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Submission to the New South Wales Law Reform Commission's Review of the *Anti-Discrimination Act 1977*

The Institute of Public Affairs (the IPA) welcomes the opportunity to make this submission to the New South Wales Law Reform Commission's (NSWLRC) Review of the *Anti-Discrimination Act 1977 (*ADA).

This submission seeks to address reform options outlined in the NSWLRC's consultation paper, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct* ("the consultation paper"), in particular Chapter 7 relating to changes to exceptions for religious bodies, Chapter 8 regarding potential changes to civil vilification protections, and mechanisms to promote substantive equality addressed in Chapter 11. IPA research finds:

1. A harm-based test for civil vilification would dramatically expand the scope and reduce the standard of unlawful speech and undermine the rule of law.
2. Legal changes that promote "substantive equality" may attempt to achieve equality by treating people unequally, and to solve discrimination with more discrimination.
3. Narrowing exceptions for religious bodies including schools risks undermining their religious character.

A harm-based test for civil vilification would dramatically expand the scope and reduce the standard of unlawful speech and undermine the rule of law.

Under the current ADA, it is unlawful to engage in a public act that "incite[s] hatred towards, serious contempt for, or severe ridicule of", a person or group of persons based on their race (section 20C), transgender status (section 38S), religious belief, affiliation, or activity (section 49ZE), homosexuality (section 49ZT), and their actual infection with, or the false assumption they are infected with HIV/AIDS (section 49ZXB).

The consultation paper seeks comment on whether the Act's vilification provisions should be expanded, including through:

- the introduction of a "harm-based" test to civil vilification provisions (Question 8.2(1)), similar to changes pending commencement in Victoria and Queensland; and
- changes to the incitement test, including through lowering the incitement standard to conduct that is "likely" to incite hatred following the Victorian model (Question 8.2(2)).

While the Act's existing standard for vilification, namely conduct that 'incite[s] hatred', is already a vague legal standard, the introduction of a harm-based protection based on similar

legislation in Queensland and Victoria would reduce the standard even further. If these jurisdictions are taken as a legislative model, this could mean the prohibition of conduct, including speech, that a potential complainant could consider to be "hateful".

As IPA research has identified, determining whether a public act is "hateful" is not an objective legal standard and fails to be consistent with the rule of law.[1] The absence of a clear definition or specific guidance about how it is intended to be interpreted means any person subject to the law cannot be capable of understanding their legal obligations. The result is rule not by objective, uniformly enforced law but rule by the inclinations of those tasked with presiding over it.

That an ambiguous harm-based protection fails the rule of law was a point acknowledged by the NSWLRC in the review into the effectiveness of section 93Z of the *Crimes Act 1900 (NSW)* in addressing racial and religious vilification in NSW. In the final report, the Commission did not recommend the introduction of a harm-based criminal offence, arguing that the test was too uncertain and potentially risked unintended consequences. The report stated "it is important for criminal offences to be clear, so they can be understood across the community and applied predictably."[2] The same principle applies to any law that applies penalties, criminal or civil.

The consultation paper also seeks comment on changing the ADA's incitement-based test, noting the possible option of lowering the threshold to cover a public act that is "likely" to incite hatred in line with the Victorian model.[3] Such a change would introduce a bias towards the complainant by lowering the burden of proving conduct that is "likely" to incite hatred in a hypothetical person. Under the existing Act, a complainant must prove that a third person was incited to hatred by the allegedly vilifying conduct.

This standard is commonly alleged to be onerous as a reason for change. For instance, a 2024 paper by the Victorian Department of Justice and Community Safety acknowledged that changes to the incitement test would reduce the burden of proof in favour of the complainant, noting that "proving whether a person has generated hatred in another person or group of people can be difficult…because evidence of how another person was thinking, feeling or acting is not usually available."[4] Rather than justifying why the burden of proof must be lowered, this inherent difficulty exposes the underlying incoherence in making it unlawful to elicit thoughts and feelings in another person.

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[1] See for example, the IPA's submission to changes to Victoria's anti-vilification laws (October 2024).
[2] New South Wales Law Reform Commission, *Report 151- Serious racial and religious vilification* (September 2024) 57-58: https://lawreform.nsw.gov.au/completed-projects/recent/section-93z.html.
[3] Ibid,183.
[4] Department of Justice and Community Safety, *Overview of proposed anti-vilification protections for all Victorians: implementing the legislative recommendations of the Victorian Inquiry into Anti-vilification Protections* (2024) (accessed 13 August 2025) 14: https://engage.vic.gov.au/anti-vilification-reforms.

Legal changes that promote "substantive equality" may attempt to achieve equality by treating people unequally, and to solve discrimination with more discrimination.

The consultation paper notes that discrimination laws are increasingly "look[ing] beyond achieving formal equality, which involves treating everyone the same way", to focus instead on achieving "substantive equality".[5] It seeks comment on a range of specific mechanisms to promote substantive equality, including:

- whether the ADA should impose a duty to provide adjustments, and what form it should take (Question 11.1)
- whether the ADA should allow for special measures (Question 11.2)
- whether the ADA should impose a positive duty to prevent or eliminate unlawful conduct (Question 11.3)

The consultation paper notes that achieving substantive equality extends beyond "comparing the treatment of individuals" and "addresses the adverse impact of broader practices, cultural norms, customs and attitudes, and unconscious bias".[6] In other words, substantive equality is based on the idea that people should receive favourable treatment in the law based on their belonging to certain groups. This is antithetical to Australia's liberal democratic tradition of formal equality, which rests on an 800-year tradition dating back to the sealing of the Magna Carta in 1215; the first attempt to codify the assertion that rulers and subjects alike are bound by the same laws. Since British settlement, this principle has been a cornerstone of Australia's legal framework.

Anti-discrimination laws were initially founded on the premise that because people were so equal, it should be unlawful to treat a person unfairly due to an arbitrary difference in personal characteristics. At least in theory, if not in practice, the provisions of anti-discrimination were available to all people: for instance, because everyone possessed a sex or race, then prohibitions against discrimination based on race or sex were broadly applicable. Mechanisms to promote substantive equality fundamentally reshape this framework by affording preferential treatment to certain people. For example, the consultation paper explores the implementation of "special measures, which would make it lawful for some people, based on their characteristics, to engage in what would ordinarily constitute unlawful discrimination, because the discrimination is intended to achieve substantive equality.

> Although special measures involve treating people differently, this is not considered discrimination. This is because the purpose of a special measure is to secure the advancement of the group, so they can exercise and enjoy human rights and fundamental freedoms equally with others.[7]

[5] NSWLRC Consultation Paper, 223.
[6] Ibid.
[7] NSWLRC Consultation Paper, 229.

The idea that an individual with protected characteristics would require a special measure to advance their position in society and somehow make them more equal is inconsistent with the egalitarian values that have shaped Australia.

Legal changes that limit religious exceptions narrowly construe the role of staff in religious organisations and risk undermining their religious character.

The consultation paper seeks comment on a range of potential changes to exceptions in the ADA relating to religious bodies, including:

- whether the ADA should provide exceptions for the training and appointments of religious personnel (Question 7.1)
- whether the ADA should contain exceptions for private educational authorities in employment and how they should apply (Question 7.5)

The consultation paper notes that while the training and appointment of members of religious bodies is "closely tied to religious freedom", a "more controversial" exception relates to the appointment of other personnel, namely the protection in section 56(c), affording religious bodies exceptions in the "appointment of any other person in any capacity by a body established to propagate religion".[8] It notes that this is "wide enough to cover appointments to roles that do not have a religious character", considering whether the exemption should be narrowed to where the "teaching, observance or practice of religion is an inherent requirement of the position or a genuine occupational requirement".

A similar reform option is considered in relation to religious schools. The consultation paper references the Victorian model, where schools are exempted from anti-discrimination provisions in employment only when conformity with the doctrines of a religion is an inherent requirement of the position, the person cannot meet the requirement because of their religious belief or activity, and the discrimination is "reasonable and proportionate" in the circumstances.[9]

In both instances, the push to introduce a genuine occupational requirement standard risks hamstringing the ability of religious organisations to employ staff who share their faith. The idea is based on the fallacy that only some staff need to share the beliefs of the organisation for a religious service to be delivered. For example, in religious education, this idea is based on the mistaken understanding that only some staff, such as the religious studies teacher, need to profess the religious beliefs of the school for a religious education to be delivered. This fallacy is repeated in the consultation paper where it states in Victorian schools:

> conformity with the doctrines, beliefs or principles of the school's religion would be an inherent requirement of a religious education position. This is unlikely to be the case for support positions, such as school gardeners.[10]

[8] NSWLRC Consultation Paper, 132-133.
[9] Ibid, 149.
[10] NSWLRC Consultation Paper, 149.

This approach misunderstands the role and purpose of religious organisations. These organisations operate with the purpose of forming communities of faith. Parents for instance send their children to religious schools not so that their children can receive a few lessons of religious instruction a week, but rather so that they may actively be involved in a culture of faith and faith community built by both staff and students. As the IPA has previously argued, these schools:

> require autonomy over who can be employed in that school in order to ensure its religious character is not diminished, and to ensure students are given a religious education that many parents expect when they enrol their children in such schools.[11]

Moreover, narrowing the exemption for religious bodies in employment may have the perverse impact of exposing a body to litigation risk if it did hire a person who shared the organisation's faith, on the grounds that the person was given favourable treatment (and hence others were given unfavourable treatment) because of religion.

I thank the Commission for the opportunity to make this submission. The IPA would be eager to assist further in any way the Commission considers appropriate as it deliberates on this topic.

Kind regards,

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[11] Morgan Begg and Daniel Wild, *Religious Liberty and its Challenges in Australia Today: A Report into the Federal Government's Religious Discrimination Bill 2019* (Institute of Public Affairs Research Report, 2019) 14.