AUSTRALIAN EDUCATION UNION
NEW SOUTH WALES TEACHERS FEDERATION BRANCH

SUBMISSION TO

NSW LAW REFORM COMMISSION

ON

REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW) - UNLAWFUL CONDUCT

Authorised by

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Introduction

The Australian Education Union New South Wales Teachers Federation Branch (the Federation) represent teachers, executives and principals working in NSW public preschools, primary and secondary schools, schools for specific purposes (SSPs); teachers working in consultant/adviser positions; teachers, head teachers and managers working for TAFE NSW; and teachers and correctional education officers working for Corrective Services NSW.

Among the objects of the Federation are the causes of upholding and improving our members' industrial and other interests and the interests of public education. Federation policy on these interests is developed and achieved through its democratic decision-making processes. These interests and policy-development processes are reflected in the rules which outline the objects of Federation, which include:

> "*To uphold the rights and to foster, protect and improve the rights and interests of members industrially and otherwise*" (AEU Rules, r.4(1));
>
> "*To formulate policies through the democratic involvement of members in the decision-making processes of the Union*" (AEU Rules, r.4(6)); and
>
> "*To foster, protect and promote the interests of government and public education including kindergarten and pre-school education, infants and primary education, secondary education, technical and further education, education at universities and colleges of advanced education, and recurrent education*" (AEU Rules, r.4(7)).

Federation welcomes the opportunity, which is provided by the NSW Law Reform Commission, to make this submission to the *Review of the Anti-Discrimination Act 1977: Unlawful Conduct*.

This opportunity is welcomed not only because our members' work aims to optimise academic outcomes for all children, young people and adult learners: their work also promotes public education, which is accessible to all without exclusion, as an agent for social cohesion. The dual social benefits of academic progress and social cohesion through public education have been noted in the *Report of the 'Vinson Inquiry'* into the provision of public education in NSW:

> "*At the general level, public education has long aspired to provide all children with an equal opportunity to cultivate their talents to the limits of their individual abilities. It has also aspired to be a force for social cohesion, for building mutual understanding between people of different ethnic, religious, vocational and socio-economic backgrounds. This disposition towards social cohesion has advantaged Australian society in the past, by contributing to peaceful co-existence of different groups and the maintenance of social arrangements and communal services that help to preserve the dignity of all Australians…the joint education of young people of diverse backgrounds provides a most helpful basis for fostering mutual understanding and tolerance"* (Vinson, Esson, Johnston, 2002, page 118).

In these contexts, Federation's responses to the consultation paper of the NSW Law Reform Commission and its Terms of Reference will focus on the areas of public life involving work and education.

1. **Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards**

   Federation refers the NSW Law Reform Commission to its various responses to other terms of reference. This is to prevent duplication in this submission. However, at this point, Federation supports modernisation of the Anti-Discrimination Act by way of modern terminology which is less offensive and more respectful of persons with protected attributes. It also supports harmonisation with similar Commonwealth protections.

2. **Whether the range of attributes protected against discrimination requires reform**

   AND

3. **Whether the areas of public life in which discrimination is unlawful should be reformed**

   Federation will refer to the range of protected attributes in the areas of public life involving work and education.

   Age

   Part 4G of the *Anti-Discrimination Act* (the Act) protects the attribute of age from unlawful discrimination.

   The scope of the protected attribute extends to the age of the aggrieved person or their relative/associate (section 49ZYA(1)) and to the person's "age group" (section 49ZYA(2)).

   Recommendation 1

   Federation does not propose any changes to the Anti-Discrimination Act's:
   - **expression of age as a protected attribute**
   - **definition of the protected attribute of age.**

   This does not mean that Federation members have not been raising their concerns of discrimination in the workplace based on the attribute of age under the Act.

   The teaching workforce in NSW is ageing. According to the NSW Public Service Workforce Profile report (NSW Public Service Commission, 2023) the average age in the Teaching Service is 42 years. Additionally, in 2023, approximately 34.5% of permanently employed teachers in the NSW Teaching Service were aged 50+ years (NSW Government, 2023). Across the NSW public service, the average age at which employees retire has risen from 62 years in 2014 to 65 years in 2023 (NSW Public Service Commission, 2023). For teachers across Australia, the average age at which retirement has been taken has increased from 64.5 years in 2020-21 to 65.0 years in 2022-23 (Australian Bureau of Statistics, 2024).

   Federation continues to be concerned about the additional scrutiny of work performance which is reported by older employees in the teaching profession. This also includes their reports of declined requests or limited access to opportunities for training, promotion and relieving in higher duties based on age. These reports underscore the importance of maintaining section 49ZYB of the *Anti-Discrimination Act*:

   " 49ZYB Discrimination against applicants and employees

   (1) It is unlawful for an employer to discriminate against a person on the ground of age-

(a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or

(b) in determining who should be offered employment, or

(c) in the terms on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of age-

(a) in the terms or conditions of employment that are afforded to the employee, or

(b) by denying or limiting access to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or

(c) by dismissing the employee or subjecting the employee to any other detriment."

Carer's responsibilities

Part 4B of the Act protects a person's attribute of carer's responsibilities from discrimination. Under section 49S, the Act covers "the person's responsibilities to care for or support":

- their child or step-child (regardless of age) who is "wholly or substantially dependent…[and] in need of care and support"
- a child or adult "who is in need of care and support" by the person who is an authorised carer, a guardian or who has parental responsibility under legislation
- "any immediate family member" who is a spouse or former spouse, a grandchild or step-grandchild, a parent or step-parent, a grandparent or step-grandparent or a brother/sister or step-brother/sister of the person or of a spouse or former spouse of the person.

Federation notes that the *Property (Relationships) Act 1984* applies to section 49S of the *Anti-Discrimination Act* to extend the definition of spouse and step-child/step-grandchild to de facto relationships.

However, the scope of the *Carer's (Recognition) Act 2010* goes further than section 49S of the *Anti-Discrimination Act*. The former Act requires public sector agencies, for example, to consult carers on policy-development on carers under section 7. Carers are defined as follows, under section 5 of the former Act, in a manner which does not directly refer to any particular family relationship:

> "*an individual who provides ongoing personal care, support and assistance to any other individual who needs it because that other individual:*
> *(a) is a person with disability within the meaning of the Disability Inclusion Act 2014, or*
> *(b) has a medical condition (including a terminal or chronic illness), or*
> *(c) has a mental illness, or*
> *(d) is frail and aged*."

Additionally, Federation notes that section 49S' recognition of family relationships as the basis of carer's responsibilities under the Anti-Discrimination Act does not clearly extend to a societal intersection with the protected attribute of race. Kinship responsibilities of Aboriginal people and Torres Strait Islander people extend carer's responsibilities to those in a kinship relationship based on cultural and societal connections.

Recommendation 2

Federation proposes that the expression and the protection of the attribute of "responsibilities of a carer" (under section 49S of the *Anti-Discrimination Act)* should be extended to include carers under the *Carer's (Recognition) Act 2010* and relationships of kinship who have responsibilities of care in our current society.

Federation also notes that its members from diverse family structures have reported less favourable treatment in the workplace. This includes on account of being:

- a single parent
- a younger or older parent than others
- a LGBTIQA+ parent
- a parent of many children
- **not** presently being a parent.

Disability

Section 4 of the Anti-Discrimination Act defines the attribute of "disability" as follows:

> "***disability*** *means—*
>
> *(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*
>
> *(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."*

Additionally, section 49A of the Act recognises that disability includes past, present and presumed disability.

The Act also extends the definition of disability to having a dog (for vision, mobility or hearing needs), a palliative or therapeutic device or an interpreter, reader, assistant or carer providing such a service (sections 49B(3) and 49B(3A)).

Federation notes that the current definition of disability in the Act is based on a medical model of disability. This is evident in its focus on deficits in terminology such as "disorder', "disfigurement" and "disturbed".

Federation has developed its policy on the education of students with disabilities beyond a medical model of disability. Instead, Federation has adopted a social and human rights basis for its policy on the education of students with disability, which focuses on optimising individual and social outcomes. This is reflected in Federation's Annual Conference decision for 2014 entitled *Special Education Policy* (NSW Teachers Federation, 2014):

> "*Federation affirms the notion of social inclusion and defines a socially inclusive public education system as one where all students, irrespective of their abilities and backgrounds, have the opportunity to participate in quality education, with equality of access to broad inclusive curriculum and the necessary support to fulfil their human potential. Federation recognises that our collective future wellbeing and prosperity depends on the critically important work and investment in the pre-school and early primary school years via early intervention strategies, to enable the healthy development of children and families*."

While the current medical model is broad enough to include physical, cognitive, mental impairments and illnesses, Federation supports the inclusion of social and human rights terminology from the Convention on the Rights of Persons with Disabilities (CRPD) in the expression of disability. CRPD language would be less offensive and support better understanding of people with disabilities. This could be achieved by including a reference to the impact of the impairment or the functional limitation on the person's equal access to social interaction and/or human rights.

Recommendation 3

Federation supports the inclusion of CRPD terminology in the definition of disability in the Act, through references to the impact of the impairments or the functional limitations on the enjoyment of full and equal social interaction and/or human rights.

The medical information of an individual should remain confidential in the workplace and in education. Disclosure of medical information on present disabilities should be on a need-to-know basis, to facilitate adjustments and accommodations and to attract funded supports. This may be the case for students with Autism and/or Attention Deficit Hyperactive Disorder, for example, to facilitate measures to enable the student's access to education on an equal basis with others.

However, discrimination in the workplace on the basis of genetic information, such as information about predispositions to illnesses or medical conditions, should also be protected under the *Anti-Discrimination Act.* This is because there is no present disability and no currently unjustifiable hardship for the employer. Additionally, there is no evidence that the employee cannot currently undertake the duties assigned notwithstanding the genetic information.

Accordingly, the extension of the definition of disability to disabilities "it is thought a person will have in the future (whether or not the person in fact will have the disability)", under section 49A(d) of the *Anti-Discrimination Act*, should be noted. However, for clarity, protection against genetic information discrimination should be expressly stated in the Act. Federation has no particular preference for including that protection as a new stand-alone attribute under the Act or by its express inclusion in the definition of disability itself.

Recommendation 4

Federation supports, but has no particular preference, for protection from genetic information discrimination, either through creation of a new attribute or by inclusion in the definition of disability in the *Anti-Discrimination Act.*

Federation also notes that discrimination based on disability is not unlawful, under section 49P of the *Anti-Discrimination Act,* for the protection of public health from infectious diseases.

However, the accountabilities and time limitations for public health orders issued by the Minister for Health under the Public Health Act must be upheld. These accountabilities and limitations must continue to guard against the marginalisation and the risk of psychological harm to individuals with a disability, a chronic illness or a mental health condition. There must continue to be evidence-informed decision-making, consideration of alternative reasonable adjustments and review mechanisms/sunset periods on public health orders to protect individuals with disabilities across all contexts.

Recommendation 5

While section 49P of the Act should continue to allow the public health exception to disability discrimination, the accountabilities and time limitations for public health orders issued under the *Public Health Act* must be upheld.

Homosexuality

The *Anti-Discrimination Act,* in Part 4C, prohibits discrimination and vilification on the basis of "homosexuality". Homosexuality is defined, in section 4, as "male or female homosexual". Section 49ZF extends this to persons who are or who are thought to be, even if they are not, homosexual.

Federation notes that the current definition of the protected attribute in section 4 is narrow. As such, it excludes other sexualities within NSW communities from protection under the law. The need to reform the protected attribute is recognised in an Annual Conference decision of Federation in 2022 (NSW Teachers Federation, 2022):

> *"Social attitudes towards LGBTQIA+ people have changed significantly in Australia over the past four decades. There is much evidence to suggest that acceptance of people of diverse sex, sexualities and genders has also improved over this time and yet sadly discrimination, violence, and harassment of LGBTQIA+ people continue. Research confirms that people who are, or are perceived to be, lesbian, gay, bisexual, transgender, intersex, and gender non-conforming experience disproportionate levels of violence and harassment compared to the general population. Legal equality has improved but significant issues in the law still remain, particularly for transgender and intersex people.*
>
> *"Research also tells us that a significant proportion of this harassment and violence occurs in schools. Even young children have been shown to express negative understandings about the LGBTIQA+ community; some using homophobia and other bigotries and prejudices as a powerful way to marginalise, harass or ostracise other children.*

The current expression of homosexuality as a protected attribute should be extended to include a broader concept of sexual orientation including bisexuality (people who are attracted to both the same gender and to the opposite gender), asexuality and pansexuality.

Accordingly, Federation's view is that the term "homosexual" is outdated and narrow. It excludes from protection people of a number of other sexual orientations who also experience discrimination based on their sexuality (such as asexuality, bisexuality and pansexuality). Federation supports a change to the definition of the attribute itself.

Recommendation 6

Federation supports a change in the expression and definition of the protected attribute of "homosexuality" under the *Anti-Discrimination Act*, so that the term "sexual orientation" is used instead of "homosexuality". A new definition should include coverage of same-gender attracted people, while extending protection under the law to other forms of sexual orientation including bisexual, asexual and pansexual persons.

Protection of the attribute of "sexual orientation" is clearly still necessary in the workplace. Federation members regularly report to Federation their experience of discrimination on the basis of sexual orientation. This includes parental requests for children to be removed from a gay teacher's class, to being overlooked for professional opportunities, advancements or employment.

Marital or domestic status

Section 39 of the Anti-Discrimination Act protects against discrimination on the basis of "marital status". This is defined in section 4 as follows:

> "*the status or condition of being -*
>
> *(a) single,*
>
> *(b) married,*
>
> *(c) married but living separately and apart from one's spouse,*
>
> *(d) divorced,*
>
> *(e) widowed, or*
>
> *(f) in cohabitation, otherwise than in marriage, with a person of the opposite sex".*

Federation supports the expansion of this definition to recognise other forms of relationships which do not involve a marriage or a de facto relationship between persons of the opposite sex living together. Other relationships which are recognised in industrial instruments in the NSW public sector should also be protected, including former de facto partners and de facto partners without reference to gender of the partners. These are recognised, for instance, in "SECTION 52(1) DETERMINATION NO 1 OF 2024" on paid parental leave (NSW Premier's Department, 2024). Accordingly, people in these relationships should also be protected from discrimination under the *Anti-Discrimination Act.*

Recommendation 7

The expression and definition of the protected attribute "marital status" and/or "domestic status" should be amended to the term "relationship status". Additionally, the list of relationships which should be legally protected from discrimination should be extended to include:

- **de facto partners (of the same or of the opposite gender) who live separately,**

- **de facto partners of the same gender who live together**
- **civil partnerships and**
- **surviving de facto partners (of the same or of the opposite gender) where there has been a death.**

Race

Part 2 of the *Anti-Discrimination Act* protects against discrimination and vilification on the basis of "race". Race is defined in section 4 as including "colour, nationality, descent and ethnic, ethno-religious or national origin".

Federation notes that the following groups are not expressly included in the definition of the protected attribute, though, subject to consultation, they should be considered for inclusion:

- Aboriginal peoples
- Torres Strait Islander peoples
- Caste, that is the socio-religious class system of South Asian background people who are living in Australia

Federation notes the adverse impact which disinformation and the incitement of hatred, on the basis of race, has on individuals.

Extending the definition of race to include the above groups is a legislative measure which may facilitate social cohesion and the full participation in society of people of different communities. This would give effect to Federation's policy on Aboriginal Education (NSW Teachers Federation, 2024) for children and their families in their participation in education:

> "*Our public education settings must successfully create a culturally safe environment whereby Aboriginal and Torres Strait Islander students and their community feel respected and acknowledged and where their wellbeing and identity is strengthened and reinforced. The establishment of such an environment is a prerequisite within these institutions for Aboriginal and Torres Strait Islander students and their communities to achieve improved educational outcomes.*
>
> *"It is the government's duty to provide quality, well-funded public educational and community programs that allow public preschools, schools and TAFE colleges to continually improve outcomes for Aboriginal and Torres Strait Islander students. The success of preschools, schools, and TAFE colleges to achieve the outcomes required can either be assisted or hindered by the local, regional and national environments in which they exist*."

Recommendation 8

With consultation of Aboriginal people, Torres Strait Islander people and caste groups, these groups should be included in the definition of race to assure protection of these attributes from discrimination in work and education.

Sex

Part 3 of the *Anti-Discrimination Act* protects against sex discrimination.

Section 23 of the Act defines sex in the binary terms of woman and man.

Federation, in line with its Annual Conference Decision *Gender, Sexuality and Identity policy* (NSW Teachers Federation, 2022) supports the expanding of the definition of "sex" under section 23 to include protection from discrimination for 'people with variations of sex characteristics' as a protected attribute. This would enable intersex people, those who are born with physical or biological sex characteristics which do not conform to either a male or female body, to be included in the protection.

This is because being intersex by biological traits should be recognised, respected and accommodated. Intersex individuals should not suffer discrimination on the basis of their biology or gender identity. People with innate variations of sex characteristics regularly experience discrimination and there should be protections for them, as there are on other attributes relating to sex and gender.

The *Darlington Statement,* a joint consensus statement by Australian and Aotearoa/New Zealand intersex organisations (InterAction for Health and Human Rights, 2017), called for effective legislative protection from discrimination and harmful practices on the grounds of sex characteristics. Additionally, the gendered practices of government systems were highlighted as examples of discrimination (by non-recognition through the binary gender worded documents and screening processes) against intersex people due to their bodily diversity.

Recommendation 9

The definition of "sex" under section 23 should be expanded to include protection from discrimination for 'people with variations of sex characteristics' as a protected attribute. This would enable intersex identity, for those who are born with physical or biological sex characteristics which do not conform to either a male or female body, to be included in the protection.

Pregnancy or breastfeeding

Federation supports the separation of pregnancy and of breastfeeding from sex discrimination under the *Anti-Discrimination Act.*

Further, Federation supports a change to the proposed protected attribute so that it becomes the attribute of 'breastfeeding or lactation'. Use of the word "person" and/or separation from the sex attribute would ensure that non-binary and transgender people are not subjected to discrimination or be forced to disclose their gender identity or sexual orientation.

The Federation is also concerned that there is a lack of provision of appropriate facilities in public schools to support breastfeeding or lactating people should they wish to express breast milk in private. The majority of employees, including teachers, in the Department of Education are women. Nearly one-third of the teaching workforce are of childbearing age (NSW Government Data, 2025). Currently, there are no purpose built 'parents' room' facilities in any NSW public school building.

The Department of Education is required to accommodate a request to utilise lactation breaks with the provision of:

- a private, lockable, hygienic room/space with a power point and comfortable seating;
- facilities for washing hands and equipment;

- refrigeration for storage of breast milk; and
- facilities for convenient storage of breast pumps and related equipment.

These requirements are set out in a guideline entitled *Breastfeeding and Lactation Breaks in Schools* (Department of Education, 2019).

Federation regularly receives requests for assistance from members seeking these essential facilities in their workplace, notwithstanding the existence of the departmental guideline. Many workplaces find it difficult to accommodate the requests of breastfeeding and lactating employees for facilities due to a lack of tied grants to schools to provide them. Federation is concerned that this is an example of systemic discrimination. A stronger statutory requirement to provide for built environments to include a parent's room at every public education site would guard against this.

Recommendation 10

Discrimination on the basis of pregnancy and/or breastfeeding should be distinct from sex discrimination under the *Anti-Discrimination Act.* The non-provision or under-provision by employers of private and dignified facilities in workplaces for breastfeeding and lactating employees to express breast milk should be among the tests for such discrimination.

Transgender

Part 3A of the *Anti-Discrimination Act* protects against discrimination on transgender grounds.

At section 38A of the Act, transgender is defined as follows:

> "*a person, whether or not the person is a recognised transgender person—*
>
> *(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or*
>
> *(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or*
>
> *(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,*
>
> *and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person."*

Federation supports the change of expression "transgender grounds" to more modern terminology which reflects the experience of transgender people.

An updated term must also ensure that non-binary and gender diverse people are not excluded from legislative protections which use binary gendered language.

Transgender-based discrimination is often based on whether a person's gender and/or gender expression is different to the one assigned for them at birth.

Therefore, Federation supports the use of the term "gender identity and expression".

Further, Federation does not support discrimination against students in education or against workers in employment of transgender identity.

Recommendation 11

Federation supports amendment of the term "discrimination on transgender grounds" to the term "discrimination on the ground of gender identity and expression".

Options for extending existing protections

Protected attributes of the past or future

The Anti-Discrimination Act currently protects against discrimination based on someone's past (section 49A) or future disability or past or future carer's responsibilities (section 49S).

However, this does not apply generally to all currently recognised protected attributes in NSW.

NSW lags behind other jurisdictions in this respect. This is notable for including, within the meaning of protected attribute, past held attributes:

1.The *Discrimination Act 1991* (ACT) provides that the meaning of protected attribute extends to "the attribute that a person has had in the past, whether or not the person still has the attribute" (section 7(2)(d));

2.The *Equal Opportunity Act 2010* (Vic) providing that the meaning of protected attribute extends to "a person [who] has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination" (section 7(2)(a)) and to "a person [who] is presumed to have that attribute or to have had it at any time" (section 7(2)(d));

3.*The Anti-Discrimination Act 1991* (Qld) providing that the meaning of protected attribute extends to "an attribute that a person had, even if the person did not have it at the time of the discrimination" (section 8(d)); and

4.*Anti-Discrimination Act 1992* (NT) providing that the meaning of protected attribute extends to a person "who has or had, or is believed to have or had, an attribute" which is protected (section 20(2)).

The coverage of protected attributes in these jurisdictions is for discriminatory action taken against another on the basis of having a protected attribute:

- presumably in the past
- actually at the time of the discriminatory treatment which occurred in the past, but which they no longer have
- actually in the past but which they no longer have at the time of the discriminatory treatment

Extension of the protected attribute to those attributes which are acquired in future would also be relevant. This may provide protection for a person who plans or proposes to adopt a protected attribute and who experiences discriminatory treatment for the plan or proposal to adopt the protected attribute. Examples where this may occur are for proposal to change in marital status, in family planning, of breastfeeding or lactation regime, of gender identity, or any other protected attribute.

Accordingly, Federation makes the following recommendation.

Recommendation 12

Federation supports extending the existing protection to:

1. **protected attributes held in the past or thought to have been held; and**
2. **a protected attribute which the person is planning or proposing to adopt in the future.**

Extending other existing attributes to relatives and associates of an aggrieved person

Currently, the *Anti-Discrimination Act* covers aggrieved persons who have a relative or associate with any of the following protected attributes:

- race – section 7(1);
- sex – section 24(1);
- transgender (transgender status)– section 38B;
- disability – section 49B;
- homosexuality (sexual orientation) – section 49ZG(1);
- age – section 49ZYA(1).

The following jurisdictions extend all recognised existing attributes to a relative or personal associate of the aggrieved person:

- Victoria (*Equal Opportunity Act 2010* (Vic), section 6(q));
- Australian Capital Territory (*Discrimination Act 1991* (ACT), section 7(c));
- Northern Territory (*Anti-Discrimination Act, 1991* (NT), section 19(1)(r));
- Tasmania (*Anti-Discrimination Act 1998* (Tas), section 16(s)); and
- Queensland (Anti-Discrimination Act 1991 (Qld), section 7(q)).

These are generally worded to cover aggrieved persons who have a relative or personal associate who has any of the protected attributes.

Federation is concerned that in employment and in education, teachers and students should not be subjected to discrimination on the basis of having a personal associate or a relative who has the currently recognised attribute for their:

- carer's responsibilities or
- marital status

who has a potentially newly recognised attribute for their:

- irrelevant criminal record
- subjection to family and domestic violence (by another)
- health record and/or irrelevant medical record
- industrial activity or political belief/activity
- physical features/appearance
- sex/gender characteristics
- socio-economic status/social origin.

Recommendation 13

Federation supports the inclusion of an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute and any potentially newly protected attribute.

Options for new protected attributes

Irrelevant criminal record

Discrimination based on an irrelevant criminal record is already unlawful in the Australian Capital Territory (*Anti-Discrimination Act 1991* (ACT), s.7(1)(k)), in the Northern Territory (*Anti-Discrimination Act 1992* (NT) s.19(q)) and in Tasmania (*Anti-Discrimination Act 1998* (Tas), s.16(q)). However, this is not currently the case in NSW.

The Tasmanian legislation (*Anti-Discrimination Act 1998* (Tas), s.3) defines irrelevant criminal record as follows:

"***irrelevant criminal record****, in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where –*

(a) further action was not taken in relation to the arrest, interrogation or charge of the person; or

(b) a charge has not been laid; or

(c) the charge was dismissed; or

(d) the prosecution was withdrawn; or

(e) the person was discharged, whether or not on conviction; or

(f) the person was found not guilty; or

(g) the person's conviction was quashed or set aside; or

(h) the person was granted a pardon; or

(i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises; or

(j) the person's charge or conviction was expunged."

Protection of the attribute of irrelevant criminal record in NSW would guard against entrenched discrimination faced by groups which are or have been over-policed, or by individuals whose prior criminal conduct has been legitimately expunged under current NSW legislative provisions of the *Criminal Records Act 1991* (NSW). The latter Act enables convictions to be spent (such as by reason of 10 years crime-free since certain adult conviction which have not involved imprisonment for more than 6 months or by reason of 3 years crime-free since an order of the Children's Court). The protection of this attribute should extend to extinguished homosexual offenses and other offences which are no longer criminalised in NSW.

A limitation, however, must apply to the area of employment which involves working with vulnerable people and children. Where the protection of vulnerable groups reasonably

requires consideration of the criminal record of employees, potential employees and other workers, there should be such an exception in employment where the criminal record is relevant to protection of the vulnerable.

Recommendation 14

There should be recognition of a new protected attribute based on irrelevant criminal record. However, an exception in employment should be for criminal convictions which are relevant to working with vulnerable groups and children.

Domestic and family violence

The *Anti-Discrimination Act* does not currently protect the attribute of being subjected to domestic and family violence.

Federation notes that, in the NSW public service and through the Fair Work Act for employees covered by the Commonwealth system, all full-time, part-time and casual employees are entitled to 10 days (under the *Fair Work Act, 2009*) or 20 days (under a NSW Premier's Memorandum *M2022-13 Support for Employees Experiencing Domestic and Family Violence*) of paid family and domestic violence leave in a calendar year.

Additionally, a healthy and safe working environment for workers who have been subjected to family and domestic violence is a responsibility of employers.

These provisions recognise the need in NSW to protect those who have been subjected to family and domestic violence so that they can "continue to participate in the workforce" (NSW Premier & Cabinet, 2022).

Other provisions, such as article 13 of the *International Covenant on Economic, Cultural and Social Rights, 1966* to which Australia is a party, guarantee a universal right to primary and secondary education and access to higher education in Australia. Being subjected to family and domestic violence or being subjected to sexual violence should not restrict this right.

Recommendation 15

Federation supports the creation of a protected attribute under *the Anti-Discrimination Act* of being subjected to domestic and family violence. This should cover the areas of work and education.

Additionally, Federation supports inclusion of people who have been subjected to sexual violence more generally, which may not occur in the context of family and domestic violence.

Health status and irrelevant medical record

Federation supports recognition by the Anti-Discrimination Act of the attribute of "health status".

Doing so would protect individuals whose health status may not necessarily fit within the currently recognised attribute of disability or within the scope of Workers Compensation legislation. Examples may include non-work related injuries and conditions. These may

include treatable sexually transmitted infections and blood borne viruses such as Human Immuno-Deficiency Virus and hepatitis. These may also include manageable episodic mental health conditions such as bipolar disorder; auto-immune diseases such as lupus; and reproductive conditions such as endometriosis.

In the workplace and in access to education, reasonable accommodations and leave for treatment and convalescence based on health status should be accessible without discrimination.

Recognition of health status as a protected attribute under the *Anti-Discrimination Act* would also be an incentive for employers to assure mentally healthy workplaces for employees. Such a need has been recognised by Federation in its Annual Conference decision entitled *Teachers Work Health and Safety* (NSW Teachers Federation, 2024).

> "*Recent results of the so-called "People Matters Employee Survey" have also provided the Department of Education and TAFE NSW significant feedback on the shortcoming of both agencies in their failure to address the rising number of members suffering from occupational burnout.*
>
> *"Preventing psychological harm, supporting recovery and promoting mental health are the critical components of a mentally healthy workplace."*

Recommendation 16

Federation supports inclusion of health status as a new attribute to be protected under the *Anti-Discrimination Act.*

Discrimination on the basis of medical history should be addressed by the Anti-Discrimination Act. Where a person's medical history is irrelevant to education or to work, irrelevant medical history should be a protected attribute.

Irrelevant medical record is already protected in Tasmania and the Northern Territory. It has also recently been enacted in Queensland and Western Australia, according to the discussion paper (NSW Law Reform Commission, 2025).

In NSW, irrelevant medical history should be recognised for past health status. It should also be extended to work-related injuries and to prior accepted claims for workers compensation for workplace injury.

Where access to irrelevant medical history and medical information, such as past gender-affirming treatment, is obtained either by disclosure or by breach of confidentiality, there must also be the protective obligation to maintain confidentiality and not to discriminate.

Recommendation 17

Federation supports the inclusion of irrelevant medical record as a new attribute in the *Anti-Discrimination Act*.

Industrial activity or political belief or activity

The *Anti-Discrimination Act* does not currently recognise the attributes of industrial activity.

Other jurisdictions, such as Victoria, Tasmania and the ACT, protect against discrimination for industrial activity. Queensland protects against discrimination on the basis of trade union activity and the Northern Territory protects against discrimination on the basis of trade union or employer association activity (NSW Law Reform Commission, 2025).

Federation notes that, in NSW, Chapter 5 Part 1 of the *Industrial Relations Act 1996* protects the right to freedom of association. This includes the right of employees who are members of an industrial organisation to organise, participate in industrial action and seek representation by a trade union in workplace matters, under section 209. The same Act also protects against victimisation of an employee or prospective employee for exercising these rights and others such as making a complaint, under section 210.

Jurisdiction to hear and determine claims of victimisation vests in the Industrial Relations Commission of NSW under section 213 of the *Industrial Relations Act,* which enables orders to be made such as reinstatement or reemployment, payment of lost or foregone remuneration, or orders not to victimise or threaten victimisation. Similarly, the *Fair Work Act 2009* in section 309 protects workers from adverse action for membership of a trade union or for engaging or proposing to engage in industrial action, through remedies in the Fair Work Commission.

Federation notes that Industrial Relations Commission of NSW, the Industrial Court of NSW and the Fair Work Commission are specialist jurisdictions on industrial matters. It also notes that the NSW Law Reform Commission, in its 1999 review of the *Anti-Discrimination Act*, previously determined that industrial activity or trade union membership need not be added as a new attribute:

> *"Indeed, to do so would duplicate existing protections, lead to public confusion and might well lead to undesirable jurisdictional competition. The ADA should therefore not be extended to cover "industrial activity" or "trade union membership"* "(NSW Law Reform Commission, 1999, p.213).

The Anti-Discrimination Act does not currently protect the attribute of political belief, opinion or activity.

For relevance to work and education, the protection of "political belief, opinion or activity" should be based on civic rights, that is rights to hold and act upon convictions about government processes and state power. Such protection should cover lawful political activity based on political goals, such as campaigning and lobbying of governments for increased government funding for public education by NSW Teachers Federation members.

However, the civil rights basis of a new attribute would not extend to beliefs and internal activity based on the politics of a group or organisation.

In the 1999 review of the *Anti-Discrimination Act,* the NSW Law Reform Commission recommended inclusion in the *Anti-Discrimination Act* of the attribute of political opinion:

> "*Recommendation 39*
>
> *Include political opinion as a ground of discrimination and define it as follows:*
>
> *"political opinion" means a belief or opinion concerning:*
>
> *(a) the nature and purpose of the state, or*
>
> *(b) the distribution and use of state power, or*

(c) interactions between the state and individuals, bodies or groups in the community (NSW Law Reform Commission, 1999, p.207)".

Recommendation 18

Federation supports Recommendation 39 of the 1999 Report (NSW Law Reform Commission, 1999) that "political opinion" should be an attribute protected under the Act. In the present review, the new attribute should also be extended to political activity which is lawful.

Physical features or appearance

The Anti-Discrimination Act does not currently protect the attribute of physical features or appearance.

In the 1999 review of the *Anti-Discrimination Act,* the NSW Law Reform Commission recommended against the inclusion of physical appearance as a new protected attribute. It provided the following reasoning, based on coverage by existing protected attributes:

> "*Appearance can mean various things and can impact on various existing grounds. For instance, it can be associated with race in relation to customary forms of dress, disability in relation to height and weight, homosexuality or transsexuality because of stereotypical assumptions. It can also simply mean the way one dresses or wears one's hair and can include aversive features. In some cases such discrimination may be covered in relation to existing grounds as a characteristic appertaining to or generally imputed to the particular group or as a form of indirect discrimination"* (NSW Law Reform Commission, 1999, p.213).
>
> "*The concept of "physical features" or "appearance" is not one which can be articulated with any level of precision. Accordingly, in the absence of clear evidence that there is a significant social problem reflected in this proposed ground, the Commission is not inclined to adopt it as a further prohibition"* (NSW Law Reform Commission, 1999, p.215).

However, Federation remains concerned that members report discrimination in the workplace due to physical appearances linked to expressions of culture, religion, race, gender-identity and sexual orientation. This extends to the hairstyles, hijabs, kippahs, turbans, and to ceremonial/cultural daggers, tattoos and jewellery (such as flags on necklaces or bracelets). It is Federation's view that employers and educational institutions must be required to support understanding rather than prohibit elements of physical appearance:

> *"Federation's policy of 'Affirmative Action' was originally developed as means to improve the educational and employment opportunities for women and minority groups that have regularly and historically been discriminated against. Progress requires building a culture of equity and the development of an understanding of the intersection of gender, class, Aboriginality, race, culture, (dis)ability, age, sexuality and identity and how they impact on students, educators and society"* (NSW Teachers Federation, 2024b).

NSW law-reformers' only concern about inclusion of the attribute is how to define "physical features" or "appearance" with precision. Federation invites consideration of how the Victorian jurisdiction defines its protected attribute of "physical features" and the limited areas in which such discrimination is excluded.

In Victoria, “physical features” is a protected attribute under section 6(j) of the *Equal Opportunity Act 2010* (Vic). “Physical features" is defined in section 4(1) of the Victorian Act in terms of the elements of “a person's height, weight, size or other bodily characteristics”. These elements do not directly refer to the attributes of race, disability, sex, gender identity, sexual orientation, which are currently protected attributes under the Victorian legislation at section 6. These elements of physical features are protected in their own right. An exception in the area of employment, under section 26(4) of the Victorian Act, is that an “employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment”.

Religious belief or activity

Religious belief or activity is not presently a protected attribute under the *Anti-Discrimination Act*.

The Act does, however, presently prohibit religious vilification. Part 4BA of the Act prohibits a public act which incites hatred, serious contempt or severe ridicule of people based on religious belief or affiliation or engagement in religious activity (Part 4BA).

Additionally, Federation notes that the currently protected attribute of “race”, under Part 2 of the *Anti-Discrimination Act*, has extended the attribute of race, by legislative amendment in 1994, to include “ethno-religious” origin under section 4 of the Act. The NSW Law Reform Commission (2025, at paragraph 5.70) affirms that the Minister’s second reading speech on 4 May 1994 confirmed the intention for “ethno-religious origin” to include Jewish, Islamic and Sikh faiths.

Federation continues to be concerned that religious beliefs may be used by some members of the community to incite ridicule, hatred and contempt for others who do not confirm to their norms. Children of same-sex parent families and adults have been subjected to such vilification on the basis of gender-identity, sexual orientation or other ethno-religious origin under the guise of religious belief. Federation notes that reports from its members of such vilification rose during the 2017 national marriage equality plebiscite, and such reports are ongoing. Federation members have also reported that providers of Special Religious Education (SRE), who are not employers of our members, have, with impunity, maligned them as teachers to the children they teach for being a single-parent, divorced or living in a de facto relationship, even though marital status is currently a protected attribute under Part 4 of the Act. The conduct of the SRE provider is not covered by the Anti-Discrimination Act because they are not the teacher’s employer. Consequently, Federation highlights the need for existing attributes to continue to be protected under the Act.

In public education, the *Education Act 1990* (NSW) requires instruction to be non-sectarian and secular (section 30). Notwithstanding this, students are entitled to receive up to one hour per week of Special Religious Education delivered on the school site by members of the same religious body (section 32), while a secular alternative (Special Education in Ethics) may be accessed by other students (section 33A). However, no student may be required to attend (section 33).

Also in public education, religious beliefs may be raised by community members in the use of *Controversial Issues in Schools Policy* of the Department of Education NSW (2025). A controversial issue is defined as “an issue on which people hold strong differing views”. Under the policy, members of the school community may call for the removal of books and other items from school library collections. The policy also allows for the withdrawal of children, at parental or carer request, from curriculum content which is deemed to be controversial.

Recommendation 19

Federation does not support recognition of "religious belief or activity" as an additional, new attribute under the *Anti-Discrimination Act.*

Sex characteristics

The *Anti-Discrimination Act* does not currently protect the attribute of sex characteristics from discrimination or vilification. The Crimes Act 1900 (NSW), at section 93Z, recognises the criminal offence of vilification on the basis of intersex status. That NSW has recognised a criminal offence of vilification on the basis of intersex status underscores the special vulnerability of this group to highly offensive and harmful conduct.

Federation's policy recognises the need to protect teachers and other officers of the NSW Teaching Service and of TAFE NSW for their intersex status. This is best encapsulated in a 2023 Annual Conference decision, which is entitled *Gender Equity and Equality in the Public Education Workforce:*

> "*Federation acknowledges that gains have been made to enhance gender equality and equity but, with such a long way to go, Federation must commit to pursuing much more in our public schools and TAFE colleges to ensure that the working conditions of members reflect the desirable and achievable goals for all members and society.*
>
> *"Federation accepts and recognises the rights of people of diverse sex gender including transgendered women, men and non-binary individuals"* (NSW Teachers Federation, 2023).

Federation notes that, in the *Darlington Statement* (InterAction of Health and Human Rights, 2017), Australian and Aotearoa/New Zealand Intersex organisations called for effective legislative protection from discrimination and harmful practices on the grounds of sex characteristics. This includes the gendered practices of government systems, such as gendered documents and screening, which are examples where people of intersex status experience discrimination and harassment due to their bodily diversity.

NSW civil law lags behind almost all other Australian jurisdictions in the recognition and protection of this attribute. The discussion paper of the NSW Law Reform Commission (2025, paragraph 5.87) identifies Victoria, the ACT, South Australia, Tasmania, the Northern Territory, Queensland and the Commonwealth of Australia as the jurisdictions which provide protection of this attribute.

Accordingly, a newly protected attribute in the *Anti-Discrimination Act* should be recognised for protection of 'people with variations of sex characteristics' from discrimination and civil vilification. This could be achieved by drawing on the definition of intersex status from section 93Z(5) of the *Crimes Act 1900* (NSW):

> *"***"intersex status"** *means the status of having physical, hormonal or genetic features that are--*
>
> *(a) neither wholly female nor wholly male, or*
>
> *(b) a combination of female and male, or*
>
> *(c) neither female nor male*".

Recommendation 20

Federation supports the inclusion of 'people with variations of sex characteristics' as a new attribute for protection from discrimination and civil vilification under the *Anti-Discrimination Act.*

Socio-economic status

The Federation is supportive of the addition of this category of protected attribute. However, the definition must be clear.

There are a range of structural and societal factors that drive women's lower economic participation and security over their lifetimes. Within these, it is known that:

• the unequal distribution of caring responsibilities is a barrier to many women participating in work of the type, and to the full extent, that they would like to

• parents/carers with children need greater access to before and after school care and improvements to flexible work practices

• women are more likely to experience significant salary discrepancy at the start of their careers that sets them up for a lower retirement/superannuation savings balance

• women seeking to re-enter the workforce after a significant time away face significant challenges because of their time out of the workforce.

Accordingly, Federation notes that indicators of socio-economic status are recognised for protection in other jurisdictions.

This includes "accommodation status" and "employment status" in the Northern Territory and the ACT (NSW Law Reform Commission, 2025, paragraphs 5.107 and 5.111). Employment arrangements or access to education should not generate disadvantage by reason of gaps in employment or gaps in available or stable accommodation. This is particularly relevant in a housing affordability crisis in NSW.

Adverse action on the basis of social origin is also prohibited in workplaces covered by the *Fair Work Act, 2009* (Cth), under section 351(1). For example, hiring practices in employment which exclude potential employees on the basis of their social origin and which entrench economic disadvantage, should not be permitted.

Recommendation 21

Federation supports the creation of a new attribute, based on socio-economic status, where a definition can be as clearly expressed as expressions used in legislation of other jurisdictions, such as "accommodation status", "employment status" or "social origin".

4. Whether the existing tests for discrimination, are clear, inclusive, and reflect modern understandings of discrimination

Intersectional discrimination

Federation recognises that people can experience intersectional discrimination, that is discrimination based on a combination of protected attributes. This may occur when a person with more than one protected attribute experiences discrimination, for example, on the grounds of race and gender.

Intersectional discrimination compounds the impact of disadvantage. Its occurrence, if unchecked, also entrenches discrimination.

Section 4A of the Anti-Discrimination Act 1977 does not expressly capture intersectional discrimination but may have relevance if intersectional discrimination is recognised by the Act. Section 4A provides that:

> "*If:*
>
> *(a) an act is done for 2 or more reasons, and*
>
> *(b) one of the reasons consists of unlawful discrimination under this Act against a person (whether or not it is the dominant or a substantial reason for doing the act),*
>
> *then, for the purposes of this Act, the act is taken to be done for that reason."*

This may mean that if discrimination by reason of two (or more) prohibited grounds is claimed to have arisen from one act, but only one prohibited ground is upheld for the claimant, then the claim may still succeed on the one prohibited ground only. However, if a claim of discrimination were to be based on the single reason of "the combined effect of two or more prohibited grounds", it is unclear if section 4A could save an intersectional discrimination claim for which a single element of the combined effect of is not upheld for the claimant. This could create a loophole to avoid claims of intersectional discrimination.

To address this, an appropriate test for recognition of intersectional discrimination should capture the complex way in which discrimination can arise, so as to avoid potential loopholes. The Act should provide for claims of discrimination based "on one or more prohibited grounds" as well as "on the effect of a combination of prohibited grounds".

5. The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

Currently protected attributes

As a civil law mechanism for addressing vilification, the *Anti-Discrimination Act* currently protects a smaller range of attributes from vilification than are protected from discrimination under the same Act. The Act also protects a smaller range of attributes from vilification than are protected under the NSW and Commonwealth criminal law.

Federation notes Table 8.1 of the discussion paper (NSW Law Reform Commission, 2025), which sets out a comparison between all attributes currently protected from discrimination and from vilification under the anti-Discrimination Act:

Table 8.1: Attributes protected from civil vilification and discrimination

Attributes protected from civil vilification	Attributes protected from discrimination
• Being "HIV/AIDS infected", actually or presumed • Homosexuality • Race • Religious belief, affiliation or activity (including not having one) • Transgender grounds	• Age • Carer's responsibilities • Disability • Homosexuality • Marital or domestic status • Race • Sex (including pregnancy and breastfeeding) • Transgender grounds

(NSW Law Reform Commission, 2025, p.175)

Federation also notes that, in NSW, the *Crimes Act 1900* (NSW) at s.93Z protects the following attributes from criminal offences of vilification:

- Race
- Religious belief or affiliation
- Sexual orientation
- Gender identity
- Intersex status
- Having HIV/AIDS

Not all attributes provide protection from both discrimination and vilification.

Federation has a proud history of promoting and advocating for the acceptance, inclusion and participation of diverse people and communities in society.

Federation recognises the positive impacts of harmonious living, social cohesion and inclusion.

These needs, in NSW, invoke a role for civil and criminal law.

The protection of vulnerable groups, under NSW civil law, from vilification - that is, the recognized offence of public acts by individuals and/or corporations which incite hatred, serious contempt or severe ridicule on the basis of having a protected attribute - is necessary.

Further, protection under NSW criminal law from public acts which breach the peace by intentionally or recklessly inciting violence towards another person or groups of persons takes this further.

Achieving this through a strong legal framework requires clear definitions and modern terminology which does not perpetuate stigma, ridicule and targeting of the vulnerable. This is possible through the harmonisation of terminology used in the civil and criminal law to define and express protected attributes.

Recommendation 22

Federation recommends the following changes in terminology to current attributes for protection from vilification under the *Anti-Discrimination Act,* to modernise terminology and/or harmonise terminology with the criminal law:

- **Changing "HIV/AIDS infected" to "HIV/AIDS status" or "living with HIV/AIDS";**
- **Changing "homosexuality" to "sexual orientation";**
- **Changing "transgender" to "gender identity and expression".**

Federation also recognises that there are a range of attributes which should be protected from vilification under the Anti-Discrimination Act.

Recommendation 23

Federation also recognises that there should be a wider range of attributes protected from vilification under the *Anti-Discrimination Act.* These should include:

- **Inclusion of "caste" in the definition of the attribute of "race". This is because many Indian-Australians are living in entrenched social exclusion, oppression and inequality, with consequential fear, unemployment or under-employment.**
- **Inclusion of "diverse sex characteristics" giving recognition and protection to people who identify as Intersex.**
- **Inclusion of "people who experience mental illness and their families and carers". This will give recognition and protection to people with episodic and treatable illnesses, such as bipolar disorder, anxiety and depression, and post traumatic stress disorder, for example.**

Tests for vilification – "incitement-based test"

Currently, the Anti-Discrimination Act requires that the civil offence requires a public act which "incites hatred towards, serious contempt for, or ridicule of" a targeted person or a group of targeted persons.

Federation notes the test does not require proof of the effect of the public act on the targeted person or the group of targeted persons.

Federation does not recommend any change to the incitement-based test.

Tests for vilification – "harm-based test"

Under the criminal law, there is no harm-based test which applies to the targeted person, such as actual violence, under section 93Z of the *Crimes Act 1900* (NSW). This is appropriate. It enables the criminal law to prevent threats of violence. This may have a deterrent effect on criminal vilification by potential offenders. This promotes a maintenance of the peace of the realm, which is the role of the criminal law.
Similarly, a harm-based test under the civil offence of vilification does not apply to the targeted person. Federation is concerned that any attempt to include a harm-based test which applies to the targeted person or group would only incentivise rather than deter the public act. This is because a harm-based test for the targeted person or persons of the targeted group would require them to give evidence of the harmful impact on them by the public act and have a potentially gratifying impact on perpetrators.

Accordingly, Federation does not support the introduction of a harm-based test in the Anti-Discrimination Act for vilification.

Definition of "public act"

Federation notes that the *Anti-Discrimination Act* defines the "public act" which incites hatred, serious contempt or severe ridicule includes:

- "any form of communication to the public…", and
- "any conduct observable by the public…" and
- "distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred…, serious contempt…or severe ridicule" of the protected attribute.

It also notes that the following have been interpreted in case law as conduct which falls within this meaning of "public act":

- words shouted in a stairwell in an apartment block (*Anderson v Thompson,* [2001])
- a teacher's spoken communication to a secondary school class (*Wolf v NSW Department of Education* [2023]); and
- a link on a public website with words of encouragement to access the link, where vilifying material is contained (*Burns v Sunol* [2015]); and
- graffiti on the door to an apartment which was visible in the hallway to passers-by (*Burns v Dye* [2002]).

However, a statement uttered in a school staff muster/meeting was not found to be sufficiently connected to the public for racial vilification (*Riley v NSW Department of Education* [2019]). Posting a link on a private Facebook page to vilifying material on a website has also been held not to be a public act (*Burns v McKee* [2017]).

Accordingly, Federation does not propose any change to the definition of "public act" for vilification under the *Anti-Discrimination Act.*

6. The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

The *Anti-Discrimination Act* was amended in 1997 to introduce protection from sexual harassment under Part 2A of the Act.

Work and education settings must be free of sexual harassment. Federation has confirmed this policy on sexual harassment in its 2025 Annual Conference decision entitled *Respect for the profession: Occupational Violence*:

> *"Workplace sexual harassment is all too common – it occurs in every industry, across all occupations and at all levels. In the last five years, one in three people (33 per cent) have been sexually harassed at work. Incidents and reports from the teaching profession highlight our members are unfortunately not immune from this gendered-based violence, the prevalence of which has been increasing over the last five years.*
>
> *"In schools, members report sexual harassment and gendered violence manifests as both singular and repeated behaviours, unwelcome physical contact, sexual*

assault, sexually suggestive comments or jokes and intrusive personal questions, to name but a few. It has involved teachers, principals and other staff onsite, students, parents and carers. The results of these harmful workplace behaviours and identified psychosocial hazards can be serious, with short- and long-term impacts on a worker's health…

"The new rights and conditions won on 26 June through the Industrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025 are the most significant increase in industrial rights for workers in NSW in over 30 years. These new provisions include, but are not limited to, the following:

• Enshrining gender equality and the elimination of workplace bullying and sexual harassment in law as explicit objectives of the Industrial Relations Act

• prosecuting cases of bullying and sexual harassment in the new jurisdiction at the Industrial Relations Commission (IRC)."

Definition of Sexual Harassment

Federation notes the four-step test for unlawful sexual harassment under the *Anti-Discrimination Act,* which is outlined in the discussion paper (NSW Law Reform Commission, 2025). Federation notes the relevance of the four-step test to conduct in schools and TAFE colleges as places of work and education.

1. The conduct of the employee, employer, colleague or other person in the workplace (section 22B) or of a staff member at an educational institution or of an adult student, who has attained the age of 16 years, at an educational institution (section 22E) is of a sexual nature.

   The sexual nature of the conduct may arise by "innuendo, insinuation, implication, overtone, undertone, horseplay, a wink or a nod" (*Vitality Works Australia Pty Ltd v Yelda* (No 2) [2021]).

2. The sexual conduct is directed to or done in relation to the complainant.

   The complainant cannot be a mere bystander or observer (*Zanella v Carroll's Auto Repairs Pty Ltd* [2001]).

3. The conduct is unwelcomed by the complainant.

   This is a subjective test, which applies to the complainant at the time of the conduct (*Ewin v Vergara (No 3)* [2013]). There is no requirement for the complainant to express objection or to state that the conduct is unwelcome at the time (*Hughes v Hill* [2020]).

4. "A reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated" (*Anti-Discrimination Act 1977* (NSW), section 22A).

Federation notes that the "reasonable person test" under the *Anti-Discrimination Act*, that is step 4, differs from the "reasonable person test" under the Sex Discrimination Act 1984 (Cth) in two ways:

(a) The Commonwealth's "reasonable person test" has a lower threshold, whereby the reasonable person need only have anticipated "the possibility" that the other person would be offended, humiliated or intimidated; and

(b) The Commonwealth's "reasonable person test" provides an inclusive but not exhaustive list of matters which must be considered to determine that anticipation of the possibility of offence humiliation or intimidation would flow. These include consideration of the attributes of the harassed person, which go to vulnerability:

- 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 harassed person;
- the relationship between the harassed person and the perpetrator; and
- any other relevant circumstances.

Recommendation 24

Federation supports expansion of the *Anti-Discrimination Act's* "reasonable person test" for sexual harassment to include the "possibility" of offence, intimidation or humiliation arising from the conduct.

Recommendation 25

Federation supports the *Anti-Discrimination Act's* "reasonable person test" expressly requiring consideration of a complainant's attributes or the relationship between the parties in addition to the current requirement to consider "all" or "other" relevant circumstances.

Federation also notes that the Commonwealth's "conduct of a sexual nature" step, which is the equivalent to the Anti-Discrimination Act's first step, provides an inclusive list that the conduct may be an oral or written statement.

Federation notes that this sets aside any ambiguity which may exist that the "conduct" needs to be physical conduct or a physical act.

Federation supports the harmonisation of NSW and Commonwealth law.

Recommendation 26

Federation supports the Anti-Discrimination Act defining that "conduct of a sexual nature" may include oral or written statements.

Other prohibited sex-based conduct

The discussion paper also notes that the Commonwealth test for sexual harassment is broader than that in the Anti-Discrimination Act. The Commonwealth Act expressly prohibits:

- "harassment on the ground of sex" and
- subjecting someone to a workplace that is "hostile on the basis of sex" (NSW Law Reform Commission, 2025).

There is potential for extending the protection against conduct of a sexual nature to conduct that is sexist, by expressly prohibiting harassment on the ground of sex.

Harmonisation of the Anti-Discrimination Act's protection of women from harmful conduct in work and education is supported by Federation. Sex-based claims of harassment and hostility should also be permitted in NSW under the Anti-Discrimination Act.

Recommendation 27

Federation supports the express prohibition in the Anti-Discrimination Act of harassment on the ground of sex.

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

The NSW Law Reform Commission (2025) invites submission on whether the Anti-Discrimination Act should be amended to create a positive duty to prevent harassment, discrimination and vilification. It acknowledges that other jurisdictions, including Victoria, the Northern Territory, Tasmania and, for sex discrimination and harassment, the Commonwealth already impose such a positive duty.

The benefits of a positive duty include:

- Promoting substantive equality for people with protected attributes;
- Managing the risk of reputational damage to employers, educational institutions and other duty holders of future lodged and successful claims;
- Reducing the obligation on the aggrieved person to take action;
- Promoting healthy work and educational environments, which increases productivity and workplace participation/educational attainment.

A positive duty to prevent harassment, discrimination and vilification involves management of psychosocial hazards. In NSW, managing the risk of psychosocial hazards is a requirement of Persons Conducting a Business or Undertaking, under clause 55C of the *Work Health and Safety Regulation 2017* (NSW).

Federation supports the view that the positive duty should be supported by establishing Codes of Practice for the positive duty, which require accountability for:

- Implementation of existing policies
- Provision of training on obligations under the *Anti-Discrimination Act*
- Development of inclusionary targets
- Keeping records of incident reporting and complaints management
- Procedures for monitoring and reviewing through data collection and evaluation.

Recommendation 28

Federation recommends that the *Anti-Discrimination Act* be amended to impose a positive duty on employers to prevent discrimination, harassment and vilification.

This positive duty should extend to all protected attributes and be supported by codes of practice that would set out the steps required to be taken by employers to meet the duty and be accountable for it.

8. Exceptions, special measures and exemption processes

Exceptions – transgender people in sport

Division 4 of Part 3A of the Anti-Discrimination Act provides an exception to protection of transgender persons in the area of sport. Section 38P provides the following exception in sport:

> "*(1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.*
>
> *(2) Subsection (1) does not apply—*
>
> *(a) to the coaching of persons engaged in any sporting activity, or*
>
> *(b) to the administration of any sporting activity, or*
>
> *(c) to any sporting activity prescribed by the regulations for the purposes of this section."*

As such, the Act does not expressly require the exclusion of transgender people from participation in sporting activity for members of the gender to which the transgender person identifies. Nor does the Act expressly require their inclusion in order to eliminate discrimination. This leads to ad hoc inclusion and exclusion practices at the level of the sporting authority, impacting on transgender people.

Federation recognises that reversing this exception could be an area of expansion in the Act for the protected attribute of transgender identity.

The NSW Law Reform Commission (2025) has noted that the ACT, Northern Territorian, Tasmanian and South Australian jurisdictions do not currently provide exceptions to discrimination in sport based on gender identity.

The value of, and the barriers to, participation in sport for LGBTIQA+ persons are outlined in a research report of the Sports Innovation Research Group of Swinbourne University and partner institutions. The report, entitled *Free to Exist: Documenting Participation Data on LGBTIQA+ Young People in Sport and Physical Activity* (Storr, R., Yeomans, C., Albury, K., Ridgers, N. & Sherry E, 2024), made the following findings from a mixed method study:

> "*When LGBTIQA+ young people do engage in sport and physical activity, their biggest motivations are for physical health and fitness (62%), fun and enjoyment (60%), and mental health (37%)…*
>
> *"There is a substantial body of evidence in Australia which identifies that sport and movement settings are unwelcoming and hostile to LGBTIQA+ communities…*
>
> *"While the comparison between historical and current participation rates in competitive sports indicates a decline across all gender identities [from 47% in 2019 to 33% in 2024], transgender groups show the largest decline: trans women*

respondents from 43.8% historically to 25.0% at present and trans men from 23.5% to no current participation…

"Negative early youth experiences in sport and PE, can have detrimental and long-lasting impacts on LGBTIQA+ people. Bullying, discrimination, and hostility to LGBTIQA+ young people can lead to them dropping out of sport, often for a lifetime.

"Young people spoke in depth about the lack of role models and representation across the sport sector, especially trans and gender diverse young people. With many trans athletes being banned from professional sports, they spoke of the devastating impact this has on their outlook in sport, and the message it sends to young people…

"The voices of LGBTIQA+ people are often not represented in discussion or policy decision making circles, despite experiencing ongoing discrimination and vilification across sport and movement settings throughout their life" (Storr et al, 2024).

Currently, research in the *Free to Exist* report (Storr et al, 2024) shows that 53% of LGBTIQA+ young people have witnessed discrimination in sport and 40% have experienced discrimination in sport, mostly through verbal vilification. These statistics demonstrate that there is more that can be done to address discrimination in this area.

Anti-discrimination laws which, on the one hand, purport to protect the attribute of gender identity while, on the other hand, do not impose an obligation for the attribute to be protected from discrimination in specific areas of life and which authorise the exclusion and invisibility in those areas of life, enable institutionalised discrimination.

To exclude people from participating in sport based on a protected attribute is to deny them the range of positive health and wellbeing impacts related to sport participation.

In NSW public schools, the situation is difficult for teachers and students to navigate. The NSW public schools' curriculum:

1. requires participation in school sport. Under the Department of Education NSW's (2024) *Sport and Physical Activity Policy,* students in Years K-10 (from 5 years to approximately 15-16 years of age) are required to participate in a minimum of 150 minutes of planned moderate to vigorous physical activity per week, including structured sport and physical activity lessons.

2. includes the NSW Healthy Children Initiative (HCI). Active participation in sport and movement is an important component of the NSW Healthy Children Initiative (HCI) which was linked to the NSW Premier's priority of reducing the prevalence of childhood overweight and obesity. The initiative, which promotes healthy eating and active living, has been implemented in 83.1% of all primary schools across the state (Innes-Hughes et al, 2019).

3. includes inter-school sports programs of the Primary Schools Sports Association (PSSA) for primary schools and the NSW Combined High Schools Sports Association (CHSSA) for secondary schools. Policy advice to schools is provided by the Schools Sport Unit of the Department of Education. Some restrictions apply, such as separate boys'/girls' teams for primary school age children and a restriction that children in the calendar year in which they turn 13 years of age may not participate with their primary school peers in heavy contact sports such as rugby league and rugby union. The Schools Sports Unit has an inclusive approach for students identifying as gender diverse, but qualifies this approach by noting the legislative context that exclusion in sport is not unlawful.

It is difficult for schools and teachers to navigate these competing and contradictory signals. All students are required to engage in physical activity, but transgender students may be excluded or required to participate in sport with the gender with which they do not identify.

The review of the *Anti-Discrimination Act* is an opportunity to clarify these competing obligations and ensure that the ultimate impact is for all young people to be appropriately supported and encouraged to engage in healthy life choices at school and are free from discrimination while doing so.

Recommendation 29

Based on all of these considerations, Federation supports the reduction or removal of the exception in s38P(1).

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