# Submission to the ACT Government's Inclusive, Progressive, Equal Discrimination Law Reform: Discussion Paper 1 - Extending the Protections of Discrimination Law

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AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

# Submission of the Australian Discrimination Law Experts Group

in response to the

## ACT Government's *Inclusive, Progressive, Equal: Discrimination law reform: Discussion Paper 1 – Extending the Protections of Discrimination Law*

January 2022

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## Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group ('ADLEG'), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on key questions raised in the *Inclusive, Progressive, Equal: Discrimination law reform: Discussion Paper 1 – Extending the Protections of Discrimination Law* ('the Discussion Paper') released in November 2021 by the ACT Justice and Community Safety Directorate, regarding the review of the *Discrimination Act 1991* (ACT) ('the Discrimination Act').

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting Robin Banks on robin.banks@utas.edu.au.

This submission may be published.

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## Summary of recommendations

This submission is made in response to the ACT Government's *Inclusive, Progressive, Equal: Discrimination law reform: Discussion Paper 1 – Extending the Protections of Discrimination Law* ('the Discussion Paper') in relation to review of the *Discrimination Act 1991* (ACT) ('the Discrimination Act').

As set out in further detail below, our recommendations are as follows:

*Coverage*

1. ADLEG recommends that the areas of activity in which discrimination is prohibited in the Discrimination Act be listed in a single provision and expressly include coverage of any activity that is not in private.
2. ADLEG recommends that there be express prohibition against discrimination and other related conduct 'by or against a person in connection with an area of activity' however defined in the Discrimination Act.

*Exceptions – general*

3. ADLEG does not recommend adopting a general limitation / single justification defence.
4. ADLEG recommends that the legislation provide a sunset clause for existing exceptions, with a parliamentary mechanism for testing the continued operation of existing exceptions consistent with international law rules for testing limitations on the right to non-discrimination.
5. ADLEG recommends that any exceptions retained in the legislation clearly require the person seeking to rely on that exception as a defence to a claim of unlawful discrimination to demonstrate that they have ensured their actions are the least discriminatory option available to achieve their legitimate purpose, and that they have done everything possible to eliminate or minimise the discriminatory effect of their actions up to the point of unjustifiable hardship.

*Exceptions for acts done to comply with the law*

6. ADLEG recommends that the legislation be amended to remove the exception for acts done under statutory authority. If an exception is retained that permits acts necessary to comply with a law prescribed by legislation, the legislation should include a mechanism for testing the validity of prescribing such a law and include a sunset clause for any such prescribed laws.
7. ADLEG supports the retention of an exception done for acts necessary to comply with a specific court or tribunal order.

*Exceptions for religious bodies*

8. ADLEG recommends that the religious body and religious educational institution defences ('exceptions') in the Discrimination Act:
    - require that conduct be reasonable and proportionate in order to be permitted under religious body (other than religious educational authorities) exceptions;
    - require that discrimination only be permitted on the ground of religious belief or activity of the employee or service user under religious body (other than religious educational authorities) exceptions, and not on the basis of any other grounds;
    - require that employment discrimination only be permitted under religious body (other than religious educational authorities) defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those inherent requirements because of the person's religious belief or activity.
9. ADLEG does not support a requirement for religious educational organisations to maintain a publicly available policy outlining their position in relation to the employment of staff or the provision of services or facilities.

*Exceptions for voluntary (not-for-profit) organisations*

10. ADLEG recommends that the exception for voluntary bodies be removed, with voluntary bodies which are dedicated to providing benefits to protected groups applying for an exemption from the ACT Human Rights Commission.

*Exceptions for licensed clubs*

11. ADLEG recommends the removal of exceptions for clubs while permitting any organisation to adopt special measures.
12. ADLEG recommends the definition of club be amended to remove the qualification that a club is an entity that holds a liquor licence.

*Exceptions relating to work*

13. ADLEG recommends that exceptions relating to genuine occupational requirements or inherent requirements be removed and replaced with a specific mechanism for the granting of an employment-based exemption in respect of one or more attributes.
14. ADLEG recommends the positive obligation to make adjustments be a stand-alone obligation that, in and of itself, can found a claim of unlawful discrimination.
15. ADLEG recommends that there be a duty to make adjustments to accommodate the needs of people with disability.

16. ADLEG recommends that there be a general duty to make adjustments to accommodate the needs of people based on their attributes.
17. ADLEG recommends that the Discrimination Act specify that an adjustment is a reasonable adjustment if it is needed to ensure a person or persons with disability do not experience discrimination and it does not impose unjustifiable hardship at the time of the alleged discrimination ('the relevant time') on the person required to make the adjustment.
18. ADLEG recommends that the Discrimination Act separately define unjustifiable hardship based on section 11 of the DDA but modified to ensure the person claiming unjustifiable hardship must provide evidence of: (a) efforts made at the relevant time to identify and secure funding or other assistance to meet the obligation to make the adjustment; and (b) what alternatives were considered to ensure the implementation of the least discriminatory outcome available without imposing unjustifiable hardship, and to ensure that the overarching benefit, consistent with the objects of discrimination law, of reducing or removing discrimination is given sufficient weight.
19. ADLEG recommends the duty to make adjustments apply to all people and organisations with obligations not to discriminate.
20. ADLEG recommends the removal of the provision allowing jobs to be declared in regulations as having genuine occupational qualifications.

*Exceptions for employing workers in private homes*

21. ADLEG recommends that the exception for domestic work or domestic child care be removed.

*Exceptions for insurance and superannuation companies*

22. ADLEG recommends that the Discrimination Act exceptions for superannuation and insurance be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors.
23. ADLEG recommends that guidance be included in the provision or as a note to the provision on what actuarial and statistical data can be used.
24. ADLEG recommends that the Discrimination Act provision go further in requiring the providers of insurance and superannuation to provide consumers with the data on which decisions about them are based and a meaningful explanation of that data.

*Positive duty to eliminate discrimination*

25. ADLEG recommends the adoption of positive duties across all attributes.

26. ADLEG recommends that the ACT adopt a positive duty similar to that in the Gender Equality Act 2020 (Vic), but which applies to all grounds.

27. ADLEG supports the statutory framework enabling and requiring the Human Rights Commission to play a greater role in monitoring and dealing with non-compliance and supporting duty holders with implementation.

*Other*

28. ADLEG recommends that the Human Rights Act Commission 2005 (ACT) be amended to specify that the respondent to a complaint of indirect discrimination has the burden of proving the reasonableness of any condition or requirement imposed.

29. ADLEG recommends that the principle set out in recommendation 25.2 be implemented in respect of both direct and indirect discrimination.

30. ADLEG recommends that the Discrimination Act be amended to use the term 'defences' rather than 'exceptions', that it frame the provisions on the basis that 'it is a defence to a complaint of …', and include, as the first provision of Part 4 setting out the defences, a provision that states:

    C. Proof of defences

    A defence referred to in this Part is a defence to a complaint, and the person who relies on a defence must prove it on the balance of probabilities.

## Coverage of the Discrimination Act

*The Government intends to amend the Discrimination Act to prohibit discrimination in all areas of public life, with an exception for private conduct. The Government welcomes comments on how this could best be achieved and what the limits of 'public life' and 'private conduct' should be.*

*For example:*

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

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

**ADLEG recommends that the areas of activity in which discrimination is prohibited in the Discrimination Act be listed in a single provision and expressly include coverage of any activity that is not in private.**

This is the approach is consistent with the international human rights law obligations to prevent discrimination across broad areas of life activity.

To further ensure the scope of protection reflects obligations under international law to prevent discrimination, the provision listing the areas of activity specify coverage of any prohibiting discrimination and other related conduct (such as sexual and other harassment and vilification) 'by or against a person or a group of people in connection with an area of activity'.

This latter approach reflects the wording of the areas of activity provision of the ADA (Tas): section 22.

In his decision considering the scope of section 22 of the ADA (Tas), Chief Justice Blow of the Tasmanian Supreme Court stated:[1]

> [20] … However it is clear that Parliament has limited the scope of Pt5 [(then) 'Discrimination and prohibited conduct'] to certain areas of activity by reference to victims, rather than to offenders. If Pt5 had been intended to apply only to offenders engaged in certain classes of activities, s22(1) could have been worded differently. Because it has been worded by reference to the activities of victims, I think its purpose was the protection of victims, regardless of the role or status of offenders. Having regard to the classes of activity referred to in s22(1), it would seem that it was intended to protect individuals undertaking the basic activities of everyday life, such as employment and education.

This interpretation promotes the objects of discrimination law as set out in section 4 of the Discrimination Act.

[1] *Burton v Houston* [2004] TASSC 57 (11 June 2004),

**ADLEG recommends that there be express prohibition against discrimination and other related conduct 'by or against a person in connection with an area of activity' however defined in the Discrimination Act.**

## Exceptions – general

*3: Should the exceptions in the Discrimination Act: a. be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable,* ***or***

A single justification defence offers a more streamlined approach to exceptions under the *Discrimination Act*. However, moving to this model raises a number of practical risks. First, it puts significant weight on tribunal determinations to clarify what is 'reasonably justifiable' (or, in other jurisdictions, 'proportionate'). Given the relative absence of tribunal decisions in this area of law, this may result in a lack of clarity around how this defence applies in practice.

Second, then, this may deter respondents from seeking to rely on the defence, even where it might be relevant or helpful. On the flip side, it might deter claimants from challenging discrimination, as there is little certainty as to whether their claim will be upheld, or whether the defence will be raised. Indeed, one of the reasons age discrimination claims are so infrequent in the UK is because direct age discrimination – unlike all other forms of discrimination – can be objectively justified as a proportionate means of achieving a legitimate aim.[2]

**ADLEG does not recommend adopting a general limitation / single justification defence.**

*3: Should the exceptions in the Discrimination Act: b. be refined to make them simpler, stronger, and better aligned with our human rights framework?*

Yes. Ideally, all exceptions found in discrimination law should be reviewed on a regular basis and/or be subject to sunset clause to ensure that there is a legislative process that tests their continuing relevance and legitimacy.

While we do not, at this stage, support a general limitation or single justification defence, it is arguably useful to consider the way in which the single justification defences in Canadian law have been tested.

These tests were first articulated by the Supreme Court of Canada in the cases of *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 SCR 3, 1999 SCC 48 (the *'Meiorin* case') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 898 (the 'Grismer case') that consider in the first case the bona fide occupational requirement test and in the second case the bona fide justification test.

[2] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (2022, Oxford Monographs on Labour Law, Oxford University Press).

Both interpretation apply the same reasoning to considering any limitation on the right to non-discrimination as is found in the guidance materials provided to the public sector by the Federal Attorney-General's Department.[3]

A limitation on rights under discrimination law, whether as an available defence or as a standing limit, should be consistent with the following three elements.

1. Can it be demonstrated that the limitation is connected to a legitimate purpose? This may, for example, require that the legitimate purpose of the limitation be clearly articulated.
2. Can it be demonstrated that the limitation requires implementation by a means rationally connected to the legitimate purpose? This may, for example, require consideration of what means are available to achieve that legitimate purpose and of whether the limitation adopted does achieve that purpose.
3. Can it be demonstrated that the limitation continues to be able to be justified as reasonably necessary to ensure the legitimate purpose and has the least discriminatory means of implementation been adopted. The third of these require the defence to include a testing of whether or not the respondent could accommodate individuals with particular characteristics without imposing unjustifiable hardship, and that they have done so up to the point of unjustifiable hardship.

**ADLEG recommends that the legislation provide a sunset clause for existing exceptions, with a parliamentary mechanism for testing the continued operation of existing exceptions consistent with international law rules for testing limitations on the right to non-discrimination.**

**ADLEG recommends that any exceptions retained in the legislation clearly require the person seeking to rely on that exception as a defence to a claim of unlawful discrimination to demonstrate that they have ensured their actions are the least discriminatory option available to achieve their legitimate purpose, and that they have done everything possible to eliminate or minimise the discriminatory effect of their actions up to the point of unjustifiable hardship.**

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[3] Australian Government, Attorney-General's Department, *Permissible limitations: public sector guidance sheet* (undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/permissible-limitations>.

## Exceptions for acts done to comply with the law

5. *Should the Discrimination Act be amended to remove the exception permitting acts done under statutory authority?*

Yes. Exceptions for acts done under statutory authority represent potentially one of the most far-reaching exceptions under discrimination law.[4] Given the *Discrimination Act* has been in place for 30 years, it is timely to phase out this exception. This could be achieved by:

- The Minister making a declaration under section 30(2) that section 30(1) (a) and (b) expire in say, 2 years and/or
- Amending section 30 to explicitly specify which statutes, if any, are still covered by the exception (rather than creating a blanket exception for acts under statutory authority).

**ADLEG recommends that the legislation be amended to remove the exception for acts done under statutory authority. If an exception is retained that permits acts necessary to comply with a law prescribed by legislation, the legislation should include a mechanism for testing the validity of prescribing such a law and include a sunset clause for any such prescribed laws.**

6. *Should the Act keep a narrower exception to permit acts done directly to comply with a specific court or tribunal order?*

Yes. **ADLEG supports the retention of an exception done for acts necessary to comply with a specific court or tribunal order.**

[4] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 132–3.

## Exceptions for religious bodies

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

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

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

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

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

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

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

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

The questions in the Discussion Paper pertaining to religious body exceptions are best dealt with together.

Religious body and religious educational institution exceptions in discrimination laws can undermine the right to equality. They should only be permitted where they can be justified when balanced with the fundamental rights and freedoms of others. International human rights law requires that discriminatory conduct not be permitted unless there is a legitimate purpose for the discriminatory conduct, and the means by which that purpose is achieved is proportionate.

The current religious body exceptions contained in section 32 of the Discrimination Act do not adopt this approach. Currently, religious bodies in the ACT can discriminate on the basis of any grounds protected by the Discrimination Act, under fairly weak tests. This is not necessary or proportionate. We note that section 32 does not provide a defence in relation to staff or students in educational institutions and this should be retained. There are, however, many aspects of the provision of goods, services and facilities, particularly in the community services sector that are dominated by religious bodies and permitting the continuation of exceptions for such services is not justifiable.

Recently proposed reforms in Victoria adopt the preferred international human rights law approach, and are a best practice approach in Australia.[5] These reforms limit or remove existing general religious body exceptions, and instead provide for the following exceptions:

- Allow religious schools to discriminate on the ground of the religion of the prospective student in the admission of students, but not at any later stage.
- Allow religious bodies to discriminate on the ground of religion in employment, but only where religious practice or observance is an inherent requirement of the role (for instance a religious education teacher, but not a maths teacher or gardener) (again, on the ground of the religion of the employee or staff member).
- Allow the government-funded provision of goods and/or services by religious bodies to discriminate on the ground of religion (of the person seeking goods or services).
- Allow the non-government-funded provision of goods and/or services by religious bodies to discriminate on multiple grounds, including sexual orientation and gender identity (of the person seeking goods or services).
- Require that all conduct permitted by these exceptions be reasonable and proportionate.

The reasonable and proportionate test provides an objective basis to assess whether the action proposed to be taken is just or unjust and includes consideration of the consequences to the person who is being discriminated against and the rights of the religious body. This in turn allows discrimination law to strike an appropriate balance between the right to equality and the right to religious belief.

Tasmanian provisions provide another example of best practice. They permit discrimination in employment only on the basis of religion where it is a genuine occupational requirement of the role,[6] while students at religious schools can only be discriminated against on the basis of religion at the time of admission,[7] that is at the first point of entry to the school, and not in relation to ongoing enrolment. The former limitation focuses on the religious educational institution's continued right to hire staff of the same religious faith where the role requires religious observance. The latter limitation focuses on the religious educational institution's continued right to build a community of faith through the admission of its students. Tasmania's lack of distinction as to government funding for goods and services is preferable to the Victorian approach. There is no justified reason why, for instance, LGBTIQA+ people or women should be discriminated against in the provision of certain goods and services but not others. The principled position should be that such discrimination is not permitted regardless of whether the provision of those goods and service is government-funded or not, or commercial or non-profit.

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5 *Equal Opportunity (Religious Exceptions) Amendment Bill 2021* (Vic).

6 *Anti-Discrimination Act 1998* (Tas) s 51.

7 *Anti-Discrimination Act 1998* (Tas) s 51A.

The ACT has the opportunity to take these reforms even further, by combining the most effective and principled parts of the respective Victorian and Tasmanian approaches and thereby become the new best practice jurisdiction on religious body defences to unlawful conduct allegations. In doing so, the Discrimination Act could appropriately reflect international human rights law, and adopt targeted defences allowing religious organisations to discriminate on the basis of religion (but no other grounds) where religion is inherent to the conduct in question and the conduct is both reasonable and proportionate.

**ADLEG recommends that the religious body and religious educational institution defences (exceptions) in the Discrimination Act:**

- **require that conduct be reasonable and proportionate in order to be permitted under religious body (other than religious educational authorities) exceptions;**
- **require that discrimination only be permitted on the ground of religious belief or activity of the employee or service user under religious body (other than religious educational authorities) exceptions, and not on the basis of any other grounds;**
- **require that employment discrimination only be permitted under religious body (other than religious educational authorities) defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those inherent requirements because of the person's religious belief or activity.**

Noting current federal proposals, **ADLEG does not support a requirement for religious educational organisations to maintain a publicly available policy outlining their position in relation to the employment of staff or the provision of services or facilities.**

ADLEG maintains that having a publicly available policy accepting and advocating for discrimination on any basis has the capacity to further exacerbate stigma of individuals based on attributes they hold by indicating that discrimination on that basis is legitimate and justifiable. As has been outlined earlier in this submission, one of the primary aims of discrimination law is to lessen the stigma of persons on the basis of attributes they hold. Explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harms that individuals will face as a consequence of a religious educational organisation's refusal to employ persons on the basis of an attribute.

## Exceptions for voluntary (not-for-profit) organisations

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

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

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

The voluntary bodies exception contained in section 31 should be removed in its current form. As it is currently drafted it allows for carte blanche discrimination in determinations of membership or in the provision of goods and services. There is no requirement that the discrimination be related to the purpose of the organisation. As highlighted in the LRAC review, this means that voluntary bodies dedicated to the special interests of their members (for example, bird watching or pottery) can discriminate on the basis of any protected attributes. There is no principled reason to allow such discrimination.

**ADLEG recommends that the exception for voluntary bodies be removed, with voluntary bodies which are dedicated to providing benefits to protected groups applying for an exemption from the ACT Human Rights Commission.**

If an exception remains, the terms of that exception should be narrowed to confine the exception to allow a voluntary body to discriminate in all aspects of membership (application for, enjoyment and termination of) on the basis of a protected attribute where the person does not hold the protected attribute and the voluntary body was established for the benefit of persons sharing that specific protected attribute There should be no limitation on the attributes that are captured by the exception.

The discussion paper queries the second limb of LRAC's recommendation that if the exception is retained, it be redrafted to permit a voluntary body to discriminate in the provision of goods and services on the basis of membership of the voluntary body. The discussion paper suggests that such an exception is not required because 'membership' is not a protected attribute. While 'membership' is not a protected attribute, ADLEG agrees with the approach suggested by LRAC to ensure that the provision is clear that an indirect discrimination claim cannot be made where goods and services are provided by voluntary bodies to their members and not to non-members, particularly where membership is dependent on an individual having a protected attribute.

## Exceptions for licensed clubs

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

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

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

Consideration could usefully be given to adopting a different definition of 'club' to ensure that it encompasses all forms of incorporated or unincorporated bodies. The inclusion of the qualification that a club is one that holds a liquor licence appears to have no continuing rational basis. It reflects the definitions found in earlier discrimination laws.

In 2014, a similar definition of 'club' found in the ADA (Tas) was repealed and replaced with the following:

> ***club*** means an incorporated or unincorporated association of at least 30 persons associated together for a lawful purpose that provides and maintains its facilities, wholly or partly, from the funds of the association;

**ADLEG recommends the removal of exceptions for clubs while permitting any organisation to adopt special measures.**

**ADLEG recommends the definition of club be amended to remove the qualification that a club is an entity that holds a liquor licence.**

## Exceptions relating to work

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

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

The original report highlighted the fact that if an employer believes that a particular skill or characteristic, including attribute-based characteristics, is a bona fide occupational requirement, then that should not be dealt with as an exception or defence, given that knowledge is available at the time the job is created and recruited to. The approach suggested by both the Women's Legal Centre (ACT and Region) and the ACT Human Rights Commission of using the exemption mechanism better reflects this characterisation and provides both certainty for employers and rewards employers who are pro-active in ensuring they have identified such requirements in advance. This approach has, to some extent been incorporated into the *Anti-Discrimination Act 1998* (Tas) with section 64 of the Act expressly providing that the Commissioner may reject a complaint if '… the complaint relates to conduct that is within the scope of an exemption granted under Division 11 of Part 5'. This can also be the basis of complaint dismissal under section 71(1)(a).

If a genuine occupational requirements test or inherent requirements test is to be retained, the defence(s) should make clear that the respondent seeking to rely on that defence must demonstrate that these requirements were identified prior to the alleged discrimination arising and that the capacity of the complainant to meet the requirements was tested and found wanting prior to the alleged discriminatory decision or action. This approach is consistent with an understanding that discriminatory attitudes (whether conscious or otherwise) are a significant factor in discriminatory decision-making and a respondent should not be able to reverse-engineer the situation to fit this defence. The achievement of the objects of the Discrimination Act as set out in section 4 will be undermined if a respondent is permitted to provide an ex post facto justification for prejudice-based decisions or actions.

**ADLEG recommends that exceptions relating to genuine occupational requirements or inherent requirements be removed and replaced with a specific mechanism for the granting of an employment-based exemption in respect of one or more attributes.**

The same approach should be applied across the board. It is incoherent that for some people, particularly people with disability, the employer has a specific 'inherent requirements' defence available, but not in respect of other attributes. While the defence may be rarely o never argued in respect of some attributes, the principled approach is to not imply–by singling them out for a special defence–that people with disability may be less capable of fulfilling requirements than people with other attributes.

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

*For example, such a duty might require an employer to permit an employee to vary their working hours because of family responsibilities, provided that the employee could still perform all essential work.*

The Discrimination Act does not expressly include within the meaning of discrimination or other unlawful conduct a failure to make an adjustment necessary for a person with disability or otherwise to comply with a condition or requirement. It does however, within the meaning of discrimination in section 8(5), identify that, in testing the reasonableness of a condition or requirement, consideration is to be given to 'the feasibility of overcoming or mitigating the disadvantage'. To avoid any uncertainty ADLEG supports the inclusion of a positive obligation to make reasonable adjustments for persons with impairment. ADLEG notes the decision of the Full Federal Court in *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128 (16 August 2017) ('the Sklavos case') and its interpretation of the positive duty found in sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth) (DDA). ADLEG is, along with key disability and human rights groups, seeking amendment to the DDA to address that interpretation, which limits the scope of the protection to situations where the reason for refusing to make an adjustment is the person's disability.

**ADLEG recommends the positive obligation to make adjustments be a stand-alone obligation that, in and of itself, can found a claim of unlawful discrimination.**

In respect of the DDA, the proposed amendment is to add a new section 6A. Using the proposed framing of that new section, ADLEG recommends that the Discrimination Act include the following stand-alone positive duty:

**A Discrimination by failing to provide reasonable adjustments**

(1) For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an impairment of the aggrieved person if:

(a) because of the impairment, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the impairment of the aggrieved person.

(2) For the purpose of this Act, an adjustment to be made by a person is a reasonable adjustment, unless making the adjustment would impose an unjustifiable hardship on the person.

**ADLEG recommends that there be a duty to make adjustments to accommodate the needs of people with disability.**

Having addressed the need for a positive stand-alone duty to make reasonable adjustments in respect of disability, ADLEG recommends that consideration be given to establishing a broader obligation to make adjustments to accommodate needs that arise because of any protected attribute under the Discrimination Act. An example of this approach is found in section 24 of the *Anti-Discrimination Act 1992* (NT) (ADA (NT)). One potential benefit of extending the obligation is that it allows an effective process to be embedded broadly into processes and practices of organisations that will, over time, help organisations to identify systemic barriers being experienced by people with particular attributes or different attributes. So, for example, flexibility around starting and finishing times for work are an adjustment commonly made by employers to enable people with parental responsibilities or other caring responsibilities to meet those responsibilities while maintaining full-time employment. Flexible work hours do not, however, only benefit these groups. They may also benefit people with disability who, for example, may need to get to work later because they continue to face barriers to accessing public transport, or because they require personal care support in order to prepare for work and have limited control over the time that the care support is available, or because of effects on medication on alertness in the morning.

Another benefit is that such an obligation would normalise the process of asking for adjustments. At present, it is common to hear of situations where people with disability are reluctant to identify they require an adjustment because of their disability. That reluctance arises from negative experiences of making such requests and a desire not to be seen as different and requiring additional expenditure.

**ADLEG recommends that there be a general duty to make adjustments to accommodate the needs of people based on their attributes.**

As such, ADLEG urges consideration be given to including the following provision, based on section 24 of the ADA (NT):

> **B Failure to accommodate need arising as a result of an attribute**
>
> (1) In addition to the obligations under section A [Discrimination by failing to provide reasonable adjustments for people with impairments], for the purposes of the Act a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an attribute if:
>
> (a) because of the attribute, the aggrieved person requires adjustments; and
>
> (b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.
>
> For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the attribute of the aggrieved person.
>
> (2) For the purposes of subsection (1):

(a) a failure or refusal to accommodate a need of another person includes making inadequate or inappropriate provision to accommodate the need; and

(b) a failure to accommodate a need takes place when a person acts in a way which unreasonably fails to provide for the need of another person if that other person has the need because of an attribute.

(3) Whether a person has unreasonably failed to provide for the need of another person depends on all the relevant circumstances of the case including, but not limited to:

(a) the nature of the need; and

(b) the cost of accommodating the need and the number of people who would benefit or be disadvantaged; and

(c) the financial circumstances of the person; and

(d) the disruption that accommodating the need may cause;

(e) the nature of any benefit or detriment to all persons concerned; and

(f) the important public purpose of eliminating discrimination.

Claims for positive obligations to avoid discriminating have arisen because of the relative ineffectiveness of discrimination laws, after nearly four decades, to substantially impact on the discrimination and inequality in society. One of the reasons for that ineffectiveness appears to be that the laws do not sufficiently impose a clear duty on those with power to prevent discrimination to bring about the social changes that are necessary. Hence the operation of case law to outline what cannot be done has been seen to be too limited a way to educate decisionmakers and co-workers about what conduct is unlawful. Another reason is that the burden of enforcement has been placed on those least able to enforce it: individuals in the groups targeted by discrimination and harassment, who tend to have fewer resources and face more difficulties and barriers in all areas of activity than people who are not in those groups.[8] As a result they tend to have less resources, both financial and social, and there are generally no or very limited resources available to assist them to litigate and protect their rights.

If a positive obligation is tied only to the prohibitions in the Act, then the same limitations will occur, especially through reliance on those affected by discrimination to enforce the law. The case law already supplies a negative duty not to act in discriminatory ways, but that has not brought about the change needed. Adopting a positive duty that is linked only to the prohibitions in the law is not likely to be a great deal more effective. Instead, it is becoming clear that adopting a stand-alone positive duty to take active preventative steps in advance of discrimination occurring is the only clear way to reduce or eliminate discrimination. This places the burden of change on those with both the power to make change and the responsibility to

[8] Law Council of Australia, *The Justice Project: Final Report – Introduction and Overview* (2018) <https://www.lawcouncil.asn.au/justice-project>.

ensure it occurs, rather than on those who are most harmed by discrimination. While there are many issues to be resolved in adopting an effective positive duty to avoid discrimination arising, ADLEG strongly advocates for that as the only effective preventive approach. Similarly to approaches to workplace health and safety, the duty must be placed on those with the power and authority to make change.

What matters should be included in the Act to determine whether adjustments are 'reasonable' or will impose 'unjustifiable hardship'?

It is important to understand the concept of a 'reasonable adjustment' refers to adjustment that does not impose an unjustifiable hardship and that is a 'necessary and appropriate modification and adjustment' to the system in place, 'needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. To be consistent with the general principles set out in article 3 of the *Convention on the Rights of Persons with Disability*, the process of determining that appropriate adjustment must necessarily involve the person with disability at the centre of the process. As such, an adjustment that was determined without giving significant weight to the view of the person with disability would not be a reasonable adjustment.

ADLEG notes the summary of the concept of "reasonable adjustment" in disability discrimination presented to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('the Disability Royal Commission') by Senior Counsel assisting, Kate Eastman SC:

> ... the adjective 'reasonable' is completely irrelevant in terms of the way the law is applied in Australia in the DDA. So a reasonable adjustment is any adjustment that does not impose unjustifiable hardship on the employer. It's got nothing to do with the reasonableness of the way somebody might behave, the way somebody might act, or whether an employer thinks what they have done is reasonable.

Disability Royal Commission Chair Ronald Sackville QC noted concern about the continuing confusion about 'reasonable' in terms of adjustments or accommodations, stating:

> … under the Act, 'an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person'.

Arguably, the provisions in discrimination laws dealing with these adjustments could useful exclude the word 'reasonable' and simply refer to the obligation to make those adjustments needed in a particular case, to ensure to persons with disabilities do not experience discrimination of any kind in the circumstance, and that the obligation must be fulfilled up to the point of unjustifiable hardship. That is the fact that fully adjusting, or adopting one form of adjustment would impose an unjustifiable hardship should not preclude a different or modified adjustment being made where it would not impose unjustifiable hardship and would go as far as possible to achieving a non-discriminatory arrangements.

In considering unjustifiable hardship, the first appropriate point of reference is section 11 of the DDA. This provision quite properly places the burden of establishing unjustifiable hardship on the party seeking to rely on this. There are several proposed modifications to this provision. The first would be to ensure that it is clear on the face of the provision that the person claiming unjustifiable hardship needs to provide evidence of efforts taken to identify and secure funding to assist with any financial costs of making the adjustment. The second is that the party claiming unjustifiable hardship should demonstrate that consideration was given to alternative adjustments short of unjustifiable hardship that would reduce the discriminatory effect of the current arrangements. The third is that it must be shown that the question of unjustifiable hardship was considered at the time of the discriminatory conduct, not at a later time. That is, what is at issue is whether a person or entity could, at the relevant time, have taken steps to avoid the discriminatory conduct. Finally, in considering benefits, the provision should make it clear that there is an overarching benefit of reducing or removing discrimination.

**ADLEG recommends that the Discrimination Act specify that an adjustment is a reasonable adjustment if it is needed to ensure a person or persons with disability do not experience discrimination and it does not impose unjustifiable hardship at the time of the alleged discrimination ('the relevant time') on the person required to make the adjustment.**

**ADLEG recommends that the Discrimination Act separately define unjustifiable hardship based on section 11 of the DDA but modified to ensure the person claiming unjustifiable hardship must provide evidence of: (a) efforts made at the relevant time to identify and secure funding or other assistance to meet the obligation to make the adjustment; and (b) what alternatives were considered to ensure the implementation of the least discriminatory outcome available without imposing unjustifiable hardship, and to ensure that the overarching benefit, consistent with the objects of discrimination law, of reducing or removing discrimination is given sufficient weight.**

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

**ADLEG recommends the duty to accommodate apply to all people and organisations with obligations not to discriminate.**

While for some attribute groups, employment is consistently the area of life that is the dominant area of complaint, for others (such as people with disability) a high proportion of complaints relate to the provision of goods, services and facilities. There is no apparently rational basis for limiting the obligation to employers.

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

**ADLEG** endorses the discussion in the Discussion Paper in this regard and, as such, **recommends the removal of the provision allowing jobs to be declared in regulations as having genuine occupational qualifications.**

## Exceptions for employing workers in private homes

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

Discrimination law often creates an artificial divide between the private sphere (the home, where discrimination is not regulated or prohibited) and the public sphere (where discrimination is prohibited).[9]

Excluding work done in private homes from the scope of discrimination law particularly disadvantages women, who perform the bulk of this work. The International Labour Organization estimates that Australia had 3,800 domestic workers in 2010, 3,600 of which were women. These estimates likely significantly understate the number of domestic workers in Australia: the 2016 Census of Population and Housing recorded roughly 36,567 domestic cleaners in Australia (8,522 men and 28,047 women); and 31,822 housekeepers (5,033 men and 26,790 women). When added to other occupations that are likely to constitute 'domestic duties' and occur in a residential setting (such as carers and aides, child carers, personal carers and assistants, age and disabled carers, nursing support, and personal care workers), there could be anywhere up to 432,501 domestic workers in Australia, with over 84% women.[10] Thus, the exclusion of people hiring workers to perform domestic duties or provide childcare in private homes from discrimination law is highly gendered and itself discriminatory.

Domestic workers experience a myriad of problems at work, including undervaluing of their labour, failure to comply with existing agreements for work, income insecurity and a risk of unfair dismissal. It is problematic to also exclude domestic workers from the protection afforded by discrimination law.

These exceptions are also inconsistent with the International Labour Organization's Convention (No 189) *Concerning Decent Work for Domestic Workers* — not yet ratified by Australia — which requires members to take measures 'to respect, promote and realize the fundamental principles and rights at work' for domestic workers, including 'the elimination of discrimination in respect of employment and occupation', by 'extending or adapting existing measures to cover domestic workers'.

There is no such exception for domestic work or domestic child care in the UK *Equality Act 2010*.

**ADLEG recommends that the exception for domestic work or domestic child care be removed.**

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9 Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act' (2010) 23 *Australian Journal of Labour Law* 240, 241.

10 Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085

## Exceptions for insurance and superannuation companies

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

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

The exceptions for insurance and superannuation providers should be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors. An example of such an exception is found in section 34 of the *Anti-Discrimination Act 1998* (Tas) (the ADA (Tas)):[11]

> (1) A person may discriminate against another person on the ground of age in the provision of services relating to any annuity, insurance, loans, credit or finance if the discrimination –
>
> (a) is based on actuarial, statistical or other data from a reliable source; and
>
> (b) is reasonable having regard to that data and any other relevant factors.
>
> (2) Sub-section (1) only applies if a person discloses to the Tribunal, when required to do so
>
> (a) the sources on which the data are based; and
>
> (b) the relevant factors on which the discrimination is based.

For insurers and superannuation providers to rely on such exceptions, they must base the decision to discriminate upon reasonable and reliable data. The use of the expression 'is based on' indicates that such data must exist and the insurer must use it in making its decision to discriminate. The decision of the Federal Court on appeal in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 provides guidance on how this requirement is to be interpreted.[12] The Federal Court in that case was considering section 46(1)(f) of the DDA which is similarly worded to section 34 of the ADA (Tas). The court interpreted the words 'based upon actuarial or statistical data' to mean 'that the discriminator actually based its decision upon certain actuarial or statistical data'.[13] Other cases provide useful judicial guidance as to what actuarial, statistical or other data can be used to justify discrimination in the provision of insurance services. Such guidance could usefully be included in either the text of the exception provision or in notes to that provision. This judicial material indicates that the data:

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11 Similarly worded exceptions are found in the ADA (Tas) in respect of gender, marital status and relationships status: section 30; superannuation and age: section 33; and disability: section 44.

12 *QBE Travel Insurance v Bassanelli* [2004] FCA 396 (7 April 2004) [30].

13 Ibid.

- must be contemporarily relevant;[14]
- must state that the condition of the person seeking insurance is an unacceptable risk;[15] and
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas and an explanation as to why there is no Australian data upon which to rely.[16]

**ADLEG recommends that the Discrimination Act exceptions for superannuation and insurance be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors.**

**ADLEG recommends that guidance be included in the provision or as a note to the provision on what actuarial and statistical data can be used.**

**ADLEG recommends that the Discrimination Act provision go further in requiring the providers of insurance and superannuation to provide consumers with the data on which decisions about them are based and a meaningful explanation of that data.** This has the positive potential to ensure that potential complainants can get advice on the prospects of success of the respondent if it relies on such data. In doing so, it may prevent unnecessary complaints and will ensure that the evidence relied on in the defence is available at an early stage and cannot be used to ambush the complainant.

14 *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [17].

15 *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23 (24 November 1998).

16 Ibid.

## Positive duty to eliminate discrimination

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

Yes. Positive equality duties are a 'fourth generation' of equality law that seek to encourage proactive and preventative approaches to achieving equality. Positive duties represent a 'radical strategy for tackling deep-seated discrimination' that could revolutionise 'the whole landscape of discrimination law', integrating equality into organisational decision-making and processes.

The Australian Human Rights Commission's *Respect@Work Report* found that the key benefit of a positive duty would be to shift the burden of enforcement off individuals, and onto employers, requiring them to take proactive and preventative action to address sexual harassment at work. Positive duties are ongoing (not complaints-based) and proactive (not reactive). The Report therefore recommended that the *Sex Discrimination Act 1984* (Cth) be amended to introduce a positive duty for all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible (Recommendation 17). This should also extend to the law in the ACT.

**ADLEG recommends the adoption of positive duties across all attributes.**

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

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

The duty should apply to both the public and private sector, though the requirements might be modified for private sector organisations in the short term, and to reflect the different sizes and resources of organisations.

A positive duty is already in place in Victoria for both the public and private sector: those who have a duty not to discriminate under the *Equal Opportunity Act 2010* (Vic) (including employers) 'must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.' What is 'reasonable and proportionate' depends on:

- the size of the business;
- the nature and circumstances of the business;
- available resources;
- business and operational priorities; and
- practicability and the cost of the measures.

This accommodates the different sizes and resources of organisations.

The *Victorian Gender Equality Act 2020* (Vic) imposes further duties to promote gender equality on public sector organisations, requiring them to:

a. consider and promote gender equality; and

b. take necessary and proportionate action towards achieving gender equality in developing policies and programs and delivering public services.

**ADLEG recommends that the ACT adopt a positive duty similar to that in the *Gender Equality Act 2020* (Vic), but which applies to all grounds.**

To be effective, positive duties need to be supported by four interlocking mechanisms: self-regulation by organisations; consultation and engagement; central scrutiny; and individual enforcement.[17] Positive duties should:

- apply to both the public and private sectors in their role as employers;
- require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity;
- require consultation and engagement, and include general principles for how engagement processes should be conducted;
- be enforceable by a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws;
- give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.[18]

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

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

The Victorian Commissioner for Gender Equality in the Public Sector (CGEPS) offers a useful model for how organisations might be supported to meet the positive duty. The CGEPS has produced written guidance and templates, undertaken significant outreach and conducted extensive training sessions for those subject to the new Victorian positive duty.

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

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17 Alysia Blackham, *Addressing Age Discrimination in Employment: A report on the findings of Australian Research Council Project DE170100228* (Research Report, University of Melbourne, November 2021) <https://doi.org/10.46580/124368>

18 Ibid.

**ADLEG supports the statutory framework enabling and requiring the Human Rights Commission to play a greater role in monitoring and dealing with non-compliance and supporting duty holders with implementation.**

The Human Rights Commission should be given functions and powers to:

- receive and conciliate complaints relating to positive duties;
- escalate enforcement in the event of non-compliance (like those held by the FWO), such as by issuing compliance notices and entering into enforceable undertakings;
- assist individual complainants; and
- have standing to bring complaints on behalf of individuals for failing to comply with the positive duty.

Such requirements in the statutory framework need to be reflected in the resourcing levels of the Human Rights Commission and its structure, to ensure the Human Rights Commission has dedicated and sufficient capacity to undertake this work.

## Other matters

*Burden of proof*

ADLEG notes that the provisions of the Discrimination Act and the related complaint provisions of the *Human Rights Act Commission 2005* (ACT) (HRCA) do not clearly specify that the burden to demonstrate reasonableness of a condition or requirement falls on the respondent to a complaint. The current rebuttable presumption found in section 53CA of the HRCA retains a high burden on the complainant, and fails to provide that the respondent to a complaint establish on the balance of probabilities the reasonableness of any requirement or condition. Indeed section 53CA(2)(b) set a high evidentiary burden on the complainant and should be reviewed to ensure that it is sufficient for the complainant to establish that the condition or requirement has, or is likely to have an effect of, disadvantaging them and this is linked to their attribute or a characteristic they have related to their attribute.

**ADLEG recommends that the *Human Rights Act Commission 2005* (ACT) be amended to specify that the respondent to a complaint of indirect discrimination has the burden of proving the reasonableness of any condition or requirement imposed.**

ADLEG also notes the original recommendation 25.2 of the LRAC review specified that the Act should be based on the principle that 'once a complainant has established that they have been treated unfavourably, a respondent should be required to show that the protected attribute or attributes alleged by the complainant were not the reasons for that treatment'. Unfortunately this is not the approach that is found in the HRCA, with the provision requiring the complainant to present evidence that the unfavourable treatment or disadvantage they experience is because of their attitude. This is in direct contrast to the principle espoused in the review.

**ADLEG recommends that the principle set out in recommendation 25.2 be implemented in respect of both direct and indirect discrimination.**

*Language of 'exceptions'*

In considering the approach to exceptions in discrimination law, there are two aspects that ADLEG urges be given consideration. The use of the language of 'exceptions' and 'exemptions' in discrimination law in Australia adds to confusion about what is permitted and what is a valid defence to a claim of discrimination. Reforms to the Discrimination Act could begin the work of making these distinctions clearer with 'exceptions' being renamed as 'defences'. It is also important that a lay person (including an organisation with obligations under the Act) understand what the 'exceptions' mean in terms of a claim of discrimination. Usefully, some legislation in Australia, for example, the ADA (Tas) includes a provision that specifies the onus of proof in respect of exceptions. Unfortunately that provision is not found in the part of the Act that deals with exceptions but much later in the Act.

**ADLEG recommends that the Discrimination Act be amended to use the term 'defences' rather than 'exceptions', that it frame the provisions on the basis that 'it is a defence to a**

**complaint of …', and include, as the first provision of Part 4 setting out the defences, a provision that states:**

**C. Proof of defences**

A defence referred to in this Part is a defence to a complaint, and the person who relies on a defence must prove it on the balance of probabilities.