

Review of the Anti-Discrimination Act 1977 (NSW)

Unlawful conduct

24

CONSULTATION
PAPER

May 2025

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Acknowledgement of Country

The NSW Law Reform Commission acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that have contributed to this review.

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the NSW Law Reform Commission is asked to review and report on the *Anti-Discrimination Act 1977* (NSW) (ADA).

In undertaking this review, the Commission is to consider matters including, but not limited to:

1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards
2. whether the range of attributes protected against discrimination requires reform
3. whether the areas of public life in which discrimination is unlawful should be reformed
4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination
5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law
6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes
7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life
8. exceptions, special measures and exemption processes
9. the adequacy and accessibility of complaints procedures and remedies
10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination
11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws
12. the interaction between the Act and Commonwealth anti-discrimination laws
13. any other matters the Commission considers relevant to these Terms of Reference.

[Dated 19 June 2023]

Questions

3. Tests for discrimination

Question 3.1: Direct discrimination

Could the test for direct discrimination be improved or simplified? If so, how?

Question 3.2: The comparative disproportionate impact test

Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

Question 3.3 Indirect discrimination and inability to comply

What are your views on the “not able to comply” part of the indirect discrimination test? Should this part of the test be removed? Why or why not?

Question 3.4: Indirect discrimination and the reasonableness standard

- (1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?
- (2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

Question 3.5: Indirect discrimination based on a characteristic

Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?

Question 3.6: Proving indirect discrimination

- (1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?
- (2) Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

Question 3.7: Direct and indirect discrimination

- (1) How should the relationship between different types of discrimination be recognised?
- (2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

Question 3.8: Intersectional discrimination

- (1) Should the ADA protect against intersectional discrimination? Why or why not?
- (2) If so, how should this be achieved?

Question 3.9: Intended future discrimination

Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

4. Discrimination: protected attributes

Question 4.1: Age discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “age”?
- (2) What changes, if any, should be made to the age-related exceptions?

Question 4.2: Discrimination based on carer’s responsibilities

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “responsibilities as a carer”?
- (2) Should the ADA separately protect against discrimination based on someone’s status of being, or not being, a parent?

Question 4.3 Disability discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “disability”?
- (2) Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability?
- (3) What changes, if any, should be made to the public health exception?

Question 4.4: Discrimination based on homosexuality

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “homosexuality”?

Question 4.5: Discrimination based on marital or domestic status

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “marital or domestic status”?

Question 4.6: Racial discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “race”?
- (2) Are any new attributes required to address potential gaps in the ADA’s protections against racial discrimination?

Question 4.7: Sex discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “sex”?
- (2) Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?

Question 4.8: Discrimination on transgender grounds

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “transgender grounds”?

Question 4.9: Extending existing protections

- (1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?
- (2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

5. Discrimination: potential new protected attributes

Question 5.1: Guiding principles

What principles should guide decisions about what, if any, new attributes should be added to the ADA?

Question 5.2: Potential new attributes

- (1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why?
- (2) How should each of the new attributes that you have identified above be defined and expressed?
- (3) If any of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?

Question 5.3: An open-ended list

Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

6. Discrimination: Areas of public life

Question 6.1: Discrimination at work — coverage

- (1) Should the definition of employment include voluntary workers? Why or why not?
- (2) Should the ADA adopt a broader approach to discrimination in work, like the way the *Sex Discrimination Act 1984* (Cth) approaches harassment? Why or why not?
- (3) Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not?

Question 6.2: Discrimination in work — exceptions

What changes, if any, should be made to the exceptions to discrimination in work?

Question 6.3: Discrimination in education

- (1) What changes, if any, should be made to the definition and coverage of the protected area of “education”?
- (2) What changes, if any, should be made to the exceptions relating to:
 - (a) single-sex educational institutions, and
 - (b) disability and age discrimination in educational institutions?

Question 6.4: The provision of goods and services — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “the provision of goods and services”?

Question 6.5: Superannuation services and insurance exceptions

What changes, if any, should be made to the exceptions applying to insurance and superannuation?

Question 6.6: The provision of goods and services — exceptions

What changes, if any, should be made to the exceptions to sex, age and disability discrimination in relation to the provision of goods and services?

Question 6.7: Discrimination in accommodation — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “accommodation”?

Question 6.8: Discrimination in accommodation — exceptions

What changes, if any, should be made to the exceptions for private households, age-based accommodation and charitable bodies in relation to discrimination in accommodation?

Question 6.9: Discrimination by registered clubs — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “registered clubs”?

Question 6.10: Discrimination by registered clubs — exceptions

What changes, if any, should be made to the exceptions for registered clubs in relation to sex, race, age and disability discrimination?

Question 6.11: Discrimination based on carer’s responsibilities

- (1) Should discrimination based on carer’s responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why?
- (2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?

Question 6.12: Additional areas of public life

- (1) Should the ADA apply generally “in any area of public life”? Why or why not?
- (2) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

7. Wider exceptions

Question 7.1: Religious personnel exceptions

- (1) Should the ADA provide exceptions for:
 - (a) the training and appointment of members of religious orders?
 - (b) “the appointment of any other person in any capacity by a body established to propagate religion”?
- (2) If so, what should these exceptions cover and when should they apply?

Question 7.2: Other acts and practices of religious bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

Question 7.3: Exceptions for other forms of unlawful conduct

Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?

Question 7.4: Exceptions for providers of adoption services

Should the ADA have a specific exception for providers of adoption services? If so, what should it cover and when should it apply?

Question 7.5: Private educational authorities employment exceptions

- (1) Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?
- (2) If you think the Act should provide exceptions in this area:
 - (a) what attributes should the exceptions apply to?
 - (b) what requirements, if any, should duty holders meet before an exception applies?

Question 7.6: Discrimination against students and prospective students

- (1) Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?
- (2) If you think it is necessary for the ADA to provide exceptions in this area:
 - (a) what attributes should the exceptions apply to?
 - (b) should they apply to prospective students, existing students, or both?
 - (c) what requirements, if any, should duty holders meet before an exception applies?

Question 7.7: Exceptions relating to sport

Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?

Question 7.8: The charities exception

Should the ADA provide exceptions relating to charitable benefits? If so, what should they cover and when should they apply?

Question 7.9: Voluntary bodies exception

Should the ADA provide an exception for voluntary bodies? If so, what should it cover and when should it apply?

Question 7.10: Aged care accommodation providers exception

Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

Question 7.11: The statutory authorities exception

Should the ADA provide an exception for acts done under statutory authority? If so, what should it cover and when should it apply?

8. Civil protections against vilification

Question 8.1: Protected attributes

- (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?
- (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

Question 8.2: The test for vilification

- (1) Should NSW adopt a “harm-based” test for civil vilification? If so, should this replace or supplement the existing “incitement-based” test?
- (2) What, if any, other changes should be made to the incitement-based test for civil vilification?

Question 8.3: The definition of “public act”

What changes, if any, should be made to the definition of “public act” in the test for vilification in the ADA?

Question 8.4: Exceptions

What changes, if any, should be made to the exceptions to the vilification protections in the ADA?

Question 8.5: Religious vilification

What changes, if any, should be made to the protection against religious vilification in the ADA?

9. Harassment

Question 9.1: The definition of sexual harassment

- (1) Should the reasonable person test be expanded to include the “possibility” of offence, intimidation or humiliation? Why or why not?
- (2) Should the ADA expressly require consideration of an individual’s attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?
- (3) Does the ADA need to define “conduct of a sexual nature”? Why or why not?

Question 9.2: Other sex-based conduct

- (1) Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?
- (2) Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?
- (3) Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?

Question 9.3: Sexual harassment in the workplace

Should the ADA adopt the *Sex Discrimination Act*’s approach of prohibiting sexual harassment in connection with someone’s status as a worker or person conducting a business or undertaking? Why or why not?

Question 9.4: Workplace-related laws regulating sexual harassment

- (1) Are workplace-related sexual harassment laws and the ADA currently working well together, in terms of the definitions of sexual harassment?
- (2) Should the ADA and workplace-related sexual harassment laws be more aligned?

Question 9.5: Expanding the areas of life where sexual harassment is prohibited

- (1) Should the ADA continue to limit the areas of life where sexual harassment is unlawful? Why or why not?
- (2) Should sexual harassment be unlawful in other areas of life? For example:
 - (a) areas of life that are protected from discrimination
 - (b) all areas of public life, or
 - (c) any area of life, public or private?

Question 9.6: The private accommodation exception

Should sexual harassment be prohibited in private accommodation? Why or why not? If an exception for private accommodation is required, how wide should it be?

Question 9.7: Attribute-based harassment

If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

10. Other unlawful acts and liability

Question 10.1: Victimisation

- (1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?
- (2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

Question 10.2: Advertisements

Should it be a defence to publishing an unlawful advertisement that the person reasonably believed publication was not unlawful? Why or why not?

Question 10.3: The forms of liability

What, if any, concerns or issues are raised by the ADA's approach to the various forms of liability?

Question 10.4: The exceptions for liability

Should the ADA continue to provide two exceptions to vicarious liability (that is, the “reasonable steps” and “unauthorised acts” exceptions)? Or is a single “reasonable steps” exception sufficient?

Question 10.5: Liability and artificial intelligence

Does the use of AI challenge the ADA’s approach to liability? If so, how could the ADA be amended to address this?

11. Promoting substantive equality

Question 11.1: Adjustments

- (1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?
- (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?
- (3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

Question 11.2: Special measures

- (1) Should the ADA generally allow for special measures? Why or why not?
- (2) If so, what criteria for a special measure should the ADA apply?
- (3) If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

Question 11.3: A positive duty to prevent or eliminate unlawful conduct

- (1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?
- (2) If so:
 - (a) What should duty holders be required to do to comply with the duty?
 - (b) What types of unlawful conduct should the duty cover?
 - (c) Who should the duty holders be?
 - (d) What attributes and areas should the duty apply to?

1. Introduction

In brief

This is the first of two consultation papers in which we will invite you to share your views on the *Anti-Discrimination Act 1977 (NSW) (ADA)*. In this paper, we consider issues relating to the tests for discrimination, who is protected, the areas in which discrimination is prohibited and exceptions. We also consider harassment, civil vilification and other unlawful acts, as well as liability and measures to promote substantive equality. We ask if any of these aspects of the ADA should change and, if so, how.

Content warning: This consultation paper deals with content that some people may find distressing. This includes discrimination, sexual harassment, and vilification (including hate speech). We also refer to concepts and language used in the ADA that can be offensive or upsetting. The [ADA project page](#) on our website lists some free services you can contact if you need support.

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- 1.1 The NSW Attorney General has asked us to review the *Anti-Discrimination Act 1977 (NSW) (ADA)*. Among other things, we have been asked to consider whether the ADA “could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards”.¹
- 1.2 This is the first of two consultation papers that we will release in this review. In this consultation paper, we focus on the conduct that is (or should be) unlawful under the ADA. In summary, we seek your views on:

1. The terms of reference for this review are set out at page ix of this consultation paper.

- the types of acts and conduct that should be prohibited, and the circumstances in which the prohibitions should apply
 - the people and groups who should be entitled to the ADA’s protections
 - the people and organisations who should be held responsible for unlawful conduct, and when (if ever) their actions should be exempt from the ADA, and
 - whether the ADA should do more to promote substantive equality.
- 1.3 Our second consultation paper will consider the procedural aspects of the ADA, including complaint pathways, enforcement options, remedies and options for preventing unlawful conduct.

Background to this review

- 1.4 The ADA was groundbreaking when it was enacted almost 50 years ago. As the first broad discrimination Act in Australia, it prohibited discrimination based on race, sex and marital status. When the legislation was introduced into the NSW Parliament, the Premier said “I am confident that this legislation is the most enlightened, and will be the most effective, legislation in this field in Australia”.²
- 1.5 Much has changed in NSW since 1977. By the 1990s, there were concerns that the ADA had not stood the test of time. This led to the NSW Government asking the NSW Law Reform Commission (NSWLRC) to review the ADA in 1991. As the NSWLRC explained in its final report:
- The legislation as it currently exists tends to reflect the political and social climate at the time of its enactment. Although the ADA has been amended several times to reflect changing community values, these amendments have been piecemeal. ... Taking into account the length of time that has elapsed since the introduction of the ADA, and the law’s inability to deal once and for all with constantly evolving social, political and legal conditions, it is appropriate that there be a comprehensive review of the legislation.³
- 1.6 Our predecessors’ 8-year review of the ADA was indeed comprehensive. The NSWLRC’s 1999 report made 161 recommendations and contained a Draft Anti-Discrimination Bill. While some recommendations were implemented, most were not.
- 1.7 In the years since 1999, there have been many changes to discrimination laws across Australia. Other states and territories have reviewed their discrimination laws. Some of these reviews have led to significant legislative reform. There have

2. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 November 1976, 3347.

3. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [1.9].

been developments in employment law and reviews of discrimination laws at the federal level too.⁴

- 1.8 In 2021, there were renewed calls by community and legal groups for a comprehensive review of the ADA.⁵ In announcing this review in 2023, the NSW Attorney General recognised that:

There have been monumental shifts in society, demographics and attitudes since the Act came into force nearly half a century ago. ... It is essential to conduct reviews of this nature to ensure our laws represent who we are today as a community.⁶

- 1.9 It could still be said, as the NSWLRC did in 1999, that many aspects of the ADA continue to “reflect the political and social climate at the time of its enactment”. In addition to concerns about its substantive content, many believe the ADA uses outdated and offensive language, and its style and structure is difficult for the community to navigate.
- 1.10 Our role in this review is to examine the ADA thoroughly and, where necessary, make recommendations to ensure that this law serves our community effectively.

Our process so far

- 1.11 We received the terms of reference for this review in June 2023. Since that time, we have conducted significant research into the operation of the ADA and into discrimination laws elsewhere.
- 1.12 We called for preliminary submissions on 20 July 2023. We received 98 preliminary submissions, many of which are available on our website. Appendix A to this consultation paper contains a list of the preliminary submissions we received. They were immensely helpful in identifying the key issues of community concern, as well as areas for further research and consideration.

4. For an overview, see Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 46–49. More recent reviews include Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022); Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023); Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2024).

5. Public Interest Advocacy Centre, *Leader to Laggard: The Case for Modernising the NSW Anti-Discrimination Act* (2021); Public Interest Advocacy Centre and others, Open Letter to the NSW Attorney General, 5 August 2021.

6. NSW Government, “NSW Government Commissions Review of Anti-Discrimination Law” (Media Release, Attorney General, 20 July 2023).

- 1.13 We also conducted targeted preliminary consultations with agencies and academics to help clarify issues about the operation of the ADA. Appendix B contains a list of these preliminary consultations.
- 1.14 From February to September 2024, we completed a separate review into the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) in addressing religious and racial vilification. Our report on this review was tabled in Parliament and released on 21 November 2024.⁷
- 1.15 We received 69 submissions during that review, and we consulted a wide range of individuals and groups. This included judicial officers, bodies that represent the legal profession, community legal centres, police and prosecutors, academic experts, groups representing Aboriginal people, religious groups, multicultural groups, and groups advocating on behalf of members of LGBTQIA+ communities and people living with HIV/AIDS.
- 1.16 While the s 93Z review was limited to examining serious racial and religious vilification, submissions and consultations raised many related issues about the ADA. These included concerns about the ADA's civil vilification protections and the effectiveness of complaint mechanisms. The views expressed in those submissions and consultations have also assisted us in preparing this consultation paper.

About this consultation paper

- 1.17 This paper seeks your views on the ADA, focusing on the conduct that it prohibits. We provide information to explain the current law. We also set out some possible options for reform, drawn from our research and suggestions made in preliminary submissions.
- 1.18 We emphasise that these options and issues are presented in this consultation paper for the purpose of discussion only. We have not yet formed a position or developed any recommendations in this review.
- 1.19 Many of the options in this paper are informed by developments in discrimination law in other states, territories and at the federal level. These include reviews conducted by other law reform agencies. Many of these reviews led to legislative amendments that have reshaped discrimination laws elsewhere. We refer to these developments throughout this consultation paper.
- 1.20 In doing so, we recognise that the law in this area is changing rapidly. At the time of writing, for example, there is uncertainty about the future of recent discrimination

7. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024).

law reforms in the Northern Territory and Queensland.⁸ We acknowledge this in the consultation paper where relevant.

Chapter overview

1.21 In this consultation paper:

- **Chapter 2** outlines the background and context to the ADA
- **Chapter 3** sets out the tests for discrimination
- **Chapter 4** considers the attributes that are currently protected from discrimination
- **Chapter 5** considers other attributes that some say should also be protected from discrimination
- **Chapter 6** sets out the areas of public life in which discrimination is prohibited, some area-specific exceptions, and related issues
- **Chapter 7** considers the wider exceptions in the ADA, some of which apply across the whole Act
- **Chapter 8** focuses on the civil vilification protections in the ADA
- **Chapter 9** discusses the ADA’s prohibition on sexual harassment and whether other forms of harassment should also be prohibited
- **Chapter 10** considers other unlawful behaviours under the ADA (including victimisation) and how liability for unlawful behaviours works under the ADA
- **Chapter 11** sets out options for possible mechanisms to promote substantive equality, such as adjustments, special measures and positive duties to prevent discrimination and unlawful conduct
- **Appendix A** lists the preliminary submissions received
- **Appendix B** lists the preliminary consultations conducted

Accessible alternatives

1.22 On our website, we have published accessible alternatives to this consultation paper:

8. M Garrick, “NT’s CLP Government Confirms Plans to Scrap Labor’s Hate Speech Changes” (2 March 2025) *ABC News* <www.abc.net.au/news/2025-03-02/nt-anti-discrimination-hate-speech-laws-repealed/104991288> (retrieved 9 April 2025); D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 2 April 2024). On 30 April 2025, the Queensland Parliament passed amendments to delay the commencement to a date to be fixed by proclamation. However, as of 9 May 2025, this had yet to receive assent: Crime and Corruption (Restoring Reporting Powers) Amendment Bill 2025.

- a short community summary of this consultation paper, which outlines key issues in our review in simpler language, and
- an Easy Read consultation paper.⁹

How to have your say

- 1.23 We invite you to share your thoughts on the issues raised in this consultation paper. The diverse views, experiences, and perspectives of individuals and groups within our community are vital to this review.
- 1.24 If you would like to have your say, you can
- make a submission
 - complete our [online survey](#), or
 - answer the questions in our Easy Read consultation paper.
- 1.25 The due date for submissions, survey responses, and answers to our Easy Read questions is **15 August 2025**.
- 1.26 Submissions and Easy Read responses can be emailed to us at adareview@dcj.nsw.gov.au.

What to include in a submission

- 1.27 This consultation paper includes questions that can help guide your response to the issues raised.¹⁰
- 1.28 However, you do not need to answer all the questions. We also encourage you to raise other issues and options that we have not covered in this consultation paper.
- 1.29 For further information, please visit our web page on [how to make a submission](#).¹¹

You can email your submission to us

- 1.30 When emailing your submission to us, please let us know if you would like your submission to be kept confidential or anonymous. Our general policy is to publish the submissions we receive on our website, unless they are confidential or unsuitable for publication. We may also refer to them in our final report.

9. NSW Law Reform Commission, *Anti-Discrimination Act review* <<https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review.html>>.

10. A list of questions is available at page x of this consultation paper.

11. NSW Law Reform Commission, *How to make a submission* <lawreform.nsw.gov.au/contribute-to-law-reform/submission.html>.

- 1.31 You can find our [privacy and information management policy](#) on our website.¹²

You can complete our survey

- 1.32 Instead of making a submission, you may prefer to complete our [online survey](#). Our community summary of this consultation paper can help you complete the survey.
- 1.33 If you prefer, you can download the survey from our website in Word or PDF, and email your responses to adareview@dcj.nsw.gov.au. Please write “ADA Survey Response” as the subject.
- 1.34 Please tell us if you want your responses to remain confidential or anonymous.

Next steps

- 1.35 Once submissions on this first consultation paper have closed, we will release a second consultation paper. This will consider issues relating to the procedures for enforcing the ADA, such as complaint processes and other options for addressing unlawful conduct.
- 1.36 We will gather more input through submissions and consultations. We will continue to research and develop options for reform.
- 1.37 We will present our recommendations to the NSW Attorney General in a final report. Your input and our research will inform our recommendations.
- 1.38 The Attorney General must table the report in both Houses of Parliament within 14 sitting days of Parliament. Once that happens, we will publish the report on our website.
- 1.39 After that, it is up to the NSW Government to decide how to respond.
- 1.40 Our website has more [information on our process](#), including a short video that explains what we do.¹³

12. NSW Law Reform Commission, *Privacy and Information Management Policy* <lawreform.nsw.gov.au/about-us/policy-documents/privacy-information-management.html>.

13. NSW Law Reform Commission, *What We Do* <lawreform.nsw.gov.au/about-us/what-we-do.html>.

2. Background and context

In brief

This chapter situates our review of the *Anti-Discrimination Act 1977* (NSW) in the international and Australian legal context. It explains key concepts including the human rights to equality and non-discrimination, and the concepts of formal and substantive equality.

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- 2.1 In this consultation paper, we invite you to share your views on, and experiences with, the *Anti-Discrimination Act 1977* (NSW) (ADA). The various chapters explain the specific protections and exceptions in the ADA, compare them to discrimination laws and other related laws in force elsewhere, and set out some possible reform options. We also provide some questions that you may wish to respond to.
- 2.2 Before we address the specific substantive aspects of the ADA, this chapter sets the scene. We explain some foundational concepts relevant to the rights to equality and non-discrimination that underpin discrimination laws in Australia. We outline how the ADA approaches these concepts.
- 2.3 We also introduce the broader context of state, territory and federal laws that deal with discrimination, harassment and vilification. The ADA operates within a complex, intersecting system of laws. There are many gaps, overlaps and unresolved issues across this system.

An introduction to the ADA

- 2.4 The NSW Parliament enacted the ADA in 1977. The Act initially protected against direct discrimination based on race, sex and marital status.

- 2.5 The ADA has been amended over the years to protect people with other attributes, to cover other forms of conduct, and to expand the protections to additional areas. Today, it prohibits four main categories of conduct: discrimination, vilification, sexual harassment and victimisation. It defines who is entitled to be protected from such conduct and who can be held responsible for it.
- 2.6 The ADA also defines the specific circumstances, relationships and areas of life in which this conduct is unlawful. In general, discrimination law is concerned with how people are treated in the public sphere. The ADA does not apply to personal or family relationships or private interactions that occur, for example, at home.
- 2.7 However, the coverage is not consistent across the categories of unlawful conduct. While there is some overlap, each category protects different attributes and applies to different duty holders. There is also a complex web of exceptions — some apply to certain forms of conduct, others to certain areas or attributes, and some apply across the whole Act.
- 2.8 The ADA also provides for a system of complaint handling and dispute resolution. It sets out the roles and functions of the NSW Anti-Discrimination Board (now known as Anti-Discrimination NSW – or ADNSW for short). Among other things, a key function of ADNSW is to conciliate complaints under the ADA. If this is unsuccessful, complainants can apply to the NSW Civil and Administrative Tribunal.

Equality and non-discrimination

- 2.9 The rights to equality and non-discrimination are the foundation of discrimination law. From the 1970s, parliaments across Australia began to enact anti-discrimination and equal opportunity laws to give effect to Australia’s international human rights obligations in relation to these rights.¹
- 2.10 In this section, we outline the core treaties that articulate the rights to equality and non-discrimination. We also reflect on the way the ADA seeks to give effect to these rights and introduce some concepts that appear throughout this consultation paper.

1. An earlier South Australian Act provided more limited protection against racial discrimination in certain areas, including the provision of services, accommodation and employment: *Prohibition of Discrimination Act 1966 (SA)* s 3–8, repealed by *Racial Discrimination Act 1976 (SA)* s 2.

The international human rights context

- 2.11 Human rights are indivisible, interdependent and interrelated — the enjoyment of one human right is closely related to the enjoyment of others.² The rights to equality and non-discrimination are part of a wider array of such rights. They are among the “cornerstones” of the concept of human rights articulated in human rights treaties.³
- 2.12 Australia is party to seven core international human rights treaties. These treaties set out obligations for the States that have agreed to be bound by them.
- 2.13 The first of these treaties is the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). It requires States Parties to prohibit racial discrimination “by any persons, group or organization”.⁴
- 2.14 The ICERD defines “discrimination” as
- any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁵
- 2.15 The first federal discrimination law, the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*), uses this definition.⁶
- 2.16 Two other human rights treaties are the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*.
- 2.17 States Parties to these treaties must ensure the equal enjoyment of rights without discrimination of any kind. This includes discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷ This is known as the principle of non-discrimination.

2. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993) [5], endorsed by United Nations General Assembly, World Conference on Human Rights, GA Res 48/121, UNGAOR, UN Doc A/48/49 (20 December 1993) [5].

3. D Moeckli, *Human Rights and Non-Discrimination in the War on Terror* (Oxford University Press, 2008) 57.

4. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 2(d).

5. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 1(1).

6. *Racial Discrimination Act 1975* (Cth) s 9(1).

7. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

- 2.18 The ICCPR also contains a standalone right to equality before the law. This provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Parties to the ICCPR must prohibit, and guarantee effective protection against, discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁸
- 2.19 Another treaty focuses on sex discrimination — the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).⁹ It defines discrimination in similar terms as the ICERD.¹⁰ One of the objects of the federal *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*) is to give effect to aspects of CEDAW.¹¹
- 2.20 Two more recent treaties focus on the human rights of children, and people with disability.¹² The *Convention on the Rights of Persons with Disabilities* goes further than other treaties in addressing equality and non-discrimination. Like the ICCPR, it refers to the right to the “equal protection of the law”. But it also refers to the right to “equal benefit of the law”.¹³ This aspect of the right requires States Parties to take positive actions, such as by providing reasonable accommodation and ensuring accessibility.¹⁴

Equality and non-discrimination and the ADA

- 2.21 Throughout this consultation paper, we refer to different ways of understanding and giving effect to the rights to equality and non-discrimination. These understandings have evolved since the ADA was enacted and may continue to do so. A significant issue in this review is whether the ADA has kept pace with these changes, and whether it appropriately addresses issues of intersecting and competing rights.

8. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 26.

9. *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981).

10. *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981) art 1. See also Human Rights Committee, *General Comment No 18 on Non-Discrimination* (10 November 1989) [7].

11. *Sex Discrimination Act 1984* (Cth) s 3(a).

12. *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

13. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 5(1).

14. Committee on the Rights of Persons with Disabilities, *General Comment No 6 on Equality and Non-Discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [16].

Formal and substantive equality

- 2.22 Two common understandings of equality are “formal” and “substantive” equality.
- 2.23 As originally enacted, the ADA promoted what is known as “formal equality”. This reflects the view that equality involves treating people the same way. It is also known as equality of opportunity.¹⁵
- 2.24 While it does not contain a specific objectives clause, the long title of the ADA indicates the purpose of the Act. This has remained unchanged since the ADA was enacted in 1977: “An act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons”.
- 2.25 Formal equality also underpins the ADA’s test for “direct discrimination”. In summary, this recognises that it is discriminatory to treat someone less favourably compared to someone else because of an aspect of their identity (known as an attribute).
- 2.26 However, equal treatment does not always result in equal outcomes. Another concept of equality — “substantive equality” — recognises that some people need to be treated differently to promote an equal outcome or equal access to opportunities.¹⁶ This requires an approach which extends beyond comparing the treatment of individuals, and addresses the adverse impact of broader practices, cultural norms, customs and attitudes, and unconscious bias. Addressing these barriers to equality means treating people or groups in a way that achieves equal outcomes or access to equal opportunities.
- 2.27 In 1981, the ADA was amended to also prohibit indirect discrimination. In doing so, the ADA moved towards addressing substantive equality. Indirect discrimination looks at the adverse outcome of a seemingly neutral requirement or condition (in effect, the same treatment) for people with different attributes. The requirement may have an unequal effect on certain groups, which is not reasonable. People with certain attributes may be unable to comply with that requirement, but people without those attributes can.¹⁷
- 2.28 Take, for example, a requirement that all job applicants attend an interview in a building that is only accessible by stairs. While the requirement applies equally to all applicants, this would not result in an equal outcome for an applicant who uses a

15. D Allen, “An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010 (Vic)*” (2020) 44 *Melbourne University Law Review* 459, 464.

16. S Fredman, “Substantive Equality Revisited” (2016) 14 *International Journal of Constitutional Law* 712, 718–20.

17. D Allen, “An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010 (Vic)*” (2020) 44 *Melbourne University Law Review* 459, 464.

wheelchair. They would not be able to comply with this requirement without adjustments such as a lift, but other applicants who do not use wheelchairs may be able to comply.

2.29 Some people think the ADA could do more to help achieve substantive equality. For instance, some other Australian discrimination laws express the objective of

promoting and facilitating the progressive realisation of equality, as far as reasonably practicable, by recognising that ... the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures.¹⁸

2.30 Examples of mechanisms to promote substantive equality include:

- requiring duty holders to provide adjustments for some people with protected attributes
- enabling duty holders to adopt “special measures” for groups who have experienced disadvantage, which allow them to be treated differently to best promote their rights, and
- imposing a positive duty to prevent discrimination and other unlawful conduct.

2.31 We consider these potential options for reform in chapter 11.

When exceptions may be justified

2.32 Across several chapters, we refer to the ADA’s complex and extensive exceptions that allow duty holders to engage in what would otherwise be unlawful conduct. One of the most controversial issues in this review is whether these exceptions remain appropriate.

2.33 International human rights law recognises that the right to non-discrimination can be limited in certain circumstances. Generally, a policy or practice will not be considered discriminatory if it pursues a legitimate aim, and is appropriate, necessary and proportionate to that aim.¹⁹ A recent review considered that duty holders should meet similar tests before they can access an exception.²⁰ An example is the requirement in the Australian Capital Territory (ACT) that discrimination must be “reasonable, proportionate and justifiable in the circumstances” for a respondent to be able to rely on an exception.²¹

18. *Discrimination Act 1991 (ACT)* s 4(d); *Equal Opportunity Act 2010 (Vic)* s 3(d)(iii).

19. OHCHR and the Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, 2023, 51.

20. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 99. See also ACT, Legislative Assembly, *Yoursay Listening Report: Discrimination Law Reform (2022)* 4.

21. *Discrimination Act 1991 (ACT)* s 33C(b).

- 2.34 In its 1999 report on the ADA, the New South Wales Law Reform Commission observed that “because discrimination law protects fundamental human rights, the prohibitions should not be lightly displaced. There must be good justification for any genuine exception”.²²
- 2.35 Throughout this report, we invite consideration of whether the existing exceptions in the ADA meet this description.

Intersectionality

- 2.36 Another important concept is “intersectionality”. The ADA only prohibits discrimination, vilification and harassment that occurs because of a limited range of protected attributes. It does not prohibit unlawful conduct that is based on more than one, or a combination of, protected attributes.
- 2.37 However, this does not always reflect the realities of how discrimination, vilification and harassment are experienced. Nor does it acknowledge that people may have more than one attribute.
- 2.38 Some have argued that the ADA needs to recognise and address “intersectional” forms of discrimination, vilification and harassment. This is conduct that occurs because of more than one attribute that a person identifies with.

Systemic discrimination

- 2.39 The concept of “systemic discrimination” focuses on the structural aspects and causes of discrimination. It regards discrimination as a social, rather than simply an individual issue, to address. This moves beyond examining an individual’s experiences of discrimination to consider the policies, practices and patterns of behaviour which create or perpetuate disadvantage for people with certain attributes.²³
- 2.40 Some other discrimination laws express the objective of encouraging “the identification and elimination of systemic causes of discrimination”, sexual harassment and victimisation.²⁴ Victoria recently enacted changes to its vilification laws, with one of the purposes being “to protect Aboriginal and Torres Strait Islander people and others experiencing systemic injustice and structural oppression”.²⁵

22. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.2].

23. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991 (2022)* 52.

24. *Equal Opportunity Act 2010* (Vic) s 3(c); *Discrimination Act 1991* (ACT) s 4(c).

25. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 1(ab).

- 2.41 One issue is whether the ADA’s individual complaints model can address these wider structural causes of discrimination and other unlawful conduct. Some say more proactive, regulatory mechanisms are needed.
- 2.42 For example, the Australian Human Rights Commission (AHRC) has the power to inquire into any matter that may relate to “systemic unlawful discrimination”. This means unlawful discrimination that affects a class or group of people, and is continuous, repetitive or forms a pattern.²⁶ We will examine these issues in our second consultation paper.

The wider Australian context

- 2.43 The ADA cannot be considered in isolation from other protections against discrimination, vilification and sexual harassment that exist across Australia. While some laws cover the same or similar conduct, there are important differences in coverage.
- 2.44 It can be extremely difficult to determine which laws, protections and processes apply in different situations. Where there are similarities or overlaps, it can be challenging to choose the most appropriate forum for bringing a complaint.
- 2.45 It is important to consider the interactions between these laws when considering reforms to the ADA’s coverage. Throughout this consultation paper, we compare the ADA to other relevant laws. We ask if the way they define the scope of the various categories of unlawful conduct could inform any changes to the ADA.
- 2.46 In our second consultation paper in this review, we will consider the various NSW and federal complaint pathways in greater detail.

Australian discrimination laws

- 2.47 The ADA is part of the system of anti-discrimination and equal opportunity laws that apply across Australia.

Federal law

- 2.48 Four federal discrimination laws operate concurrently with the ADA:
- *Age Discrimination Act 2004* (Cth)
 - *Disability Discrimination Act 1992* (Cth)
 - *Racial Discrimination Act 1975* (Cth), and

26. *Australian Human Rights Commission Act 1986* (Cth) s 35L.

- *Sex Discrimination Act 1984 (Cth)*.²⁷
- 2.49 A person can make a complaint under these Acts to the AHRC. If it is not resolved by conciliation at the AHRC, the person may seek a judicial remedy in the Federal Court of Australia or the Federal Circuit and Family Court of Australia.²⁸
- 2.50 This consultation paper highlights gaps and overlaps between the ADA and federal law. Sometimes, the same or similar conduct is covered by both federal law and the ADA. When that happens, people can choose whether to seek a remedy through federal discrimination law or the ADA. The ADA does not prevent a person from making a complaint under the ADA just because they have made a complaint based on the same facts elsewhere.²⁹
- 2.51 For example, depending on the circumstances, a person may be able to make a complaint alleging racial discrimination to the AHRC under the *Racial Discrimination Act*. Or they may make a complaint to ADNSW under the ADA.³⁰
- 2.52 In some areas, there are differences in coverage between the ADA and federal discrimination law. For example, some attributes, such as bisexuality and gender identity, are protected under the *Sex Discrimination Act* but not the ADA.³¹ This will affect where a complaint can be made.
- 2.53 Other mechanisms of making a complaint to the AHRC exist, but these do not provide a pathway to a judicial remedy. The AHRC has separate powers to inquire into, and attempt to conciliate, complaints alleging:
- discrimination in employment and occupation, as part of its functions relating to equal opportunity in employment³²
 - systemic discrimination,³³ and
 - acts or practices of the Commonwealth that breach particular human rights.³⁴

27. *Age Discrimination Act 2004 (Cth)* s 12(2); *Disability Discrimination Act 1992 (Cth)* s 13(3); *Racial Discrimination Act 1975 (Cth)* s 6A(1); *Sex Discrimination Act 1984 (Cth)* s 10(3).

28. *Australian Human Rights Commission Act 1986 (Cth)* s 11(1)(aa), s 46PO.

29. *Anti-Discrimination Act 1977 (NSW)* s 88B(1).

30. *Racial Discrimination Act 1975 (Cth)* s 15; *Anti-Discrimination Act 1977 (NSW)* s 8.

31. *Sex Discrimination Act 1984 (Cth)* s 4(1) definition of “gender identity”, definition of “sexual orientation”, s 5A, s 5B.

32. *Australian Human Rights Commission Act 1986 (Cth)* s 31.

33. *Australian Human Rights Commission Act 1986 (Cth)* s 35L.

34. *Australian Human Rights Commission Act 1986 (Cth)* s 11(1)(f).

2.54 These powers cover a wide range of attributes recognised in international human rights law and labour law instruments, many of which are not covered in federal discrimination law or the ADA.³⁵

Other states and territories

2.55 Other states and territories in Australia have their own discrimination laws.³⁶ There are similarities in coverage between them. However, many of these laws offer more protections and apply more widely (including by protecting more attributes and covering more areas) than the ADA. We provide examples of the approaches adopted in other states and territories in this consultation paper.

2.56 The ACT, Victoria and Queensland have human rights legislation that exists alongside dedicated discrimination legislation. These Human Rights Acts recognise, protect and promote the rights to equality and non-discrimination.³⁷ However, they also cover a much wider range of human rights recognised in international human rights treaties than discrimination laws do.

2.57 There is no such Act in NSW or federally, although a parliamentary committee recently recommended the enactment of a federal Human Rights Act.³⁸ Additionally, the Australian Constitution provides limited rights protection.³⁹

2.58 Whether NSW should have a Human Rights Act is beyond the scope of our review of the ADA.

Workplace protections

2.59 The ADA also operates alongside specific employment law protections against discrimination and sexual harassment at work.

2.60 In particular, the *Fair Work Act 2009* (Cth) (*Fair Work Act*) protects against adverse action in employment, and against the termination of employment, based on a wide

35. *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of “discrimination”, definition of “human rights”; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

36. *Discrimination Act 1991* (ACT); *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).

37. *Human Rights Act 2019* (Qld) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15; *Human Rights Act 2004* (ACT) s 8.

38. Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (2024) rec 1.

39. See generally G Williams and D Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013).

range of protected attributes.⁴⁰ It also protects against sexual harassment at work.⁴¹

- 2.61 The *Fair Work Act* applies across Australia, including to many workplaces in NSW. However, it does not apply to the NSW public sector and local government.⁴² Other limits also apply to some forms of protection, as we explain in chapter 5.
- 2.62 In NSW, the *Work Health and Safety Act 2011* (NSW) prohibits workplace discrimination based on a person's work health and safety activities. It requires employers to make workplaces safe, including to manage risks from hazards that can cause psychological harm, by eliminating or minimising reasonably foreseeable hazards.⁴³ Harassment and unfair decision-making are recognised as common hazards.⁴⁴

Other potential complaints mechanisms

- 2.63 In the second consultation paper, we will outline other complaint pathways in related legal areas. For instance, complaints of unfair treatment or discrimination by NSW Government agencies, local councils, and government-funded service providers can be made to the NSW Ombudsman.⁴⁵

Criminal vilification offences

- 2.64 NSW has both civil and criminal protections against vilification. The ADA protects against public acts that incite hatred, serious contempt or severe ridicule towards a person or group, based on specific protected attributes.
- 2.65 The ADA's civil protections operate alongside the criminal law. Section 93Z of the *Crimes Act 1900* (NSW) makes it an offence to publicly threaten or incite violence based on specific protected attributes. NSW Parliament recently passed amendments to create a new offence of inciting racial hatred by public act, but this offence has not come into effect yet.⁴⁶

40. *Fair Work Act 2009* (Cth) s 342, s 351, s 772(1).

41. *Fair Work Act 2009* (Cth) s 527D.

42. *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 6(c), s 6(f). See, eg, AB [2014] FWC 6723.

43. *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Regulation 2017* (NSW) cl 55D.

44. SafeWork NSW, *Code of Practice: Managing Psychosocial Hazards at Work* (2021) 8.

45. NSW Ombudsman "Complaints We Can Help You With" (2025) <www.ombo.nsw.gov.au/complaints/complaints-we-can-help-you-with> (retrieved 3 April 2025).

46. *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 93ZAA (uncommenced).

- 2.66 Federal vilification offences, and the civil protections in the *Racial Discrimination Act*, also operate to protect people in NSW.⁴⁷
- 2.67 One issue in this review is whether there should be greater alignment between the NSW civil and criminal vilification laws in terms of the attributes they protect and certain aspects of their tests. We consider this, along with other issues about the ADA's vilification protections, in chapter 8.

47. *Criminal Code* (Cth) s 80.2A, s 80.2B; *Racial Discrimination Act 1975* (Cth) s 18C.

3. Tests for discrimination

In brief

The *Anti-Discrimination Act 1977* (NSW) (ADA) prohibits direct and indirect discrimination. We ask if the tests for discrimination are working as they should and, if not, how they could be changed. We also consider the burden of proof and whether the distinction between direct and indirect discrimination should remain. Finally, we ask if the ADA should cover intended future discrimination and intersectional discrimination.

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- 3.1 In the previous chapter, we consider the different concepts of equality. We now build on that discussion by outlining the two ways the *Anti-Discrimination Act 1977* (NSW) (ADA) defines discrimination.
- 3.2 The ADA prohibits what is commonly known as “direct discrimination” and “indirect discrimination” (although the ADA does not use these expressions). The ADA sets out the tests for these types of discrimination. These tests have multiple steps or “elements”.
- 3.3 Even if these tests are satisfied, discrimination is only unlawful if the conduct in question is based on a protected attribute and occurs in one of the areas in which the ADA prohibits discrimination. Certain exceptions may also apply, permitting

what would otherwise amount to unlawful discrimination. We discuss these aspects of the ADA in later chapters.

- 3.4 There are mixed views on the tests for discrimination in the ADA. Some think they are appropriate, while others think they are too complicated and outdated.
- 3.5 In this chapter, we ask for your views about:
- whether the tests to prove direct or indirect discrimination should be changed
 - who should prove that discrimination occurred
 - whether the ADA should also capture intersectional and future discrimination, and
 - whether the distinction between direct and indirect discrimination should remain.
- 3.6 Throughout this chapter, we use the term “complainant” to mean a person with a protected attribute who is making a discrimination complaint. We use the term “respondent” to mean the person or organisation who is responding to a discrimination complaint about them.

Direct discrimination

- 3.7 In summary, direct discrimination happens when someone is treated less favourably compared to how someone else is treated because they have a protected attribute. Protected attributes are characteristics about a person or group that are protected from discrimination, such as race, sex and age. We consider the existing protected attributes in chapter 4.
- 3.8 An example of direct discrimination is where an employer decides an employee will not be trained to work on new machinery because they say the employee is too old to learn new skills.¹ It is unlawful for an employer to discriminate against an employee by preventing them from accessing training opportunities because of their age, if the employer prefers younger workers and the employee’s age is a reason for the decision.²
- 3.9 Direct discrimination relates to the concept of formal equality, which we explain in chapter 2.

1. *Equal Opportunity Act 2010* (Vic) s 8(1).

2. *Anti-Discrimination Act 1977* (NSW) s 49ZYB(2)(b).

- 3.10 Under the ADA, direct discrimination has two elements: the comparator test and the causation test. Discrimination laws in some other parts of Australia have a similar test for direct discrimination.³
- 3.11 The test for direct discrimination based on race is slightly different. In addition to the standard test, the ADA covers a situation where, based on their race, someone is segregated, or separated, from people of a different race.⁴
- 3.12 Direct discrimination also occurs when someone is treated less favourably because of a protected attribute of their relative or associate.⁵ However, this does not apply where the discrimination is based on an individual's responsibilities as a carer.⁶

The comparator test

- 3.13 To show direct discrimination has occurred, a complainant must prove they were, or would have been, treated differently compared to another person without that attribute (the "comparator").
- 3.14 The different treatment must be less favourable, in the sense of being undesirable, disadvantageous or unfair. The focus is on the treatment, not how a person feels when they believe they have been treated less favourably.
- 3.15 The comparison of the treatment must be undertaken by considering a comparator in the same, or mostly the same, circumstances. Where there is no real person to be a comparator, a hypothetical person in those same circumstances may be used.⁷

Concerns about the comparator test

- 3.16 There are mixed views about the comparator test. Some think it is objective and appropriate. However, others think it is confusing, outdated, difficult to prove and complex.
- 3.17 One reason for these concerns is that it can be hard to identify an appropriate comparator. For example, treating a woman unfavourably because she is pregnant can be a form of unlawful sex discrimination.⁸ But it is unclear whether the

3. See, eg, *Disability Discrimination Act 1992* (Cth) s 5(1); *Sex Discrimination Act 1984* (Cth) s 5(1); *Age Discrimination Act 2004* (Cth) s 14; *Equal Opportunity Act 1984* (WA) s 8–10A; *Equal Opportunity Act 1984* (SA) s 6(3); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Anti-Discrimination Act 1991* (Qld) s 10(1).

4. *Anti-Discrimination Act 1977* (NSW) s 7(1)(b).

5. *Anti-Discrimination Act 1977* (NSW) s 7(1)(a)–(b), s 24(1)(a), s 38B(1)(a), s 49B(1)(a), s 49ZG(1)(a), s 49ZYA(1)(a).

6. *Anti-Discrimination Act 1977* (NSW) s 49T.

7. *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13, 19, EOC 92-108, 76,052–76,053; *Commissioner of Police v Mohamed* [2009] NSWCA 432 [25]–[26].

8. *Anti-Discrimination Act 1977* (NSW) s 24(1B).

appropriate comparator in this case would be a non-pregnant woman, a menopausal woman, or a man.⁹

- 3.18 It may be especially difficult to prove someone was treated less favourably than someone else in the same or mostly the same circumstances. The circumstances focus on the context of the treatment given, or to be given, to the person with the protected attribute. This is a factual exercise. The circumstances are all the objective features which surround the actual or intended treatment of the person with the particular attribute. The circumstances cannot be hypothetical.¹⁰
- 3.19 Once these circumstances have been identified, a comparison must be made with the treatment that was or would have been given to a person without the attribute in circumstances that were the same, or not materially different. The question is what would have been done in those circumstances if the person concerned did not have that attribute.

An “unfavourable treatment” test

- 3.20 One option to address these concerns could be to replace the comparator test with an “unfavourable treatment” test. Victoria and the Australian Capital Territory (ACT) take this approach.¹¹ In 2024, Queensland enacted reforms to introduce an unfavourable treatment test. Along with other reforms to Queensland’s discrimination law, this change was due to commence on 1 July 2025.¹² However, the Queensland Government decided to postpone the commencement of the amendments to conduct further consultations.¹³
- 3.21 Instead of comparing the treatment of a complainant with another person, this test asks if the complainant was treated unfavourably because they have one or more protected attributes.¹⁴ This allows the effect or consequences of the treatment to be taken into account.

9. See, eg, *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, 116 IR 186 [121]–[122]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 [58].

10. *Purvis v New South Wales* [2003] HCA 62, 217 CLR 92 [222]–[224].

11. *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1).

12. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B, amending *Anti-Discrimination Act 1991* (Qld) s 10 (uncommenced).

13. See D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 4 April 2024).

14. *Discrimination Act 1991* (ACT) s 8(2). The Victorian test only considers whether the treatment was because of a single attribute: *Equal Opportunity Act 2010* (Vic) s 8(1). See, eg, *Re Prezzi and Discrimination Commissioner* (1996) 39 ALD 729 [24], EOC 92-803 [24].

- 3.22 Many reviews of discrimination laws in Australia have recommended replacing the comparator test with an unfavourable treatment test.¹⁵ In 1999, the NSW Law Reform Commission (NSWLRC) similarly recommended a test that focused on whether the conduct caused detriment based on an attribute.¹⁶
- 3.23 Some say this test is simpler, as it avoids the need to find a comparator. A simpler test, that is easier to understand, could improve access to justice. It could also account for intersectional discrimination, which we discuss below.¹⁷
- 3.24 Adopting this test would make the ADA inconsistent with the law in some other states and territories and in some federal laws. However, this may not be an issue if the recommendations of the other law reform bodies, mentioned above, are implemented.

Causation

- 3.25 A complainant must also prove that a reason they received the less favourable treatment was because they either had
- a protected attribute, or
 - a characteristic that people with that attribute have or are presumed to have.¹⁸
- 3.26 In summary, the issues are:
- Why did the less favourable treatment occur?
 - Did it occur because of the person’s attribute (or related characteristic)?
- 3.27 It does not matter if there was more than one reason why the complainant was treated unfavourably, some of which do not amount to unlawful discrimination. It is

15. Australia, Senate, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 5; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 279, 342; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, rec 4.23; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 95; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 5.

16. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.31], [3.51]–[3.52], rec 3.

17. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.1.2]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 95.

18. *Anti-Discrimination Act 1977* (NSW) s 7(1)(a), s 7(2), s 24(1)(a), s 24(1A), s 38B(1)(a), s 38B(2), s 39(1)(a), s 39(1A), s 49B(1)(a), s 49B(2), s 49T(1)(a), s 49T(2), s 49ZG(1)(a), s 49ZG(2), s 49ZYA(1)(a), s 49ZYA(2).

enough if one the reasons for the treatment amounts to unlawful discrimination, even if this is not the “dominant or a substantial reason”.¹⁹

- 3.28 Causation can be hard to prove. The complainant may experience and feel they have been treated less favourably, and genuinely believe it must be because of their personal attribute. However, the test is not subjective. It requires objective proof of the reason for the treatment.
- 3.29 This does not mean the complainant has to prove a respondent deliberately discriminated or intended to discriminate. Rather, the complainant must prove that their attribute was a reason for the treatment. The central question is: “why was the person with the attribute treated as they were?”.²⁰
- 3.30 The complainant often does not have evidence to prove why the respondent treated them this way and may have to rely on an inference being drawn. Later in this chapter, we discuss this issue in relation to the burden of proof.
- 3.31 Also, many people are not fully aware of the factors that influence the decisions they make.²¹ This might cause difficulties in proving discrimination if the respondent’s actions are influenced by unconscious bias.
- 3.32 The ADA does not say whether the respondent must have made a conscious decision to treat the complainant less favourably. Potentially, this could be clarified by adopting an aspect of the Victorian approach to causation.
- 3.33 Victorian discrimination law states that it is not relevant whether the respondent was aware of the discrimination or if they considered the treatment to be unfavourable.²² It may still be discrimination if the respondent acted out of unconscious bias, but did not intend to discriminate.²³

Question 3.1: Direct discrimination

Could the test for direct discrimination be improved or simplified? If so, how?

19. *Anti-Discrimination Act 1977* (NSW) s 4A.

20. *Purvis v New South Wales* [2003] HCA 62, 217 CLR 92 [236].

21. N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.2.28].

22. *Equal Opportunity Act 2010* (Vic) s 8(2)(a), s 10.

23. *Austin Health v Tsikos* [2023] VSCA 82, 324 IR 1 [71], [84]–[85].

Indirect discrimination

- 3.34 “Indirect discrimination” was added to the ADA in 1981.²⁴ Other discrimination laws across Australia also prohibit indirect discrimination, but use slightly different and more contemporary tests.
- 3.35 Indirect discrimination occurs when a rule or requirement that applies to everyone, unfairly disadvantages a person or group with a protected attribute. This moves beyond formal equality and towards substantive equality. We discuss these concepts in chapter 2.
- 3.36 To prove indirect discrimination, the complainant must show that:
- a requirement or condition was imposed on them by the respondent
 - they are unable to comply with a requirement or condition (the “unable to comply” test)
 - a substantially higher proportion of people who do not have the attribute can comply with it (the “disproportionate impact” test), and
 - the requirement or condition is not reasonable having regard to the circumstances of the case (the “reasonableness” test).²⁵
- 3.37 An example of indirect discrimination is where a store requires all customers to produce photo identification in the form of a driver licence to collect an order. This may disadvantage someone with a visual impairment who is not eligible to hold a driver licence.²⁶

The comparative “disproportionate impact” test

- 3.38 The complainant must also show that a substantially higher proportion of people without an attribute can comply with a condition or requirement, compared to people with that attribute.
- 3.39 This means identifying all the people on whom the requirement or condition is imposed. This becomes the base group.

24. *Anti-Discrimination (Amendment) Act 1981* (NSW) sch 5 cl 4.

25. *Anti-Discrimination Act 1977* (NSW) s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b).

26. *Equal Opportunity Act 2010* (Vic) s 9. See generally *Waters v Public Transport Corporation* (1991) 173 CLR 349, 406.

- 3.40 After identifying this group, the next step is to ask which of those people who have the attribute can comply, and which of the people who do not have the attribute can comply. Then a comparison is made.²⁷
- 3.41 This can be illustrated by an example involving a cinema that requires patrons to enter the premises using stairs. Assume, over a particular period, 100 people want to watch a movie at the cinema. This is the base group.
- 3.42 In this example, the base group of 100 patrons includes a wide range of people, including:
- 80 people without disability, all of whom can use the stairs, and
 - 20 people with a mobility disability, 5 of whom can use the stairs.
- 3.43 A comparison is made between the people without disability who can comply with the stairs requirement, and those with disability who can comply with this requirement. In this example:
- 100% (80 out of 80) of the people without disability can comply with the requirement to use the stairs, and
 - 25% (5 out of 20) of the people with a mobility disability can comply.
- 3.44 This means a substantially higher proportion of people without disability can comply with the requirement, compared with the proportion of people with mobility disability who can comply.
- 3.45 Concerns about the disproportionate impact test include that it:
- is unnecessarily complex and technical
 - can be difficult to identify an appropriate comparator group
 - is hard to prove, often requiring complex evidence, such as statistics and data, which a complainant is unlikely to have access to
 - can be difficult to apply if the relevant groups are small, as the comparisons between proportions can be distorted, and
 - is particularly challenging for complainants with limited resources or legal knowledge.²⁸

27. See, eg, *Bonella v Wollongong City Council* [2001] NSWADT 194 [76]–[77] citing Sackville J in *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 118–121.

28. See, eg, Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review, Final Report* (2008) [5.28], rec 42; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.2.1]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98.

- 3.46 One option could be to refocus the test. In several parts of Australia, the test for indirect discrimination does not assess disproportionate impact by reference to a comparator group. Instead, the issue is whether a requirement or condition disadvantages a person with a protected attribute.²⁹
- 3.47 For example, the ACT test focuses on the following questions:
- Has a condition or requirement been imposed, or is there a proposal to impose a condition or requirement?
 - Does the condition or requirement have the effect of disadvantaging a person because they have a protected attribute(s)?
 - Is the condition or requirement reasonable?³⁰
- 3.48 Recent reviews in Western Australia (WA) and Queensland also recommended replacing the disproportionate impact test with a disadvantage test.³¹ In 2024, Queensland enacted amendments to implement this reform. The amendments were due to commence on 1 July 2025 but, for the reasons explained above, it is now uncertain when they will commence.³²
- 3.49 In 1999, the NSWLRC acknowledged the complexities created by the disproportionate impact test. However, it concluded that some assessment of proportionality may be necessary to establish a link between the detriment and the attribute.³³

Question 3.2: The comparative disproportionate impact test

Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

29. *Equal Opportunity Act 2010* (Vic) s 9(1); *Discrimination Act 1991* (ACT) s 8(3); *Age Discrimination Act 2004* (Cth) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B.

30. *Discrimination Act 1991* (ACT) s 8(3)–(4).

31. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 101; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 9, [4.1.2.1].

32. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B, amending *Anti-Discrimination Act 1991* (Qld) s 11 (uncommenced). But see D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 7 April 2024).

33. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.99]–[3.100]. See *Bonella v Wollongong City Council* [2001] NSWADT 194 [94].

The “inability to comply” element

- 3.50 To prove indirect discrimination, complainants need to show that they do not, or cannot, comply with the requirement or condition. Some other discrimination laws in Australia also require this.³⁴
- 3.51 However, some recent reviews concluded that this is an unnecessary requirement.³⁵ Generally, the fact that a complainant does not comply with a requirement or condition can be assumed. Anyone who does comply would be unlikely to seek to challenge it.³⁶
- 3.52 The Queensland Human Rights Commission (QHRC) was concerned that the term “not able to comply” might be interpreted literally. This could exclude complainants who are capable of complying but choose not to because the requirement would be detrimental to them.³⁷
- 3.53 This requirement is not part of the test for indirect discrimination in the ACT, Victoria, Tasmania or the *Sex Discrimination Act 1984* (Cth).³⁸
- 3.54 This may be another argument in support of a “disadvantage” test, which does not require complainants to prove they are unable to comply with a requirement or condition.³⁹

Question 3.3: Indirect discrimination and inability to comply

What are your views on the “not able to comply” part of the indirect discrimination test? Should this part of the test be removed? Why or why not?

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34. *Disability Discrimination Act 1992* (Cth) s 6(1)(b); *Racial Discrimination Act 1975* (Cth) s 9(1A)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(a); *Equal Opportunity Act 1984* (WA) s 9(2)(c); *Equal Opportunity Act 1984* (SA) s 29(2a)(b). But see *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B, inserting *Anti-Discrimination Act 1991* (Qld) s 11A (uncommenced).
35. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) [4.1.2.3], rec 11; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 296, 339.
36. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) [4.1.2.3].
37. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98.
38. See, eg, *Discrimination Act 1991* (ACT) s 8(3)–(4); *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B. But see *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B, amending *Anti-Discrimination Act 1991* (Qld) s 10 (uncommenced).
39. See, eg, *Discrimination Act 1991* (ACT) s 8(3)–(5); *Equal Opportunity Act 2010* (Vic) s 9.

The “reasonableness” standard

- 3.55 To prove indirect discrimination, the complainant must also show that the requirement is “not reasonable having regard to the circumstances of the case”.⁴⁰
- 3.56 Other Australian discrimination laws, even those that use a disadvantage test, incorporate a reasonableness element. But, unlike the ADA, many other discrimination laws place the onus on the respondent to prove that a requirement it imposed was reasonable.⁴¹
- 3.57 We have heard concerns about the use of a reasonableness test, including that it is ambiguous and insufficiently stringent. Other reviews have also questioned its use, finding that it is vague and open to different interpretations.⁴² We set out some reform options, for consideration, below.

Factors relevant to “reasonableness”

- 3.58 To address this, an option could be to list factors to consider when determining whether a requirement is reasonable.
- 3.59 The ADA does not list such factors. Under the ADA, whether a requirement is reasonable depends on the circumstances. However, some NSW tribunal decisions have indicated factors that may be relevant in a particular case.⁴³ For example, this may include the:
- financial or economic circumstances of the respondent
 - ability of the respondent to accommodate the needs of the complainants, and
 - the availability of alternative approaches which would achieve the objectives of the respondent, in a less discriminatory way.⁴⁴

40. *Anti-Discrimination Act 1977* (NSW) s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b).

41. *Age Discrimination Act 2004* (Cth) s 15(2); *Disability Discrimination Act 1992* (Cth) s 6(4); *Sex Discrimination Act 1984* (Cth) s 7C; *Discrimination Act 1991* (ACT) s 70; *Equal Opportunity Act 2010* (Vic) s 9(2); *Anti-Discrimination Act 1991* (Qld) s 205.

42. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 296; Australia, Senate, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 6, [11.13], [11.17].

43. See, eg, *Bonella v Wollongong City Council* [2001] NSWADT 194 [95–111]; *Gardiner v WorkCover Authority of NSW* [2004] NSWADTAP 1 [24]–[41].

44. *Bonella v Wollongong City Council* [2001] NSWADT 194 [95]–[97].

- 3.60 Other discrimination laws give more guidance.⁴⁵ In Victoria, whether a requirement, condition or practice is reasonable depends on all the relevant circumstances, including:
- the nature and extent of the disadvantage resulting from its imposition, or proposed imposition
 - whether the disadvantage is proportionate to the result sought by the duty-holder who seeks or proposes to impose it
 - the cost of any alternative
 - the financial circumstances of the duty-holder imposing it, or proposing to, and
 - whether reasonable adjustments or reasonable accommodation could be made to reduce the disadvantage caused.⁴⁶
- 3.61 A recent review in WA recommended an approach modelled on Victoria.⁴⁷ The NSWLRC also supported a similar approach in 1999.⁴⁸

A proportionality test

- 3.62 Another option could be to replace reasonableness with a proportionality test. This would assess whether a requirement or condition is a proportionate means of achieving a legitimate aim. Some think a proportionality test is a better way of balancing the interests of someone with a protected attribute, and the legitimate activities of organisations.
- 3.63 The *Equality Act 2010* (UK) has a proportionality test. It requires an assessment of whether a requirement or a condition is “a proportionate means of achieving a legitimate aim”.⁴⁹
- 3.64 Some reviews of federal discrimination law have also supported consideration of a “legitimate and proportionate” test. The Australian Human Rights Commission (AHRC) stated that it “would enable more rigour and specificity” than the reasonableness test.⁵⁰

45. *Discrimination Act 1991* (ACT) s 8(5); *Equal Opportunity Act 2010* (Vic) s 9(3); *Sex Discrimination Act 1984* (Cth) s 7B(2).

46. *Equal Opportunity Act 2010* (Vic) s 9(3).

47. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 10, [4.1.2.2].

48. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 6, [3.104].

49. *Equality Act 2010* (UK) s 19.

50. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 296. See also Australia, Senate, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 6, [11.17].

3.65 However, the QHRC recommended against introducing proportionality into the test for indirect discrimination. It considered that proportionality would be too onerous and complex for respondents to understand and apply.⁵¹

Systemic discrimination

3.66 The reasonableness standard does not address systemic discrimination. Whether a requirement is reasonable is measured at a particular point in time and for a specific group. But some argue that a failure to change systemic barriers or practices should itself be considered a form of discrimination.

3.67 This could be addressed by requiring duty holders to take steps to prevent or eliminate unlawful conduct, including discrimination. We discuss this in chapter 11.

Question 3.4: Indirect discrimination and the reasonableness standard

- (1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?
- (2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

Indirect discrimination based on characteristics

3.68 As we note above, the test for direct discrimination protects against discrimination based on characteristics that people with a protected attribute either generally have or are presumed to have. However, this does not apply to indirect discrimination.

3.69 Some other states and territories do not make this distinction.⁵²

3.70 To address this, an option could be to change the way protected attributes are defined. In the ACT, for example, a protected attribute is defined to include “a characteristic that people with the attribute generally have” and “a characteristic that people with the attribute are generally presumed to have”.⁵³ The Law Reform Commission of WA (LRCWA) recommended a similar approach. In its view, it should never be lawful to discriminate based on attributes or characteristics.⁵⁴

51. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 103.

52. See, eg, *Discrimination Act 1991* (ACT) s 7(2); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8.

53. *Discrimination Act 1991* (ACT) s 7(2)(a)–(b).

54. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 65.

Question 3.5: Indirect discrimination based on a characteristic

Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?

The burden of proof

- 3.71 In NSW, complainants – not respondents – must prove each part of the tests for discrimination. That means the complainants have the “burden of proof”.
- 3.72 Discrimination claims must be proved on the balance of probabilities, like all civil claims. This means that the evidence must show it is more likely than not that the discrimination occurred.
- 3.73 It can be hard for complainants to gather the evidence they need. They often do not have clear evidence that discrimination occurred, as they do not know why the respondent treated them that way. Instead, they must rely on circumstantial evidence and ask the court to draw an inference of discrimination.⁵⁵
- 3.74 This can be particularly complex where, for instance:
- the discrimination was due to unconscious bias or stereotypical views about people with particular attributes, and/or
 - where the respondent does not realise their actions or requirements are discriminatory.
- 3.75 For instance, it can be hard to prove causation when only the respondent knows why they acted a certain way or made a certain decision.⁵⁶
- 3.76 It is also particularly difficult for people without legal representation. This can be a barrier to justice and could deter them from making a claim.
- 3.77 Considering this, some argue the law should change so that respondents bear the burden of proving some aspects of the tests for discrimination. We set out some options for consideration, below.

55. D Allen, “Reducing the Burden of Proving Discrimination in Australia” (2009) 31 *Sydney Law Review* 579, 583.

56. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.8]; D Allen, “Reducing the Burden of Proving Discrimination in Australia” (2009) 31 *Sydney Law Review* 579, 583; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 142.

Direct discrimination

- 3.78 The *Fair Work Act 2009* (Cth) (*Fair Work Act*) provides one model for consideration. Under this Act:
- the employee must prove their employer subjected them to adverse action, which can include being treated unfavourably, and
 - the employer must then prove that the treatment was *not* for a prohibited reason, being the employee’s attribute such as sex, race or disability.⁵⁷
- 3.79 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability supported this approach in its recommendations to reform the *Disability Discrimination Act 1994* (Cth).⁵⁸
- 3.80 Queensland has recently implemented another model, which applies more generally to complaint proceedings (including direct discrimination or indirect discrimination complaints). The respondent will be taken to have unlawfully discriminated against the complainant if:
- the complainant proves facts from which it could be decided, without any other explanation, that the respondent unlawfully discriminated against them, and
 - the respondent *does not prove*, on the balance of probabilities, that they did not unlawfully discriminate against the respondent.⁵⁹
- 3.81 This is like the model in the *Equality Act 2010* (UK).⁶⁰ The AHRC and the LRCWA have recommended reforms based on this model.⁶¹

Indirect discrimination

- 3.82 The ADA also requires complainants, rather than respondents, to prove each part of the test for indirect discrimination. However, in some other parts of Australia, the respondent has the burden of proving that a requirement is reasonable.⁶²

57. *Fair Work Act 2009* (Cth) s 351, s 361.

58. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 302, rec 4.23.

59. *Anti-Discrimination Act 1991* (Qld) s 204.

60. *Equality Act 2010* (UK) s 13(1), s 136.

61. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) [3.4]; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 97.

62. *Age Discrimination Act 2004* (Cth) s 15(2); *Disability Discrimination Act 1992* (Cth) s 6(4); *Sex Discrimination Act 1984* (Cth) s 7C; *Discrimination Act 1991* (ACT) s 70; *Equal Opportunity Act 2010* (Vic) s 9(2).

- 3.83 The NSWLRC recommended this in 1999, as did the LRCWA in 2022.⁶³
- 3.84 If this were applied in NSW, with no other changes to the indirect discrimination test, the complainant would have to prove:
- they have an attribute protected by the ADA
 - they are unable to comply with a requirement or condition, and
 - that a substantially higher proportion of people who do not have a protected attribute can comply.
- 3.85 The respondent would then have to prove that the requirement or condition was reasonable, in the circumstances.

Question 3.6: Proving indirect discrimination

- (1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?
- (2) Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

Some overarching issues

- 3.86 We also invite you to consider three overarching issues. Preliminary submissions raised concerns that the ADA's tests do not:
- recognise that direct and indirect discrimination can overlap
 - protect against intersectional discrimination, or
 - protect against intended future discrimination.

Overlapping forms of discrimination

- 3.87 A fundamental issue is whether the ADA should continue to treat direct and indirect discrimination separately. Under the ADA, discrimination can be either direct or indirect — but not both.⁶⁴
- 3.88 It can be hard to differentiate between direct and indirect discrimination. Some conduct could constitute either form of discrimination. This can be illustrated by the example of denying women opportunities because there are inadequate toilet facilities. This could be direct discrimination. It involves treating a woman less favourably compared to how a man is treated because they are a woman and need

63. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 6; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 97.

64. *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392–393.

their own toilet facilities. Or it could be indirect discrimination, as it involves a requirement that applies to everyone (that is, that all employees use male bathrooms). But this unfairly disadvantages women.⁶⁵

- 3.89 Some think the ADA should acknowledge that direct and indirect discrimination can overlap. For example, the *Discrimination Act 1991* (ACT) states that “discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else”.⁶⁶
- 3.90 This was based on recommendations of the ACT Law Reform Advisory Council. In its view, the change would reduce confusion by clarifying that the two concepts are not mutually exclusive.⁶⁷
- 3.91 In another approach, one preliminary submission suggested adopting a single definition that does not include the concepts of direct and indirect discrimination.⁶⁸

Question 3.7: Direct and indirect discrimination

- (1) How should the relationship between different types of discrimination be recognised?
- (2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

Intersectional discrimination

- 3.92 Another issue is whether the ADA should protect against discrimination that is based on more than one attribute. This is known as “intersectional discrimination”.
- 3.93 In the ADA, separate sections set out the tests for discrimination for each attribute. It does not provide for discrimination based on more than one attribute. It could be said that this does not reflect how discrimination occurs in real life.⁶⁹
- 3.94 People can experience discrimination based on more than one attribute. For example, Aboriginal women may experience discrimination based on both race and sex. Discrimination of this kind can expose individuals to unique and compounding types of disadvantage.⁷⁰

65. *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176–177.

66. *Discrimination Act 1991* (ACT) s 8(1).

67. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 31.

68. NSW Council for Civil Liberties, *Preliminary Submission PAD21*, 14.

69. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.3]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 50.

70. Committee on the Rights of Persons with Disabilities, *General Comment No 6 on Equality and Non-Discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) [19].

- 3.95 Across Australia, reviews of discrimination laws have recommended changes to protect against intersectional discrimination.⁷¹ International human rights bodies have recommended this too.⁷²
- 3.96 Currently, only the ACT provides some protection from intersectional discrimination. Under the ACT law, discrimination occurs if a person is treated unfavourably because of “1 or more protected attributes”.⁷³
- 3.97 However, the ACT test may not protect against discrimination based on the combined effect of multiple attributes.⁷⁴ For example, an employer might refuse to employ women of colour but employ men of colour and white women. This could be described as discrimination based on a combination of attributes (sex and race), rather than discrimination based separately on sex and race.⁷⁵ This may not be captured by the ACT test.
- 3.98 To avoid uncertainty, another approach might be to prohibit discrimination based on the combined effect of two or more protected attributes. The AHRC, LRCWA, and QHRC supported this approach.⁷⁶ Queensland enacted reforms to do this, although at the time of writing it is uncertain when they will commence.⁷⁷
- 3.99 Some other countries address discrimination based on more than one protected attribute, or on a combination of attributes. For example, the Canadian *Human Rights Act* protects against discrimination on “one or more prohibited grounds ... or

71. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) [4.7(c)]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 3.2; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 13.

72. Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [18]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third periodic Reports of Australia*, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) [10].

73. *Discrimination Act 1991* (ACT) s 8(2)–(3).

74. A Blackham and J Temple “Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework” (2020) 43 *UNSW Law Journal* 773, 781.

75. See Victoria, Commission for Gender Equality in the Public Sector, “Applying Intersectionality” (11 February 2022) <www.genderequalitycommission.vic.gov.au/applying-intersectionality> (retrieved 7 April 2025).

76. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) [4.7(c)]; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 13; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 3.2.

77. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7A, inserting *Anti-Discrimination Act 1991* (Qld) s 8(2) (uncommenced). But see D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 7 April 2024).

on the effect of a combination of prohibited grounds”.⁷⁸ The UK legislation contains a section to address “combined” discrimination, although it has not entered into force.⁷⁹

- 3.100 Protecting against intersectional discrimination could more accurately reflect the many ways discrimination can occur. It could also mean the ADA covers more instances of discrimination. On the other hand, allowing complaints to be based on overlapping attributes may increase complexity.⁸⁰

Question 3.8: Intersectional discrimination

- (1) Should the ADA protect against intersectional discrimination? Why or why not?
- (2) If so, how should this be achieved?

Intended future discrimination

- 3.101 Some Australian discrimination laws protect against intended future discriminatory conduct.⁸¹ The ADA does not do this. The ADA generally cannot be used to prevent discrimination.⁸² However, there is a prohibition on advertisements that indicate an intention to do something unlawful under the ADA. We consider this in chapter 10.
- 3.102 This could be addressed by extending the test for direct discrimination to include when a duty holder “proposes to treat” someone unfavourably. This has been done in the ACT, Victoria, the Northern Territory, Queensland and in the *Age Discrimination Act 2004 (Cth) (Age Discrimination Act)*.⁸³
- 3.103 In 1999, the NSWLRC recommended that the test for direct discrimination should include future discrimination. This would mean that a potential victim could make a complaint if they were aware of intended discrimination.⁸⁴

78. *Canadian Human Rights Act* 1985 (Canada) s 3.1.

79. *Equality Act 2010* (UK) s 14.

80. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.3].

81. See, eg, *Discrimination Act 1991* (ACT) s 8(2)–(3); *Equal Opportunity Act 2010* (Vic) s 8(1), s 9(1); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1), s 11(1); *Age Discrimination Act 2004* (Cth) s 14, s 15(1).

82. *Woods v Wollongong City Council* (1986) EOC 92-174.

83. See, eg, *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1); *Age Discrimination Act 2004* (Cth) s 14.

84. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.58], rec 4.

- 3.104 The test for indirect discrimination could also cover when someone proposes to impose a requirement, condition, or practice, which effectively captures intended future indirect discrimination. This applies in the ACT, Victoria, Queensland, and the *Age Discrimination Act*.⁸⁵

Question 3.9: Intended future discrimination

Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

85. *Discrimination Act 1991* (ACT) s 8(3); *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1991* (Qld) s 11(1); *Age Discrimination Act 2004* (Cth) s 15(1).

4. Discrimination: protected attributes

In brief

The *Anti-Discrimination Act 1977* (NSW) only protects against discrimination that is based on certain, specified attributes. We seek your views on the definitions and descriptions of the existing protected attributes, and on certain attribute-specific exceptions.

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- 4.1 The *Anti-Discrimination Act 1977 (NSW) (ADA)* makes it unlawful to discriminate based on certain features or “attributes” that can form part of someone’s identity. Listed in alphabetical order, the ADA prohibits discrimination based on:
- age
 - carer’s responsibilities
 - disability
 - homosexuality
 - marital or domestic status
 - race
 - sex (including pregnancy and breastfeeding), and
 - transgender status (referred to as “transgender grounds” in the ADA).
- 4.2 It is unlawful to discriminate against someone based on one of these attributes. It is also unlawful to discriminate based on a characteristic that people with a protected attribute either have or are presumed to have. This protects against discrimination that stems from stereotypical views.
- 4.3 For someone to discriminate based on an attribute, they must have knowledge of the attribute.¹ It can be difficult to prove that a person has an attribute, particularly where an attribute is not visible (such as a hidden disability).
- 4.4 The ADA also prohibits direct discrimination against someone based on a protected attribute of their relative or associate. But this does not cover discrimination based on carer’s responsibilities. Also, relatives and associates of people with any attributes are not protected from indirect discrimination.
- 4.5 In preliminary submissions, we heard concerns that the language used to describe and define existing protected attributes is outdated and, sometimes, offensive. Many also argued that other protected attributes should be added to the ADA.
- 4.6 In this chapter, we ask if the way the existing protected attributes are expressed or defined should change. We also set out some attribute-specific exceptions that limit the scope of the protections in certain circumstances. We consider other exceptions in chapters 6 and 7.
- 4.7 We set out some options for reform suggested by preliminary submissions and our research. But we encourage you to raise other issues and make other suggestions.

1. *Tate v Rafin* [2000] FCA 1582 [65].

- 4.8 In the next chapter, we build on this discussion by asking if it should be unlawful to discriminate based on other protected attributes.
- 4.9 The ADA also prohibits vilification based on certain protected attributes, some of which are also protected against discrimination. While we focus on discrimination in this chapter, we note where the definitions of protected attributes apply to vilification too. Chapter 8 provides more detail on the law about vilification.

Age

- 4.10 The ADA protects people against discrimination based on their age, and the age of their relatives or associates. Age includes “age group”.² It also covers discrimination based on the characteristics that people of a particular age or age group generally have or are thought to have.³
- 4.11 We did not receive any options in preliminary submissions for changing the definition or scope of this attribute. However, we welcome any suggestions.
- 4.12 The ADA also separately protects against compulsory retirement due to age. This does not apply to judges or certain other office holders.⁴ In 1999, the NSW Law Reform Commission (NSWLRC) recommended that this be merged with the prohibition against age discrimination, to align their coverage.⁵
- 4.13 The ADA contains exceptions that allow otherwise unlawful age discrimination. These include exceptions in relation to credit applications, some compulsory retirement and laws about the legal capacity or welfare of people under 18 years old.⁶
- 4.14 An exception applies to certain acts relating to driver licences. Where done to meet safety considerations that are reasonable in the circumstances, it is not unlawful to discriminate based on age relating to:
- the manner in which fitness to control a vehicle is assessed, or
 - the terms and conditions on which, and length of time during which, a licence to drive or ride a vehicle is provided or made available.⁷

2. *Anti-Discrimination Act 1977* (NSW) s 49ZYA(2).

3. *Anti-Discrimination Act 1977* (NSW) s 49ZYA.

4. *Anti-Discrimination Act 1977* (NSW) s 49ZYK, s 49ZV, s 49ZX.

5. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.111].

6. *Anti-Discrimination Act 1977* (NSW) s 49ZYU, s 49ZX, s 49ZYQ.

7. *Anti-Discrimination Act 1977* (NSW) s 49ZYV.

- 4.15 In 1999 the NSWLRC recommended the repeal of this exception. It thought the same objective could be achieved through the general exception relating to compliance with statutory requirements (which we consider in chapter 7).
- 4.16 The ADA also allows for the creation of regulations to declare any otherwise unlawful age discrimination lawful.⁸ For example, the *Anti-Discrimination Regulation 2019* (NSW) makes it lawful for a registered club to give a benefit to a member based on age.⁹

Question 4.1: Age discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “age”?
- (2) What changes, if any, should be made to the age-related exceptions?

Carer’s responsibilities

- 4.17 The ADA protects against discrimination based on someone’s responsibilities as a carer. This covers responsibilities to care for or support:
- their child or stepchild, who is dependent on them or in need of care or support
 - any child or adult in need of care or support, if they are an authorised carer or guardian, or have parental responsibility under legislation, or
 - any immediate family member (as defined) in need of care or support.¹⁰
- 4.18 The ADA also protects against discrimination based on past and/or future carer’s responsibilities. This includes responsibilities that someone is thought to have currently, has had previously, or will have in future.¹¹
- 4.19 An issue is whether this attribute, as currently defined, sufficiently reflects the diversity of cultures and relationships in our community. If not, there are a range of other options to consider.

Whether the attribute should be defined

- 4.20 The widest approach could be to leave the attribute undefined. This could allow its meaning to change with time and respond to diverse family structures.¹²

8. *Anti-Discrimination Act 1977* (NSW) s 49ZYX.

9. *Anti-Discrimination Regulation 2019* (NSW) cl 4.

10. *Anti-Discrimination Act 1977* (NSW) s 49S(1), s 49S(3)–(4).

11. *Anti-Discrimination Act 1977* (NSW) s 49S(2).

12. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 308, 311, rec 26.

- 4.21 In 2024, the Queensland Parliament enacted reforms to:
- remove the existing attribute, and definition, of “family responsibilities”, and
 - replace it with a new attribute of “family, carer or kinship responsibilities”, without defining its scope.¹³
- 4.22 These changes, along with other reforms to Queensland’s discrimination law, were due to commence on 1 July 2025. However, the current Queensland Government decided to postpone the commencement of the reforms to conduct further consultations.¹⁴
- 4.23 If the ADA’s definition was repealed, but not replaced, it is unclear how courts or tribunals would interpret it. Questions may arise as to whether the attribute should be interpreted differently to the former statutory definition. This could lead to uncertainty.

Options for different definitions of “carer”

- 4.24 Some might prefer that the legislation provide more guidance, without being too narrow. One option could be to use a wider definition of “carer” that does not depend on specific categories. For instance, the Victorian discrimination law does not use categories. It defines a “carer” as a person on whom someone is wholly or substantially dependent for ongoing care and attention, generally excluding commercial arrangements.¹⁵
- 4.25 A different idea could be to align the ADA with the *Carers (Recognition) Act 2010* (NSW).¹⁶ This defines a carer as someone who provides ongoing personal care and assistance to a person with disability, or a person who needs care because of a medical condition, mental illness or old age.¹⁷
- 4.26 If this were adopted, consideration should be given to including other existing aspects of the ADA definition. For instance, the definition in the carer’s legislation does not cover caring for other children or adults that need care or support.

13. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3)(p), amending *Anti-Discrimination Act 1991* (Qld) s 7(p) (uncommenced).

14. D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 4 April 2024).

15. *Equal Opportunity Act 2010* (Vic) s 6(i), s 4 definition of “carer”. See also *Discrimination Act 1991* (ACT) s 7(l) dictionary definition of “carer”.

16. *Carers NSW, Preliminary Submission PAD71, 2*.

17. *Carers (Recognition) Act 2010* (NSW) s 5(1).

Other forms of relationships could be recognised

- 4.27 Another option could be to expressly recognise certain other relationships. For instance, discrimination law in the Australian Capital Territory (ACT) recognises the attribute of “parent, family, carer or kinship responsibilities”.¹⁸ This could encompass a variety of family, caring and kinship relationships, including kinship connections among Aboriginal and Torres Strait Islander communities.¹⁹ It could also include kinship responsibilities of other Indigenous peoples and cultural groups.
- 4.28 Some other discrimination laws also separately protect against discrimination based on “parental status”. This includes the status of being or not being a parent.²⁰ The ADA does not currently recognise the status of “not” being a parent.

Question 4.2: Discrimination based on carer’s responsibilities

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “responsibilities as a carer”?
- (2) Should the ADA separately protect against discrimination based on someone’s status of being, or not being, a parent?

Disability discrimination

- 4.29 The ADA protects against discrimination based on someone’s disability, or the disability of their relative or associate.²¹ As we discuss in chapter 8, the ADA does not protect against disability vilification. However, it does protect against vilification against a person, or group of persons, with HIV/AIDS.²²
- 4.30 The ADA defines “disability” as
- (a) total or partial loss of a person’s bodily or mental functions or of a part of a person’s body, or
 - (b) the presence in a person’s body of organisms causing or capable of causing disease or illness, or
 - (c) the malfunction, malformation or disfigurement of a part of a person’s body, or
 - (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or

18. *Discrimination Act 1991* (ACT) s 7(l).

19. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 73, rec 11.

20. *Equal Opportunity Act 2010* (Vic) s 4 definition of “parental status”, s 6(i); *Anti-Discrimination Act 1998* (Tas) s 3 definition of “parental status”, s 16(i); *Anti-Discrimination Act 1991* (Qld) s 7(d), sch 1 definition of “parental status”.

21. *Anti-Discrimination Act 1977* (NSW) pt 4A.

22. *Anti-Discrimination Act 1977* (NSW) pt 4F.

- (e) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.²³

- 4.31 This is similar to the definition in the *Disability Discrimination Act 1992 (Cth)* (*Disability Discrimination Act*).²⁴ However, we note some differences below.
- 4.32 Although it does not use these terms, the ADA’s definition is broad enough to include a range of conditions including physical disability, cognitive impairment, mental illness, learning differences and people living with illnesses such as HIV and hepatitis. “Disability” also includes past, future and presumed disability.²⁵
- 4.33 It is also unlawful to discriminate against someone based on characteristics that a person with that disability generally has or is generally thought to have. Among other things, this includes conduct based on a person having:
- an assistance dog, where the disability relates to vision, hearing or mobility (which we discuss below)
 - a palliative or therapeutic device, or mechanical equipment, to help them, or
 - an interpreter, reader, assistant or carer who provides interpretive, reading or other services.²⁶

The language used to define “disability”

- 4.34 We have heard concerns about the language the ADA uses to define disability. Many think the definition is outdated and overly limited.

Negative or deficit-based language

- 4.35 Discrimination laws across Australia, including the ADA, define disability with reference to negative or deficit-based terms. These terms include “disorder”, “malfunction”, “malformation”, “disfigurement” and “disturbed behaviour”.²⁷ This is because they mostly align with the definition in the *Disability Discrimination Act*.
- 4.36 It may be possible to replace them with more inclusive alternatives, while keeping the essence of the definition in the *Disability Discrimination Act*. For instance, there have been proposals to:

23. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “disability”.

24. *Disability Discrimination Act 1992* (Cth) s 4 definition of “disability”.

25. *Anti-Discrimination Act 1977* (NSW) s 49A.

26. *Anti-Discrimination Act 1977* (NSW) s 49B(3)–(3A).

27. *Disability Discrimination Act 1992* (Cth) s 4 definition of “disability”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “disability”; *Equal Opportunity Act 1984* (SA) s 5 definition of “disability”; *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “impairment”; *Anti-Discrimination Act 1992* (NT) s 4 definition of “disability”; *Discrimination Act 1991* (ACT) s 5AA definition of “disability”.

- refer to “disfigurement of part of the body”, but delete the references to “malfunction” and “malformation”,²⁸ or
- replace “the malfunction, malformation or disfigurement of a part of a person’s body” with “an impairment or disturbance in the structure or functioning of the person’s body or a part of the person’s body”.²⁹

4.37 Alternative words might be “restriction” or “limitation”. These words are used, for example, in the World Health Organization’s International Classification of Functioning, Disability and Health and medical or census definitions.³⁰

A social model of disability

4.38 Another issue is whether the definition should reflect a social model or a human rights model of disability.

4.39 The definitions in the ADA, the *Disability Discrimination Act* and other Australian discrimination laws reflect a “medical model” of disability. This views disability as a deficit, abnormality or medical problem requiring a cure.³¹ It does not account for external factors that may cause, worsen or alleviate disability.

4.40 The social model is the “response to, and rejection of” the medical model.³² It argues that people are disabled by social and environmental barriers to participation, including physical and communication barriers, and discriminatory attitudes. It also includes the failure to give people with disability the adjustments they need to participate in society.³³

4.41 A human rights approach or model can identify structural, policy and legal changes to enable people with disability to have full and equal access to their rights.³⁴

28. Anti-Discrimination and Crimes Legislation Amendment (Disability) Bill 2024 (NSW) sch 1 [1].

29. Draft Anti-Discrimination Bill 2024 (Qld) sch 1 definition of “disability”.

30. See, eg, Australian Bureau of Statistics, “Disability” (27 November 2023) <www.abs.gov.au/statistics/detailed-methodology-information/concepts-sources-methods/personal-safety-survey-user-guide/2021-22/disability> (retrieved 21 March 2025); World Health Organization, “International Classification of Functioning, Disability and Health (ICF)” (2025) <www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health> (retrieved 21 March 2025).

31. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Executive Summary (2023) “Our Vision for an Inclusive Australia and Recommendations”, 17.

32. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Executive Summary (2023) “Our Vision for an Inclusive Australia and Recommendations”, 18.

33. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Interim Report (2020) 346.

34. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Executive Summary (2023) “Our Vision for an Inclusive Australia and Recommendations”, 18.

4.42 The *Convention on the Rights of Persons with Disabilities* (CRPD) is sometimes described as representing both approaches.³⁵ The CRPD states:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.³⁶

4.43 In NSW, a private member’s bill proposes to implement aspects of the CRPD definition. This would retain aspects of the current ADA definition but incorporate aspects of the CRPD definition.³⁷

4.44 One preliminary submission proposed another definition:

disability is any impairment, including a physical, mental, intellectual, cognitive, neurological, learning, communication, or sensory impairment, or a functional limitation whether permanent, temporary, or episodic in nature, whether evident or not, that, in interaction with a barrier, hinders a person’s full and equal participation in society.³⁸

4.45 There may be benefits in keeping the ADA definition consistent with other Australian discrimination laws. However, the ADA could reflect the social and human rights models in other ways, including underpinning a new proactive requirement to provide adjustments, which we consider in chapter 11.

Options for expanding the ADA’s coverage

4.46 The ADA definition is broad. It does not specify particular disabilities or require any severity of symptoms. It covers physical, mental and cognitive impairments, and certain illnesses.

4.47 However, some think the definition should more clearly include psychosocial disability, mental illness or addiction. For instance, the Queensland Human Rights Commission (QHRC) noted concerns that the Queensland definition might not cover people who experience episodic mental conditions, or who do not meet diagnostic criteria.³⁹

4.48 Another issue is whether the definition should expressly refer to addiction to alcohol or other drugs. Currently, addiction can fall within the definition of disability if characterised as affecting:

35. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008); *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 44.

36. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 1.

37. Anti-Discrimination and Crimes Legislation Amendment (Disability) Bill 2024 (NSW) sch 1 [1].

38. *Dementia Australia, Preliminary Submission PAD17*, 5.

39. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 267.

- bodily and mental functions, and/or
 - thought processes, perception of reality, emotions or judgment or disturbed behaviour.⁴⁰
- 4.49 The ADA’s prohibition on disability discrimination at work does not apply if the disability relates to a person’s addiction to a prohibited drug.⁴¹ We discuss concerns about this exception in chapter 6.
- 4.50 Whether an addiction falls within the definition depends on each particular case. It is possible that a gambling addiction could be covered by the definition also. However, tribunals have not yet confirmed this in NSW.⁴²
- 4.51 No other Australian discrimination law explicitly covers addiction in the definition of disability. However, the QHRC recommended that the definition should clearly include addiction.⁴³
- 4.52 An alternative could be to protect against discrimination based on “health status”, separately from disability. This could cover health conditions that fall outside the definition of disability, or conditions not considered to be disability by those who experience them. We discuss this option in chapter 5.

Recognising the rights of people with assistance animals

- 4.53 Another concern, raised in preliminary submissions, relates to the way the ADA refers to assistance animals. The ADA treats the use of an assistance dog as a “characteristic” that is generally held by people with disability relating to vision, hearing or mobility.⁴⁴ Discrimination based on this characteristic is a form of disability discrimination.
- 4.54 However, under the ADA there is no protection for someone who has:
- an assistance animal other than a dog, or
 - disability that does not relate to vision, hearing or mobility.
- 4.55 People with disabilities that are unrelated to vision, hearing or mobility often also use assistance dogs. For instance, they can be used to support people who have a psychosocial disability, mental illness or who experience seizures. Also, animals

40. *Marsden v HREOC* [2000] FCA 1619 [54]; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.92].

41. *Anti-Discrimination Act 1977 (NSW)* s 49PA.

42. *Hinder v Salvation Army (NSW) Property Trust (No 3)* [2017] NSWCATAD 16 [77]–[80]. See also *McDougall v Kimberley-Clark Australia Pty Ltd* [2006] VCAT 2211.

43. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 21.4.

44. *Anti-Discrimination Act 1977 (NSW)* s 49B(3).

other than dogs assist people with disability. For example, horses are used during equine therapy for people with psychosocial support needs.

- 4.56 The *Disability Discrimination Act* is broader than the ADA. It protects all people with disability when they use an assistance animal, defined as any animal:
- accredited under state or territory law to assist people with disability
 - accredited by a prescribed animal training organisation, or
 - trained to assist people with disability.⁴⁵
- 4.57 There are also differences between the ADA and the *Companion Animals Act 1988* (NSW). This Act contains rules about when assistance animals must be allowed in NSW. It uses the *Disability Discrimination Act* definition of an assistance animal.⁴⁶
- 4.58 Recent reviews in Western Australia (WA) and Queensland supported the approach in the *Disability Discrimination Act*.⁴⁷ However, this has not been implemented in either state. By contrast, discrimination legislation in the Northern Territory (NT), ACT and South Australia recognises other accredited assistance animals (as well as dogs).⁴⁸

Discrimination based on genetic information

- 4.59 With advances in technology, the use of genetic information is of increasing concern. For instance, should employers be allowed to screen potential employees for genetic predisposition to disability?⁴⁹
- 4.60 In some cases, the ADA can protect against discrimination based on genetic information, because it covers discrimination based on a possible future disability.⁵⁰ However, there may be benefits of an express protection.

45. *Disability Discrimination Act 1992* (Cth) s 8, s 9(2).

46. *Companion Animals Act 1988* (NSW) s 5 definition of “assistance animal”.

47. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 21.3; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 18. See also Anti-Discrimination and Crimes Legislation Amendment (Disability) Bill 2024 (NSW) sch 1 [1].

48. *Equal Opportunity Act 1984* (SA) s 5 definition of “assistance animal”; *Discrimination Act 1991* (ACT) s 5AA(3) definition of “assistance animal”; *Anti-Discrimination Act 1992* (NT) s 4A definition of “assistance animal”.

49. See, eg, L Heap, *No Blood-No Job: Australia’s Privacy Laws and Workers’ Rights* (Australia Institute, 2024) 13, 17–18.

50. *Anti-Discrimination Act 1977* (NSW) s 49A.

- 4.61 One option could be to include “a genetic predisposition” to disability in the definition of disability. The *Disability Discrimination Act* states that a possible future disability includes a genetic predisposition to that disability.⁵¹
- 4.62 Another option could be to add “genetic information” as a separate protected attribute, like the ACT.⁵² This could cover situations in which genetic information is used for purposes other than predicting disability.⁵³ For example, it could prevent employers basing employment decisions on genetic information that suggests certain behavioural characteristics.

The public health exception

- 4.63 It is not unlawful to discriminate based on disability if the disability is an infectious disease, and the discrimination is reasonably necessary to protect public health.⁵⁴ As the NSWLRC noted in 1999, this exception is based on the view that it is necessary to control the spread of infectious disease.⁵⁵
- 4.64 The *Disability Discrimination Act* and discrimination laws of the ACT, NT and Queensland have similar exceptions.⁵⁶
- 4.65 However, in 1999 the NSWLRC recommended changes to make the exception more targeted. It recommended the exception apply where:
- the disability involves a condition that is transmissible in circumstances that might arise if a certain act is not done, and
 - the act is based on medical or expert opinion, upon which it is reasonable to rely in the circumstances, and
 - the act is proportionate to the risks.⁵⁷

51. *Disability Discrimination Act 1992* (Cth) s 4 definition of “disability”. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 22; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 264, 266; Anti-Discrimination and Crimes Legislation Amendment (Disability) Bill 2024 (NSW) sch 1 [1], [3].

52. *Discrimination Act 1991* (ACT) s 7(1)(h).

53. ACT Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT)*, Final Report, (2015) 60.

54. *Anti-Discrimination Act 1977* (NSW) s 49P.

55. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.272].

56. *Disability Discrimination Act 1992* (Cth) s 48; *Discrimination Act 1991* (ACT) s 56; *Anti-Discrimination Act 1992* (NT) s 55; *Anti-Discrimination Act 1991* (Qld) s 107.

57. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 66.

- 4.66 The NSWLRC also recommended an exception for acts done to comply with the *Public Health Act 1991* (NSW) or the *Mental Health Act 1990* (NSW).⁵⁸

Question 4.3: Disability discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “disability”?
- (2) Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability?
- (3) What changes, if any, should be made to the public health exception?

Homosexuality

- 4.67 The ADA prohibits both discrimination and vilification based on “homosexuality”. It protects “homosexual persons” and anyone thought to be a “homosexual person”. “Homosexual” is defined as a “male or female homosexual”.⁵⁹
- 4.68 However, this attribute does not include other sexual orientations, like asexuality, bisexuality and heterosexuality. Many preliminary submissions told us that this leaves a significant gap in protection.
- 4.69 Across Australia, laws use other expressions such as “sexual orientation” or “sexuality”. They are defined to recognise the rights of a wider range of people. These laws provide a range of options to consider.
- 4.70 For instance, s 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*) currently makes it an offence to threaten or incite violence based on “sexual orientation”, among other attributes. Like the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*), the *Crimes Act* defines this to include sexual orientation towards people of:
- the same sex,
 - a different sex, or
 - the same sex and a different sex.⁶⁰

58. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 66. See *Mental Health Act 2007* (NSW), repealing *Mental Health Act 1990* (NSW).

59. *Anti-Discrimination Act 1977* (NSW) s 49ZF, s 49ZG, s 4(1) definition of “homosexual”.

60. *Crimes Act 1900* (NSW) s 93Z(5) definition of “sexual orientation”; *Sex Discrimination Act 1984* (Cth) s 4 definition of “sexual orientation”. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 36.

- 4.71 Other discrimination laws use a definition based on principles developed by international human rights law experts.⁶¹ For example, Victoria defines sexual orientation as:
- A person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender.⁶²
- 4.72 The Law Reform Commission of Western Australia (LRCWA) and QHRC recommended a similar definition.⁶³ In 2024, Queensland enacted reforms to include this definition in their discrimination law but, as we explain above, it is uncertain when these changes will commence.⁶⁴
- 4.73 Another issue is whether the definition should include asexuality. The Queensland and WA reviews also recommended including people who do *not* have attraction to, or intimate sexual relations with, other people in the definition of sexual orientation.⁶⁵
- 4.74 Queensland has enacted reforms to include protection for a “lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relation” with others.⁶⁶ It is also unclear when this will commence.
- 4.75 The ACT and Tasmania provide a further, flexible option. There, sexuality/sexual orientation is defined as “including” heterosexuality, homosexuality and bisexuality.⁶⁷ This word “including” was added to the ACT law to protect a wider understanding of sexuality.⁶⁸
- 4.76 In 2023, a NSW private member’s bill, the “Equality Bill”, originally proposed to replace the ADA definition of “homosexuality” with “sexuality”. It proposed to

61. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) 8.

62. *Equal Opportunity Act 2010* (Vic) s 4 definition of “sexual orientation”. See also *Anti-Discrimination Act 1992* (NT) s 4 definition of “sexual orientation”.

63. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 54; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 23.1.

64. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(2), s 52(2), amending *Anti-Discrimination Act 1991* (Qld) s 7(n), sch 1 definition of “sexual orientation”(uncommenced).

65. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 285, rec 23.2; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 117.

66. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7, s 52(2) amending *Anti-Discrimination Act 1991* (Qld) s 7(n), sch 1 definition of “sexual orientation”(uncommenced).

67. *Discrimination Act 1991* (ACT) dictionary definition of “sexuality”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “sexual orientation”, s 16.

68. Explanatory Statement and Human Rights Compatibility Statement, Justice Legislation Amendment Bill 2020 (ACT) 13–14.

define this to include homosexuality, bisexuality or asexuality.⁶⁹ This, along with other reforms to the ADA, were not ultimately enacted in the *Equality Act 2024* (NSW).

- 4.77 However, some who supported the original Equality Bill said an attribute of “sexual orientation” was their preferred option. In their view, the changes proposed in the original Equality Bill were intended only as an interim measure. They were designed to fit within the ADA’s existing tests and structure (including the comparator test), which they thought required wider reform.⁷⁰ We explain the existing tests and structure in chapter 3.

Question 4.4: Discrimination based on homosexuality

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “homosexuality”?

Marital or domestic status

- 4.78 “Marital or domestic status” is another protected attribute under the ADA. This includes being single; married; married but living separately from one’s spouse; divorced; widowed; or in a de facto relationship (that is, two people who live together as a couple).⁷¹
- 4.79 One issue is whether this definition should recognise other forms of relationships. For instance, other Australian discrimination laws also recognise:
- de facto partners who live separately⁷²
 - former de facto partners and the surviving de facto partner of someone who has died,⁷³ and
 - civil partnerships.⁷⁴

69. Equality Legislation Amendment (LGBTIQ+) Bill 2023 (NSW) First Print, sch 1 [23].

70. Public Interest Advocacy Centre, Submission No 17 to Legislative Assembly Committee on Community Services, *Inquiry into Equality Legislation Amendment (LGBTIQ+) Bill 2023* (12 April 2024) 4–5.

71. *Anti-Discrimination Act 1977* (NSW) s 39, s 4(1) definition of “marital or domestic status”; *Interpretation Act 1987* (NSW) s 21C.

72. *Sex Discrimination Act 1984* (Cth) s 4 definition of “marital or relationship status”.

73. *Sex Discrimination Act 1984* (Cth) s 4; *Anti-Discrimination Act 1992* (NT) s 4 definition of “relationship status”.

74. *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “relationship status”; *Discrimination Act 1991* (ACT) s 2, dictionary definition of “relationship status”; *Legislation Act 2001* (ACT) s 169.

- 4.80 Some of these discrimination laws use the expression “relationship status”.⁷⁵ Some people may consider this to be a more inclusive and modern expression.

Question 4.5: Discrimination based on marital or domestic status

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “marital or domestic status”?

Race

- 4.81 The ADA protects against both discrimination and vilification based on race. The ADA defines race to include colour, nationality, descent, ethnic origin, ethno-religious origin, and national origin.⁷⁶ While this is a broad definition, preliminary submissions identified some areas that it either does not cover or only covers indirectly.
- 4.82 We address the issue of “ethno-religious” origin when considering religious discrimination in chapter 5.

Some potential gaps in coverage

- 4.83 Some suggest amending the definition of race to expressly prohibit discrimination based on caste, immigrant status and language (including someone’s accent).
- 4.84 The ADA does not protect against caste discrimination.⁷⁷ Caste is a codified, socio-religious hierarchical class system, which affects people of South Asian backgrounds in Australia.⁷⁸
- 4.85 Nor does the ADA expressly protect against discrimination based on immigrant status. However, the definition of race includes the related concept of “nationality” which has been interpreted as meaning citizenship.⁷⁹ Nationality in terms of citizenship is different from “national origin”.⁸⁰ The definition of “race” in the ADA also includes “national origin”, which refers to where someone was born, the nation

75. *Discrimination Act 1991* (ACT) s 7(1)(s); *Anti-Discrimination Act 1991* (Qld) s 7(b); *Anti-Discrimination Act 1992* (NT) s 19(1)(e).

76. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “race”.

77. Coalition Against Caste Discrimination, *Preliminary Submission PAD28*, 13. See also Periyar Ambedkar Thoughts Circle Australia, *Submission SV06*, 1; Australian Muslim Advocacy Network, *Submission SV19*, 3–4.

78. Australian Human Rights Commission, *National Anti-Racism Framework Scoping Report 2022* (2022) 73. See also Periyar Ambedkar Thoughts Circle Australia, *Submission SV06*.

79. *SUPRA v Minister for Transport Services* [2006] NSWADT 83 [63].

80. *SUPRA v Minister for Transport Services* [2006] NSWADT 83 [62], citing *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 211.

or nations their parents are connected to, and where their parents have made their home.⁸¹

- 4.86 In some cases, the race attribute indirectly covers language as a “characteristic” of race.⁸² But an express protection could arguably be clearer.⁸³
- 4.87 Reform options could include:
- expanding the definition of “race” to clearly include caste, immigrant status and/or language, or
 - creating standalone protected attributes.
- 4.88 The approach in other states and territories varies. For example:
- In 2024 Queensland passed amendments to add “caste” discrimination to the definition of “race”, but the commencement of this change is now uncertain.⁸⁴
 - The NT and Tasmania protect immigrant status as part of the definition of race, and Queensland will soon also, although the date of commencement for this change is uncertain. However, the ACT recognises it as a standalone protected attribute.⁸⁵
 - The NT recognises “language” as a separate protected attribute. This has the benefit of including “signed language” within its scope.⁸⁶
- 4.89 It may be clearer to add distinct attributes to cover these issues. On the other hand, the risk of overlap and duplication may increase if additional, related attributes are added to the ADA.
- 4.90 If immigration status was added as a standalone attribute, or to the definition of race, another issue is whether any specific exceptions would be required. In the ACT, it is lawful to discriminate based on immigration status if the discrimination is

81. *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 346; *SUPRA v Minister for Transport Services* [2006] NSWADT 83 [57]; *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 210.

82. See, eg, *Hamzy v Commissioner of Corrective Services NSW* [2022] NSWCA 16, 107 NSWLR 544 [55].

83. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 108–109.

84. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52, amending *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “race” (uncommenced).

85. *Anti-Discrimination Act 1992* (NT) s 4 definition of “race”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “race”; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52, amending *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “race” (uncommenced); *Discrimination Act 1991* (ACT) s 7. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 84, rec 31.

86. *Anti-Discrimination Act 1992* (NT) s 19(1)(ab).

reasonable, having regard to any relevant factors.⁸⁷ This allows an employer to consider a person’s visa status when offering employment. However, the ACT Government intended that it would not be lawful to refuse someone access to services because they are a refugee.⁸⁸

- 4.91 In Queensland, a broad exception allows some government bodies to require individuals to have a certain citizenship or visa status to receive assistance, services or support.⁸⁹ The QHRC thought it was important to keep this exception.⁹⁰

Recognising Aboriginal and Torres Strait Islander peoples

- 4.92 Another issue is whether the definition of race should specifically recognise Aboriginal and Torres Strait Islander peoples. The Western Australian Law Reform Commission recommended this option should be considered, subject to consultation with First Nations people.⁹¹
- 4.93 This might not change the law in a significant way. Aboriginal peoples are already considered a “race” under discrimination law. Protections under both the ADA and the *Racial Discrimination Act 1975* (Cth) extend to them.⁹²
- 4.94 However, a specific reference to Aboriginal and Torres Strait Islander peoples could be an important statement of community standards. It could also clearly affirm their right to be free from racial discrimination. However, such an amendment should only be made after consultation with Aboriginal and Torres Strait Islander peoples.

Question 4.6: Racial discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “race”?
- (2) Are any new attributes required to address potential gaps in the ADA’s protections against racial discrimination?

87. *Discrimination Act 1991* (ACT) s 57P.

88. Explanatory Statement, *Discrimination Amendment Bill 2016* (ACT) 14.

89. *Anti-Discrimination Act 1991* (Qld) s 106B.

90. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 25.3.

91. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 108.

92. *Eatock v Bolt* [2011] FCA 1103, 197 FCR 261 [314].

Sex discrimination

4.95 The ADA prohibits sex discrimination. Preliminary submissions suggested changes to the way the ADA describes this attribute and defines its scope.

Gender discrimination and sex discrimination

4.96 One view is that it would be more accurate, and inclusive, for the ADA to refer to “gender” discrimination rather than “sex” discrimination.⁹³ The Australian Government’s Guidelines on Sex and Gender explain the distinction as follows:

- “sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex”, and
- “gender is part of a person’s personal and social identity” and “refers to the way a person feels, presents and is recognised within the community”.⁹⁴

4.97 However, the language of sex discrimination has been well-established in Australian law. Only Tasmania lists “gender” as a protected attribute.⁹⁵ The QHRC recently recommended against adding a gender attribute, as it thought that separating the concepts of sex and gender could create uncertainty.⁹⁶

Binary and non-binary language

4.98 Another question is whether the ADA should continue to use binary concepts to define sex discrimination.

4.99 The ADA does not define “sex” directly. However, it defines “man” and “woman” as being members of the male sex and female sex, respectively.⁹⁷ The tests for sex discrimination also adopt a binary approach, requiring comparisons with “a person of the opposite sex”.⁹⁸

4.100 On the other hand, the ADA also recognises the existence of persons of “indeterminate sex”.⁹⁹ In light of the use of this phrase in the ADA, the High Court concluded that another NSW law “recognises that a person may be other than male or female”.¹⁰⁰

93. Equality Australia, *Preliminary Submission PAD07*, 7.

94. *Australian Government Guidelines on the Recognition of Sex and Gender* (2015) [11], [13] (emphasis omitted).

95. *Anti-Discrimination Act 1998* (Tas) s 16.

96. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 272, 280.

97. *Anti-Discrimination Act 1977* (NSW) s 23.

98. *Anti-Discrimination Act 1977* (NSW) s 24(1).

99. *Anti-Discrimination Act 1977* (NSW) s 38A(c).

100. *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, 250 CLR 490 [18], [46].

4.101 Following amendments in 2013, the *Sex Discrimination Act* refers to people of a “different sex” instead of people of the “opposite sex”.¹⁰¹ Recent reviews in WA and Queensland recommended against the use of terms such as “opposite gender” or male and female.¹⁰² Despite recent amendments, the Queensland Act still contains references to “male” and “female”.¹⁰³

Discrimination based on pregnancy or breastfeeding

4.102 The ADA does not list pregnancy and breastfeeding as distinct protected attributes. Instead, they are dealt with as part of the test for sex discrimination.

4.103 Among other things, the test for direct discrimination covers acts based on:

- someone’s sex, or
- a characteristic that people of that sex generally either have or are generally presumed to have.¹⁰⁴

4.104 The fact that a woman is or may become pregnant, is breastfeeding or may breastfeed, is treated as a “characteristic” that women generally have. In this way, discrimination based on pregnancy or breastfeeding is considered a form of sex discrimination against women. The ADA provides that granting a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding does not constitute sex discrimination against a man.¹⁰⁵

4.105 Another approach could be to clearly recognise pregnancy and breastfeeding as separate attributes, not tied to sex discrimination. The NSWLRC recommended this in 1999. The NSWLRC thought it would make the law clearer and thought there was wide support for it.¹⁰⁶ Other discrimination laws across Australia include pregnancy as a separate attribute.¹⁰⁷ Some recognise breastfeeding as a separate attribute.¹⁰⁸

101. *Sex Discrimination Act 1984* (Cth) s 5, s 4 definition of “sexual orientation”.

102. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 30; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 280.

103. *Anti-Discrimination Act 1991* (Qld) s 98, s 111.

104. *Anti-Discrimination Act 1977* (NSW) s 24(1)–(1A).

105. *Anti-Discrimination Act 1977* (NSW) s 35.

106. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 31, [5.40], [5.42].

107. *Sex Discrimination Act 1984* (Cth) s 7; *Discrimination Act 1991* (ACT) s 7(1)(o); *Equal Opportunity Act 2010* (Vic) s 6(b); *Anti-Discrimination Act 1991* (Qld) s 7(c); *Equal Opportunity Act 1984* (WA) s 10; *Anti-Discrimination Act 1998* (Tas) s 16(g); *Anti-Discrimination Act 1992* (NT) s 19(f); *Equal Opportunity Act 1984* (SA) s 85T(4).

108. *Sex Discrimination Act 1984* (Cth) s 7AA; *Discrimination Act 1991* (ACT) s 7(d); *Equal Opportunity Act 2010* (Vic) s 6(l); *Anti-Discrimination Act 1991* (Qld) s 7(e); *Equal Opportunity Act 1984* (WA) s 10A; *Anti-Discrimination Act 1998* (Tas) s 16(h); *Anti-Discrimination Act 1992* (NT) s 19(h); *Equal Opportunity Act 1984* (SA) s 85T(5), s 87B(1).

Question 4.7: Sex discrimination

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “sex”?
- (2) Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?

Transgender grounds

- 4.106 The ADA prohibits discrimination and vilification on “transgender grounds”. It defines a transgender person as someone:
- who identifies “as a member of the opposite sex” by living or seeking to live as such
 - who has identified “as a member of the opposite sex” by living as such, or
 - who, “being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”.¹⁰⁹
- 4.107 This applies whether or not they are a “recognised transgender person”, that is, a person whose record of sex has been altered under the relevant law. The reference to a “transgender person” also includes a person being thought of as transgender, whether or not they are “in fact a transgender person”.¹¹⁰

“Gender identity” as a potential alternative

- 4.108 Aside from NSW and WA, discrimination laws across Australia include gender identity as a protected attribute.¹¹¹
- 4.109 The *Sex Discrimination Act* and s 93Z of the *Crimes Act* use the expression “gender identity”. Both define it as:
- the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.¹¹²
- 4.110 Courts have found this is broad enough to cover:

109. *Anti-Discrimination Act 1977* (NSW) s 38A.

110. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “recognised transgender person”, s 38A.

111. *Sex Discrimination Act 1984* (Cth) s 5B; *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16; *Discrimination Act 1992* (NT) s 19. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 28, rec 29.

112. *Crimes Act 1900* (NSW) s 93Z; *Sex Discrimination Act 1984* (Cth) s 4.

- transgender identity (when a person’s current gender differs from their assigned sex at birth)
- cisgender identity (when a person’s gender corresponds to the sex registered for them at birth), and
- “other kinds and aspects of gender identification”.¹¹³

4.111 Queensland takes another approach, defining gender identity as being:

- (a) the person’s internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
- (b) without limiting paragraph (a), includes —
 - (i) the person’s personal sense of the body; and
 - (ii) if freely chosen — modification of the person’s bodily appearance or functions by medical, surgical or other means; and
 - (iii) other expressions of the person’s gender, including name, dress, speech and behaviour.¹¹⁴

4.112 This aligns with human rights law principles on sexual orientation and gender identity, which were developed by international legal experts.¹¹⁵

4.113 One issue is how an attribute of “gender identity” would operate alongside the comparator test for direct discrimination, if this remains.¹¹⁶ The Federal Court dealt with this in a recent case by defining the “comparator” as a person who identifies as a “different gender identity” to the complainant.¹¹⁷ However, as we outline in chapter 3, some think the comparator test is too complicated and should be removed.

Redefining “transgender grounds”

4.114 A less far-reaching option could be to keep the expression “transgender grounds”, but to redefine it. The original Equality Bill proposed to remove the concept of a “recognised transgender person” from the ADA. It also proposed to redefine “transgender person” as someone who:

- lives as a member of another sex, or
- who identifies as a particular sex that is not exclusively male or female by living as a member of that sex.¹¹⁸

113. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, 333 IR 296 [74].

114. *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “gender identity”.

115. *The Yogyakarta Principles: Principles on the on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) 6. See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 276–276, rec 22.1.

116. Equality Australia, *Preliminary Submission PAD07*, 5.

117. *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, 333 IR 296 [74].

118. Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) First Print, sch 1 [1], [3]–[5].

- 4.115 However, as we note above, some advocates of the original Equality Bill intended this to only be an interim measure of protection. More broadly, they expressed a preference for an attribute of “gender identity”.¹¹⁹

Question 4.8: Discrimination on transgender grounds

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “transgender grounds”?

Extending existing protections

- 4.116 Another related question is whether the existing attributes should be extended in the ways described below.

Past or future attributes

- 4.117 One reform option could involve extending a feature that already applies to disability and carer discrimination. As noted above, the ADA protects against discrimination based on someone’s past or future disability, or their past or future carer’s responsibilities.¹²⁰ But this only applies to disability and carer discrimination and not generally across all attributes.
- 4.118 Some other Australian discrimination laws more broadly protect against discrimination based on an attribute that someone had in the past.¹²¹ The LRCWA also recommended protecting against discrimination based on an attribute that someone is planning, or proposing, to adopt in the future.¹²²

Relatives and associates of people with protected attributes

- 4.119 Another option could be to extend protections to relatives and associates of people with a recognised attribute, in all cases. As we explain in chapter 3, the ADA generally protects someone against direct discrimination based on a protected attribute that they, or that their relative or associate, has.¹²³ However, this does not apply to direct discrimination based on carer’s responsibility. And it does not form part of the test for indirect discrimination for any attribute.

119. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 24 August 2023, 9145; Public Interest Advocacy Centre, Submission No 17 to Legislative Assembly Committee on Community Services, *Inquiry into Equality Legislation Amendment (LGBTIQ+) Bill 2023* (12 April 2024) 5.

120. *Anti-Discrimination Act 1977* (NSW) s 49A(c), s 49A(d), s 49S(2).

121. See, eg, *Discrimination Act 1991* (ACT) s 7(2); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Anti-Discrimination Act 1992* (NT) s 20(2).

122. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 14.

123. *Anti-Discrimination Act 1977* (NSW) s 7(1), s 24(1), s 38B(1)(a)–(b), s 49B(1), s 49ZG(1), s 49ZYA(1).

4.120 Adding a specific protected attribute could address this. Other discrimination laws identify being an “associate” of someone with a protected attribute, as a protected attribute itself.¹²⁴ This covers relatives and associates under both the direct and indirect discrimination tests. This might more clearly, and generally, protect against discrimination based on having a relationship with someone with a protected attribute.

Question 4.9: Extending existing protections

- (1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?
- (2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

124. *Equal Opportunity Act 2010* (Vic) s 6; *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16; *Anti-Discrimination Act 1991* (Qld) s 7. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 50.

5. Discrimination: potential new protected attributes

In brief

The *Anti-Discrimination Act 1977* (NSW) (ADA) only protects against discrimination and vilification based on certain, specified attributes. In this chapter we ask if the ADA should recognise and protect against discrimination based on other attributes.

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- 5.1 In the previous chapter, we explain that the *Anti-Discrimination Act 1977* (NSW) (ADA) prohibits discrimination based on a limited range of recognised protected attributes. Many preliminary submissions argued that other protected attributes should be recognised.
- 5.2 In its 1999 review of the ADA, the NSW Law Reform Commission (NSWLRC) thought that changes to the protected attributes would “inevitably follow from changing social attitudes and practice”.¹ This can be important to ensure the ADA responds to societal changes and recognises the rights of those most at risk of discrimination.

1. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.8].

However, no new protected attributes have been recognised since discrimination based on carer’s responsibilities was added in 2000.

- 5.3 Discrimination laws in other parts of Australia have been amended more recently to expand the range of protected attributes. Other discrimination and employment laws protect a far wider range of attributes than the ADA. This has led to uneven protection across Australia and significant gaps in protection in NSW.
- 5.4 In this chapter, we consider whether the ADA should prohibit discrimination based on other attributes. We set out a range of options that we have drawn from preliminary submissions and our research. Other options, that relate closely to existing protected attributes, are profiled in the previous chapter.
- 5.5 In presenting these options for consideration, we recognise they may not be the only possible options. We welcome suggestions of other attributes that could be added to the ADA’s discrimination protections.

Principles that could guide reform

- 5.6 Before outlining some reform options, we invite you to comment on the principles that could guide consideration of potential new protected attributes. An important consideration is whether there are gaps in protection in state and federal laws.

Identifying the guiding principles

- 5.7 In its recent review of Queensland’s discrimination law, the Queensland Human Rights Commission (QHRC) provided some principles that might also assist to guide reform in NSW. It grouped the attributes protected in Queensland into three main categories. In summary, these protected attributes:
- relate to immutable characteristics, that is, traits a person cannot change
 - relate to the characteristics of historically marginalised groups, and/or
 - are based on attributes protected under international human rights instruments.²
- 5.8 The QHRC then identified criteria and questions, summarised below, that it thought should guide decisions about whether an attribute should be protected.

2. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 310.

Table 5.1: Possible criteria for including new attributes³

Criteria	Questions
Whether there is a gap in protection	<ul style="list-style-type: none"> ▪ Is there sufficient information to show that people with a particular characteristic need the protection of the Act? ▪ Are they already protected under an existing attribute? ▪ Are they already protected by other legislation, eg employment legislation?
Whether the proposed attribute is comparable to those already covered by the Act	<ul style="list-style-type: none"> ▪ Is the group of a comparable nature to people represented by the attributes already recognised by the Act? ▪ Is the group experiencing discrimination that cannot be reasonably and objectively justified? ▪ Is the group vulnerable, having suffered and continuing to suffer marginalisation?

- 5.9 We invite your views on whether these criteria are appropriate for NSW, or if other criteria should influence decisions about which attributes to include in the ADA.

Identifying gaps between federal and state law

- 5.10 One of the issues identified by the QHRC is whether an attribute is already protected by other legislation.
- 5.11 In our second consultation paper, we will address the issue of federal and state complaint pathways and procedures in detail. However, the relationship between federal and state laws is also important to consider when assessing the extent of any gaps in protected attributes in NSW. The complex relationship means that people with some attributes may be unable to obtain an effective remedy under either NSW or federal discrimination law.

The federal unlawful discrimination jurisdiction

- 5.12 Under federal discrimination law, “unlawful discrimination” refers to discrimination that breaches the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*), *Disability Discrimination Act 1992* (Cth) or the *Age Discrimination Act 2004* (Cth). Together, these Acts cover discrimination based on age, race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, marital or relationship status, pregnancy, breastfeeding, family responsibilities or disability.

3. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 309–310.

- 5.13 The Australian Human Rights Commission (AHRC) can attempt to conciliate complaints of unlawful discrimination. If this is unsuccessful, the complainant can seek a judicial remedy in the Federal Court of Australia or Federal Circuit and Family Court of Australia.⁴
- 5.14 Someone in NSW who experiences discrimination may be able to make a complaint under either state or federal discrimination law, depending on their respective coverage (including any relevant exceptions).
- 5.15 There are differences between the coverage of the ADA and federal discrimination law. Sometimes, there are overlaps. Other times, federal law covers a gap in the ADA. An example is bisexuality, which is protected by the federal definition of sexual orientation, but which is not protected by the ADA.

Other federal complaint pathways

- 5.16 The AHRC has separate powers to inquire into, and attempt to conciliate, complaints alleging:
- discrimination in employment and occupation, as part of its functions relating to equal opportunity in employment
 - systemic discrimination, and
 - acts or practices of the Commonwealth that breach particular human rights.⁵
- 5.17 These powers cover a wide range of attributes recognised in international human rights and labour law instruments, many of which are not covered in federal discrimination law. For instance, the equal opportunity jurisdiction includes the power to inquire into complaints about discrimination based on attributes such as religion, political opinion, medical record, irrelevant criminal record and trade union activity.⁶
- 5.18 Where there is a gap in the attributes protected by the ADA or in federal discrimination law, people in NSW may be able to use these pathways to complain to the AHRC. But there are limits to what they can achieve in terms of seeking an effective remedy.
- 5.19 This is because such complaints cannot be taken to court if conciliation is unsuccessful. Instead, the AHRC can report to the Minister if it considers the act or

4. *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(aa), s 46PO.

5. *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of “discrimination”, s 31(b), s 35L, s 11(1)(f); *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

6. *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of “discrimination”; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

practice constitutes discrimination or is inconsistent with, or contrary to any human right.⁷

Adverse action in employment under the *Fair Work Act*

5.20 Another gap is created by the interplay of the *Fair Work Act 2009* (Cth) (*Fair Work Act*) and the ADA. The *Fair Work Act* protects against “adverse action” in employment based on a broader range of personal attributes than the ADA or federal discrimination law. That is:

race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.⁸

5.21 Adverse action includes a range of conduct against an employee, such as:

- dismissing them
- injuring them in their employment
- altering their position to their prejudice, and
- discriminating between them and other employees.⁹

5.22 However, an exception provides that this does not apply to conduct that is not unlawful under any anti-discrimination law in force where the conduct occurs.¹⁰ If neither the ADA nor federal discrimination law prohibits discrimination based on these attributes, people in NSW cannot use the *Fair Work Act* to complain about certain forms of adverse action in employment based such attributes either. For instance, neither the ADA nor federal discrimination law covers discrimination based on family and domestic violence, religion, political opinion and social origin.

5.23 This means people in NSW can be doubly disadvantaged compared to people in other states and territories in which these attributes are protected.

5.24 Adding certain attributes to the ADA might enliven the employment protections under the *Fair Work Act* relating to that attribute (subject to any exceptions). This will need to be considered carefully to avoid further complexity and inconsistency between the jurisdictions. We will return to this issue in our second consultation paper.

5.25 This exception does not apply to other related protections in the *Fair Work Act*. This includes the prohibition on taking adverse action against someone because they:

7. *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f), s 20A, s 31(b), s 31(e), s 32A.

8. *Fair Work Act 2009* (Cth) s 351(1).

9. *Fair Work Act 2009* (Cth) s 342(1) item 1.

10. *Fair Work Act 2009* (Cth) s 351(2), s 723. See *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768; *Krcho v University of NSW* [2021] FWCFB 350.

- are or are not a member of an industrial association, or
- engage, propose to engage, or do not engage, in industrial activity.¹¹

5.26 In addition, the exception does not apply to the prohibition on the termination of employment based on the broad list of attributes we mention above.¹²

Question 5.1: Guiding principles

What principles should guide decisions about what, if any, new attributes should be added to the ADA?

Some options for new protected attributes

5.27 In preliminary submissions, we received a range of suggestions for possible new protected attributes. We outline these below, highlighting potential considerations relating to their expression, definitions and exceptions drawn from other laws and law reform processes. We encourage you to comment on these options and to suggest others.

Irrelevant criminal record

5.28 In preliminary submissions, we heard concerns that discrimination based on irrelevant criminal record can make it hard to enter the workforce. This form of discrimination can affect some groups disproportionately, such as Aboriginal people, sex workers and gender diverse communities, due to their high level of contact with the criminal justice system.¹³

5.29 Discrimination based on irrelevant criminal record is unlawful in the Australian Capital Territory (ACT), the Northern Territory (NT) and Tasmania.¹⁴ The AHRC says this should be unlawful under federal discrimination law too, with judicial remedies available.¹⁵ Currently, the AHRC can inquire into and try to conciliate complaints of discrimination at work based on irrelevant criminal record.¹⁶ However, as we note above, judicial remedies are not available for such complaints.

11. *Fair Work Act 2009* (Cth) s 346.

12. *Fair Work Act 2009* (Cth) s 772(1)(f).

13. See, eg, HIV/AIDS Legal Centre, *Positive Life NSW, Preliminary Submission PAD60*, 10; Inner City Legal Centre, *Preliminary Submission PAD40*, 2; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 266.

14. *Anti-Discrimination Act 1992* (NT) s 19(q); *Discrimination Act 1991* (ACT) s 7(1)(k); *Anti-Discrimination Act 1998* (Tas) s 16(q).

15. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 262.

16. *Australian Human Rights Commission Act 1986* (Cth) s 31(b); *Australian Human Rights Commission Regulations 2019* (Cth) reg 6(a)(iii).

- 5.30 In 1999, the NSWLRC recommended against including lapsed criminal convictions as an attribute. It said there was no reason for the ADA to cover criminal records, as other laws dealt with spent convictions and when a criminal record must be disclosed.¹⁷
- 5.31 In 2024, the Queensland Parliament enacted reforms to add “irrelevant criminal record” as a protected attribute. This, and other amendments to Queensland’s discrimination law, was due to commence on 1 July 2025.¹⁸ However, the current Queensland Government decided to defer the commencement of all these amendments to conduct further consultations. It expressed concerns that the attribute of “irrelevant criminal record” could affect government decision-making on issues such as weapons licensing, police protection notices or security provider licensing.¹⁹

Models for defining the scope

- 5.32 If NSW was to recognise irrelevant criminal record as a protected attribute, other states and territories might provide models. For instance, the ACT defines “irrelevant criminal record” to include:
- a record relating to an alleged offence where the proceedings were not finalised
 - a record relating to an alleged offence where the individual was acquitted
 - instances where the individual was served with an infringement notice
 - instances where the individual had a conviction for an offence, but the circumstances of the offence were not directly relevant to the situation in which discrimination arose, and
 - spent convictions (which includes extinguished homosexual convictions).²⁰
- 5.33 An issue is how the ADA might deal with discrimination based on expunged convictions for homosexuality offences, which have now been repealed. One option is to treat extinguished or expunged homosexual convictions as “irrelevant criminal records”, as in the ACT, the NT and Tasmania.²¹

17. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* Report 92 (1999) [5.236]. See also *Criminal Records Act 1991 (NSW)* s 8, s 9, s 12.

18. *Respect at Work and Other Matters Amendment Act 2024 (Qld)* s 7(3), inserting *Anti-Discrimination Act 1991 (Qld)* s 7(pe) (uncommenced).

19. D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 7 April 2024).

20. *Discrimination Act 1991 (ACT)* s 2, dictionary definition of “irrelevant criminal record”; *Spent Convictions Act 2000 (ACT)* pt 3A.

21. *Discrimination Act 1991 (ACT)* s 2, dictionary definition of “irrelevant criminal record”; *Spent Convictions Act 2000 (ACT)* pt 3A; *Anti-Discrimination Act 1992 (NT)* s 4(1) definition of “irrelevant

5.34 Alternatively, “expunged homosexual conviction” could be recognised as a distinct attribute, as in Victoria.²² The former Queensland Government preferred this approach because expunged homosexual offence convictions should never have existed. This differentiates them from other convictions.²³

Possible exceptions

5.35 Another issue is whether exceptions to discrimination based on “irrelevant criminal record” are needed to balance competing interests. For instance, exceptions apply elsewhere relating to:

- employment that involves working with vulnerable people, if the discrimination is reasonably necessary to protect their wellbeing²⁴
- employment that involves working with children if the discrimination is reasonably necessary to protect children’s wellbeing,²⁵ or
- providing accommodation, where it is reasonably necessary to protect the wellbeing of nearby residents.²⁶

Domestic and family violence

5.36 We heard that victim-survivors of domestic and family violence can experience a range of discriminatory practices. This includes in the areas of accommodation, work and education.²⁷

5.37 South Australia, the ACT and the NT protect against discrimination based on domestic or family violence.²⁸ It is also covered by the *Fair Work Act*, but this

criminal record”, s 19(1)(q); *Anti-Discrimination Act 1998* (Tas) s 3 definition of “irrelevant criminal record”, s 16(q). See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 316–317, rec 29.1; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 90, rec 36.

22. *Equal Opportunity Act 2010* (Vic) s 6(pa), s 6(pb).

23. Queensland Parliament, Community Safety and Legal Affairs Committee, *Respect at Work and Other Matters Amendment Bill 2024*, Report No 13 (2024) 7, rec 29; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pd)–(pe) (uncommenced).

24. *Anti-Discrimination Act 1992* (NT) s 37(1).

25. *Anti-Discrimination Act 1998* (Tas) s 50.

26. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 19, rec 89.

27. See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 9; Legal Aid NSW, *Preliminary Submission PAD87*, 15.

28. *Equal Opportunity Act 1984* (SA) s 85T(8); *Discrimination Act 1991* (ACT) s 7(1)(x); *Anti-Discrimination Act 1992* (NT) s 19(1)(jb). See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 55, 124.

protection against discrimination does not extend to NSW (as we discuss above).²⁹ The Queensland Parliament passed amendments in 2024 to add this attribute but, as we note above, the commencement date is now uncertain.³⁰

- 5.38 Federally, the AHRC broadly supported a new prohibition against discrimination based on domestic and family violence. However, it thought the framing of any such prohibition needed further consideration.³¹
- 5.39 Another option is to include protections for people who have been subjected to sexual violence more generally.³² This could go beyond the domestic and family violence context. It could protect a wider range of people who may be vulnerable to experiencing discrimination.

Health status and irrelevant medical record

- 5.40 Two other potential protected attributes are “health status” and “irrelevant medical history”. These could be added to the ADA separately from the disability attribute, which we outline in chapter 4. While this could expand protections, another view is that it might lead to overlaps with disability discrimination.

Health status

- 5.41 A new “health status” attribute might cover discrimination based on a range of factors, for instance mental health status, blood borne virus status, and/or sexually transmissible infection status. Some argue this could:
- be a more appropriate way of recognising the rights of people with HIV/AIDS, who may not consider having HIV/AIDS to be a disability, and
 - protect people who experience episodic mental health issues, which may not be covered clearly by the definition of disability.³³
- 5.42 Another view is that a “health status” attribute should protect people who use drugs and/or alcohol, regardless of their degree of use, to address the discrimination and stigma they face.³⁴
- 5.43 In NSW, the ADA’s definition of disability likely covers the first three of these conditions. It is also broad enough to capture drug or alcohol addiction, in some

29. *Fair Work Act 2009* (Cth) s 351(1).

30. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pa) (uncommenced).

31. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 271.

32. Full Stop Australia, *Preliminary Submission PAD70*, 3.

33. See, eg, HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 8.

34. NSW Users and AIDS Association, *Preliminary Submission PAD52*, 6.

cases.³⁵ This suggests that a new “health status” attribute may lead to a degree of overlapping coverage. The QHRC recently recommended against a separate health status attribute because such overlaps could create further complexity.³⁶

Irrelevant medical record

- 5.44 Some instances of discrimination based on medical history may also be considered disability discrimination. This could happen where, for example, someone’s medical history involves records about a disability they either had or were thought to have, or they may have in the future.³⁷
- 5.45 However, an “irrelevant medical record” attribute may provide clearer protections. It could also protect against discrimination that goes beyond disability discrimination.
- 5.46 This is recognised as a protected attribute in discrimination law in Tasmania and the NT.³⁸ The AHRC can inquire into employment discrimination based on this attribute as part of its equal opportunity function.³⁹ However, as we note above, judicial remedies are not available for such complaints.
- 5.47 The Queensland Parliament passed amendments in 2024 to cover discrimination based on medical records that are “not directly relevant to the situation in which the record or part of the record is being considered”.⁴⁰ However, the commencement date is now uncertain.
- 5.48 The Law Reform Commission of Western Australia (LRCWA) similarly recommended adding this attribute to WA’s discrimination law and considered it should also cover workers’ compensation history. In its view, people may be reluctant to make valid workers’ compensation claims if they think the claims may be disclosed to future employers.⁴¹

35. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “disability”; *Marsden v HREOC* [2000] FCA 1619 [54]; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.92]. But see *Anti-Discrimination Act 1977* (NSW) s 49PA.

36. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 271.

37. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of disability, s 49A.

38. *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(1)(p).

39. *Australian Human Rights Commission Regulations 2019* (Cth) reg 6(a)(ii); *Australian Human Rights Commission Act 1986* (Cth) s 31(b).

40. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), s 52(2), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pf), sch 1 definition of “irrelevant medical record” (uncommenced).

41. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 93, rec 37–38.

Industrial activity or political belief or activity

5.49 Another idea could be to protect against discrimination based on industrial activity, and/or political belief or activity. We heard this could prevent people being targeted at work because of their involvement in such activities.⁴²

Industrial activity

5.50 In 1999, the NSWLRC recommended against adding industrial activity or trade union membership to the ADA as a protected attribute. It concluded this was already protected by industrial laws.⁴³

5.51 However, discrimination laws in most other states and territories prohibit discrimination based on:

- industrial activity⁴⁴
- trade union activity,⁴⁵ or
- trade union or employer association activity.⁴⁶

5.52 Federally, the AHRC can inquire into complaints about discrimination based on trade union activity as part of its functions relating to equal opportunity in employment.⁴⁷ However, federal judicial remedies do not apply.

5.53 As we note above, the *Fair Work Act* also protects against adverse action against someone because they:

- are or are not a member of an industrial association, or
- engage, propose to engage, or do not engage, in industrial activity.⁴⁸

5.54 In the discrimination laws of other states and territories, this attribute generally covers a range of activities, including:

- being a member of an organisation, as well as proposing or refusing to join one
- establishing or forming, or being involved in establishing or forming, an organisation

42. Unions NSW, *Preliminary Submission PAD90*, 4–5.

43. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.221]–[5.222].

44. *Equal Opportunity Act 2010* (Vic) s 6(f); *Anti-Discrimination Act 1998* (Tas) s 16(l); *Discrimination Act 1991* (ACT) s 7(1)(j).

45. *Anti-Discrimination Act 1991* (Qld) s 7(k).

46. *Anti-Discrimination Act 1992* (NT) s 19(1)(k).

47. *Australian Human Rights Commission Act 1986* (Cth) s 31(b); *Australian Human Rights Commission Regulations 2019* (Cth) reg 6(a)(viii).

48. *Fair Work Act 2009* (Cth) s 346.

- participating in, organising, encouraging, assisting or promoting lawful industrial activity (or proposing to)
- not participating in, or refusing to participate in, lawful industrial activity, and
- representing or advancing the views, claims or interests of members of an industrial organisation or industrial association.⁴⁹

5.55 Tasmania specifically permits discrimination in employment based on industrial activity if it is based on a genuine occupational requirement relating to a particular position.⁵⁰

Political belief, opinion or activity

5.56 International human rights law prohibits discrimination based on political or other opinion.⁵¹ Some laws in Australia also protect against this:

- While the expressions vary, some other states and territories protect against discrimination based on political belief or activity.⁵²
- The AHRC can receive complaints of discrimination in employment based on this attribute as part of its equal opportunity jurisdiction.⁵³ However, judicial remedies do not apply.
- The *Fair Work Act* also protects against adverse action based on political opinion.⁵⁴ An exception to this currently applies in NSW, for the reasons we note above.

5.57 Although the definitions in these laws differ, this attribute generally includes:

- having, or not having, a political conviction, belief, opinion or affiliation, and
- engaging, or not engaging in, political activity.⁵⁵

49. *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “industrial activity”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “industrial activity”; *Discrimination Act 1991* (ACT) dictionary, definition of “industrial activity”. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 85–86, rec 33.

50. *Anti-Discrimination Act 1998* (Tas) s 49.

51. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

52. *Anti-Discrimination Act 1991* (Qld) s 7(j); *Anti-Discrimination Act 1998* (Tas) s 16(m)–(n); *Equal Opportunity Act 2010* (Vic) s 6(k); *Anti-Discrimination Act 1992* (NT) s 19(1)(n); *Discrimination Act 1991* (ACT) s 7(1)(n); *Equal Opportunity Act 1984* (WA) s 53.

53. *Australian Human Rights Commission Act 1986* (Cth) s 3 definition of “discrimination”, s 31(b).

54. *Fair Work Act 2009* (Cth) s 351(1).

55. *Discrimination Act 1991* (ACT) s 7(1)(n), dictionary definition of “political conviction”. See also *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “political belief or activity”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “political belief or affiliation”; *Anti-Discrimination Act 1992* (NT) s 4(5), s 19(1)(n).

- 5.58 In 1999, the NSWLRC recommended including “political opinion” as a protected attribute in the ADA.⁵⁶
- 5.59 If NSW was to recognise this as a protected attribute, one issue is what kinds of beliefs or opinions should be protected. For instance:
- the ACT Tribunal found that “political” means “concerned with the ‘processes of government’” or “bearing on government”⁵⁷
 - the NSWLRC recommended defining “political opinion” as opinions about the role of the state and state power,⁵⁸ and
 - Victoria confines the protection to a “lawful political belief” and “lawful political activity”.⁵⁹
- 5.60 Some laws permit discrimination based on this attribute in relation to employment in political roles (such as ministerial advisors or employees of political parties).⁶⁰ However, the LRCWA said this should only apply when:
- holding or not holding a political conviction, or engaging (or failing to engage) in any lawful political activities, is an inherent requirement of the job
 - the person cannot comply with the requirement because of their political conviction, and
 - it is reasonable and proportionate in the circumstances.⁶¹
- 5.61 Victoria has two additional exceptions, which apply to clubs established principally for a political purpose and local councillors.⁶² In 1999, the NSWLRC supported these exceptions.⁶³

Physical features or appearance

- 5.62 Another option is to protect against discrimination based on physical features or appearance.

56. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 39.

57. *Kovac v Australian Croatian Club Ltd* [2014] ACAT 41 [70].

58. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 39.

59. *Equal Opportunity Act 2010 (Vic)* s 4(1) definition of “political belief or activity”.

60. *Discrimination Act 1991 (ACT)* s 45; *Equal Opportunity Act 1984 (WA)* s 66(2); *Anti-Discrimination Act 1998 (Tas)* s 53; *Equal Opportunity Act 2010 (Vic)* s 27.

61. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 201–202, rec 92.

62. *Equal Opportunity Act 2010 (Vic)* s 66A, s 73–74.

63. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 82, rec 83.

- 5.63 While this may overlap with existing protections against disability discrimination, it could also go beyond them. For instance, a new attribute could apply more generally to protect against discrimination based on height, weight, size or other bodily features.⁶⁴
- 5.64 In Victoria, this attribute has been interpreted broadly to include characteristics that a person has from birth or that emerge later in life. It also protects against discrimination based on physical features that come from deliberate bodily alterations, such as tattoos.⁶⁵
- 5.65 However, an issue is whether the law should prohibit discrimination against someone based on physical features they have chosen to adopt. The QHRC concluded it was not necessary to protect against discrimination based on chosen alterations. It said that people with tattoos, certain hairstyles or cosmetic procedures do not experience broader structural disadvantage, unless this aspect of their appearance relates to another existing attribute (such as race).⁶⁶ The recent Queensland amendments take a similar approach but, as we note above, the commencement of these changes is uncertain.⁶⁷
- 5.66 Some other exceptions could also be considered. For instance, discrimination based on physical features or appearance is allowed elsewhere if:
- it is necessary to protect health, safety, or property⁶⁸
 - there is a genuine occupational requirement, for example, in forms of employment such as modelling,⁶⁹ or
 - welfare services are being provided to people with particular physical features.⁷⁰
- 5.67 In 1999, the NSWLRC recommended against including this attribute in the ADA. It said the concept could not be articulated clearly.⁷¹

64. *Discrimination Act 1991* (ACT) dictionary definition of “physical features”; *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “physical features”.

65. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 327.

66. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 30, 328. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 99, rec 41–42.

67. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52(2), inserting *Anti-Discrimination Act 1991* (Qld) dictionary, definition of “physical appearance” (uncommenced).

68. *Discrimination Act 1991* (ACT) s 57R; *Equal Opportunity Act 2010* (Vic) s 86(1).

69. *Equal Opportunity Act 2010* (Vic) s 26(4).

70. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 203, rec 93.

71. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.230].

Religious belief or activity

- 5.68 International human rights law contains a right to non-discrimination based on religion.⁷² In most Australian states and territories, it is unlawful to discriminate based on religious belief, conviction and/or activity.⁷³ Federally, the AHRC can inquire into complaints based on religious discrimination in work as part of its equal opportunity function, but judicial remedies are not available.⁷⁴
- 5.69 The ADA does not contain a protected attribute that addresses religious discrimination. The *Fair Work Act*'s protections against adverse action based on religion do not apply in NSW, for the reasons we outline above.⁷⁵ Many think this creates a significant gap in protection in NSW.

Existing religious protections

- 5.70 In the ADA, the definition of racial discrimination provides limited and indirect protections for religion. Discrimination based on “ethno-religious origin” is a form of racial discrimination. This term was added to the ADA to clarify that ethno-religious groups, such as members of the Jewish, Islamic and Sikh faiths, are protected against racial vilification and discrimination.⁷⁶
- 5.71 However, “ethno-religious origin” has been interpreted inconsistently. One view is that it protects against discrimination based on being a Muslim from a particular national grouping, but not against discrimination based on being a member of that religion generally.⁷⁷ Other Tribunal decisions have not drawn this clear line, making it hard for Anti-Discrimination NSW to advise the public clearly about their rights.⁷⁸
- 5.72 The complex system of exceptions is another way the ADA indirectly protects freedom of religion. For instance, religious organisations and private schools have broad exceptions from the ADA. We outline these in chapter 7.

72. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

73. *Equal Opportunity Act 2010* (Vic) s 6(n); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o); *Anti-Discrimination Act 1992* (NT) s 19(1)(m); *Discrimination Act 1991* (ACT) s 7(1)(t); *Equal Opportunity Act 1984* (WA) s 53.

74. *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of “discrimination”, s 31(b).

75. *Fair Work Act 2009* (Cth) s 351(1).

76. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 4 May 1994, 1827.

77. See, eg, *Khan v Commissioner of Corrective Services* [2002] NSWADT 131 [20]; *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 [32], [102].

78. *Anti-Discrimination NSW, Preliminary Submission PAD83*, 9.

5.73 Previous reviews have recommended that specific protections against religious discrimination should be introduced in NSW and federal law.⁷⁹ However, attempts at enacting such protections have so far been unsuccessful.

Defining any new protected attribute

5.74 If NSW were to protect against religious discrimination, other parts of the ADA and other laws provide examples of approaches that could be adopted or adapted.

5.75 While the ADA does not prohibit religious discrimination, it does prohibit religious vilification. It is unlawful to publicly incite hatred towards, serious contempt for or severe ridicule of an individual or a group of people based on their:

- religious belief or affiliation (or lack of), or
- engagement, or lack of engagement, in religious activity.⁸⁰

5.76 The ADA does not define “religious belief”, “religious affiliation” or “religious activity”. As we discuss in chapter 8, we heard many concerns about this approach.

5.77 Some preliminary submissions suggest that the ADA’s religious vilification protection should use the definitions in s 93Z of the *Crimes Act 1900* (NSW) instead.⁸¹ Section 93Z makes it an offence to publicly threaten or incite violence based on a specific religious belief or affiliation. This is defined as “holding or not holding a religious belief or view”. It appears to be narrower than the protection offered in the ADA. It only includes affiliation with a religious group if this amounts to holding a religious belief or view and does not include engaging in a religious activity.

5.78 Other states and territories may also provide models. Their protections against discrimination based on religious belief and/or activity, or religious conviction generally cover:

- holding or not holding a religious belief, and
- engaging, or not engaging, in religious activity.⁸²

79. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) 95, rec 16; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 38; Parliament of NSW, Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report (2021) 2–3, rec 1.

80. *Anti-Discrimination Act 1977* (NSW) s 49ZE(1).

81. See, eg, Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 11. See also Public Interest Advocacy Centre, *Submission SV10*, 4, rec 1.

82. *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “religious belief or activity”; *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “religious activity”, definition of “religious belief”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “religious activity”, definition of “religious belief or affiliation”; *Discrimination Act 1991* (ACT) dictionary definition of “religious conviction”.

- 5.79 Some laws only prohibit discrimination based on “lawful” religious activities and/or beliefs.⁸³ The ADA’s prohibition on religious vilification does not have this qualification. However, one view is that this is unnecessary, as lawfulness is part of the well-established judicial definition of “religion”.⁸⁴
- 5.80 Developing this new attribute could also provide an opportunity to recognise the rights of Aboriginal and Torres Strait Islander peoples. The ACT recognises the cultural heritage and distinct spiritual practices of Aboriginal and Torres Strait Islander peoples. In the NT, “religious belief or activity” includes “Aboriginal spiritual belief or activity”.⁸⁵ In 1999, the NSWLRC recommended that a similar form of recognition be part of a new religious belief attribute.⁸⁶
- 5.81 Other characteristics related to religion could also be protected. For instance, the LRCWA recently recommended expressly protecting against discrimination based on religious appearance or dress.⁸⁷
- 5.82 An alternative could be to add a broader attribute that protects freedom of thought, conscience and religion. The AHRC recommended adding this to federal discrimination law.⁸⁸ This is the approach in the UK, where the protected attribute of “religion or belief” includes philosophical beliefs.⁸⁹

The relationship with race discrimination

- 5.83 If new protections against religious discrimination are added, it might not be necessary to keep “ethno-religious origin” in the definition of race. The NSWLRC recommended in 1999 that it be removed, preferring to expressly protect against religious discrimination instead.⁹⁰
- 5.84 But there may be benefits in keeping “ethno-religious” origin in the definition of “race”. Arguably, having both could provide broad protections to people of faith.⁹¹

83. *Equal Opportunity Act 2010* (Vic) s 6(n), s 4(1) definition of “religious belief or activity”; *Anti-Discrimination Act 1991* (Qld) s 7(i), sch 1 definition of “religious activity”.

84. *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983)154 CLR 120, 136.

85. *Discrimination Act 1991* (ACT) dictionary definition of “religious conviction”; *Anti-Discrimination Act 1992* (NT) s 4(4).

86. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 38.

87. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 112, rec 51. See also *Equal Opportunity Act 1984* (SA) s 85ZN.

88. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 261–262.

89. Explanatory Notes, *Equality Act 2010* (UK) s 10(2), [51]–[52].

90. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [5.14], rec 30.

91. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 106–107.

Exceptions

- 5.85 If NSW adds a new protected attribute, the question of exceptions will need to be carefully considered. The interaction between any new protections against religious discrimination and other protected attributes, such as sex, sexual orientation and gender identity, is likely to be complicated.
- 5.86 Given this, we consider the existing exceptions relating to religious belief in greater detail in chapter 7. These include exceptions for private educational authorities, charities, adoption services and religious bodies.

Sex characteristics

- 5.87 Unlike most other Australian discrimination laws, the ADA does not protect against discrimination or vilification based on having innate variations of sex characteristics.⁹² Many preliminary submissions told us it should. We heard that people with innate variations of sex characteristics regularly experience discrimination, including in employment and schools.⁹³
- 5.88 The criminal vilification offence in the *Crimes Act* provides one option for expressing and defining this attribute. Under s 93Z of the *Crimes Act*, it is an offence to publicly threaten or incite violence towards an individual or group because they are of intersex status. This is defined as having physical, hormonal or genetic features that are:
- neither wholly female nor wholly male
 - a combination of female and male, or
 - neither female nor male.⁹⁴
- 5.89 For consistency with the criminal law, this definition could be adopted in the ADA. The *Sex Discrimination Act* and the *Fair Work Act* also use it.⁹⁵
- 5.90 However, other expressions and definitions may be more widely accepted by people entitled to this protection. In particular, the attribute of “sex characteristics”

92. See *Equal Opportunity Act (2010) (Vic)* s 6(oa); *Discrimination Act 1991 (ACT)* s 7(v); *Sex Discrimination Act 1984 (Cth)* s 5C; *Equal Opportunity Act 1984 (SA)* s 29; *Anti-Discrimination Act 1998 (Tas)* s 16(eb); *Anti-Discrimination Act 1992 (NT)* s 19(ca); *Anti-Discrimination Act 1991 (Qld)* s 7(o). See also *Fair Work Act 2009 (Cth)* s 351(1).

93. Intersex Human Rights Australia, *Preliminary Submission PAD02*, 18.

94. *Crimes Act 1900 (NSW)* s 93Z(5) definition of “intersex status”.

95. *Sex Discrimination Act 1984 (Cth)* s 4 definition of “intersex status”, s 5C; *Fair Work Act 2009 (Cth)* s 12 definition of “intersex status”, s 351(1), s 772(1)(f).

reflects the terminology and definitions developed by international human rights law experts.⁹⁶

5.91 Several other states and territories already protect against discrimination based on sex characteristics. They define this as “a person’s physical features relating to sex”, including:

- genitalia and other sexual and reproductive parts of the person’s anatomy, and
- the person’s chromosomes, hormones and secondary physical features emerging as a result of puberty.⁹⁷

5.92 However, the interaction between a protected attribute of “sex characteristics” and the existing test for direct discrimination, if unchanged, might cause complications. As everyone has sex characteristics, it might be hard to identify an appropriate comparator. As such, some argue the ADA may not effectively protect people with innate variations of sex characteristics if the comparator test is kept.⁹⁸

5.93 As first introduced, the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) (Equality Bill) proposed to protect people with “a variation of sex characteristics”, or those thought to have this. This would have been defined as “a person who has an innate variation of primary or secondary sex characteristics that differ from norms for female or male bodies”.⁹⁹ This was not enacted. Other reforms were passed that refer to “variations of sex characteristics”, without defining this term.¹⁰⁰

Sex work, lawful sexual activity and occupation

5.94 Sex work has been mostly decriminalised in NSW for almost 30 years. However, we heard that sex workers regularly experience discrimination in many areas of life, including accommodation, employment, and accessing financial services.¹⁰¹

96. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 315, citing *The Yogyakarta Principles Plus 10* (adopted 10 November 2017, Geneva) 7. See also Intersex Human Rights Australia, *Preliminary Submission PAD02*, 8.

97. *Discrimination Act 1991* (ACT) s 7(v) dictionary definition of “sex characteristics”; *Equal Opportunity Act* (2010) (Vic) s 4(1) definition of “sex characteristics”; *Anti-Discrimination Act 1998* (Tas) s 3 definition of “sex characteristics”; *Anti-Discrimination Act 1992* (NT) s 4(1) definition of “sex characteristics”; *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “sex characteristics”. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 116, rec 52, rec 53.

98. Equality Australia, *Preliminary Submission PAD07*, 8.

99. Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), First Print, sch 1 [13].

100. See, eg, *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) sch 2 [1], amending *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(b) (to commence 1 July 2025).

101. See, eg, Respect Inc, *Preliminary Submission PAD57*, 2, 4.

- 5.95 Discrimination laws in other states and territories could provide models for reform. Options include prohibiting discrimination based on sex work, lawful sexual activity or, more broadly, based on profession, trade, occupation or calling.

Protections specifically for sex workers

- 5.96 The first option could be to specifically prohibit discrimination against sex workers. Queensland defines “sex work activity” to cover adults who provide, for payment or reward, services that involve:

- participating in a sexual activity with another person, or
- the use or display of their body for the sexual arousal or gratification of another person.

This includes people who currently provide such services or who have done so in the past.¹⁰²

- 5.97 This is not confined to “lawful” sex work activity. This word was avoided to include people who work outside the licenced sector.¹⁰³

- 5.98 In NSW, the Equality Bill originally proposed to prohibit discrimination based on being, or previously being, a sex worker (that is, a “person who provides sexual services on a commercial basis”).¹⁰⁴

Protections for lawful sexual activity

- 5.99 Another approach, from Tasmania and Victoria, could be to prohibit discrimination based on lawful sexual activity. This includes engaging, not engaging or refusing to engage in lawful sexual activity.¹⁰⁵ This would also protect against discrimination based on any other forms of lawful sexual activity, in addition to sex work.

- 5.100 An issue is whether there should be any exceptions to this prohibition. As part of sex worker decriminalisation processes, Victoria and Queensland recently repealed exceptions that allowed a person to refuse accommodation to someone who intended to use it for lawful commercial sexual activity.¹⁰⁶ Victoria did this to

102. *Anti-Discrimination Act 1991* (Qld) s 7(l), sch 1 definition of “sex work activity”. See also *Anti-Discrimination Act 1992* (NT) s 4(1) definition of “sex work”, s 19(1)(ec).

103. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 290.

104. Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), First Print, sch 1 [39].

105. *Anti-Discrimination Act 1998* (Tas) s 3 definition of “sexual activity”; *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “lawful sexual activity”.

106. *Equal Opportunity Act 2010* (Vic) s 62, repealed by *Sex Work Decriminalisation Act 2022* (Vic) s 36; *Anti-Discrimination Act 1991* (Qld) s 106C, repealed by *Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Act 2024* (Qld) s 5.

address discrimination against sex workers in accommodation settings.¹⁰⁷ Queensland made the change because it is consistent with decriminalisation, and it sought to reduce the stigma and discrimination experienced by sex workers.¹⁰⁸

5.101 In 2022 the LRCWA considered that such an exception remained necessary in WA, where sex work is generally unlawful.¹⁰⁹

A wider protection: profession, trade, occupation or calling

5.102 Prohibiting discrimination based on profession, trade, occupation or calling would be an even wider option. The ACT and Victoria have this model.¹¹⁰ This attribute could apply generally, protecting a wide range of people against discrimination based on the work they do.

5.103 Although it has a wide application, Victoria added this specifically to protect sex workers.¹¹¹ As we note above, it also has a “lawful sexual activity” attribute that protects other forms of sexual activity in addition to lawful sex work. If NSW introduced an attribute to protect profession, trade, occupation or calling, it could clarify in a definition that sex work is an occupation.

5.104 While this is a broad protection, some exceptions may be necessary. For instance, Victoria permits discrimination in employment based on this attribute if:

- experience in a particular profession is a genuine occupational requirement, and
- it is reasonable to discriminate, on that basis, in the circumstances.¹¹²

5.105 The ACT permits discrimination based on profession, trade, occupation or calling if:

- the profession is relevant to the “transaction”, and
- the discrimination is reasonable in the circumstances.¹¹³

107. Explanatory Memorandum, Sex Work Decriminalisation Bill 2021 (Vic) cl 36.

108. Queensland Law Reform Commission, *A Decriminalised Sex-Work Industry for Queensland*, Report (2023) vol 1 [4.95], [4.97].

109. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 94. But see Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 39, rec 90.

110. *Equal Opportunity Act 2010* (Vic) s 6(la); *Discrimination Act 1991* (ACT) s 7(1)(p).

111. *Equal Opportunity Act 2010* (Vic) s 6(la); Explanatory Memorandum, Sex Work Decriminalisation Bill 2021 (Vic) cl 34.]

112. *Equal Opportunity Act 2010* (Vic) s 26(5).

113. *Discrimination Act 1991* (ACT) s 57N.

Socio-economic status

- 5.106 Some other Australian states and territories prohibit discrimination based on certain features relating to socio-economic status. Adding this to the ADA could help protect the rights of some of the most vulnerable members of the community.

Homelessness or accommodation status

- 5.107 Discrimination based on “accommodation status” is unlawful in the ACT and the NT. Broadly speaking, this covers:
- tenants, boarders, lodgers or licensees
 - people experiencing homelessness or transient forms of accommodation, and
 - residents in aged care facilities, or in disability or supported care accommodation.¹¹⁴
- 5.108 In recommending this protection, the ACT Law Reform Advisory Council acknowledged the experiences of people with no fixed address or secure accommodation. For example, the Council reported that some people have been told that they cannot make a doctor’s appointment until they have a permanent address.¹¹⁵
- 5.109 However, there may be scope for some exceptions to this protection. In the ACT, it is not unlawful to discriminate based on accommodation status where this is reasonable, having regard to any relevant factors.¹¹⁶ This was added to allow certain conduct, like looking at someone’s rental history when deciding whether to rent accommodation to them.¹¹⁷
- 5.110 The Queensland amendments will, upon commencement, prohibit discrimination based on “homelessness”.¹¹⁸ The narrower approach was taken to clearly protect this disadvantaged group.¹¹⁹

114. *Anti-Discrimination Act 1992* (NT) s 4(1) definition of “accommodation status”, s 19(1)(ea); *Discrimination Act 1991* (ACT) s 7(1)(a) dictionary definition of “accommodation status”. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 67–68, rec 15, rec 16, rec 17.

115. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 79.

116. *Discrimination Act 1991* (ACT) s 26(2). See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 195, rec 86.

117. Explanatory Statement, *Discrimination Amendment Bill 2016 (ACT)* cl 22.

118. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pb) (uncommenced).

119. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 337–338, rec 32.

Employment status

- 5.111 The ACT and the NT also prohibit discrimination based on employment status. This includes:
- being unemployed
 - receiving a pension or another social security benefit
 - receiving compensation
 - being employed on a part-time, casual or temporary basis, and
 - undertaking shift or contract work.¹²⁰
- 5.112 The LRCWA also recommended introducing this protection. Among other reasons, it recognised that the growing reliance on non-standard work arrangements, such as gig economy work, could increase opportunities for discrimination.¹²¹
- 5.113 However, exceptions may also be required to balance different interests. The ACT permits discrimination against applicants and employees based on employment status where reasonable, having regard to any relevant factors.¹²² For example, if an agent looked at an applicant’s work history when assessing their suitability for employment.¹²³

Social origin or status

- 5.114 International human rights law also contains a right to non-discrimination based on social origin.¹²⁴ We received some suggestions that the ADA should prohibit discrimination based on social origin or status.¹²⁵ This could apply, for instance, where former students of exclusive schools receive preferential treatment in hiring decisions.¹²⁶
- 5.115 Discrimination based on social origin is addressed in a limited way under federal laws. The *Fair Work Act* prohibits adverse action because of “social origin” but, as

120. *Discrimination Act 1991* (ACT) dictionary definition of “employment status”; *Anti-Discrimination Act 1992* (NT) s 4(1) definition of “employment status”.

121. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 75–76, rec 23, rec 24.

122. *Discrimination Act 1991* (ACT) s 570. See also *Anti-Discrimination Act 1992* (NT) s 35A.

123. Explanatory Statement, *Discrimination Amendment Bill 2016* (ACT) cl 27.

124. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

125. See, eg, M Thornton, *Preliminary Submission PAD59*, 1–2; Women’s Legal Service NSW, *Preliminary Submission PAD55*, 4; HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 12.

126. Legal Aid NSW, *Preliminary Submission PAD87*, 18–19.

we explain above, this does not apply in NSW currently.¹²⁷ While complaints can be made to the AHRC about discrimination in employment based on social origin, this does not include access to judicial remedies.¹²⁸

5.116 However, discrimination based on social origin is not prohibited by other states and territories. Reviews in other states have not supported adding it as a protected attribute. Their reasons include that the attribute is too broad and uncertain, there is not enough evidence about what it is designed to address, and it lacks community support.¹²⁹

5.117 In 1999, the NSWLRC considered that social status should not be added as an attribute on the basis that there was no evidence that discrimination based on social origin was occurring.¹³⁰

Question 5.2: Potential new attributes

- (1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, what should be added and why?
- (2) How should each of the new attributes that you have identified above be defined and expressed?
- (3) If any of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?

An alternative approach: an open-ended list

5.118 Currently, discrimination is only unlawful under the ADA if it is based on a recognised attribute. The only way to protect against other forms of discrimination is if NSW Parliament enacts legislation to change the ADA. This can take time, and may mean that the law does not keep up with changing community attitudes.

5.119 A more flexible alternative could be to enact a non-exhaustive list of attributes. This might prohibit discrimination based on:

- the protected attributes specifically recognised in the legislation, and
- any other attributes that meet certain criteria.

127. *Fair Work Act 2009* (Cth) s 351(1). But see the protections against termination: s 772(1)(f).

128. *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of “discrimination”, s 31(b).

129. Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) rec 47, 95–98; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 337; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 118–119.

130. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.248].

- 5.120 In South Africa, for instance, discrimination is prohibited based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or HIV/AIDS status. The legislation also prohibits discrimination based on any other attribute, where discrimination based on that attribute:
- causes or perpetuates systemic disadvantage
 - undermines human dignity, or
 - adversely affects the equal enjoyment of rights and freedoms in a serious manner that is comparable to discrimination based on the attributes set out above.¹³¹
- 5.121 Similarly, international human rights law prohibits discrimination based on an undefined category of “other status”.¹³²
- 5.122 On the other hand, recent reviews of other discrimination laws have not supported the concept of an open-ended list. Their concerns included that this approach could be uncertain and complex, particularly for duty holders.¹³³

Question 5.3: An open-ended list

Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

131. See, eg, *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 1(1)(xxii) definition of “prohibited grounds”.

132. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

133. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 311; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 271; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 56.

6. Discrimination: Areas of public life

In brief

The *Anti-Discrimination Act 1977* (NSW) defines the areas of public life in which discrimination is unlawful. It also includes exceptions that apply to specific protected areas. We ask if the scope of any of these existing areas should change and if any new areas should be recognised.

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- 6.1 Discrimination can happen anywhere — it is not limited to specific relationships, places or events. However, it can be hard to define who should have a duty to not discriminate, and where and when that duty should apply to make discrimination unlawful.
- 6.2 The *Anti-Discrimination Act 1977 (NSW) (ADA)* only prohibits discrimination that happens in specific areas of activity, relationships and places. Broadly, these areas are:
- work
 - education
 - the provision of goods and services
 - the provision of accommodation, and
 - certain activities of registered clubs.
- 6.3 These protected areas operate in what can be loosely termed as “public life”. The ADA does not apply to personal or family relationships or private interactions that occur, for example, at home. In its 1999 review of the ADA, the NSW Law Reform Commission (NSWLRC) said this distinction was important to protect personal and private choice, thought and expression.¹
- 6.4 However, the ADA does not cover all areas of public life. Also, many exceptions limit the scope of each protected area. These exceptions do not apply consistently. Some apply across multiple areas, while others are limited to specific areas or attributes. Some exceptions are limited to discrimination and/or vilification, while others apply to all conduct prohibited by the ADA.
- 6.5 There is a view that the ADA has not kept pace with societal changes. These changes include the rise of the gig economy, such as ridesharing, which challenges traditional employment relationships. The ADA’s coverage should be relevant and effective today, and flexible enough to respond to future challenges.
- 6.6 In this chapter, we outline the protected areas of public life and the exceptions that are specific to particular areas. We discuss wider exceptions, including those applying to multiple areas, in chapter 7.
- 6.7 We ask if the scope of these areas should change, and if the ADA should prohibit discrimination in other areas too. We also outline possible options for reform, drawn from our research and preliminary submissions. We welcome other suggestions too.

1. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.2].

Discrimination in work

6.8 The ADA prohibits discrimination in work. This covers all protected attributes and a wide range of work-related scenarios. The protected area includes a wide range of subcategories of work-related situations, as set out in the table below.

Table 6.1: Discrimination prohibited in work

Discrimination by	Discrimination against	Summary of coverage
An employer	Applicants and employees	<ul style="list-style-type: none"> ▪ Offering employment, and the terms and conditions ▪ Promotion, transfer, training, other benefits ▪ Dismissal or other detriment
A principal	Commission agents, or potential commission agents	<ul style="list-style-type: none"> ▪ Engaging a commission agent, and the terms and conditions ▪ Promotion, transfer, training, other benefits ▪ Termination or other detriment
A principal	Contract workers	<ul style="list-style-type: none"> ▪ Terms of work ▪ Not allowing them to work ▪ Access to benefits ▪ Any other detriment
Partnerships (6 or more partners) or people proposing to form a partnership	Partners and potential partners	<ul style="list-style-type: none"> ▪ Offering a partnership role and the terms ▪ Benefits arising from firm membership ▪ Expulsion or any other detriment
Local government councillors	Another member of the council	<ul style="list-style-type: none"> ▪ While performing official functions
Industrial organisations	Non-members and members	<ul style="list-style-type: none"> ▪ Admission to membership and terms ▪ Access to benefits ▪ Varying terms or depriving membership ▪ Any other detriment
Qualifying bodies (for a profession, trade or occupation)	Persons qualified or seeking to be qualified	<ul style="list-style-type: none"> ▪ Conferring, renewing or extending authorisation or qualification ▪ Withdrawing, or varying the terms, of the authorisation or qualification
Employment agencies	People seeking its services	<ul style="list-style-type: none"> ▪ Whether it provides its services ▪ How it provides its services

- 6.9 As we note in chapter 4, the ADA also protects against compulsory retirement due to age.² This does not apply to judges or certain other office holders.³

Issues relating to coverage

- 6.10 The ADA prohibits discrimination in many work situations, but there may be gaps in its coverage.

Unpaid workers and volunteers

- 6.11 The ADA's definition of "employment" includes "work under a contract for services". It is unclear if this includes unpaid work or volunteering. In contrast, the ADA expressly protects volunteers and unpaid trainees from sexual harassment.⁴
- 6.12 In 1999, the NSWLRC recommended protecting volunteers, trainees and unpaid workers against discrimination.⁵ More recent discrimination law reviews made similar recommendations, including because excluding unpaid work may discourage volunteering, and these roles can be important for young people.⁶
- 6.13 Some other discrimination laws in Australia clearly protect volunteers.⁷ In Queensland, for instance, the definition of "work" includes voluntary or unpaid work, work experience, vocational placement, and apprenticeships.⁸

Gig economy workers

- 6.14 Another potential gap relates to gig economy workers. In this type of work, mobile apps and websites connect people providing services with consumers.⁹
- 6.15 Gig economy workers could be covered under the ADA in some situations. For example, in some cases they may be regarded as "contract workers". Under the ADA, contract workers perform work for an employer or, if there is no contract of

2. *Anti-Discrimination Act 1977* (NSW) pt 4E.

3. *Anti-Discrimination Act 1977* (NSW) s 49ZX.

4. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of "employment", s 22B(6), s 22B(9) definition of "workplace participant".

5. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 9, [4.42].

6. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 59, 131–133; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 253, 255.

7. See, eg, *Discrimination Act 1991* (ACT) dictionary definition of "employment"; *Anti-Discrimination Act 1991* (Qld) sch 1 definition of "work"; *Equal Opportunity Act 1984* (SA) s 5 definition of "employee"; *Anti-Discrimination Act 1992* (NT) s 4(1) definition of "work".

8. *Anti-Discrimination Act 1991* (Qld) sch 1 definition of "work".

9. Australia, Fair Work Ombudsman, "Employee-Like Workers" <www.fairwork.gov.au/find-help-for/independent-contractors/regulated-workers/employee-like-workers> (retrieved 1 April 2025).

employment, a “principal”.¹⁰ It is unlawful for an employer to discriminate against an employee, and for a principal to discriminate against a contract worker.

- 6.16 But it is not always clear who the employer or principal is when it comes to the gig economy. For example, an online platform could argue that a gig economy worker is not performing work for them, but for the consumer using the platform. If this is the case, the worker would not be able to complain or seek a remedy from the online platform for discrimination occurring on its platform.

A possible broader approach to discrimination at work

- 6.17 Some think we need to reconsider who is held responsible for discrimination in work contexts. Currently, like other Australian discrimination laws, the ADA covers situations where a person with authority at work discriminates against someone without that authority. However, some say the focus should be on how and whether someone has been discriminated against at work. It should not focus on whether they have a particular relationship with the person who discriminated against them.¹¹
- 6.18 For example, the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*) prohibits sexual harassment by any person if it is in connection with either the complainant’s or respondent’s status at work.¹²
- 6.19 There may be benefits to applying this approach to discrimination as well, including that it could be simpler for complainants. This is because it would not require them to establish a specific work relationship with the person who discriminated against them. It might also capture more instances of discrimination, like where a customer, patient or visitor to a business discriminates against staff.¹³
- 6.20 Any change to this area needs to be considered carefully, as it could make more people responsible for discrimination. For example, an employee could be found to have unlawfully discriminated against a colleague, or their employer. Other issues include whether this would overlap with other forms of unlawful conduct, including vilification and harassment.

10. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “contract worker”, definition of “principal”.

11. A Blackham, “‘We are All Entrepreneurs Now’: Options and New Approaches for Adapting Equality Law for the ‘Gig Economy’” (2018) 34 *International Journal of Comparative Labour Law and Industrial Relations* 431, 433.

12. *Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).

13. NSW Nurses and Midwives’ Association, *Preliminary Submission PAD50*, 3.

Local government and age discrimination

- 6.21 The ADA prohibits discrimination by local government members against fellow members while performing official functions.¹⁴ This was introduced to protect local government members who perform unpaid work in their official capacity.¹⁵
- 6.22 It applies to all attributes, except age. It is unclear why age discrimination was excluded from this protection. It could be time to revisit this exclusion.

Question 6.1: Discrimination at work — coverage

- (1) Should the definition of employment include voluntary workers? Why or why not?
- (2) Should the ADA adopt a broader approach to discrimination in work, like the way the *Sex Discrimination Act 1984* (Cth) approaches harassment? Why or why not?
- (3) Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not?

Exceptions to discrimination in work

- 6.23 The ADA has many exceptions to its discrimination protections. We consider the exceptions specific to the area of work, below. Other, wider exceptions apply to this area too (as we discuss in chapter 7).

Employment for private household purposes

- 6.24 The protections against discrimination for applicants and employees do not apply to employment for a private household.¹⁶ Most other discrimination laws in Australia contain a similar exception.¹⁷
- 6.25 The NSWLRC did not recommend significant changes to this in 1999. It said the purpose of the exception was to protect privacy, and discrimination law should not intrude into someone's decision about who enters their home. It also thought the exception would not have a widespread impact due to the low number of people employed in private households.¹⁸

14. *Anti-Discrimination Act 1977* (NSW) s 10B, s 27B, s 38G, s 42B, s 49H, s 49Z, s 49ZKA.

15. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 4 May 1994, 1830.

16. *Anti-Discrimination Act 1977* (NSW) s 8(3), s 25(3)(a), s 49D(3)(a), s 49ZYB(3), s 38C(3)(a), s 49ZH(3)(a), s 40(3)(a), s 49V(3)(a).

17. See, eg, *Equal Opportunity Act 2010* (Vic) s 24(1); *Discrimination Act 1991* (ACT) s 24; *Equal Opportunity Act 1984* (WA) s 11(3); *Anti-Discrimination Act 1991* (Qld) s 26(1); *Disability Discrimination Act 1992* (Cth) s 15(3); *Age Discrimination Act 2004* (Cth) s 18(3); *Sex Discrimination Act 1984* (Cth) s 14(3).

18. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.88]–[4.89].

- 6.26 However, the NSWLRC recommended that the exception only apply to work in a dwelling occupied by the employer or their relative. It said the expression “employment for the purposes of a private household” was unclear and could lead to the exception being applied widely. For instance, it could allow discrimination by employment agencies that provide private household workers.¹⁹
- 6.27 The Australian Human Rights Commission (AHRC) has raised concerns about similar exceptions in federal discrimination laws. It suggested these exceptions could be limited to the selection of the worker and not to treatment that occurs during employment.²⁰

Employment by small businesses

- 6.28 Another exception applies to employers with five or less employees. This covers all protected attributes except for race and age.²¹ In 1999, the NSWLRC recommended removing this exception. It said small businesses provide significant employment opportunities, which should be available to everyone. In the NSWLRC’s view removing the exception would not intrude on personal relationships significantly.²²

Discrimination by small partnerships

- 6.29 The prohibitions against discrimination by partnerships only apply to firms of six or more partners.²³ Many other discrimination laws in Australia have a similar exception.²⁴
- 6.30 The NSWLRC recommended removing this exception. It said small partnerships were like small businesses, so the same considerations applied.²⁵

Persons addicted to prohibited drugs: disability discrimination

- 6.31 The protections against disability discrimination do not apply if:
- the disability relates to addiction to a prohibited drug, and

19. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 9, [4.90]–[4.92].

20. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 278.

21. *Anti-Discrimination Act 1977* (NSW) s 25(3)(b), s 38C(3)(b), s 40(3)(b), s 49D(3)(b), s 49V(3)(b), s 49ZH(3)(b).

22. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 14, [4.99].

23. *Anti-Discrimination Act 1977* (NSW) s 10A, s 27A, s 38F, s 42A, s 49G, s 49Y, s 49ZK, s 49ZE.

24. See, eg, *Anti-Discrimination Act 1991* (Qld) s 16, s 17; *Equal Opportunity Act 2010* (Vic) s 31; *Equal Opportunity Act 1984* (WA) s 14; *Disability Discrimination Act 1992* (Cth) s 18; *Age Discrimination Act 2004* (Cth) s 21; *Sex Discrimination Act 1984* (Cth) s 17.

25. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 15, [4.102].

- the person who is being discriminated against is addicted to a prohibited drug at that time.

This applies to all subcategories of work except for local government councillors, industrial organisations and qualifying bodies.²⁶

- 6.32 It could be argued that this exception:
- discourages people from accessing harm reduction and treatment services, and
 - allows discrimination based on addiction, rather than encouraging decisions to be made based on whether someone is able to perform the job requirements.
- 6.33 An option could be to address concerns about work suitability or performance through the inherent requirements exceptions, which we discuss next.

The “inherent requirements” and “unjustifiable hardships” exceptions

- 6.34 The ADA allows some duty holders to discriminate against someone who is unable to carry out the “inherent requirements” of the role. This only applies to discrimination based on disability and carer’s responsibilities.
- 6.35 This also applies if someone:
- requires services, facilities or arrangements to carry out those inherent requirements, which people without that attribute do not require, and
 - it would cause the duty holder “unjustifiable hardship” to provide them.
- 6.36 A related exception applies to discrimination by industrial organisations in the provision of benefits. The ADA permits discrimination based on disability or carer’s responsibilities where someone:
- requires the benefit to be provided in a special manner, and
 - the industrial organisation cannot provide it in this manner without “unjustifiable hardship”.
- 6.37 One or more of these exceptions applies to the subcategories of “work” aside from discrimination of local government councillors.²⁷
- 6.38 Several factors must be considered to assess someone’s ability to carry out the inherent requirements of a role. These include:
- their past training, qualifications and experience relevant to the role
 - their performance (as relevant), and

26. *Anti-Discrimination Act 1977* (NSW) s 49PA(1).

27. *Anti-Discrimination Act 1977* (NSW) s 49D(4), s 49E(3), s 49F(2), s 49G(3), s 49I(3), s 49J(2), s 49K(2), s 49V(4), s 49W(3), s 49X(2), s 49Y(3), s 49ZA(3), s 49ZB(2), s 49ZC(2).

- all other factors that are reasonable to take into account.²⁸
- 6.39 All relevant circumstances are to be considered in working out if there would be unjustifiable hardship. These include:
- the nature of the likely benefit or detriment to anyone concerned
 - the effect of the person’s disability or responsibilities as a carer, and
 - the financial circumstances of the duty holder and the amount of expenditure required.²⁹
- 6.40 The *Fair Work Act 2009* (Cth) (*Fair Work Act*) also contains an “inherent requirements” exception to its protections against adverse action and being terminated because of a protected attribute.³⁰
- 6.41 The Disability Royal Commission criticised the “inherent requirements” exception in the *Disability Discrimination Act 1992* (Cth) (*Disability Discrimination Act*). The Royal Commission found the exception does not encourage employers to discuss adjustments. Also, a lack of information about the inherent requirements of a job may discourage people with disability from applying for it.³¹
- 6.42 The Royal Commission recommended employers should be required to consider two more factors in determining whether a person with disability is able to meet a role’s inherent requirements. These are:
- the nature and extent of any adjustments made, and
 - the extent of consultation with the person with disability.³²
- 6.43 An option could be to link the inherent requirements exception with a duty to make adjustments. We discuss the concept of adjustments in chapter 11. However, in summary, this option could involve:
- requiring duty holders to make an adjustment to accommodate another person’s needs arising from a protected attribute, and
 - permitting employers to discriminate if the person cannot meet the inherent requirements of the role, despite any adjustments able to be made by the employer.³³

28. *Anti-Discrimination Act 1977* (NSW) s 49D(4), s 49E(3), s 49F(2), s 49G(3), s 49J(2), s 49K(2), s 49V(4), s 49W(3), s 49X(2), s 49Y(3), s 49ZB(2), s 49ZC(2).

29. *Anti-Discrimination Act 1977* (NSW) s 49C(c), s 49U(c).

30. *Fair Work Act 2009* (Cth) s 351(2)(b), s 772(2)(a).

31. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 7, “Inclusive Education, Employment and Housing” Part B, 389.

32. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 7, “Inclusive Education, Employment and Housing” Part B, rec 7.26, 438.

33. See, eg, *Discrimination Act 1991* (ACT) s 74, s 33C.

- 6.44 The Australian Capital Territory (ACT) takes this approach. There, discrimination must be reasonable, proportionate and justifiable in the circumstances for the inherent requirements exception to apply.³⁴
- 6.45 A further issue is whether the exception should apply to attributes other than disability and carer’s responsibilities. The ACT model applies to all protected attributes. This could reduce concerns inherent requirements exceptions are used specifically to permit discrimination against people with disability and carers.
- 6.46 We discuss adjustments more in chapter 11, and the option of a targeted inherent requirements exception for religious employment in chapter 7.

Exceptions based on “genuine occupational qualifications”

- 6.47 Broad exceptions apply in relation to certain attributes that are considered an occupational qualification. The ADA permits discrimination based on race, sex or age including
- for “authenticity”, in entertainment, art, performance, or the provision of food or drink, or
 - to provide welfare or similar services to people of that same race, sex or age.³⁵
- 6.48 In 1999, the NSWLRC thought the “authenticity” exceptions to racial discrimination were appropriate, as they were likely to benefit minority races.³⁶ However, it recommended changes to other aspects of the genuine occupation qualification exceptions.
- 6.49 In relation to sex discrimination, the ADA lists situations in which being of a particular sex will be a genuine occupational qualification for a job. Among other things, this includes where the job requires physical strength or stamina, or involves fitting clothes, conducting searches, or entering a bathroom or change room.³⁷
- 6.50 The NSWLRC thought two situations should be removed from this list. That is, where the job:
- is one of two to be held by a married couple, or

34. *Discrimination Act 1991 (ACT)* s 33C.

35. *Anti-Discrimination Act 1977 (NSW)* s 14, s 31, s 49ZYJ.

36. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.151].

37. *Anti-Discrimination Act 1977 (NSW)* s 31(2)(a)–(i).

- involves providing people of a particular sex with personal services relating to welfare or education, and they might object to someone of an opposite sex doing that.³⁸
- 6.51 The NSWLRC also recommended the removal of a regulation-making power, which can be used to extend the exception to age and sex discrimination to other jobs, or classes of jobs. It could see no need for making the exception any wider. Finally, the NSWLRC said employers should be required to act in good faith when using the genuine occupational requirement exceptions for sex discrimination.³⁹
- 6.52 The ACT provides a different model, in which a single broad exception covers genuine occupational qualifications. This exception applies to discrimination based on any protected attribute, except religious conviction. It provides that discrimination is not unlawful if:
- it is a genuine occupational qualification that the position be filled by a person with a particular protected attribute, and
 - the discrimination is reasonable, proportionate and justifiable.⁴⁰
- 6.53 The ACT legislation provides the following examples of a genuine occupational qualification:
- employing a female carer to provide personal care services for a woman due to privacy or modesty
 - selecting someone of a particular race for a role in a theatrical performance based on authenticity, aesthetics or tradition, and
 - preferencing people with lived experience of family and domestic violence for peer support positions in a women’s crisis centre.⁴¹
- 6.54 Requiring employers to show the act is “reasonable, proportionate and justifiable” could provide more protection than the ADA. Also, a single exception could be easier to navigate.
- 6.55 However, the NSWLRC recommended against this approach. It thought it was unclear, as it does not spell out the situations in which the exception applies in the same detail as the ADA.⁴²

38. *Anti-Discrimination Act 1977 (NSW)* s 31(2)(h)–(i); NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 55, rec 56.

39. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.180], [6.323], rec 55, rec 57, rec 73.

40. *Discrimination Act 1991 (ACT)* s 33B(1)(a).

41. *Discrimination Act 1991 (ACT)* s 33B.

42. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.150].

Discrimination against young people

- 6.56 Other exceptions to age discrimination apply to the employment of people under 21 years old. For example, it is not unlawful under the ADA to pay young workers lower wages. This exception can be removed by proclamation.⁴³
- 6.57 In 1999, the NSWLRC said this exception was hard to justify and should be removed by December 2000. But it did not recommend immediate repeal, as the issue of junior wages was being considered federally.⁴⁴
- 6.58 Another option could be to limit the exception to circumstances where the young worker is being offered a lower wage in accordance with an industrial award or agreement. This is the approach in SA, WA and the ACT.⁴⁵
- 6.59 Under the *Fair Work Act*, modern awards can include minimum wages, including wage rates for junior employees. An award does not discriminate against junior employees simply because it provides a minimum wage for all junior employees or a class of employees.⁴⁶

Discrimination in favour of married couples

- 6.60 It is not unlawful to discriminate based on marital or domestic status, if a job is one of two to be held by a married couple.⁴⁷ The NSWLRC recommended this should also include couples in a domestic relationship, but that this exception should only apply where there is a reasonable need.⁴⁸
- 6.61 Other discrimination laws have similar exceptions, which also apply to people in de facto relationships.⁴⁹

Employment outside NSW

- 6.62 The prohibitions on race discrimination do not apply if someone:
- is not normally a resident of NSW, and they are employed to learn skills to be used entirely outside NSW, or

43. *Anti-Discrimination Act 1977* (NSW) s 49ZYI.

44. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.321].

45. *Equal Opportunity Act 1984* (SA) s 85F(4)(b); *Equal Opportunity Act 1984* (WA) s 66ZS(1)(b); *Discrimination Act 1991* (ACT) s 57B.

46. *Fair Work Act 2009* (Cth) s 139(1), s 153(3).

47. *Anti-Discrimination Act 1977* (NSW) s 46.

48. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 63, [6.248].

49. See, eg, *Discrimination Act 1991* (ACT) s 35; *Equal Opportunity Act 1984* (WA) s 29; *Anti-Discrimination Act 1991* (Qld) s 31.

- was engaged outside NSW to be employed on a ship or aircraft in NSW.⁵⁰
- 6.63 The *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*) contains a similar exception in relation to employment on a non-Australian ship or aircraft if engaged outside Australia.⁵¹
- 6.64 The NSWLRC recommended removing these exceptions, describing them as inappropriate. The exceptions also cover situations that could, in its view, be addressed by an exemption application to the Anti-Discrimination Board. We describe this procedure in chapter 11.⁵²

Question 6.2: Discrimination in work — exceptions

What changes, if any, should be made to the exceptions to discrimination in work?

Education

- 6.65 “Education” is another protected area. It is unlawful for an “educational authority” to discriminate against students and people applying to be students. This applies to discrimination based on all protected attributes, except carers’ responsibilities.
- 6.66 This area includes situations where an educational authority:
- refuses or fails to accept someone’s application for admission as a student
 - accepts someone’s application on discriminatory terms
 - denies or limits a student’s access to any benefit, or
 - expels a student or subjects them to another detriment.⁵³

Issues relating to coverage

- 6.67 An issue is whether the prohibition should apply more broadly to other institutions. The ADA definition of “educational authority” includes a person or body administering a school, college, university or other institution at which education or training is provided.⁵⁴
- 6.68 The *Disability Discrimination Act* is broader. It extends duties to other “education providers”, such as organisations whose purpose is to develop or accredit

50. *Anti-Discrimination Act 1977* (NSW) s 15, s 16.

51. *Racial Discrimination Act 1975* (Cth) s 9(3).

52. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 54, [6.164]–[6.166].

53. *Anti-Discrimination Act 1977* (NSW) s 17, s 31A, s 49L, s 49ZYL, s 38K, s 49ZO, s 46A.

54. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “educational authority”.

curricula.⁵⁵ The Law Reform Commission of Western Australia (LRCWA) recently supported this approach, as these bodies set rules for curricula and exams that could discriminate against students.⁵⁶

- 6.69 Another issue is whether the ADA covers all relevant conduct. The LRCWA recommended the education area in WA discrimination law should expressly cover discrimination in selecting or evaluating student applications. While the LRCWA thought this may already be unlawful, it preferred setting it out in legislation.⁵⁷ The WA discrimination legislation is like the ADA in its coverage of the education area.⁵⁸

Exceptions to discrimination in education

- 6.70 A range of exceptions limit the discrimination protections in education. These apply to sex, disability, and age discrimination.
- 6.71 We consider wider exceptions that apply to discrimination in education, and to other areas and forms of unlawful conduct, in chapter 7. These include the exceptions for private educational authorities, which apply in the work and education area in relation to most protected attributes.

Single-sex educational institutions

- 6.72 The prohibition against sex discrimination does not apply to single-sex educational institutions. This includes both public and private schools. An institution is considered single-sex even if it admits transgender people who identify with the sex the institution is conducted for. Single-sex educational institutions can lawfully refuse, or fail to accept, an application from someone of the opposite sex.⁵⁹
- 6.73 One issue is whether this exception can be used to exclude transgender students from single-sex schools that are consistent with their gender identity. Some argue this exception should clearly state that it does not allow discrimination against transgender students.⁶⁰

55. *Disability Discrimination Act 1992* (Cth) s 4(1) definition of “education provider”.

56. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 127, rec 57.

57. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 128, rec 58.

58. *Equal Opportunity Act 1984* (WA) s 18, s 35AJ, s 35I, s 35W, s 44, s 61, s 66ZD.

59. *Anti-Discrimination Act 1977* (NSW) s 31A(3)(b), s 31A(4).

60. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 63–64.

Disability discrimination exceptions

- 6.74 The ADA also provides an exception for schools, colleges, universities, or other institutions that are run solely for students with a particular disability. They can refuse or fail to accept applications by people without the same disability.⁶¹
- 6.75 In 1999, the NSWLRC recommended repealing this exception. It described it as “obscure”. The NSWLRC thought that students with disability could benefit from associating with students with different disabilities.⁶²
- 6.76 Other exceptions apply. These include where a person with disability requires services or facilities not required by students who do not have a disability, or a benefit to be provided in a “special manner”. It is not unlawful to discriminate where these cannot be provided without causing the educational authority “unjustifiable hardship”.⁶³
- 6.77 An option for reform is to instead require educational authorities to provide adjustments. We consider this option in chapter 11.

Age discrimination exceptions

- 6.78 The ADA includes exceptions which allow schools to refuse to enrol children under 6 years old. It also allows educational institutions to only provide education or training for students above a particular age and to provide age-based benefits, including concessions, to students.⁶⁴
- 6.79 In 1999, the NSWLRC recommended replacing this with exceptions for:
- age discrimination relating to the provision of educational services up to and including secondary school
 - a minimum age requirement on a particular educational program, and
 - quotas in relation to students of different ages.
- 6.80 In the NSWLRC’s view, it may be appropriate for an educational authority to impose a maximum admission age in some cases. However, the NSWLRC thought they should apply to the Anti-Discrimination Board for an exemption to do so.⁶⁵ We consider exemptions in chapter 11.

61. *Anti-Discrimination Act 1977* (NSW) s 49L(3)(b).

62. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.280]–[6.285], rec 67.

63. *Anti-Discrimination Act 1977* (NSW) s 49L(4)–(5).

64. *Anti-Discrimination Act 1977* (NSW) s 49ZYL(3)(a), s 49ZYL(4)–(5).

65. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 74, [6.336].

Question 6.3: Discrimination in education

- (1) What changes, if any, should be made to the definition and coverage of the protected area of “education”?
- (2) What changes, if any, should be made to the exceptions relating to:
 - (a) single-sex educational institutions, and
 - (b) disability and age discrimination in educational institutions?

The provision of goods and services

- 6.81 The ADA prohibits discrimination in the provision of goods and services. This covers:
- refusing to provide goods or services, and
 - discriminating in the terms on which goods or services are provided.⁶⁶
- 6.82 The ADA does not define “goods”. It defines “services” to include services:
- relating to banking, insurance and the provision of grants, loans, credit or finance
 - relating to entertainment, recreation or refreshment
 - relating to transport or travel
 - of any profession or trade
 - provided by a council or public authority, and
 - consisting of access to, and the use of any facilities in, any place or vehicle that the public, or section of the public, is entitled or allowed to enter (whether or not for payment).⁶⁷
- 6.83 We outline some issues relating to the coverage of this area, including the exceptions that apply to superannuation services and insurance, below. We consider the related issue of discrimination in the administration of state laws and programs later in this chapter.

Issues relating to coverage

The manner in which goods and services are provided

- 6.84 The ADA prohibits discrimination in the terms on which someone is provided with goods or services. This only applies to the terms and conditions initially offered. It does not prohibit discrimination in the manner, or the way, in which the good or service is provided after the terms and conditions are agreed.

66. *Anti-Discrimination Act 1977* (NSW) s 19, s 33, s 49M, s 49ZYN, s 38M, s 49ZP, s 47.

67. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “services”.

- 6.85 In one case, for example, a transgender person was allowed to board a public bus on the same terms as everyone else. The driver insulted them after they boarded the bus. The Tribunal said there was a gap in the law because it only covered the terms and conditions on which services were offered but not the manner in which they were provided.⁶⁸
- 6.86 Other discrimination laws prohibit discrimination in the manner, or way, goods and services are provided.⁶⁹ Some make it unlawful to subject someone “to any other detriment” or treat them “less favourably in any way” in connection with the supply of goods and services.⁷⁰
- 6.87 In 1999, the NSWLRC recommended the ADA should prohibit discrimination in the “manner” in which goods and services are provided. It preferred this expression because it is used elsewhere in Australia and provides broad protection.⁷¹

The receipt of goods and services

- 6.88 Unlike NSW, the Northern Territory (NT) makes it unlawful for someone who receives goods, services or facilities to discriminate against someone in the way they receive those goods, services or facilities.⁷² This was added in 2022 to address discrimination by customers against staff in pubs, and race-based discrimination against taxi drivers by passengers.⁷³ It might also protect gig economy workers who may experience discrimination in providing goods and services to app users.
- 6.89 However, it could be said that this goes beyond the traditional reach of discrimination law. It imposes obligations on people who receive goods and services — not just those who provide them. This may have unintended consequences. For example, questions arise as to whether it might capture consumer boycotts. Without specific exceptions, it could also apply to customers receiving goods and services in their homes.

68. *Turner v State Transit Authority* [2004] NSWADT 89 [71]–[73].

69. *Anti-Discrimination Act 1991* (Qld) s 46; *Anti-Discrimination Act 1992* (NT) s 41; *Age Discrimination Act 2004* (Cth) s 28(c); *Disability Discrimination Act 1992* (Cth) s 24(c); *Discrimination Act 1991* (ACT) s 20(c); *Equal Opportunity Act 1984* (WA) s 66K(c); *Sex Discrimination Act 1984* (Cth) s 22(c).

70. *Equal Opportunity Act 2010* (Vic) s 44(1)(c); *Anti-Discrimination Act 1992* (NT) s 41.

71. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 17, [4.140]–[4.143], [4.152], [4.163].

72. *Anti-Discrimination Act 1992* (NT) s 41.

73. Northern Territory, Department of the Attorney-General and Justice, *Modernisation of the Anti-Discrimination Act*, Discussion Paper (2017) 19–20.

Access to premises

- 6.90 Another issue is whether the ADA should more clearly prohibit discrimination relating to someone's ability to access and use premises. This particularly affects people with disability.
- 6.91 One option could be to extend the ADA's definition of "services". As we note above, this currently includes "services consisting of access to, and the use of any facilities".⁷⁴ In 1999, the NSWLRC recommended a wider definition to prohibit discrimination relating to:
- someone's access to any place, vehicle or facility that members of the public are entitled to use
 - the terms on which access is allowed
 - the provision of means of access, and
 - the requirement to leave or stop using any place, vehicle or facility.⁷⁵
- 6.92 Another option is to add "access to premises" as a separate, protected area. Under the *Disability Discrimination Act*, it is unlawful to discriminate against someone:
- by refusing to allow them to access or use premises, or its facilities, that the public can enter or use (whether or not for payment)
 - in the terms and conditions of their access or use of those premises or facilities
 - in relation to providing means of access to those premises, or
 - by requiring them to leave the premises or stop using the facilities.⁷⁶
- 6.93 Victoria has a similar approach.⁷⁷ A Victorian review found that treating access to premises as a subset of "goods and services" led to patchy and unclear rules.⁷⁸
- 6.94 However, in 1999 the NSWLRC thought that a new "access to premises" area could be confusing. It noted that the provision of a service often includes providing access to premises too. The NSWLRC preferred to expand the definition of services.⁷⁹

74. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of "services".

75. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [4.198], rec 23.

76. *Disability Discrimination Act 1992* (Cth) s 23.

77. *Equal Opportunity Act 2010* (Vic) s 57(2) definition of "premises".

78. Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [5.73], rec 45.

79. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [4.198], rec 23.

Question 6.4: The provision of goods and services — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “the provision of goods and services”?

Exceptions for superannuation services and insurance

- 6.95 The ADA does not recognise superannuation or insurance as distinct, protected areas. However, services relating to insurance are mentioned specifically in the definition of “services”. Superannuation may also fall within this broad and non-exhaustive definition.⁸⁰
- 6.96 In 1999, the NSWLRC recommended that superannuation should be listed as part of the definition of “services”.⁸¹ Some other discrimination laws in Australia take this approach, including the *Disability Discrimination Act* and the *Age Discrimination Act 2004* (Cth).⁸²
- 6.97 Another option could be to recognise superannuation as a separate area of public life in the ADA. Several states and territories have taken this approach.⁸³
- 6.98 Under either option, or even if there is no change, there remain questions about what — if any — exceptions should be provided to insurers and superannuation funds. Currently, the ADA provides both with broad exceptions in relation to certain attributes.
- 6.99 It should be noted that insurance and superannuation is regulated by federal legislative schemes.⁸⁴ Under the *Australian Constitution*, federal law prevails over inconsistent state law and state law is invalid to the extent of the inconsistency.⁸⁵ The High Court has found certain protections against discrimination in the ADA invalid to the extent of inconsistency with federal life insurance legislation.⁸⁶ This indicates that the relationship between federal and state law will require careful

80. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.149].

81. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 18.

82. *Disability Discrimination Act 1992* (Cth) s 4(1) definition of “services”; *Age Discrimination Act 2004* (Cth) s 5 definition of “services”. See also *Anti-Discrimination Act 1998* (Tas) s 3 definition of “services”; *Equal Opportunity Act 1984* (WA) s 4(1) definition of “services”.

83. *Anti-Discrimination Act 1991* (Qld) pt 4 div 5; *Equal Opportunity Act 1984* (WA) s 35AR, s 66P, s 66ZL; *Equal Opportunity Act 1984* (SA) s 63, s 78; *Anti-Discrimination Act 1992* (NT) s 48; *Discrimination Act 1991* (ACT) s 28.

84. See, eg, *Life Insurance Act 1995* (Cth).

85. *Australian Constitution* s 109.

86. *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 339–340. See also *McNally v Resolution Life Australasia Ltd* [2024] NSWCATAD 388.

consideration before any decision is made to change the ADA's approach to superannuation and insurance.

Exceptions for insurance services

6.100 The ADA permits sex, age and disability discrimination in relation to insurance terms and conditions.⁸⁷

6.101 Sex and age discrimination in the terms on which insurance is offered or may be obtained is permitted when the discrimination is:

- based on actuarial or statistical data on which it is reasonable to rely, and
- reasonable, having regard to the data and other relevant factors.

The insurer must disclose the source on which the data is based if the Tribunal requires it.⁸⁸ For age discrimination, the insurer must also disclose any relevant factors relied upon, if required.⁸⁹

6.102 The exception for discrimination based on disability is similar. However, a key difference is that the discriminatory terms and conditions do not need to be based on actuarial or statistical data if this data is not available and cannot reasonably be obtained. In this scenario, the terms and conditions must be reasonable having regard to any other relevant factors.⁹⁰

6.103 Some have observed the disability discrimination exception has been misused to deny or excessively limit cover, or to increase premiums such that a person with disability cannot afford insurance.⁹¹ There may be a lack of evidence to support the discriminatory decision, but people can face barriers when seeking to challenge the insurer's decision. This can include poor communication by insurers about the complex review options, and a lack of affordable specialised legal assistance for insured people.⁹² The exception may also discourage people from seeking diagnosis and treatment for conditions.⁹³

6.104 In 1999, the NSWLRC was concerned about the exception relating to sex discrimination. It did not consider sex to be a reliable basis on which to assess risk for insurance premiums, without compelling evidence. It recommended an

87. *Anti-Discrimination Act 1977* (NSW) s 37, s 49Q, s 49ZYT.

88. *Anti-Discrimination Act 1977* (NSW) s 37(b), s 49Q(b), s 49ZYT(b).

89. *Anti-Discrimination Act 1977* (NSW) s 49ZYT(b).

90. *Anti-Discrimination Act 1977* (NSW) s 49Q(b).

91. Legal Aid NSW, *Preliminary Submission PAD87*, 40; Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (2021) 14–15.

92. Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (2021) 15, 72, 74.

93. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 389.

exception like the one found in the *Sex Discrimination Act*, which requires discrimination to be based on reasonable actuarial or statistical data that is presented to the consumer on request.⁹⁴

Superannuation exceptions

- 6.105 Currently, superannuation funds are permitted to discriminate in their terms and conditions based on sex, marital or domestic status, age or disability. Generally this applies if the terms or conditions:
- are based on actuarial or statistical data on which it is reasonable to rely, and
 - are reasonable having regard to the data and any other relevant factors.
- 6.106 If no such data is available and cannot be reasonably obtained, the terms or conditions must be reasonable having regard to any other relevant factors.⁹⁵
- 6.107 For sex, marital or domestic status, and disability, the source of any data and other relevant factors must be disclosed to the Tribunal, if the Tribunal requires it.⁹⁶
- 6.108 For age, discrimination is also permitted if:
- it occurred because of other specific legal requirements under NSW or federal superannuation laws, or
 - it is based on an existing condition and the person became a member of the scheme before, or within 12 months of, the exception being introduced, or the discrimination happened within 12 months of the exception being introduced.⁹⁷
- 6.109 In 1999, the NSWLRC expressed concerns about the breadth of the exceptions relating to sex and what was then known as “marital status”.⁹⁸
- 6.110 The NSWLRC considered the onus should instead be on superannuation funds to obtain an exemption if they could justify discrimination based on sex or marital or domestic status (chapter 11 outlines the exemption process). It also recommended that existing funds that discriminate based on sex or marital or domestic status

94. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 62, [6.239]–[6.241].

95. *Anti-Discrimination Act 1977 (NSW)* s 36, s 49, s 49Q, s 49ZYS(1)(c)–(e).

96. *Anti-Discrimination Act 1977 (NSW)* s 36, s 49, s 49Q, s 49ZYS(2).

97. *Anti-Discrimination Act 1977 (NSW)* s 49ZYS(1)(a)–(b), s 49ZYS(1)(f).

98. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 64, [6.254], [6.216]–[6.222], [6.228]. The attribute was expanded to include “domestic status” in 2008: *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW)* sch 1 [1], [5], [6].

could continue if they did not accept new members and offered existing members an option to transfer into another fund.⁹⁹

- 6.111 The NSWLRC considered that the ADA exception relating to disability offered better protection than the equivalent federal exception.¹⁰⁰ This allows people to be refused insurance cover or membership of a superannuation fund and does not require disclosure of the source that is relied on.¹⁰¹
- 6.112 The ADA also permits superannuation funds to treat a transgender person as being “of the opposite sex from the sex with which the transgender person identifies”.¹⁰² In preliminary submissions, we heard concerns that this perpetuates harm and the practice of misgendering.¹⁰³
- 6.113 The NSWLRC recommended repealing this exception. It could not see any justification for the exception, and thought its removal would not affect superannuation providers significantly.¹⁰⁴

Alternatives to the ADA’s insurance and superannuation exceptions

- 6.114 NSW could look to other Australian discrimination laws for alternative models. For instance, the ACT allows superannuation providers (and insurers) to discriminate against a person with any protected attribute if:
- the discrimination is based on actuarial or other statistical data, or other relevant documents
 - it is reasonable to rely on that data or documents, and
 - the discrimination is reasonable, proportionate and justifiable in the circumstances.¹⁰⁵
- 6.115 The insurer or superannuation provider must also provide the customer with the data or other documents, or a “meaningful explanation” of them, in writing, upon request.¹⁰⁶

99. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 61, rec 64, rec 65, [6.230], [6.270].

100. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.289].

101. *Disability Discrimination Act 1992* (Cth) s 46(1).

102. *Anti-Discrimination Act 1977* (NSW) s 38Q.

103. ACON, *Preliminary Submission PAD44*, 10; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [109].

104. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.402], rec 80.

105. *Discrimination Act 1991* (ACT) s 28(2).

106. *Discrimination Act 1991* (ACT) s 28(3). See also *Sex Discrimination Act 1984* (Cth) s 41(1)(e).

- 6.116 Another option, supported by the Queensland Human Rights Commission (QHRC), is to include a non-exhaustive list of factors to guide consideration of whether it is reasonable to rely on the actuarial or statistical data. This would include factors such as whether the data is up-to-date and from a reasonable source.¹⁰⁷

Question 6.5: Superannuation services and insurance exceptions

What changes, if any, should be made to the exceptions applying to insurance and superannuation?

Other exceptions to discrimination in goods and services

- 6.117 There are specific exceptions relating to sex, age and disability which limit the protections against discrimination in “goods and services”. These are in addition to the wider exceptions that apply more generally across areas (chapter 7).
- 6.118 It is not unlawful for someone to exercise a skill in relation to men or women only, when they commonly exercise that skill in a different way for men and for women.¹⁰⁸
- 6.119 In addition, it is not unlawful age discrimination to:
- offer or provide holiday tours to people of a particular age or age group
 - discriminate based on age in disposing of goods or services by gift or will, or
 - provide benefits, including concessions, to someone because of their age.¹⁰⁹
- 6.120 The NSWLRC thought the first two age-related exceptions should be repealed. It recommended the exception relating to benefits and concessions should be replaced with a narrower exception to allow the provision of benefits or services at concessional, age-based rates.¹¹⁰
- 6.121 Another exception applies where the provision of goods and services to a person with disability would impose “unjustifiable hardship” on the provider.¹¹¹ We consider this exception, and alternatives to it, in chapter 11.

Question 6.6: The provision of goods and services — exceptions

What changes, if any, should be made to the exceptions to sex, age and disability discrimination in relation to the provision of goods and services?

107. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 41.

108. *Anti-Discrimination Act 1977* (NSW) s 33(2).

109. *Anti-Discrimination Act 1977* (NSW) s 49ZYN(2)–(3).

110. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 74, [6.337]–[6.338].

111. *Anti-Discrimination Act 1977* (NSW) s 49M(2).

Accommodation

- 6.122 Accommodation is another protected area. It is unlawful for a principal or agent to discriminate against someone, based on any protected attribute:
- by refusing or deferring their application for accommodation, or giving them lower priority than other applicants
 - in the terms on which they are offered accommodation
 - by denying or limiting access to benefits associated with their accommodation, or
 - evicting or subjecting them to any other detriment.¹¹²

Issues relating to coverage

- 6.123 The definition of “accommodation” includes residential or business accommodation.¹¹³ In 1999, the NSWLRC said it should more clearly cover caravans and mobile homes.¹¹⁴ Other types of accommodation could be specified, too.
- 6.124 Another issue is whether the coverage of this area should more clearly reflect the rights of people with disability. For example, in Victoria, accommodation providers must allow a person with disability to make reasonable alterations to accommodation if certain conditions are met. Failure to allow this could amount to discrimination.¹¹⁵
- 6.125 Similar requirements about reasonable alterations exist in Queensland, the NT and under the *Disability Discrimination Act*.¹¹⁶ In 1999, the NSWLRC recommended the ADA should also include a similar protection as it aligns with these other discrimination laws.¹¹⁷
- 6.126 In Victoria, it is also unlawful to refuse accommodation to a person with disability because they have an assistance dog. It is unlawful to make them keep their dog elsewhere or pay an extra charge because of the dog.¹¹⁸

112. *Anti-Discrimination Act 1977* (NSW) s 20(1)–(2), s 34(1)–(2), s 49N(1)–(2), s 49ZY(1)–(2), s 38N(1)–(2), s 49ZQ(1)–(2), s 48(1)–(2).

113. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “accommodation”.

114. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [4.218], [4.219], rec 24.

115. *Equal Opportunity Act 2010* (Vic) s 55(1).

116. *Anti-Discrimination Act 1991* (Qld) s 84; *Anti-Discrimination Act 1992* (NT) s 39; *Disability Discrimination Act 1992* (Cth) s 25(2)(d).

117. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [4.221]–[4.222], rec 25.

118. *Equal Opportunity Act 2010* (Vic) s 54(1)–(2).

- 6.127 If NSW were to take this approach, consideration could be given to whether other assistance animals should also be included. As we discuss in chapter 4, people with disability may use assistance animals other than dogs.
- 6.128 Currently, the ADA provides an exception to the prohibition on disability discrimination if:
- a person with disability requires special services or facilities, or requires a benefit to be provided in a special manner, and
 - it would impose “unjustifiable hardship” on the accommodation provider to provide these services or facilities, or the benefit in that manner.¹¹⁹
- 6.129 Refusing to allow reasonable alterations or assistance dogs could already be unlawful in NSW, if the test for direct or indirect disability discrimination is met and the accommodation provider cannot prove that doing so would cause unjustifiable hardship.¹²⁰ However, it could be argued that the Victorian approach is clearer. We consider the option of an obligation to provide adjustments in chapter 11.

Question 6.7: Discrimination in accommodation — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “accommodation”?

Exceptions to discrimination in accommodation

- 6.130 Several other exceptions apply specifically to discrimination in accommodation, which we discuss below. Certain wider exceptions also apply, which we discuss in chapter 7.

Exceptions for private households

- 6.131 There are exceptions for private households. These apply if the accommodation is for six people or less, and the person providing the accommodation, or their near relative, lives there.¹²¹
- 6.132 In 1999, the NSWLRC broadly supported such an exception. It said deciding who to live with is a personal choice. However, it thought an exception should only apply to accommodation in the main home. This would clarify that a self-contained granny flat would not be exempt.¹²² This was based on the NT approach.¹²³

119. *Anti-Discrimination Act 1977* (NSW) s 49N(4), s 49N(6).

120. *Anti-Discrimination Act 1977* (NSW) s 49B(3), s 49N(6).

121. *Anti-Discrimination Act 1977* (NSW) s 20(3), s 34(3), s 38N(3), s 49N(3), s 48(3), s 49ZQ(3), s 49ZYQ(3)(a)–(b).

122. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 26, [4.227].

123. *Anti-Discrimination Act 1992* (NT) s 40(1).

- 6.133 Other discrimination laws also exempt private households, although Tasmania only applies the exception to discrimination based on gender.¹²⁴ Some limit the exception to accommodation for no more than 3 people, other than the provider or their near relatives.¹²⁵ Others do not limit the number of people.¹²⁶
- 6.134 The NSWLRC noted the limit of up to 6 people in accommodation was intended to ensure business activities were not exempt from the ADA. It did not recommend changing the NSW approach.¹²⁷

Exceptions for age-based accommodation

- 6.135 Another exception applies to age-based accommodation. This permits discrimination in the provision of accommodation if a concession is provided in good faith to a person because of their age.¹²⁸
- 6.136 The NSWLRC recommended that this exception be removed. It thought a new, general special measures “exception” would be a better way of addressing the issues raised by age-based accommodation.¹²⁹ We discuss the concept of special measures in chapter 11.
- 6.137 As we detail in chapter 7, a related exception applies across the ADA. This exception allows establishments that provide “housing accommodation for aged persons” to limit admission to people of a particular sex, marital or domestic status or race.¹³⁰

Exception for charitable bodies – disability discrimination

- 6.138 Another exception allows charitable bodies that provide accommodation to people with a particular disability to discriminate based on disability. This also applies to other bodies that do not distribute profits to members.¹³¹ Chapter 7 has more detail on general exceptions for charitable bodies.

124. *Age Discrimination Act 2004* (Cth) s 29(3); *Disability Discrimination Act 1992* (Cth) s 25(3)(a); *Sex Discrimination Act 1984* (Cth) s 23(3)(a); *Racial Discrimination Act 1975* (Cth) s 12(3); *Equal Opportunity Act 2010* (Vic) s 59; *Equal Opportunity Act 1984* (WA) s 21(3). But see *Anti-Discrimination Act 1998* (Tas) s 16(e), s 27(1)(e).

125. *Sex Discrimination Act 1984* (Cth) s 23(3)(a)(ii); *Age Discrimination Act 2004* (Cth) s 29(3)(b); *Disability Discrimination Act 1992* (Cth) s 25(3)(a)(ii); *Equal Opportunity Act 2010* (Vic) s 59(1)(b); *Equal Opportunity Act 1984* (WA) s 21(3)(a)(ii).

126. *Racial Discrimination Act 1975* (Cth) s 12(3); *Anti-Discrimination Act 1992* (NT) s 40(1).

127. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.226].

128. *Anti-Discrimination Act 1977* (NSW) s 49ZYO(3)(c).

129. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 76.

130. *Anti-Discrimination Act 1977* (NSW) s 59.

131. *Anti-Discrimination Act 1977* (NSW) s 49N(5).

Question 6.8: Discrimination in accommodation — exceptions

What changes, if any, should be made to the exceptions for private households, age-based accommodation and charitable bodies in relation to discrimination in accommodation?

Registered clubs

- 6.139 The ADA prohibits discrimination by registered clubs.¹³² A club is a “registered club” if it has a club licence under the *Liquor Act 2007* (NSW).¹³³
- 6.140 Under the ADA, it is unlawful for registered clubs to discriminate against potential members, based on a protected attribute:
- by refusing or failing to accept a membership application, or
 - in the terms on which it is prepared to accept them as a member.
- 6.141 It is also unlawful for registered clubs to discriminate against members based on a protected attribute by:
- denying or limiting access to club benefits
 - removing membership or varying the terms of their membership, or
 - subjecting them to any other detriment.
- 6.142 In December 2024 there were around 1250 registered clubs in NSW. This included, for instance, bowling clubs, golf clubs and RSL clubs.¹³⁴

Issues relating to coverage

- 6.143 One question is whether this protected area is too limited. Limiting the duty holders to clubs that hold a liquor licence may be a way to distinguish between larger public or commercial clubs and smaller, private groups.¹³⁵ But there may be other ways to ensure that the ADA covers groups that are “public” in nature.
- 6.144 In 1999, the NSWLRC said the ADA should instead prohibit discrimination by “clubs and associations”. This would include incorporated associations and registered

132. *Anti-Discrimination Act 1977* (NSW) s 20A(1)–(2), s 34A(1)–(2), s 380, s 48A, s 490(1)–(2), s 49ZR, s 49ZYP(1)–(2).

133. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “registered club”; *Registered Clubs Act 1976* (NSW) s 4(1) definition of “registered club”.

134. Liquor and Gaming NSW, “Licenced Premises Data” (2025) <www.liquorandgaming.nsw.gov.au/resources/licensed-premises-data> (retrieved 28 February 2025).

135. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 142.

corporations whose membership is open to the public. The NSWLRC said this would identify the “public” groups that should be covered by the ADA more accurately.¹³⁶

6.145 Another option is to use the definition of club from the *Disability Discrimination Act*. This defines a “club” as an association of people

- who associate for social, literary, cultural, political, sporting, athletic or other lawful purposes, and
- which provides and maintains its facilities using the funds of the association.¹³⁷

6.146 This distinguishes between the private and public sphere by treating any association that has its own facilities and raises funds to maintain them, as public.

6.147 The definition in the *Sex Discrimination Act* additionally requires that clubs have 30 or more members, and that they sell or supply liquor.¹³⁸

6.148 The QHRC supported the *Disability Discrimination Act* definition. It thought that providing or maintaining facilities indicates that a club has “more of a public, rather than private character”, and that the sale of alcohol was an irrelevant criterion.¹³⁹ However, this recommendation was not implemented in recent discrimination law reforms in Queensland.

6.149 If the ADA was to include a broader definition of “club”, the existing general exception for “voluntary bodies” must also be considered.¹⁴⁰ In its current form, this broad exception may exempt certain clubs that might otherwise be covered by a broader definition of “club”. We discuss this exception in chapter 7.

Question 6.9: Discrimination by registered clubs — coverage

What changes, if any, should be made to the definition and coverage of the protected area of “registered clubs”?

Exceptions to discrimination by registered clubs

6.150 Exceptions in the ADA allow registered clubs to discriminate lawfully in certain situations. Below, we discuss two that apply specifically to registered clubs. Other wider exceptions also apply. We discuss these in chapter 7.

136. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 27, [4.269], [6.88].

137. *Disability Discrimination Act 1992* (Cth) s 4(1) definition of “club”.

138. *Sex Discrimination Act 1984* (Cth) s 4(1) definition of “club”. Neither the *Racial Discrimination Act 1975* (Cth) nor the *Age Discrimination Act 2004* (Cth) defines “club”.

139. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 358–359, rec 35.

140. *Anti-Discrimination Act 1977* (NSW) s 57.

Clubs that provide benefits to certain groups of people

- 6.151 There is an exception for registered clubs whose principal object is to provide benefits to people of a particular race or age, or who have a particular disability.¹⁴¹ They can discriminate against people of other races, disabilities or ages, including in relation to who they accept as members. However, the relevant race cannot be defined by colour.¹⁴²
- 6.152 The NSWLRC recommended repealing this exception. But it supported a new exception to race discrimination for clubs that operate principally to either reduce the disadvantage of people of a particular culture or to preserve a minority culture. The exception would allow such clubs to exclude applicants who do not share that cultural identity. The NSWLRC said this should operate in addition to a new special measures “exception”, as not all such clubs would meet the tests for a special measure.¹⁴³
- 6.153 If religion was added as a protected attribute, the NSWLRC recommended an exception to permit religious discrimination by clubs established for people of a particular religion or belief. It thought they should have the same protections as cultural groups.¹⁴⁴
- 6.154 The ACT takes a different approach. It allows clubs to discriminate against someone with any protected attribute, but only if:
- the club is established to benefit people who share a protected attribute, and
 - the discrimination is reasonable, proportionate and justifiable.¹⁴⁵

Exceptions to sex discrimination

- 6.155 If membership of a registered club is only available to members of one sex, an exception to sex discrimination allows the club to exclude someone of the opposite sex. A registered club for members of one sex can admit a transgender person who identifies as that sex without affecting its status as a registered club for people of the same sex only.¹⁴⁶

141. *Anti-Discrimination Act 1977* (NSW) s 20A(3), s 490(3), s 49ZYP(3)(a).

142. *Anti-Discrimination Act 1977* (NSW) s 20A(3).

143. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.157].

144. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.436].

145. *Discrimination Act 1991* (ACT) s 31.

146. *Anti-Discrimination Act 1977* (NSW) s 34A(3), s 34A(3A).

- 6.156 The NSWLRC said this exception was discriminatory and recommended its repeal. In its view, organisations should apply to the Anti-Discrimination Board for an exemption from the ADA instead.¹⁴⁷
- 6.157 A further exception relates to club benefits. Registered clubs can discriminate against members based on sex if it is not practicable to offer the club's benefit or services to men and women simultaneously or to the same extent.¹⁴⁸ The NSWLRC recommended keeping this exception. It thought there could be legitimate reasons for applying it, including where it would be inappropriate for women and men to share facilities at the same time.¹⁴⁹

Exception to disability discrimination

- 6.158 The ADA provides an exception to disability discrimination where a person with disability requires a benefit to be provided in a special manner, and this cannot be done without causing "unjustifiable hardship" to the registered club.¹⁵⁰ We discuss the reform option of a duty to provide adjustments in chapter 11.

Question 6.10: Discrimination by registered clubs — exceptions

What changes, if any, should be made to the exceptions for registered clubs in relation to sex, race, age and disability discrimination?

Protecting all attributes in all areas

- 6.159 So far in this chapter, we have set out the areas of public life in which discrimination is prohibited. But not all attributes are protected in all the protected areas. The ADA protects people who have a protected attribute in all areas of public life, except for carers. It only prohibits discrimination based on carer's responsibilities in work and not in any other area.
- 6.160 Federal discrimination law has a similar gap. The *Sex Discrimination Act* only prohibits discrimination based on family responsibilities at work.¹⁵¹ Some other discrimination laws protect all attributes in all areas (unless an exception applies).¹⁵²

147. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 59, [6.194].

148. *Anti-Discrimination Act 1977 (NSW)* s 34A(4).

149. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.197].

150. *Anti-Discrimination Act 1977 (NSW)* s 49O(5).

151. *Sex Discrimination Act 1984 (Cth)* pt 2 div 1.

152. *Discrimination Act 1991 (ACT)* s 7; *Anti-Discrimination Act 1991 (Qld)* s 7; *Anti-Discrimination Act 1992 (NT)* s 19; *Anti-Discrimination Act 1998 (Tas)* s 16.

- 6.161 In its 1999 report, the NSWLRC supported limiting the protections for carers. It was only aware of discrimination based on caring responsibilities in the work context. However, it said the law should be revised if discrimination against carers became a problem in other areas.¹⁵³
- 6.162 It could be time to revise this assessment.¹⁵⁴ The AHRC supported prohibiting discrimination based on family responsibilities in all protected areas of public life. In its view, this would be more consistent and less complex than having different protections for different attributes.¹⁵⁵ The LRCWA also recommended consistency across the protected attributes, unless an exception applies.¹⁵⁶

Question 6.11: Discrimination based on carer’s responsibilities

- (1) Should discrimination based on carer’s responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why?
- (2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?

Other potential protected areas

- 6.163 Many preliminary submissions suggested that the ADA should cover additional areas of public life. We outline some options below. First, we set out one option to ensure the ADA is flexible enough to respond to new areas as they arise.

A broader application to all areas of public life

- 6.164 Like most Australian discrimination laws, the ADA does not apply to all conduct that occurs “in public”. It only applies in the areas we outline above.
- 6.165 A different approach could be a non-exhaustive list that prohibits discrimination in any area of public life. This might enable the ADA to evolve to meet society’s needs, without requiring legislative change each time another area is identified.
- 6.166 The *Racial Discrimination Act* provides one model. It prohibits racial discrimination “in the political, economic, social, cultural or any other field of public life”. Without limiting that definition, the Act specifically prohibits discrimination in relation to

153. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [5.219]–[5.220].

154. See, eg, Carers NSW, *Preliminary Submission PAD71*, 3.

155. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 256.

156. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 56, 125–126.

land, housing and other accommodation, access to places and facilities, the provision of goods and services, the right to join trade unions, and employment.¹⁵⁷

- 6.167 Proposals to change other laws to prohibit discrimination in “any area of public life” have been unsuccessful.¹⁵⁸ Concerns have been raised that this approach is less clear than identifying specific areas of application.¹⁵⁹ A related view is some emerging areas may not fit neatly in the public or private spheres.¹⁶⁰
- 6.168 The NSWLRC did not support this approach. It preferred the ADA’s approach of prohibiting discrimination in defined areas, rather than in all areas of public life.¹⁶¹

Disposal of interests in land

- 6.169 Some other state and territory discrimination laws prohibit discrimination in the disposal of interests in land, including the sale or transfer of property.¹⁶²
- 6.170 The ADA does not cover this area. However, people in NSW are protected by federal discrimination law under which it is unlawful to discriminate based on disability, sex or age:
- by refusing or failing to distribute an interest in land, or
 - in the terms or conditions on which the interest in land is offered.¹⁶³
- 6.171 In 1999, the NSWLRC recommended adding disposal of interests in land to the ADA as an area of public life. It warned that permitting discrimination in this area could enable apartheid.¹⁶⁴

157. *Racial Discrimination Act 1975* (Cth) s 9(1), s 11–15.

158. See, eg, Exposure Draft, Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 22; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 52, rec 6.1.

159. ACT Legislative Assembly, *Yoursay Listening Report: Discrimination Law Reform* (2022) 4; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 347; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 125; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.26]–[4.29].

160. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 125.

161. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.29].

162. *Equal Opportunity Act 2010* (Vic) s 50; *Equal Opportunity Act 1984* (SA) s 38(1), s 60(1), s 75(1), s 85J, s 85ZF(1)–(2); *Equal Opportunity Act 1984* (WA) s 21A(1), s 35AN(1), s 35ZA(1), s 47A, s 66ZH(1); *Anti-Discrimination Act 1991* (Qld) s 77.

163. *Disability Discrimination Act 1992* (Cth) s 26(1); *Sex Discrimination Act 1984* (Cth) s 24(1); *Age Discrimination Act 2004* (Cth) s 30(1).

164. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.289], rec 28.

Government functions and the administration of laws

- 6.172 The ADA only protects against discrimination in state laws and programs when these are considered a “service” under the “provision of goods and services” area.¹⁶⁵ However, some preliminary submissions said it is sometimes unclear when a government agency is providing a “service” for this purpose.¹⁶⁶
- 6.173 For example, police conducting the initial investigation of a complaint has been found to be a “service” to victims. But whether the later stages of an investigation, including decisions about whether to arrest or prosecute, are “services” depends on each case.¹⁶⁷
- 6.174 Some think the ADA should expressly protect against discrimination in the administration of state laws and programs.¹⁶⁸ Many other discrimination laws do this.¹⁶⁹ The ADA itself prohibits sexual harassment in the administration of state laws and programs.¹⁷⁰
- 6.175 Similarly, in 1999, the NSWLRC said that the government should have to comply with its own discrimination standards. It recommended the ADA prohibit discrimination in the administration of state and local government laws and programs, and the functions and powers of local government.¹⁷¹
- 6.176 Another option could be to expand the definition of services to clearly include the administration of state and local government laws and programs.

Requests for information

- 6.177 The ADA does not protect against discriminatory requests for information. Some other states and territories do.¹⁷² For example, in Queensland, requesting a birth

165. See, eg, *New South Wales v Whiteoak* [2014] NSWCATAP 99.

166. Legal Aid NSW, *Preliminary Submission PAD87*, 24; NSW Aboriginal Women’s Advisory Network, *Preliminary Submission PAD27*, 9.

167. *Commissioner of Police v Mohamed* [2009] NSWCA 432 [87]–[88].

168. See, eg, Equality Australia, *Preliminary Submission PAD07*, 19; Legal Aid NSW, *Preliminary Submission PAD87*, 24; NSW Aboriginal Women’s Advisory Network, *Preliminary Submission PAD27*, 9; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 5; Law Society of NSW, *Preliminary Submission PAD31*, 10.

169. *Discrimination Act 1991* (ACT) s 23C; *Anti-Discrimination Act 1991* (Qld) s 101; *Disability Discrimination Act 1992* (Cth) s 29; *Sex Discrimination Act 1984* (Cth) s 26; *Age Discrimination Act 2004* (Cth) s 31. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 60.

170. *Anti-Discrimination Act 1977* (NSW) s 22J.

171. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 29, [4.302]–[4.303].

172. See, eg, *Anti-Discrimination Act 1991* (Qld) s 124(1); *Discrimination Act 1991* (ACT) s 23; *Anti-Discrimination Act 1992* (NT) s 26.

date in a job application form has been found to be unlawful if it would be sufficient to ask if an applicant is over 18.¹⁷³

6.178 This area is also covered in federal discrimination law in relation to age, disability, and sex discrimination. This provides a measure of protection for people in NSW, but only in relation to those attributes. Under federal law, it is unlawful for a duty holder to request information from someone with a protected attribute if the duty holder:

- requires the information in connection with an act that constitutes unlawful discrimination
- needs the information to discriminate against that person, and
- would not request the information from someone without that attribute in the same circumstances.¹⁷⁴

6.179 The ACT provides another approach. The ACT prohibits requests for information in connection with an act that constitutes unlawful discrimination.¹⁷⁵ However, unlike federal law, the ACT does not require a comparison with what the duty holder would have done to someone without that attribute. This might make the test simpler and easier to prove.

6.180 Queensland takes a broader approach. It is unlawful to request information on which discrimination “might” be based. However, it is a defence if the respondent can prove the information was reasonably required for a non-discriminatory purpose.¹⁷⁶

6.181 This approach can capture a wider range of conduct than the federal law. This is because there is no requirement that the information be intended to be used for a discriminatory purpose. The LRCWA supported this model.¹⁷⁷

Sport and other competitions

6.182 The ADA does not expressly include sport as an area of public life in which discrimination is prohibited. This is different to sexual harassment, in which the ADA’s protections extend to people engaged in sporting activities.¹⁷⁸

173. *Willmott v Woolworths Ltd* [2014] QCAT 601 [37].

174. *Age Discrimination Act 2004* (Cth) s 32; *Sex Discrimination Act 1984* (Cth) s 27(1); *Disability Discrimination Act 1992* (Cth) s 30(1)–(2).

175. *Discrimination Act 1991* (ACT) s 23. See also *Anti-Discrimination Act 1992* (NT) s 26(1).

176. *Anti-Discrimination Act 1991* (Qld) s 124(1), s 124(3).

177. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 65, 144–145.

178. *Anti-Discrimination 1977* (NSW) s 221.

- 6.183 In relation to discrimination, participation in sport may be covered indirectly by other areas of public life in some cases. For instance, when it is a benefit provided by a registered club.¹⁷⁹
- 6.184 Also, sport may also be considered a “service” if it relates to “entertainment, recreation or refreshment”.¹⁸⁰ Similar terms in the *Sex Discrimination Act* have been found to include the facilitation of participation in a sailing event.¹⁸¹
- 6.185 However, there could be benefits to expressly clarifying that sport is a protected area. One option could be to expressly list sports as a “service”, which forms part of the goods and services area of public life. The NT and Queensland take this approach.¹⁸²
- 6.186 Another option could be to recognise sport as a distinct protected area. The ACT, Victoria and the *Disability Discrimination Act* take this approach.¹⁸³ In the ACT, for example, people responsible for running “formally organised” sporting activities cannot discriminate against someone with a protected attribute in relation to their participation in those activities.
- 6.187 Examples of “formally organised” sporting activities include basketball competitions organised by a private school, and dodgeball league matches. It does not cover informally organised sport, such as a backyard cricket match.¹⁸⁴
- 6.188 Other discrimination laws do not distinguish between formal and informal sporting activities. In Victoria, a person must not discriminate against someone by:
- refusing or failing to select them in a sporting team, or
 - excluding them from participating in a sport activity.¹⁸⁵
- 6.189 A related issue is whether non-sporting competitions should be recognised as a protected area. Only the ACT prohibits discrimination in other, formally organised competitions. Examples of this might include a radio singing contest, a children’s chess competition or a not-for-profit short film festival.¹⁸⁶

179. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.236]. See, eg, *Umina Beach Bowling Club v Ryan* [1984] 2 NSWLR 61.

180. *Anti-Discrimination Act 1977 (NSW)* s 4(1) definition of “services”.

181. *Coady v Yachting Victoria Inc* [2019] FCCA 2095 [160].

182. *Anti-Discrimination Act 1992 (NT)* s 4(1) definition of “services”, s 41; *Anti-Discrimination Act 1991 (Qld)* sch 1 definition of “services”, s 46.

183. *Discrimination Act 1991 (ACT)* s 23A; *Equal Opportunity Act 2010 (Vic)* s 71; *Disability Discrimination Act 1992 (Cth)* s 28.

184. *Discrimination Act 1991 (ACT)* s 23A.

185. *Equal Opportunity Act 2010 (Vic)* s 71.

186. *Discrimination Act 1991 (ACT)* s 23B.

6.190 The ADA currently excludes certain conduct relating to sport from the protections against discrimination (and where relevant, vilification).¹⁸⁷ Exceptions for sport also apply in other discrimination laws across Australia, including those that expressly protect against discrimination in sport. We consider exceptions relating to sport in more detail in chapter 7.

Strata committees and owners' corporations

6.191 The ADA does not cover the acts of strata committees and owners' corporations, unless they are a "service".¹⁸⁸ While some of their functions may be considered a service, no court or tribunal has said that general strata management is a service.¹⁸⁹ No other state, territory or federal discrimination law provides a general protection against discrimination by strata committees or owners' corporations.

6.192 Some argue this should be addressed in the ADA. Many people own or live in strata and community-titled property. Strata committees and owners' corporations can have a significant impact on people's lives. Owners' corporations control the common property in a strata titled property, which includes shared areas, entrance ways and stairs.

6.193 A person with disability may require an alteration to common property to get to their apartment, like a ramp or a device to open a door automatically. Currently, alterations to common property must be agreed through a special resolution. This requires the support of 75% of voters.¹⁹⁰ But because owners' corporations are not generally subject to the ADA, failing to provide an adjustment is not considered unlawful discrimination.

6.194 In Victoria, owners' corporations must allow an owner or an occupier with a disability to make reasonable adjustments to common property to meet their needs, if certain conditions are met.¹⁹¹ However, this only protects people with disability and not people with other attributes. For example, it would not address issues with body corporates banning breastfeeding on common property, children from using a shared swimming pool, or owners from displaying gay pride flags on their balconies.¹⁹²

187. *Anti-Discrimination Act 1977* (NSW) s 22, s 38, s 38P(1), s 49R, s 49ZYW(1).

188. C Sherry, *Preliminary Submission PAD01*, 1.

189. C Sherry, "Does Discrimination Law Apply to Residential Strata Schemes?" (2020) 43 *UNSW Law Journal* 307, 333; *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119.

190. *Strata Schemes Management Act 2015* (NSW) s 108(1)–(2), s 5(1)(b)(i). An amendment to the Act will, upon commencement, lower the threshold for passing a special resolution in relation to accessibility infrastructure. Such a resolution will pass if less than 50% of votes cast are against it: *Strata Schemes Legislation Amendment Act 2025* (NSW) sch 1 [2].

191. *Equal Opportunity Act 2010* (Vic) s 56(1)–(2).

192. C Sherry, "Does Discrimination Law Apply to Residential Strata Schemes?" (2020) 43 *UNSW Law Journal* 307, 338.

6.195 One way the ADA could address this gap would be to extend its coverage to services and facilities associated with land and accommodation. This could include services provided by strata schemes to owners and residents. This would go further than the Victorian approach and would apply to individually owned lots too.¹⁹³ It could also protect people with other attributes, not just disability.

Question 6.12: Additional areas of public life

- (1) Should the ADA apply generally “in any area of public life”? Why or why not?
- (2) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

193. C Sherry, “Does Discrimination Law Apply to Residential Strata Schemes?” (2020) 43 *UNSW Law Journal* 307, 336.

7. Wider exceptions

In brief

The *Anti-Discrimination Act 1977* (NSW) contains many exceptions, some of which apply across the Act. Others only apply to discrimination, but across a range of protected areas and attributes. We ask if these exceptions are appropriate and outline some possible reform options.

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- 7.1 In the previous chapter, we consider the areas in which the *Anti-Discrimination Act 1977* (NSW) (ADA) makes it unlawful to discriminate based on a protected attribute. The coverage is not absolute, even within these areas. The protections in the ADA are limited by exceptions that make otherwise unlawful acts, lawful.

- 7.2 The exceptions in the ADA are complex. Some apply specifically to certain attributes. We discuss most of these attribute-specific exceptions in chapter 4. Other exceptions apply to protected areas in which discrimination would otherwise be unlawful, like work. We address most of these in chapter 6.
- 7.3 The ADA contains broader exceptions too. Some of these apply across the entire ADA, including to the prohibitions on discrimination, vilification, harassment, victimisation and unlawful advertisements. Some apply to both discrimination and vilification. Others only apply to discrimination, but across a range of protected areas and attributes.
- 7.4 In this chapter, we consider the exceptions relating to:
- religious bodies and faith-based organisations
 - adoption services
 - private educational authorities, including religious educational authorities
 - sport
 - charities
 - voluntary bodies
 - aged care accommodation, and
 - acts done under statutory authority.

Religious bodies

- 7.5 One of the most controversial issues in discrimination law is whether and, if so when, religious bodies should be granted exceptions that allow them to discriminate.
- 7.6 The ADA provides broad exceptions for religious bodies. Section 56 of the ADA states:
- Nothing in this Act affects:
- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
 - (c) the appointment of any other person in any capacity by a body established to propagate religion, or
 - (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.
- 7.7 These exceptions apply to the whole ADA, not just the prohibition of discrimination. This means the exceptions also permit religious bodies to engage in other forms of otherwise unlawful conduct (including sexual harassment and vilification).

- 7.8 In some circumstances, certain religious bodies will be able to access other exceptions. This includes the exceptions for private educational authorities, adoption service providers, voluntary bodies, charitable benefits, and aged care accommodation providers, which are each outlined later in this chapter.
- 7.9 This is a complex and sensitive area, which raises issues about the best way to accommodate intersecting human rights. These include the right to non-discrimination (including based on sex, sexual orientation, gender identity, marital or relationship status, pregnancy, race, or religion). They also include the right to freedom of thought, conscience, and religion.¹
- 7.10 As we discuss in chapter 2, international human rights law recognises that the right to non-discrimination can be limited in some cases.²
- 7.11 International human rights law also recognises that some, but not all, aspects of the right to freedom of thought, conscience, and religion can be limited. There are two aspects to this right: freedom of belief, and freedom to manifest that belief. Freedom of belief means adopting a religion or belief of one's choice. This right cannot be limited because no one can be compelled to reveal what they believe in their own mind.³
- 7.12 The freedom to manifest beliefs, such as through worship, observance, practice and teaching, includes the freedom to choose religious leaders and teachers, and to establish religious schools.⁴ Under international human rights law, this aspect of the right can be limited in certain circumstances, including to protect other people's human rights.⁵ United Nations guidance explains that freedom of religion or belief should never be used to justify ends that are inconsistent with any human rights instruments.⁶
- 7.13 We received a range of views in preliminary submissions about the ADA's religious exceptions. Most generally accepted that, in a diverse society, religious exceptions in some form are important to respect freedom of religion. We heard that religious

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1. See *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 18(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(vii).
 2. OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) 51.
 3. Human Rights Committee, *General Comment No 22: Article 18: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/ Rev 1/Add 4 (30 July 1993) [3].
 4. Human Rights Committee, *General Comment No 22: Article 18: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/ Rev 1/Add 4 (30 July 1993) [4].
 5. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).
 6. A Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief: Gender-Based Violence and Discrimination in the Name of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) [60].

exceptions are needed to allow churches and other religious bodies to operate according to their convictions, doctrines, tenets and beliefs.⁷

- 7.14 But there is disagreement about how wide the exceptions should be, who they should apply to, and under what conditions. As we outline below, questions have been raised about whether the breadth of the ADA's exceptions for religious bodies is appropriate.

Training and appointing religious personnel

- 7.15 Two of the exceptions relate to the training and appointment of members of religious bodies.⁸ These are closely tied to the exercise of religious freedom. For example, s 56(a) allows a church to discriminate based on any protected attribute when appointing a priest.
- 7.16 Most other Australian discrimination laws have similar exceptions about appointing and training members of religious orders.⁹ Preliminary submissions generally supported exempting the appointment and education of religious leaders from the discrimination prohibitions. This view was shared by some who were concerned about the breadth of other religious exceptions.¹⁰
- 7.17 The Australian Law Reform Commission (ALRC) considered that an identical exception to sex discrimination in the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*) should be amended so that it better reflects the diversity of descriptions of religious leaders across religions.¹¹
- 7.18 In 1999, the NSW Law Reform Commission (NSWLRC) also thought that s 56(a) and (b) should not focus on the Christian faith alone. It proposed a revised exception to discrimination regarding the selection, ordination or appointment of persons to perform functions in relation to a religion. It would also cover training or education

7. Presbyterian Church of Australia in New South Wales, *Preliminary Submission PAD56*, 3, 6; Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 2; Catholic Schools NSW, *Preliminary Submission PAD80*, 3.

8. *Anti-Discrimination Act 1977* (NSW) s 56(a)–(b).

9. *Sex Discrimination Act 1984* (Cth) s 37(1)(a)–(b); *Equal Opportunity Act 2010* (Vic) s 82(1); *Anti-Discrimination Act 1998* (Tas) s 52(a)–(c); *Discrimination Act 1991* (ACT) s 32(1)(a)–(c); *Anti-Discrimination Act 1992* (NT) s 51(a)–(c); *Equal Opportunity Act 1984* (WA) s 72(a)–(c); *Anti-Discrimination Act 1991* (Qld) s 109(1)(a)–(c); *Equal Opportunity Act 1984* (SA) s 50(1)(a)–(b).

10. Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 15. See also Anonymous, *Preliminary Submission PAD89*, 27; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 17; Rainbow Families, *Preliminary Submission PAD36*, 15–16.

11. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 2. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 46.

for religious appointments. For the exception to apply, the discrimination must be necessary to comply with the doctrines, tenets or belief of that religion.¹²

Appointing any other person in any capacity

- 7.19 A more controversial exception relates to the appointment of other personnel. Section 56(c) covers the appointment of “any other person in any capacity by a body established to propagate religion”.
- 7.20 The ADA does not explain what a “body established to propagate religion” is, and much will depend on the facts of a particular case. It has, however, been found to include charitable institutions established by churches (as we explain below).¹³
- 7.21 There is also a view that similar wording in the *Sex Discrimination Act* is broad enough to potentially include religious educational institutions.¹⁴ There may be some overlaps with the exceptions for private educational authorities, which we consider below.
- 7.22 The exception in the ADA is wide enough to cover appointments to roles that do not have a religious character.¹⁵ If this exception is considered too broad, there are a range of ways it could be changed.

Inherent requirements, reasonableness and proportionality tests

- 7.23 One option could be to only allow discrimination in employment if the teaching, observance or practice of religion is an inherent requirement of the position or a genuine occupational requirement. As we mentioned in chapter 5, the NSWLRC recommended making religious belief and practices a protected attribute. It also recommended adding a new exception to allow religious discrimination in employment where religious belief is a genuine occupational qualification.¹⁶
- 7.24 There is a view, however, that further safeguards are needed. Some argue that such an exception could indirectly allow discrimination against LGBTQIA+ people, their supporters, and others who do not adhere to a particular religion’s beliefs on marriage, sexuality and gender. For instance, it could be argued that adherence to these beliefs is a genuine occupational requirement of the role.¹⁷

12. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.70], Appendix A: Draft Anti-Discrimination Bill 1999, cl 66.

13. *OV v QZ (No 2)* [2008] NSWADT 115 [69]–[70].

14. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) [4.166].

15. *OV v Wesley Mission Council* [2010] NSWCA 155, 79 NSWLR 606 [70].

16. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 84.

17. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 76–77, reforms 12, 13.

- 7.25 Some discrimination laws have additional requirements that religious bodies must meet. For example, religious bodies in Victoria can discriminate based on religious belief or activity if:
- conformity with the doctrines of the religion is an inherent requirement of the position, and
 - the discrimination is reasonable and proportionate in the circumstances.¹⁸
- 7.26 In Victoria, this exception applies to the whole work relationship, not just at the point of appointment. If this model is considered for NSW, an option could be to confine the exception to appointments (as the ADA does currently).
- 7.27 The Queensland Human Rights Commission (QHRC) similarly recommended that religious organisations should only be able to discriminate based on religious belief or activity in relation to work if:
- it was reasonable and proportionate in the circumstances, and
 - participation in the teaching, observance or practice of a particular religion was a genuine occupational requirement.¹⁹

Adherence to religious beliefs and/or practices

- 7.28 An alternative option could be to allow religious institutions (potentially including religious educational institutions) to discriminate by preferring a candidate or refusing to hire them, or in the allocation of duties and responsibilities, depending on whether they:
- adhere to the religious beliefs and practices of the institution, or
 - conduct themselves consistently with the religious beliefs and practices of the institution.²⁰
- 7.29 As a safeguard, it has been suggested that the law could require institutions to have a written policy. Employers would only be allowed to terminate employees under this exception if they breach a written agreement to conduct themselves in accordance with the ethos of the institution.²¹
- 7.30 The Australian Capital Territory (ACT) takes a similar approach. There, religious bodies can discriminate in employment, but only on the ground of religious conviction:

18. *Equal Opportunity Act 2010* (Vic) s 82A(1). See also *Discrimination Act 1991* (ACT) s 33C.

19. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 39.1–39.2.

20. S C Derrington, "Of Shields and Swords: Let the Jousting Begin!" (Paper presented at Freedom19 Conference, Sydney, 4 September 2019) 8–9.

21. S C Derrington, "Of Shields and Swords: Let the Jousting Begin!" (Paper presented at Freedom19 Conference, Sydney, 4 September 2019) 8–9.

- where this conforms to the doctrines, tenets or beliefs of the body’s religion, and
- when the discrimination is necessary to avoid injury to the religious susceptibilities of adherents of the religion, and the body has published an employment policy.²²

7.31 The exception does not apply to employment at a religious educational institution, or to a religious body whose sole or main purpose is commercial.²³ The ACT Law Reform Advisory Council recommended amending this exception so it only permits discrimination where it is reasonably justified.²⁴

Duties relating to religious observance or practice

7.32 A narrower option could be to exempt only the selection or appointment of people to perform duties or functions in relation to “religious observance or practice”. Many other discrimination laws in Australia contain this exception.²⁵ In 2023, a private members’ Bill (the Equality Bill) proposed to add a similar exception to the ADA.²⁶ This aspect of the Bill was not enacted.

Question 7.1: Religious personnel exceptions

- (1) Should the ADA provide exceptions for:
 - (a) the training and appointment of members of religious orders?
 - (b) “the appointment of any other person in any capacity by a body established to propagate religion”?
- (2) If so, what should these exceptions cover and when should they apply?

Other acts or practices of religious bodies

7.33 A related issue is whether religious bodies should be permitted to discriminate in relation to any other acts and practices.

7.34 Section 56(d) contains a wide exception for any body “established to propagate religion”. Nothing in the ADA applies to the acts or practices of such bodies that either:

- conform to the doctrines of that religion, or

22. *Discrimination Act 1991* (ACT) s 32(1)(e).

23. *Discrimination Act 1991* (ACT) s 32(2)–(3).

24. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT), Final Report (2015) rec 19.2.

25. *Sex Discrimination Act 1984* (Cth) s 37(1)(c); *Equal Opportunity Act 2010* (Vic) s 82(1)(c); *Anti-Discrimination Act 1998* (Tas) s 52(c); *Discrimination Act 1991* (ACT) s 32(1)(c); *Anti-Discrimination Act 1992* (NT) s 51(c); *Equal Opportunity Act 1984* (WA) s 72(c); *Anti-Discrimination Act 1991* (Qld) s 109(1)(c).

26. Equality Legislation Amendment (LGBTIQ+) Bill 2023 (NSW), First Print, sch 1 [40].

- are necessary to avoid injury to the religious susceptibilities of the adherents of that religion.²⁷
- 7.35 As we note above, the ADA does not define what a “body established to propagate religion” is. However, it has been found to include charitable institutions that are established by churches.²⁸ For example, it applied to a foster care service provided by the Wesley Mission.²⁹
- 7.36 An almost identical exception in the *Sex Discrimination Act* permitted aged care services run by religious organisations to discriminate against same sex couples.³⁰
- 7.37 The ALRC observed that the *Sex Discrimination Act* exception could also apply to religious educational institutions. It recommended expressly excluding them.³¹
- 7.38 The *Fair Work Act 2009* (Cth) contains a similar exception to its protection against termination because of one or more protected attributes. An exception applies if the person is a staff member of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. The termination must be in good faith and “to avoid injury to the religious susceptibilities of adherents of that religion or creed”.³²
- 7.39 The ALRC recommended amending this exception in relation to religious educational institutions. It considered the exception should be no broader than the ALRC’s recommended exceptions under the *Sex Discrimination Act*.³³
- 7.40 As discussed above, some submissions supported retaining the current religious exceptions because they safeguard freedom of thought, conscience and religion.³⁴ However, some think s 56(d) is too broad and argue it prioritises religious freedom over other human rights.³⁵

27. *Anti-Discrimination Act 1977* (NSW) s 56(d).

28. *OV v QZ (No 2)* [2008] NSWADT 115 [69]–[70].

29. *OW v Wesley Mission Council* [2010] NSWADT 293 [35].

30. Australia, Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012*, Explanatory Notes, Exposure Draft (2012) [190]; *Sex Discrimination Act 1984* (Cth) s 37(1)(d), s 37(2)(a). This exception was amended in 2013 to no longer apply to Commonwealth-funded aged care.

31. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1, [4.165]–[4.166].

32. *Fair Work Act 2009* (Cth) s 772(2)(b). See also *Fair Work Act 2009* (Cth) s 351(2)(c).

33. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 5.

34. See, eg, Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 4.

35. See, eg, NSW Council for Civil Liberties Inc, *Preliminary Submission PAD21* [104]; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 7; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 15; New South Wales Bar Association, *Preliminary Submission PAD86* [40].

7.41 If this exception is considered too broad, there may be ways to limit its scope while respecting freedom of religion. We set out some possible options below.

Limit the exception to certain attributes

7.42 Currently, the exception in s 56(d) applies to all protected attributes. An option could be limit it to certain attributes.

7.43 In Victoria, a general exception for religious bodies only permits discrimination based on religious belief, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.³⁶ The exception does not permit discrimination based on other attributes, such as disability or race.

7.44 In 2018, a federal expert panel on religious freedom (the Religious Freedom Review) recommended that jurisdictions with exceptions for religious bodies with respect to pregnancy, disability, race or intersex status should review them.³⁷

7.45 Alternatively, the exception could be limited to only allow religious bodies to discriminate based on religious belief or activity. The QHRC recommended this approach.³⁸

Require reasonableness and proportionality

7.46 Another option could be to add further requirements into the exception. For example, Victoria allows a religious body to discriminate in most areas but only if it is reasonable and proportionate in the circumstances. Different rules apply to religious bodies that are employing people or providing services.³⁹

7.47 The Law Reform Commission of Western Australia (LRCWA) and the QHRC recommended a similar approach.⁴⁰ The QHRC also supported a non-exhaustive list of factors to help determine if the discrimination is reasonable and proportionate. These include the importance of the conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion.⁴¹

36. *Equal Opportunity Act 2010* (Vic) s 82(2).

37. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 1.

38. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 38.1.

39. *Equal Opportunity Act 2010* (Vic) s 82(2).

40. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 75–76; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 38.1.

41. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 38.2.

Special rules for religious bodies providing public goods and services

- 7.48 Many religious bodies provide essential public services, including health and aged care, and they often receive public funding to deliver these services. One view is that churches that provide social services to the community need to have exceptions, so they can maintain the character of their organisation by only employing people who support their faith.⁴²
- 7.49 However, some preliminary submissions suggested faith-based bodies should not be permitted to discriminate when providing public services or receiving public funding.⁴³ The right to non-discrimination in international law includes the right to have equal access to public services.⁴⁴
- 7.50 In 2016, a South Australian review recommended clarifying that an existing exception does not apply to discrimination by religious bodies in the provision of public services, such as health and education.⁴⁵
- 7.51 Another option could be to add specific requirements before religious bodies providing public services can lawfully discriminate. Victoria, for example, only allows religious bodies to discriminate in the provision of government-funded goods or services based on religious belief or activity (and not other attributes). The discrimination must:
- be reasonable and proportionate in the circumstances, and
 - conform with the doctrines and beliefs of the religion or be necessary to avoid injury to the religious sensitivities of followers of the religion.⁴⁶
- 7.52 The QHRC proposed factors to help determine if discrimination by a religious body is reasonable and proportionate when providing goods and services. These include:
- whether the religious organisation operates in a commercial manner
 - the reasonable availability of alternative services, and
 - whether the services are essential services.⁴⁷

42. Presbyterian Church of Australia in New South Wales, *Preliminary Submission PAD56*, 6.

43. See, eg, NSW Council for Civil Liberties Inc, *Preliminary Submission PAD21* [105]; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 7; Anti-Discrimination NSW, *Preliminary Submission PAD83*, 13; Legal Aid NSW, *Preliminary Submission PAD87*, 12.

44. See *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 25(c).

45. South Australian Law Reform Institute, “*Lawful Discrimination*”: *Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status*, Report (2016) rec 2.

46. *Equal Opportunity Act 2010* (Vic) s 82(2), s 82B. See also *Discrimination Act 1991* (ACT) s 32(1).

47. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 38.2.

7.53 The *Sex Discrimination Act* also treats religious body exceptions differently when certain public services are involved. Although it has a broad exception for religious bodies, this does not apply to the provision of Commonwealth-funded aged care by a religious body, except in relation to employment.⁴⁸

Replace the exception with area-specific exceptions

7.54 Another option could be to replace the broad exception in s 56(d) with more targeted, area-specific exceptions. This may be particularly important if the ADA is amended to prohibit religious discrimination.

7.55 As we outline in chapter 5, in 1999 the NSWLRC recommended adding religion as a protected attribute. It also recommended replacing s 56(d) with area-specific exceptions to allow:

- religious discrimination in employment where religious belief is a genuine occupational requirement
- educational institutions that operate according to religious principles to discriminate in employment based on sex, domestic status, sexuality, transgender status and religion
- educational institutions established for particular religious groups to discriminate based on religion, and
- discrimination based on religion in relation to accommodation established for religious purposes.⁴⁹

7.56 It recommended, for instance, a new accommodation exception modelled on Queensland’s discrimination law.⁵⁰ The Queensland exception applies where accommodation is controlled by a religious body and the discrimination is both:

- in line with the doctrine of their religion, and
- necessary to avoid “offending the religious sensibilities” of people of that religion.⁵¹

7.57 The ALRC offered another approach. It recommended that the *Sex Discrimination Act* should not permit religious educational institutions to discriminate in the provision of accommodation.⁵²

48. *Sex Discrimination Act 1984* (Cth) s 37(2).

49. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.72], rec 16, rec 46, rec 84–85, rec 87.

50. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 87.

51. *Anti-Discrimination Act 1991* (Qld) s 90.

52. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1.

- 7.58 The NSWLRC also considered whether there should be an exception to religious discrimination in relation to access to sites of religious significance. However, it concluded this would be best addressed through a general “special measures” exception (we discuss this in chapter 11).⁵³
- 7.59 Other states and territories have specific exceptions that allow access to significant sites to be restricted. The Northern Territory (NT) allows a person to restrict access to land, a building or a place of cultural or religious significance by people who are not of a particular sex, age, race or religion. This is an exception to discrimination in the area of goods, services and facilities. For the exception to apply, the restriction must be:
- in accordance with the culture or doctrine of the religion, and
 - necessary to avoid offending cultural or religious sensitivities of people of that culture or religion.⁵⁴
- 7.60 An almost identical Queensland exception to discrimination in goods and services permits people to restrict access to sites of cultural or religious significance. Another Queensland exception permits discrimination in the sale of land based on sex, age, race or religion, if the relevant interest in land is of cultural or religious significance.⁵⁵

Question 7.2: Other acts and practices of religious bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

Harassment, vilification and victimisation by religious bodies

- 7.61 As we note above, the exceptions for religious bodies in s 56 apply to all forms of unlawful conduct under the ADA, including discrimination, harassment, victimisation and vilification.
- 7.62 Another issue is whether these exceptions should instead be limited to discrimination, as the NSWLRC recommended in 1999. It stated that “this protection should not be something which religious groups are allowed to hide behind in cases where harassment or vilification of a particular group occurs”.⁵⁶

53. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 88.

54. *Anti-Discrimination Act 1992* (NT) s 43(1).

55. *Anti-Discrimination Act 1991* (Qld) s 48, s 80.

56. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.71].

- 7.63 One view is that exceptions to harassment or victimisation are never permissible. This conduct cannot be justified under international human rights law.⁵⁷
- 7.64 Aside from NSW, only Western Australia (WA), Queensland and the NT have exceptions for religious bodies that potentially extend to harassment or victimisation in some cases.⁵⁸ However, the LRCWA recommended narrowing the WA exception to only apply to discrimination.⁵⁹
- 7.65 Section 56 of the ADA also applies to vilification. Some consider this important to protect genuine religious teaching and religious freedom.⁶⁰ It operates alongside the specific vilification exceptions for religious discussion and/or instruction. We discuss these vilification-specific exceptions in chapter 8.
- 7.66 Aside from NSW, only Queensland and the NT have exceptions allowing religious bodies and faith-based organisations to engage in vilification.⁶¹ Victoria has an exception for genuine religious purposes, such as conveying or teaching a religion or proselytising.⁶²

Question 7.3: Exceptions for other forms of unlawful conduct

Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?

Adoption services

- 7.67 The ADA contains an exception for faith-based organisations that provide adoption services. For the purposes of this exception, a “faith-based organisation” is an organisation established or controlled by a religious organisation, which is accredited under the *Adoption Act 2000* (NSW) to provide adoption services.⁶³
- 7.68 The prohibitions on discrimination and vilification based on homosexuality or transgender grounds do not apply to the policies and practices of such

57. OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) 53.

58. *Anti-Discrimination Act 1992* (NT) s 51; *Equal Opportunity Act 1984* (WA) s 72; *Anti-Discrimination Act 1991* (Qld) s 109.

59. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 74, rec 77.

60. Anglican Church Diocese of Sydney, *Submission SV22* [23], [29]. See also Shia Muslim Council of Australia, *Submission SV53* [59].

61. *Anti-Discrimination Act 1991* (Qld) s 109; *Anti-Discrimination Act 1992* (NT) s 51.

62. *Racial and Religious Tolerance Act 2001* (Vic) s 11(1)(b)(i), s 11(2).

63. *Anti-Discrimination Act 1977* (NSW) s 59A(3) definition of “faith-based organisation”.

organisations concerning the provision of adoption services. However, this does not permit discrimination against any child who is or may be adopted.⁶⁴

- 7.69 There are conflicting views on this exception. Some argue it is important to faith-based adoption agencies, because same sex adoption is incompatible with some religious views about child raising.⁶⁵ Others argue that faith-based adoption services should not be allowed to discriminate in the provision of services for which they receive public funding.⁶⁶
- 7.70 Any law reform efforts will require consideration of the interactions between this exception and the general exceptions for religious bodies in s 56 of the ADA. The general exception for the acts and practices of religious bodies in s 56(d) (outlined above) has been found to apply to foster care services provided by a faith-based organisation.⁶⁷ This suggests faith-based adoption service providers may be able to rely on the general exception, even if the specific adoption service exception is repealed.
- 7.71 There is also a view that the general exception in s 56(d) is wider than the adoption services exception. The adoption services exception does not permit discrimination against children — no such limitation applies to s 56(d).⁶⁸

Question 7.4: Exceptions for providers of adoption services

Should the ADA have a specific exception for providers of adoption services? If so, what should it cover and when should it apply?

Private educational authorities

- 7.72 The ADA has specific exceptions for “private educational authorities”. These allow any “private educational authority” to discriminate in relation to work or education, based on almost any protected attribute.
- 7.73 These exceptions were introduced in 1981, when the ADA was amended to prohibit discrimination against staff or students in public schools. They were intended to

64. *Anti-Discrimination Act 1977* (NSW) s 59A(1)–(2).

65. See, eg, Freedom for Faith, *Preliminary Submission PAD25*, 6–7.

66. See, eg, Rainbow Labor NSW, *Preliminary Submission PAD30*, 2; Rainbow Families, *Preliminary Submission PAD36*, 16.

67. *Anti-Discrimination Act 1977* (NSW) s 56(d); *OW v Wesley Mission Council* [2010] NSWADT 293 [35].

68. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 85, referring to the *Anti-Discrimination Act 1977* (NSW) s 56(d), s 59A(2).

address the concerns about private schools and mainstream churches about being subject to the ADA.⁶⁹

- 7.74 One view is that that private schools are private communities, set up to create “distinct schooling environments”.⁷⁰ Some preliminary submissions support exceptions for religious schools in particular, because the exceptions:
- protect the right to freedom of thought, conscience and religion
 - allow schools to maintain their ethos and identity in all aspects of school life, including by employing staff and preferring families whose values align with the school’s ethos
 - allow parents the freedom to choose a faith-based schooling environment for their child, that aligns with their religious and moral convictions, and
 - allow schools to teach a distinctive worldview without having to deal with costly discrimination claims.⁷¹
- 7.75 Many other preliminary submissions argued that these exceptions are too broad.⁷² Some are concerned that the exceptions apply unconditionally, without requiring duty holders to justify their conduct.⁷³ There are also specific concerns that the exceptions:
- can be used to permit discrimination against LGBTQIA+ people and their supporters⁷⁴
 - do not reflect contemporary community standards and provide people in NSW with less protections than in other parts of Australia,⁷⁵ and
 - are outdated, unjustified and undermine inclusivity.⁷⁶

69. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.104]–[4.105], [4.178], [4.181].

70. Australian Christian Lobby, *Preliminary Submission PAD12*, 8.

71. See, eg, David A W Miller, *Preliminary Submission PAD15*, 3; Freedom for Faith, *Preliminary Submission PAD25*, 5; Adventist Schools Australia, Australian Association of Christian Schools, Christian Schools Australia, *Preliminary Submission PAD26*, 4; Presbyterian Church of Australia in New South Wales, *Preliminary Submission PAD56*, 3, 7; Family First Party Australia, *Preliminary Submission PAD65* [5.3.2]; Catholic Schools NSW, *Preliminary Submission PAD80*, 3.

72. See, eg, Respect Inc, *Preliminary Submission PAD57*, 7; Equality Australia, *Preliminary Submission PAD07*, 12; Independent Education Union of Australia NSW/ACT Branch, *Preliminary Submission PAD19*, 1; HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 18; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 7; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 3; Unions NSW, *Preliminary Submission PAD90*, 12.

73. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 61, 68.

74. Equality Australia, *Preliminary Submission PAD07*, 3.

75. Independent Education Union of Australia NSW/ACT Branch, *Preliminary Submission PAD19*, 1.

76. Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 3.

- 7.76 A recent parliamentary inquiry also noted that NSW is the only part of Australia that allows discrimination against school staff and students based on disability. It recommended that consideration be given to removing the exceptions which permit discrimination against people with disability in private schools.⁷⁷
- 7.77 There is also a view that religious schools should be subject to secular laws as they receive public funding and tax benefits.⁷⁸
- 7.78 In the following sections, we consider the scope of the exceptions for private educational authorities, and how they apply in employment and education.
- 7.79 We also raise some possible alternatives for consideration. In doing so, we note that any attempts to change these exceptions will need to consider the effects of the general exceptions for religious bodies (outlined above).⁷⁹ There are possible overlaps between these categories of exceptions, as the general exceptions potentially include religious educational institutions.

The exceptions cover a wide range of educational bodies

- 7.80 The ADA is the only Australian discrimination law with exceptions for “private educational authorities”. Some other states and territories, and the *Sex Discrimination Act*, have more targeted exceptions for religious schools instead.
- 7.81 A preliminary issue is whether any such exceptions should extend to all private educational authorities. To the extent that exceptions are considered necessary, should they be limited to religious educational authorities?
- 7.82 In 1999, the NSWLRC observed the exceptions reflect the idea that the state should not interfere with education in the “private sphere”. But it concluded there is no coherent rationale for the “extremely broad” exceptions and recommended replacing them with narrower exceptions specifically for religious schools.⁸⁰
- 7.83 Under the ADA, a “private educational authority” includes any school, college, university or other institution at which education or training is provided, which is not public. It excludes any university established under an Act of incorporation.⁸¹

77. NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 24, [3.75].

78. See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.119]; Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) [2.23].

79. *Anti-Discrimination Act 1977* (NSW) s 56(c)–(d).

80. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 16, [4.104]–[4.106].

81. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “private educational authority”.

However the definition includes any business colleges and other private post-secondary institutions that are not established under an Act of incorporation.⁸²

- 7.84 Many NSW schools fit this definition. Most of these private schools have a religious affiliation. In 2023, 37.1% of NSW students were enrolled in non-government schools.⁸³ Eighteen percent of NSW students were enrolled in Catholic schools. Nineteen percent were enrolled in independent schools, 83% of which have a religious affiliation.⁸⁴
- 7.85 In 2022–23, combined government funding (from both the Australian and NSW Governments) for non-government schools in NSW was \$6.6 billion.⁸⁵
- 7.86 The statistics indicate that limiting the exceptions to religious schools would confine the scope of the exception, but not significantly. Nor would it address the issue of whether the exceptions appropriately address the intersection between religious freedom and other rights in relation to work and education. Other issues require consideration.

Discrimination in work

- 7.87 Exceptions in the ADA allow private educational authorities to discriminate based on sex, disability, transgender grounds, homosexuality, or marital or domestic status in relation to employment.⁸⁶ For example, they can discriminate:
- in deciding who to employ and the terms of employment
 - by denying or limiting access to promotions, transfers, training or other benefits, or
 - by dismissing an employee or subjecting them to other detriment.⁸⁷
- 7.88 Most other Australian discrimination laws contain specific work-related exceptions for religious educational authorities.⁸⁸ The *Sex Discrimination Act*, for example, has

82. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.106].

83. NSW, Centre for Education Statistics and Evaluation, *Schools and Students: 2023 Statistical Bulletin* (2024) 2.

84. Association of Independent Schools of NSW, *Independent Schools in NSW Snapshot* (2024) 2–3.

85. Australia, Productivity Commission, *Report on Government Services 2025: Child Care, Education and Training*, (part B) (2025) table 4A.2.

86. *Anti-Discrimination Act 1977* (NSW) s 25(3)(c), s 38C(3)(c), s 40(3)(c), s 49D(3)(c), s 49ZH(3)(c).

87. See, eg, *Anti-Discrimination Act 1977* (NSW) s 25(2), s 25(3)(c).

88. *Sex Discrimination Act 1984* (Cth) s 38(1); *Anti-Discrimination Act 1998* (Tas) s 51(2); *Discrimination Act 1991* (ACT) s 46(2); *Equal Opportunity Act 2010* (Vic) s 83A; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) s 73(1)–(2); *Anti-Discrimination Act 1991* (Qld) s 25.

a broad exception for any educational institution that is “conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”.⁸⁹

- 7.89 On the other hand, some discrimination laws do not contain this kind of exception.⁹⁰ In 2022, the NT Act was amended to remove an exception that permitted religious educational authorities to discriminate based on religious belief or activity, or sexuality, in employment.⁹¹ The intention was to provide greater community inclusion.⁹²
- 7.90 One option could be to repeal the existing private educational authority employment exceptions and introduce a more general employment exception. The NT, for instance, still allows discrimination if it is based on a genuine occupational qualification.⁹³ We outline this option in more detail in chapter 6.
- 7.91 However, the current NT Government has indicated that it plans to reintroduce the targeted religious educational authorities’ employment exception, to “restore religious freedoms”.⁹⁴
- 7.92 In NSW, some may continue to support distinct employment exceptions for private educational authorities or for religious educational authorities, more specifically. This raises questions about what any such exceptions should cover. We set out some considerations, below.

The relevant attributes

- 7.93 The ADA’s exceptions for private educational authorities permit discrimination in work based on sex, disability, transgender grounds, homosexuality, and marital or domestic status.
- 7.94 Some Australian discrimination laws are narrower and only permit religious educational institutions to discriminate in work based on religious belief or activity.⁹⁵ The ALRC supported this narrow application. It considered that if religious

89. *Sex Discrimination Act 1984* (Cth) s 38(1).

90. See, eg, *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Anti-Discrimination Act 1992* (NT).

91. *Anti-Discrimination Amendment Act 2022* (NT) s 17, repealing *Anti-Discrimination Act 1992* (NT) s 37A.

92. Northern Territory Attorney-General’s Department, “Modernising the Anti-Discrimination Act 1992” <agd.nt.gov.au/law-reform-reviews/law-reforms/modernising-the-anti-discrimination-act-1992> (retrieved 19 March 2025).

93. *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i).

94. M Garrick, “NT’s CLP Government Confirms Plans to Scrap Labor’s Hate Speech Changes” (2 March 2025) *ABC News* <www.abc.net.au/news/2025-03-02/nt-anti-discrimination-hate-speech-laws-repealed/104991288> (retrieved 9 April 2025).

95. *Anti-Discrimination Act 1998* (Tas) s 51(2); *Discrimination Act 1991* (ACT) s 46(2); *Equal Opportunity Act 2010* (Vic) s 83A.

discrimination is made unlawful at the Commonwealth level, there should be a limited exception for religious educational institutions.⁹⁶

- 7.95 However, this may still raise issues about how to reconcile competing views. There is an argument that such an exception could permit a religious school to terminate an employee who refused to believe that marriage can only be between a man and a woman. This could be considered a form of discrimination based on religious belief (or lack of).⁹⁷ Opinions will differ on whether such an outcome would strike the right balance, with some arguing that certain safeguards should apply to limit the exception.
- 7.96 Others have supported allowing religious educational authorities to discriminate based on other attributes. The Religious Freedom Review concluded that religious educational authorities should be able to discriminate in employment based on sexual orientation, gender identity and relationship status. But they should not be able to discriminate based on race, disability, pregnancy or intersex status.⁹⁸
- 7.97 In 1999 the NSWLRC concluded that religious educational authorities should be allowed to discriminate in employment based on sexual orientation, transgender status, domestic status, sex and pregnancy. It also recommended permitting religious discrimination in employment where religious belief is a genuine occupational requirement.⁹⁹

The circumstances in which an exception applies

- 7.98 Another issue is whether the ADA should contain further requirements that must be met before any such exceptions to discrimination in work apply.
- 7.99 If an exception applies only to religious educational authorities, one approach could be to confine it to acts promoting or protecting the observance of religious beliefs.
- 7.100 The *Sex Discrimination Act*, for example, applies an exception to acts done in good faith to avoid injury to the religious susceptibilities of adherents of that religion.¹⁰⁰ However, the ALRC recommended repealing this exception.¹⁰¹

96. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 7(B).

97. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 9–10.

98. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 5– 6.

99. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 16, rec 84, appendix A: Draft Anti-Discrimination Bill 1999, cl 28(5).

100. *Sex Discrimination Act 1984* (Cth) s 38(1)–(2).

101. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1.

- 7.101 Some other reviews have proposed that religious educational authorities should be able to discriminate in employment if:
- the discrimination is founded in the precepts of the religion,¹⁰² or
 - the school has a genuine belief that the discrimination is required to comply with the tenets of the religion.¹⁰³
- 7.102 Another view is that the *Sex Discrimination Act* should allow religious institutions (including religious schools) to discriminate in employment by preferring a candidate, or refusing to hire them, depending on whether:
- they adhere to the institution’s religious beliefs and practices, or
 - their conduct is consistent with the institution’s religious beliefs and practices.¹⁰⁴
- 7.103 Employers would be allowed to terminate employees that breach a written agreement to conduct themselves in accordance with the ethos of the school.¹⁰⁵
- 7.104 As an additional safeguard, some discrimination laws require educational authorities to publish a policy. The ACT requires the school to publish a readily accessible policy in relation to employment of staff and engagement of contractors.¹⁰⁶ South Australia requires a school to have a written policy stating its position in relation to the matter of the precepts of the religion as it relates to sexual orientation, gender identity or intersex status, which is provided on request.¹⁰⁷
- 7.105 The Religious Freedom Review supported a similar requirement.¹⁰⁸ This can make prospective employees aware of the school’s beliefs, and they can choose not to apply for roles at the school if this raises any concerns.
- 7.106 Other models apply further safeguards to confine the application of the exception. In Victoria, religious educational institutions may only discriminate against someone in relation to employment where:
- conformity with the doctrines of the religion is an inherent requirement of the position

102. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 5(a).

103. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 16.

104. S C Derrington, “Of Shields and Swords: Let the Jousting Begin!” (Paper presented at Freedom19 Conference, Sydney, 4 September 2019) 8–9.

105. S C Derrington, “Of Shields and Swords: Let the Jousting Begin!” (Paper presented at Freedom19 Conference, Sydney, 4 September 2019) 8–9.

106. *Discrimination Act 1991* (ACT) s 46(4)–(5).

107. *Equal Opportunity Act 1984* (SA) s 34(3).

108. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 5.

- the person cannot meet the inherent requirement because of their religious belief or activity, and
 - the discrimination is reasonable and proportionate based on the circumstances.¹⁰⁹
- 7.107 In determining the inherent requirements of the position, the nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be considered.¹¹⁰
- 7.108 For example, the Victorian Attorney-General observed that, in most religious schools, conformity with the doctrines, beliefs or principles of the school’s religion would be an inherent requirement of a religious education position. This is unlikely to be the case for support positions, such as school gardeners. Another safeguard in Victorian law is the requirement that the discrimination be reasonable and proportionate. The Attorney-General indicated that this may require consideration of factors such as:
- the nature of the role
 - the nature and extent of the inconsistency of the employee’s belief
 - the consequences for both the employee and the employer should the discriminatory action happen or not happen, and
 - whether there are any other responses available to the employer.¹¹¹
- 7.109 Others have also suggested adding requirements of reasonableness and proportionality.¹¹² For example, the ALRC recommended only allowing religious educational authorities to discriminate based on religion and only when selecting staff. The discrimination must be:
- reasonably necessary to build a community of faith, and
 - proportionate to the aim of building a community of faith, including considering any disadvantage or harm that may be caused to any person.¹¹³

109. *Equal Opportunity Act 2010* (Vic) s 83A(1).

110. *Equal Opportunity Act 2010* (Vic) s 82A(2).

111. Victoria, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 19 November 2021, 4646.

112. See, eg, Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 79; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 39.2; South Australian Law Reform Institute, “*Lawful Discrimination*”: *Exceptions under the Equal Opportunity Act 1984* (SA) to *Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status*, Report (2016) rec 3.

113. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 7B.

Question 7.5: Private educational authorities employment exceptions

- (1) Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?
- (2) If you think the Act should provide exceptions in this area:
 - (a) what attributes should the exceptions apply to?
 - (b) what requirements, if any, should duty holders meet before an exception applies?

Discrimination in education

- 7.110 Other broad exceptions in the ADA allow private educational authorities to discriminate against students or potential students based on sex, disability, age, transgender grounds, homosexuality or marital or domestic status.¹¹⁴ These institutions can discriminate based on these attributes by:
- refusing admission
 - admitting students subject to certain terms
 - denying or limiting access to benefits, or
 - expelling students or subjecting them to any other detriment.¹¹⁵
- 7.111 For example, it is not unlawful discrimination for a private school to expel a student who identifies as transgender. Similarly, students with disability will not be protected by the ADA if they are expelled from a private school because of their disability.¹¹⁶
- 7.112 As discussed above, no other Australian laws contain exceptions for “private educational authorities”. However, some other Australian discrimination laws have exceptions to discrimination in education that apply only to religious educational institutions.¹¹⁷ As above, an option could be to similarly make these exceptions only available to religious educational institutions.
- 7.113 However, a more fundamental question is whether religious educational institutions should be able to access exceptions to discrimination in relation to students and prospective students. Some argue that religious educational authorities should

114. *Anti-Discrimination Act 1977* (NSW) s 31A(3)(a), s 38K(3), s 46A(3), s 49L(3)(a), s 49ZYL(3)(b), s 49ZO(3).

115. See, eg, *Anti-Discrimination Act 1977* (NSW) s 31A.

116. NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) ix.

117. *Sex Discrimination Act 1984* (Cth) s 38(3); *Equal Opportunity Act 2010* (Vic) s 39, s 61; *Anti-Discrimination Act 1998* (Tas) s 51A; *Discrimination Act 1991* (ACT) s 46(1); *Equal Opportunity Act 1984* (SA) s 85ZE(5); *Equal Opportunity Act 1984* (WA) s 73(3); *Anti-Discrimination Act 1991* (Qld) s 41.

never be permitted to discriminate against students or prospective students. This is because:

- discrimination is harmful to vulnerable students
- discriminating against students with protected attributes in the name of religion is inconsistent with international human rights obligations, and
- schools that are funded with public money should be safe for all students and accountable to community expectations.¹¹⁸

7.114 The ALRC recently recommended repealing the *Sex Discrimination Act* exception that allows religious schools to discriminate against students and prospective students.¹¹⁹ If this option is pursued in NSW, consideration would need to be given to the overlapping operation of the exceptions for private educational authorities and the general exceptions for religious bodies in s 56.

7.115 However, as we acknowledge above, others argue that exceptions for religious schools are important to protect religious freedom, enable religious schools to uphold their ethos and values, and give families a choice of education for their children. On this basis, some may argue that the exceptions should be retained — at least in some form.

7.116 This raises further questions about what any such exceptions should cover. We set out some considerations, below.

The relevant attributes

7.117 The current exceptions in the ADA apply to discrimination in education based on sex, disability, transgender grounds, homosexuality, or marital or domestic status.

7.118 Other discrimination laws take a narrower approach. In Victoria, the ACT, Queensland and Tasmania, religious educational authorities can only discriminate in education based on religious belief. South Australia only allows discrimination based on religious appearance.¹²⁰

7.119 Both the NSWLRC and the Religious Freedom Review recommended that religious educational authorities should also be permitted to discriminate based on domestic

118. See Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) [4.23]. See also NSW Council for Civil Liberties Inc, *Preliminary Submission PAD21* [101]–[102].

119. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1.

120. *Equal Opportunity Act 2010* (Vic) s 39(a); *Anti-Discrimination Act 1998* (Tas) s 51A(1), s 51A(4); *Discrimination Act 1991* (ACT) s 46(1)–(2); *Equal Opportunity Act 1984* (SA) s 85ZE(5); *Anti-Discrimination Act 1991* (Qld) s 41(a).

status, sexuality, and gender identity. In 1999, the NSWLRC also recommended the exception should permit sex discrimination.¹²¹

Application to prospective or existing students

- 7.120 Another question is: at what point in the educational relationship should the exceptions apply? Currently, as noted above, the exceptions apply across a wide range of points in the relationship between a student or prospective student, and a private educational authority.
- 7.121 Other Australian discrimination laws provide more limited exceptions. For example, some only allow discrimination against prospective students at admission, and not when students are already enrolled.¹²² This would allow a school to refuse to admit a student because of their religious beliefs at the time of enrolment. But they could not discriminate against a student once they are enrolled.¹²³
- 7.122 Similarly, the NSWLRC previously recommended an exception to religious discrimination relating to admission to educational institutions established for particular religious groups.¹²⁴

The circumstances in which the exception should apply

- 7.123 Another issue is whether the ADA should contain further requirements that must be met before any such exceptions to discrimination in education will apply.
- 7.124 As with discrimination in work, one approach could be to link the exception to acts promoting or protecting the observance of religious beliefs. The *Sex Discrimination Act*, for instance, applies an exception in education to acts done in good faith to avoid injury to the religious susceptibilities of adherents of that religion.¹²⁵ However, as noted above, the ALRC has recommended repealing this exception.¹²⁶
- 7.125 Another view is that religious educational authorities should be allowed to prefer or refuse to admit a student based on whether:

121. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 7; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 20, rec 22.

122. *Anti-Discrimination Act 1998* (Tas) s 51A(2); *Discrimination Act 1991* (ACT) s 46(1); *Anti-Discrimination Act 1991* (Qld) s 41.

123. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 385.

124. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 85.

125. *Sex Discrimination Act 1984* (Cth) s 38(3). See also *Anti-Discrimination Act 1977* (NSW) s 56(d).

126. Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1.

- the student (or their parents) adheres to the religious beliefs and practices of the institution, and
- the student is recognised by the institution as either “having the relevant religious status” or conducting themselves in accordance with the religious beliefs and practices of the institution.

Under this model, the exception would only apply to conduct that is consistent with the religious beliefs and practices of the institution.¹²⁷

- 7.126 Other reviews suggested other requirements, such as consideration of the best interests of the child. The Religious Freedom Review recommended that religious schools be allowed to discriminate against students, including enrolled students, if:
- the discrimination is founded in the precepts of the religion, and
 - the school has regard to the best interests of the child as the primary consideration.¹²⁸
- 7.127 The Religious Freedom Review also recommended that religious educational authorities should have to publish policies setting out their position.¹²⁹ This enables parents to choose not to enrol their child in a school if their beliefs are inconsistent with the school’s policy.
- 7.128 This is currently required in Tasmania and the ACT. In Tasmania, the educational institution’s admissions policy must demonstrate that the criterion for admission relates to the religious belief or affiliation, or religious activity of the prospective student, their parents or grandparents.¹³⁰ In the ACT, a religious educational institution must publish a widely accessible admissions policy.¹³¹
- 7.129 However, some argue that more safeguards are required. Even if religious schools are only permitted to discriminate based on religious belief, there is a view that this could still be used indirectly to discriminate against LGBTQIA+ students and their supporters. For example, it may still be open to a school to require students to adhere to a particular religion’s teachings on gender and sexuality.¹³²
- 7.130 Another option is to require religious schools to meet requirements of reasonableness and proportionality. Victoria permits religious educational

127. S C Derrington, “Of Shields and Swords: Let the Jousting Begin!” (Paper presented at Freedom19 Conference, Sydney, 4 September 2019) 7.

128. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 7.

129. P Ruddock, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 7.

130. *Anti-Discrimination Act 1998* (Tas) 51A(4).

131. *Discrimination Act 1991* (ACT) s 46(3).

132. Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (2024) 65, reform 7.

institutions to discriminate based on religious belief or activity. However, the discrimination must be reasonable and proportionate in the circumstances. It must also either:

- conform with the doctrines, beliefs, or principles in accordance with which the religious educational institution is to be conducted, or
- be reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion in accordance with which the religious educational institution is to be conducted.¹³³

Question 7.6: Discrimination against students and prospective students

- (1) Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?
- (2) If you think it is necessary for the ADA to provide exceptions in this area:
 - (a) what attributes should the exceptions apply to?
 - (b) should they apply to prospective students, existing students, or both?
 - (c) what requirements, if any, should duty holders meet before an exception applies?

Sport

- 7.131 The ADA also contains exceptions relating to discrimination in sport. These exceptions apply to discrimination based on race, sex, transgender grounds, disability and age.¹³⁴ Other exceptions may apply if, for example, the sporting organisation is a “voluntary body” (we outline this exception below).
- 7.132 The key issue is whether these exceptions for sport strike an appropriate balance between ensuring sporting competitions remain fair, while protecting the rights to equality and non-discrimination.

Sex discrimination exception

- 7.133 Under the ADA, it is lawful to exclude people of one sex from participating in any sporting activity. The exception does not include coaching or administration.¹³⁵
- 7.134 Other discrimination laws have more limited exceptions for sex discrimination in sport, which only apply:

133. *Equal Opportunity Act 2010* (Vic) s 83(2). See also *Equal Opportunity Act 2010* (Vic) s 39.

134. *Anti-Discrimination Act 1977* (NSW) s 22, s 38, s 38P, s 49R, s 49ZYW.

135. *Anti-Discrimination Act 1977* (NSW) s 38.

- to competitive sporting activities¹³⁶
- where the strength, stamina or physique of competitors is relevant to the activity¹³⁷
- to people over the age of 12,¹³⁸ and
- where the restriction is reasonable or “reasonable, proportionate and justifiable in the circumstances”.¹³⁹

7.135 The exception in the *Sex Discrimination Act* contains some of these safeguards. It allows someone to be excluded from participating in a competitive sporting activity because of their sex if the strength, stamina or physique of competitors is relevant. This does not apply to sporting activities for children under the age of 12.¹⁴⁰

7.136 In 1999, the NSWLRC recommended narrowing the exception to include criteria relating to strength, stamina and physique. But it thought the exception should continue to apply to children under the age of 12. Its view was there could still be sex-based differences in strength, stamina and physique in young children.¹⁴¹

Transgender discrimination and vilification exception

7.137 Another exception permits the exclusion of a transgender person from sporting activities, other than coaching or administration, “for members of the sex with which the transgender person identifies”. The exception applies to the protections against discrimination and transgender vilification.¹⁴²

136. *Sex Discrimination Act 1984* (Cth) s 42(1); *Discrimination Act 1991* (ACT) s 41(1); *Equal Opportunity Act 2010* (Vic) s 72; *Anti-Discrimination Act 1992* (NT) s 56(1); *Anti-Discrimination Act 1991* (Qld) s 111(1); *Anti-Discrimination Act 1998* (Tas) s 29; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1984* (WA) s 35(1).

137. *Sex Discrimination Act 1984* (Cth) s 42; *Discrimination Act 1991* (ACT) s 41(a); *Equal Opportunity Act 2010* (Vic) s 72(1); *Anti-Discrimination Act 1992* (NT) s 56(1)(a); *Anti-Discrimination Act 1991* (Qld) s 111(1)(a); *Equal Opportunity Act 1984* (SA) s 48(a); *Equal Opportunity Act 1984* (WA) s 35(1).

138. *Sex Discrimination Act 1984* (Cth) s 42; *Anti-Discrimination Act 1992* (NT) s 56(2), *Anti-Discrimination Act 1991* (Qld) s 111(2); *Anti-Discrimination Act 1998* (Tas) s 29; *Equal Opportunity Act 2010* (Vic) s 72(3).

139. *Discrimination Act 1991* (ACT) s 41(1)(b); *Anti-Discrimination Act 1991* (Qld) s 111(1)(a); *Anti-Discrimination Act 1992* (NT) s 56(1)(a).

140. *Sex Discrimination Act 1984* (Cth) s 42(2)(e).

141. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 60, [6.204].

142. *Anti-Discrimination Act 1977* (NSW) s 38P(1).

- 7.138 One view is that this exception is necessary to ensure that women’s sport is kept fair and safe.¹⁴³ Others think the exception is too broad.¹⁴⁴ Some highlight that banning transgender people from participating in sport is stigmatising and damaging to health and wellbeing.¹⁴⁵
- 7.139 If reform is considered necessary, one option could be to repeal the exception. For example, the ACT, NT, Tasmania and South Australia do not provide exceptions to discrimination in sport based on gender identity.
- 7.140 Another option could be to retain the exception but make it more targeted. Other discrimination laws have narrower exceptions. For example, some:
- prohibit discrimination against children under 12 years old¹⁴⁶
 - limit the exception to competitive sporting activities¹⁴⁷
 - only apply to the extent that the strength, stamina or physique of competitors is relevant to the sport (the NSWLRC recommended this also),¹⁴⁸ and
 - provide that the exception does not apply to umpiring or refereeing.¹⁴⁹
- 7.141 Another option could be to require that any discrimination against transgender athletes be reasonable and proportionate.¹⁵⁰

Disability discrimination exception

- 7.142 Another exception allows the exclusion of people with disability from a sporting activity, if:
- they are not reasonably capable of performing the actions reasonably required

143. Family First Party Australia, *Preliminary Submission PAD65* [5.2.1]–[5.2.9]; Feminist Legal Clinic Inc, *Preliminary Submission PAD72* [8].

144. Equality Australia, *Preliminary Submission PAD07*, 15; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 16; Anti-Discrimination NSW, *Preliminary Submission PAD83*, 12–13; Anonymous, *Preliminary Submission PAD89*, 30–31; ACON, *Preliminary Submission PAD44*, 10; NSW Council for Civil Liberties Inc, *Preliminary Submission PAD21* [108].

145. ACON, *Preliminary Submission PAD44*, 10.

146. *Sex Discrimination Act 1984* (Cth) s 42(2)(e); *Equal Opportunity Act 2010* (Vic) s 72(3).

147. *Sex Discrimination Act 1984* (Cth) s 42(1); *Equal Opportunity Act 2010* (Vic) s 72(1); *Anti-Discrimination Act 1991* (Qld) s 111(3).

148. *Sex Discrimination Act 1984* (Cth) s 42(1); *Equal Opportunity Act 2010* (Vic) 72(1); *Anti-Discrimination Act 1991* (Qld) s 111(3); NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 60, rec 81.

149. *Sex Discrimination Act 1984* (Cth) s 42(2)(b); *Anti-Discrimination Act 1991* (Qld) s 111(4)(b), *Equal Opportunity Act 1984* (WA) s 35(2)(b).

150. Equality Australia, *Preliminary Submission PAD07*, 15–16; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 16.

- selection for participation in the sporting activity is done in a reasonable way, based on skills and abilities relevant to the sporting activity and relative to other participants, or
- the sporting activity is conducted for people with a particular disability and the person does not have that disability.¹⁵¹

7.143 There is a similar exception in the *Disability Discrimination Act 1992* (Cth).¹⁵² All other states and territories also have exceptions that allow the exclusion of people with disability from sporting activities in some cases.¹⁵³ However, some states and territories:

- limit the exception to competitive sporting activities¹⁵⁴
- require that discrimination is reasonable, proportionate and justifiable,¹⁵⁵ and
- clearly exclude coaching, administration and umpiring of sporting activities.¹⁵⁶

7.144 In 1999, the NSWLRC recommended repealing this exception. It noted that sport is not a protected area under the ADA, such that this section was unnecessary.¹⁵⁷ However, this is arguably inconsistent with its recommendations to retain the other sport-related exceptions.

Age discrimination exception

7.145 The ADA also makes it lawful to exclude people of particular ages from participating in any sporting activity, other than coaching or administration.¹⁵⁸

7.146 There is no sport exception in the *Age Discrimination Act 2004* (Cth), but other states and territories permit discrimination in sport based on age.¹⁵⁹ Their

151. *Anti-Discrimination Act 1977* (NSW) s 49R.

152. *Disability Discrimination Act 1992* (Cth) s 28(c).

153. *Discrimination Act 1991* (ACT) s 57; *Equal Opportunity Act 2010* (Vic) s 72(2)(c); *Anti-Discrimination Act 1992* (NT) s 56(1)(d); *Anti-Discrimination Act 1991* (Qld) s 111(1)(d); *Anti-Discrimination Act 1998* (Tas) s 43; *Equal Opportunity Act 1984* (SA) s 81; *Equal Opportunity Act 1984* (WA) s 66N(3).

154. *Discrimination Act 1991* (ACT) s 57(1); *Equal Opportunity Act 2010* (Vic) s 72(2); *Anti-Discrimination Act 1991* (Qld) s 111(1).

155. *Discrimination Act 1991* (ACT) s 57(1)(a).

156. *Discrimination Act 1991* (ACT) s 57(2); *Anti-Discrimination Act 1992* (NT) s 56(3); *Anti-Discrimination Act 1991* (Qld) s 111(4).

157. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [6.295], rec 68.

158. *Anti-Discrimination Act 1977* (NSW) s 49ZYW.

159. *Discrimination Act 1991* (ACT) s 57M(1); *Equal Opportunity Act 2010* (Vic) s 72(2)(b); *Anti-Discrimination Act 1992* (NT) s 56(1)(c); *Anti-Discrimination Act 1991* (Qld) s 111(1)(c); *Anti-Discrimination Act 1998* (Tas) s 31; *Equal Opportunity Act 1984* (SA) s 85Q; *Equal Opportunity Act 1984* (WA) s 66ZJ(3).

exceptions are often narrower than in the ADA, as they only apply to competitive sport.¹⁶⁰

- 7.147 In 1999, the NSWLRC recommended narrowing the exception to only apply to competitive sporting activities where the strength, stamina or physique of the competitors is relevant. It considered that age distinctions can be arbitrary and may not reflect the level of skill or ability.¹⁶¹

Racial discrimination and vilification exception

- 7.148 The ADA also permits discrimination and vilification based on nationality, place of birth or length of residence in:

- selecting people to represent a place in any sport or game, or
- the eligibility to compete, under the rules of any competition, in a sport or game.¹⁶²

- 7.149 The characteristics relevant to this exception are different to the ADA's wide definition of race, which "includes colour, nationality, descent and ethnic, ethno-religious or national origin".¹⁶³

- 7.150 The purpose of this exception may be different to the other sport exceptions. In 1999, the NSWLRC noted the view that its primary purpose was to allow sporting groups based on national identity to exclude people of different national origins. However, it thought the formation of clubs on racial grounds could have wider, detrimental effects. The NSWLRC recommended repealing this exception and introducing a narrow exception to discrimination by registered clubs. This new exception would be targeted at actions to reduce disadvantage or preserve minority culture (which we discuss in chapter 6).¹⁶⁴

Question 7.7: Exceptions relating to sport

Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?

160. *Discrimination Act 1991* (ACT) s 57M(1); *Equal Opportunity Act 2010* (Vic) s 72(2); *Anti-Discrimination Act 1992* (NT) s 56(1); *Anti-Discrimination Act 1991* (Qld) s 111(1)(c); *Anti-Discrimination Act 1998* (Tas) s 31; *Equal Opportunity Act 1984* (SA) s 85Q.

161. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 79, [6.396].

162. *Anti-Discrimination Act 1977* (NSW) s 22.

163. *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of "race".

164. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.160], rec 53.

Charitable benefits

- 7.151 An exception applies across the ADA in relation to:
- a provision of a deed, will or other instrument that confers charitable benefits (or enables them to be conferred) on people of a class identified by reference to one or more of the attributes protected from discrimination, and
 - an act which is done to give effect to such a provision.¹⁶⁵
- 7.152 The ADA defines a “charitable benefit” as a benefit for purposes that are exclusively charitable according to the law in force anywhere in Australia.¹⁶⁶ Commonwealth law defines “charitable purposes” broadly, to include a wide range of purposes including advancing health, education, public welfare and religion.¹⁶⁷
- 7.153 The exception can have wide applications. For example, it allowed someone to bequeath funds to a hospital for the medical treatment of exclusively “white babies”.¹⁶⁸
- 7.154 If this exception is considered too broad, but some form of exception is desirable, there are several other options to consider.
- 7.155 In 1999, the NSWLRC considered an exception of this type was important, partly because the exception seeks to ensure the ADA does not intrude into the private sphere. However, it did not support the exception in its current form. It recommended replacing the general exception with one covering the provision of goods, or disposal of property by gift or will, to a specific recipient.¹⁶⁹ As we discuss in chapter 6, the NSWLRC recommended that the ADA specifically prohibit discrimination in the disposal of interests in land.
- 7.156 Another option would be to adopt the approach used in federal discrimination law, which only grants an exception to registered charities and not individuals.¹⁷⁰
- 7.157 A different option, recommended by the LRCWA, was to exempt only acts that were:
- consistent with the stated purpose of the relevant charity, and

165. *Anti-Discrimination Act 1977* (NSW) s 55.

166. *Anti-Discrimination Act 1977* (NSW) s 55(2) definition of “charitable benefits”.

167. *Charities Act 2013* (Cth) s 12 definition of “charitable purpose”.

168. *Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292 [19]–[20].

169. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 45, [6.59].

170. *Sex Discrimination Act 1984* (Cth) s 36; *Disability Discrimination Act 1992* (Cth) s 49; *Age Discrimination Act 2004* (Cth) s 34; *Racial Discrimination Act 1975* (Cth) s 8(2).

- reasonable and proportionate to the public benefit the charity was trying to achieve.¹⁷¹

7.158 The *Equality Act 2010* (UK) provides another model to consider. Subject to certain exceptions, it allows a person to restrict the provision of benefits to people with certain protected characteristics, if this is done in pursuance of a charitable instrument. However, the provision of benefits must be either:

- a proportionate means of achieving a legitimate aim, or
- for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.¹⁷²

Question 7.8: The charities exception

Should the ADA provide exceptions relating to charitable benefits? If so, what should they cover and when should they apply?

Voluntary bodies

7.159 The ADA has a broad exception for non-profit bodies. The exception provides that nothing in the ADA applies to:

- any rule or practice of a body that restricts admission to membership, and
- the provision of benefits, facilities or services to members of that body.¹⁷³

7.160 This applies across the whole ADA, including the protections against discrimination, harassment, vilification, victimisation and unlawful advertisements.

7.161 Examples of voluntary bodies covered by this exception include a surf lifesaving club and a social tennis group.¹⁷⁴ However, the exception does not apply to bodies established by legislation. Nor does it apply to certain bodies registered under legislation, including registered clubs, cooperatives, friendly societies, building societies or credit unions, and cooperative housing societies.¹⁷⁵

7.162 On one view, voluntary bodies should be exempt from discrimination law because they operate within the private sphere. It could be argued that they need independence so they can maintain a specific organisational culture, or associational autonomy.

171. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 70, rec 71.

172. *Equality Act 2010* (UK) s 193(2).

173. *Anti-Discrimination Act 1977* (NSW) s 57(2).

174. *Webb v Surf Life Saving New South Wales* [2020] NSWCATAD 232 [27]–[34]; *Grass v Voyager Tennis Pty Ltd* [2023] NSWCATAD 68 [58].

175. *Anti-Discrimination Act 1977* (NSW) s 57(1).

- 7.163 Others think they should be covered by the ADA, including because they often receive substantial public funding and benefits, and provide important community services.¹⁷⁶
- 7.164 In 1999, the NSWLRC recommended repealing this exception. It concluded that the ADA should prohibit discrimination in relation to membership and access to benefits by all incorporated associations with membership open to the public or a section of the public.¹⁷⁷ We discuss the issue of clubs further in chapter 6.
- 7.165 Another option could be to make the exception narrower. For instance, a similar exception in the ACT only covers discrimination. It only applies if:
- the club or body is established to benefit a class of people sharing a protected attribute, and
 - the discrimination is reasonable, proportionate and justifiable in the circumstances.¹⁷⁸

Question 7.9: Voluntary bodies exception

Should the ADA provide an exception for voluntary bodies? If so, what should it cover and when should it apply?

Aged care accommodation providers

- 7.166 Another exception applies to establishments that provide “housing accommodation for aged persons”. The ADA does not apply to any rule or practice of these establishments that restricts admission to people of a particular sex, marital or domestic status, or race.¹⁷⁹
- 7.167 The NSWLRC recommended this exception be repealed. It concluded that people should not be arbitrarily excluded from accommodation based on race, sex or marital status. Instead, it thought a new “special measures” exception should be implemented to accommodate the needs of particular groups.¹⁸⁰ We consider special measures in chapter 11.

176. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.77], [6.83].

177. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 27, rec 47, [6.88].

178. *Discrimination Act 1991 (ACT)* s 31. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 72.

179. *Anti-Discrimination Act 1977 (NSW)* s 59.

180. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 48, [6.93]–[6.96].

- 7.168 WA is the only other state or territory with an exception about admission to aged care accommodation.¹⁸¹ The LRCWA recommended repealing it.¹⁸²
- 7.169 Aged care providers with religious affiliations may also be able to access the general exceptions for religious bodies, which we discuss above. If the aged care exception is repealed, consideration should also be given to whether s 56(c) and s 56(d) should be amended.

Question 7.10: Aged care accommodation providers exception

Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

Acts done under statutory authority

- 7.170 There is an exception from the whole ADA for anything that is “necessary” to comply with a requirement of:
- any other Act, whether passed before or after the ADA
 - any regulation, ordinance, by-law or other instrument made under any other Act, or
 - an order of the NSW Civil and Administrative Tribunal (NCAT), or
 - any court order, aside from those made by bodies with the power to fix minimum wages, or other terms and conditions of employment.¹⁸³
- 7.171 Other discrimination laws have narrower exceptions. For example, the *Sex Discrimination Act* lists the laws that the relevant exception applies to.¹⁸⁴ This requires parliament to consider laws that may conflict with the prohibition on sex discrimination and add them to the list if necessary.
- 7.172 The exception relating to court and NCAT orders raises further issues. Federal discrimination law contains similar exceptions for court orders.¹⁸⁵

181. *Equal Opportunity Act 1984* (WA) s 74(2)(a).

182. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 82.

183. *Anti-Discrimination Act 1977* (NSW) s 54.

184. *Sex Discrimination Act 1984* (Cth) s 40(2B)–(3). See also *Disability Discrimination Act 1992* (Cth) s 47(2).

185. *Disability Discrimination Act 1992* (Cth) s 47(1); *Age Discrimination Act 2004* (Cth) s 39(7); *Sex Discrimination Act 1984* (Cth) s 40(1)(d)–(e).

- 7.173 In 1999, the NSWLRC thought the exception about complying with a court or NCAT order was unnecessary. This was because such an order was unlikely to require conduct that would be unlawful under the ADA.¹⁸⁶
- 7.174 Other reviews have taken different approaches. The ACT Law Reform Advisory Council considered the exception for court and tribunal orders should be limited to an act done under an order of a court or tribunal, which was mandatory and specific about conduct that must be performed in the absence of a non-discriminatory alternative.¹⁸⁷ However, the LRCWA concluded an exception for acts done to comply with a court or tribunal order was appropriate.¹⁸⁸

Question 7.11: The statutory authorities exception

Should the ADA provide an exception for acts done under statutory authority? If so, what should it cover and when should it apply?

186. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 43, [6.38].

187. *Discrimination Act 1991 (ACT)* s 30(1); ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 19.1.

188. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 158.

8. Civil protections against vilification

In brief

We seek your views on the protections in the *Anti-Discrimination Act 1977* (NSW) against vilification based on race, homosexuality, transgender grounds, HIV/AIDS, and religious belief, affiliation or activity. We ask if these protections should extend to other attributes. We also invite views on the test for vilification, and the exceptions to it.

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- 8.1 Vilification, discrimination and other hate-based conduct causes significant harm to victims and our community.¹ Vilification laws are designed to protect diverse

1. See NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024) ch 3.

communities from hate speech and denigration, and can also play an important role in promoting inclusion and social cohesion.

- 8.2 A key issue is whether vilification laws strike the right balance with other rights and freedoms. International human rights law recognises that everyone has the right to freedom of expression.² The enjoyment of freedom of expression “enables vibrant, multi-faceted public interest debate giving voice to different perspectives and viewpoints”.³
- 8.3 However, the right to freedom of expression “carries with it special duties and responsibilities”.⁴ Like the rights to equality and non-discrimination, this right may be restricted in certain circumstances, as provided under international human rights law.⁵
- 8.4 NSW has civil and criminal protections against different forms of vilification. The *Anti-Discrimination Act 1977 (NSW) (ADA)* protects against public acts that incite hatred, serious contempt or severe ridicule towards a person or group, based on specific protected attributes.
- 8.5 Section 93Z of the *Crimes Act 1900 (NSW) (Crimes Act)* makes it an offence to publicly threaten or incite violence based on specific protected attributes. A new offence of inciting racial hatred by public act has been enacted, although it has not commenced at the time of writing.⁶
- 8.6 In 2024, we reviewed the effectiveness of s 93Z in addressing serious racial and religious vilification.⁷ Our current review of the ADA raises wider issues about civil vilification laws, which we were not able to address within the narrow scope of the s 93Z review. In this chapter, we invite you to share your views on the:
- attributes protected against vilification in the ADA, including the 2023 reforms to prohibit religious vilification
 - tests for civil vilification, including the definition of “public act”, and

2. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

3. “Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence” in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [8]; *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

4. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

5. See Human Rights Committee, *General Comment No.34 on Article 19: Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (29 July 2011) [21]–[22].

6. *Crimes Amendment (Inciting Racial Hatred) Act 2025 (NSW)* sch 1, inserting *Crimes Act 1900 (NSW)* s 93ZAA (uncommenced).

7. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024).

- exceptions to civil vilification.

Protections against vilification: an overview

- 8.7 As we mention above, NSW has both civil and criminal protections against vilification. People and groups in NSW are also protected against vilification by federal law.

NSW protections against vilification

Civil protections

- 8.8 The ADA protects against vilification based on the protected attributes of race, homosexuality, transgender grounds, HIV/AIDS, and religious belief, affiliation or activity. The protection against HIV/AIDS vilification also protects people thought to have HIV/AIDS (whether or not they do).⁸
- 8.9 Under the ADA, it is unlawful to publicly incite hatred, serious contempt or severe ridicule towards a person or group, on the ground the person or members of the group have a protected attribute.⁹

Criminal offences

- 8.10 Section 93Z of the *Crimes Act* covers more serious forms of conduct. This section commenced in 2018. Previous serious vilification offences were consolidated, updated and moved from the ADA to the *Crimes Act*.¹⁰
- 8.11 Under s 93Z, it is an offence to publicly threaten or incite violence towards another person, or group of people, because they have a protected attribute. The offence applies to the protected attributes of race, religious belief or affiliation, sexual orientation, gender identity, intersex status, and having HIV or AIDS.
- 8.12 A police officer or the Director of Public Prosecutions can commence a prosecution under s 93Z.¹¹ An individual convicted of this offence can face a maximum penalty of 100 penalty units (\$11,000), 3 years' imprisonment, or both. For corporations, the maximum penalty is 500 penalty units (\$55,000).
- 8.13 The NSW Parliament recently enacted legislation to add a related offence to the *Crimes Act*. Upon commencement, it will be a criminal offence to incite racial hatred

8. *Anti-Discrimination Act 1977* (NSW) s 49ZXB.

9. *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZXB, s 49ZE, s 49ZT.

10. *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 93Z.

11. *Crimes Act 1900* (NSW) s 93Z(4).

against a person or group. The offence will operate for three years.¹² This means there will be two potential pathways for addressing acts that incite racial hatred: a civil complaints pathway under the ADA and a criminal prosecution.

- 8.14 The new criminal offence will only apply to public acts that intentionally incite hatred based on race. The NSW Government has also commissioned a further review of criminal law hate speech protections for vulnerable communities.¹³
- 8.15 Like the civil vilification law in the ADA, the new criminal offence will require proof that a person, by a public act, incited hatred against a person or group based on race. However, the new offence will have two additional requirements:
- that the person accused of the offence *intentionally* incited racial hatred, and
 - that the act would cause a reasonable person, who was part of the target group, to fear harassment, intimidation, or violence, or to fear for their safety.¹⁴

Federal protections

Civil protection

- 8.16 Under s 18C of the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*) it is unlawful for a person to do an act, otherwise than in private that:
- is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and
 - is done because of the race, colour or national or ethnic origin of the other person or of some or all the people in the group.
- 8.17 Under this civil protection, complaints can be made to the Australian Human Rights Commission.¹⁵
- 8.18 The regulation of broadcasting services provides another way of addressing vilification. For example, the Commercial Radio Code of Practice states that licensees must not broadcast a program which, in all the circumstances:
- is likely to incite in a reasonable listener, hatred against, or serious contempt for, or severe ridicule of, any person or group of persons because of age, ethnicity,

12. *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 93ZAC (uncommenced).

13. NSW Government, “Review into Hate Speech Protections for Vulnerable Communities” (Media Release, Attorney General, 8 May 2025) <www.nsw.gov.au/ministerial-releases/review-into-hate-speech-protections-for-vulnerable-communities> (retrieved 12 May 2025).

14. *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 93ZAA(1) (uncommenced).

15. *Australian Human Rights Commission Act 1986* (Cth) s 46P.

nationality, race, gender, sexual preferences, religion, transgender status or disability ...¹⁶

Criminal offences

- 8.19 There are also federal criminal protections against vilification. These apply to protect groups, members of groups, and close associates of groups that are distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion.
- 8.20 Under the *Criminal Code (Cth)* (*Criminal Code*), it is an offence for a person to advocate the use of force or violence against these groups, their members, or their close associates. The person may have in mind a combination of the protected attributes mentioned above.
- 8.21 The accused person does not have to intend that the force or violence occur. It is sufficient if they are reckless as to whether force or violence will occur.¹⁷
- 8.22 It is also an offence to threaten the use of force or violence against these groups, or their members or close associates, if a reasonable member of the targeted group would fear that the threat will be carried out.¹⁸
- 8.23 It is also an offence to advocate force or violence by causing damage to property (for example, painting an offensive slogan on a building). This only applies if the targeted group is distinguished by race, religion or ethnic origin.¹⁹
- 8.24 Aggravated versions of each offence (with a higher maximum penalty) may apply if the use of force or violence would threaten the peace, order, and good government of the Commonwealth if carried out.²⁰

The protected attributes: civil vilification

- 8.25 The ADA prohibits vilification based on:
- race
 - homosexuality
 - transgender grounds
 - having HIV/AIDS, and

16. Commercial Radio Australia, *Commercial Radio Code of Practice* (2017, last updated March 2018) cl 2.1.4. See also *Broadcasting Services Act 1992* (Cth) s 123.

17. *Criminal Code* (Cth) s 80.2A(2)(b), s 80.2B(2)(b).

18. *Criminal Code* (Cth) s 80.2BA(2), s 80.2BB(2).

19. *Criminal Code* (Cth) s 80.2BE(2)(d).

20. *Criminal Code* (Cth) s 80.2A(1)(d), s 80.2B(1)(e), s 80.2BA(1)(d), s 80.2BB(1)(e).

- religious belief, affiliation or activity, including not having a religious belief or affiliation, or not engaging in religious activity.²¹
- 8.26 If someone brings a complaint on behalf of other people, each person on whose behalf the complaint is made must:
- have the characteristic that the conduct in question was based on, or
 - claim to have that characteristic, and there is no sufficient reason to doubt this.²²
- 8.27 We will consider complaints procedures and remedies in detail in our second consultation paper.
- 8.28 In preliminary submissions, we heard concerns that:
- the way the ADA expresses and defines certain attributes that are protected against vilification is outdated and under-inclusive, and
 - other people, and groups of people, should be protected against vilification.

How the protected attributes are expressed and defined

- 8.29 As we detail in chapter 4, preliminary submissions raised many concerns about the way the ADA expresses and defines certain attributes in relation to the discrimination protections. While we do not repeat them here, many concerns are also relevant to the way the same attributes are expressed in the vilification sections of the ADA.
- 8.30 Some have specifically suggested that NSW should harmonise the expressions and definitions in the ADA's vilification protections with those in s 93Z of the *Crimes Act*.
- 8.31 The offence in s 93Z covers public acts that threaten or incite violence based on any of the following attributes:
- (a) the race of the other person or one or more of the members of the group,
 - (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation,
 - (c) the sexual orientation of the other person or one or more of the members of the group,
 - (d) the gender identity of the other person or one or more of the members of the group,
 - (e) that the other person is, or one or more of the members of the group are, of intersex status,
 - (f) that the other person has, or one or more of the members of the group have, HIV or AIDS.²³

21. *Anti-Discrimination Act 1977* (NSW) s 20C(1), s 38S(1), s 49ZT(1), s 49ZXB(1), s 49ZE(1).

22. *Anti-Discrimination Act 1977* (NSW) s 88.

23. *Crimes Act 1900* (NSW) s 93Z(1).

- 8.32 It is irrelevant whether the alleged offender’s assumptions or beliefs about an attribute of the other person or member of a group were correct or incorrect at the time of the relevant conduct.²⁴
- 8.33 As defined in s 93Z:
- “race” includes colour, nationality, descent and ethnic, ethno-religious or national origin
 - “religious belief or affiliation” means holding or not holding a religious belief or view
 - “sexual orientation” means a person’s sexual orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex
 - “gender identity” means the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth, and
 - “intersex status” means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, or a combination of female and male, or neither female nor male.²⁵
- 8.34 The definition of “race” in s 93Z is the same as the ADA. But there are differences in relation to the other attributes.
- 8.35 Some have argued that the expressions and definitions of the protected attributes in s 93Z are wider, more modern, and more inclusive of LGBTQIA+ people than the ADA.²⁶ Compared to the ADA, s 93Z covers:
- sexual orientation (as opposed to “homosexuality” in the ADA)
 - gender identity (as opposed to “transgender grounds” in the ADA), and
 - people of intersex status (who are not covered at all in the ADA, under either the discrimination or vilification protections).
- 8.36 If the ADA mirrored these protected attributes as expressed in s 93Z, it would give people with these attributes the ability to make a civil complaint. This may be particularly important in cases that do not meet the criminal threshold.
- 8.37 We also heard concerns about the expression used in the ADA regarding HIV/AIDS vilification. The ADA refers to a person as being “HIV/AIDS infected”. This is

24. *Crimes Act 1900* (NSW) s 93Z(2).

25. *Crimes Act 1900* (NSW) s 93Z(5).

26. See, eg, NSW Aboriginal Women’s Advisory Network, *Preliminary Submission PAD27*, 7; Law Society of NSW, *Preliminary Submission PAD31*, 13.

considered outdated and stigmatising, as it emphasises the illness rather than the person.²⁷

- 8.38 Options could include using the expression in s 93Z, that is, a person who “has ... HIV or AIDS”. One preliminary submission suggested person-centred language such as “persons living with HIV/AIDS”.²⁸ Another suggested extending the vilification protections to include the unwanted disclosure of a person’s HIV/AIDS status or threats to disclose it.²⁹
- 8.39 We consider the definition of “religious belief or affiliation” in detail later in this chapter, when we discuss the 2023 reforms that prohibited vilification on this ground.

Other potential protected attributes

- 8.40 Some think the ADA fails to protect certain other groups that experience high levels of social stigma and hate speech. In submissions both to this review and our review of s 93Z, we received suggestions that the law should prohibit vilification based on:
- disability³⁰
 - caste³¹
 - people who experience mental illness, and their families and carers³²
 - sex workers,³³ and
 - all members of LGBTQIA+ communities, including bisexual+ people, non-binary and other gender diverse people and people with diverse sex characteristics.³⁴
- 8.41 The Disability Royal Commission recommended that the *Disability Discrimination Act 1992* (Cth) should:

27. ACON, *Preliminary Submission PAD44*, 7; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 7.

28. Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 7.

29. HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 14.

30. See, eg, NSW Aboriginal Women’s Advisory Network, *Preliminary Submission PAD27*, 7; Vision Australia, *Preliminary Submission PAD68*, 3; Family Advocacy, *Preliminary Submission PAD75*, 1.

31. Periyar Ambedkar Thoughts Circle Australia, *Submission SV06*, 7–11.

32. Mental Health Carers NSW, *Preliminary Submission PAD42*, 6.

33. See, eg, ACON, *Preliminary Submission PAD44*, 7; Respect Inc, *Preliminary Submission PAD57*, 1, 6; Neophile, *Preliminary Submission PAD66*, 9; Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 5–6; Sex Workers Outreach Project, *Preliminary Submission PAD77*, 7.

34. See, eg, Intersex Human Rights Australia, *Preliminary Submission PAD02*, 9; ACON, *Preliminary Submission PAD44*, 7; Neophile, *Preliminary Submission PAD66*, 13–14.

- contain a new protection against offensive behaviour, modelled on the *Racial Discrimination Act*, and
 - make it unlawful to perpetrate or encourage violence or serious abuse, or incite hatred, because of disability.³⁵
- 8.42 The Royal Commission also recommended that criminal vilification offences be extended to cover the vilification of people with disability based on their disability or perceived disability.³⁶
- 8.43 Others have cautioned against expanding the list of protected attributes. We heard concerns about the potential impact of expanding vilification law on freedom of speech and freedom of religion.³⁷
- 8.44 We invite you to comment on whether the coverage of the ADA’s civil vilification protections should be expanded and, if so, which groups should be added. We set out below some considerations, adopted from other recent reviews, that could guide your response.

General principles to guide decision-making about protected attributes

- 8.45 A preliminary issue is what principles should guide decisions about which, if any, new attributes should be covered by the ADA’s civil vilification protections.
- 8.46 The New South Wales Law Reform Commission (NSWLRC) took a cautious approach in its 1999 review of the ADA, noting arguments that:
- vilification laws can have a chilling effect on free speech, and
 - wider protections may increase complaints, which can have resource implications.³⁸
- 8.47 The NSWLRC’s view in 1999 was that vilification laws should only protect groups that are “socially significant”, and who are being harmed noticeably and actively by hatred. It considered that the coverage of vilification laws should be justifiable and based on statistical information on the incidence of vilification of a particular group. In its view, new or extended vilification prohibitions should only be recommended where there is evidence that:
- a practical problem needs to be addressed

35. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, rec 4.29, rec 4.30.

36. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, rec 4.30.

37. See, eg, Australian Christian Lobby, *Preliminary Submission PAD12*, 11, 12; Feminist Legal Clinic, *Preliminary Submission PAD72*, 3.

38. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.79]–[7.80].

- existing laws are ineffective in addressing this problem
 - the proposed prohibition might reasonably be expected to have an appropriate impact on this problem, and
 - the proposed prohibition would not disproportionately diminish freedom of speech.³⁹
- 8.48 Applying these considerations, the NSWLRC did not support expanding the ADA’s coverage to prohibit gender, religion or disability vilification.⁴⁰ However, a prohibition on religious vilification was added to the ADA in 2023.⁴¹
- 8.49 More recent reviews of vilification laws have also identified principles to guide attribute selection. Some similarly considered that protections against vilification should only be extended to other groups if there is empirical evidence that the group is targeted or is at risk of experiencing vilifying behaviour.⁴²
- 8.50 The Law Commission of England and Wales identified a range of factors that could be used to assess whether there is a “demonstrable need” for protection against vilification. These include the:
- severity of the vilifying behaviour experienced by the group
 - total amount of vilifying behaviour targeted at the group, and
 - amount of vilification targeted at the group, compared with the size of the group.⁴³
- 8.51 Other recent reviews also supported adding new groups that had been omitted from protection. This could involve consideration of whether:
- the attribute is protected in other states and territories
 - the attribute is protected under discrimination law, but not vilification law, and
 - existing human rights standards provide any guidance.⁴⁴

39. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.75], [7.84], [7.93].

40. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.81]–[7.92].

41. *Anti-Discrimination Act 1977 (NSW)* s 49ZE, inserted by *Anti-Discrimination Amendment (Religious Vilification) Act 2023 (NSW)* sch 1.

42. England and Wales, Law Commission, *Hate Crime Laws*, Final Report No 402 (2021) [3.45]; Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 54–55.

43. England and Wales, Law Commission, *Hate Crime Laws*, Final Report No 402 (2021) [3.42], [3.45].

44. See Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 54–55; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 44; Law Reform

8.52 The Law Commission of England and Wales also referred to the principle of “additional harm”. This considers if there is evidence that the vilification of a member of a particular group also causes harm to other members, and to society more widely. “Additional harm” is harm that is “associated with a shared sense of collective identity”.⁴⁵

Consistency between discrimination law and civil vilification law

8.53 One issue is whether the civil vilification protections should apply to the same groups as the ADA’s discrimination protections.

8.54 The ADA’s vilification protections apply to a narrower range of attributes than the discrimination protections, as we set out in the table below.

Table 8.1: Attributes protected from civil vilification and discrimination

Attributes protected from civil vilification	Attributes protected from discrimination
<ul style="list-style-type: none"> ▪ being “HIV/AIDS infected”, actually or presumed ▪ homosexuality ▪ race ▪ religious belief, affiliation or activity (including not having one) ▪ transgender grounds 	<ul style="list-style-type: none"> ▪ age ▪ carer’s responsibilities ▪ disability ▪ homosexuality ▪ marital or domestic status ▪ race ▪ sex (including pregnancy and breastfeeding) ▪ transgender grounds

8.55 For instance, the ADA:

- prohibits discrimination based on age, carer’s responsibilities, disability, marital or domestic status and sex, but does not protect against vilification on these grounds, and
- specifically prohibits vilification based on a person being, or thought to be, “HIV/AIDS infected”,⁴⁶ but HIV/AIDS status is not a distinct protected attribute for the purposes of discrimination law. Instead, discrimination on the basis of HIV/AIDS status may constitute a form of disability discrimination (we discuss this more in chapter 4).

Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 229–230.

45. England and Wales, Law Commission, *Hate Crime Laws*, Final Report No 402 (2021) [3.83].

46. *Anti-Discrimination Act 1977 (NSW)* s 49ZXB.

- 8.56 It could be argued that the groups at risk of experiencing discrimination are likely also to be at risk of experiencing vilification. However, there may be differences in principle between discrimination and vilification that justify different coverage.
- 8.57 In 1999, the NSWLRC did not accept that all groups protected against discrimination should also be protected against vilification. Instead, it considered the merits and problems of extending vilification protections to each specific group, and applied the principles set out above.
- 8.58 Views may differ about whether this approach is still appropriate today. For instance, in its 2015 report, the ACT Law Reform Advisory Council recommended that vilification laws should cover all attributes protected by discrimination laws.⁴⁷ This was not adopted, and the Australian Capital Territory (ACT) discrimination protections continue to cover many more attributes than its civil vilification protections.⁴⁸
- 8.59 As we discuss in chapter 9, the ADA’s specific protections against harassment only cover sexual harassment and not harassment based on protected attributes.

Consistency between the civil and criminal law

- 8.60 Another question is whether s 93Z of the *Crimes Act* and the ADA’s civil vilification protections should cover the same protected attributes. There is a view that some of the expressions and definitions used in s 93Z are more modern and should be adopted in the ADA.
- 8.61 As noted above, currently s 93Z goes beyond the ADA by covering vilification based on “intersex status” and “sexual orientation” (as opposed to “homosexuality”).

Identifying gaps based on the coverage of other civil vilification laws

- 8.62 Some other states and territories prohibit vilification based on a wider range of attributes than the ADA. These include:
- disability⁴⁹
 - gender identity⁵⁰
 - age⁵¹

47. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 96.

48. *Discrimination Act 1991 (ACT)* s 7, s 67A.

49. *Discrimination Act 1991 (ACT)* s 67A(1)(a); *Anti-Discrimination Act 1992 (NT)* s 19(1)(j), s 20A; *Anti-Discrimination Act 1998 (Tas)* s 16(k), s 17(1), s 19(b).

50. *Discrimination Act 1991 (ACT)* s 67A(b); *Anti-Discrimination Act 1992 (NT)* s 19(1)(ba), s 20A; *Anti-Discrimination Act 1991 (Qld)* s 124A(1); *Anti-Discrimination Act 1998 (Tas)* s 16(ea), s 17(1), s 19(e).

51. *Anti-Discrimination Act 1992 (NT)* s 19(1)(d), s 20A; *Anti-Discrimination Act 1998 (Tas)* s 16(b), s 17(1).

- relationship, accommodation, or employment status,⁵² and
 - association with a person who has, or is believed to have, a protected attribute.⁵³
- 8.63 The Northern Territory (NT) discrimination law protects the widest range of attributes against vilification. However, the NT Government recently signalled its intention to repeal these vilification protections.⁵⁴
- 8.64 Recent reviews in other states have recommended extending their own protections to cover more attributes, including attributes not currently covered in NSW.⁵⁵
- 8.65 Some states have introduced or proposed new laws to expand the list of protected attributes in vilification laws. Most recently, the Victorian Parliament passed amendments to its vilification law to protect the attributes of disability, gender identity, sex, sex characteristics, sexual orientation, in addition to the existing protected attributes of race and religious belief.⁵⁶
- 8.66 The Victorian amendments also provide that it is irrelevant that the person engaging in the conduct was incorrect about:
- a protected attribute of the other person or group, or
 - whether the other person or group had a particular protected attribute.⁵⁷
- 8.67 The Queensland Parliament passed similar amendments in 2024.⁵⁸ Along with other reforms, these amendments were due to commence on 1 July 2025. However, the

52. *Anti-Discrimination Act 1992* (NT) s 19(e)–(eb), s 20A.

53. *Anti-Discrimination Act 1992* (NT) s 19(r), s 20A.

54. M Garrick, “NT’s CLP Government Confirms Plans to Scrap Labor’s Hate Speech Changes” (2 March 2025) *ABC News* <www.abc.net.au/news/2025-03-02/nt-anti-discrimination-hate-speech-laws-repealed/104991288> (retrieved 9 April 2025).

55. See, eg, Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 114; Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 1, 60; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 44, rec 4.

56. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102B (uncommenced). See also *Racial and Religious Tolerance Act 2001* (Vic) s 7–8.

57. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102F (uncommenced). See also *Racial and Religious Tolerance Act 2001* (Vic) s 10.

58. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21., amending *Anti-Discrimination Act 1991* (Qld) s 124A (uncommenced).

current Queensland Government decided to postpone the commencement of the reform package.⁵⁹

- 8.68 A further issue is whether the ADA should protect against vilification based on having an association, real or perceived, with a targeted group. This might be a way of protecting people who are friends, parents, or relatives of someone with protected attributes.
- 8.69 This is currently part of the NT law.⁶⁰ Victoria has passed amendments to include this in its list of protected attributes.⁶¹
- 8.70 Another issue is whether NSW should prohibit vilification based on more than one attribute. The Victorian amendments will, upon commencement, provide that it does not matter if the conduct is claimed to have been in respect of one or more protected attributes.⁶²
- 8.71 After recent amendments, the federal vilification offences can apply if the accused person had in mind a combination of protected attributes when targeting an individual or group.⁶³
- 8.72 Prohibiting vilification that occurs because of more than one attribute might recognise that people with multiple protected attributes can experience vilification in unique and intersectional ways. It could also simplify the law, as it is sometimes hard to work out which attribute a vilifying act was based on.⁶⁴

Question 8.1: Protected attributes

- (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?
- (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

59. D Frecklington, “Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws” (14 March 2025) *Queensland Government* <statements.qld.gov.au/statements/102168> (retrieved 4 April 2024).

60. *Anti-Discrimination Act 1992* (NT) s 19, s 20A.

61. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102B(h) (uncommenced).

62. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 14, inserting *Equal Opportunity Act 2010* (Vic) s 113(1A) (uncommenced).

63. *Criminal Code* (Cth) s 80.2A(3A), s 80.2B(4A), s 80.2BA(5), s 80.2BB(6), s 80.2BC(5), s 80.2BD(6), s 80.2BE(4).

64. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 58–59.

The test for vilification

- 8.73 Under the ADA, vilification occurs when a person, by public act, incites hatred towards, serious contempt for, or severe ridicule of a person or group because they have a protected attribute. This is an “incitement-based” test.
- 8.74 There are mixed views on incitement-based tests. In general, some consider them unclear and overly restrictive. Another criticism is that incitement-based tests ignore the harm experienced by the victim.⁶⁵
- 8.75 We heard specific concerns about the test in the ADA. Some observe that the ADA imposes a higher standard than the *Racial Discrimination Act*.⁶⁶ Others consider the ADA’s focus on a third-party audience sets the bar too high.⁶⁷
- 8.76 On the other hand, we heard concern that a lower threshold would unjustifiably restrict free speech and prevent criticisms of religion.⁶⁸ In its 1999 report, the NSWLRC did not recommend changes to the incitement-based test.⁶⁹
- 8.77 Section 93Z also contains an incitement-based test. We did not recommend changes to this test in our review of that section. However, we have not reached a view on the test as it operates in the ADA, or on any potential alternatives. If it is felt that the ADA test requires reform, there are a range of options to consider.

An overview of the ADA’s incitement-based test

- 8.78 The ADA’s test focuses on whether the public act incites, or is capable of inciting, particular emotions or responses in others. It does not consider the effect of the act on the targeted person or group. Similar tests are found in the civil vilification laws of several other states and territories.⁷⁰

65. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024) [8.72]–[8.75]; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report No 22 (2022) 31, 45.

66. NSW Bar Association, *Preliminary Submission PAD86* [29]; NSW Aboriginal Women’s Advisory Network, *Preliminary Submission PAD27*, 7.

67. Kingsford Legal Centre, *Preliminary Submission PAD35*, 5.

68. Australian Christian Lobby, *Submission SV56*, 3–4.

69. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.107]–[7.110].

70. *Discrimination Act 1991* (ACT) s 67A(1); *Anti-Discrimination Act 1991* (Qld) s 124A(1); *Civil Liability Act 1936* (SA) s 73(1); *Racial and Religious Tolerance Act 2001* (Vic) s 7, s 8; *Anti-Discrimination Act 1998* (Tas) s 17.

- 8.79 The ADA does not define the word “incite”. However, courts have held it to mean “to rouse, to stimulate, to urge, to spur on, to stir up or to animate”, and that it “covers conduct involving commands, requests, proposals, actions or encouragement”.⁷¹
- 8.80 The public act must reach an intended audience. Under the ADA, the act must be capable of inciting an ordinary member of that audience to feel hatred, serious contempt or severe ridicule based on the protected attribute. When assessing whether an act could incite those emotions, the context and intended audience of the act is relevant.⁷²
- 8.81 Importantly, there is no need to show that the person who did the act intended to incite those emotions. It is also not necessary for anyone to in fact, be incited to feel those emotions.⁷³

A harm-based test

- 8.82 One reform option could be to introduce a harm-based test. This would focus on the impact of the conduct on the individuals and groups targeted by a public act. For instance, harm-based tests elsewhere focus on whether the conduct:
- is reasonably likely to offend, insult, humiliate, intimidate or ridicule a person with a protected attribute,⁷⁴ or
 - would be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful, seriously contemptuous, or reviling or seriously ridiculing of the targeted person or group.⁷⁵

Perspectives on a harm-based test

- 8.83 Some argue harm-based tests better reflect how members of the community understand and experience vilification.⁷⁶ This is because they consider how the target group experiences the conduct.

71. *Sunol v Collier (No 2)* [2012] NSWCA 44 [41]. See also *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 15 VR 207 [12]–[14].

72. *Sunol v Collier (No 2)* [2012] NSWCA 44 [34], [61]–[62]. See also *Margan v Manias* [2015] NSWSC 307 [61]–[62], [76].

73. *Sunol v Collier (No 2)* [2012] NSWCA 44 [29]–[31].

74. See, eg, *Racial Discrimination Act 1975* (Cth) s 18C(1)(a); *Anti-Discrimination Act 1998* (Tas) s 17(1).

75. See, eg, Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 10; *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(1)(b) (uncommenced).

76. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 9, 119.

- 8.84 A harm-based test could also lower the threshold for civil vilification complaints. Removing the need to prove the conduct could have incited a third party might reduce the burden on the complainant.⁷⁷
- 8.85 In our recent review of s 93Z of the *Crimes Act*, we concluded that a harm-based test should not be introduced into the NSW criminal vilification offence. We were concerned that the elements of a harm-based test are insufficiently certain for application in the criminal law. Such a test could lead to unintended consequences, especially if it had an “objective” standard and there was no element that focused on the accused person’s state of mind.⁷⁸
- 8.86 However, we have not reached a view about whether a harm-based test should be part of the ADA’s civil vilification framework. Different considerations may apply to civil vilification laws, where no criminal penalty applies.

Examples of civil harm-based tests

- 8.87 Harm-based tests apply in civil vilification laws in the NT, Tasmania and in the *Racial Discrimination Act*.⁷⁹ Amendments to introduce such a test were recently enacted in Victoria.⁸⁰ Recent inquiries supported the introduction, or consideration, of such a test in other states and territories too.⁸¹
- 8.88 If NSW was to introduce a civil harm-based test, an issue is whether it should replace the existing ADA test or operate in addition to it. Some laws, such as the civil vilification protections in the NT and the *Racial Discrimination Act*, only apply a harm-based test.⁸²
- 8.89 However other civil vilification laws apply both a harm-based and an incitement-based test, in separate sections. This ensures that a wide range of vilifying behaviours are unlawful.⁸³

77. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 9, 119; Explanatory Notes, Respect at Work and Other Matters Amendment Bill 2024 (Qld) 11; Queensland Parliament Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report No 22 (2022) 45.

78. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151(2024) [4.55]–[4.70].

79. *Racial Discrimination Act 1975* (Cth) s 18C(1)(a); *Anti-Discrimination Act 1992* (NT) s 20A(1)(a); *Anti-Discrimination Act 1998* (Tas) s 17(1).

80. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(1)(b) (uncommenced).

81. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [6.3.2]; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 95, rec 17.1, rec 17.2.

82. *Racial Discrimination Act 1975* (Cth) s 18C(1)(a); *Anti-Discrimination Act 1992* (NT) s 20A(1)(a).

83. See, eg, *Anti-Discrimination Act 1998* (Tas) s 17(1), s 19.

- 8.90 Tasmania, for example, applies an incitement-based test to vilification based on race, disability, sexual orientation, lawful sexual activity, religious belief, affiliation or activity, gender identity or sex characteristics. A harm-based test applies to a wider range of attributes.⁸⁴
- 8.91 The Victorian amendments will, upon commencement, provide for a harm-based test in addition to a separate incitement-based test. These will cover the same protected attributes.
- 8.92 First, the Victorian harm-based test will make it unlawful to engage in public conduct:
- because of a protected attribute of another person or group of persons
 - that would, in all the circumstances, be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful or seriously contemptuous of, or reviling or severely ridiculing, the other person or group of persons.⁸⁵
- 8.93 The test will provide for conduct that is engaged in for two or more reasons. Where one of the reasons is a protected attribute, the conduct is taken to have been engaged in because of a protected attribute. This applies even if this is not the dominant or substantial reason for the conduct.⁸⁶
- 8.94 Second, the Victorian incitement-based test will cover public conduct:
- that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute of that other person or group of persons.⁸⁷
- 8.95 The test will provide that the motive for engaging in any such conduct is irrelevant.⁸⁸
- 8.96 The Queensland amendments would also introduce a new harm-based test to operate alongside an incitement-based test.⁸⁹ However, as we explain above, their commencement date is now uncertain.

84. *Anti-Discrimination Act 1988* (Tas) s 17(1), s 19.

85. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(1) (uncommenced).

86. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(3) (uncommenced).

87. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102E(1) (uncommenced).

88. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102E(3) (uncommenced). See also *Racial and Religious Tolerance Act 2001* (Vic) s 9.

89. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21, inserting *Anti-Discrimination Act 1991* (Qld) s 124C, s 124D (uncommenced).

The new offence of inciting hatred

- 8.97 Although a criminal provision, the new NSW offence of inciting hatred will use aspects of both an incitement-based and harm-based test.
- 8.98 Section 93ZAA of the *Crimes Act* will, upon commencement, require proof that the accused person intentionally incited racial hatred towards another person or group. It will also require proof that their act would cause a reasonable person, who was the target of the incitement of hatred or a member of the targeted group, to fear harassment, intimidation or violence, or to fear for their safety.

Other options for reform

- 8.99 Another option might be to lower the threshold in the ADA's incitement-based test to cover a public act that is "likely" to incite. The Victorian incitement-based test will take this approach.⁹⁰ It was considered that this reform may reduce the burden on complainants.⁹¹
- 8.100 Other options, drawn from Victoria, include confirming that the conduct may:
- consist of a single occasion or a number of occasions over time, and
 - occur in or outside the state.⁹²
- 8.101 Further considerations could include changing the conduct that is prohibited. For example, the ADA could make it unlawful to:
- commit a public act that expresses (rather than incites) hostility against, brings into contempt or ridicules a person with a protected attribute⁹³
 - engage in conduct that is likely to create, promote or increase animosity towards, threaten, seriously abuse or severely ridicule,⁹⁴ or
 - threaten vilification.⁹⁵

90. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102E(1) (uncommenced). See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21, inserting *Anti-Discrimination Act 1991* (Qld) s 124D (uncommenced).

91. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 8, rec 9, 112–119; Department of Justice and Community Safety, *Strengthening Civil Anti-Vilification Protections for all Victorians: Implementing the Legislative Recommendations of the Victorian Inquiry into Anti-vilification Protections* (2023) 8–9.

92. *Racial and Religious Tolerance Act 2001* (Vic) s 7; *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(2), s 102E(2) (uncommenced).

93. Kingsford Legal Centre, *Preliminary Submission PAD35*, 5.

94. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 113.

95. HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 14.

Question 8.2: The test for vilification

- (1) Should NSW adopt a “harm-based” test for civil vilification? If so, should this replace or supplement the existing “incitement-based” test?
- (2) What, if any, other changes should be made to the incitement-based test for civil vilification?

The definition of public act

8.102 The prohibitions on vilification in the ADA and in the *Crimes Act* only apply to public acts. Maintaining a distinction between public and private acts is one way the law seeks to protect diverse groups, without unjustifiably intruding into the private sphere. However, there may be ways of clarifying the definition of “public act” to ensure it covers relevant conduct and keeps pace with social change.

The ADA takes a broad approach to “public act”

8.103 The ADA provides that a “public act” includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons [on the basis of the protected attribute of the person or members of the group].⁹⁶

8.104 Tribunals have interpreted the expression “public act” broadly. It includes conduct or communication that is “capable of being seen or heard, without undue intrusion, by a non-participant”.⁹⁷

8.105 The NSW Civil and Administrative Tribunal has observed that the following factors may be helpful in determining if there has been a public act:

- whether there is an audience (where a speaker addresses an audience, it is more likely to be public)
- the size of any audience (where a speaker addresses a group, it is more likely to be public)
- the nature of the communication

96. *Anti-Discrimination Act 1977* (NSW) s 20B, s 49ZS. See also *Anti-Discrimination Act 1977* (NSW) s 38R, s 49ZD, s 49ZXA.

97. *Z v University of A (No 7)* [2004] NSWADT 81 [100].

- the intention of the person or people communicating, and
 - the circumstances that led to the communication.⁹⁸
- 8.106 For instance, the following have been found to be public acts:
- words shouted in the stairwell of an apartment block⁹⁹
 - shouting words from private property into a public street,¹⁰⁰ and
 - a police exercise involving 200 people at a public train station that was closed to the public.¹⁰¹
- 8.107 In some situations, acts directed at sections of the public, or limited classes of people, can be considered public acts. In one case, this included a teacher’s spoken communication to a high school class.¹⁰²
- 8.108 Certain online activity has also been considered a public act. For example, where someone posts:
- written text on a website that is not password protected¹⁰³
 - written text on a public Facebook page or one that has an audience of “a number of people”,¹⁰⁴ or
 - a link on a public website to another website containing vilifying material, with an express invitation to access that link.¹⁰⁵
- 8.109 While broad, the definition of public act is not unlimited. For instance, a statement made in a school staff muster meeting was found not be a public act. This was because the meetings were not open to the public.¹⁰⁶
- 8.110 Also, the definition does not apply to all online acts. For instance, social media posts directed at smaller, private audiences may not be public acts. The Tribunal has commented that posting a link to a website that contains vilifying material on a private Facebook page will not, in and of itself, be a public act.¹⁰⁷

98. *Barry v Futter* [2011] NSWADT 205 [74]–[76].

99. *Anderson v Thompson* [2001] NSWADT 11 [25].

100. *Lamb v Campbell* [2021] NSWCATAD 103 [23]–[28].

101. *Ekeramawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79 [42]–[46].

102. *Wolf v NSW Department of Education* [2023] NSWCATAD 202 [44]–[45].

103. *Collier v Sunol* [2005] NSWADT 261 [33].

104. *Burns v Smith* [2019] NSWCATAD 56 [34]–[35].

105. *Burns v Sunol* [2015] NSWCATAD 131 [41]; *Burns v Sunol* [2016] NSWCATAD 16 [35]–[36].

106. *Riley v NSW Department of Education* [2019] NSWCATAD 223 [118].

107. *Burns v McKee* [2017] NSWCATAD 66 [62].

Options for clarifying the definition

- 8.111 Views differ about whether the ADA’s definition of “public act” is appropriate and effective. Some think it is too narrow, unclear, inconsistent and inadequate in its application to online acts.¹⁰⁸ Others think the definition is too broad and should be narrowed to preserve freedom of speech and religion.¹⁰⁹
- 8.112 In our recent review of s 93Z of the *Crimes Act*, we examined whether the definition of public act in this criminal vilification offence should be amended. We considered a range of potential reform options suggested in submissions and drawn from our research of the law in other states, territories and federally.
- 8.113 We concluded it was unnecessary to amend the definition. We considered it appropriately broad and flexible, with scope for argument on a case-by-case basis. The definition is well-established in NSW, and we expressed concern that any attempt to amend it may lead to unnecessary complications.¹¹⁰
- 8.114 The definition of public act in s 93Z was based on the civil definition in the ADA. Given this close relationship, it is likely that these considerations also apply to the ADA. However, it may be that minor amendments could clarify the civil definition.
- 8.115 One option could be to further harmonise the ADA’s definition of public act with the definition in s 93Z.¹¹¹ Although the definitions are similar, there are some differences. Unlike the ADA, s 93Z expressly clarifies that a public act can include:
- communicating through social media and other electronic means
 - graffiti, and
 - acts that occur on private land.¹¹²
- 8.116 The reference to graffiti was added to s 93Z in March 2025.¹¹³
- 8.117 Making similar amendments to the ADA could lead to further alignment between the civil and criminal vilification regimes in NSW. It would address the situation that

108. NSW Greens, *Preliminary Submission PAD85*, 9–10; Inner City Legal Centre, *Preliminary Submission PAD40*, 3; Anti-Discrimination NSW, *Preliminary Submission PAD83*, 16.

109. Catholic Women’s League Australia, NSW Inc, *Preliminary Submission PAD88*, 5; Australian Christian Lobby, *Preliminary Submission PAD12*, 20.

110. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024) [6.26]–[6.55]

111. Anti-Discrimination NSW, *Preliminary Submission PAD83*, 16; Inner City Legal Centre, *Preliminary Submission PAD40*, 3.

112. *Crimes Act 1900* (NSW) s 93Z(5).

113. *Crimes Act 1900* (NSW) s 93Z(5) definition of “public act”, amended by *Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025* (NSW) sch 1 [1].

the definition in the criminal legislation is expressed in wider terms than in the civil legislation.

- 8.118 However, to the extent it would reflect existing interpretations of the ADA, it may not practically change the law. For instance, certain conduct involving graffiti has been held to be a “form of communication to the public” for the purpose of a homosexual vilification claim under the ADA.¹¹⁴
- 8.119 The definitions in the ADA and s 93Z also differ in their approach to the “distribution or dissemination of any matter to the public”. To be considered a public act, the ADA requires this be done “with knowledge that the matter promotes or expresses” vilification.¹¹⁵ Section 93Z does not require that the person distributing or disseminating the material had knowledge that it promotes or expresses vilification.¹¹⁶
- 8.120 In 1999, the NSWLRC reported that the ADA’s knowledge requirement “prevents those innocently distributing material, without being aware of its contents, from being liable”.¹¹⁷ It is not clear why this requirement was not included in s 93Z, although it may relate to the mental elements of knowledge and recklessness that apply to this offence. Regardless, this indicates that the differences between the civil and criminal contexts may need consideration if alignment between the two definitions is contemplated.
- 8.121 Other developments in Victoria and Queensland could also be considered. The Victorian amendments include a definition of “public conduct” based on the s 93Z definition of “public act”. For avoidance of doubt, the Victorian definition will also provide:
- conduct may be public even if it occurs on private property or land, or at a place that is not open to the general public, and
 - a display on a person’s body by means of tattooing or other body modification is not considered “public conduct”.¹¹⁸
- 8.122 The Queensland amendments would also clarify that conduct may still be a public act even if it happens somewhere the public do not ordinarily access.¹¹⁹

114. *Burns v Dye* [2002] NSWADT 32 [86]–[88].

115. *Anti-Discrimination Act 1977* (NSW) s 20B(c).

116. *Crimes Act 1900* (NSW) s 93Z(5) definition of “public act”.

117. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.113].

118. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102C(2)–(3) (uncommenced).

119. *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21, inserting *Anti-Discrimination Act 1991* (Qld) s 124B(2) (uncommenced).

Question 8.3: The definition of “public act”

What changes, if any, should be made to the definition of “public act” in the test for vilification in the ADA?

Exceptions

- 8.123 There are a range of exceptions to the ADA’s protections against vilification. Some, such as the general exceptions for religious bodies, apply across the ADA, including to the prohibitions on vilification. Others apply to both discrimination and vilification, such as the exceptions for faith-based organisations providing adoption services and the exception relating to transgender people in sport. We outline these broad exceptions in chapter 7.
- 8.124 Other exceptions apply specifically to vilification. The prohibitions on vilification do not apply to:
- a fair report of a public act of vilification
 - the communication, distribution or dissemination of any matter that would be subject to a defence of absolute privilege in defamation proceedings, or
 - a public act, done reasonably and in good faith, for certain purposes.¹²⁰

“Fair report” and “absolute privilege for defamation” exceptions

- 8.125 The first category of exceptions applies to “a fair report” of an act of vilification. The purpose of this exception is to allow the media to report freely, provided the reporting is fair and factual.¹²¹
- 8.126 In 1999, the NSWLRC recommended that the Anti-Discrimination Board (now known as Anti-Discrimination NSW or “ADNSW”) should have the power to create guidelines on what is a fair report.¹²² This was not implemented and may be an option for consideration regarding the powers and functions of ADNSW. We will detail these powers and functions in our second consultation paper in this review.
- 8.127 The second category of exceptions concerns the defence of absolute privilege to defamation. It is a defence to a claim of defamation if the defendant can prove that the material in question was published on an occasion of “absolute privilege”. The defence only covers certain situations, and in some cases, certain people or bodies.

120. *Anti-Discrimination Act 1977 (NSW)* s 20C(2), s 38S(2), s 49ZE(2), s 49ZT(2), s 49ZXB(2).

121. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.132]–[7.133].

122. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 95.

For example, a person may have a defence of absolute privilege if the communication was made:

- during the proceedings of a parliamentary body
- during the proceedings of an Australian court or tribunal, or
- to a police officer while the officer is acting in their official capacity.¹²³

8.128 In 1999, the NSWLRC considered this exception should remain.¹²⁴

The public interest exceptions

8.129 The third category of exceptions aims to allow acts and discussions to occur when there is a public interest justification. They are designed to achieve a balance between the right to free speech, and the right to live free from vilification and the harms it causes.¹²⁵

8.130 Generally, each of the public interest exceptions in the ADA apply to public acts, done reasonably and in good faith, for:

- academic, artistic, scientific or research purposes, or
- other purposes in the public interest including discussion or debate about, and expositions of, any act or matter.¹²⁶

8.131 As we discuss below, the public interest exceptions for homosexual, transgender grounds, HIV/AIDS and religious vilification also refer to certain religious purposes.

Perspectives on the public interest exceptions

8.132 In 1999, the NSWLRC noted the public interest exceptions were appropriate and an important safeguard of the right to freedom of expression.¹²⁷

8.133 However, some have argued that the exceptions go too far and do not protect the rights of marginalised groups.¹²⁸ A related view is that the exceptions give a special status to acts done for certain purposes. Some consider this unfair, particularly

123. *Defamation Act 2005* (NSW) s 27(1)–(2)(b1).

124. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.136].

125. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 4 May 1989, 7488.

126. *Anti-Discrimination Act 1977* (NSW) s 20C(2)(c), s 38S(2)(c), s 49ZE(2)(c), s 49ZT(2)(c), s 49ZXB(2)(c).

127. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.140].

128. Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 5.

where people engaging in these purposes have significant privilege and acts done for these purposes could inflict harm.¹²⁹

- 8.134 If it is desirable to narrow the exception, one option could be to qualify that the academic, artistic, scientific, religious or research purpose should be “genuine”. Victoria, the NT and the *Racial Discrimination Act* take this approach.¹³⁰
- 8.135 A Victorian Parliamentary Committee recommended that the exception for acts done for any “purpose in the public interest” should also be confined to “genuine” purposes.¹³¹ The Victorian amendments will introduce this.¹³²
- 8.136 On the other hand, adding the word “genuine” might not lead to significant changes in the law’s application. There may also be further uncertainty if the criteria to be used in assessing whether a purpose is “genuine” are unclear.
- 8.137 The Victorian amendments also provide exceptions for conduct engaged in reasonably and in good faith in:
- the performance, exhibition or distribution of an artistic work, or
 - making or publishing a fair and accurate report of any event or matter of public interest.¹³³
- 8.138 Another issue is whether the public interest exception should extend to “fair comment”. Exceptions in the NT and the *Racial Discrimination Act* extend to “a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment”.¹³⁴ The NSWLRC did not support such an exception in 1999. It noted concerns that this could exempt any public comments made by someone who believes them to be true, no matter how abusive or offensive they are.¹³⁵

129. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.138].

130. *Racial Discrimination Act 1975* (Cth) s 18D; *Anti-Discrimination Act 1992* (NT) s 20B; *Racial and Religious Tolerance Act 2001* (Vic) s 11(1)(b)(i).

131. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 12, 126.

132. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102G(1)(b) (uncommenced).

133. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102G(1)(a), s 102G(1)(c) (uncommenced). See also *Racial and Religious Tolerance Act 2001* (Vic) s 11(1)(a), s 11(1)(c).

134. *Racial Discrimination Act 1975* (Cth) s 18D(c)(ii); *Anti-Discrimination Act 1992* (NT) s 20B(c)(ii).

135. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.134].

Religious discussion or instruction purposes

- 8.139 The public interest exception to homosexual vilification extends to acts done for the purposes of “religious instruction”. The exceptions for vilification based on transgender grounds, HIV/AIDS, or religious belief, affiliation or activity apply more broadly to “religious discussion or instruction purposes”.¹³⁶
- 8.140 In contrast, the public interest exception to racial vilification in the ADA does not expressly include these purposes. However, the recently enacted NSW offence of publicly inciting racial hatred does not apply to an act that “consists only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion”.¹³⁷
- 8.141 The vilification protections in the ACT, the NT, and the *Racial Discrimination Act* do not provide exceptions for acts done for religious purposes.¹³⁸
- 8.142 However, the Victorian exception extends to acts done for genuine religious purposes. This is currently defined as including, but not limited to, conveying or teaching a religion or proselytising.¹³⁹
- 8.143 The Victorian amendments will, upon commencement, clarify that a religious purpose includes, but is not limited to, worship, observance, practice, teaching, preaching and proselytising in conformity with the doctrines, beliefs or principles of that religion.¹⁴⁰
- 8.144 An issue is whether a religious purposes exception to vilification is necessary or desirable in the ADA. One consideration is that there may be a degree of overlap between these aspects of the public interest exceptions and other exceptions in the ADA. As we discuss in chapter 7, a general exception applies throughout the ADA (including the vilification protections) to the acts or practices of a body established to propagate religion, that:
- conforms to the religion’s doctrine, or
 - is necessary to avoid injury to the religious susceptibilities of adherents of that religion.¹⁴¹

136. *Anti-Discrimination Act 1977* (NSW) s 49ZT(2)(c), s 38S(2)(c), s 49ZXB(2)(c), s 49ZE(2)(c).

137. *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) sch 1, inserting *Crimes Act 1900* (NSW) s 93ZAA(2) (uncommenced).

138. *Racial Discrimination Act 1975* (Cth) s 18D; *Discrimination Act 1991* (ACT) s 67A(2); *Anti-Discrimination Act 1992* (NT) s 20B. See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21, inserting *Anti-Discrimination Act 1991* (Qld) s 124D(2)(c) (uncommenced).

139. *Racial and Religious Tolerance Act 2001* (Vic) s 11(1)(b)(i), s 11(2).

140. *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102G(2) (uncommenced).

141. *Anti-Discrimination Act 1977* (NSW) s 56(d).

- 8.145 Another exception excludes the policies and practices of faith-based adoption services from the prohibitions on vilification based on homosexuality and transgender grounds.¹⁴²
- 8.146 Others have considered it unnecessary to exempt acts done for religious purposes from vilification protections. The Law Reform Commission of Western Australia concluded that prohibitions on vilification do not unduly prevent individuals from expressing their religious views and opinions. Individuals can hold, and even strongly express, their religious views without this amounting to civil vilification.¹⁴³

Question 8.4: Exceptions

What if any, changes should be made to the exceptions to the vilification protections in the ADA?

Religious vilification protections

- 8.147 In preliminary submissions to this review of the ADA, and during our 2024 review of s 93Z of the *Crimes Act*, we heard concerns about the ADA's protection against religious vilification.
- 8.148 It is unlawful, by public act, to incite hatred towards, serious contempt for or severe ridicule of a person, or group of people, because they:
- have or do not have a religious belief or affiliation, or
 - engage, or do not engage, in religious activity.¹⁴⁴
- 8.149 This was added to the ADA in 2023. Some regard this reform as an important protection for people of faith in the context of growing intolerance.¹⁴⁵ Others, while generally supporting protections against religious vilification, argue that the legislation is unclear, too broad and does not strike the right balance with freedom of expression.

142. *Anti-Discrimination Act 1977* (NSW) s 59A.

143. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 231.

144. *Anti-Discrimination Act 1977* (NSW) s 49ZE(1)(a).

145. See, eg, National Catholic Education Commission, *Preliminary Submission PAD16*, 2; Australian National Imams Council, *Preliminary Submission PAD23*, 7; Australian Muslim Advocacy Network, *Preliminary Submission PAD47* [2.3]; Hindu Council of Australia, *Preliminary Submissions PAD58* [35].

The definition of religious belief, affiliation and activity

- 8.150 In particular, some noted that the ADA does not define “religious belief”, “religious affiliation” and “religious activity”.¹⁴⁶ When the reform was introduced, concerns were expressed that the term “religious affiliation” is ambiguous, and could protect anyone claiming to be affiliated with a religion or a religious group.¹⁴⁷ Some argued individuals could bring a complaint if they are affiliated with a religious organisation that received public criticism.¹⁴⁸
- 8.151 Some have suggested the ADA should adopt the definition of religious belief and affiliation in s 93Z of the *Crimes Act*.¹⁴⁹ It is an offence to threaten or incite violence towards a person, or group, because the person or one or more members of the group has a “specific religious belief or affiliation”.
- 8.152 Unlike the ADA, s 93Z:
- defines “religious belief or affiliation” as “holding or not holding a religious belief or view”,¹⁵⁰ and
 - does not expressly cover public acts of incitement based on a person or group engaging, or not engaging in, religious activity.
- 8.153 Others have raised concerns that the ADA does not only protect against vilification based on “lawful” religious activities.¹⁵¹ However, as we outline in chapter 5, others have argued that lawfulness is already part of the well-established judicial definition of “religion”.¹⁵² Chapter 5 also considers other options for defining religious protections.

Other concerns about the religious vilification protections

- 8.154 Some preliminary submissions expressed concerns that the ADA could go beyond protecting individuals and groups against vilification based on their religious beliefs

146. Public Interest Advocacy Centre, *Submission SV10*, 3; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 11; NSW Greens, *Preliminary Submission PAD85*, 12; Legal Aid NSW, *Preliminary Submission PAD87*, 30.

147. NSW, *Parliamentary Debates*, Legislative Assembly, 2 August 2023, 48.

148. Public Interest Advocacy Centre, *Submission SV10*, 15.

149. Public Interest Advocacy Centre, *Submission SV10*, 4; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 11.

150. *Crimes Act 1900* (NSW) s 93Z(5) definition of “religious belief or affiliation”.

151. Public Interest Advocacy Centre, *Submission SV10*, 3; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 8; Legal Aid NSW, *Preliminary Submission PAD87*, 30.

152. NSW, *Parliamentary Debates*, Legislative Council, 3 August 2023, 8196–8197, 8203–8204. See also *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

or views. There is a view that it could also be used to silence criticism of those beliefs and views themselves.¹⁵³

- 8.155 When the reform was introduced into Parliament, the Attorney General said it was not intended to “protect religion or religious beliefs themselves, and they are not intended to be used to silence criticism or debate”.¹⁵⁴ An option could be to clarify this in the ADA for the avoidance of doubt.
- 8.156 Some also argued the ADA does not only protect individuals and groups of people against religious vilification. It could also allow religious organisations, including churches, to seek redress for being vilified as an organisation.¹⁵⁵ This is because the prohibition covers the vilification of a “person” or a “group of persons”.¹⁵⁶ In NSW, a “person” includes “an individual, a corporation and a body corporate or public”.¹⁵⁷
- 8.157 The other vilification protections in the ADA also apply to persons and groups of persons. There is a view that this is less concerning in relation to vilification based on other protected attributes. This is because other organisations are arguably unable to be characterised as having race, sexuality, gender identity or HIV/AIDs status, but can be characterised as “religious”.¹⁵⁸
- 8.158 Some argued that vilification complaints made by religious organisations against individuals could silence public debate and undermine democratic engagement and institutional accountability.¹⁵⁹ One suggestion involved clarifying that the ADA’s protection against religious vilification only applies to “natural persons”.¹⁶⁰

Question 8.5: Religious vilification

What changes, if any, should be made to the protection against religious vilification in the ADA?

153. NSW Council for Civil Liberties, *Preliminary Submission PAD21* [71]; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 8.

154. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 28 June 2023, 4.

155. Public Interest Advocacy Centre, *Submission SV10*, 3; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [74]; Legal Aid NSW, *Preliminary Submission PAD87*.

156. *Anti-Discrimination Act 1977* (NSW) s 49ZE(1).

157. *Interpretation Act 1987* (NSW) sch 4 definition of “person”.

158. Public Interest Advocacy Centre, *Submission SV10*, 13.

159. NSW Council for Civil Liberties, *Preliminary Submission PAD21* [74].

160. Public Interest Advocacy Centre, *Submission SV10*, 13–14; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [74]–[75].

9. Harassment

In brief

The *Anti-Discrimination Act 1977* (NSW) (ADA) prohibits sexual harassment. We ask if changes are required to the tests for sexual harassment and to the areas of public life in which sexual harassment is unlawful. We also ask whether and, if so, how the ADA should prohibit harassment based on an individual's attributes.

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9.1 The *Anti-Discrimination Act 1977* (NSW) (ADA) prohibits sexual harassment. Sexual harassment is unwelcome sexual conduct that would make a person feel offended, humiliated, or intimidated.¹ This chapter focuses on the definition of sexual harassment, the areas of life where sexual harassment is prohibited and whether harassment on other grounds should be covered by the ADA.

1. *Anti-Discrimination Act 1977* (NSW) s 22A.

- 9.2 A significant issue is whether the ADA should be updated to reflect recent developments in sexual harassment law. The sexual harassment sections in the ADA have not been amended since they were introduced in 1997.
- 9.3 However, major changes have occurred at the federal level. The Australian Human Rights Commission (AHRC)'s national inquiry into sexual harassment in workplaces has led to this change. In its 2020 *Respect@Work* report, the AHRC found that the federal sexual harassment laws (which were broadly consistent with the ADA) were not fit for purpose in addressing workplace sexual harassment. It recommended changes to place greater emphasis on victims, gender and intersectionality.² The *Sex Discrimination Act 1984 (Cth)* (*Sex Discrimination Act*) was amended to implement the AHRC's recommendations.
- 9.4 Another issue is how the ADA relates to other laws that prohibit sexual harassment. The *Sex Discrimination Act*, federal employment laws, and NSW work health and safety laws also prohibit sexual harassment, either directly or indirectly. This means NSW complainants can face different options about which law to use and where to make a complaint.
- 9.5 They might also have options about how to frame their complaint. Sexual harassment can also amount to sex discrimination, bullying or subjecting someone to a hostile work environment.³ Serious instances of sexual harassment can also amount to criminal conduct, including sexual assault.⁴
- 9.6 This chapter considers some of these legal frameworks and asks if there are any gaps in the ADA or indeed any overlaps with existing protections. We also ask if there is benefit in reforming the ADA to be more consistent with these frameworks.
- 9.7 We consider in chapter 11 whether there should be a positive obligation to prevent and eliminate harassment. In the second consultation paper, we will consider remedies, enforcement and complaints handling.

The test for sexual harassment under the ADA

- 9.8 There are four elements to sexual harassment under the ADA. The test in the *Sex Discrimination Act* is similar, but with some important differences that we explain below.

2. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 10.

3. *Anti-Discrimination Act 1977 (NSW)* s 24; *Fair Work Act 2009 (Cth)* s 789FD(1); *Sex Discrimination Act 1984 (Cth)* s 28M.

4. *Crimes Act 1900 (NSW)* pt 3 div 10.

The ADA's four-step test for sexual harassment

- 9.9 Sexual harassment can include a broad range of behaviours, from sexually suggestive comments or questions to unwanted physical contact.⁵ A single or isolated act of sexual conduct may be enough to be unlawful.⁶
- 9.10 The first step in the test is identifying what a person did and the sexual nature of the conduct. Sexual conduct includes sexual advances and requests for sexual favours.⁷ However, the conduct does not have to be sexually explicit. For example, it can include sexual “[i]nnuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod”.⁸
- 9.11 The intention of the person engaging in the sexual conduct is irrelevant. This includes the person’s view about their conduct and how it was received by the complainant.⁹ Instead, whether the conduct is “sexual in nature” depends on the facts of the situation. This is what is known as an “objective” element.¹⁰
- 9.12 The second step is that the conduct must be directed to or done in relation to the complainant. This means there must be some connection between the conduct and the complainant. Simply being a bystander or observing sexual conduct may not be enough to be considered sexual harassment.¹¹
- 9.13 The next step is that the sexual conduct must be unwelcome to the complainant. Whether the conduct is “unwelcome” is determined from the complainant’s perspective at the time of the conduct.¹² In other words, it is a “subjective” element.¹³ Sometimes, it may be “obvious” just from the nature of the conduct that

5. See, eg, *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *San v Dirluck Pty Ltd* [2005] FMCA 750, 222 ALR 91; *Elliott v Nanda* [2001] FCA 418, 111 FCR 240; *Poniatowska v Hickinbotham* [2009] FCA 680; *Kraus v Menzie* [2012] FCA 3 [53].

6. See, eg, *Hall v Sheiban Pty Ltd* (1989) 20 FCR 217, 231; *Cooke v Plauen Holdings* [2001] FMCA 91 [25]; *Johanson v Blackledge Meats* [2001] FMCA 6 [85]; *Aldridge v Booth* (1988) 80 ALR 1, 5.

7. *Anti-Discrimination Act 1977* (NSW) s 22A(a).

8. *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [125].

9. *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [82], [96], [98]; *Huang v University of New South Wales* [2008] FCA 1930 [48].

10. *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [34].

11. *Zanella v Carroll's Auto Repairs Pty Ltd* [2001] NSWADT 220 [70]–[74]; *Carter v Linuki Pty Ltd* [2004] NSWADT 287 [24], [27]; *Noble v Baldwin* [2011] FMCA 283 [237].

12. *Ewin v Vergara (No 3)* [2013] FCA 1311 [447].

13. *Aldridge v Booth* (1988) 80 ALR 1, 5; *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [34]; *Hall v Sheiban Pty Ltd* (1989) 20 FCR 217, 247; *Elliott v Nanda* [2001] FCA 418, 111 FCR 240 [109]; *Poniatowska v Hickinbotham* [2009] FCA 680 [289].

it was unwelcome.¹⁴ There is no requirement that the complainant expressly objected to the conduct or said that the conduct was unwelcome.¹⁵

- 9.14 The final step is that a reasonable person, with knowledge of all the circumstances, would anticipate that the complainant would be offended, humiliated or intimidated by the unwelcome sexual conduct.
- 9.15 This is known as the “reasonable person” test or standard. It is objective, meaning it is not assessed from the perspective of the complainant, but rather from the perspective of a hypothetical reasonable person with knowledge of the situation.¹⁶

Differences to the *Sex Discrimination Act*

- 9.16 Under both the ADA and the *Sex Discrimination Act*, sexual harassment includes engaging in unwelcome conduct of a sexual nature in relation to another person. An objective “reasonable person” standard applies in both laws to determine whether the unwelcome sexual conduct could be considered as offending, humiliating or intimidating to the complainant.
- 9.17 However, there are important differences between these two laws. An issue is whether the ADA should be amended to align with the *Sex Discrimination Act*.

The threshold of the “reasonable person” standard

- 9.18 One difference is that the threshold of the “reasonable person” standard is lower under the *Sex Discrimination Act*. It requires a reasonable person to anticipate “the possibility” that the person harassed would be offended, humiliated or intimidated.¹⁷ By contrast, the ADA requires a reasonable person to anticipate that the person harassed would be offended, humiliated or intimidated.¹⁸
- 9.19 The *Sex Discrimination Act* was previously the same as the ADA standard. However, it was lowered in response to concerns that the previous standard:
- was too narrow,¹⁹ and
 - could allow a person to “run the risk” of causing offence, humiliation or intimidation.²⁰

14. *Hughes v Hill* [2020] FCAFC 126, 277 FCR 511 [23].

15. *Aldridge v Booth* (1988) 80 ALR 1, 5; *O’Callaghan v Loder* [1983] 3 NSWLR 89 103–104.

16. See, eg, *Johanson v Blackledge Meats* [2001] FMCA 6 [84].

17. *Sex Discrimination Act 1984* (Cth) s 28A(1)(b), s 28AA(1)(b), s 28M(2)(c).

18. *Anti-Discrimination Act 1977* (NSW) s 22A.

19. Explanatory Memorandum, Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth) [69]–[70].

20. Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) [11.36], rec 15.

Matters to be considered

- 9.20 Another difference is that the *Sex Discrimination Act* lists matters to be considered in determining whether a reasonable person would anticipate the possibility of offence, insult or humiliation. These are:
- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, disability, race, colour or national or ethnic origin of the person harassed
 - the relationship between the person harassed and the harasser, and
 - any other relevant circumstance.²¹
- 9.21 By contrast, the ADA says that the reasonable person would have regard to “all the circumstances”.²² It does not specify what those circumstances could include.
- 9.22 There could be benefits in listing some circumstances for consideration, as the *Sex Discrimination Act* does. For example, it would expressly allow for consideration of the complainant’s individual circumstances, including their protected attributes. Some may consider this important, as inequalities that arise from an individual’s characteristics can influence their risk of sexual harassment, and how they experience and respond to it.²³
- 9.23 However, some have argued the *Sex Discrimination Act* list is ineffective. There is a view that complainants’ attributes continue to be ignored in sexual harassment matters.²⁴

Definition of “conduct of a sexual nature”

- 9.24 The final difference between the definitions of sexual harassment in the ADA and *Sex Discrimination Act* relates to the term “conduct of a sexual nature”. In the *Sex Discrimination Act*, this includes making an oral or written statement of a sexual nature to a person or in the presence of a person.²⁵
- 9.25 The ADA does not define this term. One view is that defining it could make it clear that conduct can include statements. However, it may not be necessary to define it.

21. *Sex Discrimination Act 1984* (Cth) s 28A(1A).

22. *Anti-Discrimination Act 1977* (NSW) s 22A.

23. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 359.

24. Australian Discrimination Law Experts Group, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (4 March 2019) 23. See also Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 456.

25. *Sex Discrimination Act 1984* (Cth) s 28A(2). See also *Discrimination Act 1991* (ACT) s 58(2); *Equal Opportunity Act 2010* (Vic) s 92(2)(b).

The NSW Court of Appeal has found that it is a broad term and it should not be interpreted in a limited way.²⁶ Defining the term could even have the effect of narrowing the current interpretation.

Question 9.1: The definition of sexual harassment

- (1) Should the reasonable person test be expanded to include the “possibility” of offence, intimidation or humiliation? Why or why not?
- (2) Should the ADA expressly require consideration of an individual’s attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?
- (3) Does the ADA need to define “conduct of a sexual nature”? Why or why not?

Other sex-based conduct

9.26 Unlike the ADA, the *Sex Discrimination Act* also prohibits:

- harassment “on the ground of sex”,²⁷ and
- subjecting someone to a workplace that is “hostile on the basis of sex”.²⁸

9.27 We refer to these as “sex-based conduct”. These forms of conduct are different from sexual harassment in that they do not need to be sexual in nature.

Tests for other sex-based conduct

9.28 Under the *Sex Discrimination Act*, “harassment on the ground of sex” occurs when a person engages in unwelcome, demeaning conduct in relation to the complainant because of the complainant’s sex.²⁹ A reasonable person must anticipate the possibility that the conduct would offend, humiliate or intimidate the complainant.³⁰

9.29 Subjecting someone to a workplace that is “hostile on the ground of sex” happens when:

- a person engages in conduct in the workplace, and

26. *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [97].

27. *Sex Discrimination Act 1984* (Cth) s 28AA.

28. *Sex Discrimination Act 1984* (Cth) s 28M, inserted by *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 1 cl 5.

29. *Sex Discrimination Act 1984* (Cth) s 28AA(1)(a).

30. *Sex Discrimination Act 1984* (Cth) s 28AA(1)(b).

- a reasonable person would anticipate the possibility that the conduct would result in a workplace environment that is offensive, intimidating or humiliating to a person of the sex of the complainant.³¹

9.30 Factors to be considered in determining whether someone has been subjected to either form of conduct include:

- the seriousness of the conduct
- whether it was repeated, and
- the role, influence and authority of the person engaging in the conduct.³²

Benefits of prohibiting sex-based conduct

9.31 Adopting similar protections in NSW could clarify the law and address some existing “grey areas” in the ADA. This includes behaviours that are not clearly prohibited by sex discrimination or sexual harassment laws in the ADA.³³ For example, behaviour that is:

- sexist rather than sexual in nature,³⁴ or
- not specifically directed to a person, for example, workplaces with an underlying culture of inappropriate behaviour.³⁵

9.32 Introducing similar protections in NSW would allow people to pursue these sex-based claims under the ADA rather than having to use the federal laws. It would also reduce the inconsistency across Australia.

Concerns about prohibiting sex-based conduct

9.33 However, adding these protections to the ADA could make it harder for a complainant to decide which law best applies to their experience. This could arise where the same conduct could constitute sex discrimination, sex-based harassment and sexual harassment.³⁶

31. *Sex Discrimination Act 1984* (Cth) s 28M(2).

32. *Sex Discrimination Act 1984* (Cth) s 28AA(2), s 28M(3).

33. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 457, 460; Revised Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), Statement of Compatibility with Human Rights [12].

34. Women’s Legal Service NSW, *Preliminary Submission PAD55* [43]–[45].

35. Revised Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) [6]. See also Australian Lawyers for Human Rights, *Preliminary Submission PAD62* [6].

36. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 136–137, 140–141; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 460.

- 9.34 One alternative is to clarify in the ADA that in some cases a hostile work environment may constitute indirect discrimination.³⁷ Further, better education and information about sex discrimination and sexual harassment may also help reduce confusion.³⁸
- 9.35 Another consideration is whether the ADA needs to prohibit conduct that is already prohibited by the *Sex Discrimination Act*. Currently, complainants can use the *Sex Discrimination Act* to make complaints about other sex-based conduct.
- 9.36 Even if it is considered that the ADA should prohibit sex-based conduct, the *Sex Discrimination Act* may not be the preferred model. Aspects of this law have been criticised, including the:
- requirement for conduct to be “demeaning” to be considered harassment on the ground of sex
 - requirement for someone to be “subjected” to a workplace that is hostile on the ground of sex, and
 - factors listed in the *Sex Discrimination Act* to determine whether sex-based conduct has occurred.
- 9.37 Some think that the requirement for conduct to be “demeaning”, as part of the test for harassment on the ground of sex, is unnecessary. The tests for sexual harassment and sex discrimination do not have this requirement. Some think it should be enough that a person was exposed to unwelcome conduct because of their sex, and that the “reasonable person” standard was met.³⁹
- 9.38 The Queensland Human Rights Commission (QHRC) considered that the requirement could lead to misunderstandings, including that:
- conduct must be demeaning to be considered unlawful sex discrimination or sexual harassment, and
 - demeaning conduct is only unlawful in relation to sex, not other attributes.⁴⁰
- 9.39 Some think that the *Sex Discrimination Act*’s prohibition of a hostile workplace environment is ineffective and onerous for complainants. There are also concerns

37. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 141.

38. See, eg, Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 460; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 135, 141.

39. Australian Discrimination Law Experts Group, Submission to the Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) [10].

40. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 136–137.

that the protection may not fill the gaps in the law, as it was intended to. In particular, it may not overcome one problem that sexual harassment complainants face — that is, the need to prove that the respondent’s actions directly affected them. This is because “subjecting” someone to a hostile environment would still require a person’s actions to directly impact another person.⁴¹

- 9.40 There may also be concerns about the factors listed in the *Sex Discrimination Act* to be considered in determining if sex-based conduct has occurred. One view is that these factors pose unnecessary hurdles for complainants. It could be argued that factors such as the seriousness or repetition of the conduct are higher barriers than those found in the tests for sexual harassment.⁴²

Question 9.2: Other sex-based conduct

- (1) Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?
- (2) Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?
- (3) Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?

Areas in which sexual harassment is unlawful

- 9.41 The ADA only prohibits sexual harassment in the following areas of public life:
- employment
 - education
 - goods and services
 - accommodation
 - land dealings
 - sport
 - state programs
 - bodies that confer trade or occupational qualifications, and
 - employment agencies.⁴³

41. Australian Discrimination Law Experts Group, Submission to the Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) [16].

42. Australian Discrimination Law Experts Group, Submission to the Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) [12].

43. *Anti-Discrimination Act 1977* (NSW) s 22B–s22J.

9.42 The application of the ADA in these areas is, as we describe below, complicated. However, other laws take a different approach.

Overview of the ADA's approach

9.43 Within the areas of public life listed above, the ADA specifies who is prohibited from sexually harassing who. In most areas, the prohibition applies broadly. For example, it is unlawful to sexually harass someone while:

- providing or receiving goods and services
- providing or receiving accommodation
- engaging in sporting activities (including as a coach, player, official or administrator), or
- carrying out any function under NSW law for a state program.⁴⁴

9.44 In some areas, the ADA only prohibits a person who has authority in a relationship from sexually harassing a person who does not have this authority. For example:

- members or employees of bodies that issue trade or occupational qualifications must not sexually harass people seeking those qualifications, and
- operators or employees of employment agencies must not sexually harass people who they are providing services to.⁴⁵

9.45 Some areas are further limited. For instance, in the area of “education”, the prohibition applies to staff members sexually harassing students aged 16 and over, and students aged 16 and over sexually harassing staff members.⁴⁶

9.46 It does not apply where a student sexually harasses another student, or a staff member sexually harasses another staff member. However, the latter scenario may be covered by the prohibition on sexual harassment in the “employment” area.

Comparisons with the *Sex Discrimination Act*

9.47 The ADA's coverage is similar to the areas of life protected from sexual harassment under the *Sex Discrimination Act*. However, the *Sex Discrimination Act* also prohibits sexual harassment in clubs, and unions or employer associations.⁴⁷

9.48 The *Sex Discrimination Act* also protects more types of workers from sexual harassment. Its approach to prohibiting sexual harassment in the workplace is simpler than the ADA's.

44. *Anti-Discrimination Act 1977* (NSW) s 22F, s 22G, s 22I, s 22J.

45. *Anti-Discrimination Act 1977* (NSW) s 22C, s 22D.

46. *Anti-Discrimination Act 1977* (NSW) s 22E.

47. *Sex Discrimination Act 1984* (Cth) s 28D, s 28K.

- 9.49 The *Sex Discrimination Act* prohibits sexual harassment in connection with a person’s status as a “worker” or “person conducting a business or undertaking”.⁴⁸ These terms are broadly defined to cover a wide range of people in the employment sphere.
- 9.50 Workers include employees, contractors, apprentices, students gaining work experience, outworkers and volunteers.⁴⁹ A person conducting a business or undertaking includes a person doing so alone, and whether or not for profit or gain.⁵⁰
- 9.51 By contrast, the ADA prohibits sexual harassment of specific types of workers by other specified workers or employers. For example, the ADA prohibits the sexual harassment of:
- an employee by their employer or a fellow employee
 - a commission agent or contractor by their employer or fellow commission agent or contractor, and
 - a partner in a partnership by another partner in the partnership.⁵¹
- 9.52 The ADA restricts the protection of other less traditional types of workers. It prohibits the sexual harassment of a “workplace participant” by another “workplace participant”, but only where this occurs at the workplace of both these people.⁵²
- 9.53 Workplace participants include the more conventional types of workers listed above, as well as:
- self-employed people, and
 - volunteers or unpaid trainees.⁵³
- 9.54 This means that the following instances of sexual harassment must occur in the workplace of both parties to be unlawful under the ADA:

48. *Sex Discrimination Act 1984* (Cth) s 28B(3)–(8).

49. *Work Health and Safety Act 2011* (NSW) s 7(1) definition of “worker”.

50. *Work Health and Safety Act 2011* (NSW) s 5(1) definition of “person conducting a business or undertaking”.

51. *Anti-Discrimination Act 1977* (NSW) s 22B(1)–(5).

52. *Anti-Discrimination Act 1977* (NSW) s 22B(6).

53. *Anti-Discrimination Act 1977* (NSW) s 22B(9) definition of “workplace participant”.

Table 9.1: Unlawful sexual harassment in the workplace

Sexual harassment by	Sexual harassment of
Any workplace participant	A self-employed person, volunteer or unpaid trainee
A member of Parliament	Any workplace participant
A member of Parliament	A member of Parliament
A co-worker who is an employee	A commission agent or contractor
An employee, commission agent or contractor	A partner

9.55 A “workplace” is defined as a place where a workplace participant works or attends “in connection” with being a workplace participant.⁵⁴ This includes accommodation provided by an employer, modes of transportation to attend work events and places where there are social gatherings of work colleagues.⁵⁵

9.56 If NSW adopted the *Sex Discrimination Act* approach, it would mean:

- more types of workers would be covered by the prohibition on sexual harassment
- all types of workers would be treated the same, with no differences in requirement for where the sexual harassment took place, and
- sexual harassment done by any person, not just an employer or co-worker, would be prohibited, if done in connection with someone’s status as either a worker or a person conducting a business or undertaking.

9.57 The Australian Law Reform Commission (ALRC) recently recommended the *Sex Discrimination Act* should prohibit sexual harassment in “all areas of public activity”.⁵⁶ The ALRC also recommended that the Australian Government consider whether the prohibition should be expanded further to apply “universally” — that is, to any area of life, public or private.⁵⁷ The Australian Government has not yet responded to these recommendations.

54. *Anti-Discrimination Act 1977* (NSW) s 22B(9) definition of “workplace”.

55. See, eg, *Ewin v Vergara (No 3)* [2013] FCA 1311; *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130, 144 FCR 402. These cases discuss the definition of “workplace” in the *Sex Discrimination Act*, which was the same as the ADA definition at the time.

56. Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 48.

57. Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 49.

Question 9.3: Sexual harassment in the workplace

Should the ADA adopt the *Sex Discrimination Act's* approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking? Why or why not?

Workplace-related laws also regulate sexual harassment

- 9.58 Employment laws and work health and safety laws also regulate sexual harassment. These laws are limited to the workplace.
- 9.59 Sexual harassment in the workplace is prohibited, directly or indirectly, under the *Fair Work Act 2009* (Cth) (*Fair Work Act*) and the *Work Health and Safety Act 2011* (NSW) (*WHS Act*).⁵⁸ These Acts apply to “workers” and “people conducting a business or undertaking”. These Acts cover more types of workers than the ADA currently does.
- 9.60 The *Fair Work Act* uses the *Sex Discrimination Act* definition of sexual harassment. Under the *Fair Work Act*, a person must not sexually harass a “worker” or “person conducting a business or undertaking” if the harassment occurs “in connection” with the person being either of those things.⁵⁹
- 9.61 The *Fair Work Act* also prohibits bullying at work, which involves repeated unreasonable behaviour towards a worker or group of workers in a workplace, that creates a risk to health and safety.⁶⁰ A person may apply to the Fair Work Commission for an order to stop the bullying or an order to stop the sexual harassment.⁶¹
- 9.62 The *Fair Work Act* applies to most workplaces in NSW, but it does not apply to the state public sector and local government.⁶²
- 9.63 The *WHS Act* imposes duties on people conducting a business or undertaking to:
- ensure, as far as reasonably practicable, the health and safety of their workers and others, and

58. *Fair Work Act 2009* (Cth) s 527D; *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11.

59. *Fair Work Act 2009* (Cth) s 527D(2) definition of “worker”; *Work Health and Safety Act 2011* (Cth) s 7 definition of “worker”.

60. *Fair Work Act 2009* (Cth) s 789FD(1).

61. *Fair Work Act 2009* (Cth) s 789FC, s 527F.

62. See *Industrial Relations (Commonwealth Powers) Act 2009* (NSW) s 6(c), s 6(f); *AB* [2014] FWC 6723.

- manage risks arising from hazards that may cause psychological harm.⁶³

9.64 Harassment is recognised in the SafeWork NSW code of practice on psychosocial hazards as a common hazard that may cause psychological harm.⁶⁴ SafeWork NSW also has a separate code of practice which provides guidance to workers and people conducting a business or undertaking on how to identify and manage the risks of sexual and gender-based harassment.⁶⁵

Question 9.4: Workplace-related laws regulating sexual harassment

- (1) Are workplace-related sexual harassment laws and the ADA currently working well together, in terms of the definitions of sexual harassment?
- (2) Should the ADA and workplace-related sexual harassment laws be more aligned?

Prohibiting sexual harassment in other areas of life

9.65 We heard some support for expanding the areas of life in which sexual harassment was prohibited. Options to consider included:

- prohibiting sexual harassment in any area of life, public or private
- prohibiting sexual harassment in all areas of public life, and
- expanding the areas of life protected from sexual harassment to cover all areas of life that are protected from discrimination under the ADA.

9.66 Prohibiting sexual harassment in any area of life, public or private, would make it unlawful to sexually harass a person on the street or in the home. This is the approach taken in Queensland and the Northern Territory (NT).⁶⁶ In 2022, the QHRC concluded this was operating well.⁶⁷ The ALRC also favoured this approach in its recent review of justice responses to sexual violence.⁶⁸

9.67 Arguments in favour of this approach include that it would:

- simplify and clarify the ADA, and

63. *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11.

64. *Work Health and Safety Regulation 2017* (NSW) cl 55D; SafeWork NSW, *Managing Psychosocial Hazards at Work: Code of Practice* (2021) 8.

65. SafeWork NSW, *Sexual and Gender-Based Harassment: Code of Practice* (2023).

66. *Anti-Discrimination Act 1991* (Qld) s 118; *Anti-Discrimination Act 1992* (NT) s 22.

67. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 130.

68. Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 49, [14.79]–[14.112].

- cover instances of sexual harassment that are pervasive but which the ADA does not prohibit, including sexual harassment on the street.⁶⁹
- 9.68 It may also be considered appropriate that sexual harassment is unlawful no matter which area of life or type of relationship it occurs in. However, an argument against including areas of private life is that it may be inconsistent with the ADA’s current distinction between public and private areas of life, and limitation to the public sphere only.⁷⁰
- 9.69 A second option is to prohibit sexual harassment in all areas of public life. As with the first option, this would remove the need for the ADA to specify areas of life or who is prohibited from sexually harassing who. This would be simpler than the current approach and may also eliminate any uncertainty about where harassment is unlawful.⁷¹
- 9.70 A third option is to expand the areas of life protected from sexual harassment to cover all areas of life that are protected from discrimination under the ADA. For example, registered clubs are included in the areas of life protected from discrimination, but not sexual harassment.⁷²
- 9.71 Only NSW, South Australia (SA) and Western Australia (WA) do not expressly prohibit sexual harassment in clubs. However, SA prohibits sexual harassment by a “member of a governing body of an association”, which may extend to clubs.⁷³
- 9.72 Further, WA may adopt the recommendation of the Law Reform Commission of Western Australia (LRCWA) to extend the prohibition against sexual harassment to all areas of public life that are protected from discrimination. The LRCWA considered that sexual harassment should not be tolerated in any of those areas.⁷⁴

Question 9.5: Expanding the areas of life where sexual harassment is prohibited

- (1) Should the ADA continue to limit the areas of life where sexual harassment is unlawful? Why or why not?
- (2) Should sexual harassment be unlawful in other areas of life? For example:

69. Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 6–7; NSW Council for Civil Liberties, *Preliminary Submission PAD21*, 21–22; Inner City Legal Centre, *Preliminary Submission PAD40*, 3.

70. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.17].

71. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 52.

72. *Anti-Discrimination Act 1977 (NSW)* s 20A, s34A, s 380, s 48A, s 490, s 49ZR, s 49ZYP.

73. *Equal Opportunity Act 1984 (SA)* s 87(6g).

74. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 56, [4.3.1].

- (a) areas of life that are protected from discrimination
- (b) all areas of public life, or
- (c) any area of life, public or private?

The private accommodation exception

- 9.73 The ADA prohibits sexually harassing someone while providing, or offering to provide, accommodation to them.⁷⁵ However, this does not apply to accommodation in a private household.⁷⁶
- 9.74 Only NSW completely excludes private accommodation from the prohibition on sexual harassment. While the *Sex Discrimination Act* has an exception for private accommodation, it applies only where the private accommodation is being provided by a near relative.⁷⁷
- 9.75 The ADA's sexual harassment exception is broader than the private accommodation exception that applies to discrimination (we discuss this in chapter 6). The discrimination exception only applies where:
- the person providing the accommodation is a near relative and intends to continue to reside at the premises, and
 - the accommodation provided is for no more than 6 people.⁷⁸
- 9.76 In 1999 the NSW Law Reform Commission recommended repealing the private accommodation exception for sexual harassment.⁷⁹
- 9.77 We discuss other exceptions that apply across the ADA, including to the sexual harassment protections, in chapter 7.

Question 9.6: The private accommodation exception

Should sexual harassment be prohibited in private accommodation? Why or why not? If an exception for private accommodation is required, how wide should it be?

75. *Anti-Discrimination Act 1977* (NSW) s 22G(1).

76. *Anti-Discrimination Act 1977* (NSW) s 22G(2).

77. *Sex Discrimination Act 1984* (Cth) s 4(1) definition of "near relative", s 28H.

78. *Anti-Discrimination Act 1977* (NSW) s 20(3), s 34(3), s 38N(3), s 48(3), s 49N(3), s 49ZQ(3), s 49ZYQ(3)(a)–(b).

79. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.49], rec 91.

Harassment based on protected attributes

9.78 Harassing a person based on a protected attribute is not currently prohibited under the ADA. However, attribute-based harassment is prohibited elsewhere, including in Tasmania, the NT, WA and in some federal discrimination laws.⁸⁰

Arguments for and against new prohibitions

9.79 Arguably, attribute-based harassment may already be prohibited by other means. There are instances where this conduct may be considered:

- unlawful discrimination (if for example, a person was treated less favourably based on a protected attribute)⁸¹
- vilification (if the conduct incited hatred or violence of people with that protected attribute)⁸²
- intimidation (including for example, if the conduct caused the person to fear for their safety),⁸³ or
- workplace bullying (if the conduct created a risk to health and safety).⁸⁴

9.80 However, an attribute-based approach to harassment may make it easier for people who are subjected to offensive, intimidating and humiliating treatment, based on their attributes, to make a complaint. Currently, they would need to make a discrimination or vilification complaint. But not all attribute-based harassment meets the threshold of discrimination or vilification.

9.81 Expressly prohibiting attribute-based harassment may better reflect the reality of people's experiences of harassment.⁸⁵ For example, a person of colour may experience sexual and racial harassment in the same conduct. Currently, they would need to pursue a sexual harassment claim and a separate race discrimination claim. They may decide it is easier to only pursue one claim or to not make a complaint. If the ADA prohibited attribute-based harassment, they may only need to satisfy one test.

80. *Anti-Discrimination Act 1998* (Tas) s 17(1); *Anti-Discrimination Act 1992* (NT) s 20(1)(b); *Racial Discrimination Act 1975* (Cth) s 18C; *Disability Discrimination Act 1992* (Cth) s 35, s 37, s 39; *Equal Opportunity Act 1984* (WA) s 49A(3), s 49B(2), s 49C(2).

81. *O'Callaghan v Loder* [1983] 3 NSWLR 89; *Hall v Sheiban Pty Ltd* (1989) 20 FCR 217. See also ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 90.

82. *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZE, s 49ZS, s 49ZT, s 49ZXB; *Crimes Act 1900* (NSW) s 93Z.

83. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7 definition of "intimidation", s 13.

84. *Fair Work Act 2009* (Cth) s 789FD(1).

85. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 463.

Conduct that could be considered attribute-based harassment

- 9.82 The type of conduct covered in various states, territories and federally differs. Tasmania has the broadest model, covering conduct that offends, humiliates, intimidates, insults or ridicules a person. This applies to both sexual harassment and attribute-based harassment. The only difference between attribute-based harassment and sexual harassment in Tasmania is that sexual harassment must be sexual in nature.⁸⁶
- 9.83 Part of the Tasmanian test is that a reasonable person would have anticipated that the complainant would be offended, humiliated, intimidated, insulted or ridiculed.⁸⁷
- 9.84 Other places cover a narrower range of conduct. WA limits attribute-based harassment to threats, abuse, insults or taunts.⁸⁸ Also, WA and the NT treat attribute-based harassment as a form of discrimination. This means complainants must establish that they were disadvantaged or treated less favourably because of the harassment.⁸⁹ This is a higher standard than the objective “reasonable person” standard used in Tasmania and for sexual harassment in the ADA.
- 9.85 The LRCWA recommended removing the requirement to establish disadvantage. It recommended adopting an objective standard.⁹⁰ It considered this would make it clearer that harassment is unacceptable.⁹¹
- 9.86 The *Disability Discrimination Act* does not define harassment. It has been interpreted narrowly by the courts, requiring repetitive and serious conduct.⁹² The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) found that the *Disability Discrimination Act* has been ineffective in preventing harassment, with no successful claims since 2000.⁹³

86. *Anti-Discrimination Act 1998* (Tas) s 17(1), s 17(3).

87. *Anti-Discrimination Act 1998* (Tas) s 17(1).

88. *Equal Opportunity Act 1984* (WA) s 49A(3), s 49B(2), s 49C(2).

89. *Anti-Discrimination Act 1992* (NT) s 20(1)(b), s 20(2); *Equal Opportunity Act 1984* (WA) s 49A(3)(b), s 49B(2)(b), s 49C(2)(b).

90. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 104, rec 105.

91. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) [5.2.1].

92. *McCormack v Commonwealth of Australia* [2007] FMCA 1245 [75].

93. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 318.

9.87 The *Sex Discrimination Act* requires the conduct to be “demeaning”. As discussed earlier in the chapter, this has been criticised as unnecessary.⁹⁴ The *Sex Discrimination Act* is the only discrimination law that lists factors to be considered for attribute-based harassment. These include:

- the attributes of the complainant
- any power imbalance in the relationship between the parties
- the seriousness of the conduct, and
- whether the conduct was repeated.⁹⁵

Harassment on the ground of other attributes and areas of life

9.88 Australian discrimination laws take different approaches to which attributes are protected from harassment and in which areas of life. Some align the attributes and areas with discrimination, while others are more limited.

9.89 One approach is to protect the same attributes and the same areas of life from both discrimination and harassment. Only the NT takes this approach.⁹⁶ Tasmania and the federal *Sex Discrimination Act* protect the same areas of life (but not attributes) from both harassment and discrimination.

9.90 A benefit of aligning the areas and attributes may be that it could be easier to understand when harassment and discrimination were unlawful, and it could promote consistency across the ADA.

9.91 However, some discrimination laws only protect selected attributes from harassment. The extent of the protection varies:

- In Tasmania, most attributes protected from discrimination are also protected from harassment. The exceptions are industrial activity, political and religious beliefs and activities, irrelevant criminal and medical records, and associations with people who have these or other protected attributes.⁹⁷
- Federal discrimination law protects two attributes from harassment: sex and disability.⁹⁸
- By contrast, WA only protects against harassment based on race.⁹⁹

94. Australian Discrimination Law Experts Group, Submission to the Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) [10].

95. *Sex Discrimination Act 1984* (Cth) s 28AA(2).

96. *Anti-Discrimination Act 1992* (NT) s 20(1)(b).

97. *Anti-Discrimination Act 1998* (Tas) s 16(l)–(s).

98. *Sex Discrimination Act 1984* (Cth) s 28AA; *Disability Discrimination Act 1992* (Cth) s 35, s 37, s 39.

99. *Equal Opportunity Act 1984* (WA) s 49A, s 49B, s 49C.

- 9.92 A concern with prohibiting harassment based on some attributes and not others is that it may suggest that harassing behaviour is sometimes acceptable.¹⁰⁰
- 9.93 Some discrimination laws only protect against harassment in limited areas of life. WA and the *Disability Discrimination Act* only prohibit harassment in three areas of life. This approach has been criticised. For example, the LRCWA considered that racial harassment should not be tolerated in any area of life, and recommended extending the prohibition to all areas of public life protected by its Act.¹⁰¹ Similarly, the Disability Royal Commission considered that the limited scope of the disability harassment provision is one reason why it has been ineffective.¹⁰²

Question 9.7: Attribute-based harassment

If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

100. Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 136–137.

101. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [5.2.2.1], rec 106.

102. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, “Realising the Human Rights of People with Disability”, 319. See also *Disability Discrimination Act 1992* (Cth) s 35, s 37, s 39.

10. Other unlawful acts and liability

In brief

The *Anti-Discrimination Act 1977* (NSW) (ADA) prohibits other behaviour, including victimisation and unlawful advertisements. We invite comment on the ADA's approach to these unlawful acts. We also seek your views on how liability for unlawful conduct operates under the ADA. This includes whether the use of artificial intelligence in automated decision-making challenges current understandings of liability.

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- 10.1 In previous chapters, we consider the prohibitions against discrimination, vilification and sexual harassment under the *Anti-Discrimination Act 1977* (NSW) (ADA). The ADA also makes it unlawful to:
- victimise someone for taking action under the ADA, or
 - publish advertisements that contravene the ADA.
- 10.2 In this chapter, we outline what is covered by these forms of unlawful conduct and the defences that apply to them. We ask if any changes should be made.
- 10.3 We also discuss who may be held liable for unlawful conduct under the ADA and in what circumstances. We ask whether the growing use of artificial intelligence (AI) in decision-making challenges established understandings of liability and, if so, how this could be addressed.

Victimisation

- 10.4 Victimisation occurs where someone experiences retribution or further disadvantage because they exercise their rights under the ADA. One example of exercising rights under the ADA is making a discrimination complaint.

When victimisation occurs

- 10.5 Someone would be victimised under the ADA if they were subjected to any “detriment” because they had:
- brought proceedings under the ADA
 - given evidence or information in connection with proceedings under the ADA
 - alleged that someone had done something that contravened the ADA, or
 - otherwise done anything under or by reference to the ADA.
- 10.6 Victimisation also occurs when someone is subjected to a detriment because the respondent knew that they intended to do any of these things, or suspected they had done them.¹
- 10.7 A “detriment” means any form of “disadvantage”,² loss, damage or injury.³ The detriment needs to be of some substance and not merely trivial.⁴ Examples include being:
- dismissed from a role at work⁵
 - denied opportunities at work⁶
 - excluded from a community social group,⁷ and
 - exposed to public humiliation or abuse.⁸
- 10.8 It is a defence if the allegation made under the ADA (for which someone believed they were being victimised) was false and not made in good faith.⁹

Options to expand or clarify the coverage of this prohibition

- 10.9 There are questions about whether the prohibition against victimisation should more clearly cover two other scenarios.

1. *Anti-Discrimination Act 1977* (NSW) s 50(1).

2. *Borg v Department of Corrective Services* (2002) EOC 93-198 [173].

3. *Shaikh v NSW Fire Brigades* (1996) EOC 92-808 [48].

4. *Bogie v University of Western Sydney* (1990) EOC 92-313; *Sivananthan v NSW Police Service* [2001] NSWADT 44 [40]–[41].

5. *Kolavo v Ainsworth Nominees* (1994) EOC 92-576.

6. *Borg v Department of Corrective Services* (2002) EOC 93-198.

7. *Grass v McIntosh, Leong and Auyeng* [2023] NSWCATAD 258.

8. See, eg, *Ferguson v Shoalhaven City Council* [2023] NSWCATAD 276; *Burns v Sunol* [2012] NSWADT 246; *Burns v Sunol* [2014] NSWCATAD 61.

9. *Anti-Discrimination Act 1977* (NSW) s 50(2).

Threats to victimise

- 10.10 The first scenario is where a person threatens to victimise someone. The ADA appears to require someone alleging victimisation to prove that a detriment has already occurred. By contrast, most other Australian anti-victimisation laws expressly cover threats to victimise someone.¹⁰
- 10.11 In 1999, the NSW Law Reform Commission (NSWLRC) thought that the ADA should clearly prohibit any conduct, actual or threatened, which would undermine its purposes, which include enabling people to bring complaints. The NSWLRC recommended that the ADA expressly cover a situation where the respondent threatened to victimise someone.¹¹

Victimisation that occurs for two or more reasons

- 10.12 The second scenario is where someone was victimised for two or more reasons. For instance, they were victimised both for bringing an action under the ADA and for other reasons unrelated to the ADA. Currently, the ADA does not clearly include this in the test for victimisation.
- 10.13 By contrast, the ADA is clearer when it comes to unlawful discrimination. If an act was done for two or more reasons, and one reason was unlawful discrimination, the act is taken to be done for a discriminatory reason. This applies even if this was not the dominant or substantial reason.¹²
- 10.14 However, where a person victimises someone for two or more reasons, it has been found to be sufficient that one of the “real, genuine or true reasons” for doing so was that the person was pursuing a right under the ADA.¹³

Question 10.1: Victimisation

- (1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?
- (2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

10. See, eg, *Sex Discrimination Act 1984* (Cth) s 47A(2); *Anti-Discrimination Act 1991* (Qld) s 130(1); *Equal Opportunity Act 2010* (Vic) s 104(1); *Equal Opportunity Act 1984* (WA) s 67(1).

11. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 98, [7.154].

12. *Anti-Discrimination Act 1977* (NSW) s 4A.

13. *Nicholls v Department of Education and Training (No 2)* [2009] NSWADTAP 20 [36]; *Jones v TRAD* [2013] NSWCA 389, 86 NSWLR 241; *Shaikh v NSW Fire Brigades* (1996) EOC 92-808; *Waterhouse v Bell* (1991) 25 NSWLR 99.

Unlawful advertisements

- 10.15 It is unlawful to publish, or cause to be published, an advertisement that indicates an intention to do something that is unlawful under the ADA.
- 10.16 An “advertisement” includes any notice, sign, label, circular and any similar thing. It also includes anything that is not in writing, but which conveys a message because of the form or context in which it appears. The prohibition covers publishing the advertisement by any means, including in a newspaper or periodical, by radio or television broadcast, or in a film.¹⁴
- 10.17 The maximum penalty for contravening this section is 50 penalty units (\$5500) for a body corporate or 10 penalty units (\$1100) in any other case.¹⁵
- 10.18 One issue is whether there should be a defence to this form of unlawful conduct. Under the ADA, it is a defence if a person believed on reasonable grounds that the publication of the advertisement was not an offence.¹⁶
- 10.19 Only South Australia has a similar defence.¹⁷ Queensland and Victoria have defences that the person took reasonable precautions and exercised due diligence to prevent publication.¹⁸ Other Australian discrimination laws do not provide any defences to publishing something unlawful.¹⁹

Question 10.2: Advertisements

Should it be a defence to publishing an unlawful advertisement that the person reasonably believed publication was not unlawful? Why or why not?

Liability for unlawful behaviour

- 10.20 To establish a breach of the ADA, a complainant must identify who engaged in or did the wrongful act. Duty holders under the ADA include employers, partners, educational authorities, and people who provide services or accommodation. These duty holders may be individuals, partnerships, corporations, associations or government agencies.

14. *Anti-Discrimination Act 1977* (NSW) s 51(1).

15. *Anti-Discrimination Act 1977* (NSW) s 51(2).

16. *Anti-Discrimination Act 1977* (NSW) s 51(4).

17. *Equal Opportunity Act 1984* (SA) s 103(2).

18. *Anti-Discrimination Act 1991* (Qld) s 127(2)–(3); *Equal Opportunity Act 2010* (Vic) s 183.

19. See, eg, *Sex Discrimination Act 1984* (Cth) s 86; *Discrimination Act 1991* (ACT) s 69; *Anti-Discrimination Act 1998* (Tas) s 20.

10.21 It is often possible to identify who engaged in certain conduct or made decisions. However, sometimes it can be difficult to identify the duty holder who is legally responsible under the ADA.

Forms of liability

10.22 There are several ways a duty holder may be liable for conduct or decisions that breached the ADA. These forms of liability are:

- direct or personal liability
- vicarious liability
- joint and several liability, and
- accessory liability.

10.23 One way is if an individual is a duty holder, and they engage in conduct that is prohibited by the ADA. The individual would be personally liable or responsible for their actions. This is direct or personal liability.

10.24 Another way is if the duty holder is an employer, educational authority or government. The conduct of individuals may be treated as the conduct of the employer, educational authority or government. In this instance, the duty holder may be held:

- directly liable for the conduct of an individual, generally where the individual was an officer, director, principal, agent or employee, or
- vicariously liable under the ADA for the acts of an agent²⁰ or employee²¹, unless they can prove a defence (we discuss this in the next section).

10.25 In some circumstances, the individual employee or agent and the employer or principal are both liable.²² This is joint and several liability.

10.26 Finally, any person who caused, instructed, induced, aided or permitted another person to do an act that was unlawful under the ADA will be liable.²³ This is accessory liability.

10.27 To establish accessory liability, a complainant must prove:

- a breach of the ADA occurred by a person (person A)
- another person (person B) had reason to think the breach would occur

20. See, eg, *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [43].

21. *Shellharbour Golf Club Ltd v Wheeler* [1999] NSWSC 224, 46 NSWLR 253 [30], [33]; *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [43]. See also *NSW Breeding and Racing Stables Pty Ltd v V* [2005] NSWCA 114 [25]–[33].

22. *Anti-Discrimination Act 1977* (NSW) s 53(2).

23. *Anti-Discrimination Act 1977* (NSW) s 52.

- person B had the power to prevent it, and
 - it was what person B did or failed to do that permitted the breach by person A.²⁴
- 10.28 A person may be liable in an accessorial way for conduct they could have prevented, or where they assisted, directly or indirectly, a duty holder to do an unlawful act. This includes a person who knowingly places someone in a situation where there is a real possibility that unlawful conduct will occur.²⁵
- 10.29 Accessorial liability can also be a way of holding an employee liable for unlawful discrimination against a fellow employee. For example, in one case a complainant succeeded in claims of unlawful discrimination against her employer and her supervisor. The employer was found to have breached the ADA. Further, the supervisor was found to have caused the employer to discriminate, resulting in a finding that the supervisor was liable in an accessorial way. The Tribunal then treated the employer and supervisor as jointly and severally liable.²⁶
- 10.30 These forms of liability do not override exceptions under the ADA or other immunities from liability. For example, the immunity of judicial officers performing their functions.²⁷

Question 10.3: The forms of liability

What, if any, concerns or issues are raised by the ADA's approach to the various forms of liability?

Exceptions for employers or agents

- 10.31 The ADA provides two defences for employers or principals. The onus is on the employer or principal to prove that they either:
- took all reasonable steps to prevent the agent or employee from breaching the ADA, or
 - did not authorise the agent or employee to do the act.²⁸
- 10.32 The “reasonable steps” exception to vicarious liability is common to all Australian discrimination laws.²⁹ This exception was added to the ADA at the same time as the prohibition on sexual harassment. The purpose was to align the ADA with the Sex

24. *City of Adelaide v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, 487; *Dixon v RNJ Sicame Pty Ltd* [2002] NSWADT 154 [51]; *Hollingsworth v NSW Police* [2004] NSWADT 17.

25. *Elliott v Nanda* [2001] FCA 418, 111 FCR 240 [163].

26. *Borg v Department of Corrective Services* [2002] NSWADT 42 [120]–[121].

27. See, eg, *Johnston v New South Wales* [2009] NSWADT 314 [61].

28. *Anti-Discrimination Act 1977* (NSW) s 53(1), s 53(3).

29. See, eg, *Sex Discrimination Act 1984* (Cth) s 106(2); *Discrimination Act 1991* (ACT) s 121A(3); *Equal Opportunity Act 2010* (Vic) s 110.

Discrimination Act 1984 (Cth), and to encourage employers to adopt sexual harassment grievance handling policies and procedures.³⁰

- 10.33 What steps are “reasonable” may depend on the resources and circumstances of the principal or agent. A large company may be required to take more steps than a small company.³¹
- 10.34 The employer or principal must take “all” reasonable steps, not just “some” reasonable steps.³² For instance, the mere existence of a policy or training addressing the unlawful behaviour is not necessarily enough. The policy or training must be adequate, implemented and brought to the attention of the employee or agent.³³
- 10.35 However, the ADA is the only discrimination law in Australia that includes an exception relating to unauthorised acts. Whether an act was “authorised” has been interpreted broadly:
- an act has been considered authorised if the principal or employer was aware it was likely to occur and took no action,³⁴ and
 - a principal or employer must prove they did not authorise the conduct “at any time”, not just after the unlawful act occurred.³⁵
- 10.36 In its 1999 review of the ADA, the NSWLRC recommended that the “unauthorised act” exception be removed. It said that the “reasonable steps” exception was sufficient and “achieved a practical approach” to the issue of attributed liability.³⁶

Question 10.4: The exceptions for liability

Should the ADA continue to provide two exceptions to vicarious liability (that is, the “reasonable steps” and “unauthorised acts” exceptions)? Or is a single “reasonable steps” exception sufficient?

-
30. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 20 November 1996, 6265.
31. *Johanson v Blackledge* [2001] FMCA 6 [101]; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109 [143]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 [37].
32. *Van Schoeler v Allen Taylor and Company Ltd (No 2)* [2020] FCAFC 13, 273 FCR 189 [60].
33. See, eg, *Van Schoeler v Allen Taylor and Company Ltd (No 2)* [2020] FCAFC 13, 273 FCR 189 [85]; *Caton v Richmond Club Ltd* [2003] NSWADT 202; *Richardson v Oracle Corporation Australia Pty Ltd* (2013) 232 IR 31 [158], [164].
34. *Shellharbour Golf Club Ltd v Wheeler* [1999] NSWSC 224, 46 NSWLR 253 [58]. See also *Hudson v Strathfield Golf Club* [2000] NSWADT 88 [183]; *NSW Breeding and Racing Stables Pty Ltd v V* [2005] NSWCA 114 [32]-[33].
35. *Shellharbour Golf Club Ltd v Wheeler* [1999] NSWSC 224, 46 NSWLR 253 [74].
36. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 100, [7.209]-[7.210].

Liability and artificial intelligence

- 10.37 Another issue is how liability operates when it comes to automated decision-making by AI. AI is being increasingly used to make decisions that affect people's rights, including in government services and recruitment processes.³⁷ This can result in discrimination where, for example, the data used to train the computer program was biased.³⁸
- 10.38 Decisions made by AI technologies can have limited human involvement. This could make it difficult to assign liability for any resulting unlawful discrimination.
- 10.39 One option to address this issue could be to amend the ADA to clarify the law on attributing acts to an individual or body corporate. For instance, the ADA could provide that decisions made by a computer program used by an individual or body corporate would be attributed to that individual or body corporate. Similar provisions exist in other Australian laws.³⁹
- 10.40 The onus would then be on the individual or body corporate to prove a defence. For example, a defence could include that they took all reasonable steps to prevent the unlawful conduct, such as an audit of the computer program. If the individual or body corporate was found liable, those who developed or sold the product could also be found liable for causing or assisting the employer to discriminate.⁴⁰ We discuss accessorial liability above.

Question 10.5: Liability and artificial intelligence

Does the use of AI challenge the ADA's approach to liability? If so, how could the ADA be amended to address this?

37. Australian Human Rights Commission, *Human Rights and Technology*, Final Report (2021) 35.

38. N Sheard, "Employment Discrimination by Algorithm: Can Anyone Be Held Accountable?" (2022) 45 *UNSW Law Journal* 617, 625–626.

39. *Migration Act 1958* (Cth) s 495A; *Social Security (Administration) Act 1999* (Cth) s 6A(2).

40. N Sheard, "Employment Discrimination by Algorithm: Can Anyone Be Held Accountable?" (2022) 45 *UNSW Law Journal* 617, 638.

11. Promoting substantive equality

In brief

We consider a range of mechanisms to promote substantive equality: adjustments, special measures and positive duties to prevent discrimination and other unlawful conduct. We invite views on whether (and if so, how) these mechanisms should be part of the *Anti-Discrimination Act 1977 (NSW)*.

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- 11.1 Around Australia and internationally, discrimination laws increasingly look beyond achieving formal equality, which involves treating everyone the same way. There is a focus on what more could be done to achieve substantive equality.
- 11.2 As we discuss in chapter 2, this requires an approach which extends beyond comparing the treatment of individuals, and addresses the adverse impact of broader practices, cultural norms, customs and attitudes, and unconscious bias. Addressing these barriers to equality means treating people or groups in a way that achieves equal outcomes or access to equal opportunities.
- 11.3 Currently, how the *Anti-Discrimination Act 1977 (NSW)* (ADA) seeks to address substantive equality is limited to prohibiting indirect discrimination (we discuss this in chapter 3). However, other mechanisms to promote substantive equality can be found in discrimination laws across Australia. These include:
- a requirement for duty holders to provide adjustments for some people with protected attributes

- special measures for groups who have experienced disadvantage, which allow them to be treated differently to best promote their rights, and
 - a positive duty to prevent discrimination and other unlawful conduct.
- 11.4 In this chapter, we outline these mechanisms and ask if they should be part of the ADA. We will return to issues relating to the enforcement of any new mechanisms in the second consultation paper.

Adjustments

- 11.5 Adjustments are requirements for duty holders to support people with certain attributes to participate in the community and areas where discrimination is unlawful.
- 11.6 Adjustments can come in many forms. For example, an adjustment could involve providing:
- a ramp for accessing a building
 - a machine reading software package to assist someone who is blind or vision impaired
 - a student with a uniform that corresponds with their gender identity, or
 - time off work for Sorry Business for an Aboriginal and Torres Strait Islander employee.¹
- 11.7 Adjustments are sometimes called “reasonable adjustments” or “reasonable accommodation”. Parties to the *Convention on the Rights of Persons with Disabilities*, including Australia, must take steps to ensure that “reasonable accommodation” is provided to people with disability.²
- 11.8 The ADA does not require duty holders to provide adjustments. We discuss the current model in the ADA below and ask whether it should change.

The current model in the ADA

- 11.9 As we detail in chapter 6, certain exceptions apply to discrimination based on disability in the areas of work, accommodation, education, the provision of goods and services, and the activities of registered clubs. These exceptions apply if

1. See, eg, Explanatory Statement and Human Rights Compatibility Statement, Discrimination Amendment Bill 2022 (ACT) cl 30.

2. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 2 definition of “reasonable accommodation”, arts 5, 14, 24, 27.

people with that attribute require a particular arrangement and it would impose an “unjustifiable hardship” on the duty holder to provide it.³

- 11.10 Similar exceptions apply to discrimination based on carer’s responsibilities in employment (the only protected area applicable to this attribute).⁴ All relevant circumstances are to be considered in working out if there would be unjustifiable hardship. These include:
- the nature of the benefit or detriment likely to anyone concerned
 - the effect of the person’s disability or responsibilities as a carer, and
 - the financial circumstances of the duty holder and the amount of expenditure required.⁵
- 11.11 These exceptions imply that duty holders are sometimes required to provide adjustments for people with these two attributes so they can, for instance, fulfill the inherent requirements of a job. However, there is no clear duty to provide adjustments.

Models for a new requirement to provide adjustments

- 11.12 Many preliminary submissions supported amending the ADA to include such a duty. Potential benefits could include helping to prevent discrimination, promote equality and reduce the burden on individuals to seek the adjustments to support their participation and inclusion. It might also clarify parties’ rights and obligations.
- 11.13 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) considered that a standalone duty would be consistent with Australia’s international obligations in relation to people with disability.⁶
- 11.14 If the ADA was to include a requirement to provide adjustments, other discrimination laws provide two main models for consideration.

Adding adjustments to the test for discrimination

- 11.15 The *Disability Discrimination Act 1992 (Cth)* (*Disability Discrimination Act*) provides one model. It deals with “reasonable adjustments” as part of the definition of direct and indirect disability discrimination.⁷ For example, a failure to make reasonable

3. *Anti-Discrimination Act 1977 (NSW)* s 49D(4)(b), s 49E(3)(b), s 49F(2)(b), s 49G(3)(b), s 49L(4).

4. *Anti-Discrimination Act 1977 (NSW)* s 49V(4)(b), s 49W(3)(b), s 49X(2)(b), s 49Y(3)(b).

5. *Anti-Discrimination Act 1977 (NSW)* s 49C, s 49U.

6. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report (2023)* vol 4, “Realising the Human Rights of People with Disability”, 308.

7. *Disability Discrimination Act 1992 (Cth)* s 5(2), s 6(2).

adjustments that results in a person with disability being treated less favourably may be direct discrimination.⁸

11.16 This means any consideration of adjustments only arises in the areas where discrimination is unlawful and through the definition of “discrimination”. However, there is no clear obligation to provide an adjustment to a person with disability separate from the definition of “discrimination” applying to the particular alleged unlawful conduct.⁹ A 2017 full Federal Court decision found that for the right to a reasonable adjustment under the *Disability Discrimination Act* to be enforceable, a person with disability must show that:

- they are disadvantaged by a failure to provide a reasonable adjustment, and
- their disability was a reason for the failure to provide the adjustment.¹⁰

11.17 We heard concerns that this approach has created more difficulties for people who require adjustments.

11.18 It is important to note that “reasonable adjustments” simply means any “adjustment” that does not impose unjustifiable hardship on the person who would need to make it. It is not necessary to determine what is “reasonable”.¹¹

11.19 Under the *Disability Discrimination Act*, what constitutes unjustifiable hardship depends on the circumstances, including the:

- nature of any benefit or detriment likely to be suffered
- effect of the disability, and
- financial circumstances and expenditure required by the person making the adjustment.¹²

A separate duty to provide adjustments

11.20 Another model involves a separate duty to provide adjustments. This provides that a failure to provide adjustments can itself be unlawful discrimination.

11.21 Victoria has this model, for example. There, duty holders, including employers, educational institutions and service providers, are required to make reasonable adjustments for people with disability.¹³

8. *Disability Discrimination Act 1992* (Cth) s 5(2).

9. *Purvis v New South Wales* [2003] HCA 62, 217 CLR 92 [104]; *Watts v Australian Postal Corporation* [2014] FCA 370, 222 FCR 220 [233].

10. *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 [23]–[53].

11. *Watts v Australian Postal Corporation* [2014] FCA 370, 222 FCR 220 [22].

12. *Disability Discrimination Act 1992* (Cth) s 4 definition of “reasonable adjustment”, s 11 definition of “unjustifiable hardship”.

13. *Equal Opportunity Act 2010* (Vic) s 20, s 22A, s 33, s 40, s 45.

- 11.22 Whether an adjustment is reasonable depends on the context in which the duty applies. For instance, in the employment context, an adjustment is what a person with a disability requires to “adequately” perform the “genuine and reasonable requirements” of the role.¹⁴
- 11.23 The Victorian law sets out non-exhaustive lists of factors that must be considered in determining whether an adjustment is reasonable in each of the contexts where the duty applies. In employment contexts, this includes the:
- nature of the person’s circumstances and disability
 - nature of the role
 - size and nature of the workplace, and
 - financial impact of making the adjustment.¹⁵
- 11.24 In the Australian Capital Territory (ACT), duty holders must make adjustments to accommodate someone’s “particular needs arising from a protected attribute”, as long as this does not cause unjustifiable hardship for the duty holder.¹⁶
- 11.25 The Disability Royal Commission recommended that the *Disability Discrimination Act* should have a separate duty to make reasonable adjustments.¹⁷ Other reviews have also recommended this model.¹⁸ Reasons include that it would:
- be consistent with Australia’s international obligations¹⁹
 - improve clarity about people’s rights and obligations, and
 - encourage early intervention, preventing discrimination.²⁰

Attributes that could be covered

- 11.26 The models discussed above only apply to disability discrimination. If a requirement to provide adjustments was introduced in NSW, it could also extend to other attributes.

14. *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432 [141]; *Equal Opportunity Act 2010* (Vic) s 20(1)(b)–(2), s 33(1)(b)–(2).

15. See, eg, *Equal Opportunity Act 2010* (Vic) s 20(3).

16. *Discrimination Act 1991* (ACT) s 74.

17. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 308, rec 4.26.

18. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 5.1; NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 25.

19. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 308.

20. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 122–123.

- 11.27 One approach might involve providing adjustments to anyone with any protected attribute, as required. This is the approach taken in the ACT.²¹ Similarly, the Northern Territory obliges duty holders to provide reasonable accommodation to any person who has a “special need” because of an attribute.²²
- 11.28 Alternatively, an obligation to provide adjustments could apply to certain, specified protected attributes and contexts. For example, Victoria prohibits employers from unreasonably refusing to accommodate an employee’s responsibilities as a parent or carer.²³
- 11.29 The Law Reform Commission of Western Australia (LRCWA) recommended the obligation cover, at minimum, people with needs arising from family responsibilities or carer obligations, pregnancy and breastfeeding, as well as people with disability. The LRCWA also thought the option of extending the duty to all attributes and areas of life should be considered.²⁴
- 11.30 Applying the duty to all protected attributes would allow more people to benefit from adjustments. But this could be a significant change in NSW, where duty holders may be less familiar with the concept of adjustments. Introducing a requirement to make adjustments in relation to a smaller range of attributes could give duty holders more time to prepare.
- 11.31 We discuss how a duty to make adjustments relates to inherent requirement exceptions in more detail in chapter 6.

Question 11.1: Adjustments

- (1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?
- (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?
- (3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?
- (4) What test should be used to determine the scope of, including any limits to, the obligation to provide adjustments?

21. *Discrimination Act 1991* (ACT) s 74.

22. *Anti-Discrimination Act 1992* (NT) s 24(1).

23. *Equal Opportunity Act 2010* (Vic) s 17(1), s 19(1), s 22(1), s 32(1).

24. Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 151, rec 66.

Special measures

- 11.32 “Special measures” are benefits, programs or policies that support some or all members of a disadvantaged group. They are implemented for the sole purpose of promoting substantive equality and redressing historical disadvantage. The concept comes from international human rights law.²⁵
- 11.33 Although special measures involve treating people differently, this is not considered discrimination. This is because the purpose of a special measure is to secure the advancement of the group, so they can exercise and enjoy human rights and fundamental freedoms equally with others.²⁶
- 11.34 Examples of special measures could include:
- a swimming pool located in an area with a significant Muslim population holding women-only swimming sessions to enable Muslim women to use the pool, or
 - a company in an industry in which Aboriginal and Torres Strait Islander people are under-represented developing a training program to increase employment opportunities for Aboriginal and Torres Strait Islander people.²⁷

The ADA’s approach

- 11.35 The ADA does not generally provide for special measures. Instead, it has:
- narrow “special needs” exceptions relating to race and age discrimination, and
 - processes for duty holders to seek exemptions and certifications to undertake actions that promote equal opportunity.

Special needs exceptions

- 11.36 The ADA has “special needs” exceptions to racial discrimination and vilification, and to age discrimination. The exceptions apply to anything done to provide certain people with access to facilities, services or opportunities to meet their special needs or to promote equal and improved access.²⁸ These exceptions do not promote the rights of people with other attributes.
- 11.37 The ADA has other exceptions of a similar nature. For example:

25. *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 1(4). See also *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4).

26. *Gerhardy v Brown* (1985) 159 CLR 70, 133.

27. *Equal Opportunity Act 2010* (Vic) s 12, examples.

28. *Anti-Discrimination Act 1977* (NSW) s 21, s 49ZJR.

- a duty holder can discriminate against men to give women rights or benefits relating to pregnancy, childbirth or breastfeeding, and
- educational authorities can discriminate based on race in certain situations, such as running language classes for migrants.²⁹

Exemptions

- 11.38 If a duty holder wishes to take affirmative action in relation to people with any other protected attribute, they can apply to the President of Anti-Discrimination NSW (ADNSW) for an exemption.³⁰
- 11.39 For instance, exemptions might be granted for activities that help improve access to jobs, programs, services or facilities for groups that experience discrimination. An example might be targeted jobs or recruitment programs for people with protected attributes.³¹
- 11.40 Exemptions were intended to be a transitional measure to give duty holders time to comply with the ADA.³² However, their use has increased over time. In 2023–2024, 77 exemption applications were made, of which 65 were granted. By comparison, 49 applications were made in 2018–2019, of which 35 were granted.³³
- 11.41 In assessing an exemption application, the President of ADNSW must consider:
- whether it is necessary, and appropriate or reasonable
 - whether there are non-discriminatory ways of achieving the purpose of the exemption
 - whether the applicant can take or has taken reasonable steps to avoid any adverse impact of the exemption
 - the community impact of granting the exemption, and
 - any conditions or limitations that could be imposed.³⁴

29. *Anti-Discrimination Act 1977 (NSW)* s 17(3), s 35; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.182].

30. *Anti-Discrimination Act 1977 (NSW)* s 126.

31. *Anti-Discrimination NSW, Annual Report 2022–23* (2023) 24.

32. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.124].

33. *Anti-Discrimination NSW, Annual Report 2023–24* (2024) 24; *Anti-Discrimination Board of NSW, Annual Report 2018–19* (2019) 14.

34. *Anti-Discrimination Regulation 2019 (NSW)* cl 6(1).

- 11.42 ADNSW asks applicants to provide them with information that meets these criteria, as well as background information about the applicant’s business and any anti-discrimination policies or initiatives it has in place.³⁵
- 11.43 The President has the power to vary or revoke an exemption, considering the criteria listed above.³⁶ ADNSW asks exemption-holders to provide exemption compliance reports to monitor compliance with the exemption and any conditions attached to it.³⁷

Certifications

- 11.44 An alternative process is for a duty holder to seek “certification” of a special needs program or activity. Certifications are approvals granted by the NSW Attorney General for activities with a primary purpose to promote or improve access to facilities, services or opportunities that meet the special needs of people affected by unlawful discrimination.³⁸ For example, certification has been granted to programs for women in male-dominated industries.³⁹
- 11.45 Certification provides an exception for anything done by a person in good faith for the purposes of the certified program or activity. The exception applies to discrimination based on sex, transgender grounds, marital or domestic status, disability, carer’s responsibilities and homosexuality.⁴⁰
- 11.46 Certifications are not required for programs based on race and age, which are covered by the ADA’s existing special needs exceptions.
- 11.47 Compared to exemptions, certifications are relatively rare. Between 2018–19 to 2023–24, only 23 certifications were granted.⁴¹ In 2023–24, only 5 applications were made, of which 4 were granted.⁴²

35. Anti-Discrimination NSW, “Exemptions and Certifications” (2025) <antidiscrimination.nsw.gov.au/anti-discrimination-nsw/organisations-and-community-groups/exemptions-and-certifications.html> (retrieved 4 March 2025).

36. *Anti-Discrimination Act 1977* (NSW) s 126(5).

37. Anti-Discrimination NSW, *Annual Report 2023–24* (2024) 24.

38. *Anti-Discrimination Act 1977* (NSW) s 126A(2).

39. Anti-Discrimination NSW, *Annual Report 2022–23* (2023) 38.

40. *Anti-Discrimination Act 1977* (NSW) s 126A(1).

41. Anti-Discrimination Board of NSW *Annual Report 2018–19* (2019) 14; Anti-Discrimination NSW, *ADNSW Annual Report 2019–20* (2020) 38; Anti-Discrimination NSW, *ADNSW Annual Report 2020–21* (2021) 31; Anti-Discrimination NSW, *Annual Report 2021–22* (2022) 35; *Annual Report 2022–23* (2023) 24; Anti-Discrimination NSW, *Annual Report 2023–24* (2024) 24.

42. Anti-Discrimination NSW, *Annual Report 2023–24* (2024) 24.

Concerns about the existing measures and processes

- 11.48 Many preliminary submissions raised issues about the current processes. We heard that they are:
- resource intensive for both ADNSW and for applicants⁴³
 - difficult for the public to understand due to the overlap between what is covered by each process,⁴⁴ and
 - inconsistent with the laws in all other states and territories, creating complexities for businesses operating across Australia.⁴⁵
- 11.49 One reform option, supported by many preliminary submissions, would be for the ADA to generally permit duty holders to take special measures. In 1999, the NSW Law Reform Commission (NSWLRC) also recommended a general special measures “exception” to the prohibition against discrimination.⁴⁶
- 11.50 This could avoid the need for duty holders to apply for an exemption or certification each time they wanted to take steps to advance substantive equality. It might be particularly important for employers that wish to run affirmative action-style targeted recruitment campaigns.⁴⁷

Options for a potential new “special measures” section

- 11.51 If the ADA were to generally allow for special measures, one question is how this should be framed. Sometimes, special measures are seen as “exceptions” to the prohibition on discrimination.⁴⁸ However, a better view is that they are “integral” to the meaning of the right to equality and discrimination, and not an exception to it.⁴⁹ Some discrimination laws reflect this latter view.⁵⁰

43. See, eg, Business Council of Australia, *Preliminary Submission PAD13*, 3–4; Anti-Discrimination NSW, *Preliminary Submission PAD83*, 19–20; Australian Industry Group, *Preliminary Submission PAD24*, 4; Transport for NSW, *Preliminary Submission PAD91*, 4.

44. Anti-Discrimination NSW, *Preliminary Submission PAD83*, 20.

45. Business Council of Australia, *Preliminary Submission PAD13*, 4.

46. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 49.

47. See, eg, Diversity Council Australia, *Preliminary Submission PAD14*, 2–3.

48. See, eg, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 49.

49. *Maloney v R* [2013] HCA 28, 252 CLR 168 [327].

50. See, eg, *Equal Opportunity Act 2010* (Vic) s 12; *Sex Discrimination Act 1984* (Cth) s 7D. See also ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 20.1; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 4.1.

- 11.52 Perhaps the most significant issue involves identifying the criteria that should determine what constitutes a special measure. Under international human rights law, a special measure:
- is necessary to accelerate or achieve equality
 - has a sole purpose of securing adequate advancement of certain people so that they can equally enjoy or exercise their human rights
 - does not lead to separate or unequal rights between groups, and
 - is discontinued once the objectives of the measure have been achieved.⁵¹
- 11.53 Other recent law reform reviews have recommended that the criteria for special measures in domestic discrimination laws should be consistent with international human rights law.⁵²
- 11.54 Victoria provides an example of how this could be done. The Victorian Act allows a person to take a special measure for the purpose of promoting or achieving substantive equality for members of a group with a protected attribute. It provides that, to be a special measure, the action must be:
- undertaken in good faith for achieving substantive equality
 - reasonably likely to achieve this purpose
 - a proportionate means of achieving this purpose, and
 - justified because members of the group have a particular need for assistance.⁵³
- 11.55 Both the Queensland Human Rights Commission (QHRC) and the ACT Law Reform Advisory Council supported this model.⁵⁴
- 11.56 In another approach, the NSWLRC recommended in 1999 that the following criteria should form part of a special measures “exception”:
- the purpose is not to cause detriment or disadvantage to any other person

51. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4); *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

52. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 20.2; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 116.

53. *Equal Opportunity Act 2010 (Vic)* s 12.

54. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 20.1; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 4.1

- the measure is done in good faith for the purpose of securing the advancement or protecting the welfare of certain groups
- those groups are in need of advancement or protection because they are in a position of social disadvantage or isolation (including because of historical discrimination)
- those groups are likely to accept the benefit offered by the measure
- the measure is reasonably capable of achieving its purpose, and
- the measure will not continue indefinitely unless required, or beyond a period reasonably necessary to achieve its purpose.⁵⁵

11.57 Other reviews have suggested additional criteria, including that the measure:

- does not restrict the rights of affected people, and
- should only be implemented after consultation with affected people and communities, particularly Aboriginal and Torres Strait Islander peoples.⁵⁶

The relationship with exemptions and certifications

11.58 Another issue is whether the existing exemption and certification processes should stay if the ADA provides for special measures more generally. There could be concerns about removing the exemption and certification processes.

11.59 The first relates to the removal of the oversight measures in these processes, which could be seen as important safeguards. These include:

- the ability for ADNSW or the Attorney General to deny inappropriate measures, and
- the power of ADNSW (and NCAT, in reviewing an exemption decision) to place conditions on exemptions.

11.60 There is also a risk that some measures that are currently covered by exemptions or certifications may fall outside the scope of a new special measures section. For example, some current exemptions allow certain employers to discriminate to comply with US export policies.⁵⁷

55. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A, Draft Anti-Discrimination Bill 1999, cl 68.

56. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 20.2; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 4.3.

57. Anti-Discrimination NSW, "Current Exemptions" (2025) <antidiscrimination.nsw.gov.au/anti-discrimination-nsw/organisations-and-community-groups/exemptions-and-certifications/current-exemptions.html> (retrieved 4 March 2025). See also *Re Rheinmetall Defence Australia Pty Ltd* [2022] QIRC 440; *BAE Systems Australia Ltd* [2008] VCAT 1799.

- 11.61 One option could be to keep the exemption process, even if a new section dealing with special measures is introduced. Some other Australian discrimination laws have both.⁵⁸
- 11.62 The NSWLRC also recommended this in 1999. However, the NSWLRC thought that its proposed special measures “exception” should replace the certification process. It thought this process was unnecessary and resource intensive.⁵⁹

Question 11.2: Special measures

- (1) Should the ADA generally allow for special measures? Why or why not?
- (2) If so, what criteria for a special measure should the ADA apply?
- (3) If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

A duty to prevent or eliminate unlawful conduct

- 11.63 Another mechanism to achieve substantive equality is to require duty holders to take steps to prevent or eliminate unlawful conduct, including discrimination, sexual harassment, vilification or victimisation. This goes further than making adjustments for someone, or taking special measures for protected groups, by seeking to prevent unlawful conduct.
- 11.64 Many discrimination laws in Australia impose such a duty.⁶⁰ Recent reviews have also recommended introducing positive duties to prevent unlawful conduct.⁶¹

Arguments for and against a positive duty

- 11.65 Many preliminary submissions considered that the ADA should include a positive duty to prevent unlawful conduct. Such a duty might:

58. See, eg, *Sex Discrimination Act 1984* (Cth) s 44; *Equal Opportunity Act 2010* (Vic) s 89; *Anti-Discrimination Act 1992* (NT) s 59.

59. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.139], rec 51.

60. *Equal Opportunity Act 2010* (Vic) s 15; *Anti-Discrimination Act 1992* (NT) s 18B; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1998* (Tas) s 104; *Sex Discrimination Act 1984* (Cth) s 47C. See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).

61. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, rec 4.27; Australian Human Rights Commission, *Free and Equal: Revitalising Australia’s Commitment to Human Rights*, Final Report (2023) 82–83, 92, 95; Australian Human Rights Commission, *The National Anti-Racism Framework: A Roadmap to Eliminating Racism in Australia* (2024) rec 10; Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 53.

- reduce the burden that currently falls on victims having to make a complaint to address, or stop, a specific incident of discrimination or ongoing discrimination
 - more effectively address the causes of discrimination than the current model of individual remedies, for example by requiring duty holders to change discriminatory policies
 - improve understanding of the impact of discrimination and help to change prejudiced views, and
 - help duty holders avoid the costs arising from unlawful conduct, including complaints, reduced productivity, and reputational damage.
- 11.66 On the other hand, we also heard some concerns about introducing a positive duty. These included that:
- existing duties are sufficient
 - any new duties could conflict with existing duties, and
 - any new duties could be too onerous.
- 11.67 Some NSW duty holders are already required to take steps to prevent discrimination, harassment and vilification under other laws. It could be argued that these existing duties are sufficient. In particular, NSW employers have obligations under other laws to:
- take reasonable and proportionate measures to eliminate sex discrimination, sexual or sex-based harassment, subjecting a person to a hostile workplace environment on the ground of sex, and related victimisation⁶²
 - ensure the physical and psychological health and safety of their workers by eliminating or minimising risks to health and safety, as far as is reasonably practicable,⁶³ and
 - manage psychosocial risks arising from work-related hazards that could cause psychological harm by eliminating or minimising reasonably foreseeable hazards and reviewing measures taken to ensure they are effective.⁶⁴
- 11.68 On the other hand, it could be said these existing duties are too limited because:
- they only apply to employers, not other duty holders under the ADA, and
 - the work health and safety focus of these duties does not align with the purpose of discrimination laws.⁶⁵

62. *Sex Discrimination Act 1984* (Cth) s 47C(1)–(4).

63. *Work Health and Safety Act 2011* (NSW) s 17, s 19.

64. *Work Health and Safety Regulation 2017* (NSW) cl 34–35, cl 37–38, cl 55A definition of “psychosocial hazard”, cl 55B definition of “psychosocial risk”, cl 55D.

65. Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 73.

- 11.69 A related concern is the risk that a new a positive duty in the ADA could conflict with these existing duties. It may not be clear to employers which duty they need to comply with, or how they can comply with multiple duties. However, some argued that new duties could work in a complementary and “mutually reinforcing” way alongside existing duties.⁶⁶ Careful legislative drafting would be needed to ensure this occurred.
- 11.70 Another concern is that positive duties could place a high regulatory burden on duty holders. There were different views on this. For example, some consider that a positive duty may decrease the burden on employers by reducing their risk of being found vicariously liable for discrimination or other unlawful conduct. As we discuss below, the regulatory burden could be managed by carefully framing the scope and requirements of the positive duty.
- 11.71 If NSW was to introduce a positive duty to prevent unlawful conduct, questions would arise about what it required of duty holders; the conduct, protected attributes and protected areas the duty should cover; and who the duty holders should be. We set out some options below.

Options for a positive duty

What the duty could require

- 11.72 The most common approach in other Australian discrimination laws is to require duty holders to take “reasonable and proportionate” steps to prevent or eliminate unlawful conduct. For example, this could require duty holders to:
- implement policies to prevent unlawful behaviour
 - provide training on ADA obligations
 - develop inclusion targets
 - keep records in incident management and complaints systems,⁶⁷ and
 - review policies and procedures, develop action plans and collect and monitor data.⁶⁸
- 11.73 Victoria’s discrimination law provides an example. Anyone who has a duty not to engage in discrimination, sexual harassment or victimisation must take reasonable

66. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 480; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 230.

67. NSW Nurses and Midwives’ Association, *Preliminary Submission PAD50*, 4.

68. See, eg, Explanatory Statement and Human Rights Compatibility Statement, *Discrimination Amendment Bill 2022 (ACT)* cl 30; Explanatory Memorandum, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)* [14].

and proportionate measures to eliminate that conduct as far possible. What is “reasonable and proportionate” will depend on:

- the size, nature and circumstances of the duty holder’s business
- the duty holder’s resources
- the duty holder’s business and operational priorities, and
- the practicability and cost of the measure.⁶⁹

11.74 This approach requires meaningful action. However, the requirements are tailored to the circumstances of the duty holder. For instance, a small community organisation may only be required to ensure that its staff are aware of its commitment to treat them fairly, and of how compliance will be managed. By contrast, a large company will have to undertake a compliance assessment, develop a compliance strategy and undertake regular monitoring.⁷⁰

Types of conduct the duty should address

11.75 The ADA prohibits discrimination, harassment, vilification and victimisation. A positive duty to prevent unlawful conduct could address some or all of this conduct.

11.76 Positive duties in other discrimination laws across Australia cover discrimination and sexual harassment. Some also cover vilification,⁷¹ and some cover victimisation.⁷² Both the QHRC and LRCWA concluded that positive duties should not be confined to only some forms of prohibited conduct.⁷³

11.77 The duty in the *Sex Discrimination Act* covers discrimination and other forms of conduct related to sex.⁷⁴ Some of this sex-based conduct is not currently prohibited by the ADA.⁷⁵ We discuss whether this conduct should be prohibited in chapter 9.

Coverage of attributes, areas and duty holders

11.78 If the ADA were to adopt a positive duty, there are questions about what protected attributes and areas it should cover, as well as who the duty holders should be.

69. *Equal Opportunity Act 2010* (Vic) s 15(6).

70. *Equal Opportunity Act 2010* (Vic) s 15, examples.

71. *Discrimination Act 1991* (ACT) s 75.

72. *Anti-Discrimination Act 1992* (NT) s 18B; *Equal Opportunity Act 2010* (Vic) s 15; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131(I) (uncommenced).

73. Queensland Human Rights Commission, *Building belonging: Review of Queensland’s Anti-Discrimination Act 1991*, Report (2022) 230; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 241.

74. *Sex Discrimination Act 1984* (Cth) s 47C.

75. *Sex Discrimination Act 1984* (Cth) s 28AA, s 28M.

- 11.79 Most positive duties in Australian discrimination laws apply to all protected attributes.⁷⁶ Federal positive duties do not exist for all protected attributes, however the Australian Human Rights Commission (AHRC) recommended they should.⁷⁷ Other law reviews also supported covering all protected attributes, stating this would avoid creating a “hierarchy” of attributes and better recognise intersectional discrimination.⁷⁸
- 11.80 In terms of the areas of life covered, some discrimination laws apply the duty to unlawful conduct in all areas of public life in which discrimination or other unlawful conduct is prohibited.⁷⁹ Other discrimination law reviews have also recommended introducing positive duties across all areas of public life in which discrimination or other unlawful conduct is prohibited.⁸⁰
- 11.81 A related issue is who the duty should apply to. In Victoria and the NT, it applies to anyone who has an obligation not to engage in discrimination, sexual harassment or victimisation.⁸¹ The AHRC also recommended introducing a duty that applies to all duty holders under discrimination laws.⁸²
- 11.82 Currently, the positive duty under the *Sex Discrimination Act* is limited to employers and anyone conducting a business or undertaking. This includes sole traders, not-for-profit organisations that engage and pay staff, government departments and companies.⁸³

76. *Equal Opportunity Act 2010* (Vic) s 15(2); *Anti-Discrimination Act 1992* (NT) s 18B(2); *Discrimination Act 1991* (ACT) s 75(2); *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).

77. Australian Human Rights Commission, *Free and Equal: Revitalising Australia’s Commitment to Human Rights*, Final Report (2023) 82, 92, 95.

78. Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 228.

79. *Equal Opportunity Act 2010* (Vic) s 15(1)–(2); *Anti-Discrimination Act 1992* (NT) s 18B(1)–(2); *Discrimination Act 1991* (ACT) s 75(1)–(2). See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).

80. Australian Human Rights Commission, *Free and Equal: Revitalising Australia’s Commitment to Human Rights*, Final Report (2023) 82–83, 95; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 15.2; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 125.

81. *Equal Opportunity Act 2010* (Vic) s 15(1); *Anti-Discrimination Act 1992* (NT) s 18B(1).

82. Australian Human Rights Commission, *Free and Equal: Revitalising Australia’s Commitment to Human Rights*, Final Report (2023) 81–83.

83. *Sex Discrimination Act 1984* (Cth) s 47C(1), s 4 definition of “person conducting a business or undertaking”; *Work Health and Safety Act 2011* (Cth) s 5; Australian Human Rights Commission, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984* (Cth) (2023) 15.

11.83 Similarly, the ACT applies a positive duty to organisations and businesses, and people with “organisational management responsibility” for these bodies. This includes, for example, sole traders, small business owners or university chancellors. This includes people who are responsible for controlling or directing an organisation or business, but not general employees or mid to low-level managers.⁸⁴

A duty to promote equality

11.84 Another option could be to introduce a public sector equality duty. The Australian examples, discussed above, apply to government entities (such as an employer which is a government department) and to non-government actors, such as privately owned businesses.

11.85 However, the UK has a broader “equality duty” that applies only to public authorities.

11.86 The equality duty goes beyond taking steps to eliminate unlawful discrimination. It shapes the development of public policy decisions. When exercising their functions, public authorities must have due regard to the need to:

- eliminate discrimination, harassment and victimisation
- advance the equality of opportunity between people with a relevant protected attribute and those without it, and
- foster good relations between people with a relevant protected characteristic and those without it.⁸⁵

11.87 Public authorities must publish information annually to demonstrate their compliance with the duty. They must also publish specific and measurable objectives for meeting their obligations.⁸⁶

11.88 Victoria has a similar, but narrower, duty. Victorian public authorities must consider and promote gender equality, and take necessary and proportionate action towards achieving it.⁸⁷

84. *Discrimination Act 1991* (ACT) s 75(1), s 75(6) definition of “organisational management responsibility”; Explanatory Statement and Human Rights Compatibility Statement, *Discrimination Amendment Bill 2022* (ACT) cl 30. See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).

85. *Equality Act 2010* (UK) s 149(1). See also *Northern Ireland Act 1998* (UK) s 75(2).

86. *Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017* (UK) reg 4, reg 5.

87. *Gender Equality Act 2020* (Vic) s 7.

- 11.89 Drawing on the UK and Victorian examples, the Disability Royal Commission recommended that all Commonwealth entities should be under a duty to promote disability equality and inclusion.⁸⁸
- 11.90 A potential benefit of this approach is that, by just focusing on public authorities, it avoids imposing onerous obligations on private actors. On the other hand, this could also mean that the duty's ability to prevent discrimination is limited.
- 11.91 However, it would also be possible to introduce both:
- a duty to eliminate unlawful conduct that applies to private and public actors, and
 - a broader UK-style duty to promote equality, that only applies to public authorities.

Question 11.3: A positive duty to prevent or eliminate unlawful conduct

- (1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?
- (2) If so:
 - (a) What should duty holders be required to do to comply with the duty?
 - (b) What types of unlawful conduct should the duty cover?
 - (c) Who should the duty holders be?
 - (d) What attributes and areas should the duty apply to?

88. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, "Realising the Human Rights of People with Disability", rec 4.12.

Appendix A:

Preliminary submissions

- PAD01** Professor Cathy Sherry, 20 July 2023
- PAD02** Intersex Human Rights Australia, 24 July 2023
- PAD03** Confidential, 2 August 2023
- PAD04** Mark Seymour, 8 August 2023
- PAD05** Shooters Union NSW, 19 August 2023
- PAD06** Councillor Nathan Zamprogno, 28 August 2023
- PAD07** Equality Australia, 31 August 2023
- PAD08** Dr Jason M Chin, 7 September 2023
- PAD09** M E Browne, 9 September 2023
- PAD10** Confidential, 15 September 2023
- PAD11** Confidential, 22 September 2023
- PAD12** Australian Christian Lobby, 22 September 2023
- PAD13** Business Council of Australia, 26 September 2023
- PAD14** Diversity Council Australia, 26 September 2023
- PAD15** David A W Miller, 26 September 2023
- PAD16** National Catholic Education Commission, 27 September 2023
- PAD17** Dementia Australia, 27 September 2023
- PAD18** Disability Advocacy NSW, 27 September 2023
- PAD19** Independent Education Union of Australia NSW/ACT Branch, 27 September 2023
- PAD19A** Independent Education Union of Australia NSW/ACT Branch, 17 April 2024
- PAD20** Shooting Industry Foundation Australia, 27 September 2023
- PAD21** NSW Council for Civil Liberties Inc, 28 September 2023
- PAD22** Amazon, 28 September 2023
- PAD23** Australian National Imams Council, 28 September 2023
- PAD24** Australian Industry Group, 28 September 2023
- PAD25** Freedom for Faith, 28 September 2023
- PAD26** Adventist Schools Australia, Australian Association of Christian Schools, Christian Schools Australia, 28 September 2023

- PAD27** NSW Aboriginal Women’s Advisory Network, 28 September 2023
- PAD28** Coalition Against Caste Discrimination, 29 September 2023
- PAD29** Associate Professor Mark Fowler, 29 September 2023
- PAD30** Rainbow Labor NSW, 29 September 2023
- PAD31** Law Society of NSW, 29 September 2023
- PAD32** UNSW Allens Hub for Technology, Law and Innovation, 29 September 2023
- PAD33** Australian Feminists for Women's Rights, 29 September 2023
- PAD34** Falun Dafa Association of Australia Inc, 29 September 2023
- PAD35** Kingsford Legal Centre, 29 September 2023
- PAD36** Rainbow Families, 29 September 2023
- PAD37** Catholic Archdiocese of Sydney, 29 September 2023
- PAD38** Marque Lawyers Pty Ltd, 29 September 2023
- PAD39** National Justice Project, 29 September 2023
- PAD40** Inner City Legal Centre, 29 September 2023
- PAD41** NSW Ombudsman, 29 September 2023
- PAD42** Mental Health Carers NSW Inc, 29 September 2023
- PAD42A** Mental Health Carers NSW Inc, 30 September 2024
- PAD43** LGB Alliance Australia, 29 September 2023
- PAD44** ACON, 29 September 2023
- PAD45** Fair Game Australia, 29 September 2023
- PAD46** Associate Professor Bruce Baer Arnold and Associate Professor Wendy Bonython, 29 September 2023
- PAD47** Australian Muslim Advocacy Network, 29 September 2023
- PAD48** Confidential, 29 September 2023
- PAD49** Law Society of NSW Young Lawyers Human Rights Sub-Committee, 29 September 2023
- PAD50** New South Wales Nurses and Midwives' Association, 29 September 2023
- PAD51** Cleaning Accountability Framework, 29 September 2023
- PAD52** NSW User’s and Aids Association, 29 September 2023
- PAD53** People with Disability Australia, 29 September 2023
- PAD54** UTS, Jumbunna Institute for Indigenous Education and Research, 29 September 2023

- PAD55** Women’s Legal Service NSW, 29 September 2023
- PAD56** Presbyterian Church of Australia in New South Wales, 29 September 2023
- PAD57** Respect Inc, 29 September 2023
- PAD58** Hindu Council of Australia, 29 September 2023
- PAD59** Professor Margaret Thornton, 29 September 2023
- PAD60** HIV/AIDS Legal Centre, Positive Life NSW, 29 September 2023
- PAD61** Adrian Buckley, 29 September 2023
- PAD62** Australian Lawyers for Human Rights
- PAD63** Racial Justice Centre Ltd, 29 September 2023
- PAD64** Helena Chui, 29 September 2023
- PAD65** Family First Party Australia, 2 October 2023
- PAD66** Neophile, 3 October 2023
- PAD67** Church of Scientology Australia, 3 October 2023
- PAD68** Vision Australia, 3 October 2023
- PAD69** Australian Human Rights Commission, 4 October 2023
- PAD70** Full Stop Australia, 4 October 2023
- PAD71** Carers NSW, 4 October 2023
- PAD72** Feminist Legal Clinic Inc, 5 October 2023
- PAD73** Community Legal Centres NSW, 6 October 2023
- PAD74** Scarlet Alliance, Australian Sex Workers Association, 6 October 2023
- PAD75** Family Advocacy, 6 October 2023
- PAD76** Australian Retailers Association, 9 October 2023
- PAD77** Sex Workers Outreach Project NSW, 9 October 2023
- PAD78** Office of the Advocate for Children and Young People, 9 October 2023
- PAD79** Equal Pay for Equal Play NSW, 11 October 2023
- PAD80** Catholic Schools NSW, 12 October 2023
- PAD81** Sydney University Postgraduate Representative Association, 13 October 2023
- PAD82** Public Interest Advocacy Centre, 13 October 2023
- PAD83** Anti-Discrimination NSW, 13 October 2023
- PAD84** Australian Discrimination Law Experts Group, 13 October 2023
- PAD85** NSW Greens, 16 October 2023

- PAD86** New South Wales Bar Association, 18 October 2023
- PAD87** Legal Aid NSW, 20 October 2023
- PAD88** Catholic Women's League Australia, New South Wales Inc, 20 October 2023
- PAD89** Anonymous, 23 October 2023
- PAD90** Unions NSW, 25 October 2023
- PAD91** Transport for NSW, 31 October 2023
- PAD92** J Grass, 28 November 2023
- PAD93** The Sussan Group, 20 March 2024
- PAD94** Michael Page International, 16 April 2024
- PAD95** Aber Karhani, 2 November 2024
- PAD96** Philip Sacks, 28 November 2024

Appendix B:

Preliminary consultations

Australian Discrimination Law Experts Group (PCAD01)

29 August 2023

Dr Alice Taylor

Associate Professor Anne Hewitt

Professor Beth Goldblatt

Liam Elphick

Peta Spyrou

Dr Robin Banks

Professor Simon Rice OAM

Professor Margaret Thornton

Anti-Discrimination New South Wales (PCAD02)

20 November 2023

Helen McKenzie (President)

Anti-Discrimination New South Wales staff workshop (PCAD03)

5 December 2023

NSW Civil and Administrative Tribunal (PCAD04)

20 December 2023

Justice Lea Armstrong, President

Judge Susanne Cole (Deputy President and Division Head of Administrative and Equal Opportunity Division and Occupational Division)

Theresa Simon (Principal Member)

NSW Civil and Administrative Tribunal (PCAD05)

17 March 2025

Justice Lea Armstrong, President

Judge Rashelle Seiden SC (Deputy President and Division Head of Administrative and Equal Opportunity Division and Occupational Division)

Acting Judge Nancy Hennessy (Deputy President)