss 11(2), 205.

<sup>126</sup> *Discrimination Act 1991* (ACT) s 8(4).

<sup>127</sup> See also the submissions of the Human Rights Commission in *Wang v Australian Capital Territory (Discrimination)* [2016] ACAT 71 at [46], [49], and the finding of the Tribunal at [264].

<sup>128</sup> *Anti-Discrimination Act 1977* (NSW) e.g., s 7(1)(c); *Equal Opportunity Act 1984* (SA) e.g. s 29(2)(b)(ii); *Equal Opportunity Act 1984* (WA) e.g. s 8(2)(b); *Anti-Discrimination Act 1998* (Tas) s 15.

<sup>129</sup> We use the term ‘exception’ to mean statutory provisions that recognise that specified discriminatory conduct is not unlawful under the statute. See further the note in part 3.1 of this paper. The legislation in Queensland, the Northern Territory and South Australia refer to these exceptions as ‘exemptions’.

<sup>130</sup> As Rees, Rice and Allen note, this is conducive to unnecessary ‘confusion, cost and delay’: Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 162.

others, exceptions are found in one Part of the statute (for example, Part 5 of the *Anti-Discrimination Act 1998* (Tas)).

Some exceptions apply to *all* prescribed attributes, notwithstanding that they may apply to very particular types of organisations (establishments providing housing accommodation for aged persons, for example), conduct (acts done under statutory authority, for instance) or both (in respect of charities, pursuant to documents or instruments providing for charitable benefits to a group with a prescribed attribute). We describe these as ‘general exceptions’. Only the South Australian statute contains no general exceptions.<sup>131</sup>

Adding to the complexity of the task of statutory interpretation, other exceptions apply only in respect of certain prescribed attributes or certain regulated areas of activity. We describe these as ‘specific exceptions’.<sup>132</sup> Statutes distinguish between different forms of discrimination in the number of specific exceptions applying. For example, in a pattern broadly consistent with other jurisdictions, under the *Discrimination Act 1991* (ACT), there are ten specific exceptions in respect of *disability* discrimination and only two in respect of *race* discrimination.

### 1.5.1 General exceptions

Table 2 below sets out general exceptions in each state and territory anti-discrimination statute, excluding South Australia. Note that where a statute does not cover a particular area as a general exemption, it may be subject to more specific exceptions.

All statutes provide a general exception for acts done under a statutory authority or to comply with orders of a court or tribunal. Similarly, most statutes allow for some general exception for discrimination by voluntary or charitable bodies.

One common type of ‘exception’ is special measures,<sup>133</sup> equality or equal opportunity measures. This exception is for measures which can loosely be described as positive discrimination<sup>134</sup>, designed to achieve goals such as equality of opportunity, or access to opportunities to meet the particular special needs of a class of people. The exception may be subject to a requirement that the measures must not discriminate against a member of the relevant class in a way that is not reasonable for the achievement of their purpose,<sup>135</sup> or that the exception will only apply until equality of opportunity ‘has been achieved’.<sup>136</sup> Such provisions can be contrasted to section 12 of

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<sup>131</sup> In the South Australian Act, ‘general’ exceptions apply in relation to particular parts of the Act for specific grounds, covering roughly similar areas as well as specific exceptions to particular sections.

<sup>132</sup> In some state and territory anti-discrimination legislation, exceptions that apply to one or two prescribed attributes are described as general exceptions. For example, s 85 of Part 5 of the *Equal Opportunity Act 1984* (Vic) creates an exception for legal incapacity in respect of age and disability discrimination only but is described as a general exception). Consistent with our distinction between ‘general’ and ‘specific’ exceptions, we address those as specific exceptions in the following part of this paper.

<sup>133</sup> In one sense, ‘special measures are not an ‘exception’ to discrimination because a special measure does not constitute discrimination.

<sup>134</sup> The term ‘positive discrimination’ may be problematic. Often there is reference to the concept of ‘substantive equality’. See the document produced by the Victorian Equal Opportunity and Human Rights Commission in respect of ‘Special Measures’: <https://www.humanrights.vic.gov.au/for-organisations/special-measures/>.

<sup>135</sup> See, e.g., *Discrimination Act 1991* (ACT) s 27.

<sup>136</sup> *Anti-Discrimination Act 1992* (NT) s 57(2); *Anti-Discrimination Act 1991* (Qld) 105(2). Cf *Anti-Discrimination Act 1998* (Tas) s 26, concerning ‘any program, plan or arrangement designed to promote equal opportunity’ which does not include such an express end for its application.

the Victorian Act, which allows for special measures in relation to the promotion or realisation of substantive equality, beyond mere equality of opportunity.<sup>137</sup>

In a number of jurisdictions, some general as well as specific exceptions apply that are consistent with the usual divide in the regulation by anti-discrimination law of public activity and private life. These exceptions govern situations where the two overlap, such as in employment for duties in private residential premises or the provision of accommodation in premises shared with the person providing the accommodation. For example, in the *Discrimination Act 1991* (ACT) general exceptions apply in respect of employment where the position involves duties carried out in the residential premises of the discriminating employer (s 24); in respect of employment providing childcare where a child lives (s 25); and for accommodation provided by a person where that person or 'a near relative or carer of the person' lives at the premises, but only if the accommodation is for no more than 6 people in addition to the discriminator, their near relative or carer (s 26(1)(a)). Other statutes provide for similar exceptions, either with general application, or with reference to specific attributes.

General exceptions also apply to some areas in which it is considered that discrimination would be reasonable, such as in relation to insurance or superannuation.<sup>138</sup>

One aspect of anti-discrimination law that is the subject of ongoing controversy at both the Commonwealth and state and territory levels (and in other countries) is the balancing of competing interests in exceptions, particularly those granted to faith-based educational institutions in respect of conduct in respect of students, teachers and other staff and their impact upon LGBTI people and their families.<sup>139</sup> Quite broad exceptions are permitted in various jurisdictions (in particular, NSW, WA and the NT) for religious bodies, as well as faith-based exceptions in relation to areas such as adoption in NSW (see below tables).

There is a great degree of complexity and inconsistency in the legal tests and requirements across jurisdictions. In Victoria, for example, previously the protections did not apply to 'anything done on the basis of [listed attributes]... by a religious body'<sup>140</sup> or done 'in the course of establishing, directing, controlling or administering the educational institution' conducted in accordance with religious beliefs<sup>141</sup> which is in conformity with the religion's doctrines, beliefs or principles and is also 'reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.'

However, in December 2021, the Victorian Parliament passed the *Equal Opportunity (Religious Exceptions) Amendment Act 2021*. The reforms narrowed and removed religious exceptions to

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<sup>137</sup> However, per s 12(3), these measures must be undertaken in good faith, be reasonably likely to achieve their purpose, be proportionate, and be justified because of a particular need for advancement or assistance among the relevant group.

<sup>138</sup> See *Discrimination Act 1991* (ACT) ss 28 and 29. Contrast other statutes where this is treated as a specific exception, e.g., *Anti-Discrimination Act 1991* (Qld) ss 59-65 and 73-5. See s 47 of the *Equal Opportunity Act 2010* for the Victorian insurance exception to discrimination in relation to provision of goods and services.

<sup>139</sup> Much has been written in this area. See, for example, Sarah Moulds, 'Drawing the boundaries: The scope of the religious bodies exemptions in Australian anti-discrimination law and implications for reform' (2020) 47(1) *University of Western Australia Law Review* 112. On a framework for the balancing of religious exemptions generally see Paul Billingham, 'How Should Claims for Religious Exemptions be Weighed?' (2017) 6(1) *Oxford Journal of Law and Religion* 1. See also Renae Barker, 'Children in Schools: The Battleground of Religious Belief' (2020) 47(1) *University of Western Australia Law* 152.

<sup>140</sup> *Equal Opportunity Act 2010* (Vic) s 82.

<sup>141</sup> *Equal Opportunity Act 2010* (Vic) s 83.

discrimination in the *Equal Opportunity Act*. The key changes are summarised in the Factsheet produced by the Victorian Equal Opportunity and Human Rights Commission.<sup>142</sup>

Most of the amendments came in effect from 14 June 2022. The amendments regarding religious organisations or bodies that provide government-funded goods and services came into operation on 14 Dec 2022. In addition, the previous broad exemption for discrimination on the basis of various attributes which is reasonably necessary for the discriminator to comply with the doctrines, beliefs or principles of their religion<sup>143</sup> has been repealed.

There are also broad exceptions in WA, for example in relation to discrimination against staff members in religious schools on the basis of religious doctrines, tenets, beliefs or teachings which is done ‘in good faith’.<sup>144</sup> In NSW, no such good faith requirement applies to private schools. The precise scope of the complex and varied legal tests in South Australia and Queensland in relation to discrimination against employees in schools run by religious institutions, as noted by Moulds, is unclear.<sup>145</sup>

In addition, a general exception may be included for the avoidance of doubt, such as s 33A of the ACT Act, providing that is not unlawful discrimination, on its own, to charge for accommodation, goods or services or making facilities available, or s 58 of the NT Act, providing that it is not unlawful to discriminate against a person with a special need if it is unreasonable to require the person to supply the required special services or facilities.

A number of exceptions are described as general but are (for our purposes) specific in their operation, as they do not apply to all attributes. Across jurisdictions there is variation in whether some areas are treated as general or specific exceptions, such as exceptions for the genuine occupational or inherent requirements of employment, sport, testamentary dispositions, and legal incapacity.

**Table 2 General exception provisions in state and territory anti-discrimination legislation**

Exceptions	ACT	NSW	NT	Qld	Tas	Vic	WA
Special measures and needs / Equal opportunity measures / Equality measures	27	-	57	105	25-26	88 <sup>146</sup>	-

<sup>142</sup> [https://www.humanrights.vic.gov.au/static/10c25831305713e07a5027641d387373/Factsheet-Religious\\_exceptions\\_reform-Equal\\_Opportunity\\_Act\\_2010-2.pdf](https://www.humanrights.vic.gov.au/static/10c25831305713e07a5027641d387373/Factsheet-Religious_exceptions_reform-Equal_Opportunity_Act_2010-2.pdf).

<sup>143</sup> *Equal Opportunity Act 2010* (Vic) s 84. See, e.g., the decision of *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, [180]. The case was decided under an earlier version of the provisions (that referred to acts which were ‘necessary’ as opposed to ‘reasonably necessary’) and is also of interest in relation to vicarious liability. See also the decision of *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507, relating to a contravention of s 38(1) in the refusal of a Christian college to admit a Sikh student because he had uncut hair and wore a Patka as an essential practice of his religious faith, in which the specific exception of s 39 was not made out.

<sup>144</sup> *Equal Opportunity Act 1984* (WA) s 73(1).

<sup>145</sup> See Sarah Moulds, ‘Drawing the boundaries: The scope of the religious bodies exemptions in Australian anti-discrimination law and implications for reform’ (2020) 47(1) *University of Western Australia Law Review* 112, 120.

<sup>146</sup> See also s 12 (special measures).

Exceptions	ACT	NSW	NT	Qld	Tas	Vic	WA
Unreasonable to accommodate special needs	-	-	58	-	-	-	-
Welfare measures	-	-	-	104	-	28	-
Acts done under statutory authority or to comply with court or tribunal order(s)	30	54	53	106	24	75; 76	69
Voluntary bodies	31	57	-	-	-	-	71
Charities / conferring charitable benefits	-	55	52; 40(4)	110	23	80	70
Religious bodies (including religious accommodation)	32	56	51; 40(3)	90; 109	-	82(1) <sup>147</sup>	72; 73
Domestic / personal services	24	-	35(2)	26-27	-	24	-
Care of children	25	-	-	27-28	-	25	-
Adoption	25A	59A <sup>148</sup>	-	-	-	-	-
Educational standards of dress and behaviour	-	-	-	-	-	42	-
Residential shared accommodation	26	20(3)	40(1)	87	-	59	-
Workplace accommodation	-	-	-	88	-	-	-
Preselection by employment agencies	26A	-	-	-	-	-	-
Employment discrimination based on genuine occupational	-	-	35(1)( b)(i)- (ii)	25	-	-	-

<sup>147</sup> Note recent changes narrowing some of the religious exceptions in Victoria:

[https://www.humanrights.vic.gov.au/static/10c25831305713e07a5027641d387373/Factsheet-Religious exceptions reform-Equal Opportunity Act 2010-2.pdf](https://www.humanrights.vic.gov.au/static/10c25831305713e07a5027641d387373/Factsheet-Religious%20exceptions%20reform-Equal%20Opportunity%20Act%202010-2.pdf). 83A and 82A EO Act. Religious bodies and schools can now only discriminate against employees (and potential employees) based on the person's religious belief or activity and only where: conformity with religious beliefs is an inherent (core, essential or important) requirement of the job; the other person cannot meet that inherent requirement because of their religious belief or activity ;the discrimination is reasonable and proportionate in the circumstances.

<sup>148</sup> Applying to 'faith-based organisations' only, defined as 'an organisation that is established or controlled by a religious organisation and that is accredited under the *Adoption Act 2000* to provide adoption services: *Anti-Discrimination Act 1977* (NSW) ss 59A(1), (3).

Exceptions	ACT	NSW	NT	Qld	Tas	Vic	WA
<b>requirements / inherent requirements</b>							
<b>Insurance</b>	28	-	-	-	-	47 <sup>149</sup>	-
<b>Superannuation</b>	29	-	49	-	-	78-9	-
<b>Testamentary dispositions</b>	-	-	-	79	-	51	-
<b>Aged-care accommodation providers</b>	-	-	-	-	-	-	74 <sup>150</sup>
<b>Legal incapacity</b>	-	-	50 <sup>151</sup>	112	-	see s 85 EO Act	-
<b>Public health</b>	-	-	-	107	-	see s 86 EO Act	-
<b>Sport</b>	-	-	56 <sup>152</sup>	111 <sup>153</sup>	-	-	-
<b>Citizenship or visa requirements imposed under State Government policies etc</b>	-	-	-	106B	-	-	-
<b>Workplace health and safety</b>	-	-	-	108	-	see s 86 EO ACT	-
<b>Pensions</b>	-	-	-	-	-	77	
<b>Charging for accommodation, goods or services</b>	33A	-	-	-	-	-	-

<sup>149</sup> Noting that said discrimination must be permitted under the Commonwealth SDA, DDA or RDA, or it is based on actuarial or statistical data on which it is reasonable for the insurer to rely, and the discrimination is reasonable with regard to that data and other relevant factors, per s 47(1).

<sup>150</sup> Noting, however, various exceptions to this 'exception' for persons with an impairment, gender reassigned persons, and age discrimination relating to the provision of benefits facilities and services to those in the housing accommodation, at s 74(3)-(4).

<sup>151</sup> Noting, however, that such incapacity in this 'general' exception will be on the basis of age or impairment.

<sup>152</sup> Note that, while listed as a general exception in the statute, it has application to particular grounds (sex, age, impairment) as well as permitting restriction of participation to 'people who can effectively compete'.

<sup>153</sup> Note that, while listed as a general exception in the statute, it has application to particular grounds (sex, age, impairment, gender identity) as well as permitting restriction of participation to 'people who can effectively compete'.

Exceptions	ACT	NSW	NT	Qld	Tas	Vic	WA
Clubs for minority cultures <sup>154</sup>	-	-	47(1)	97	-	66	-

### 1.5.2 Specific exceptions

Specific exceptions are complex and so varied between jurisdictions as to make generalisations about underlying principles impracticable. A particular area of complexity in attempting any coherent comparative analysis arises from the different grounds used, such as for example, how concepts of gender and sex are used in different jurisdictions, and the extent to which, for example, pregnancy or breastfeeding are treated as separate grounds or as characteristic extensions of other grounds. However, there is an element of commonality in the areas covered by particular exceptions, such as in relation to sex and gender, for sport<sup>155</sup> and the genuine occupational or inherent requirements of work.<sup>156</sup> In Victoria this is limited to sex.<sup>157</sup>

Exceptions may, in some circumstances, provide consideration of objective standards of reasonableness or proportionality. Of particular note is the exception to the discrimination on the ground of disability in relation to the provision of access to or use of a place or facilities if it would impose unjustifiable hardship on the person in s 84 of the South Australian Act.

In some jurisdictions, and on some grounds, specific exceptions have a beneficial operation. For example, in the South Australian Act specific exceptions are made for 'projects for benefit' for people with particular attributes.<sup>158</sup>

<sup>154</sup> While this is not technically a general exception, the particular clubs for minority cultures which are protected by the ground are not set out in the relevant sections of the Victorian Act (s 66) and Queensland Act (s 97 for 'minority cultures and disadvantaged peoples') and it is not a defined term.

<sup>155</sup> See, e.g., *Anti-Discrimination Act 1977* (NSW) ss 38 and 38P; *Discrimination Act 1991* (ACT) s 41; *Anti-Discrimination Act 1998* (Tas) s 29; *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1984* (WA) s 35.

<sup>156</sup> See, e.g., *Discrimination Act 1991* (ACT) s 34; *Anti-Discrimination Act 1998* (Tas) s 27; *Equal Opportunity Act 2010* (Vic) s 26; *Equal Opportunity Act 1984* (SA) s 34; *Equal Opportunity Act 1984* (WA) s 27. See also *Anti-Discrimination Act 1977* (NSW) s 31, which inter alia allows for sex discrimination in circumstances where 'the job is one of two to be held by a married couple' (s 31(2)(i)). The operation of this subsection is unclear, as it would appear to create an exception to discrimination in relation to the employment of same-sex married couples, in conflict with other provisions which make discrimination unlawful on the basis of homosexuality.

<sup>157</sup> Section 26(1) *Equal Opportunity Act 2010* (Vic) : An employer may limit the offering of employment to people of one sex if it is a genuine occupational requirement of the employment that the employees be people of that sex.

<sup>158</sup> E.g., *Equal Opportunity Act 1984* (SA) ss 64-65 (on race).



**Table 3 Specific exception provisions in state and territory anti-discrimination legislation**

Attribute/ Ground (s) <sup>159</sup>	ACT	NSW	NT	Qld	Tas	Vic	SA	WA
<b>Age</b>	57A-57M	49ZX; 49ZYB(3); 49ZYG(2); 49ZYI; 49ZYJ; 49ZYK; 49ZYL(3)-(5); 49ZYN(2)-(3); 49ZYO(3); 49ZYP(3); 49ZYQ-49ZYY	35(1)(a); 36; 43-5; 47(2)	32; 33; 43; 48-50; 60-5; 74-5; 80; 91; 99; 106A <sup>160</sup>	31-39; 54	26(3); 28A; 29; 39; 43; 48; 49; 58A; 60; 61; 67; 78-9; 85; 87; 88(3)(b)	85F; 85G(2)-(4); 85H(2)-(3); 85I(3); 85K(3); 85L(4)-(5); 85M-85R	66W(3); 66Y(2); 66ZD(4); 66ZE(2); 66ZF(2); 66ZG(3); 66ZH(2); 66ZI(3); 66ZJ(3)-(4); 66ZL(c)-(f); 66ZM-66ZS
<b>Breastfeeding</b>	37; 39	-	-	-	28	-	-	31
<b>Disability</b>	48-57	49D(3)-(4); 49E(3); 49F(2); 49G(3); 49I(3); 49J(2); 49K(2); 49L(3)-(5); 49M(2); 49N(3)-(6); 49O(3)-(5); 49P-49R	-	-	43-48; 54	23; 26(3); 34; 37; 39; 41; 46; 58; 61; 79; 85; 86(1)	71; 73(2); 74(3); 75(2); 76(2)-(3); 77(2a); 78(1)(c)-(d); 78(2); 79-85	-
<b>Employment status</b>	57O	-	-	-	-	-	-	-
<b>Family / Caring responsibilities / Parental status</b>	-	49V(3)-(4); 49W(3); 49X(2); 49Y(3); 49ZA(3); 49ZB(2); 49ZC(2)	-	-	28	82(2); 83(2); 84. S 82(2) is subject to s 83 & 83A.	85Z(1); 85ZB(2); 85ZF(3); 85ZH(4)-(5); 85ZI; 85ZK <sup>161</sup>	32(1); 35B(3)-(4); 35D(2); 35I(3); 35K; 35L; 35M

<sup>159</sup> As outlined above, there are a wide variety of grounds upon which basis discrimination is unlawful in each of the state and territory jurisdictions. In the interests of concision, some similar grounds have been grouped together in this table and general nomenclature is given, which may mean that some aspects of the ground are not specified in the table. For example, the absence of affiliation (included in the ACT act) from ‘Political belief or activity’. There will also be some overlap, depending on the ways in which particular grounds are understood. This table is for reference only and the precise wording of the statute should be consulted to determine the exact scope of particular exceptions.

<sup>160</sup> Although included among general provisions in the statute, this exception for discrimination in relation to compulsory retirement age is relevant to age discrimination.

<sup>161</sup> For the purposes of this column, the general category of Family responsibilities / Parental status / caring responsibilities should also be read to include some provisions which relate to ‘association with a child’ under *Equal Opportunity Act 1984* (SA) s 85T(d).

Attribute/ Ground (s) <sup>159</sup>	ACT	NSW	NT	Qld	Tas	Vic	SA	WA
<b>Gender / Gender identity / Transgender</b>	-	38C(3); 38K(3) 38N(3), 38P; 38Q <sup>162</sup>	-	-	27; 29; 30	72; 82(2); 83(2); 84. s 82(2) is subject to 83 and 83A	34; 35(2a); 35(2b); 38(2); 40(3); 45-50	35AM(3); 35AN(2); 35AP(2); 35AR(aa)-(bb)
<b>Identity of a spouse or domestic partner</b>	-	-	-	-	-	-	85Z(1); 85Z(2); 85ZB(2); 85ZB(3); 85ZF(3); 85ZH(4); 85ZI; 85ZL	-
<b>Impairment</b>	-	-	55 <sup>163</sup> ; 30(3); 35(1)(a); 40(2B)	34-6; 41; 44; 51; 60- 5; 74-5; 89; 92; 100;	-	-	-	66B(3); 66D(2); 66I(3)-(4); 66J(2); 66K(2) 66L(3); 66M(3)-(5); 66N(3); 66P(aa)- (bb); 66Q-66U
<b>Immigration status</b>	57P	-	-	-	-	-	-	-
<b>Industrial activity</b>	-	-	-	-	49	-	56; 57(2); 60(2); 62(2a); 64; 65	-
<b>Intersex status</b>	-	-	-	-	-	-	34; 35(2a); 35(2b); 38(2); 40(3); 45-50	-

<sup>162</sup> Note that all provisions listed for NSW are under the narrow 'transgender' ground.

<sup>163</sup> This exception in relation to public health is listed under general exceptions in the statute, but with sole application to impairment.

Attribute/ Ground (s) <sup>159</sup>	ACT	NSW	NT	Qld	Tas	Vic	SA	WA
<b>Irrelevant criminal record</b>	-	-	37 <sup>164</sup>	-	50	<sup>165</sup>	-	-
<b>Lawful sexual activity</b>	-	-	-	106C <sup>166</sup>	-	62; 82(2); 83(2); 84	-	-
<b>Marital status / relationship status</b>	35; 39	40(3); 46; 46A(3); 48(3); 49; 59 <sup>167</sup>	-	31; 45A; 59; 91	28; 30	79; 82(2); 83(2); 84	85Z(1); 85Z(2); 85ZB(2)-(3); 85ZF(3); 85ZH(4)-(5); 85ZI; 85ZK; 85ZM	29; 31; 33(2); 34
<b>Physical features</b>	57Q; 57R	-	-	-	-	26(4); 86(1)	-	-
<b>Political belief or activity</b>	45	-	-	102(2)	53	27; 66A; 74	-	54(4); 61(3); 63(3); 66
<b>Pregnancy</b>	37; 39	-	-	-	28	86(2); 88(3)(a)	85Z(1); 85Z(3); 85ZE(3); 85ZF(3);	28; 31

<sup>164</sup> NAAJA has submitted that s 37 is an unnecessary exception which creates unnecessary confusion. An ‘irrelevant’ record would in no circumstances be reasonably necessary in relation to the care of vulnerable people, as it is presumed that any criminal record be relevant in those circumstances, also raising concern over the distinction made with pending charges which may be subsequently withdrawn or the prospective employee may be later found not guilty: North Australian Aboriginal Justice Agency, Submission to Department of the Attorney-General and Justice Northern Territory Government, *Modernisation of the Northern Territory Anti-Discrimination Act: Discussion Paper* (February 2018) 12.

<sup>165</sup> Spent convictions (narrower than irrelevant criminal record) is a protected attribute in Victoria. See the Factsheet published by the Victorian Equal Opportunity and Human Rights Commission: [https://www.humanrights.vic.gov.au/static/adc2ca4452ff3af6474ddf70bf04b634/Resource-Spent\\_Conviction\\_Discrimination\\_Guideline-Complying\\_with\\_the\\_EOA\\_2010.pdf](https://www.humanrights.vic.gov.au/static/adc2ca4452ff3af6474ddf70bf04b634/Resource-Spent_Conviction_Discrimination_Guideline-Complying_with_the_EOA_2010.pdf).

<sup>166</sup> Although included among general provisions, this exception for discrimination in relation to the supply of accommodation ‘if the accommodation provider reasonably believes the other person is using, or intends to use, the accommodation in connection with that person’s, or another person’s, work as a sex worker’ is relevant to lawful sexual activity.

<sup>167</sup> While this exception relating to housing accommodation for aged persons is listed as a general exception, it applies specifically to sex, marital or domestic status or race.

Attribute/ Ground (s) <sup>159</sup>	ACT	NSW	NT	Qld	Tas	Vic	SA	WA
							85ZH(4)-(5); 85ZI; 85ZJ	
Profession, trade, occupation or calling	57N	-	-	-	-	Now protected attribute <sup>a</sup>	-	-
Publication of a person's details on Fines Enforcement Registrar's website	-	-	-	-	-	-	-	67I(3)
Race	42-43	14-16; 17(3); 20A(3); 21-22; 59	43	48; 80	40-42	26(3); 39; 60; 61	64-65	37(3); 44(3); 47(3); 47A(2); 48(3); 50-52
Religious belief or activity	44; 46	-	30(2); 37A; 40(2A); 43	41; 48; 80; 89	51-52	39; 60; 61; 82(2); 83(2); 84	-	54(4); 61(3); 63(3); 66
Religious appearance or dress	-	-	-		-	-	85Z(1); 85Z(4)- (5); 85ZE(4)-(5); 85ZN	-
Sex	34; 36- 41	25(3); 31; 31A(3); 33(2); 34(3); 34A(3)- (4); 35-8; 59	54 <sup>168</sup> ; 30(1); 40(2); 42; 43; 47(3)	30; 41; 48; 59; 73; 80; 89; 91; 98	-	26(1)-(3); 39; 60; 61; 68; 69; 72; 79; 82(2); 83(2); 84	34; 35(2); 35(2a); 37(3); 38(2); 40(3)-(4); 45-50	27; 28; 30; 31; 32(2); 33(1); 34; 35

<sup>168</sup> This exception in relation to rights and privileges related to pregnancy or childbirth is listed under general exceptions in the statute, but with sole application to men.

Attribute/ Ground (s) <sup>159</sup>	ACT	NSW	NT	Qld	Tas	Vic	SA	WA
Sexuality / Sexual orientation / Homosexuality	-	49ZH(3); 49ZO(3); 49ZQ(3) <sup>169</sup>	37A	45A	-	82(2); 83(2). s 84 has been repealed.	34; 35(2a); 35(2b); 38(2); 39(2); 40(3); 45- 50	35P(3); 35R(2); 35Z(3); 35ZA(2); 35ZD

<sup>169</sup> Please note that for NSW only, the ground is limited to homosexuality as defined in that Act.

## 1.6 Other unlawful conduct

In addition to discrimination, all state and territory statutes prohibit other forms of harmful attribute-based conduct such as harassment and vilification, as well as victimisation in reprisal for making a complaint or participating in anti-discrimination legislation complaint procedures. Both victimisation and sexual harassment are proscribed in all state and territory anti-discrimination statutes.

However, jurisdictions diverge significantly on what other conduct is prohibited. Other prohibitions range from, for example, making racial vilification and vilification on the ground of HIV/AIDS status unlawful (in s 67A(1) of the *Discrimination Act 1991* (ACT) and ss 20C and 49ZXB of the *Anti-Discrimination Act 1977* (NSW)), to making it unlawful to refuse or defer an application for accommodation on the basis that the applicant intends to share accommodation with a child (at s 87A of the *Equal Opportunity Act 1984* (SA)). In this section, we provide a comparative overview of harassment, vilification and victimisation in state and territory jurisdictions.

**Table 4 Other prohibited or unlawful conduct in state and territory jurisdictions**

State or territory statute	Other prohibited or unlawful conduct
<i>Discrimination Act 1991</i> (ACT)	<ul style="list-style-type: none"> <li>- Sexual harassment (Part 5)</li> <li>- Victimisation of a person who takes or proposes to take discrimination action (defined in s 68 to include making a discrimination complaint or providing evidence, information or documents in relation to a discrimination complaint or participating in or assisting with an investigation under s 750 of the <i>Criminal Code 2002</i> (ACT)).</li> <li>- Vilification: inciting hatred toward, revulsion of, serious contempt for, or severe ridicule (other than in private) on the basis of disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics or sexuality (s 67A(1)). Serious vilification threatening physical harm on those grounds is also an offence under <i>Criminal Code 2002</i> (ACT) s 750.</li> <li>- Advertising a matter indicating or that could be reasonably understood to indicate an intention to do an act that is unlawful under Parts 3 (unlawful discrimination), 5 (sexual harassment), or 7 (other unlawful acts, i.e., vilification or victimisation) (s 69).</li> </ul> <p>The <i>Criminal Code</i>, Ch 2 applies to all offences under the <i>Discrimination Act</i> (per s 6A).</p>
<i>Anti-Discrimination Act 1998</i> (Tas)	<ul style="list-style-type: none"> <li>- Conduct which offends, humiliates, intimidates, insults or ridicules another person on the grounds of race; age; sexual orientation; lawful sexual activity; gender; gender identity; intersex variations of sex characteristics; disability; marital status; relationship status; pregnancy; breastfeeding; parental status; or family responsibilities (s 17(1)). The conduct must be in circumstances in which a reasonable</li> </ul>

	<p>person, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed. The conduct must be in relation to areas of activity in s 22.</p> <ul style="list-style-type: none"> <li>- Sexual harassment (s 17(2)-(3)), in relation to activity areas in s 22.</li> <li>- Victimisation of a person because they have made or intend to make a complaint under the Act; gave or intends to give evidence or information in proceedings under the Act; alleged or intend to allege a contravention of the Act; refused or intends to refuse to do anything that would contravene the Act; or 'has done anything in relation to any person under or by reference to this Act' (s 18). The conduct must be in relation to areas of activity in s 22.</li> <li>- Vilification: Inciting by public act hatred, serious contempt, or severe ridicule in relation to race; disability; sexual orientation or lawful sexual activity; religious belief, affiliation or activity; gender identity or intersex variations of sex characteristics (s 19).</li> <li>- Publishing or displaying any sign, notice or advertising that promotes, expresses or depicts discrimination or prohibited conduct (s 20) in relation to areas of activity in s 22.</li> <li>- Knowingly causing, inducing or aiding another person to contravene the Act (s 21) in relation to areas of activity in s 22.</li> </ul>
<p><i>Equal Opportunity Act 2010 (Vic)</i></p>	<ul style="list-style-type: none"> <li>- S 15 imposes a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation. Contravention may lead to an investigation by the Commission under Part 9.</li> <li>- Sexual harassment (Part 6).</li> <li>- Victimisation (Part 7, Div 1).</li> <li>- Authorising or assisting discrimination (Part 7, Div 2).</li> <li>- Requesting discriminatory information (Part 7, Div 3).</li> <li>- Discriminatory advertising: to publish or display an advertisement or other notice that indicates, or could be reasonably understood as indicating, that any person intends to engage in conduct that would contravene Parts 4, 6 or 7, or to authorise the same (Part 12, Div 2).</li> <li>- See also s 185 on obstructing the Commission and s 186 on false or misleading information.</li> </ul> <p>Racial and religious vilification are dealt with under the <i>Racial and Religious Tolerance Act 2001 (Vic)</i>, including separate offences for serious vilification on those grounds in Part 4, and relevant victimisation provisions in Part 2, Div 2.</p>
<p><i>Anti-Discrimination Act 1992 (NT)</i></p>	<ul style="list-style-type: none"> <li>- Sexual harassment (s 22)</li> <li>- Victimisation of a person because they have made or intends to make a complaint under the Act; gave or intends to give evidence or</li> </ul>

	<p>information in connection to proceedings under the Act; alleged or intends to allege a contravention of the Act; refused or intends to refuse to do anything that would contravene the Act; or 'has done anything in relation to a person under or by reference to this Act' (s 23).</p> <ul style="list-style-type: none"> <li>- Failure or refusal to accommodate a special need that another person has because of an attribute (s 24).</li> <li>- Advertising: publishing, causing to be published or authorising the publication of an advertisement that promotes or expresses (or could reasonably be understood to promote or express) prohibited conduct or an intention to engage in the prohibited conduct (s 25).</li> <li>- Asking another person to supply information on which unlawful discrimination might be based (s 26).</li> <li>- Causing, instructing, inducing, inciting, assisting or promoting another person to contravene the Act (s 27).</li> </ul> <p>The <i>Criminal Code</i>, Part IAA applies to all offences under the <i>Discrimination Act</i> (per s 5A).</p>
<p><i>Anti-Discrimination Act 1991</i> (QLD)</p>	<ul style="list-style-type: none"> <li>- Sexual harassment (Ch 3, Parts 1-2).</li> <li>- Requesting or encouraging contravention of the Act (Ch 4, Part 2).</li> <li>- Asking another person for information on which unlawful discrimination might be based (Ch 4, Part 3).</li> <li>- Vilification (by public act inciting hatred towards, serious contempt for or severe ridicule of a person or group on the ground of their race, religion, sexuality or gender identity) (Ch 4, Part 4).</li> <li>- Serious vilification on the ground of race, religion, sexuality or gender identity (involving threat or inciting others to threaten physical harm), constituting an offence per s 131A.</li> <li>- Advertising: publishing or displaying of an advertisement that indicates that a person intends to act in a way that contravenes the Act (or authorising the same), or making a false statement to induce another to publish or display such an advertisement (Ch 5, Part 3).</li> <li>- Victimisation because a person refused to do a contravening act, in good faith alleged or intends to allege that a contravention occurred, or is, has been or intends to be involved in a proceeding (or where they believe that the person has done any of those things, or that a person associated to that person has) (Ch 5, Part 4).</li> </ul>
<p><i>Anti-Discrimination Act 1977</i> (NSW)</p>	<ul style="list-style-type: none"> <li>- Sexual harassment (Part 2A)</li> <li>- Racial vilification (Part 2 Div 3A)</li> <li>- Transgender vilification (Part 3A Div 5).</li> <li>- Homosexual vilification (Part 4C Div 4).</li> <li>- HIV/AIDS vilification (Part 4F).</li> <li>- Compulsorily retiring an employee (Part 4E), with some specified exceptions (s 49ZX).</li> </ul>



	<ul style="list-style-type: none"> <li>- Victimisation of a person who has brought proceedings under the Act, given evidence or information in connection with proceedings under the Act, made an allegation that a person has contravened the Act, or 'otherwise done anything under or by reference to the Act in relation to the discriminator or any other person', or where the discriminator knows or suspects that they intend to take one of these actions (s 50).</li> <li>- Advertising: publishing or causing to be published an advertisement that indicates an intention to do an unlawful act under the Act (s 51).</li> <li>- Causing, instructing, inducing, aiding or permitting another person to do an unlawful act under the Act (s 52).</li> </ul> <p>See also s 93Z of the <i>Crimes Act 1900</i> (NSW) which created a single offence for intentionally or recklessly threatening or inciting violence, by a public act, against people on the basis of race, religious belief or affiliation, sexual orientation, gender identity, intersex status, or HIV/AIDS status.</p>
<p><i>Equal Opportunity Act 1984</i> (SA)</p>	<ul style="list-style-type: none"> <li>- Sexual harassment in specified circumstances, including in the workplace (of fellow workers or people seeking to become a fellow worker), in education, in provision of accommodation and goods or services, and perpetrated by judicial officers, parliamentarians, local council members, professional authority or body members in relation to authorisation or qualification conferral, association governing body members (s 87). It is also unlawful for an employer to fail to take reasonable steps to prevent further sexual harassment per s 87(7), and for a secondary school educational authority to fail to have a readily available written policy on sexual harassment, incorporating complaint resolution procedures, per s 87(8).</li> <li>- Victimisation against a person for bringing proceedings in respect of discrimination, giving evidence or information in proceedings under the Act, alleging a contravention of the Act, reasonably asserting the rights of another to lodge a complaint or take other proceedings; or otherwise doing 'anything under or by reference to this Act' (or for intending to do any of the above, or where they suspect that the person has done or intends to do any of the above) (s 86).</li> <li>- Refusing or deferring accommodation applications on the ground that the applicant intends to share accommodation with a child (s 87A)</li> <li>- See also s 87B on discrimination by an educational authority in relation to breastfeeding of infants by students, s 88 on imposing conditions or requirements with the result of separating an assistance animal from a person with a disability, and s 88A on accommodation applications involving therapeutical animals</li> </ul>

	<ul style="list-style-type: none"> <li>- There is also a penalty available for publishing a report of proceedings which identifies or contains information that tends to identify a child (s 96A).</li> </ul> <p>Racial vilification is not prohibited under the Act but is subject of specific legislation (<i>Racial Vilification Act 1996</i> (SA) and s 73 of the <i>Civil Liability Act 1936</i> (SA)).</p>
<p><i>Equal Opportunity Act 1984</i> (WA)</p>	<ul style="list-style-type: none"> <li>- Sexual harassment is described as a form of discrimination, unlawful in employment, education and in relation to accommodation (Part 2 Div 4).</li> <li>- Requesting or requiring information on which unlawful discrimination might be based in relation to particular grounds of discrimination (ss 23, 35AQ, 35J, 35ZC, 49, 65, 66O).</li> <li>- Racial harassment (Part 3, Div 3A).</li> <li>- Victimisation for bringing or proposing to bring proceedings, furnishing or producing documents, appearing or proposing to appear as a witness, reasonably asserting or proposing to assert the rights of a person victimised or rights of another under this Act, or has made an allegation relating to unlawful conduct under various parts of the Act (including where the person believes that another has done or refused to do one of those listed actions) (s 67).</li> <li>- Publishing or displaying of an advertisement or notice that indicates or could reasonably be understood as indicating an intention to do an unlawful Act per the statute or permitting the same (s 68). S 68(2) sets out an inclusive and broad list of what may constitute an advertisement.</li> <li>- See also procedural provisions on, e.g., obstruction (s 155), failure to provide actuarial or statistical data (s 156).</li> </ul> <p>For additional provisions relating to racist harassment and vilification, see Chapter XI of the <i>Criminal Code 1913</i>.</p>

### 1.6.1 Harassment

Harassment on the ground of prescribed attributes can be understood as a specific form of discrimination.<sup>170</sup> It is expressly described as such in both the *Anti-Discrimination Act 1992* (NT) and *Equal Opportunity Act 1984* (WA).<sup>171</sup> Factual circumstances supporting a claim of harassment may also, therefore, support a direct discrimination claim.<sup>172</sup> However, in some jurisdictions,

<sup>170</sup> For a detailed analysis of the law around harassment, see chapter 12 of Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018).

<sup>171</sup> *Anti-Discrimination Act 1992* (NT) s 20(1)(b); *Equal Opportunity Act 1984* (WA) Part II Div 4.

<sup>172</sup> See Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 630.

protections against harassment extend beyond the areas of activity in which discrimination is prohibited. While all jurisdictions expressly prohibit sexual harassment,<sup>173</sup> the prohibition of harassment in relation to other prescribed attributes varies between jurisdictions.

In most jurisdictions, the definition of 'sexual harassment' is similar, requiring behaviour of a sexual nature that is unwelcome.<sup>174</sup> This common definition requires, first, an objective factual determination of whether the relevant conduct amounts to a sexual advance, request for sexual favours or conduct of a sexual nature and, second, an assessment of whether the conduct was subjectively unwelcome to the complainant.

In Western Australia, a complainant must, in addition, show that they suffered actual disadvantage or have reasonable grounds for believing they would suffer disadvantage for rejecting the relevant unwelcome sexual behaviour in connection with employment, education or accommodation, the areas of activity in which sexual harassment is prohibited.<sup>175</sup>

The definition of 'sexual harassment' in the Queensland and Northern Territory anti-discrimination statutes is framed differently from the other state and territory jurisdictions. Section 22(2) of the *Anti-Discrimination Act 1992* (NT) provides:<sup>176</sup>

Sexual harassment takes place if a person:

- (a) subjects another person to an unwelcome act of physical intimacy; or
  - (b) makes an unwelcome demand or request (whether directly or by implication) for sexual favours from the other person; or
  - (c) makes an unwelcome remark with sexual connotations; or
  - (d) engages in any other unwelcome conduct of a sexual nature,
- and:
- (e) that person does so:
    - (i) with the intention of offending, humiliating or intimidating the other person; or
    - (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct; or
  - (f) that other person is, or reasonably believes that he or she is likely to be, subjected to some detriment if he or she objects to the act, demand, request, remark or conduct.

For Rees, Rice and Allen, the differences between the jurisdictions 'may be more apparent than real'.<sup>177</sup> For example, the conduct described in paragraphs (a), (b) and (d) is the same as that described in the other jurisdictional definitions and (c) is covered by the term 'conduct of a sexual

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<sup>173</sup> See Table 1 above.

<sup>174</sup> See *Discrimination Act 1991* (ACT) s 58(1)-(2); *Anti-Discrimination Act 1977* (NSW) s 22A (conduct of a sexual nature is not defined); *Equal Opportunity Act 1984* (SA) s 87(9); *Anti-Discrimination Act 1998* (Tas) s 17(3); and *Equal Opportunity Act 2010* (Vic) s 92.

<sup>175</sup> *Equal Opportunity Act 1984* (WA) ss 24(3), 25(2), 26(2).

<sup>176</sup> Albeit that 'unwelcome' is described as 'unsolicited', s 119 of the *Anti-Discrimination Act 1991* (Qld) is effectively in the same terms, except that s 119 contains no equivalent to s 22(2)(f).

<sup>177</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 633.

nature', which is expressly defined in a number of those statutes to include statements of a sexual nature.<sup>178</sup>

Jurisdictions differ in the areas of activity in which sexual harassment is prohibited. Most broadly, the Queensland statute prohibits sexual harassment without reference to certain areas of activity.<sup>179</sup> In all other state and territory jurisdictions, sexual harassment is prohibited only in defined circumstances or in the context of specific relationships or activities.<sup>180</sup>

Some jurisdictions prohibit sexual harassment in the same areas of activity in which discrimination is prohibited.<sup>181</sup> Other jurisdictions go further. For instance, ss 22B(7)-(8) of the *Anti-Discrimination Act 1977* (NSW) and s 87(6c) of the *Equal Opportunity Act 1984* (SA) expressly prohibit sexual harassment in State Parliament.<sup>182</sup>

**Table 5 Areas in which sexual harassment is prohibited in state and territory jurisdictions, other than Queensland**

Areas <sup>183</sup>	ACT	NSW	NT <sup>184</sup>	SA	Tas	Vic	WA
Employees	59(1)-(2)	22B(1)	31(1)-(2)	87(1)	22(1)(a)	93(1)-(2), 4(1)	24(1)
Applicants for employment	59(1)	22B(1)	31(1)	87(1)	22(1)(a)	93(1)-(2), 4(1)	24(1)
Commission agents	59(3)-(4)	22B(3)-(4)	31(1)-(2)	87(1), (9)	22(1)(a)	93(1)-(2), 4(1)	24(2)
Contract workers	59(3)-(4)	22B(3)-(4)	31(1)-(2)	87(1), (9)	22(1)(a)	93(1)-(2), 4(1)	24(2)
Partnerships	59(5)	22B(5)	-	87(1), (9)	22(1)(a)	95	-
Other workplace participants <sup>185</sup>	59(6)	22B(6)	31, 4(1)	87(1), (9)	22(1)(a)	94	24(1)

<sup>178</sup> For example, *Discrimination Act 1991* (ACT) s 58(2).

<sup>179</sup> *Anti-Discrimination Act 1991* (Qld) s 118.

<sup>180</sup> The areas in which sexual harassment is unlawful in these other state and territory jurisdictions are summarised in Table 5.

<sup>181</sup> For example, see s 22(1) of the *Anti-Discrimination Act 1992* (NT) and s 22(1) of the *Anti-Discrimination Act 1998* (Tas).

<sup>182</sup> This reflects ad hoc amendments in response to specific complaints: Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 650.

<sup>183</sup> Note that where there is no express reference to an area, it is possible that the circumstances of the harassment may fall into other areas which are covered by the legislation.

<sup>184</sup> Under the *Anti-Discrimination Act 1992* (NT), s 22(1) sexual harassment is a form of discrimination that is prohibited in areas of activity referred to in Part 4 (education; work; accommodation; goods, services and facilities; clubs; and insurance and superannuation, (s 28)).

<sup>185</sup> We use the term 'workplace participants' broadly here to capture participants in workplaces that do not fall within the preceding categories in Table [\*] which describe different working relationships, rather than in accordance with the manner in which the term is defined in certain jurisdictions (for example, in s 22B(9) of the *Anti-Discrimination Act 1977* (NSW)) in respect of sexual harassment). The applicable

Areas <sup>183</sup>	ACT	NSW	NT <sup>184</sup>	SA	Tas	Vic	WA
In State Parliament	-	22B(7)-(8)	-	87(6c)-(6d)	-	-	-
Professional and trade organisations or associations	-	-	32	87(6g)	22(1)(a)	96 <sup>186</sup>	-
Qualifying bodies	-	22C	33	87(6f)	22(1)(a)	97	-
Employment agencies	-	22D	34	-	22(1)(a)	-	-
Education or training	60	22E	29	87(2)-(3)	22(1)(b)	98	25
Access to premises	61	-	-	-	22(1)(c)	-	-
Goods, services and facilities	62	22F <sup>187</sup>	41 <sup>188</sup>	87(6)(a)-(b), (6aa) <sup>189</sup>	22(1)(c)	99 <sup>190</sup>	-
Accommodation	63	22G	38	87(6)(e), (6aa)	22(1)(d)	100	26
Clubs	64	-	46	-	22(1)(e)	101	-
Insurance and/or superannuation	62	22F	48	-	22(1)(c)	-	-

provisions should be read closely, along with relevant definitions, to determine the extent of their coverage (for example, of unpaid or volunteer work).

<sup>186</sup> Limited to industrial organisations.

<sup>187</sup> S 22F of the *Anti-Discrimination Act 1977* (NSW) makes sexual harassment unlawful in respect of goods and services, not facilities, including protections for the providers and receivers of goods and services. Note, however, that the definition of services in the Act includes 'services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not', which may encompass facilities and access.

<sup>188</sup> Noting the relevancy of the definition of services in s 4 to 'access to or use of any land, place, vehicle or facility that members of the public are, or a section of the public is, permitted to use; ...services connected with the selling or leasing of an interest in land; [and]... services provided by a government, statutory corporation, a company or other body corporate in which a government has a controlling interest, or a local government council'.

<sup>189</sup> S 87(6)(a)-(b) and (6aa) of the *Equal Opportunity Act 1984* (SA) makes sexual harassment unlawful in respect of goods and services, not facilities.

<sup>190</sup> S 99 of the *Equal Opportunity Act 2010* (Vic) makes sexual harassment unlawful in respect of goods and services, not facilities. Note that the definition of services in s 4 includes 'access to and use of any place that members of the public are permitted to enter'.

Areas <sup>183</sup>	ACT	NSW	NT <sup>184</sup>	SA	Tas	Vic	WA
Land	-	22H	-	-	22(1)(c)	-	-
Sport	-	22I	-	-	-	-	-
State laws and programs	-	22J	-	-	22(1)(f)	-	-
By judicial officers	-	-	-	87(6a)-(6b)	-	-	-
In local councils	-	-	-	87(6e)	-	93(1)-(3), 102	-
Awards, enterprise agreements or industrial agreements	-	-	-	-	22(1)(g)	-	-

### 1.6.2 Vilification

New South Wales, South Australia and Victoria have specific legislation addressing vilification, rather than including vilification as conduct regulated by anti-discrimination legislation. In South Australia, racial vilification is a criminal offence under the *Racial Vilification Act 1996* (SA) and in Victoria both racial and religious vilification are criminal offences under the *Racial and Religious Tolerance Act 2001* (Vic).

Vilification laws apply to public acts only, and are subject to various defences and exceptions, such as public acts done reasonably and in good faith for academic, artistic, scientific, research, or public interest purposes.<sup>191</sup> In NSW, public acts that intentionally or recklessly threaten or incite violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status are a criminal offence under the Crimes Act 1900 (NSW).<sup>192</sup>

In some state and territory jurisdictions, some types of vilification on the ground of certain protected attributes are a criminal offence, either in the anti-discrimination statute itself or other specific or criminal legislation.<sup>193</sup> Notably, there is no vilification legislation in the Northern Territory.<sup>194</sup> At the other end of the spectrum, of particular note is the broad provision in s 17(1)

<sup>191</sup> See, e.g., *Anti-Discrimination Act 1977* (NSW) s 20C(2); s 11 *Racial and Religious Tolerance Act 2001* (Vic).

<sup>192</sup> Section 93Z. The following offences were removed from the *Anti-Discrimination Act 1977* (NSW): section 20D (offence of serious racial vilification); section 38T (offence of serious transgender vilification); section 49ZTA (offence of serious homosexual vilification); and section 49ZXC (offence of serious HIV/AIDS vilification).

<sup>193</sup> For a detailed analysis of the law around harassment, see chapter 13 of Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018).

<sup>194</sup> Despite consideration of reforms to introduce such laws, none have been implemented. See, e.g., Jano Gibson 'NT Government considers introducing anti-vilification laws for race, sexual orientation, disability' *ABC News* (4 September 2017) <<https://www.abc.net.au/news/2017-09-04/nt-government-considers->

of the Tasmanian Act, which covers a range of attributes, proscribes conduct that offends, humiliates, intimidates, insults or ridicules, is not subject to any defence or exception, and is not limited to acts in public.<sup>195</sup> Yet, even where laws exist which create offences punishable by imprisonment or a fine, their effectiveness can be questioned where they are not used.<sup>196</sup>

### 1.6.3 *Victimisation*

Victimisation is prohibited in all state and territory jurisdictions in anti-discrimination legislation.<sup>197</sup> In South Australia, victimisation is defined as treating the victim (or their associate) unfavourably on the relevant grounds.<sup>198</sup> In all other jurisdictions, this is defined as subjecting another person (or their associate) to detriment, or 'any detriment' on the relevant grounds.<sup>199</sup> The meaning of the differently worded provisions is understood to be the same.

There is also some variation in the application of these provisions, such as whether victimisation by a person who *suspects* or *believes* that the second person (the victim) has, for example, made an allegation under the Act, is covered.<sup>200</sup> Some statutes also cover detriment based on the reasonable assertion of rights of the victimised person or any other person.<sup>201</sup>

Most sections do not apply where a person subjects or threatens to subject the second person or their associate to any detriment in relation to a false allegation which was not made in good faith.<sup>202</sup>

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introducing-anti-vilifia/8869174>. Although not expressly provided for in the NT legislation, arguably both direct and indirect vilification may come within the scope of the unique definition of discrimination in s 20(1)(a).

<sup>195</sup> This can be viewed as 'effectively' a form of anti-vilification provision (see Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 760). Cf, Anjalee de Silva, 'Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law' (2020) 43(3) *Melbourne University Law Review* 987, at note 13, looking at sex-based vilification in particular: 'Section 17(1) is not so much a sex-based vilification law as it is an extension of existing anti-discrimination laws to encompass harmful speech engaged in in specified contexts that would not be captured by, for example, provisions prohibiting sexual harassment'.

<sup>196</sup> See, e.g., Christopher Knaus, 'NSW race hate laws not used in two years since introduction' *The Guardian* (4 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/04/nsw-race-hate-laws-not-used-in-two-years-since-introduction>>.

<sup>197</sup> For a detailed analysis of the law around harassment, see chapter 14 of Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018).

<sup>198</sup> *Equal Opportunity Act 1984* (SA) s 50.

<sup>199</sup> *Discrimination Act 1991* (ACT) s 68(1); *Anti-Discrimination Act 1977* (NSW) s 50(1); *Anti-Discrimination Act 1992* (NT) s 23(2); *Anti-Discrimination Act 1991* (Qld) s 130(1); *Equal Opportunity Act 2010* (Vic) s 104(1); *Anti-Discrimination Act 1998* (Tas) s 18(2); *Equal Opportunity Act 1984* (WA) s 67.

<sup>200</sup> See *Equal Opportunity Act 1984* (WA) s 67; *Equal Opportunity Act 1984* (SA) s 86; *Anti-Discrimination Act 1977* (NSW) s 50(1); *Equal Opportunity Act 2010* (Vic) s 104; *Anti-Discrimination Act 1991* (Qld) s 130(1)(b); *Discrimination Act 1991* (ACT) s 68(1). Cf *Discrimination Act 1992* (NT) s 23; *Anti-Discrimination Act 1998* (Tas) s 18.

<sup>201</sup> See, e.g., *Equal Opportunity Act 1984* (WA) s 67(1)(e). Where no such express basis is included, it may be covered by catch-all subsections in other legislative provisions, such as *Anti-Discrimination Act 1998* (Tas) s 18(1)(e).

<sup>202</sup> See (with slight variation in wording and structure): *Anti-Discrimination Act 1992* (NT) s 23(3); *Anti-Discrimination Act 1977* (NSW) s 50(2); *Equal Opportunity Act 1984* (SA) s 86(3); *Equal Opportunity Act 1984* (WA) s 67(2). In Queensland, victimisation must concern allegations made 'in good faith', per s

#### 1.6.4 Other forms of unlawful conduct

State and territory anti-discrimination statutes make other conduct unlawful. What conduct is proscribed varies considerably between jurisdictions.

In some jurisdictions, other prohibitions can appear ad hoc, having been added in response to specific concerns to address conduct already subject to civil liability under the statute through imposing additional penalties. For example, s 88 of the *Equal Opportunity Act 1984* (SA) makes it unlawful to impose a condition or requirement that would result in a person with a disability being separated from his or her assistance animal, in addition to any civil liability incurred under the Act.

All statutes make some provision for discriminatory advertising, while some also prohibit requesting or requiring information from another on which discriminatory behaviour might be based.

### 1.7 Exemptions

Each state and territory anti-discrimination statute provides for a procedure by which a person can apply for a temporary fixed-term exemption from the statute in respect of conduct that would otherwise contravene it. The procedures vary between jurisdictions. In some jurisdictions, there may be a hearing for an exemption application.

Exemptions are generally granted subject to conditions and may be varied or revoked.<sup>203</sup> Grants are usually subject to notice requirements.

The circumstances in which an exemption is granted differ according to each statute. Neither the New South Wales or Western Australian statutes specify factors to which the designated decision-making person or agency must or may have regard in determining whether an exemption should be granted.<sup>204</sup> Section 90 of the *Equal Opportunity Act 2010* (Vic) requires the Tribunal to consider, among other factors, whether 'the proposed exemption is a reasonable limitation on the right to equality in the Charter of Human Rights and Responsibilities' and 'all the relevant circumstances of the case'. In other statutes, the considerations are worded very broadly, providing that the relevant decision-making entity may have regard to any factor they consider relevant.<sup>205</sup>

In practice, exemptions are generally granted to conduct that is discriminatory but promotes the interests of groups subject of historic discrimination, such as by enabling the provision of appropriate services for their advancement or the use of quotas or identified positions in employment and recruitment.<sup>206</sup> Each of the ACT, Northern Territory, South Australian and

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130(1)(a)(ii), without reference to the falsity of the allegation. In the *Discrimination Act 1991* (ACT), per s 68(2)(h), victimisation relates only to detriment because of a claim of an unlawful act 'other than a claim that is false and not made honestly', see also *Equal Opportunity Act 2010* (Vic) s 104(1)(g). Cf *Anti-Discrimination Act 1998* (Tas) s 18 where no such requirement applies.

<sup>203</sup> This may depend on whether, for example, a condition has been breached. See s 59(5)(b) *Anti-Discrimination Act 1992* (NT) and s 92(2)(b) *Equal Opportunity Act 1984* (SA).

<sup>204</sup> *Anti-Discrimination Act 1977* (NSW) s 126(1); *Equal Opportunity Act 1984* (WA) s 135.

<sup>205</sup> See *Discrimination Act 1991* (ACT) s 109(3); *Anti-Discrimination Act 1992* (NT) s 59(3); *Equal Opportunity Act 1984* (SA) s 92(2); and *Anti-Discrimination Act 1998* (Tas) s 56(2).

<sup>206</sup> For example, a current exemption applies in respect of the Aboriginal Legal Service (NSW/ACT) Ltd to allow for Aboriginal and Torres Strait Islander identified staffing positions up to 75%. See Anti-Discrimination Board of NSW, *Current section 126 exemptions*



Tasmanian statutes expressly recognise that the relevant decision-making authority may have regard to whether the discriminatory conduct subject of the exemption would advance redress of the effects of past discrimination.<sup>207</sup>

Exemptions have the benefit of providing certainty that conduct will not contravene the relevant statute before such conduct occurs, in contrast to the special measure or special needs exceptions in anti-discrimination legislation. However, Rees, Rice and Allen cite recent cases in which the Victorian Civil and Administrative Tribunal has dismissed exemption applications on the basis that the conduct for which the exemption was sought was a special measure.<sup>208</sup>

Exemptions have also been granted to defence companies operating in Australia in respect of race discrimination on the grounds of nationality. The exemptions enable those companies to comply with defence contracts with the United States Government obliging the companies not to transfer controlled defence material to nationals of certain proscribed countries, 'nationality' within the meaning of the obligations being based solely upon place of birth and applicable to dual nationals.<sup>209</sup>

In New South Wales, separate to the exemption procedure at s 126 of the *Anti-Discrimination Act 1977* (NSW), s 126A empowers the Minister to certify that a program or activity is for special needs and that therefore anything done by a person in good faith in the course of the program or activity is not unlawful under Parts 3 to 4C (concerning discrimination on the grounds of sex, transgender grounds, marital or domestic status, disability, carer's responsibilities and homosexuality). The s 126A exemption is available for special needs programs and activities for groups affected by unlawful discrimination to which the Act applies. Current section 126A exemptions in New South Wales include fitness services for men only and provision of crisis accommodation exclusive to women, for example.<sup>210</sup> Race and age group special measures programs are subject of separate statutory exceptions at ss 21 and 49ZYR of the statute, respectively.

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<[http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1\\_antidiscriminationlaw/adb1\\_exemptions/exemptions\\_126.aspx](http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.aspx)>.

<sup>207</sup> *Discrimination Act 1991* (ACT) s 109(3); *Anti-Discrimination Act 1992* (NT) s 59(3); *Equal Opportunity Act 1984* (SA) s 92(6)(a); and *Anti-Discrimination Act 1998* (Tas) s 56(2)(a).

<sup>208</sup> Neil Rees, Simon Rice, Dominique Allen, *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd ed, 2018) 882, citing *AusNet Services Ltd* [2015] VCAT 1817; *Trafalgar High School* [2015] VCAT 1647; *Yooralla* [2015] VCAT 78.

<sup>209</sup> The ACT Human Rights Commission has, for example, to date, granted two s 109 *Discrimination Act 1991* (ACT) exemptions, which apply to defence companies BAE Systems Australia Limited and Raytheon Pty Ltd contracting with the United States government. See ACT Human Rights Commission, *Exemptions Granted to Unlawful Discrimination – ACT Human Rights Commission* <<https://hrc.act.gov.au/discrimination/exemptions-granted-unlawful-discrimination/>>.

<sup>210</sup> Anti-Discrimination Board of NSW, *Current section 126A exemptions* <[http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1\\_antidiscriminationlaw/adb1\\_exemptions/s126av2.aspx](http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_exemptions/s126av2.aspx)>.

**Table 6 Exemption grant procedures**

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>Relevant provision(s)</b>	Ss 109-110	S 126	S 59	Ss 113-113A	S 92	Ss 56-59	Ss 89-91	Ss 135-137
<b>Designated person or agency</b>	ACT Human Rights Commission	President Anti-Discrimination Board	NT Anti-Discrimination Commissioner	Queensland Civil and Administrative Tribunal	South Australian Employment Tribunal	Tasmanian Anti-Discrimination Commissioner	Victorian Civil and Administrative Tribunal	State Administrative Tribunal
<b>Initial exemption period</b>	Up to 3 years	Up to 10 years	Up to 3 years	Up to 5 years	Up to 3 years	Up to 3 years	Up to 5 years	Up to 5 years
<b>Renewed exemption period</b>	Up to 3 years	Up to 10 years	Up to 3 years	Up to 5 years	Up to 3 years	Up to 3 years	Up to 5 years	Up to 5 years
<b>Conditional grant of exemption (ss)</b>	S 109(4)(b)	S 126(2)	S 59(5)	S 113(6)(a)-(b)	S 92(b)(a)	S 57(2)	S 89(4)	S 135(6)(a),(c)
<b>Considerations in grant of exemption (ss)</b>	S 109(3)	-	S 59(3)	S 113(2)-(3)	S 92(6)	S 56(2)	S 90	-
<b>Publication of notice of an exemption (ss)</b>	S 109(4)(a)	S 126(1)	S 59(7)	-	S 92(7)-(8)	S 58(1)	S 89(1)	S 136(1)
<b>Application for review or right of appeal (ss)</b>	Ss 109(6), 110	S 126(9)-(11)	-	S 113A	-	S 59	-	-

## 1.8 Liability

As noted above, anti-discrimination acts in all state and territory jurisdictions prohibit (through various words, importing slightly different coverage) people from aiding or permitting another person to do an act which is unlawful under the legislation. Relevant provisions (and the language used) are set out in Table 7.

The consequences of breaches of these sections are similar across jurisdictions. For example, in Western Australia and the ACT, a person who so acts is taken 'also to have done the act'. In Tasmania, South Australia, Queensland, the Northern Territory a person is jointly and severally liable for any contravention. Note, however, that in Tasmania, there is a requirement for knowledge in the relevant section. In NSW, it is simply stated that it is 'unlawful' for someone to so act.

One point of slight difference is whether the statutes expressly provide for proceedings against those who aid or permit contraventions even where proceedings are not brought against the contravener. In Victoria, for example, s 106 provides that, if such assistance (or inducement etc) leads to a contravention, a person can bring a dispute to the Commission or apply to the Tribunal against the contravener, the person who has assisted or authorised the contravener (i.e., the person who has breached s 105), or both. Proceedings can also be brought against either or both in Queensland, per s 123.

**Table 7 Liability provisions in state and territory anti-discrimination statutes**

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<b>Aiding and permitting (ss)</b>	73 (aids, abets, counsels or procurers)	52 (cause, instruct, induce, aid or permit)	27 (cause, instruct, induce, incite, assist or promote)	122-3 (request or encourage)	90 (cause, instructs, induce or aids)	21 (knowingly cause, induce, or aid)	105-6 (request, instruct, induce, encourage, authorise or assist) <sup>211</sup>	160 (causes, instructs, induces, aids, or permits)
<b>Vicarious liability (ss)</b>	121A	53	105	133	91	104	109-110	161

Approaches to vicarious liability of a first person for the acts of their representatives are also largely similar.<sup>212</sup>

<sup>211</sup> See *Oliver v Bassari (Human Rights)* 2022 VCAT 329 for comments on the authorising and assisting provision of the EOA and whether it includes inaction.

<sup>212</sup> Slightly different terms apply under the various acts. For comparative purposes, 'first person' and 'representative' shall be used to describe the person who may be vicariously liable and the person who has committed an unlawful act, respectively. In the ACT, Western Australia and South Australia, a

The requisite connection of the conduct to the role of the person differs slightly in different jurisdictions. In Queensland, Victoria and South Australia, the conduct must occur in the course of work or employment, or while the person is acting as an agent. The conduct must be within the scope of the 'actual or apparent authority' of the representative in the ACT. In the Northern Territory and Western Australia, the act must be in connection with the representative's work or duties as an agent. In NSW, the first person must have expressly, or by implication, authorised the representative to do the act (either before or after the unlawful act).

In the ACT, NSW, the Northern Territory and Western Australia, the section is not applicable where the first person establishes that they took 'all reasonable steps' to prevent the representative from engaging in the conduct. In the Northern Territory, s 105(3) sets out a non-exhaustive list of matters that may be taken into account in determining whether the first person has taken all reasonable steps (including their financial circumstances, the size of their workforce, and policy or training they have provided).

In contrast, the Queensland defence in s 133(2) and South Australian defence in s 91(2) requires only that the first person took 'reasonable steps', not *all* reasonable steps must be taken. The South Australian Act also provides an example of what would constitute a defence for the purposes of s 91(2): that the first person had in force an appropriate policy and had taken reasonable steps to enforce it. Similarly, in Victoria, a defence is established where, on the balance of probabilities, the first person took 'reasonable precautions' to prevent contravention of the Act by the person (s 110).

Various statutes provide that the first person and representative are jointly and severally liable,<sup>213</sup> or that it applies as if the first person had also done the act.<sup>214</sup> In the Northern Territory, any order for a proportion of compensation to be paid by the first person must be made after consideration of the extent of any steps they took to prevent the prohibited conduct (s 105(4)).

Tasmania takes a different approach altogether. Vicarious liability relates to 'organisations'<sup>215</sup> liability for the acts of its 'members, officers, employees and agents'. In effect, s 104(2) imposes a positive obligation on such organisations to take reasonable steps to ensure that members, officers, employees and agents do not engage in discrimination or prohibited conduct (and liability for any subsequent contravention if it does not comply), rather than providing this as a standard in a defence to alleged vicarious liability for conduct which has already occurred. S 104(1) also requires organisations to ensure that its members, officers, employees and agents are made aware of the prohibited conduct under the Act, to give notice of the terms of any order relating to the organisation and to ensure that the conduct is not engaged in, continued or repeated in future.

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representative is an employee or agent. The same concept applies in NSW, with the first person being a principal (including commission agent and contract work relationships) or employer, and with inclusion of volunteer or unpaid trainee relationships. In the Northern Territory and Queensland, the representative is an agent of 'worker' within the meaning of those Acts. 'Vicarious' liability may be more accurately referred to as 'attributed' liability.

<sup>213</sup> *Anti-Discrimination Act 1991* (QLD) s 133(1); *Anti-Discrimination Act 1977* (NSW) s 53(2).

<sup>214</sup> *Anti-Discrimination Act 1992* (NT) s 105(1); *Discrimination Act 1991* (ACT) s 121A(2); *Equal Opportunity Act 2010* (VIC) s 109; *Equal Opportunity Act 1984* (WA) s 161(1).

<sup>215</sup> Organisation includes a council, Government department or State authority, per s 3.

## 1.9 Complaint-handling procedures

The procedures for complaining about discriminatory or otherwise prohibited or unlawful conduct under the anti-discrimination legislation vary according to jurisdiction. With the exception of Victoria (discussed separately below) and the ACT,<sup>216</sup> the general procedure is as follows:

Complaints may be made by an eligible person, according to the requirements of the legislation.<sup>217</sup> In some jurisdictions, this includes the option to make a representative complaint,<sup>218</sup> and there may also be provision for a complaint to be referred for investigation by a relevant Minister.<sup>219</sup> Complaints must be made within a set time after the alleged contravening conduct occurred (usually 12 months) and must follow form requirements set out in the relevant statute.<sup>220</sup>

Complaints will be investigated by the relevant Commissioner or other authorised person.<sup>221</sup> In some jurisdictions, the Commissioner may also be able to investigate discrimination or prohibited conduct without a complaint being lodged.<sup>222</sup> The Commissioner may decide to accept or reject a complaint.<sup>223</sup> If the complaint has been rejected, the complainant may request or be given a

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<sup>216</sup> Procedures for the resolution of discrimination complaints in the ACT are governed by the *Human Rights Commission Act (2005)*.

<sup>217</sup> *Anti-Discrimination Act 1998* (Tas) ss 60-1, 66; *Equal Opportunity Act 1984* (WA) s 83; *Equal Opportunity Act 1984* (SA) s 93(1); *Anti-Discrimination Act 1991* (QLD) s 134; *Anti-Discrimination Act 1992* (NT) s 60; *Anti-Discrimination Act 1977* (NSW) s 87A (s also s 88 on vilification complaints).

<sup>218</sup> *Anti-Discrimination Act 1998* (Tas) s 60(1)(b)-(c); *Equal Opportunity Act 1984* (WA) ss 83(1), 114-5; *Equal Opportunity Act 1984* (SA) s 93(1) (requires the consent in writing of any other person on behalf of whom a complaint is made); *Anti-Discrimination Act 1991* (QLD) ss 146-152; *Anti-Discrimination Act 1977* (NSW) ss 87A(1)(a)(ii), (c), 87B, 87C (requiring that each person consents to the complaint being made on their behalf by a representative body and that the body has a sufficient interest in the complaint).

<sup>219</sup> *Anti-Discrimination Act 1998* (Tas) s 70; *Equal Opportunity Act 1984* (WA) s 81 (note that the Minister can refer a complaint directly to the Tribunal per s 107(1)); *Anti-Discrimination Act 1991* (QLD) s 155. In the case of South Australia, a matter can be referred by the Tribunal to the Commissioner on the latter's application, with the approval of the Minister, and if the Commissioner is of the view that the matter should be referred to the Tribunal following that investigation, will lodge a complaint with the Tribunal, per *Equal Opportunity Act 1984* (SA) ss 93A, 95D.

<sup>220</sup> In this part of the paper, all relevant first instance decision makers will be referred to by the word 'Commissioner'. See *Anti-Discrimination Act 1998* (Tas) s 62; *Equal Opportunity Act 1984* (SA) s 93(2); *Anti-Discrimination Act 1991* (QLD) ss 136, 138. Note that, in Queensland, once a complaint concerning dismissal from work has been accepted by the Commissioner, they are precluded from seeking industrial relief to which they would otherwise be entitled (see ss 153-4). See also *Anti-Discrimination Act 1992* (NT) ss 64-65; *Anti-Discrimination Act 1977* (NSW) s 89; *Equal Opportunity Act 2010* (VIC) s 116(a).

<sup>221</sup> *Anti-Discrimination Act 1998* (Tas) ss 62, 69; *Equal Opportunity Act 1984* (WA) ss 84, 94; *Equal Opportunity Act 1984* (SA) s 94, noting that s 93(4) provides that a Commissioner may not proceed with an investigation if there is a criminal investigation or charge relating to the matter; *Anti-Discrimination Act 1991* (QLD) ss 154A, 244; *Anti-Discrimination Act 1977* (NSW) s 89A (the complaints process is handled by the President of the Anti-Discrimination Board in NSW).

<sup>222</sup> *Anti-Discrimination Act 1998* (Tas) s 60(2); *Anti-Discrimination Act 1991* (QLD) s 155(2).

<sup>223</sup> *Anti-Discrimination Act 1998* (Tas) s 64; *Equal Opportunity Act 1984* (WA) s 89; *Equal Opportunity Act 1984* (SA) s 95A; *Anti-Discrimination Act 1992* (NT) ss 66-68; *Anti-Discrimination Act 1977* (NSW) s 89B. In Queensland, the Commissioner must reject complaints if they are of the reasonable opinion that it is frivolous, trivial, vexatious, misconceived or lacking in substance per *Anti-Discrimination Act 1991* (QLD) s 139, and may with consent deal with the complaint under the *Human Rights Act 2019* instead, per s 140A.

statement of reasons for the rejection and, in some jurisdictions, can apply for, or request to be referred for, a review by a relevant tribunal.<sup>224</sup>

An attempt will be made to resolve complaints by conciliation or in any other way considered appropriate and as permitted by the statute.<sup>225</sup> This can involve a conciliation conference with powers granted (in some jurisdictions) to the Commissioner to compel attendance.<sup>226</sup> The Commissioner will also investigate complaints and will have powers in relation to this function, such as to compel the production of relevant materials and documents.<sup>227</sup> Where the complaint has not been settled by agreement and where Commissioner (or other authorised person) believes that a complaint cannot be conciliated, or where conciliation attempts have been unsuccessful, or where the nature is such that it should be subject to an inquiry, (or, in some jurisdictions after a complaint has remained unresolved before the Commissioner for a set period of time) a referral for inquiry by the relevant tribunal will be made.<sup>228</sup>

Tribunal inquiries will generally be conducted in public and, depending on the applicable statute, the tribunal may not be bound by the rules of evidence.<sup>229</sup> The tribunals are able to make interim orders, such as to maintain the status quo, and can refer the complaint to a further conciliation conference.<sup>230</sup> In WA, the tribunal will discontinue an inquiry if a complainant notifies the tribunal

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<sup>224</sup> *Anti-Discrimination Act 1998* (Tas) s 65; *Equal Opportunity Act 1984* (WA) ss 89-90; *Anti-Discrimination Act 1991* (QLD) s 142. *Anti-Discrimination Act 1977* (NSW) ss 92(2), 93A and 96, but cf s 89B(4), which expressly provides that a decision to decline a complaint for the purposes of that section is not reviewable by the Tribunal.

<sup>225</sup> *Anti-Discrimination Act 1998* (Tas) ss 74, 76 (note that such conciliation can occur before, after or during an investigation); *Equal Opportunity Act 1984* (WA) s 91; *Equal Opportunity Act 1984* (SA) s 95 (requiring the Commissioner to make all reasonable endeavours to conciliate complaints); *Anti-Discrimination Act 1991* (QLD) s 158; *Anti-Discrimination Act 1992* (NT) ss 78-80.

<sup>226</sup> *Anti-Discrimination Act 1998* (Tas) s 75; *Equal Opportunity Act 1984* (WA) ss 87-8; *Equal Opportunity Act 1984* (SA) s 95(5); *Anti-Discrimination Act 1991* (QLD) ss 159-160; *Anti-Discrimination Act 1977* (NSW) s 91A.

<sup>227</sup> See, e.g., *Anti-Discrimination Act 1977* (NSW) ss 90-90B.

<sup>228</sup> *Anti-Discrimination Act 1998* (Tas) s 78; *Equal Opportunity Act 1984* (WA) s 93(1) (that provision also allows for the Commissioner to assist the complainant in the presentation of their case to the Tribunal or contribute to the costs of calling or giving evidence, where appropriate. See also s 93A for available Supreme Court support). See *Equal Opportunity Act 1984* (SA) s 95B (s 95C provides that the Commissioner may represent either party before the Tribunal); *Anti-Discrimination Act 1977* (NSW) ss 93A-93C, 95-6. See also *Anti-Discrimination Act 1991* (QLD) ss 165-6, s 164A (right of complainant to request referral after an unsuccessful conciliation conference) and s 167 (right to request a referral if there is no resolution within six months after its acceptance). Note that in Queensland the relevant Tribunal will be either the Queensland Civil and Administrative Tribunal or the Industrial Relations Commission (for work related complaints), and the relevant tribunal also has a discretionary power to provide an opinion on the application of the Act to a specific situation on the request of the Commissioner, which may be appealed, per ss 288-233. In the Northern Territory, the complainant will first need to request that the Commissioner evaluate the complaint, after which the Commissioner may refer the complaint to the Tribunal, see *Anti-Discrimination Act 1992* (NT) ss 81(3), 84-86.

<sup>229</sup> *Anti-Discrimination Act 1998* (Tas) ss 87(4), 94; *Anti-Discrimination Act 1992* (NT) s 90.

<sup>230</sup> *Anti-Discrimination Act 1998* (Tas) ss 86, 98; *Equal Opportunity Act 1984* (WA) s 126; *Equal Opportunity Act 1984* (SA) s 96(2)(a); see also *Anti-Discrimination Act 1991* (QLD) s 144 (before referral to the Tribunal, on application by the Commissioner); *Anti-Discrimination Act 1992* (NT) s 101; *Anti-Discrimination Act 1977* (NSW) s 105.

that they do not wish the inquiry to continue.<sup>231</sup> The tribunals are usually able to dismiss a complaint (for example, if it finds that it is unsubstantiated, or is satisfied that it is trivial, vexatious, misconceived or lacking in substance, or dismissing the complaint would be just and appropriate for some other reason).<sup>232</sup>

If the tribunal finds that a matter is substantiated, it will make appropriate orders. In South Australia, reasons will be published only if this is requested by a party.<sup>233</sup> In some jurisdictions, security for costs may be ordered.<sup>234</sup> The legislation may also clarify costs rules applicable to tribunal proceedings. For instance, in Tasmania, ordinarily parties to an inquiry bear their own costs. However, the tribunal is able to order otherwise, including that the party's representative pay all or part of the costs of the inquiry.<sup>235</sup>

Parties will usually have a right to appeal tribunal decisions to the relevant state or territory Supreme Court.<sup>236</sup> In Western Australia, a 'person aggrieved' can appeal on a question of law only, with leave.<sup>237</sup>

A different procedure operates in Victoria. In that State, a contravention may be the subject of an application to the tribunal, irrespective of whether or not the person has engaged with the Commission's dispute resolution procedures.<sup>238</sup> Investigations by the Commission are conducted only in relation to issues that are serious in nature, relate to a class or group of people (rather than an individual) and cannot reasonably be expected to be resolved by either dispute resolution or the Tribunal process.<sup>239</sup> However, the investigation could relate to an individual complaint, so long as the issue relates to a class or group of people (i.e. a systemic issue).

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<sup>231</sup> *Equal Opportunity Act 1984* (WA) s 107(3a).

<sup>232</sup> *Anti-Discrimination Act 1998* (Tas) s 99 (vexatious complaints may lead to fines); *Equal Opportunity Act 1984* (WA) s 127(a); *Equal Opportunity Act 1984* (SA) s 96(2)(b); *Anti-Discrimination Act 1991* (QLD) s 210.

<sup>233</sup> *Equal Opportunity Act 1984* (SA) s 96C.

<sup>234</sup> E.g., *Anti-Discrimination Act 1998* (Tas) s 86A; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 66; *Queensland Civil and Administrative Tribunal Act 2009* (QLD) s 109; *Victorian Civil and Administrative Tribunal Act 1998* (VIC) s 79.

<sup>235</sup> *Anti-Discrimination Act 1998* (Tas) ss 95, 99A.

<sup>236</sup> See, e.g., *Equal Opportunity Act 1984* (SA) s 98A; *Anti-Discrimination Act 1992* (NT) ss 106-7; *Anti-Discrimination Act 1998* (Tas) s 100.

<sup>237</sup> *Equal Opportunity Act 1984* (WA) s 134 and *State Administrative Tribunal Act 2004* (WA) s 105.

<sup>238</sup> *Equal Opportunity Act 2010* (VIC) s 113-4 (relating to dispute resolution for individual complaints or representative complaints, with the latter requiring sufficient interest, consent and the contravention arising out of the same conduct). See also s 122-4 in relation to the Tribunal.

<sup>239</sup> *Equal Opportunity Act 2010* (VIC) s 127. There must also be reasonable grounds to suspect that one or more contraventions have occurred and the investigation would advance the objectives of the Act. The Tribunal is able to refer a matter to the Commission for investigation (s 128). On the Commission investigation procedure, see also ss 129-144. One potential outcome under s 139(2)(c) is that the Commission refers the matter to the Tribunal in order for an inquiry to be conducted (s 141). The Commission is also able to agree to review compliance of a person's programs and practices, on the request of that person (s 151) and can act as an amicus with leave of the relevant court or tribunal (s 160).

## 1.10 Remedies

Provisions relating to remedies that can be obtained in tribunals in relation to contraventions of the anti-discrimination statutes are set out in Table 8 below.<sup>240</sup> In addition to these remedies, various contraventions may also give rise to criminal liability or civil penalty provisions according to the applicable legislation (see Table 4).

The outcome may be a finding that a contravention has occurred without any further action or order being made.<sup>241</sup> However, there are various possible orders available to complainants whose complaints have been found to be substantiated and who have suffered loss or damage as a consequence.<sup>242</sup>

All jurisdictions make provision for compensatory damages. Most tribunals are able to award any amount they think fit or consider appropriate.<sup>243</sup> In Tasmania, the tribunal can also order the respondent to make reasonable efforts to identify people entitled to the benefit of an order and, where they cannot be personally identified, instead order the respondent to pay a specified amount to an organisation acceptable to the tribunal, or to establish a trust fund into which the amount can be paid.<sup>244</sup> In other jurisdictions, caps on compensation are imposed.<sup>245</sup>

Other orders available in all jurisdictions include an order that the respondent to perform an act or course of conduct to redress loss or damage (or injury)<sup>246</sup> or an order to prevent the respondent from continuing or repeating the conduct.

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<sup>240</sup> Note that in the ACT, the relevant provisions are those under the *Human Rights Commission Act 2005* (ACT) s 53E.

<sup>241</sup> See, e.g., *Equal Opportunity Act 2010* (VIC) s 125(b).

<sup>242</sup> See, e.g., *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28, [34]. See s 125(a) of the *Equal Opportunity Act 2010* (Vic) for orders VCAT can make if a contravention has occurred.

<sup>243</sup> See, e.g., *Equal Opportunity Act 2010* (VIC) s 125(a)(ii); *Anti-Discrimination Act 1998* (Tas) s 89(1)(d); *Anti-Discrimination Act 1991* (QLD) s 209(1)(b); and *Equal Opportunity Act 1984* (SA) s 96(1)(a) (noting that it must take into account the amount of damages or compensation awarded in other proceedings relating to the same act(s) and cannot be made against a child, per s 96(3a)-(3b)). In the ACT, the Tribunal can order compensation of 'a stated amount' (except in representative proceedings) (up to the general jurisdictional cap of \$25 000 -s 18 ACT Civil and Administrative Tribunal Act 2008), but must consider various factors when making an order for compensation: the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law and other human rights; the right to equality before the law, the inherent dignity of all people and the impact of the discrimination on that right and dignity; the nature of the discrimination and any mitigating factors (*Human Rights Commission Act 2005* (ACT) s 53E(2)(c)-(3)). In Victoria this can include aggravated or exemplary damages, but awards of this kind are less common.

<sup>244</sup> *Anti-Discrimination Act 1998* (Tas) s 89(4)-(5).

<sup>245</sup> In WA, compensation is capped at \$40,000, except in relation to representative complaints or matters referred under s 107(1) (*Equal Opportunity Act 1984* (WA) s 127(b)(i)). In NSW, compensation is capped at \$100,000. In relation to complaints brought by representative bodies in NSW, the compensation will not be paid to the body. The Tribunal has a wide discretion to order the application of damages in this context: *Anti-Discrimination Act 1977* (NSW) s 108(4)-(5). See also s 108(6) in relation to the cap for vilification damages. See also s 111A in relation to compensation for offenders in custody, which will be paid into the Victims Support Fund.

<sup>246</sup> In some jurisdictions, damage is expressly stated to include 'the offence, embarrassment, humiliation, and intimidation suffered by the person': *Anti-Discrimination Act 1992* (NT) s 88(3); *Anti-Discrimination Act 1991* (QLD) s 209(5). In South Australia, damage 'includes injury to his or her feelings': *Equal Opportunity Act 1984* (SA) s 96(3). This remedy may also not be available in representative complaints or



In a number of jurisdictions, the Tribunal can make a declaration that any contract or agreement contravening the legislation is void.<sup>247</sup> The NSW, Northern Territory, Queensland and Tasmanian statutes also state that the tribunal can order that an apology or retraction be made or published.<sup>248</sup> Orders may be extended under specified provisions<sup>249</sup> or, more generally, specific powers which are not provided under particular statutes may be available through broad discretionary powers given to the tribunal,<sup>250</sup> including the power to order acts which would redress the complainant's loss. Enforcement of orders may require the filing of orders or a tribunal certificate in the relevant supreme court, whereby the order or certificate will operate as a judgement or enforceable order of that court.<sup>251</sup>

In some jurisdictions, the legislation specifies separate procedures in relation to complaints about industrial agreements. For example, in Tasmania, referrals will be made related to complaints concerning modern awards, enterprise agreements or industrial agreements, for the variation or setting aside of the award or agreement.<sup>252</sup>

As observed by Glaze, compensation awards in discrimination cases are often low and are unlikely to have a significant deterrent effect or to bring about systemic change.<sup>253</sup>

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other matters referred to the Tribunal (see, e.g., NSW 108(2)(c)). In Victoria, this is a broad power to 'order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention'. In the ACT, NSW and WA, the ordered act or course of conduct must be reasonable. In ACT, there is only a power to order a stated act, rather than a course of conduct. In the Northern Territory, the order can redress the damage of the complainant *or any other person* (emphasis added). In South Australia, the order can relate to any other party. The statutes in the Northern Territory (s 88(2)) and Western Australia (s 209(4)) clarify that the respondent can be required to employ, reinstate or re-employ a person, promote them, or move them to a specified position within a specified time. The Tasmanian provision is worded broadly, to include redress for loss, injury or humiliation. S 89(1)(c) provides that the Tribunal is empowered to order a respondent to re-employ a complainant.

<sup>247</sup> The declaration by the Tribunals in NSW, the Northern Territory and Queensland can make the contract or agreement void in whole or in part and ab initio or subsequently. In Tasmania, this includes a power to order that a contract or agreement be varied.

<sup>248</sup> See, for example, *Anti-Discrimination Act 1977* (NSW) s 108(2)(d), pursuant to which the Tribunal may give directions as to the 'time, form, extent and manner of publication of the apology or retraction' by the respondent. In NT s 89, the order can apply to the complainant or respondent and published or made in such a manner as the Tribunal thinks fit.

<sup>249</sup> For example, in NSW, the Tribunal may extend any order to the conduct of the respondents affecting people other than the complainant, if considered appropriate in the circumstances of the case: *Anti-Discrimination Act 1977* (NSW) s 108(3).

<sup>250</sup> For example, due to the breadth of s 89(1)(h), the Tasmanian Tribunal is able to make orders along the lines of the more specific orders elaborated in other statutes, such as for the development or a policy or publication of an apology.

<sup>251</sup> *Anti-Discrimination Act 1977* (NSW) s 114 (see also s 113 on the enforcement of orders by the President where they believe that this is in the public interest); *Anti-Discrimination Act 1998* (Tas) s 90. Cf *Equal Opportunity Act 2010* (VIC) s 126.

<sup>252</sup> *Anti-Discrimination Act 1998* (Tas) s 91. See also *Anti-Discrimination Act 1977* (NSW) s 109, providing that the Chief Commissioner of the Industrial Relations Commission must be notified if an order affects an instrument.

<sup>253</sup> Beth Glaze 'Damages for discrimination: Compensating denial of a human right' (2013) 116 *Precedent* 20, 23.

The awards in discrimination cases under equal opportunity or human rights legislation can be contrasted with the *Fair Work Act 2009* (Cth) which empowers courts to issue penalties against employers of breaching the general protections provisions, which can act as a deterrent.

**Table 8 Remedies available in state and territory anti-discrimination statutes**

Provisions	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Compensatory damages	53E(2)(c)	108(2)(a)	88(1)(b)	209(1)(b)	96(1)(a)	89(1)(d)	125(a)(ii)	127(b)(i)
Order to prevent the respondent from continuing or repeating the conduct	53E(2)(a)	108(2)(b)	88(1)(a)	209(1)(a)	96(1)(b)	89(1)(a)	125(a)(i)	127(b)(ii)
Order the respondent to perform an act or course of conduct to redress loss or damage (or injury)	53E(2)(a)	108(2)(c)	88(1)(c)	209(1)(c)	96(1)(c)	89(1)(b)-(c)	125(a)(iii)	127(b)(iii)
Order that an apology or retraction be made / published	-	108(2)(d)	89	209(1)(d)-(e)	-	92	-	-
Order the respondent to develop and implement policy / programs	-	108(2)(e) (only in relation to vilification complaints)	-	209(1)(f)	-	-	-	-
Declaration that any contract or agreement contravening the Act is void	-	108(2)(f)	88(1)(d)	209(1)(h)	-	89(1)(f)	-	127(b)(iv)
Order for damages for non-compliance within specified time	-	108(7) (up to \$100,000)	-	-	-	-	-	-
Order that the respondent pay a fine	-	-	-	-	-	89(1)(e)	-	-
Interest on damages	-	112	-	209(1)(g)	-	-	-	-
Orders in relation to conduct by state or territory government officers or employees	-	-	-	-	-	89(2)-(3)	-	-
'Any other order' considered appropriate	-	-	-	-	-	89(1)(h)	-	-

## Research Paper 5: Appendix A: Areas of unlawful discrimination in state and territory anti-discrimination legislation<sup>1</sup>

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<b>Applicants for employment</b>	10(1)	8(1) (race discrimination), 25(1) (sex), 38C(1) (transgender), 40(1) (marital or domestic status), 49D(1) (disability), 49V(1) (carer's responsibilities), 49ZH(1) (homosexuality), 49ZYB(1) (age)	31(1)	14	30(1) (sex, sexual orientation or gender identity), 52(1) (race), 67(1) (disability), 85B(1) (age), 85V(1) (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)	22(1)(a)	16	11(1) (sex, marital status, pregnancy or breast feeding), 35AC(1) (gender history), 35B(1) (family responsibility or family status), 35P(1) (sexual orientation), 37(1) (race), 54(1) (religious or political conviction), 66B(1) (impairment), 66W(1) (age), 67B(1) (publication of relevant details on Fines Enforcement Registrar's website)
<b>Employees</b>	10(2), 11	8(2) (race), 25(2) (sex), 38C(2) (transgender), 40(2) (marital or domestic status), 49D(2) (disability), 49V(2) (carer's responsibilities), 49ZH(2) (homosexuality), 49ZYB (age)	31(2), (3)	15, 15A	30(2) (sex, sexual orientation or gender identity), 52(2) (race), 67(2) (disability), s 85B(2) (age), s 85V(2) (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)	22(1)(a)	18	11(2) (sex, marital status, pregnancy or breast feeding), 35AC(2) (gender history), 35B(2) (family responsibility or family status), 35P(2) (sexual orientation), 37(2) (race), 54(2)-(3) (religious or political conviction), 66B(2) (impairment), 66W(2) (age), 67B(2) (publication of relevant

<sup>1</sup> The legislation referred to, unless otherwise noted, for the state and territory jurisdictions is: *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
								details on Fines Enforcement Registrar's website)
<b>Commission agents</b>	12	9 (race), 26 (sex), 38D (transgender), 41 (marital or domestic status), 49E (disability), 49W (carer's responsibilities), 49ZI (homosexuality), 49ZYC (age)			31 (sex, sexual orientation or gender identity), 53 (race), 68 (disability), 85C (age), 85W (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)	22(1)(a), 3		12 (sex, marital status, pregnancy or breast feeding), 35AD (gender history), 35C (family responsibility or family status), 35Q (sexual orientation), 38 (race), 55 (religious or political conviction), 66C (impairment), 66X (age), 67C (publication of relevant details on Fines Enforcement Registrar's website)
<b>Contract workers</b>	13	10 (race), 27 (sex), 38E (transgender), 42 (marital or domestic status), 49F (disability), 49X (carer's responsibilities), 49ZJ (homosexuality), 49ZYD (age)			32 (sex, sexual orientation or gender identity), 54 (race), 69 (disability), 85D (age), 85X (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)	22(1)(a), 3	21	13 (sex, marital status, pregnancy or breast feeding), 35AE (gender history), 35D (family responsibility or family status), 35R (sexual orientation), 39 (race), 56 (religious or political conviction), 66D (impairment), 66Y (age), 67D (publication of relevant details on Fines Enforcement Registrar's website)
<b>Partnerships</b>	14	10A (race), 27A (sex), 38F (transgender), 42A (marital or domestic status), 49G (disability), 49Y (carer's		16-18	33 (sex, sexual orientation or gender identity), 55 (race), 70 (partnerships), 85E (age), 85Y (marital or	22(1)(a), 3	30-31	14 (sex, marital status, pregnancy or breast feeding), 35AF (gender history), 35E (family responsibility or family

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
		responsibilities), 49ZK (homosexuality), 49ZYE (age)			domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)			status), 35S (sexual orientation), 40 (partnerships), 57 (religious or political conviction), 66E (impairment), 66Z (age)
<b>Professional organisations, trade unions</b>	15	11 (race), 28 (sex), 38H (transgender), 43 (marital or domestic status), 49I (disability), 49ZA (carer's responsibilities), 49ZL (homosexuality), 49ZYF (age)	32	19-20	35 (sex, sexual orientation or gender identity), 57 (race), 72 (disability), 85G (age), 85ZB (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities)	22(1)(a), 3	35	15 (sex, marital status, pregnancy or breast feeding), 35AG (gender history), 35F (family responsibility or family status), 35T (sexual orientation), 41 (race), 58 (religious or political conviction), 66F (impairment), 66ZA (age), 67E (publication of relevant details on Fines Enforcement Registrar's website)
<b>Qualifying bodies</b>	16	12 (race), 29 (sex), 38I (transgender), 44 (marital or domestic status), 49J (disability), 49ZB (carer's responsibilities), 49ZM (homosexuality), 49ZYG (age)	33	21-23	36 (sex, sexual orientation or gender identity), 58 (race), 73 (disability), 85H (age), 85ZC (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities)	22(1)(a), 3	36	16 (sex, marital status, pregnancy or breast feeding), 35AH (gender history), 35G (family responsibility or family status), 35U (sexual orientation), 42 (race), 59 (religious or political conviction), 66G (impairment), 66ZB (age), 67F (publication of details on Fines Enforcement Registrar's website)
<b>Employment agencies</b>	17	13 (race), 30 (sex), 38J (transgender), 45 (marital	34	23		22(1)(a), 3		17 (sex, marital status, pregnancy or breast

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
		or domestic status), 49K (disability), 49ZC (carer's responsibilities), 49ZN (homosexuality), 49ZYH (age)						feeding), 35AI (gender history), 35H (family responsibility or family status), 35V (employment agencies), 43 (race), 60 (religious or political conviction), 66H (impairment), 66ZC (age), 67G (publication of relevant details on Fines Enforcement Registrar's website)
<b>Education</b>	18	17 (race), 31A (sex), 38K (transgender), 46 (marital or domestic status), 49L (disability), 49ZO (homosexuality), 49ZYL (age)	29	38-39	37 (sex, sexual orientation or gender identity), 59 (race), 74 (disability), 85I (age), 85ZE (marital or domestic partnership status, spouse or partner's identity, pregnancy, caring responsibilities and religious appearance or dress)	22(1)(b)	38	18 (sex, marital status, pregnancy or breast feeding), 35AJ (gender history), 35I (family responsibility or family status), 35W (sexual orientation), 44 (race), 61 (religious or political conviction), 66I (impairment), 66ZD (age)
<b>Access to premises</b>  <i>*In WA, also applies to access to vehicles.</i>	19						57	19 (sex, marital status, pregnancy or breast feeding), 35AK (gender history), 35X (sexual orientation), 45 (race), 66J (impairment), 66ZE (age)

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
<b>Provision of goods, services and facilities<sup>2</sup></b>	20	19 (race), 33 (sex), 38M (transgender), 47 (marital or domestic status), 49M (disability), 49ZP (homosexuality), 49ZYN (age)	41	46	39 (sex, sexual orientation or gender identity), 61 (race), 76 (disability), 85K (age), 85ZG (marital or domestic partnership status, spouse or partner's identity, pregnancy, association with a child or caring responsibilities)	22(1)(c)	44	20 (sex, marital status, pregnancy or breast feeding), 35AL (gender history), 35Y (sexual orientation), 46 (race), 62 (religious or political conviction), 66K (impairment), 67H (publication of relevant details on Fines Enforcement Registrar's website)
<b>Accommodation</b>	21	20 (race), 34 (sex), 38N (transgender), 48 (marital or domestic status), 49M (disability), 49ZQ (homosexuality), 49ZYO (age)	38	82-85	40 (sex, sexual orientation or gender identity), 62 (race), 77 (disability), 85L (age), 85ZH (marital or domestic partnership status, spouse or partner's identity, pregnancy or caring responsibilities)	22(1)(d)	52-56	21 (sex, marital status, pregnancy or breast feeding), 35AM (gender history), 35Z (sexual orientation), 47 (race), 63 (religious or political conviction), 66L (impairment), 66ZG (age), 67I (publication of relevant details on Fines Enforcement Registrar's website)
<b>Clubs</b>	22	20A (race), 34A (sex), 38O (transgender), 48A (marital or domestic status), 49O (disability), 49ZR (homosexuality), 49ZYP (age)	46	94-95		22(1)(e)	64-65	22 (sex, marital status, pregnancy or breast feeding), 35AO (gender history), 35ZB (sexual orientation), 48 (race), 64 (religious or political conviction), 66M (impairment), 66ZI (age)

<sup>2</sup> In New South Wales, Queensland, South Australia and Victoria, the provision applies to goods and services only. However, in each statute 'services' is defined to include reference to access and use of facilities.



Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Requesting for or requiring provision of information	23							23 (sex, marital status, pregnancy or breast feeding), 35AQ (gender history), 35J (family responsibility or family status), 35ZC (sexual orientation), 49 (race), 65 (religious or political conviction), 66O (impairment), 66ZK (age)
Insurance and, or superannuation			48	53-57 (superannuation) 67-71, (insurance)	63 (race) 78 (disability) <sup>3</sup>			35AR (gender history), 66P (impairment), 66ZL (age)
Local government members against other local government members		10B (race), 27B (sex), 27B (transgender), 42B (marital or domestic status), 49H (disability), 49Z (carer's responsibilities), 49ZKA (homosexuality)		102			73	
Administration of state laws and programs				101		22(1)(f)		
Land				77	38 (sex, sexual orientation or gender identity discrimination), 60 (race), 75 (disability), 85J (age), 85ZF (marital or domestic partnership status, spouse or partner's		50	21A (sex, marital status, pregnancy or breast feeding), 35AN (gender history), 35ZA (sexual orientation), 47A (race), 66ZH (age)

<sup>3</sup> Both in respect of superannuation.

Areas covered	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
					identity, pregnancy or caring responsibilities)			
<b>Awards, enterprise agreements or industrial agreements</b>						22(1)(g)		
<b>Sport</b>							71	35AP (gender history), 66N (impairment), 66ZJ (age)