First Peoples Disability Network

Submission:

Review of the Anti-Discrimination Act 1977 (NSW) – Unlawful conduct

August 2025

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Acknowledgement

[1.01] First Peoples Disability Network (FPDN) acknowledges the Traditional Custodians of the lands, waters, and skies where we live and work across Australia. We pay our respects to Elders and Ancestors past and present, and celebrate their continuing connection to Country, community, and culture. We acknowledge and value the wisdom and knowledge shared by our Elders and communities in shaping our work.

Introduction and Context

[2.01] To support FPDN's response to the Consultation Paper (the 'Consultation Paper') for the Review of the *Anti-Discrimination Act 1977 (*NSW) ('the ADA') which has been put forward by the New South Wales Law Reform Commission ('NSWLRC'), this submission will begin by introducing relevant background information about the challenges faced by First Nations people living with disability, in addition to key topics and overarching themes. These are:

- Intersectional Discrimination: First Nations people with disability and 'double disadvantage';
- First Nations concepts of care and disability – Culture is Inclusion;
- The United Nations Declaration on the Rights of Indigenous Peoples;
- The National Agreement on Closing the Gap; and
- Australia's Disability Strategy 2021-2031.

[2.02] Once FPDN has adequately set out the underlying context, this submission will move onto answering the NSWLRC's questions (as per the numbering of the Consultation Paper) and providing specific critiques of the current ADA.

Intersectional Discrimination: First Nations people with disability and 'double disadvantage'

[2.03] First Nations people with a disability are amongst the most marginalized members of the Australian community,[1] including being at least twice as likely to be living with disability as non-Indigenous Australians.[2] Data and testimony indicates that intersectional inequality is acute and pervasive across all supports for First Nations people with disability, including disability services, health, education, employment, housing and transport.[3]

[2.04] For First Nations persons with disability, there is a level of 'double disadvantage' (or intersectional disadvantage) that manifests in extremely poor levels of diagnosis and a general reluctance of First Nations people with disability to take on another perceived negative label of disability, especially when they already experience discrimination based upon their First Nations status.

[2.05] Additionally, frequent exposures to various forms of discrimination can result in 'apprehended discrimination', where the fear of discrimination transforms into a rational expectation of discrimination, and

[1] Bostock, L., 'Access and inequity for people with a double disadvantage', 1991, Australian Disability Review, Volume 2, pp. 3-8.
[2] Australian Institute of Health and Welfare, 'Aboriginal and Torres Strait Islander Health Performance Framework', pp. 1-14.
[3] See Avery, S., 'Culture is Inclusion', 2018, Chapter 6 – *'Intersectional inequality: The numbers and Narratives'.*

First Nations persons adopt of pattern of pre-emptively declining to engage in situations where they could be exposed to discrimination.[4]

First Nations concepts of care and disability – Culture is Inclusion

[2.06] FPDN does not support an overreliance on the 'medical' or 'clinical' model of disability which has historically guided much of Australia's approach. Amongst other things, this has included a reliance upon negative or deficit-based definitions of disability within legislation, which are highly focused on concepts such as 'impairment' and 'malfunction'. These concepts still carry a great deal of historical baggage regarding the classification of disability as something that is somehow 'wrong' or necessary to fix, whilst also inviting exclusionary discussions about the level of impairment that must be demonstrated before a person 'counts' as having a 'real disability' .

> *...[I]n traditional language there was and is no word for disability. This is a wonderful thing in our communities – we have always been "come as you are".*[5]

[2.07] The NSWLRC appears to have recognised and acknowledged many of the problems and insensitivities associated with relying on medical model of disability as the basis for protections within the ADA. These are the types of issues that led to the emergence of the 'social model' of disability as the 'response to, and rejection of' the medical model.

[2.08] However, from the perspective of FPDN, it is important to also highlight that, whilst the social model of disability has (following the initial drafting of the ADA) become accepted as a foundational doctrine within the sector, a great deal of time has now also passed since the NSWLRC's previous review of the ADA (in 1999).[6]

[2.09] As it currently stands, the social model of disability is a foundational, but decades-old concept.[7] Whilst it remains very relevant, discourse has advanced significantly following its proliferation, often in order to address the various gaps and shortcomings of the social model.

[2.10] FPDN understands and appreciates that it is likely that the current NSWLRC Consultation paper contains a simplified summary of the social model (in order to promote discussion). Nevertheless, addressing the problems which are likely to arise as a result is a vital step towards beginning to arrive at the expression of a model of disability which best 'fits' how First Nations communities tend to perceive disability.

[2.11] As originally conceived, the social model views disability to be the result of barriers to equal participation in each person's social, cultural, structural and physical environments. These barriers can and must be dismantled (e.g. via imposing obligations to make 'adjustments'), but the reality remains that this conception of disability is still one that is fundamentally 'negative' or 'deficit-based'.

[2.12] FPDN generally advocates for the need to move beyond even a social model, so as to ensure that the 'cultural determinants' which support First Nations people with disability are considered wherever and whenever Government designs policies and programs. Within Aboriginal languages, the Eurocentric concept of disability did not exist prior to colonisation and many First Nations persons with significant medical impairments still do not actively conceive of themselves (or even dependents who they are actively caring for and supporting) as 'disabled'. The commonly accepted 'modern', 'medical' or 'Western' conceptions of disability (including the more recent conceptualisation of 'social barriers') are often subconsciously

[4] S Avery, 'Culture is Inclusion - Executive Summary'.
[5] D Griffis, CEO of FPDN.
[6] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', 1999.
[7] See R Slorach, '40 Years of the Social Model of Disability: How Relevant Is It Today?'.

disregarded in favour of a holistic, communally oriented ('kinship'-based) assessment of 'what a person needs to be happy and included in their community'.[8]

[2.13] For First Nations people with disability, FPDN applies these concepts as part of a 'cultural model of inclusion' that recognises the diversity of cultures, languages, knowledge systems and beliefs of First Nations people and the importance of valuing and enabling participation in society in ways that are meaningful to First Peoples.[9] A First Nations 'cultural model' of disability can be operationalised alongside the 'social' and 'human rights' models of disability to ensure that all approaches, services and supports are culturally safe, inclusive, and disability rights informed. It is a model of disability that seeks to improve the human condition through focusing on what keeps people strong, as distinct from merely negating the adverse impact of difference.

[2.14] As such, FPDN takes the position that the cultural model is actually the model of disability that is best suited to discussing the imposition of 'positive duties' to eliminate discrimination (which is a focus of Question 11.3 of the Consultation Paper). By centring a cultural model of disability inclusion and elevating the experiences, aspirations, needs and rights of First Nations people with disability, outcomes can be improved not only for First Nations people with disability, but for all.

The United Nations Declaration on the Rights of Indigenous Peoples

[2.15] The *United Nations Declaration on the Rights of Indigenous Peoples 2007* ('UNDRIP') establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to indigenous peoples.[10]

[2.16] The NSWLRC Consultation Paper does not appear to have considered the implications of UNDRIP, which FPDN suspects may be a consequence of its status as a declaration (as opposed to a 'core' human rights instrument). Nevertheless, Australia has formally endorsed UNDRIP and is obligated to take steps to incorporate those provisions within domestic legislation.

[2.17] In particular, the existence of the following articles should be noted:

- *Article 1:* Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

- *Article 7.2:* Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

- *Article 14.2:* Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

[8] See S Avery, 'Culture is Inclusion', 2018.
[9] Ibid.
[10] 'United Nations Declaration on the Rights of Indigenous Peoples 2007'.

- *Article 21.1:* Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

- *Article 21.2:* States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

The National Agreement on Closing the Gap

[2.18] All Australian jurisdiction governments are parties to the *National Agreement on Closing the Gap 2020* (the 'CTG Agreement'), including all 19 socio-economic Targets and 4 Priority Reforms.[11] As such, all jurisdictions need to apply the Priority Reforms and seek progress against the relevant CTG targets in all the work that they do.

[2.19] Additional consideration must also be given to the *Transformational Elements* set out under Priority Reform Three: Transforming Government Organisations, which include commitments to "identify and eliminate racism" and "embed and practice meaningful cultural safety".

Australia's Disability Strategy 2021-2031

[2.20] All Australian jurisdictions are signatories to *Australia's Disability Strategy 2021-2031* ('ADS') and have a responsibility to ensure that policy, services and legislation demonstrate leadership towards a society in which people with disability can participate as equal members, with equal opportunities to fulfil their potential.[12] The Strategy also includes a dedicated Safety, Rights and Justice Outcome Area that sets out the commitment all governments have made to promoting, upholding and protecting the rights of people with disability and ensuring they feel safe and enjoy equality before the law.

Adding an objects clause to the ADA

[2.21] FPDN's recommendation is that, moving forward, the NSWLRC must seriously consider the benefits of adding an objects clause into the ADA, in order to explicitly reference Australia's international human rights obligations (e.g. UNDRIP, UNCRPD) and national commitments (e.g. CTG, ADS).

[2.22] This would serve a distinct purpose in empowering decision-makers to interpret and apply the ADA in a way that aligns with these broader frameworks. It would make it clear that the ADA is not just a standalone piece of legislation, and forms part of a larger commitment to human rights and equality within Australia.

[**2.23]** FPDN's position is that any objects clause must include a commitment to, as far as possible, uphold Australia's commitments under international instruments and national agreements in promoting equality and eliminating discrimination.

[2.24] S4 of the *Discrimination Act 1991* (ACT) could be used as a point of reference (notwithstanding that NSW does not have an equivalent of the *Human Rights Act 2004* (ACT), which means that an objects clause

[11] 'National Agreement on Closing the Gap 2020'.
[12] 'Australia's Disability Strategy 2021-2031'.

for the ADA would instead need to make more direct references to those international human rights obligations):

> ***'Objects of Act***
>
> *The objects of this Act are—*
>
> *(a) to eliminate discrimination to the greatest extent possible; and*
>
> *(b) to promote and protect the right to equality before the law under the Human Rights Act 2004, including—*
>
> *(i) the right to enjoy a person's human rights without distinction or discrimination of any kind; and*
>
> *(ii) the right to the equal protection of the law without discrimination; and*
>
> *(iii) the right to equal and effective protection against discrimination on any ground; and*
>
> *(c) to encourage the identification and elimination of systemic causes of discrimination; and*
>
> *(d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—*
>
> *(i) discrimination can cause social and economic disadvantage and that access opportunities are not equitably distributed throughout society; and*
>
> *(ii) equal application of a rule to different groups can have unequal results or outcomes; and*
>
> *(iii) the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures.'*[13]

[2.25] This would be a simple, utilitarian addition to the ADA which should not draw significant controversy and could easily be accompanied by an inclusive list of relevant instruments and agreements which merit special consideration.

[13] *Discrimination Act 1991* (ACT), s4.

Area 3: Tests for discrimination

Question 3.1: Direct discrimination -
Could the test for direct discrimination be improved or simplified? If so, how?

[3.01] Yes. The test for direct discrimination under the ADA is needlessly reliant on arbitrary criteria that do not reflect the realities of how discrimination occurs, and place an unreasonable burden of proof upon legitimate complainants.

[3.02] This situation is a direct result of the continued existence of the 'comparator test' and the ADA's current approach towards the need to demonstrate causation (which is the subject of Question 3.6(1))).

[3.03] Additional changes are also necessary to provide adequate protections against intersectional discrimination (which is the subject of Question 3.8).

Inadequacies of the 'comparator test'

[3.04] FPDN fully supports amending the ADA's test for direct discrimination in order to remove any judicial scope for the application of a 'comparator test', and replace it with an equivalent of the 'unfavourable treatment' test (also referred to as the 'detriment test') which has been adopted by Victoria and the ACT.[14]

[3.05] FPDN appreciates and respects the desire of the NSWLRC to attempt to provide an 'even handed' summary of public attitudes towards the comparator test, but at the same time wishes to dispel any notion that the test can be considered 'reasonable and appropriate'.

[3.06] It must be stressed that what is now being referred to as the 'comparator test' is essentially a judicial creation, formulated as a result of early attempts to interpret the unfortunately expressed legislative requirement that the discriminator must treat the aggrieved person less favourably than the discriminator would treat *a person without the attribute in circumstances that are not materially different*.[15] There is no indication that the drafters foresaw (or deliberately intended) that the provision would necessitate anything remotely akin to the complexity of the comparator test.

[3.07] Were it not for need to account for the (unfortunate) drafting of this provision of the ADA, FPDN's position is that there would be no compelling argument against the superiority of the (non-comparative) 'unfavourable treatment' approach towards determining whether direct discrimination has occurred.

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[14] See *Equal Opportunity Act 2010* (Vic), s8(1). See also *Anti-Discrimination Act 1991* (ACT), s 8(2).

FPDN acknowledges that the reforms contained in the *Respect at Work and Other Matters Amendment Act* 2024 (Qld), s7B *(*amending the *Anti-Discrimination Act 1991* (Qld)*,* s 10) would also achieve the same result.

However, FPDN wishes to avoid the potential for confusion. Due to the LNP's indefinite delay on the commencement on those reforms, FPDN will default to referring to the current (unamended) state of Queensland's discrimination law throughout this submission, unless otherwise specified.

[15] See, for example, *Anti-discrimination Act 1977* (NSW)*,* s7 ('What constitutes discrimination on the grounds of race') and s24 ('What constitutes discrimination on the ground of sex'). The ADA sets out a slightly different wording tailored to each 'ground' of discrimination, but the broader elements are relatively consistent.

As for the prior need for judicial intervention (at the High Court level) in order to confirm the existence/ application of the 'comparator test', see *Purvis v New South Wales* (2003) 217 CLR 92, 160–61 [223–25], 175 [273].

[3.08] FPDN is confident that, amongst laypersons, most would make the reasonable assumption that direct discrimination hinges upon demonstrating that a person has suffered some form of 'detriment' because of possessing a protected attribute (even if not expressed in those exact words). Whilst the exact legalese/ terminology is nuanced, the 'unfavourable treatment' test itself is intuitive, relatively streamlined and simple in concept for a citizen attempting to understand whether or not they may have been legally wronged.

[3.09] Likewise, it is entirely fair to say that, excluding members of the legal profession with the relevant knowledge and experience, few (if any) persons would ever have assumed that the judicial test for discrimination absolutely needs a person with a protected attribute to:

(i) Find or create a 'comparative person' without their protected attribute; and
(ii) Assume the evidentiary burden of proving (to the civil standard of 'on the balance of probabilities') that the alleged discrimination would not have occurred towards the 'comparative person' (whether they be a real example or otherwise a hypothetical person).

[3.10] To be blunt, the 'comparator test' is fundamentally inappropriate and only exists as a mechanism for interpreting something that can effectively be described as a drafting oversight in a (now) dated piece of discrimination legislation. FPDN would go as far as to submit that the test is widely disparaged by academics and legal professionals, such that its removal would be largely uncontroversial.[16]

Appropriateness of the 'unfavourable treatment' test

[3.11] A layperson might rightfully assume that, where appropriate, determining whether an incident of discrimination has occurred might *sometimes* be naturally achieved by drawing a comparison with the treatment of another. For this reason, it is imperative to note that the 'unfavourable treatment' test does not exclude this possibility.

[3.12] The 'unfavourable treatment' test merely does not necessitate that, as a matter of doctrine and in order to succeed, the person with the protected attribute *must always* present a comparison between the treatment of themselves and a person without the relevant attribute. As was endorsed by the Supreme Court of Victoria in *Tsikos v Austin Health* [2022] VSC 174, *'[t]his analysis may be informed by consideration of the treatment afforded to relevant others, particularly in circumstances where it is not clear whether the treatment is unfavourable'*.[17] If the exercise of comparison provides useful and probative evidence (for the positions of either party), then the Court will undertake the exercise, meaning that the 'unfavourable treatment' test does not exclude any utility that might have otherwise been offered by the 'comparator test'. To put it concisely, nothing of any value has been lost.

[3.13] Conversely, the process of selecting the 'correct' person to serve as a point of comparison is a very real, well documented and widely maligned requirement of the 'comparator test'. FPDN also wishes to dispel any notion that the 'comparator test' is somehow more 'objective'. The test can only ever function correctly in the minority of cases where (i) a real 'comparative person' exists and has presented the respondent with the same 'choice' that the complainant has been aggrieved by, (ii) that person lacks all protected attributes that the complainant claims to have influenced the respondent's conduct, and (iii) nothing else about the characteristics of the real 'comparator' (e.g. their professional history/ conduct as an employee) grants the

[16] For a relevant example, see the Royal Commission into Violence, Abuse, Neglect and Exploitation, 'Final Report – Volume 4: Realising the human rights of people with disability', 2023, pp. 299-301, where the DRC appeared to see little need to attempt to defend the element of 'comparative less favourable treatment' within the *Disability Discrimination Act* 1992 (Cth).
[17] *Tsikos v Austin Health* [2022] VSC 174, [47], citing *Slattery v Manningham City Council*, [35]-[53].

respondent a viable argument that something about the circumstances of their previous decision were 'materially different'.

[3.14] Absent in all but the most 'ideal' of lawsuits, the occurrence of the situation described above is largely a fantasy that does not reflect how incidences of discrimination come to occur. In reality, many complainants will be forced to rely on a 'hypothetical comparator' and, as a direct result of having the very facts of their matter reduced to what amounts to a subjective 'guessing game', will have their matters dismissed.

[3.15] On this point, the NSWLRC is already aware of both the prior recommendations made by the NSWLRC within the 1999 ADA Review, as well as the outcome in matter of *Purvis v New South Wales [2003] HCA 62 ('Purvis')*.

[3.16] Nonetheless, FPDN would not presume to attempt to craft a more authoritative set of general critiques than those which have already been provided within the joint dissent of McHugh and Kirby JJ in *Purvis,* so FPDN has instead chosen to extract some relevant portions of that dicta below. Whilst the paragraphs are lengthy, FPDN considers that this is an area where, unless significant changes are made, the core concept of 'discrimination' under the ADA may remain in a state that is effectively useless for the purposes of any complainant with complex circumstances (especially disability). Therefore, this is not an area where it is appropriate to leave 'any room for doubt':

> *'[114] In this case, as in most cases, s 5 requires the construction of a "notional person" whose treatment can be compared to that of Mr Hoggan [the plaintiff]. The need for such a comparator is open to the criticism that it limits the Act's capacity to deal with cases of direct discrimination. In the United Kingdom, commentators have attempted to reformulate the notion of direct discrimination so as to free it of the shackles of the comparator. One critic has said that a model predicated on comparability is particularly unsuited to the ground of impairment because the complainant simply cannot be said to be similarly situated to an able-bodied person.*
>
> *[115] The relevant comparator in this case is a person without Mr Hoggan's disability. But, for the purpose of s 5, what are the circumstances that are the same or are not materially different?...*
>
> *[129] The learned judges of the Federal Court erred in holding that the proper comparator was one who exhibited the behaviour that Mr Hoggan did. Indeed, as will later appear, the proper comparator was a student who did not misbehave. The comparator adopted by the Federal Court would be appropriate if the case was one concerned with discrimination on the ground of sex or race. In such a case, the behaviour of the person alleged to have been discriminated against is not related to the prohibited ground. Thus, it would be appropriate to compare the treatment of a man who behaves badly with that of a woman who behaves badly to determine whether the man or woman, as the case may be, had received less favourable treatment on the ground of sex.*
>
> *[130] Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as "proxies" for discriminating on the basic grounds covered by the legislation. But the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment. And loss of the Act's protection would not be limited to such dramatic cases as*

the blind and amputees. Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the Act requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker. When that comparison is made the employer will be shown to have breached the Act unless it can make out a case of unjustifiable hardship as defined by s 11 of the Act'.[18]

[3.17] For the sake of clarity, FPDN does also wish to:

(i) Acknowledge that the decision in *Purvis* occurred at a time when the *Disability Discrimination Act 1992 (Cth)* did not specify that *'[t]o avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability'*;[19] and

(ii) Emphasise that this does not detract from any critique of the 'comparator test' that has been made, insofar as the case demonstrates how arcane, prone to subjectivity and difficult to understand/ consistently apply the 'comparator test' is, even amongst the most learned legal professionals in Australia.

[3.18] For the purposes of this submission, it does not particularly matter that the DDA's definition of disability has since been updated (and not just because no such change has been made to the ADA). P*urvis* is indicative of how unsuitable and restrictive the comparator test is as a whole, regardless of which exact protected attribute (or combination thereof) is being considered (e.g. 'race' and 'transgender grounds').

The undue effects of the comparator test on First Nations persons

[3.19] Whilst the outcome of *Purvis* alone should already be taken as demonstrative of manifest inadequacies with the 'comparator test', FPDN wishes to draw attention to the fact that the argumentation in Purvis was primarily concerned with the difficulties of choosing between multiple different potential 'comparative persons'. I.e. Regardless of whether the comparative person was to be one who merely lacked the disability, or instead one who lacked both the disability and violent behaviour, the case always proceeded under the assumption that some suitable, realistic point of reference must exist. This is not always the case, and nowhere is this unfairness more evident than in relation to historically disadvantaged minority groups, such as First Nations persons.

[3.20] FPDN wishes to illustrate this fact by pointing towards two different (but comparable) matters that were brought under the *Racial Discrimination Act* 1975 (Cth) ('RDA').[20] FPDN's reason for doing so is that, for at least the last decade, conflicting decisions have arisen regarding whether the wording of s9(1) of the RDA does or does not require the application of the comparator test. As a result, wildly different outcomes can occur.

[3.21] First is the class action matter of *Wotton v Queensland (No 5)* [2016] FCA 1457 *('Wotton')*, where the allegation was that the police had committed acts of unlawful racial discrimination against community members of Palm Island during their investigation into Mulrunji's Doomadgee's 2004 death in custody and the subsequent police response.

[18] *Purvis v New South Wales* [2003] HCA 62, [114-115], [129-130].
[19] See *Disability Discrimination Act 1992* (Cth), s4.
[20] *Racial Discrimination Act 1975* (Cth), s9(1).

[3.22] *Wotton* is notable for being a very rare instance of discrimination legislation being successfully used in order to obtain compensation for police misconduct against a First Nations community, but this was (in large part) only possible due to the willingness of Mortimer J to reach the conclusion that discrimination had occurred based on inferences drawn from a *'comparative analysis of the circumstances, albeit one that is not constrained by the complex comparator structure found in other federal anti-discrimination statutes'*.[21] As a result, Mortimer J concluded that:

> *'[Queensland Police] were not respectful, they were dismissive. They were not consultative, they dictated. They did not recognise grief and frustration, they over-policed. They behaved in this way because this was an Aboriginal community where the police had a sense of impunity and separateness, and an intention to exert control. The distinction was based on race'*.[22]

[3.23] Second, and by way of contrast, is the matter of *Campbell v Northern Territory (No 3)* [2021] FCA 1089, where the alleged discriminatory conduct was the decision made by staff of the infamous Don Dale Youth Detention Centre to transfer Marley Campbell to Don Dale Youth Detention Centre and refuse to transfer him back to the Alice Springs Youth Detention Centre (which was in much closer proximity to his family).

[3.24] However, as was excellently described by the Racial Justice Centre (as part of their 2023 submission to the NSWLRC), Marley Campbell was denied the opportunity to be heard as a direct result of the Court's (conflicting) insistence on the necessity of the 'comparator test':

> *'The Court did not have to resolve whether his treatment involved a relevant distinction, exclusion or restriction because at the first test he failed to establish causation for want of a comparator. The applicant's case manager at Don Dale stated that he had never seen a transfer decision made on the basis of the detainee's race because "[a]lmost all of the detainees were Indigenous" and he could "only recall one or two non-Indigenous detainees". This produces the highly distorted and inequitable result that a plaintiff 'did not experience' discrimination because "those suffering the disadvantage of discrimination may find themselves in circumstances quite unlike other more fortunate than they". Actual and hypothetical comparators who are required to be in the same or similar factual situation as the plaintiff are not viable because the test does not allow them to exist – the very fact that they lack the protected attribute often precludes the possibility that they would find themselves in that situation in the first place'*.[23]

[3.25] Perhaps Marley Campbell might not have ultimately succeeded in establishing that this conduct amounted to discrimination in any event. Nevertheless, there is no reason that a complainant should not be afforded the opportunity to 'make their case' because of a technicality. In *Campbell*, there was a legitimate argument that the transferal decisions were rooted in systemic racism, which is in turn demonstratable via the historical treatment of Aboriginal detainees in the Northern Territory generally, and the numerous damning incidents of discrimination that have been documented at Don Dale specifically.[24]

[3.26] FPDN can see no legitimate reason that the ADA should not be amended to replace the 'comparator test' with an equivalent of the 'unfavourable treatment'/ 'detriment' test. Additionally, FPDN's answer to this question has not yet even considered the difficulties that the 'comparator test' poses in relation to intersectional discrimination (which is the subject of Question 3.8 of the Consultation Paper). Suffice to say, there is no definitive answer as to how a person with multiple protected attributes (e.g. A First Nations elderly

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[21] *Wotton v Queensland (No 5)* [2016] FCA 1457, [540]
[22] Ibid, [1093].
[23] Racial Justice Centre, 'Review of NSW Anti-Discrimination Law – Joint submission to the NSW Law Reform Commission', 2023, pg. 14.
[24] See, for example, the Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, 2017.

mother with disability) should go about selecting a comparative person, including whether they are required to undertake the inane exercise of presenting multiple alternative 'comparative persons' who each lack a single protected attribute.

Interactions between the 'comparator test' and the need to demonstrate causation for direct discrimination

[3.27] FPDN intends to discuss the burden of proof under the ADA for direct discrimination as part of Question 3.6(1), which directly asks whether any of that burden should be shifted onto the respondent (which is a proposition that FPDN ultimately supports, irrespective of whether it is agreed that the 'comparator test' should be abolished).

[3.28] However, a matter that might otherwise be overlooked is that the problems with the ADA's approach towards causation (for direct discrimination) are further exacerbated by the myriad inadequacies of the 'comparator test'.

[3.29] As has been acknowledged by the NSWLRC, putting the 'full' burden of proof upon the complainant requires them demonstrate a causal link between the 'reasons' for the respondent's actions which often falls completely outside of the scope of matters which the complainant could reasonably be expected to know (e.g. whether the respondent acted upon an intentional or subconscious bias or stereotype). Whilst the complainant is not obligated to prove 'deliberate' discrimination, evidence proving some form of 'causal link' must still be provided.

[3.30] In reality, outside of situations where the respondent has made a direct statement signalling what their intention was (which the complainant can rely upon as evidence), a major impediment for achieving successful actions is that the complainant is at the mercy of a whether the decision-maker will be willing to draw a favourable inference based upon circumstantial evidence.

[3.31] When attempting to establish 'direct discrimination', the requirement of causation still exists as 'yet another hurdle' for any complainant that does actually manage to satisfy the 'comparator test'. I.e. A complainant could invest the majority of their (almost certainly limited) time and resources into ensuring that the decision-maker is satisfied that the complainant's treatment was, in fact, different from that offered to a comparative person (whether real or hypothetical), only to still fail to satisfactorily convince the decision-maker to draw the inference that the discrimination occurred *because* of the protected attribute.

[3.32] FPDN's overall point is that, when the burdens placed upon the complainant by the 'comparator test' and the current requirements for demonstrating causation are 'stacked upon each other', their cumulative effect is that of an almost farcical level of pitfalls, redundancies and unfairness for complainants.

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?

[3.33] Yes. FPDN's position is that the 'comparative disproportionate impact' test for indirect discrimination is wholly redundant, offers no benefits to the administration of justice, and should be wholly removed (with no replacement).

[3.34] Whilst (within our answer to Question 3.2) FPDN will adopt the Consultation Paper's terminology and refer to the 'comparative disproportionate impact test', FPDN briefly wishes to note that what is being described is often described as the 'proportionality test' within prior discourse on the topic.

[3.35] Additionally, at least as part of the Questions 3.2 and 3.3 of the Consultation Paper, the NSWLRC appears to have separated any consideration of the 'unable to comply' and 'substantially higher proportion' requirements of the test for indirect discrimination, preferring instead to deal with each as a distinct element which the complainant must prove.

[3.36] FPDN is not suggesting that this approach is necessarily incorrect --- only that it has the potential to be problematic, due to deemphasising the fact that, within the text of the ADA, it is quite difficult to 'cleanly' differentiate between the effects of the 'substantially higher portion' and 'not able to comply' requirements, which are directly connected:

> ***7 What constitutes discrimination on the ground of race***
>
> *(1) A person (**"the perpetrator"**) discriminates against another person (**"the aggrieved person"**) on the ground of race if the perpetrator--*
>
> > *(c) requires the aggrieved person to comply with a requirement or **condition with which a substantially higher proportion of persons not of that race, or who have a relative or associate not of that race, comply or are able to comply** [emphasis added]...*[25]

[3.37] FPDN does not seek to be pedantic. However, to provide one example, the Consultation Paper appears to be somewhat erroneous regarding the statement (at [3.49]) that *'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'*.

[3.38] In actuality, the 1999 NSWLRC Review discussed this issue under the heading of '[t]he proportionality test' and made no usage whatsoever of the term 'comparative proportionate impact test'. I.e. To the extent that such an acknowledgement was made by the NSWLRC, it is evident that (at that time) the NSWLRC's discussion of the need for 'some assessment of proportionality' to be retained was also highly related to the consequences of the 'not able to comply' requirement (which is the subject of Question 3.3 of the Consultation Paper).[26]

[3.39] The 'substantially higher proportion' requirement is (by itself), in FPDN's view, fundamentally flawed, and simply does not require any direct replacement. FPDN would still petition for it to be removed even if the NSW Government was unwilling to alter the remainder of the test for indirect discrimination under the ADA.

[3.40] As was discussed by the NSWLRC in the 1999 Review (and demonstrated via an analysis of the High Court's decision in the '*Australian Iron and Steel case*'),[27] the current ADA forces a complainant to provide statistical information in order to succeed, such that the focus is not on the 'the person', but on 'persons'. I.e. Even if the complainant can demonstrate (without any contention) that they, as a direct result of their experience with a protected attribute (e.g. a disability), will be seriously and personally disadvantaged by a requirement imposed by the respondent, they can and will still fail to establish indirect discrimination if the precise nature of their disadvantage is sufficiently uncommon, poorly documented, and/or the decision-maker decides that it is most appropriate to 'compare' their situation to a 'class' of other persons in a fashion that results in an unfortunate statistical result.

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[25] *Anti-discrimination Act 1977* (NSW), s7(1)(c).
[26] See, for example, New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', 1999, [3.91].
[27] Ibid [3.92 - 3.100], referring to *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

[3.41] Within the context of First Nations persons with disability, complainants are extremely unlikely to have the relevant expertise, resources and legal representation to make a compelling argument on behalf of what is effectively 'everyone' with their particular combination of attributes, nor can FPDN identify any compelling policy justification for requiring individual complainants to do so.

[3.42] In other words, the 'significantly higher proportion' requirement functions as an additional burden upon complainants that is both unfair and highly arbitrary. FPDN 'more or less' prefers the option set out within [3.46] of the Consultation Paper of 'refocusing' the test in order to ensure that '*the test for indirect discrimination does not assess disproportionate impact by reference to comparator group'* and *'[i]nstead, the issue is whether a requirement or condition disadvantages a person with a protected attribute'*. FPDN's primary concern with the exact phrasing of any such 'refocused' test is actually the (far more significant) implications that any such changes are likely to have upon the 'not able to comply' requirement (as is discussed below).

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?

[3.43] Yes. The 'not able to comply' component of the test for indirect discrimination should be replaced with a version of the 'disadvantage' test that is used in Victoria and the ACT.[28]

[3.44] FPDN has some reservations with the NSWLRC's choice to, in relation to the issue of the 'not able to comply' part being interpreted literally, only briefly frame this as a potential concern of the of the Queensland Human Rights Commission (QHRC) (at [3.52]).

[3.45] FPDN's view is that it is sufficiently clear that this very real problem. It does not take long to find different explanations and applications of the 'not able to comply' requirement that place onerous burdens upon complainants, are not easy to settle, and arguably sometimes outright contradict one other. FPDN will highlight a notable 'haircut' decision from QCAT. FPDN recognises that such decisions are not precedential, but nevertheless submits that this is the appropriate analysis, given that the vast majority of complainants will never have the resources to pursue a supreme court appeal.

[3.46] In the matter of *Australian Christian College Moreton Ltd & Anor v Taniela [*2022] QCATA 118 *('Taniela')*, a male student of Cook Islander and Niuean descent ('Cyrus') was threatened with 'unenrolment' due a refusal to cut his hair short, in compliance with the college's uniform policy. Ultimately, Cyrus and his parents succeeded in establishing that the enforcement of the uniform policy amounted to indirect discrimination.

[3.47] In theory, QCAT members will not take an overly 'literal' approach to interpreting the words of 'not able to comply'. On this point, *Taniela* was reported on (within legal/academic spheres) as supporting the proposition that tribunals will not restrict the phrase to situations of physical impossibility. This does mean that there must be 'no difficulty, disruption or inconvenience' whatsoever, but that the applicable standard is one of 'serious disadvantage'.[29]

[3.48] However, when one further examines the decision, it becomes clear that, even though 'Cyrus' ultimately succeeded, the level of burden imposed as a result of the 'not able to comply' component was simply ludicrous. In an argument about 'haircuts', Cyrus's success hinged upon the fact that it is a tradition

[28] See *Equal Opportunity Act 2010* (Vic), s9(1). See also *Anti-Discrimination Act 1991* (ACT), s8(3).
[29] *Australian Christian College Moreton Ltd & Anor v Taniela* [2022] QCATA 118, [81] citing *Hurst v State of Queensland* (2006) 151 FCR 562, [134].

associated with Cook Island/ Niuean culture for the eldest son to undergo a hair-cutting ceremony at a time of the parents choosing (with the child's hair remaining uncut from birth, prior to the ceremony).

[3.49] This 'controversy' apparently involved (amongst other things) the QCAT member (at first instance) accepting Cyrus's father as an expert on Cook Island culture, whilst weighing his evidence (regarding hair-cutting ceremonies) against that given by an 'independent expert'. It is crucial to understand that this was not an argument that either QCAT or QCATA appears to have considered dismissing as trivial or frivolous.

[3.50] This was a lengthy (and no doubt exorbitantly expensive) argument where the college attempted to establish that the 'not able to comply' component did not apply to Cyrus, as his parents held some ability to choose when to conduct the hair-cutting ceremony (and could have theoretically done so prior to Cyrus's enrolment). In order for Cyrus to successfully demonstrate that they were 'not able to comply', QCATA accepted the Tribunal's first instance conclusion that *'the timing was a matter for Cyrus' parents and that was integral to the ceremony. Because it was to be held around his 7th birthday, he could not comply with the requirement to have his hair cut earlier and therefore, could not, consistently with the cultural practices of his racial group, comply with the requirement imposed to cut it before semester 2 of 2020'*.[30]

[3.51] FPDN's point is not that Cryus did not ultimately succeed. It is that, even for a matter concerning something as ostensibly simple as an educational institution's haircut policy, the burden imposed upon a complainant by the 'not able to comply' requirement can be obscene and unjustifiable. A vast majority of those in similar situations to Cyrus (and Cyrus' parents) would simply not be capable of securing and devoting the amount of money, time and resources that such an endeavour demands.

[3.52] Furthermore, a less discussed element of the *Taniela* decision is that the parents of Cryus also apparently attempted to ground their arguments using gender discrimination, but found no success, even though the school's policies would not have prevented a female student from adopting a similar or identical haircut.

[3.53] This, it seems, does not amount to the standard of 'serious disadvantage' and is an acceptable distinction for a school to make, and is exactly what occurred in *XA (BY ZA) v School* [2024] QCAT 15 *('XA v School')*, where the Senior Member refused to make a finding of indirect discrimination, and even directly stated that *'[t]here is no suggestion of any racial, cultural, religious or gender identity significance to the manner in which XA wears his hair. Given the very young age of XA which I infer to be 4 or 5 years, it is reasonable to assume that XA's hairstyle is a styling choice made by his parents and that the views set out in the Complaint as to restriction and disadvantage are the views of ZA'*.[31]

[3.54] FPDN's position is that the 'not able to comply' test must be removed. If a complainant is able and willing to pursue a cause of action for discrimination (for which they must already satisfy the general law test of requisite 'standing' which applies to every civil matter), there is little justification for requiring the complainant to demonstrate the extent to which they 'cannot comply'. The exact effects of discrimination are likely to be deeply personal for each individual, and it can reasonably be assumed that their willingness to continue seeking a remedy will typically demonstrate that they have been sufficiently aggrieved (providing that the litigation is not clearly vexatious).

[30] *Australian Christian College Moreton Ltd & Anor v Taniela* [2022] QCATA 118, [82].
[31] *XA (BY ZA) v School* [2024] QCAT 15, [12].

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?

[3.55] Yes. FPDN accepts that 'reasonableness' should remain as part of the test for indirect discrimination. Without some equivalent of the reasonableness standard, it would otherwise be inevitable that decision-makers may feel compelled to order an individual or organisations to refrain from enforcing a policy or requirement that is logical and necessary to carry out a legitimate purpose. In such cases, ordering a remedy for an act of indirect discrimination would actually promote unjust outcomes and absurdities.

[3.56] On this point, FPDN takes no issue with outcomes such as that *in Sklavos v Australasian College of Dermatologists* ('*Sklavos*'), where a finding was made (under the *Disability Discrimination Act 1992* (Cth)) that it was 'close to a necessity' that the College be permitted to require the plaintiff (Dr Sklavos) to complete final examinations prior to admittance as a Fellow, regardless of the legitimacy of the phobias and/or disabilities that were at issue.[32]

[3.57] FPDN does have a number of problems with the 'reasonableness standard' as implemented within the ADA. However, these are ancillary consequences of the ADA:

i. Not placing the onus on the respondent to demonstrate that a requirement is 'reasonable' (which falls under Question 3.6 of the Consultation Paper); and
ii. Not requiring duty holders to take steps to prevent or eliminate discrimination (which is the subject of Question 11.3 of the Consultation Paper).

(2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

[3.58] Within the Consultation Paper, the NSWLRC has correctly noted concerns about ambiguity, vagueness and the standard being open to different interpretations. Out of the approaches canvassed within the Consultation paper, FPDN would most support an approach modelled on s9(3) of the *Equal Opportunity Act 2010* (Vic).

[3.59] The primary issue with a test of 'reasonableness' for indirect discrimination is that it is entirely possible, if not inevitable, that several different 'reasonable' conclusions will be reached for the same set of facts, without providing any clear guidelines as to how a decision-maker should 'choose' between competing interpretations. In FPDN's experience, this means that decision-makers tend to excessively 'err on the side of caution' when confronting a social norm, policy or longstanding practice. This is counterproductive to the underlying purpose of eliminating discriminatory practices within various areas of public life.

[3.60] When decision-makers are being asked to make a determination about behaviour that is potentially a form of entrenched, systemic discrimination, it is inevitable that factors such as 'convenience', 'normalcy', 'expense' and 'logistics' will be weighed against the alleged unlawful conduct. To (once again) refer to the example of *Campbell v Northern Territory (No 3)* [2021] FCA 1089, a nebulous conception of 'reasonableness' can serve as yet another reason that the plights of minority groups (such as First Nations children) may be dismissed during discrimination actions, without any meaningful examination of the relevant underlying

[32] *Sklavos v Australasian College of Dermatologists* [2016] FCA 179, [203].

historical circumstances. I.e. Just because a behaviour is tolerated as a matter of course should not, for the purposes of discrimination law, automatically paint the respondent's behaviour with 'the colour of law'.[33]

[3.61] FPDN accepts that, when it comes to assessing and overturning systemic discrimination, courts are not intended to function as an activist or legislative institution, and that there are limits on the extent to which a judicial decision should overturn the status quo (without the enactment of new legislation or executive actions). However, the Victorian approach (to setting out relevant circumstances) does not exceed these boundaries. It merely provides some 'gentle guidance' and establishes a permission structure through which the judicial branch can, upon all of the relevant evidence, scrutinise a requirement, condition or practice in light of:

(a) *the nature and extent of the disadvantage resulting from its imposition, or proposed imposition*
(b) *whether the disadvantage is proportionate to the result sought by the duty holder who seeks or proposes to impose it*
(c) *the cost of any alternative*
(d) *the financial circumstances of the duty-holder imposing it, or proposing to, and*
(e) *whether reasonable adjustments or reasonable accommodation could be made to reduce the disadvantage caused.*[34]

[3.62] It is crucial to note that, in order for the approach described above to be implemented successfully within the ADA, it would be dependent upon several other features which are not currently part of the ADA:

i. Placing the onus on the respondent to demonstrate that a requirement is 'reasonable'; and
ii. Obligating members of the public to consider making adjustments and accommodations in order to avoid incidences of indirect discrimination.

The Consultation Paper and a 'proportionality test'

[3.63] As for the other option put forward by the NSWLRC of a 'proportionality test', FPDN has some concerns.

Avoiding confusion

[3.64] In the interests of avoiding confusion, it is not ideal to describe the approach taken within s19 of the *Equality Act 2010* (UK) as a 'proportionality test', as this is the same nomenclature that seems to most often be used within discourse of Australian discrimination legislation to refer to the need for a complainant to prove '*a requirement or condition with which a substantially higher proportion of persons not of that race, or who have a relative or associate not of that race, comply or are able to comply*'.

[3.65] For example, the submissions made by the Law Society of New South Wales refer to the current ADA already using a 'proportionality test' for indirect discrimination.

[3.66] For present purposes, FPDN would suggest that referring to the approach taken within s19 as a 'justification' or 'objective justification' defence (or similar) may assist in avoiding unnecessary confusion. This is not an issue that is unique to the Consultation Paper, and other previous discourse has also used the

[33] See, for more information, R Rothstein, '*The Color of Law: A Forgotten History of How Our Government Segregated America*', 2017. Rothstein's insights are primary given in relation to the history of racial discrimination in America, but can also be applied to Australia.
[34] *Equal Opportunity Act 2010* (Vic), s9(3).

phrase 'proportionality test' within a single document to refer to multiple different concepts within various pieces of discrimination/ human rights legislation.[35]

Merits of an 'objective justification' approach

[3.67] FPDN's brief opinion is that an 'objective justification' approach for indirect discrimination would be superior to the ADA's current approach, but likely still inferior to the approach taken within the *Equal Opportunity Act 2010 (Vic)*.

[3.68] Both approaches are relatively similar, but the Victorian approach provides more specific details and also includes 'proportionality' as one of many factors which a decision-maker can consider. If sufficiently defined and restricted, providing scope for courts to consider whether a respondent is pursuing a 'legitimate aim' could be promising --- but otherwise poses a severe risk of allowing perceived social norms (e.g. cost benefit analysis) further scope to displace existing protections against discrimination under the guise of historical 'legitimacy'.

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?

[3.69] Yes. Assuming that the distinction between 'direct' and 'indirect' discrimination within the ADA is to be maintained (which FPDN supports), the relatively minor change of extending the prohibition on indirect discrimination to characteristics that people with protected attributes either generally have or are assumed to have would encourage consistency within the ADA.

[3.70] Even speaking theoretically, no respondent should ever be placed in a situation where they could successfully defend themselves against the prohibition of indirect discrimination using an argument along the lines that their discriminatory presumption was ultimately somewhat erroneous/ inaccurate (as applied to the complainant).

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?

[3.71] Yes. FPDN's position is that, unless the ADA adopts an approach based on a shared burden of proof, it will remain hopelessly ineffectual and out of touch with more modernised pieces of disability legislation.

[3.72] In this regard, FPDN's preference would be that the recommendation made by the Queensland Human Rights Commission (QHRC) within the Building Belonging Report (Recommendation 13.1) should also be accepted by the NSWLRC in relation to the ADA:

> *'The Act should introduce a shared burden of proof in which the burden shifts to the respondent once the complainant has established a prima facie case. The provision should be based on section 136 of*

[35] For example, see the Queensland Human Rights Commission, 'Building belonging – Review of Queensland's Anti-Discrimination Act 1991', 2022.

the Equality Act 2010 (UK), and informed by the guide in the Annex to the UK case of Igen Ltd & Ors v Wong [2005] EWCA Civ 142.'[36]

[3.73] In practice, Queensland did go on to implement such a model within the (un-commenced) *Respect at Work and Other Matters Amendment Act 2024* (Qld), in a form which FPDN submits would also be appropriate for the purposes of the ADA:

> ***'204 Burden of proof—general***
> *(1) In a complaint proceeding, if there are facts from which it could be decided, in the absence of any other explanation, that the respondent contravened the provision of the Act the subject of the alleged contravention, the respondent is taken to have contravened the provision.*
>
> *(2) Subsection (1) does not apply if the respondent proves, on the balance of probabilities, that the respondent did not contravene the provision.*
>
> *(3) Subsection (1) and (2) apply in addition to any other provision of the Act that provides for who has the onus of proving a particular matter'.*

[3.74] FPDN takes no issue with the (quite similar) model contained in the *Fair Work Act 2009 (Cth)* (which the NSWLRC has also discussed within the Consultation Paper), but considers that the wording and form of these provisions are simply less directly 'transplantable' into the ADA, which has a scope that extends beyond employment scenarios.

[3.75] FPDN foresees that the NSWLRC will likely receive some submissions to the effect that any modification of the burden of the proof in discrimination matters would result in an unfair burden being placed upon respondents (with a focus on employers).

[3.76] Respectfully, such concerns should be dismissed, such as was the conclusion of the QHRC (following a lengthy examination of the competing factors).[37] Without the implementation of a 'shifting' or 'shared' burden of proof, the ADA will fail to contain any meaningful recognition of the reality that disabled applicants are highly vulnerable to acts of discrimination and often have to operate from a position of inherent disadvantage when attempting to prove any complaint, since it is actually the respondent who is best placed to provide evidence relating to their subjective intentions.

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

[3.77] Yes. In principle, FPDN agrees that, for indirect discrimination, the respondent should bear the burden of proving that a requirement is reasonable.

[3.78] The Consultation Paper properly notes that (i) both the NSWLRC and LRCWA have previously recommended this, and (ii) this is already the case in multiple other Australian jurisdictions.

[3.79] Alleging that an otherwise discriminatory action is 'reasonable' is tantamount to raising a legal defence, which respondents are far better positioned to provide evidence in relation to. For example, a person with disability should not be required to speculate upon and 'rule out' the possibility that the respondent has some (as of yet undisclosed) justification for their behaviour that is not obvious.

[36] Ibid, pg. 24.
[37] Ibid, pp. 196-198.

[3.80] In practice, this outcome should also be pursued via implementing a general 'shared burden of proof' into the ADA, akin to s134 of the *Equality Act 2010* (UK), as FPDN discussed above in relation to Question 3.6(1).

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?**

[3.81] FPDN's preference is that the ADA retains the distinction between direct and indirect discrimination, whilst adopting the approach taken in the *Discrimination Act 1991* (ACT).

[3.82] Despite the potential for the concepts of direct and indirect discrimination to overlap, they do each serve a valuable purpose in broadly setting out two distinct forms of discrimination (with a focus on the intention, or lack thereof, of the person engaging in the behaviour) which do not always coexist.

[3.83] As it currently stands, the core issues with the test for direct discrimination within the ADA are the lack of a shared burden of proof and the unnecessary complexities of the 'comparator test'. Once these areas are reformed, complainants who genuinely believe that they have been targeted by a deliberate act of direct discrimination should no longer feel compelled (or receive legal counsel advising them) to counterintuitively pursue a claim of indirect discrimination.

[3.84] Additionally, a complainant who wishes to allege that they have been treated differently (but not 'unfavourably') as a direct result of a protected characteristic will still be relying on the existence of the distinction.

[3.85] Nevertheless, the fact that the ADA currently does not clarify that the two concepts are not mutually exclusive is a problem that must be resolved, especially for the benefit of complainants with more 'borderline' cases (such as described in [3.88] of the Consultation Paper). In particular, First Nations persons with disability are frequently not in a position to know whether a requirement has been imposed upon them as a form of overt discrimination/ racism, or whether the respondent has simply failed to consider the (indirect) impact of their actions. In practice, the answer might not become entirely clear until the respondent provides their own evidence/ defences.

[3.86] For these reasons, FPDN broadly supports adopting a combination of the approaches taken in both Victoria and the ACT. Each of these jurisdictions have their own slight advantages, and NSW is fortunately able to 'pick and choose' accordingly:

(i) ***The meaning of discrimination:***
S8(1) of the *Discrimination Act 1991* (ACT) explicitly states that discrimination can occur '*directly or indirectly,* ***or both*** *[emphasis added], against someone else*'. The stipulation of 'or both' (which is not present in s7 of the *Equal Opportunity Act 2010* (Vic)) is beneficial, as it minimises the need for a decision-maker to expend unnecessary time and effort distinguishing between the two varieties of discrimination in 'borderline' matters where a variety of overlapping conduct has occurred.

(ii) ***The meanings of 'indirect' and 'direct' discrimination:***

Overall, FPDN prefers the approach/structure that is reflected in ss8-9 of the *Equal Opportunity Act 2010* (Vic), which contains dedicated sections that focus on defining 'direct' and 'indirect' discrimination respectively.

These sections provide a greater level of detail, including by (i) giving practical examples of scenarios that would likely constitute 'direct' or 'indirect' discrimination,[38] and (ii) clarifying the extent to which it is irrelevant that a person who discriminates is aware of the discrimination,[39] and/or has other reasons for the treatment (provided that the attribute is a substantial reason).[40]

By contrast, the *Discrimination Act 1991* (ACT) briefly sets out the meanings of direct and indirect discrimination in separate subsections within s8.[41] FPDN considers this approach to be completely serviceable, but not quite as useful to unrepresented litigants and advocates who are encountering the concepts of 'direct' and 'indirect' discrimination for the first time.

[3.87] The only other addition that FPDN would suggest is that the NSWLRC should consider the explicit inclusion of what would effectively be a type of 'alternative verdict' power for decision-makers to the effect that, notwithstanding that a complainant has only alleged direct discrimination, the decision-maker can nevertheless find that indirect discrimination has occurred (and vice versa), if satisfied that the relevant type of discrimination has been proven (and regardless of whether the complainant ever mentions it).

[3.88] This would accomplish a great deal insofar as ensuring that, for professionals and sophisticated litigants, the distinction between the two 'types' of discrimination remains, but will not also serve to penalise those (typically self-represented) litigants who do not grasp the complexities (and know to pre-emptively set out alternative pleadings).

Question 3.8: Intersectional discrimination

(1) Should the ADA protect against intersectional discrimination? Why or why not?

[3.89] Yes. FPDN staunchly asserts that the ADA's current approach to protecting against discrimination (based on addressing each attribute/ ground separately and 'one at a time') is thoroughly outdated and 'out of touch' with the realities of discrimination.

[3.90] There is no commonsense, policy-grounded justification for an ADA that requires complainants to artificially 'divide themselves up' into their constituent attributes. In practice, this is not an exercise that either complainants or respondents are undertaking throughout the course of any discriminatory conduct, so it makes little sense for decision-makers to be compelled to do so as a consequence of the limitations of the current ADA's legislative drafting.

[3.91] In FPDN's experience, First Nations populations unfortunately have such a high prevalence of disability (upwards of 80%, depending on the definition that is used) that it becomes difficult to discern whether patterns are targeted at a person's First Nation status, or their disability. Even the alleged discriminator is

[38] *Equal Opportunity Act 2010* (Vic), ss8(1), 9(4).
[39] Ibid ss8(2)(a), 9(4).
[40] Ibid ss8(2)(b).
[41] *Discrimination Act 1991* (ACT), s8(2-3).

likely to be operating under a series of subconscious assumptions and biases of which they are not fully cognizant.

[3.92] FPDN would like to present the hypothetical example of an adverse employment decision against a First Nations person with a mixture of intellectual and physical disabilities, who also possesses what could be deemed as an 'irrelevant criminal record'. This person may be more than capable of meeting the 'inherent requirements' of a position, whilst requiring adjustments on the grounds of culture (e.g. leave for 'Sorry time') and disability (e.g. mobility aids). In the event that this hypothetical person attempts to utilise their adjustments, but is quickly labelled as underperforming (with a suspected racial undertone and evidence to suggest that the employer has recently discovered their criminal record), is it reasonable to expect that this individual must pursue multiple different causes of actions for each protected attribute? FPDN's answer to this question is obviously 'no'.

[3.93] Additionally, as the NSWLRC has correctly identified (at [3.97]), a major problem with actioning intersectional discrimination is that there are times where, until a decision-maker is willing to consider that a respondent may have been acting based upon the 'combined effect' of multiple attributes, the complainant will not be capable of coherently establishing the true nature and extent of the alleged discrimination.

[3.94] When it comes to offering protections against intersectional discrimination, FPDN systematically disagrees with any assertion to the effect that *'[o]n the other hand, allowing complaints to be based on overlapping attributes may increase complexity*'. As a matter of fact, these supposed 'complexities' <u>are</u> the true nature of discrimination in real world scenarios, and any test that opts to ignore them for the sake of simplicity is plainly unfit for purpose.

[3.95] Furthermore, to return to the NSWLRC's observations at [3.97] (regarding an employer who might refuse to employ women of colour but employ men of colour and white women), the act of allowing the decision-maker to consider 'overlapping attributes' actually simplifies the judicial process, via removing artificial barriers and allowing decision-makers to embrace a 'whole of person' approach towards assessing each complainant's allegations.

(2) If so, how should this be achieved?

[3.96] As was identified by the NSWLRC in [3.97], the ACT test is still somewhat problematic, in that it is somewhat ambiguous regarding whether there is protection against discrimination based on the combined effect of multiple attributes.

[3.97] FPDN is of the view that this ambiguity could be resolved via utilising the approach that is reflected within s7A of the (un-commenced) *Respect at Work and Other Matters Amendment Act 2024* (Qld), which inserted the following subsection clarifying the 'meaning of discrimination on the basis of an attribute':

> *'(2) Also, **discrimination on the basis of an attribute** of a person who has 2 or more attributes includes discrimination in relation to—*
>
> *(a) any of the attributes; or*
>
> *(b) 2 or more of the attributes; or*
>
> ***<u>(c) the combined effect of 2 or more of the attributes</u>** [emphasis added]'.*[42]

[42] *Respect at Work and Other Matters Amendment Act 2024* (Qld), s7A.

[3.98] In any event, FPDN is of the view that current the structure of the ADA (NSW) is itself an impediment to reforms in this area, and does not consider that this topic was sufficiently acknowledged by the NSWLRC throughout the Consultation Paper. Crucially, the ADA does not actually contain any overarching concept of 'attributes' or 'protected attributes' (despite the NSWLRC mostly framing the Consultation Paper as if this was the case).

[3.99] By stark contrast, the ADA contains separate 'what constitutes discrimination' sections for each 'ground' of discrimination,[43] which duplicate the tests for discrimination and then set out matters which are peculiar to each specific 'type of discrimination' within the ADA.

[3.100] Amongst other problems, this results in various inconsistencies in how each attribute is treated,[44] makes the ADA (NSW) far more idiosyncratic and confusing to navigate, and complicates the process of adding new protected attributes. If the ADA is to be updated to recognise intersectional discrimination, its current structure will need to be revised.

[3.101] Both the *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic) are structured in a way that is far more streamlined and superior to the ADA, due to those pieces of legislation relying on 'catch-all' definitions of discrimination which, in turn, are applied equally to every 'attribute' that is protected.

[3.102] Using the *Discrimination Act 1991* (ACT) as an illustration:

- S7 contains a list of every 'protected attribute', in addition to extending *every* 'protected attribute' to include matters such as characteristics that persons with the attribute are generally have or are presumed to have, past attributes, future attributes, attributes that the persons is thought to have, etc;
- S8 contains the tests for direct and indirect discrimination; and
- Most matters which are peculiar to a specific attribute are set out within the legislation's dictionary, a discrete definition provision (e.g. s5A for 'potential pregnancies), or discrete exception provisions (e.g. s51 for discrimination by educational institutions relating to disability).

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?

[3.103] Yes. FPDN is not aware of any compelling argument against the proposition that, if a complainant can successfully establish a respondent's intention to engage in discriminatory future conduct, that person should be entitled to a remedy (namely, an injunction to prevent the harm).

[3.104] As has been noted by the NSWLRC within the Consultation Paper, numerous other jurisdictions have already addressed this gap in coverage by extending the tests for direct and indirect discrimination to include situations when a duty holder 'proposes to treat' someone unfavourably/ disadvantageously.[45]

[43] See, for example, *Anti-discrimination Act 1977* (NSW), s7 ('What constitutes discrimination on the ground of race') and s24 ('What constitutes discrimination on the ground of sex').
[44] For example, Questions 4.9(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?') and 4.9(2) ('(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?') would simply not arise under the *Discrimination Act 1991* (ACT), due to the way that 'protected attributes' are defined in s7.
[45] See, for example, *Equal Opportunity Act 2010* (Vic) ss8-9.

[3.105] Victims of discrimination who are in a position to take pre-emptive action should not, as a prerequisite to making a complaint, be forced to wait until the discrimination (and associated harm/ disadvantage) has already occurred.

Area 4: Discrimination: protected attributes

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"?

[4.01] FPDN takes the position that the current protections under the ADA for 'responsibilities as a carer' are narrowly defined, rigid and based on outdated assumptions regarding carers, filial responsibility and traditional Western family structures. This is especially true for First Nations persons, who maintain distinct cultural beliefs about the meaning of 'family' that the Australian legal system has not only failed to accept as legitimate, but has actively weaponised against First Nations communities.[46]

[4.02] The existing attribute/definition should be changed to an (undefined) attribute of either:

- 'family, carer or kinship responsibilities', as introduced by s7 the (un-commenced) *Respect at Work and Other Matters Amendment Act 2024* (Qld); or
- 'parent, family, carer or kinship responsibilities', as per s7(1)(l) of the *Discrimination Act 1991* (ACT).

[4.03] FPDN's position is that any new or amended attribute must explicitly acknowledge 'kinship responsibilities'. Given the historical background of generational disadvantage, death and family separations, it is a common occurrence for First Nations persons to (on the grounds of a sense of 'kinship') assume responsibilities over a person that are equivalent to those of traditional 'carer', despite the absence of any 'immediate' relation and especially without being legally recognised as an authorised carer, guardian or person bearing parental responsibility.

[4.04] There is no compelling reason that if, for example, a First Nations person chooses to 'step up' in order to care for, support (and quite often house) a child who they perceive to fall within their kinship network, the ADA should remain incapable of providing protections against discrimination. Under any non-legalistic definition of the word, such a First Nations person has assumed the responsibilities of a 'carer' --- regardless of family trees, marriage certificates or court orders. Those responsibilities may be formal or informal, intended to be long term or only offered in a time of crisis, and may or may not involve the usage of words related to 'family' (e.g. mum, uncle).

[4.05] Not every kinship relationship will bear the hallmarks of a traditional 'parent' or 'carer', but many will, which is why FPDN prefers the usage of the term 'kinship responsibilities'. This is an incredibly complex and sensitive topic, and FPDN does not intend to (as part of this submission) comprehensively describe every type of possible 'kinship relationship' or attempt to exhaustively list every 'subset' of relationship that would rise to the level of 'kinship responsibilities' for the purposes of the legislation. Such an endeavour would serve little purpose, especially given FPDN's preference that the new attribute should be left undefined.

[4.06] As is touched upon within [4.17-4.23] of the NSWLRC Consultation Paper, it can be seen how thoroughly outdated and exclusive the ADA's definition of 'carer', that was once considered by its drafters to be appropriate and forward-thinking, has since become. First Nations communities are far from the only 'category' of persons who are disadvantaged by rigid categorisations which cannot 'allow [the term's] meaning to change with time and respond to diverse family structures'.

[4.07] FPDN notes that (at [4.23]), the Consultation Paper acknowledges the potential option of using a definition of 'carer' akin to the one used in Victorian discrimination law. Whilst this approach is superior to

[46] See, for more information, the Human Rights and Equal Opportunity Commission, 'Bringing them Home – Final report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', 1997.

the current ADA, FPDN's opinion is that the *Equal Opportunity Act's* definition of carer (as a person on whom someone is wholly or substantially dependent for ongoing care and attention, generally excluding commercial arrangements) is fairly accurate but ultimately unnecessary, given that this description offers little that could not otherwise be discerned from the 'plain meaning' of the term. Additionally, it does not capture certain important nuances which are present within less 'traditional' relationships, including kinship responsibilities.

[4.08] In response to [4.25 – 4.26] of the Consultation Paper, FPDN would not support conflating the 'carer' attribute with the definition from the *Carers (Recognition) Act 2010 (NSW)*, which contemplates a narrower class of carers (personal care and assistance due to disability, medical condition, illness, age etc.) that is tailored for the specific purposes of that legislation.

[4.09] As for the potential concerns set out in [4.23] of the Consultation Paper that *'[i]f the ADA's definition was repealed, but not replaced, it is unclear how courts or tribunals would interpret it'* and that *'[t]his could lead to uncertainty'*, FPDN's position is that these concerns are outweighed by the need to provide decision-makers with the interpretative leeway to make flexible, evolving and fact-sensitive judgements about the scope and nature of family, kinship and carer's responsibilities. Some degree of 'uncertainty' is a necessary and unavoidable consequence that ought to be preferred over the alternative of a prescriptive definition.

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"?

[4.10] FPDN refers back to the prior section within this submission regarding '*First Nations concepts of care and disability – Culture is Inclusion*', including the discussion therein about the limitations of both the 'medical' and 'social' models of disability, especially for First Nations persons with disability.

[4.11] FPDN advocates for the concept of disability (which previously did not exist within traditional Aboriginal languages) to be understood within the framework of 'a cultural model of inclusion', which avoids many of the entrenched preconceptions of other models of disability (i.e. deemphasising the focus on extent of impairment in favour focusing on 'what a person needs to be happy and included in their community').

[4.12] The definition of 'disability' contained within the ADA is woefully outdated and does not reflect the current understanding of the nature/ scope of disability. FPDN also shares the QHRC's concerns that these types of definitions may not always cover people who experience episodic mental conditions, or who do not meet specific diagnostic criteria.

[4.13] The ADA definition uses deficit-based language that is quite outdated, unnecessary and, at times, borderline offensive (e.g. 'malfunction', 'malformation'), even after accounting for the definition's focus on the medical model of disability.

[4.14] Even if it is accepted that '*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*', it remains true that, in order to access the protections within the ADA and bring a claim, many persons with disability need to accept having themselves described in a way that is demeaning, completely out of touch with how they perceive their 'condition', and quite often not even required by modern understandings of medicine/ disability.

[4.15] Take, for example, a complainant with autism spectrum disorder who is alleging direct discrimination against an employer that is imposing additional supervision requirements upon them, under the (incorrect/ unjustified) assumption that additional precautions are necessary.

[4.16] Many such complainants absolutely would not describe or perceive themselves as someone with *'a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction'*, yet (counterintuitively) must do so even if their desire is just to be treated 'normally'.

[4.17] This approach is positioned in direct contrast to the increasing understanding and acceptance of neurodiversity (variations between human minds occurring naturally within a population, including ADHD, dyspraxia and dyslexia) amongst medical professionals.

[4.18] FPDN's position is not that the 'medical' model of disability has no place whatsoever within discrimination law. Rather, it is that definitions which assume the framing of the 'medical' model are inherently deficit-based and, as a consequence, will always fail to provide a definition of disability that is broad enough to facilitate the implementation of the 'social' and 'human rights' models of disability (which are briefly discussed in [4.40-4.42] of the Consultation Paper), yet alone the 'cultural' model of disability. It is imperative that these problems are not misunderstood, minimised or miscategorised as concerns of 'political correctness'.

Inclusion of Cultural Context

[4.19] The 'spirit' of the cultural model of disability could easily be embedded by updating the definition of disability to that require decision-makers to consider cultural context when interpreting the ADA, especially for First Nations peoples. For example, *'in interpreting and applying this definition, due regard shall be given to diverse cultural understandings of ability and inclusion, particularly for Aboriginal and Torres Strait Islander peoples'*.

Exploring alternative definitions of disability for the ADA

[4.20] FPDN's position is that replacing the current ADA definition of disability with a slightly 'sanitised' version of the DDA's definition (which is more or less the option discussed within [4.35-4.37] of the Consultation Paper) will result in some improvements, but that there is further work to be done in refining the definition of 'disability' for the purposes of the ADA (and Australian discrimination law as a whole).

[4.21] The Consultation Paper (at [4.41 4.42]) also references Article 1 of the CRPD, acknowledging that it is sometimes described as representing the best of both the 'social model' and a 'human rights approach or model':

> *'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'*.

[4.22] FPDN fully supports the principles of this approach. The CRPD may not always go as far as FPDN would towards embedding a 'cultural model' of disability (where much less focus is placed upon the extent of a person's impairments and barriers, as opposed to what each person requires to be 'happy' and 'satisfied' within their society).

[4.23] Nevertheless, an approach that focuses on identifying and overcoming barriers to societal participation (alongside careful references to medical classifications) is uniquely suited to the practical implementation requirements of discrimination legislation. The real problem that lies before the NSWLRC is that Article 1 of the CRPD lacks the level of mechanical detail that would be required for direct incorporation within the ADA or any other piece of Australian discrimination legislation.

[4.24] FPDN acknowledges that this is a complicated topic, and that a new definition of disability will take a great deal of time, effort and consultation to develop. However, FPDN staunchly believes that the current Australian legislative definitions of 'disability' can and should be modernised and improved, wherever and whenever opportunities present themselves. In this instance, NSW has the opportunity to become the 'trailblazer' amongst all jurisdictions.

(2) Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability?

[4.25] FPDN's preference would be for the addition of a separate protected attribute for 'genetic information', modelled on s7(1)(h) of the *Discrimination Act 1991* (ACT).

[4.26] FPDN is vehemently opposed to genetic signifiers being used as the basis for discriminatory decisions in almost any setting (not just predicting disability), and this should be understood within Australia's historical abuse of eugenics and pseudoscientific racism against First Nations populations.

[4.27] Additionally, FPDN has some misgivings about whether the DDA's inclusion of 'a genetic predisposition' to disability in the definition is sufficiently 'airtight'.

[4.28] In particular, FPDN's understanding is that this medical term is almost always used to describe the increased likelihood of a person developing a particular disease/condition due to their inherited genetic makeup. It is not clear that it would, for example, apply to a person who is not themselves genetically predisposed to develop the condition, but has (either by themselves or in combination with another mutated gene from their partner) an increased likelihood of having a child with a genetic predisposition.

[4.29] I.e. Would a 'silent genetic carrier' technically be excluded from the protections (even though, for example, an employer who knows about their carrier status could anticipate that they may have additional responsibilities as a carer in the future and make an adverse employment decision on that basis)?

[4.30] This is one hypothetical situation where it appears that a separate attribute for 'genetic information' would definitely offer protection, whereas the inclusion of protected attribute for 'genetic predisposition' might not. FPDN has similar concerns that a sufficiently well-resourced party (with the ability to fund expert evidence from geneticists) may be able to find and exploit other potential 'loopholes' regarding the scope of the meaning 'a genetic predisposition' which might not be anticipated by legislative drafters.

[4.31] However, another option that is not considered by the Consultation Paper is the possibility of creating a new attribute for 'genetic information' and including 'a genetic predisposition' to disability within the ADA's definition of disability. Even if this results in a slight 'overlap' between the provisions, 'genetic predisposition' is an issue that is largely specific to the protected attribute of disability and thus warrants a specific acknowledgement in the ADA outside of (an in addition to) a more general protection for 'genetic information'. FPDN would support this approach.

Question 4.6: Racial discrimination

(2) Are any new attributes required to address potential gaps in the ADA's protections against racial discrimination?

[4.32] Yes. *Aboriginal and Torres Strait Islander status must become a new protected attribute*, distinct and separate from the more general ground of 'race'.

[4.33] The struggles of First Nations persons against historical discrimination more than justifies this degree of inclusion and recognition. A backdrop of disastrous Government policies (such as the forcible removal of First Nations children) has resulted in a culture of ongoing disadvantage throughout all socio-economic outcomes, which continues to be exacerbated by incidences of direct and systemically entrenched discrimination.[47] This is the very reason for the existence of the CTG Agreement, which has been signed by Australian governments in all jurisdictions and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations (the Coalition of Peaks).

[4.44] The Consultation Paper fails to recognise or grapple with the reality that 'race'-based protections are not broadly effective for the majority of First Nations persons. Put bluntly, it is a gross oversimplification for the NSWLRC (at [4.93-4.94]) to reduce the potential significance of 'a specific reference to Aboriginal and Torres Strait Islander peoples' to something that:

- *'might not change the law in a significant way [because] Aboriginal peoples are already considered a "race" under discrimination law. Protections under both the ADA and the Racial Discrimination Act (Cth) extend to them'; and*
- *'could be an important statement of community standards'* and *'affirm their right to be free from racial discrimination'*.

[4.45] The Consultation Paper's framing of 'race' does not capture the realities of the context within which First Nations persons experience discrimination. The extent and nature of discrimination against First Nations persons (as an Indigenous population) is simply not comparable to other persons of a culturally and linguistically diverse ('CALD') backgrounds generally.[48] The very existence of the UN Declaration on the Rights of Indigenous Peoples ('UNDRIP') should also be taken as evidence that the need for the special protection of Indigenous rights is a concept with broad support under international law. NSW (and Australia as a whole) must finally take steps to domestically incorporate their obligations under UNDRIP.

[4.46] The Consultation Paper's more general discussion of 'some potential gaps in coverage' makes it evident that the NSWLRC is already aware that, even though the ADA's definition of 'race' is supposedly broad, there are already instances where complainants must struggle to establish that the race attribute indirectly covers the 'characteristic' of their race which is forming the basis of the discrimination (e.g. cultural practices).

[4.47] The moment that an act of discrimination shifts away from overt, conscious behaviours which are directly predicated upon the concept of a person's national origin, the 'race'-based protections in the ADA begin to waver. A clear example of this is the abject failure of the ADA to protect against caste discrimination (as noted in [4.84]), despite the obvious connection between Caste and South Asian backgrounds. The concept of 'race' (within the ADA) is rigid to such an extent that it cannot provide protections against a

[47] See, for example, Parliament of Australia Senate Community Affairs Reference Committee, 'A hand up not a hand out: Renewing the fight against poverty – Report on poverty and financial hardship', March 2004, Chapter 13 ('Indigenous Australians').
[48] See, for example, Australian Government Productivity Commission, 'Review of the National Agreement on Closing the Gap – Study report', January 2024, pp. 58-59.

codified, hierarchical class system, by virtue of the added complexity that these hierarchical class systems have a mixed socio-religious foundation that is more concerned with lineage, cultural features, practices and taboos than the more overt concepts of 'race', 'language' and 'skin colour'.

[4.48] Nevertheless, it is telling that the Consultation Paper appears to treat 'caste'-based discrimination very differently than discrimination against First Nations ('Aboriginal and Torres Strait Islander') persons. There appears to be an implicit understanding that reforms surrounding caste (whether via expanding the definition of race or by creating a standalone protected attribute) would change the law 'in a significant way' that is simply not being extended to the possibility of changes to the ADA for First Nations persons. In other words, the NSWLRC does not explore any possibility that, within modern-day Australia, Aboriginal and Torres Strait Islander persons experience unique facets of discrimination that cannot always (or even a majority of the time) be neatly confined within the concepts of 'race' or 'racial characteristics'.

[4.49] Respectfully, FPDN takes the position that the NSWLRC's approach towards setting out 'principles that could guide consideration of potential new protected attributes' (which are the focus of Question 5.1 of the Consultation Paper) place far too much weight on the potential concerns about creating some degree of overlap with an 'existing attribute', as opposed to demonstrating a keen willingness to protect historically marginalised groups. First Nations persons may derive some protections from the ADA's 'race' attribute, but those protections are far from comprehensive and do not reflect how First Nations persons experience discrimination on a 'day-to-day' basis.

[4.50] The truth is that, in so many ways, First Nations persons are '*permanently confirmed to the bottom rung of the racial hierarchy*' within Australia. On this topic, the work of Associate Professor Fiona Allison (UTS) captures the essence of the crisis so thoroughly that FPDN sees little reason to attempt to summarise their words. FPDN encourages the NSWLRC to explore *'A limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an access to justice lens'* in its entirety:

> *'Whilst racism directed here towards particular immigrant groups may, to some degree, abate over time as waves of migration bring people from 'new' nations here, who are then fresh targets of racist stereotyping; for Aboriginal and Torres Strait Islanders it is a constant - coursing with resilience throughout 200-plus years of contact. The relationship between Indigenous and non-Indigenous people over time has largely been one of oppression, entrenched prejudice and racial domination.*
>
> *Significantly, racism against Indigenous people has always resided and is still located within the nation's 'framework' itself, permeating 'the very fabric of contemporary Australian society'. It is embedded as 'institutional' racism within areas as diverse as our health, legal and educational systems and in our sport, in housing and in politics, including government policy. It is also clearly evidenced by the 'statistical inequality' of Indigenous Australians, the result of which is that a 'disproportionate number of the Indigenous population are at the very bottom of Australia's socio-economic ladder and appear to be going nowhere'. Thus in a range of key areas, the quality of many Aboriginal and Torres Strait Islander's lives cannot be said to be anywhere near equal to that of other Australians. Their social exclusion is represented by (but is not limited to) reduced chances of employment, difficulties in finding adequate housing, overrepresentation in the criminal justice system and poor health outcomes. When compared to a non-Indigenous person, an Indigenous person is thus 'much less likely to be employed, live in an adequate house, achieve education milestones, survive childbirth or live beyond the age of 55.' The latter is both a legacy of past racism and in and of itself a form of contemporary racism.*
>
> *Whilst the law may to some extent have done something to address more obvious manifestations of racial discrimination, thereby providing some measure of more formal equality, according to Burney it*

is data about health and other social outcomes that best demonstrates continuing Indigenous inequality. 'Direct discrimination is not as apparent in public debate today', she claims, but these 'statistics tell their own story'. In this way, discrimination 'has [now] manifested in more insidious forms of political and institutional racism, while simultaneously residing in a kind of malign neglect by the rest of the population'.

Taking, for example, Indigenous health, as Thornton suggests, although we no longer tolerate Indigenous peoples being given handouts of poisoned flour or being shot in hunting expeditions, 'we do condone a health scenario which endows an Aboriginal person with a more tenuous hold on life than a white person'. Inequality in this area means a lack of access to broad-spectrum health services for Aboriginal and Torres Strait Islanders living remotely, for example, but it is more than this. Health services in general have been principally developed to meet the needs of non-Indigenous consumers. This means that Indigenous people are likely to be effectively excluded from these services, or at least from drawing real benefit from them. Health service providers may fail to genuinely accommodate the cultural differences of Aboriginal and Torres Strait Islander people, whether that means responding inadequately to language issues or to Indigenous expectations or need around the type of care that will be provided. They may suffer harm as a result, including, for instance, given the aforementioned language issues when they do not understand what medication is being provided to them and/or how to take it or what surgical procedure they are 'consenting' to. Further, expenditure on Indigenous health care is said to be far from adequate, given the additional health needs of and extent of health-related problems in Indigenous communities.

...

Gaze suggests that anti-discrimination law seeks to alter society 'at both instrumental and symbolic levels, changing actual practices or social understandings'. It can and should be held accountable in terms of its performance in this regard. Significantly, she also suggests that law which is 'relatively ineffective at the instrumental level may not have much impact at the symbolic level'. In other words, if anti-discrimination law has little practical utility for Indigenous people, including because they are not using it to challenge discrimination, it will be unlikely to achieve its intended objectives of upholding the human rights of the most vulnerable members of our community. The degree to which Aboriginal and Torres Strait Islanders are challenging racism through anti-discrimination law is thus one important measure of the law's efficacy for Indigenous people. In this regard, there is evidence to suggest that Indigenous people do not enjoy adequate levels of access to justice with respect to discrimination. Gaze, again, has suggested that whilst 'significant inroads' have been made for relevant groups by laws targeting gender and impairment discrimination, it is much less clear that there have been similar gains 'for those affected by race and related discrimination'; in particular, Indigenous Australians. She writes that the law in this area has been 'unavailing against the situation of Indigenous people, where the problems are so deep that mere anti-discrimination legislation is hardly used.' This is likely to have been a contributing factor in the still relatively high incidence of both formal and (particularly) substantive inequality Indigenous people face in contemporary Australia. It also points to the difficulties the law has had in bringing about real change for Aboriginal and Torres Strait Islanders'.[49]

[4.51] Additionally, once Aboriginal and Torres Strait Islander (First Nations) status is recognised as a protected attribute, the NSW government will then also have a direct, functional method of making specific

[49] F Allison, 'A limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an access to justice lens', (2013/2014) 17(2) AILR, pp. 7-9.

references to First Nations persons within the ADA. This will ground FPDN's recommendations as to how the Bill should handle the consultation requirements of 'special measures' for achieving racial equality for First Nations persons (which is the focus of Question 11.2 of the Consultation Paper).

[4.52] The introduction of a new protected attribute for Aboriginal and Torres Strait Islander status would necessitate revising any existing protected areas or exceptions within the ADA which are currently restricted to 'race' (e.g. s17 – Discrimination in education by educational authorities, which is the focus of Question 6.3 of the Consultation paper) to also refer to the new 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?

[4.53] Yes. The lack of general protections for 'past' attributes (i.e. for each and every 'ground' of discrimination) within the ADA is a glaring omission, and the NSWLRC Consultation Paper does not sufficiently acknowledge the extent to which this is a direct result of the structure/ layout of the ADA.

[4.54] As FPDN discussed above (in relation to Question 3.8(2) of the Consultation Paper), the ADA does not actually contain any overarching concept of 'protected attributes', such as is present within the *Discrimination Act 1991* (ACT). Instead, the ADA contains separate 'what constitutes discrimination' sections for each 'ground' of discrimination, duplicating the tests and then setting out matters which are peculiar to each specific type of discrimination. This is the foremost reason that the ADA is filled with inconsistencies such as protecting against discrimination based on someone's 'past' disability (but not for other grounds of discrimination).

[4.55] To ensure consistency and avoid unnecessary duplication of the general tests for discrimination, the ADA must be restructured to function similarly to the legislation in Victoria and the ACT, via including a list of every protected attribute contained within a single section of the legislation. The ADA could then contain an equivalent of s7(2) of the *Discrimination Act 1991* (ACT), which would then automatically extend the interpretative scope of *every* 'protected attribute' covered by the ADA:

' 7(2) For this Act, "protected attribute" includes—

(a) a characteristic that people with the attribute generally have; and
(b) a characteristic that people with the attribute are generally presumed to have; and
(c) the attribute that a person has; and
*(d) **the attribute that a person has had in the past, whether or not the person still has the attribute** [emphasis added]; and*
(e) the attribute that a person is thought to have, whether or not the person has the attribute; and
*(f) **the attribute that a person is thought to have had in the past, whether or not the person has had the attribute in the past** [emphasis added]"*[50]

[4.56] FPDN also supports amending the ADA to protect against any attribute that a person 'may have in the future' (as per the recommendation of the LRCWA that was noted within the Consultation Paper). For certain 'attributes' (such as 'transgender grounds'), it is entirely conceivable that a person may signal their intention

[50] *Discrimination Act 1991* (ACT), s7(2).

to begin adopting the attribute, so the addition of explicit protections for 'future' attributes will be relevant and meaningful.

(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?

[4.57] Yes. As discussed above, this is another matter that could be easily resolved by adopting a legislative structure similar to that of the *Discrimination Act 1991* (ACT) or the *Equal Opportunity Act 2010* (Vic).

[4.58] For example, s6(q) of the *Equal Opportunity Act 2010* (Vic) includes the attribute of *'personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes'*.

Area 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?

[5.01] For the most part, FPDN has a favourable view of the 'guiding principles' set out within the Consultation paper.

[5.02] Nevertheless, FPDN respectfully submits that the Consultation paper's 'possible criteria for including new attributes' (represented by 'Table 5.1' within [5.8]) contains questions which are not designed to ensure prioritisation of the category of protected attributes which '*are based on attributes protected under international human rights instruments*' (I.e. One of the three main categories identified by the QHRC).

[5.03] When it comes to recognizing a new protected attribute for the benefit of Aboriginal and Torres Strait Islander persons (which would also relate to the characteristics of a historically marginalised group), the fact that Australia has endorsed UNDRIP, which has a scope that is more specific and extends beyond that of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'), should be dispositive of almost any argument to the effect that a new protected attribute is not required. Australia has made a deliberate commitment against Indigenous discrimination which has not yet been incorporated within State or Commonwealth domestic legislation.

> *'Article 21.1: Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security'.*[51]

[5.04] In light of the above, when NSWLRC assesses 'whether there is a gap in protection' for First Nations persons, it is redundant and unnecessary to question whether '*there [is] sufficient information to show that people with a particular characteristic need the protection of the Act'*. Even though FPDN would mount a vehement argument that sufficient evidence does exist, this is unnecessary. According to Article 21.1 of UNDRIP, which Australia has endorsed, the need exists.

[5.05] As for the matter of whether Aboriginal and Torres Strait Islander persons are *'already protected under an existing attribute*', this question means little if it is not accompanied by a detailed assessment of whether those protections are comprehensive and appropriate, considering the nature and importance of the human right that is to be protected. The protected attribute of 'race' obviously offers some measure of protection for First Nations persons, but it is far from sufficient (as was discussed by FPDN in relation to Question 4.6(2) of the Consultation Paper).

[5.06] FPDN's question in this instance would instead be 'If the new attribute will have any overlap with protections under an existing attribute, would this result in any harmful consequences?'. The NSWLRC Consultation Paper is already grappling with the reality that more modern, effective pieces of discrimination legislation explicitly acknowledge the occurrence of intersectional discrimination, based on a combination of protected attributes.

[5.07] Taking into account the importance of Article 21.1 of UNDRIP, and the dire Australian history of marginalisation for Aboriginal and Torres Strait Islander persons, FPDN's submission is that the consequences of any 'overlap' are ultimately insignificant, largely hypothetical, and far outweighed by the

[51] 'UN Declaration on the Rights of Indigenous Peoples 2007', Article 21.1.

absolute necessity of avoiding any 'gaps' in the protections against discrimination that are offered to First Nations persons in Australia.

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?

A new protected attribute for 'irrelevant criminal record'

[5.08] FPDN fully supports the addition of a protected attribute for 'irrelevant criminal record'. The need for a truly robust definition of 'irrelevant criminal record' is further heightened for First Nations people with disability, who are significantly more at risk of becoming 'trapped' and institutionalised within the Australian criminal justice system.[52] Making meaningful progress towards the Priority Reform Areas of the CTG Agreement will be impossible if First Nations people with prior convictions are denied a true pathway to employment and re-integration.

[5.09] The modern reality of job prospects for those with a criminal history makes protections for 'irrelevant criminal record' a necessity for all Australians, given that police and criminal records checks are increasingly used by employers on a routine basis, even where there is no legal requirement to do so. In 2022, the University of Queensland's Pro Bono Centre published a highly relevant paper on 'Reforming Criminal Conviction Discrimination in Queensland', which neatly explains the issue at hand:

> *'Naylor (2012) asserts there is not enough valid data to justify exclusion based on a prior criminal record. On the contrary, studies show that potentially 'excellent' staff are being lost to the emphasis on prior criminal history. This is significant when one considers that an estimated one in six Australians have a criminal record. Research conducted in the United Kingdom also indicated that employers' concerns that ex-offenders would lack reliability and honesty was refuted in practice. Naylor (2005) also emphasises that discrimination based on prior criminal history is not only destroying opportunities for employers and employees alike, but it is also harming society on a larger scale. This is due to the fact that, without re-employment and reintegration, there are no substantially effective tools in preventing criminal recidivism. Bradfield (2015) notes that mechanisms already in place to prevent recidivism, such as judicial discretion not to record a conviction, have not been as efficient as initially anticipated where employers are able to access wider information about a person's criminal record, such as whether they were charged with a criminal offence.*
>
> *Westrope (2018) suggests that the only universal and successful remedy to this issue is an explicit statutory ban on discrimination regarding prior criminal history. Westrope's recommendation is akin to creating a presumption that all criminal history discrimination is prohibited. This would in turn shift the onus onto employers/potential discriminators to have ready a defence that they have considered*

[52] See Australian Law Reform Commission, 'What is justice reinvestment?', 11 January 2018, [4.13].

the job and the inherent requirements of the position, similar to the federal system... Applicants with prior criminal convictions are being unnecessarily discriminated against. This is in large part due to the lack of an adequate protective mechanism. This leaves ex-offenders vulnerable to recidivism as well as lower qualities of life, not only due to the lack of a stable income but also the lack of connection to society. As a result, more Australian jurisdictions have been urged by scholars to introduce provisions regarding employment discrimination based on prior history into their anti-discrimination legislation'.[53]

[5.10] As for defining the scope of 'irrelevant criminal record' as a protected attributed, FPDN notes that the Consultation Paper appears to focus on the definition in the *Discrimination Act* 1991 (ACT). FPDN would suggest that the NSWLRC should instead seriously consider the approach that has been taken in s3 of the *Anti-Discrimination Act 1998* (Tas), which has a number of significant advantages in coverage:

*'**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 under the Expungement of Historical Offences Act 2017...'.[54]

[5.11] The Tasmanian definition explicitly includes circumstances where there has only been an arrest and/or interrogation (without charge), which is a vital area of coverage that is not encompassed by the *Discrimination Act 1991* (ACT).

Exceptions to a protected attribute for 'irrelevant criminal record'

[5.12] FPDN's general position is that exceptions to discrimination protections should be kept to a minimum.

[5.13] For example, it would not be necessary for an exception (to an attribute of 'irrelevant criminal record') to apply to '*providing accommodation, where it is reasonably necessary to protect their wellbeing*', as (under the ACT or TAS models) the protections for 'irrelevant criminal record' would not ever come into effect unless

[53] C Linklater-Steele, E Morsali, A Sullivan and H Woodfield, The University of Queensland – Pro Bono Centre, 'Reforming Criminal Conviction Discrimination in Queensland', 3 February 2022, pg. 6.
[54] *Anti-Discrimination Act 1998* (Tas), s3.

the circumstances relating to the offence for which the person was convicted 'are not directly relevant to the situation in which the discrimination arises'.[55]

[5.14] In effect, a provider of accommodation could already (without the need for any exception) make determinations about wellbeing on the basis of a person's 'relevant' criminal record, and there is no compelling basis to permit discrimination beyond that.

[5.15] On the other hand, FPDN is also of the view that, for 'irrelevant' criminal record, an abundance of caution is justified for employment that involves working with vulnerable people or children, if the discrimination is reasonably necessary to protect children's wellbeing. However, it is important to note that such exceptions are still not a blanket permission structure for turning away anyone with any history whatsoever of police contact, charges or convictions, and do still require an examination of whether the discrimination is, on the available evidence, 'reasonably necessary'.

A new protected attribute for 'subjection to domestic abuse and family violence'

[5.16] FPDN fully supports the addition of a protected attribute for 'subjection to domestic abuse and family violence' (and will seek to justify that exact phrasing below).

[5.17] The AHRC's concerns that 'the framing of any such prohibition needed further consideration' were raised within the context of a reform agenda for federal discrimination laws, which presented a number of additional complexities that would not be directly comparable to any proposal to insert a new protected attribute of discrimination into the ADA (NSW). In any event, the AHRC was clear that *'[t]he question then is the place for the protection, not that there is no need for it'*.[56]

[5.18] As has been noted in [5.37] of the Consultation Paper, South Australia, the ACT and the NT have already demonstrated that (at least at a state level), it is quite a simple and uncontentious matter to insert a protected attribute that is defined by reference to the terminology of the jurisdiction's domestic violence legislation, thus ensuring consistency and ease of interpretation:

- In the *Equal Opportunity Act 1984* (SA), the protection applies to those 'being, or having being, subject to domestic abuse',[57] which has the same meaning as in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA);[58] and
- In the *Anti-Discrimination Act 1992* (NT), the protection applies to those 'subjected to domestic violence',[59] which has the same meaning as in the *Domestic and Family Violence Act 2007* (NT).[60]

[5.19] In NSW, the equivalent term would be 'domestic abuse' in the *Crimes (Domestic and Personal Violence) Act* 2007.[61]

[5.20] However, FPDN wishes to highlight that the *Discrimination Act 1991* (ACT) goes even further, via simply including a protected attribute of 'subjection to domestic or family violence',[62] without any definition. As per Recommendation 14.2 of the ACTLRAC Review of the *Discrimination Act 1991* (ACT), these terms are

[55] *Anti-Discrimination Act 1998* (Tas), s3(i). See also, *Anti-Discrimination Act 1991* (ACT), Dictionary.
[56] Australian Human Rights Commission, 'Free and Equal: A Reform Agenda for Federal Discrimination Laws', 2021, pg. 271.
[57] *Equal Opportunity Act 1984* (SA), s85T(1)(g).
[58] Ibid s5.
[59] *Anti-Discrimination Act 1992* (NT), s19(jb).
[60] Ibid s4.
[61] *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s6A.
[62] *Discrimination Act 1991 (ACT)*, s7(1)(x).

referable to *'the definitions of domestic violence and family violence in s 13 of the Domestic Violence and Protection Orders Act 2008 (ACT) and s 4AB of the Family Law Act 1975 (Cth) respectively'*, and would *'appropriately extend the protection of the Discrimination Act to a vulnerable part of the ACT community'*.[63]

[5.21] In FPDN's view, the approach taken in the *Discrimination Act 1991* (ACT) is ideal and should be adapted for the purposes of the ADA (NSW). I.e. The addition of an (otherwise undefined) protected attribute for 'subjection to domestic abuse and family violence', referable to s6A of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and s4AB of the *Family Law Act 1975* (Cth) respectively.

[5.22] FPDN assumes that business associations (or similar organisations) are likely to, once again, raise uncompelling arguments to the effect that:

- Other legislation (such as the *Fair Work Act* 2009) deals with some family violence issues, and that any 'additional, overlapping ground of discrimination' is not required (even though it is evident that the existing protections are incredibly limited in scope, particularly outside of employment scenarios);

- Non-legislative domestic violence frameworks and education initiatives should be preferred (even though these avenues provide no legal remedies or enforceable rights to individuals); and

- A new protected attribute would introduce additional regulatory burdens on employers (even though these hypothetical costs are rarely substantiated, yet alone assessed against the economic costs of domestic violence to the community using a cost-benefit analysis).

[5.23] The protections which already exist in SA, the ACT and the NT aptly demonstrate that (at least at the state level), there are no convincing reasons to suspect that any of the above concerns will eventuate.

New protected attributes for 'physical features or appearance' and 'religious belief or activity'

[5.24] FPDN's submissions on the potential inclusion of new protected attributes for 'physical features or appearance' and 'religious belief or activity' will only discuss the potential application of these attributes to First Nations persons, noting that:

- At [5.65] of the Consultation Paper, the NSWLRC includes a conclusion of the QHRC that the *'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**) [emphasis added]'*.

- At [5.80] of the Consultation Paper, the NSWLRC states that *'Developing this new attribute [of religious belief or activity] 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".'*

[63] Australian Capital Territory Law Reform Advisory Council, 'Review of the Discrimination Act 1991', 2015.

[5.25] FPDN's position is that both of above 'opportunities' are inferior versions of protections that would be offered to First Nations persons via the inclusion of a protected attribute for Aboriginal and Torres Strait Islander status (as discussed above in relation to Question 4.6 of the Consultation Paper). This is because:

(i) The discission regarding 'deliberate bodily alterations' and 'chosen alterations' invokes many of the difficulties that a First Nations complainant is likely to face. First Nations persons can and do 'experience broader structural disadvantages' that are very difficult to establish under the protected attribute of 'race', as it must effectively be proven that the respondent is using the pretence of a grievance with the 'chosen alteration' (e.g. a tattoo or hairstyle') to disguise an act of racial discrimination; and

(ii) The discussion regarding 'religious belief or activity' is indicative of the need to offer specific protections regarding all behaviours that fall within the distinct cultural heritage and spiritual practices of First Nations persons.

[5.26] FPDN's point is that the best and most comprehensive solution for both of the above issues is the inclusion of a new protected attribute for Aboriginal and Torres Strait Islander status.

[5.27] The ultimate source of this discrimination is entrenched racism against First Nations persons, and to attempt to address this via introducing a mixture of every anticipated 'characteristic' (e.g. spirituality, tattoos, dress, hairstyle) that could possibly be associated/ conflated with Aboriginal and Torres Strait Islander status is to invite the creation of an ineffective patchwork, splattered with 'gaps in coverage'.

A new protected attribute for 'accommodation status'

[5.28] FPDN supports the inclusion of a protected attribute for 'accommodation status', akin to s7(1)(a) of the *Discrimination Act 1991* (ACT).

[5.29] First Nations persons are disproportionally affected by poor housing outcomes. This impact is widespread and has social, emotional, physical, economic and cultural impacts. Finding affordable and stable housing has become increasingly difficult as rental prices are increasing with low vacancy rates on rental properties.

[5.30] The current housing and cost of living crises are contributing to the lack of housing options for people on low incomes and statistics show that First Nations Australians are four times more likely to be living in social housing and experience overcrowding in the dwelling.[64] First Nations persons with disability face the additional hurdles associated with locating housing that is accessible, which can include ramps for wheelchairs, bedrooms and bathrooms with accessible showers/ railings.

[5.31] Without appropriate housing, individuals experience poorer health outcomes and lower levels of education, leading to lower rates of employment:

> *"With so many Aboriginal Australians experiencing homelessness, it is no wonder that five of the seven [Closing the Gap] targets relating to school attendance, life expectancy, educational*

[64] M Andersen, A Williamson, P Fernando, S Eades and S Redman, 'They took the land, now we're fighting for a house,' 2018, pp. 635-660.

achievement, and employment are not on track. Without a safe and secure place to call home, school attendance, employment, and health become inconsequential in the hierarchy of needs."[65]

[5.32] The degree to which First Nations persons may not technically be 'homeless', yet still suffer equivalent consequences as a result of chronic housing instability, overcrowding and the stigmas of relying on social housing is the main reason that FPDN takes the position that introducing a new attribute of 'homelessness' (only) would be far too narrow, and that offering protections for 'accommodation status' is both preferable and justified.

[5.33] FPDN wishes to make it clear that, for many First Nations persons, these types of concerns are not hypothetical --- they are a matter of day-to-day reality and have been for generations. FPDN encourages the NSWLRC to explore the (well documented) saga of Joan Martin,[66] a Yamatji mother and grandmother who was a public housing tenant in WA in 1997.

[5.34] Joan Martin (and her extended family) were evicted from their home by Homeswest (the largest rental landowner in Western Australia) as a result of refusing Homeswest's order to stop housing her family and overcrowding her premises (supposedly in breach of Homeswest's tenancy conditions).

[5.35] Despite the existence of substantial evidence that Homeswest's order was a response to a series of racially motivated complaints by a neighbour, in addition to being part of a consistent practice of (at that point) 10 years of abusing certain provisions of the *Residential Tenancies Act 1987* (WA) to evict First Nations persons, Joan Martin received no substantive justice.

[5.36] Despite an initial success (in establishing indirect discrimination) in the Supreme Court of Western Australia, the Full Court of Appeal went as far as to overrule any finding that Joan Martian's plight could be connected under discrimination law to her indigeneity, kinship obligations, and the underlying background of systemic oppression.[67]

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[65] S Vallesi, E Tighe, H Bropho, M Potangaroa and L Watkins, 'Wongee Mia: An innovative family-centred approach to addressing Aboriginal housing needs and preventing eviction in Australia', 2020, pg. 10.

[66] H McGlade and J Purdy, 'From Theory to Practice: Or what is a Homeless Yamatji Grandmother anyway? Joan Martin v Homeswest', (1998) 11 Australian Feminist Law Journal 137.

See also H McGlage, 'Racism in Legal Education Special - The Day of the Minstrel Show' [2005] IndigLawB 4; (2005) 6(8) Indigenous Law Bulletin 16.

See also Human Rights Working Group – Federation of Community Legal Centres, 'Right Off: The Attack on Human Rights in Australia', 2002, pg. 25.

See also F Allison, 'A limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an access to justice lens', (2013/2014) 17(2) AILR, pp. 16-17.

[67] *State Housing Commission v Martin* [1998] WASCA 327.

Area 6: Discrimination: Areas of public life

Question 6.2: Discrimination in work — exceptions

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

Employment for private household purposes

[6.01] FPDN supports the NSWLRC's prior recommendation that the exception for *'employment for the purposes of a private household'* should be changed to *'employment, or an application for employment, which requires work to be done in a dwelling occupied by the employer or by a relative of the employer'*.

[6.02] FPDN shares the NSWLRC's concern that, as presently worded, the exception '*could allow discrimination by employment agencies that provide private household workers*'.

[6.03] It is also important to note that (following the NSWLRC's Review in 1999) the introduction of the NDIS has led to the proliferation of NDIS household services for eligible persons with disability, which are offered by providers comprised of all different business structures and sizes (e.g. sole traders, large commercial providers), including employment agencies. It would certainly be abnormal if these types of commercial services/ entities could seek to rely upon the exception.

Employment by small businesses and small partnerships

[6.04] FPDN supports the NSWLRC's prior recommendation that the exception for employers with five or less employees should be removed. The effects of this exception are even more unjustifiable and oppressive in rural and remote communities, where both small businesses and First Nations persons with disability are more prevalent.

[6.05] Within the landscape of present-day Australia, *any* employer who wishes to discriminate on the basis of sex, disability, carer's responsibilities (or any other protected attribute) should be liable to the test of proving 'reasonableness' (or any applicable exception).

[6.06] Likewise, partnerships of five or less partners should also not be given carte-blanche to engage in forms of workplace discrimination, and FPDN supports the NSWLRC's prior recommendation to remove this exception.

Persons addicted to prohibited drugs: disability discrimination

[6.07] From the outset, FPDN's position is that the exception to disability discrimination for persons addicted to prohibited drugs is:

(i) Completely out of touch with a 'whole of person' understanding of disability and invites employers to perform a discriminatory, surface level analysis of the 'underlying causes' of a person's disabilities (which they are almost certainly unqualified to conduct on any meaningful level);

(ii) Counterproductive to the activities of Aboriginal Community Controlled Health Organisations (ACCHOs) and Aboriginal Community Controlled Organisations (ACCOs) in attempting to identify, treat and rehabilitate First Nations persons; and

(iii) Completely unnecessary and redundant, given that employers with legitimate concerns can already make use of the 'inherent requirements' exception to discriminate against a person who, by reason of a substance addiction or otherwise, is unable to carry out inherent requirements of the role. FPDN also wishes to highlight that the 'inherent requirements' exception lacks any unnecessarily punitive connection to the usage of 'a prohibited drug'.

[6.08] Ultimately, the exception should be removed (without any replacement). No meaningful detriment will result for employers.

The "inherent requirements" and "unjustifiable hardships" exceptions

[6.09] FPDN is of the view that the major issue with the ADA's current implementation of the 'inherent requirements' exception (and corresponding 'unjustifiable hardship' consideration) is the lack of additional considerations for *'the nature and extent of any adjustments made'* and *'the extent of consultation with the person with disability'*.

[6.10] The NSWLRC states (at [6.43]) that *'[a]n option could be to link the inherent requirements exception with a duty to make adjustments'*. In FPDN's view, this 'option' is a necessity. In the absence of a concurrent legal obligation upon employers to provide adjustments for persons with disability, no decision-maker will be in a position to meaningfully interpret and apply the 'inherent requirements' exception (and/or 'unjustifiable hardship' consideration), especially for persons with disability. FPDN will also discuss the concept of adjustments below (in response to Question 11.1 of the Consultation Paper).

[6.11] Lastly, the FPDN is not necessarily opposed to the ACT model of 'inherent requirements' which applies to all protected attributes (instead of just disability and carers' responsibilities), but is not actively aware of any such scenarios that would not be more suitably addressed under the 'genuine occupational qualifications' exception, (which FPDN discusses directly below).

Exceptions based on "genuine occupational qualifications"

[6.12] FPDN's position is that the patchwork of 'genuine occupational qualifications' contained in the ADA is strictly inferior to the ACT's model of a single broad exception for all genuine occupational qualifications, which applies consistently to all protected attributes (other than 'religious conviction') and requires employers to show that the act of discrimination is 'reasonable, proportionate and justifiable'.

[6.13] Respectfully, the NSWLRC's prior thoughts (that the ACT exception '*was unclear, as it does not spell out the situations in which the exception applies in the same detail as the ADA'*) merits reconsideration. This is because the way that the ADA 'spells out' the 'details' of its exceptions is by way of lists of situations which are inconsistent and haphazardly divided between 'race' (s 14), 'sex' (s 31) and 'age' (s 49ZYJ). In particular, these provisions are of questionable utility to any ACCOs, ACCHOs or Aboriginal Representative Organizations (AROs) seeking to identify employees with particular attributes in order to service the specific needs of different intersections of the First Nations community (E.g. Non-CIS First Nations persons with disability who have lived experience of domestic violence).

[6.14] The ACT's protections for genuine occupational requirements possess flexibility and utility precisely *because* there is no attempt to take the unnecessarily prescriptive approach that is reflected within the ADA.

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"?

[6.15] Noting that the 'WA discrimination legislation is like the ADA in its coverage of the education area', FPDN supports the recommendations of the Law Reform Commission of Western Australia (LRCWA) that:

(i) The ADA's definition of 'educational authority' should cover other 'education providers' (such as institutions which set rules for curricula and exams); and
(ii) The ADA should expressly cover discrimination in selecting or evaluating student applications.

[6.16] Whilst these changes would not be specifically targeted towards outcomes for First Nations persons (including those with disability), there is significant evidence of pervasive racism throughout the entire structure of Australia's tertiary education system, which includes racism targeted at First Nations students.[68] In these circumstances, FPDN's view is that an 'abundance of caution' is preferable to taking no action and risking gaps in coverage.

[6.17] Additionally, for the reasons outlined above, FPDN is of the view that the protected area of 'education' in s17 of the ADA should be amended to apply to (FPDN's recommended new protected attribute of) Aboriginal and Torres Strait Islander status (as opposed to 'race' only).

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?

[6.18] FPDN supports the proposition (in [6.152] of the Consultation Paper) that it is time to revise the NSWLRC's prior assessment (in 1999) which supported limiting the areas of protection for carers.

FPDN respectfully submits that he NSWLRC's statements (to the effect that it was 'only aware of discrimination based on caring responsibilities in the work context'):

(i) Were already questionable/ outdated in 1999. Even upon a cursory glance, it is evident that carer's responsibilities can become extremely relevant to discrimination in other areas of public life, such as 'accommodation'; and

(ii) Did not account for the complexities of intersectional discrimination. For example, FPDN routinely engages with First Nations persons with children (with a mixture of disability-related needs) who encounter immense struggles in attempting to secure appropriate social housing, to the point of simply 'giving up' and accepting any offer that is made to them (regardless of suitability and typically after enduring waitlists of several years).

[6.19] Additionally, the NSWLRC was previously operating on a (highly optimistic) premise that has since been proven incorrect; being that the ADA could be promptly revised if discrimination against carers became evident as a problem in other areas (in the future).

[68] See, for example, 'Hidden in plain view: Indigenous early career researchers' experiences and perceptions of racism in Australian universities', 2022.

[6.20] The NSWLRC made its Report in 1999. The majority of the NSWLRC's recommendations were never actioned, and it has taken until 2025 for the ADA to be revisited. At this point, it simply must be assumed that any changes that the (current) NSWLRC recommends must be 'futureproofed' and are not likely to be revisited (or 'adjusted') for a great deal of time.

[6.21] As FPDN will discuss below (in relation to Question 6.11(2) of the Consultation Paper), modernised pieces of discrimination legislation (such as the *Equal Opportunity Act 2010* (Vic)) have already long since moved towards an approach that extends protections against discrimination to *all protected attributes* *in all protected areas*, subject to specific exceptions.

(2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?

[6.22] Protections against discrimination under the ADA should extend to all protected attributes in all protected areas, subject to specific exceptions.

[6.23] FPDN wishes to note that, despite the inclusion of Question 6.11(2), this is not an aspect of the ADA which the Consultation Paper appears to devote any significant degree of attention to, outside of:

(i) Highlighting (at [6.159]) that carer's responsibilities are currently an exception under the ADA, with all other (existing) attributes being protected in all areas of public life; and
(ii) Briefly noting (at [6.162]) that the AHRC and LRCWA both recommended consistency across all protected attributes (unless an exception applies).

[6.24] Respectfully, FPDN believes that the Consultation Paper does not sufficiently acknowledge the extent to problems have arisen as a direct result of the structure/ layout of the ADA.

[6.25] As FPDN discussed above (in relation to Questions 3.8(2) and 4.9(1) of the Consultation Paper), the ADA does not actually contain any overarching concept of 'protected attributes', such as is present within the *Discrimination Act 1991* (ACT) and *Equal Opportunity Act 2010* (Vic), and instead contains separate 'what constitutes discrimination' sections for each 'ground' of discrimination.

[6.26] For the purposes of this submission, this means that, to the extent that the NSWLRC does accept that new 'protected attributes' should be added to the ADA, there is no guarantee that those attributes will be protected in all areas of public life (and further inconsistencies could arise). The ADA's reliance on duplicative 'grounds' of discrimination is weakness that must be addressed.

[6.27] Once again, FPDN is compelled to stress that these types of inconsistencies (e.g. carer's responsibilities only being protected in relation to employment) simply do not arise under the more streamlined models of the ACT and Victoria. Moreover, neither of these jurisdictions has experienced any substantiated 'opening of the floodgates' of litigation as a result.

Question 6.12: Additional areas of public life

(2) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

[6.28] Yes. For the purposes of this submission, there are two 'additional' areas of public life which FPDN wishes to focus on.

Government functions and the administration of laws

[6.29] To this day, it remains confounding that the ADA does not explicitly require the NSW Government to comply with its own anti-discrimination standards in the programs it develops and administers.

[6.30] In this regard, FPDN fully supports the (long overdue) implementation of the NSWLRC's prior recommendation (in 1999):

> *'Recommendation 29*
> *Include the exercise of functions and powers of local government and the administration of State and local government laws and programs as a new area'.*[69]

[6.31] It is telling that the NSWLRC has decided to cite the matter of *Commissioner of Police v Mohamed [2009] NSWCA 432*, in which the current structure of the ADA placed the complainant in the difficult (and incongruent) position of needing to classify late-stage investigatory behaviour by police as 'services' in order secure protection from discrimination.

[6.32] During the Royal Commission into Aboriginal Deaths in Custody, it was accepted that Indigenous people were 28.0 times more likely to be arrested than non-Indigenous people (in 1992).[70]

[6.33] In response to Question 3.1 of the Consultation Paper, FPDN has also already summarised aspects of *Wotton v Queensland (No 5) [2016] FCA 1457 ('Wotton')*, in which Queensland police had committed acts of unlawful racial discrimination against an entire class of First Nations community members of Palm Island during their investigation into Mulrunji's Doomadgee's 2004 death in custody.

[6.34] No First Nations person who has been discriminated against by the police would naturally seek to describe themselves as having been offered a 'service' and it is completely unacceptable that the ADA requires this at all.

[6.35] Moreover, this is not a gap in coverage that applies exclusively to police conduct. This is a problem that the NSWLRC (in 1999) had no issue whatsoever in identifying:

> *4.302* ***It is clearly sound in principle that the Government should comply with its own anti-discrimination standards in the programs it develops and administers*** *[emphasis added]. Although a majority of the High Court in IW v City of Perth held that a local council's consideration of a planning application could constitute a "service" for the purposes of anti-discrimination law, the division of opinion in that case makes it desirable to clarify the result under the ADA. It is clear that the concept of "services" is broad but not unlimited and the outer limit will no doubt mean that some aspects of government administration are covered, but others are not.*[71]

[69] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', 1999.
[70] See the Australian Human Rights Commission, 'Indigenous Deaths in Custody: Arrest, Imprisonment and Most Serious Offence'.
[71] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', 1999, [4.302].

[6.36] To provide a modern example, FPDN is constantly advocating for Homes NSW to administer its social housing initiatives in a way that provides equity for First Nations persons. There is likely an argument that much of Homes NSW's conduct (and underlying decision making) could be classified as being related to the provision of a 'service', but FPDN can see no justification that the extent of the NSW Government's obligations to obey its own discrimination legislation should ever be this ambiguous.

[6.37] The ADA's current lack of coverage for 'government functions and the administration of laws' is only further exacerbated by the current state of the 'statutory authorities' exception in s54 of the ADA (which FPDN will discuss below in response to Question 7.11 of the Consultation Paper).

Access to premises

[6.38] FPDN notes that the Consultation Paper does address coverage for 'access to premises', but primarily discusses this issue within the context of expanding the coverage of the protected area of the provision of goods and services (as per Question 6.4 of the Consultation Paper).

[6.39] However, FPDN much more prefers the option of entrenching 'access to premises' as a distinct protected area under the ADA (which the Consultation paper discusses at [6.92- 6.94]). This is crucial, given the decreased proportion of home ownership for First Nations persons, and the corresponding increased likelihood that a First Nations person (with disability) will be either be renting a property that is subject to a body corporate/ strata scheme or living in a property that is managed by some form of social housing provider.

[6.40] If the ADA is to remain consistent with the UNCRPD and UNDRIP in ensuring commitment to the full and effective access and participation of all persons (including First Nations persons with disability) on an equal basis with others, then it is integral that the ADA includes explicit protections for 'access to premises'.

[6.41] Bearing in mind that the NSWLRC is now considering the topic of positive duties (both to make adjustments and to take steps to eliminate forms of discrimination) under the ADA, it will not be sufficient for 'access' protections to continue to be treated as an offshoot of the protected area of the provision of goods and services (especially insofar as 'access' protections are required in other areas such as 'employment').

[6.42] Respectfully, the NSWLRC's former preference for expanding the definition of 'services' (as opposed to adding a new 'access to premises' area) seems questionable in retrospect, with the benefit of hindsight. The NSWLRC's reluctance to cause potential confusion via the addition of an area must now be viewed alongside the approach that has been taken in Victoria, which was modelled after the DDA (as has been noted in [6.92-6.93] of the Consultation Paper).

[6.43] S57(1) of the *Equal Opportunity Act 2010* (Vic) effectively establishes 'discrimination in access to public premises' as a standalone area of public life, and FPDN can find no substantial evidence that any meaningful confusion has arisen as a result:

> *(1) A person must not discriminate against another person on the basis of disability in relation to any premises that the public or a section of the public is entitled or allowed to enter or use (whether or not for payment)—*
>
> *a) by refusing to allow the other person access to, or the use of, the premises; or*
>
> *b) in the terms or conditions on which the other person is allowed access to, or the use of, the premises; or*
>
> *c) in relation to the provision of means of access to the premises; or*
>
> *d) by refusing to allow the other person the use of any facilities in the premises that the public or a sector of the public is entitled or allowed to use (whether or not for payment); or*

e) in the terms or conditions on which the other person is allowed the use of any facilities in the premises that the public or a section of the public is entitled or allowed to use (whether or not for payment); or

f) by requiring the other person to leave the premises or cease to use any facilities in the premises that the public or a section of the public is entitled or allowed to use (whether or not for payment).[72]

[6.44] It should also be noted that the Victorian approach is also supported by a comprehensive exception (in s58) for when allowing access to or use of public premises cannot reasonably be avoided, which (i) ensures that building owners cannot be forced to incur unjustifiable financial costs and consequences, and (ii) is consistent with the system of 'disability standards' made under the DDA.

[72] *Equal Opportunity Act 2010* (Vic), s57(1).

Area 7: Wider exceptions

[7.01] FPDN has decided not to place an extensive amount of focus on the 'wider exceptions' to the ADA as part of this submission.

[7.02] This is an area where FPDN continues to support the recommendations that were made by the NSWLRC (in 1999) which have not yet been implemented. At that time, the NSWLRC was quite critical of the majority of what where then referred to as the 'general exceptions' to the ADA, making findings to the effect that they often did not justify displacing aspects of discrimination law which are intended to protect fundamental human rights (and that the 'general exceptions' sometimes appeared anachronistic due to reflecting the prevailing social norms of 1977).[73]

[7.03] In particular, FPDN supports the following prior recommendations of the NSWLRC, which pertain to Questions 7.1, 7.8 and 7.9 of the Consultation Paper:

> ***Recommendation 45***
> *Replace s 55 (general exception for charities) with an exception covering the provision of goods or disposal of property by inter vivos gift or by will to a specific recipient or recipients.*
>
> ***Recommendation 46***
> *Amend s 56 (general exception for religious bodies) to: refer to the religious personnel of all faiths; provide that the exception only covers positions requiring a commitment to the tenets of the particular religion concerned; and repeal s 56(d)*
>
> ***Recommendation 47***
> *Repeal s 57 (general exception for voluntary bodies).*[74]

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?

[7.04] The only 'general exception' that FPDN wishes to focus on is the 'statutory authorities' exception in s54 of the ADA. FPDN does not consider that the Consultation Paper fairly represents the views that were expressed by the NSWLRC (in 1999) regarding the 'statutory authorities' exception.

[7.05] It is true that '*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*'. However, the NSWLRC's observations went far beyond this, to the extent that it was ultimately recommended that s54 should be repealed in its entirety:

> ***Recommendation 43***
> *Repeal s 54 (general exception for acts done under statutory authority) with effect from 12 months after the commencement of the new Act.*
>
> ***Recommendation 44***
> *All new legislation should be scrutinised to ensure compliance with the ADA.*[75]

[73] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', 1999, [6.1-6.4].
[74] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)'.
[75] Ibid.

[7.06] The Consultation Paper simply does not acknowledge the extent to which the continued existence of s54 is incredibly problematic. The exception tends to create a problem where, in any situation where NSW legislation establishes a government plan, program or policy (including in relation to First Nation persons and/or persons with disability), some argument arises that any resulting discrimination is 'necessary' to comply with the statutory authority (which includes 'any regulation, ordinance, by-law, rule or other instrument made under any such other Act'). This is an oppressive and unjustified scope of authority to grant to government agencies, insofar as they participate in areas of public life (including employment and provision of goods and services).

[7.07] Everything that was stated by the NSWLRC (in 1999) in their conclusion on s54 appears to still be relevant, so FPDN has elected to set out a highly relevant portion below:

> *6.34 In relation to Acts, delegated legislation and statutory instruments, there appears to be no justification for a universal overriding exception. Accordingly, s 54, in its present form, should be repealed. As a matter of principle, the law should define with specificity its area of operation and whether its application is universal or otherwise. The key policy considerations were clearly enunciated by Justice McHugh in Waters. Discussing the power given to the Minister under s 31(1) of the Transport Act 1983 (Vic), his Honour stated: The power of the Minister to give directions under s 31(1) is subject to the operation of the general law. By the general law, I mean the body of common law and equitable rules which are supplemented or amended by statutes and regulations and other instruments having the force of law. Section 31(1) therefore, would not authorise a direction that the corporation commit a crime or a tort or breach a contract or by-law. Nor would it authorise a direction that the corporation commit a breach of a statute such as the Act. These propositions, though not directly expressed in the Transport Act are self-evident. They are self-evident because, under a Government of laws and not of men and women it is axiomatic that, in the absence of express words or necessary intendment, Parliament does not intend the recipient of the power to authorise a Minister, statutory body or Government official to break the general law of the land.*
>
> *6.35 In relation to subsequent legislation, there will always be a question as to whether a specific provision was intended to impliedly repeal a prohibition in the ADA, in the absence of any direct recognition by Parliament of an inconsistency. So far as possible, steps should be taken to ensure that subsequent legislation does not unintentionally weaken the protections given by the Act to basic human rights. The Commission recommends that steps should be taken to guard against this possibility. The repeal of s 54(1) would not, of course, prevent either express or implied repeal by later legislation: an ordinary Act of Parliament cannot entrench itself.*
>
> *6.36 The ADB has proposed that agencies responsible for various Acts of Parliament should be given a period of time, between six months and two years, in which to make a submission to a parliamentary committee as to why any Act or regulation which breaches the ADA should be preserved. The committee would then determine on the basis of arguments put by the agency concerned and the ADB and other concerned organisations, whether the discriminatory provision should remain or be repealed or amended. Any provisions of Acts or regulations which the committee decides should be exempt from the ADA could then be contained in a schedule to the ADA or, alternatively, a s 126 exemption be granted in respect of those provisions.*
>
> *6.37 The Commission has given careful consideration to the possibility that unintended consequences may flow from the proposed repeal of s 54. However, there are grounds for thinking that this would be unlikely. First, the legislation has now been in force for almost two decades and there are only a handful of cases in which s 54 has been relied upon successfully. Secondly, the Act*

has been amended to remove the exception in relation to awards and industrial agreements and current industrial legislation seeks to ensure that all such instruments comply with the principles of the ADA.

6.38 Thirdly, the exception in relation to an order of a court or tribunal seems to be unnecessary. Again, so far as the Commission is aware, it has never been relied on in the EOT, is not available in all jurisdictions and has never, to the Commission's knowledge, given rise to any serious issue. It is difficult in principle to see that any real issue could arise where conduct was undertaken in order to comply with a court order: the necessary preconditions for a contravention of the ADA would simply not be satisfied.

6.39 Finally, administrative arrangements can be made to ensure that offending provisions, if any, are identified after publication of this Report.[76]

[76] Ibid, [6.34-6.39].

Area 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?

[11.01] Yes. The ADA should contain a *standalone* (separate) duty to provide adjustments that applies to *every* attribute in the ADA (including all of the 'new attributes' that FPDN has recommended as part of this submission).

[11.02] FPDN also wishes to briefly note that (in relation to Question 6.2) the NSWLRC mentioned that *'[a]n option could be to link the inherent requirements exception with a duty to make adjustments'*, so FPDN has already somewhat touched upon the need for the ADA to contain a duty to provide adjustments. Without such a duty, it is otherwise incredibly difficult for a decision-maker to apply the 'inherent requirements' defence in a manner that is fair to complainants.

The model of 'reasonable adjustments' within the current DDA verses the need for a 'standalone' duty

[11.03] To avoid any doubt, FPDN unconditionally supports the introduction of a positive, *standalone* duty to make adjustments for persons with disability **in all contexts and settings**, as encompassed in Recommendation 4.26 of Volume 4 of the Final Report of Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability:

> ***Recommendation 4.26 Standalone duty to make adjustments***
>
> *The Disability Discrimination Act 1992 (Cth) should be amended to include the following provision:*
>
> ***Duty to make adjustments***
>
> *It is unlawful for a person to fail or refuse to make an adjustment for:*
>
> *(a) a person with a disability; or*
>
> *(b) a group of persons with disability*
>
> *unless making the adjustment would impose an unjustifiable hardship on the person.*[77]

[11.04] Within the context of the *Disability Discrimination Act* 1992 (Cth), FPDN considers the necessity of such a change to effectively be 'non-negotiable' and consistent with the concept of 'reasonable accommodation' in the Convention *on the Rights of Persons with Disabilities ('CRPD')*.

[11.05] As will be discussed further below, this does not mean that FPDN accepts that it is appropriate for the ADA to only impose duties in relation to the attribute of 'discrimination'. On the contrary, there is no compelling reason for pieces of generalised discrimination legislation to contain such a dire limitation.

[77] Royal Commission into Violence, Abuse, Neglect and Exploitation, 'Final Report – Volume 4: Realising the human rights of people with disability', 2023, pg. 30.

[11.06] The primary reason that FPDN has chosen to address the DDA's approach is because the Consultation Paper (at [11.5-11.19]) treats the current DDA as the first of two potential models for providing adjustments (by dealing with 'reasonable adjustments' as part of the definitions of disability), without any apparent consideration for the subsequent DRC recommendations.

[**11.07]** Respectfully, FPDN would suggest that NSWLRC should 'stay as far away as possible' from the (current) DDA when seeking inspiration as to how to incorporate 'adjustments' into the ADA. Whilst the Consultation Paper notes that '*[the NSWLRC] heard concerns that this approach has created more difficulties for people who require adjustments'*, this is a grave understatement of the severity of the problem. In particular, the DRC spent multiple pages discussing the confusion that the DDA's approach has caused, including the confusion regarding whether a request must be 'reasonable', notwithstanding that this is inconsistent with the clear statutory defence of 'unjustifiable hardship'.[78]

[11.08] Ultimately, the DRC clearly endorsed the importance of the need for the DDA to impose a standalone duty to make an adjustment via designating such as an independent form of discrimination:

> *'Making reasonable adjustments for a person with disability is necessary to eliminate discrimination and to promote substantive equality and inclusion. It is a core principle of the CRPD which suggests the failure to make an adjustment should be recognised as a form of discrimination, not just an element of direct or indirect discrimination. The right to a reasonable adjustment is not without limits. The definition of 'reasonable accommodation' in article 2 of the CRPD describes adjustments as those that do not impose a 'disproportionate or undue burden'. We accept that unjustifiable hardship should be a consideration in determining whether a particular adjustment should be made for a person with disability.*
>
> *The DDA should be amended to remove 'reasonable adjustments' from the definitions of direct and indirect discrimination. We consider a failure to make an adjustment should constitute a form of discrimination itself, not simply an element of direct or indirect discrimination. The DDA should also impose a standalone duty to make adjustments. The focus would then be on whether there has been a refusal to make an adjustment and, if so, whether making the adjustment would impose unjustifiable hardship on the respondent. This approach is consistent with the CRPD, and in our view, relatively straightforward…'.*[79]

<u>The need for a standalone duty to make adjustments that applies to every attribute in the ADA</u>

[11.09] FPDN's position is that, within the ADA, a standalone duty to provide adjustments should exist and apply to <u>*every*</u> attribute in the ADA.

[11.10] I.e. FPDN would not support the ADA being amended to align with the approach that has been taken in Victoria, which is restricted to adjustments for people with disability (and to some extent carer's responsibilities). This is an unnecessarily narrow scope of coverage for any piece of generalised discrimination legislation, and wholly neglects the vital role that 'adjustments' serve in relation to every protected attribute.

[11.11] For instance, the NSWLRC has (rightfully) noted [at 11.6 of the Consultation Paper] that:

> *'Adjustments can come in many forms. For example, an adjustment could involve providing:*

[78] Ibid, pp. 304-309.
[79] Ibid, pg. 308.

- *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 [emphasis added]'.*

[11.12] It is imperative to note that, even though 'disability' is almost certainly the protected attribute which is most often used to illustrate the concept of 'adjustments', half of the above examples are not directly connected to disability. Naturally, the acknowledgement of 'Sorry Business for an Aboriginal and Torres Strait Islander employee' stands out to FPDN, but FPDN is also confidant that numerous other examples of completely valid adjustments exist in relation to other protected attributes (e.g. carer's responsibilities and transgender status).

[11.13] FPDN's view is that the majority of the questions and concerns that have been put forward by the NSWLRC (as part of Question 11.1) are currently best represented by the approach taken in s74 of the *Discrimination Act 1991* (ACT):

> *(1) A person must make reasonable adjustments to accommodate another person's particular needs arising from a protected attribute if discrimination on the ground of the attribute is unlawful under this Act.*
> *(2) For subsection (1), an adjustment is not reasonable if it would cause unjustifiable hardship to the person making the adjustment.*
> *(3) Failure to make reasonable adjustments in accordance with this section is an unlawful act.*[80]

[11.14] Overall, the ACT's approach is simple, ethical, and remains subject to the reasonable constraint of the defence of 'unjustifiable hardship'. FPDN accepts that this would be a significant change in NSW, but notes that there is a lack of any compelling evidence that duty holders in other jurisdictions (including employers) have been unduly burdened by the concept of adjustments, and submits that the supposed 'floodgates' of unnecessary litigation have never eventuated.

[11.15] These changes are necessary, beneficial, and FPDN does not consider that the process should be delayed or implemented in 'stages' (i.e. in relation to a 'smaller range of attributes', whilst relying upon a precarious assumption that the legislation will be promptly re-amended and expanded as appropriate). Applying the changes to all attributes will not place an unrealistic burden on persons, entities, businesses, courts or the NSW Government.

Potential improvements to the approach taken in the ACT

[11.16] FPDN also does not consider that the approach represented by s74 of the *Discrimination Act 1991* (ACT) is 'perfect'. It would still be a significant improvement over the current state of the ADA, but there are some further improvements that the NSWLRC should consider.

Updating the language to reflect the findings of the DRC

[11.17] Similarly to the DDA, s74 of the *Discrimination Act 1991* (ACT) uses the term 'reasonable adjustments'. This is likely unnecessary, and the term could be replaced with 'adjustments' to remove any

[80] *Discrimination Act 1991* (ACT), s74.

misconception that reasonableness is an element in deciding whether an adjustment is required (as opposed to the absence of unjustifiable hardship).

[11.18] Likewise, any equivalent of s74(2) could simply specify that an adjustment is not required if it would cause unjustifiable hardship to the person making the adjustment.

Adopting aspects of the Victorian approach for disability adjustments

[11.19] If the ADA (NSW) is updated to contain a standalone duty to make adjustments that applies to every attribute, it is nevertheless reasonable to expect that disability adjustments will be the most common usage of the concept.

[11.20] As is set out in [11.23] of the Consultation Paper, the *Equal Opportunity Act 2010* (Vic) contains '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'.

[11.21] Whilst FPDN does not support the overall more limited scope of the Victorian model, the examples and lists of factors that it contains provide an extensive level of guidance for any decision-maker, and cover key scenarios in which a person with a disability is most likely to request an adjustment (e.g. s20 and employees with a disability), s40 and educational authorities, s45 and service providers). This sheds light on what exactly is meant by 'unjustifiable hardship' and reinforces that, for entities such as large employers and educational institutions, the defence is not to be relied upon trivially and there is a real expectation that legitimate disability adjustments will be fulfilled.

[11.22] If persons with disabilities are to achieve good outcomes under the ADA, then it needs to be clear that any duty to make adjustments is not displaced by mere 'inconvenience', unwillingness to change policies, or a refusal to incur a level of expense that it is reasonable to expect (in all the circumstances) the entity to absorb as a contemporary 'cost of doing business'.

[11.23] For this reason, the NSWLRC ought to consider the merits of adopting the relevant portions of the above Victorian sections as either (i) explanatory/guidance notes within the ADA, or (ii) separate provisions that apply to disability adjustments within the relevant context (e.g. employment), but do not otherwise narrow the scope of the ADA's application.

(3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

[11.24] FPDN is not entirely sure what the NSWLRC is asking via Question 11.1(3) of the Consultation Paper, as:

(i) It is not a matter that the NSWLRC seems to have discussed (as part of [11.1-11.31]), and
(ii) None of the adjustment models that were considered by the NSWLRC explicitly impose any requirement for a person with a protected attribute to request an adjustment before any obligation to do so arises.

[11.25] FPDN supposes that it is possible that, as an example, s74 of the *Discrimination Act 1991* (ACT) could technically be read in such a manner (as to positively require a request for adjustments be made).

[11.26] However, it also seems that it would command an exceptional set of facts for a decision-maker to conclude that a '[f]ailure to make reasonable adjustments' (per s74(3)) has occurred in circumstances where

no request (of any kind) was ever made. In any event, FPDN is not aware of any well-known concern or established practice of complainants beginning a legal action to seek an adjustment, without ever making a request beforehand.

[11.27] Overall, FPDN opposes the addition of any requirement for a complainant to 'request' an adjustment as a prerequisite to obtaining any right to an adjustment. At best, such a requirement seems unnecessary. At worst, it might be designed or interpreted in a manner that requires each complainant to a make a request in an overly specific, formal and/or prescriptive manner, or else risk the dismissal of their ADA case.

Question 11.2: Special measures

(1) Should the ADA generally allow for special measures? Why or why not?

[11.28] Yes. The ADA's current approach to 'special needs exceptions' is manifestly inadequate and out of step with other jurisdictions. A robust general exception for 'special measures' is necessary for the ADA to empower entities to willingly adopt courses of conduct that are intended to reduce substantive inequalities, without (counterintuitively) having to worry about breaching the ADA via doing so.

[11.29] The Consultation Paper already notes [at 11.35] that the ADA only has 'narrow "special needs" exceptions relating to race and age discrimination'. Even putting aside the lack of coverage for other protected attributes (which is a massive gap in coverage), FPDN is compelled to highlight that the Anti-Discrimination Board has also interpreted 'opportunities' to exclude employment opportunities.[81] As a result, matters that would be treated as a simple 'affirmative action' programs (e.g. for 'race') in other jurisdictions will still require the applicant to obtain an individualised exemption in NSW.

(2) If so, what criteria for a special measure should the ADA apply?

[11.30] FPDN generally supports the approach and criteria for 'special measures' that are contained in s12 of the *Equal Opportunity Act 2010* (Vic), in addition to the broad examples of special measures that are provided:

> ***'Special measures***
>
> *(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.*
>
> ***Examples***
>
> *1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.*
>
> *2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.*
>
> *3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.*
>
> *(2) A person does not discriminate against another person by taking a special measure.*

[81] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', [6.137].

(3) A special measure must—

(a) be undertaken in good faith for achieving the purpose set out in subsection (1); and

(b) be reasonably likely to achieve the purpose set out in subsection (1); and

(c) be a proportionate means of achieving the purpose set out in subsection (1); and

(d) be justified because the members of the group have a particular need for advancement or assistance.

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

(a) solely for that purpose; or

(b) for that purpose as well as other purposes.

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

Example

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

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

(7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure'.[82]

[11.31] However, all of the above examples of special measures are (i) likely being undertaken by a non-government entity; and (ii) unambiguously beneficial in character.

[11.32] Insofar as the NSWLRC has identified that other reviews (such as the Queensland Building Belonging Report) have suggested additional criteria that the measure 'does not restrict the rights of affect people' and 'should only be implemented after consultation with affected people and communities, *particularly Aboriginal and Torres Strait Islander peoples* [emphasis added]', it is absolutely vital that the NSWLRC fully appreciates that it is beginning to touch upon a very different, controversial (and often historically oppressive) variety of 'special measure' that has previously fallen almost completely outside of the ambit of the ADA due to a combination of (i) the expansive scope of the 'statutory authorities' exception in s54, and (ii) the ADA's lack of coverage for a public area of 'Government functions and the administration of laws'.

[11.33] For example, when the Queensland Department of Justice requested submissions for the *Draft Anti-Discrimination Bill 2024* (Qld), the Director-General specifically directed FPDN's attention towards the provisions of the Bill which purported to create different and higher standards when 'affirmative measures' are applied to minority racial groups. As a result, FPDN's submissions placed a high degree of focus on the Queensland government's actions in relation to the implementation of 'alcohol management plans' (AMPs), which are clearly targeted at areas with predominantly First Nations populations, and are responsible for generating a prominent High Court decision concerning racially targeted 'special measures'.[83]

[11.34] For NSW, the most comparable initiative would be granting local councils the authority to declare 'Alcohol Free Zones' ('AFZs') and 'Alcohol Prohibited Areas' ('APAs') under the *Local Government (Street*

[82] *Equal Opportunity Act 2010* (Vic), s12.
[83] *Maloney v the Queen* [2013] HCA 28.

Drinking) Amendment Act 1990 (NSW) in compliance with the guidelines issued by the Department of Local Government. Similar provisions have a striking history of being used almost exclusively against Aboriginal people in rural areas, inviting further contact with police and often being enforced in communities with little to no 'public amenities' to begin with.[84]

[11.35] Recommendation 4.3 of the Building Belonging Report followed a discussion of the greater historical background of some of the most significant racially-based 'special measures' that have originated from government action in Australia against First Nations persons, and absolutely was not intended to apply procedural restrictions to special measures (e.g. employment initiatives) that an individual/ private entity wishes to implement, outside of the involvement of any government plan, policy or program, which was reflected in Recommendation 4.2:

> *'The Act should impose a different and higher standard for measures that apply to government plans, policies, or programs in relation to minority racial groups, requiring that they are reasonable and proportionate to the scope and impact of the measures on the affected group. The Act should confirm that such measures be designed and implemented after prior consultation with affected communities, and with the active participation of the communities'.*[85]

[11.36] I.e. FPDN would not seek to impose 'blanket' requirements for community consultation on non-governmental entities that are likely to be unduly burdensome and counterproductive. For example, in the case of a private employer who is seeking to recruit for a First Nations identified position:

- Many employers will not have the capacity or desire to dedicate the necessary resources to scope out and undertake appropriate (and continuing) efforts at consultation with local First Nations persons and representative groups; and
- First Nations representative groups do not need to be consulted about every single affirmative action that is proposed by a person/ private entity, nor would it be an efficient use of resources to constantly be engaging with 'procedural' consultation requests.

[11.37] In other words, FPDN does want the ADA to provide that special measures targeted at First Nations communities are subject to a requirement of genuine consultation, but only for Government plans, policies and activities --- and contingent upon the ADA being amended in such a way that the NSW Government entities are consistently required to comply with the discrimination requirements of the ADA (which FPDN discussed in relation to Questions 6.12 and 7.11 of the Consultation Paper).

[11.38] If the NSWLRC is going to consider this course of action, FPDN invites the NSWLRC to reach out directly to FPDN and the Coalition of Aboriginal Peak Organisations ('CAPO'), as designing these 'consultation' and/or 'co-design' requirements will be a complex and involved process.

[11.39] Within the context of 'special measures', the extent and nature of consultation requirements for First Nations individuals is going to be completely different than for a hypothetical measure targeted at any other ethnic group. Time and time again, governments have pledged to engage with First Nations people, but the Productivity Commission's 2024 Review of the National Agreement on Closing the Gap draws the damning conclusions that the commitment to decision-making is rarely achieved in practice (Priority Reform One) and the transformation of government organisations has barely begun (Priority Reform 3).[86] Furthermore:

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[84] See, Cunneen, C., 'Moves to Recriminalise Public Drunkenness in New South Wales', 1991.
[85] Queensland Human Rights Commission, 'Building belonging – Review of Queensland's Anti-Discrimination Act 1991', 2022, pg. 21.
[86] Australian Government Productivity Commission, 'Review of the National Agreement on Closing the Gap – Study Report', January 2024, pp. 4-6.

'The wide gap between governments' rhetoric and action appears to stem, in part, from a failure by governments to fully grasp the nature and scale of the change required to fulfil the Agreement. Despite some pockets of good practice, many parts of government are still operating in what amounts to a variation of business-as-usual, where their actions to implement the Agreement are simply tweaks of, or actions overlayed onto, existing systems, rather than root-and-branch transformations'.[87]

[11.40] The ADA must be amended in a way that aligns with Priority Reform One of the CtG Agreement ('Formal Partnerships and Shared Decision Making'). Genuine and effective self-determination for First Nations persons is impossible unless (i) partnerships with government are accountable and representative, (ii) formal agreements are put in place, and (iii) decision-making authority is actually shared with First Nations people.

(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?

The certification process

[11.41] In light of what has been discussed above, FPDN's position is that the ADA's approach to 'certifications' is outdated and ineffective. This is consistent with the position that was held by the NSWLRC in 1999:

'It must be noted that while s 126A provides an exemption for special needs programs by certification, s 21 and 49ZYR provide specific exceptions for similar programs, which require no certification, in relation to race and age respectively. This inconsistency can create confusion in the community. The Commission can see no justification for requiring special needs programs and activities for women, men or people of a particular marital status to be certified by the Minister. The ADB believes that the certification program is cumbersome to administer'.[88]

[11.42] It appears that, for all intents and purposes, the process of certifications could be removed and that this would not cause any significant debate or disagreement.

The exemptions process

[11.43] For the process of obtaining an exemption via an application to the President of Anti-Discrimination NSW, FPDN's views do begin to differ somewhat to those expressed by the NSWLRC (in 1999).

[11.44] FPDN's position is that, if general 'special measures' are built into the ADA (as per FPDN's submissions), then there essentially should not be any procedure (within the ADA) for obtaining an exemption for any matter that:

(i) Cannot meet the criteria that is required to demonstrate that the conduct is a 'special measure'; and
(ii) Is not specifically excluded from the operation of the ADA via legislation.

[11.45] Outside of these scenarios, the process of 'exemptions' would retain almost no purpose whatsoever, other than to leave parties with a mechanism to bypass parliamentary oversight.

[87] Ibid, pg. 79
[88] New South Wales Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', [6.139].

[11.46] To illustrate this point, FPDN notes that (as of the time of writing) nearly every single of the current exemptions (published by Anti-Discrimination NSW) has the character of an affirmative action within an employment context (e.g. '[t]o advertise, designate and recruit up to 11 positions for Aboriginal or Torres Strait Islander Persons only').[89] As FPDN has already explained, this type of exemption is wholly unnecessary and ought to be replaced with a general exception for special measures.

[11.47] The handful of remaining exemptions (e.g. those granted to Anduril Australia Pty Ltd and BAE Systems Australia Limited and ASC Shipbuilding Pty Ltd) all seem to concern an incredibly specific issue that is faced by entities that sign commercial agreements which compel them to comply with certain US Regulations (namely, the United States International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR)).

[11.48] Put simply, this is the only area where the exemption process appears to have any remaining utility (however cumbersome the process may be). This repeated issue regarding US Regulations would likely be much better resolved via (i) the addition of tailored exception within the ADA, or (ii) separate legislation.

[11.49] Once these issues are resolved, FPDN submits that it is not appropriate or necessary for Anti-Discrimination NSW to retain any broad power of 'exemption'. FPDN has already laid out a broad definition of 'special measures', such that any remaining exemptions that an entity might seek would inevitably not be regarded as being in the best interests of the category of persons who are to be treated differently (e.g. due to lack of consultation, lack of sufficient evidence that any benefit will occur, or evidence that the proposed course of conduct will result in harm and/or is opposed by a significant number of persons with the protected attribute).

[11.50] If an action is not eligible to be considered a beneficial 'special measure', then there should be almost zero capacity for any exemption to be granted, and the applicant's recourse is to petition for legislative change (subject to all the burdens and oversight that this process entails).

[11.51] At most, the ADA should only allow for a discretionary 'futureproofing' exemption that can be applied by a decision-maker when the applicant's conduct would have otherwise met the criteria for a beneficial special measure, were it not for the lack of the lack of a relevant protected attribute within the ADA.

[89] See Anti-Discrimination New South Wales, 'Current exemptions'.

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?

[11.52] Yes. Throughout the entirety of this submission, FPDN has attempted to stress the extent to which entrenched systemic discrimination against First Nations persons cannot effectively be combatted by the ADA's current approach to discrimination, which is best described as 'purely reactive'.

[11.53] Not only must a complainant be sufficiently motivated, well-resourced and informed enough to engage with complex legal processes and terminology; the ADA also places the obligation on the complainant, at every step of the way, to establish that the respondent has engaged in wrongdoing tantamount to discrimination, without any meaningful assessment of the respondent's prior conduct and precautions.

[11.54] Marginalised groups and populations deserve better. If the ADA is ever going to be effective for First Nations persons (and especially those with disability), the legislation must empower them by altering the framing of the issue via imposing a positive duty to take steps to prevent or eliminate discrimination on any person or entity that is required (by the ADA) not to engage in unlawful conduct.

[11.55] FPDN would direct the NSWLRC away from approach that is taken in Victoria's discrimination law, which is largely symbolic, due to restricting the Victorian Equal Opportunity and Human Rights Commission to investigating breaches only (as opposed to issuing meaningful remedies for the complainant).

[11.56] FPDN's position is that the ADA should instead be amended/ restructured to include an approach that operates similarly to s75 of the *Discrimination Act 1991* (ACT):

***'Positive duty to eliminate discrimination, sexual harassment and unlawful** vilification*

(1) This section applies to an organisation or business, and any individual with organisational management responsibility for an organisation or business, required under this Act not to engage in discrimination, sexual harassment or unlawful vilification in particular circumstances.

Examples—organisation

- *educational authority*
- *sporting club*
- *church*

Examples—individual with organisational management responsibility

- *sole trader*

- *chancellor or vice-chancellor at a university*
- *owner of a small private business*

(2) The organisation, business or individual must take reasonable and proportionate steps to eliminate the discrimination, sexual harassment and unlawful vilification.

(3) In deciding whether steps are reasonable and proportionate, all the circumstances must be considered, including the following:

(a) the nature and size of the organisation or business;

(b) the resources of the organisation, business or individual;

(c) the business or operational priorities of the organisation, business or individual;

(d) practicability and cost of the steps.

...

"organisational management responsibility", in relation to an organisation or business, means responsibility for controlling or directing the organisation or business."[90]

[11.57] The time has come that, when a decision-maker is presented with a discrimination matter under the ADA, the legislation must obligate that decision-maker to consider the various actions (and failures to take action) of the respondent that have led to complaint at hand, in light of the respondent's level of status, resources and social obligations.

First Nations persons, a positive duty to eliminate discrimination, and the implications of the European Accessibility Act:

[11.58] The Consultation Paper discusses (at [11.84-11.90]) the alternative option of introducing an 'equality duty' that only applies to public authorities, akin to that of the *Equality Act 2010* (UK). The Consultation Paper also includes (at [11.91]) the possibility of introducing this 'equality duty' alongside and in addition to a duty to eliminate unlawful conduct (which would apply to private and public actors).

[11.59] FPDN's position is that this approach lacks sufficient nuance regarding the modern realities of equality, equity and discrimination. An equality duty for public authorities (only) would improperly vindicate a large number of powerful non-government/ commercial entities that must proactively cooperate if 'equality' is ever to be achieved.

[11.60] The NSWLRC should also draw inspiration from the recently commenced *European Accessibility Act* 2019 ('EAA'),[91] which officially came into effect on 28 June 2025. The EAA (which focuses on accessibility for digital products and services) is one example of specific accessibility standards that could be adapted into informed guidelines for NSW, so as to provide the necessary detail to support the interpretation of any 'positive duties' that are introduced within the ADA. This would also align with Article 9(1) of the CRPD in ensuring access to the physical environment, transportation, information, and communication technologies.

[11.61] The introduction of the EAA followed extensive impact assessments and market impact analysis for the relevant products and services, in order to justify the various industries (e.g. restaurants and online

[90] *Discrimination Act 1991* (ACT), s75.
[91] European Accessibility Act (Directive (EU) 2019/882.

services providers) and key products (e.g. smartphones, telephony services and audio-visual media services) that ought to be subject to prescriptive, enforceable accessibility requirements.[92]

[11.62] The intention of the EAA is to create an environment where products and services are more accessible, leading to a more inclusive society and facilitating independent living for persons with disabilities.[93]

How Accessibility Impacts the Priority Reform Areas of the CTG Agreement

[11.63] For First Nations persons, the EAA's focus on accessible products and services can directly support the implementation of the Priority Reforms:

- **Formal partnerships and shared decision-making:** The EAA requires that economic operators cooperate with competent authorities and relevant stakeholders, including 'persons with disabilities and organisations that represent them'. This principle of co-design and consultation aligns with the goal of formal partnerships and shared decision-making. By applying this principle, the development of policies and services under the CTG Agreement could be more effective and better tailored to the needs of First Nations people with disabilities.
- **Building the Aboriginal Community-Controlled sector:** The EAA's framework, which includes guidelines, tools, and a focus on reducing administrative burdens for microenterprises and small and medium enterprises, could serve as a model for strengthening the Aboriginal Community-Controlled sector. By ensuring that products and services are accessible, these organisations could be better equipped to serve their communities and operate more effectively.
- **Transforming government organisations:** The EAA sets out mandatory accessibility requirements for products and services. Applying these principles would help transform government organisations by making accessibility a core requirement in their policies and programs, aligning with the goal of embedding the cross-cutting outcome of disability in practices.
- **Shared access to data and information at a regional level:** The Act emphasises the need for information to be made available in accessible formats. It also states that information on product accessibility and compliance must be provided to market surveillance authorities and, upon request, to consumers in an accessible format. Adopting these standards would directly support the goal of shared access to data and information by ensuring that data is perceivable, understandable, and usable by First Nations people with disabilities.

How Accessibility Impacts the Socio-Economic Outcome Areas of the CTG Agreement

[11.64] The accessibility requirements of the EAA can be mapped to many of the Socio-Economic Outcome Areas ('SEOs'), which can help drive successful outcomes.

- **SEO 1: Aboriginal people enjoy long and healthy lives:** The EAA covers services such as electronic communications and certain self-service terminals. Applying accessibility standards to health-related products and services, such as health information websites or booking systems, would

[92] See, for more information, European Commission, 'European accessibility act'.
[93] Ibid.

make it easier for First Nations people with disabilities to access and manage their health, contributing to a longer and healthier life.

- **SEO 3 & 4 (Early Childhood Education) & SEO 5 & 6 (Education Pathways):** The EAA includes requirements for accessible e-books and dedicated software. These standards, when applied to educational materials and platforms, would ensure that First Nations children and students with disabilities can fully participate in learning, supporting their engagement, thriving, and achievement of their full potential.
- **SEO 7 (Youth employment/education) & SEO 8 (Economic participation and development):** The EAA requires that electronic communications services, consumer terminal equipment, and e-commerce services be accessible. By adopting these standards, First Nations youth and adults with disabilities would have more opportunities for education and employment, as they would have equitable access to online job applications, educational platforms, and digital communication tools necessary for work. The EAA also provides a framework for economic operators, including small and medium enterprises, which could be used to support the growth of accessible businesses within the Aboriginal Community-Controlled sector.
- **SEO 9: Appropriate, affordable housing:** Whilst the EAA does not directly cover housing, it does include a provision that Member States may decide to apply accessibility requirements to the *built environment* used by clients of services. This includes aspects like 'use of entrances', 'paths in horizontal circulation', and 'use of facilities and buildings'. This principle could be applied to ensure that housing-related services, like housing authority websites or tenant portals, are accessible, and it could also be extended to ensure that the built environment of the homes themselves is accessible for people with disabilities.
- **SEO 14: Social and emotional wellbeing:** The EAA aims to create a more inclusive society and facilitate independent living for persons with disabilities. By removing barriers and increasing the availability of accessible products and services, First Nations people with disabilities can have greater independence and social participation, which are key components of social and emotional wellbeing.
- **SEO 17: Access to information and services:** The core of the EAA is to ensure that products and services, including electronic communications, websites, and mobile applications, are accessible. This directly aligns with the goal of enabling First Nations people to access information and services, as the EAA's requirements ensure that this information is 'perceivable, operable, understandable and robust'.

Recommendations

1. **Introducing an objects clause into the ADA**

   The ADA should include an objects clause that operates similarly to s4 of the *Discrimination Act 1991* (ACT).

   Because NSW does not have an equivalent of the *Human Rights Act 2004* (ACT), the ADA's objects clause should instead make direct references to Australia's international human rights obligations (e.g. UNDRIP, UNCRPD) and national commitments (e.g. CTG Agreement, ADS).

2. **Replacing the 'comparator test' for direct discrimination with the 'unfavourable treatment' test**

   The ADA's usage the 'comparator test' for direct discrimination should be replaced with an equivalent of the 'unfavourable treatment' test that operates similarly to s 8(1) of the *Equal Opportunity Act 2010* (Vic) and/or s8(2) of the *Anti-Discrimination Act 1991* (ACT).

3. **Removing the 'comparative disproportionate impact' test for indirect discrimination**

   The ADA's usage of the 'comparative disproportionate impact' test (i.e. the 'proportionality test') for indirect discrimination should be removed. No replacement is necessary for the a 'substantially higher proportion' portion of the requirement in s7 of the ADA.

4. **Replacing the 'not able to comply' part of indirect discrimination with 'disadvantage'**

   The ADA's usage of the 'not able to comply' part of the indirect discrimination test should be replaced with a requirement of 'disadvantage' that operates similarly to s9(1) of the *Equal Opportunity Act 2010* (Vic) and/or s8(3) of the *Anti-Discrimination Act 1991* (ACT).

5. **Amending the 'reasonableness standard' of indirect discrimination**

   The ADA should continue to use the 'reasonableness standard' as part of the test for indirect discrimination, but the ADA should be amended to:

   a. Place the onus on the respondent to demonstrate that a requirement is 'reasonable' (See also, FPDN Recommendation 8); and
   b. Provide guidance regarding the factors and circumstances that are relevant to determining whether conduct is 'reasonable' similarly to s9(3) of the *Equal Opportunity Act 2010* (Vic).

6. **Including characteristics that people with attributes generally have or are assumed to have**

   The ADA's prohibition on indirect discrimination should extend to characteristics that people with protected attributes either generally have or are assumed to have.

7. **Introducing a shared burden of proof for direct discrimination**

   The ADA should include a shared burden of proof for direct discrimination that operates similarly to s136 of the *Equality Act 2010* (UK). The burden of proof should fall upon the respondent once the complainant has proven facts from which it could be decided that, in the absence of any other explanation, a contravention has occurred.

8. **Introducing a shared burden of proof for indirect discrimination**

   The ADA should include a shared burden of proof for indirect discrimination that operates similarly to s136 of the *Equality Act 2010* (UK). The burden of proof should fall upon the respondent once the complainant has proven facts from which it could be decided that, in the absence of any other explanation, a contravention has occurred.

   For indirect discrimination, the ADA should also specify that the respondent bears the burden of proving that a requirement is 'reasonable'.

9. **Using a 'general burden of proof' that applies to both direct and indirect discrimination claims**

   Ideally, the ADA should approach FPDN Recommendations 7 and 8 via introducing a 'general' burden of proof (contained within a single section) that applies to both direct and indirect discrimination claims.

10. **Continuing to distinguish between direct and indirect discrimination**

    The ADA should continue to distinguish between direct and indirect discrimination.

    Ideally, the ADA should combine the approaches from both *the Anti-Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic) to ensure that:

    a. The ADA explicitly states that discrimination can occur 'directly or indirectly, or both, against someone else'.

b. 'Direct' and 'indirect' discrimination are each set out in a dedicated section which:
    i. Provides definitions for each type of discrimination that contain a greater level of detail;
    ii. Gives examples of scenarios that would likely constitute 'direct' or 'indirect' discrimination; and
    iii. Clarifies that it is irrelevant whether a person who discriminates is aware of the discrimination and/or has other reasons for the treatment.

11. **Including an 'alternative verdict' power for findings of direct and indirect discrimination**

    The ADA should include an 'alternative verdict' power that enables decision-makers to (where satisfied by the facts) find that either direct or indirect discrimination has occurred, regardless of whether the plaintiff even mentions or specifically pleads the 'other' category of discrimination.

12. **Restructuring the ADA to rely on 'attributes' (instead of 'grounds' of discrimination)**

    The ADA should be restructured to contain 'attributes' and a 'catch-all' tests of discrimination, which applies to every attribute within the legislation (as opposed to separate sections for each 'ground' of discrimination).

    This is a viral perquisite for any of FPDN's recommendations which refer to 'attributes' (or 'protected attributes'). Ideally, the ADA should operate similarly to the *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic).

13. **Protecting against intersectional discrimination (the combined effect of multiple attributes)**

    The ADA should be amended to protect against intersectional discrimination by specifying that discrimination includes discrimination in relation to an attribute, 2 or more attributes, or the combined effect of 2 or more attributes. Ideally, this should operate similarly to the changes in s7A of the (un-commenced) *Respect at Work and Other Matters Amendment Act 2024* (Qld)).

14. **Protecting against intended future discrimination**

    The ADA should capture intended future discrimination by extending the tests for direct and indirect discrimination to include situations when a duty holder 'proposes to treat' someone unfavourably/ disadvantageously.

15. **Expanding protections for 'carer's responsibilities' to include kinship responsibilities**

The ADA's existing 'ground' of 'carer's responsibilities' should be changed to an undefined protected attribute of either:

a. 'family, carer or kinship responsibilities' that operates similarly to s7 the (un-commenced) *Respect at Work and Other Matters Amendment Act 2024* (Qld); or
b. 'parent, family, carer or kinship responsibilities' that operates similarly to s7(1)(l) of the *Discrimination Act 1991* (ACT).

The ADA's protections for this attribute should not be based upon definitions from the *Carers (Recognition) Act 2010* (NSW).

16. **Redefining 'disability' in the ADA**

The ADA's definition of disability should be modernised and improved to:

a. transition away from a medical model of disability (using outdated and offensive language) and towards a model of disability that focuses on identifying and overcoming barriers to societal participation (alongside more careful references to medical classifications); and
b. require that, when interpreting the definition of disability, due regard shall be given to cultural context and diverse understandings of ability and inclusion, particularly for Aboriginal and Torres Strait Islander peoples.

Any changes should be made in consultation with peak bodies, and should be consistent with the Article 1 of the CRPD and a Cultural Model of Inclusion for First Nations persons.

17. **Including a new protected attribute of 'genetic information'**

The ADA should include a new protected attribute of 'genetic information' that operates similarly to s7(1)(h) of the *Discrimination Act 1991* (ACT). Ideally, the ADA's definition of disability should also be changed to extend to 'a genetic predisposition' to disability.

18. **Including a new protected attribute of 'Aboriginal and Torres Strait Islander status'**

The ADA should include a new protected attribute of 'Aboriginal and Torres Strait Islander status', distinct and separate from the more general protections for 'race'.

19. **Including attributes that a person has had in the past or may have in the future**

    The ADA should apply to protected attributes that a person:

    a. has had in the past, similarly to s7(2) of the *Anti-Discrimination Act 1992* (ACT); and/or

    b. may have in the future.

20. **Including a new protected attribute of 'personal association'**

    The ADA should include a new protected attribute of personal association (whether as a relative or otherwise) with a person who is identified by reference to a protected attribute. Ideally, this should operate similarly to s6(q) of the *Equal Opportunity Act 2010* (Vic).

21. **Including a new protected attribute of 'irrelevant criminal record'**

    The ADA should include a new protected attribute of 'irrelevant criminal record' that covers circumstances where there has only been an arrest and/or interrogation (without charge), in a manner that is similar to s3 of the *Anti-Discrimination Act 1998* (Tas).

22. **Including a new protected attribute of 'subjection to domestic abuse and family violence'**

    The ADA should include a new protected attribute of 'subjection to domestic abuse and family violence'. Ideally, this would operate similarly to s7(1)(x) of the *Discrimination Act 1991* (ACT).

23. **Including a new protected attribute for 'accommodation status'**

    The ADA should include a new protected attribute of 'accommodation status' that operates similarly to s7(1)(a) of the *Discrimination Act 1991* (ACT).

24. **Narrowing the exception for 'employment for the purposes of a private household'**

    The ADA's exception in s38C(3)(a) to discrimination in work for *'employment for the purposes of a private household'* should be narrowed to an exception for *'employment, or an application for employment, which requires work to be done in a dwelling occupied by the employer or by a relative of the employer'*.

25. **Removing the exceptions for employment by small businesses and small partnerships**

    The ADA's exceptions to discrimination for 'small businesses' and 'small partnerships' should be removed.

26. **Removing the exception to disability discrimination for 'persons addicted to prohibited drugs'**

    The ADA's exception to discrimination on the ground of disability in work for '*persons addicted to prohibited drugs*' should be removed.

27. **Linking the 'inherent requirements' exception to adjustments and the extent of consultation**

    The ADA's 'inherent requirements' exception should be dependent on the nature and extent of any adjustments made and the extent of consultation with the person with disability.

28. **Including a single, broad exception for 'genuine occupational requirements' for all attributes**

    The ADA's current patchwork of narrow, inconsistent exceptions for some characteristics should be replaced by a single, broad exception for all 'genuine occupational qualifications', which applies consistently to all protected attributes (other than 'religious conviction') and requires employers to show that the act of discrimination is 'reasonable, proportionate and justifiable'.

29. **Expanding the definition of 'educational authority' to include other 'education providers'**

    The ADA's definition of 'educational authority' in s4(1) should cover other 'education providers' (such as institutions which set rules for curricula and exams).

30. **Ensuring that educational authorities cannot discriminate in evaluating student applications**

    The ADA's protected area of education (in s17) should explicitly specify that it is unlawful for an educational authority to discriminate in selecting or evaluating student applications.

31. **Expanding the protected area of 'education' to include 'Aboriginal and Torres Strait Islander status'**

    The ADA's protected area of education (in s17) should also apply to 'Aboriginal and Torres Strait Islander status (in addition to 'race'). See FPDN Recommendation 18.

32. **Prohibiting discrimination in all protected areas of public life for all protected attributes**

    The ADA's prohibitions against discrimination should extend to all protected attributes in all protected areas, subject to specific exceptions, in a manner that operates similarly to the *Discrimination Act 1991* (ACT) and *Equal Opportunity Act* 2010 (Vic). See FPDN Recommendation 12.

33. **Including a new protected area for 'government functions and the administration of laws'**

    The ADA should include a new protected area that covers the exercise of functions and powers of local government and the administration of State and local government laws and programs, as described in Recommendation 29 of the NSWLRC (in 1999).

34. **Including a new protected area for 'access to premises'**

    The ADA should include a new protected area for 'access to premises' that is not part of the protected area of 'provision of goods and services' in s19 of the ADA and instead operates similarly to s57(1) of the *Equal Opportunity Act 2010* (Vic).

    Ideally, the exceptions to this new protected area would also operate similarly to s58 of the *Equal Opportunity Act 2010* (Vic).

35. **Removing the 'statutory authorities' exception**

    The ADA's general exception for acts done under statutory authority in s54 should be removed and all new legislation should be scrutinised to ensure compliance with the ADA, as per Recommendations 43 and 44 of the NSWLRC (in 1999).

36. **Including a standalone duty to provide adjustments that applies to every protected attribute**

    The ADA should include a *standalone* (separate) duty to provide adjustments that applies to every protected attribute, in a manner that operates similarly to s74 of the *Discrimination Act 1991* (ACT). Ideally, this standalone duty would also include non-exhaustive lists of factors that must be considered in determining whether an adjustment is reasonable, similarly to the *Equal Opportunity Act* 2010 (Vic).

    The ADA should not contain any explicit requirement for a person with a protected attribute to 'request' an adjustment (before the obligation to provide one arises).

37. **Including a general exception for 'special measures'**

    The ADA should include a general exception for 'special measures' that:

    a. applies to all protected attributes in all protected areas, and generally operates similarly to s12 of the *Equal Opportunity Act 2010* (Vic); and

b. imposes a different and higher standard for measures that apply to government plans, policies or programs in relation to racial minority groups (specifically those of Aboriginal and Torres Strait Islander status). These requirements should be codesigned alongside members of the Coalition of Aboriginal Peaks ('CAPO').

38. **Removing the existing exemption and certifications processes**

The ADA's current processes for obtaining exemptions and certifications should be removed. A discretionary 'futureproofing' exemption could be added for conduct that would otherwise meet the criteria for a beneficial special measure, were it not for the lack of the lack of a relevant protected attribute within the ADA.

39. **Including a positive duty to take steps to prevent or eliminate discrimination**

The ADA should impose a positive duty to take steps to prevent or eliminate discrimination on any person or entity that is required not to engage in unlawful conduct (across all protected attributes and protected areas).

Ideally, the positive duty should be supported by specific accessibility standards that provide the necessary detail to support the interpretation of the scope of any 'positive duties' that are introduced within the ADA. In particular, the NSWLRC should derive examples from the *European Accessibility Act* 2019.