



Submission to Anti-Discrimination Act Review

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1. Summary

1.1 Amnesty International Australia (AIA) welcomes the opportunity to make a submission to the Law Reform Commission's review of the *Anti-Discrimination Act 1977 (NSW)*(ADA).

1.2 The recommendations contained in this submission aim to ensure that everyone in New South Wales can live free from discrimination.

1.3 The rights to equality and freedom from discrimination are central to human rights. Our work on non-discrimination is grounded in human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CROC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

1.4 In accordance with these treaties, Amnesty calls for states to take measures that prohibit discrimination as well as positive measures to address systemic disadvantages.

1.5 It is Amnesty's strong view that the most important action the NSW government can take to protect the human rights of people in NSW is a Human Rights Act. Such an Act would protect all the rights of people in NSW, and alongside the ADA, establish a framework that ensures that all people's rights are universal, indivisible, and can be realised, reflecting international human rights standards. It would, for example, ensure that any oversight body established to protect people with innate variations of sex characteristics in medical settings, must consider human rights when making decisions. This is a crucial step in preventing the ongoing serious human rights violations of unnecessary, non-consensual surgeries on intersex children and young people.

1.6 In a situation where one right impacts or impinges on another rights, an Act would fairly balance these rights. The Universal Declaration of Human Rights allows for rights to be balanced with each other so that the restriction of rights is not disproportionate or unnecessary, and respects human rights. A Human Rights Act for NSW would, for example, allow the fair and appropriate balancing of the right of a person to hold a religious belief and the rights of LGBTQIA+ people to live free from discrimination.

Recommendation 1: Legislate a comprehensive Human Rights Act protecting human rights in NSW.

1.7 However pending the introduction of a Human Rights Act, AIA of the view that the ADA must be urgently updated to ensure the right to live free from discrimination in NSW, particularly for the LGBTQIA+ community, is adequately protected.

1.8 The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) and the Yogyakarta Principles plus 10 (YP+10)¹ provide that "sexual orientation and gender identity, gender expression and sex characteristics are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."² The Principles together set out States' obligations under international law for protecting sexual identity and gender expression. They call on States to take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual

¹ The Yogyakarta Principles were developed and adopted in 2006 by distinguished experts from 25 countries with expertise in human rights law, and the YP+10 were adopted in 2017 to supplement these.

² *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007, Principle 2; *Yogyakarta Principles plus 10: Additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement The Yogyakarta Principles*, 2017, Preamble.

orientation, gender identity, gender expression or sex characteristics to hold and practice religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or imposition of beliefs.³

1.9 Urgent and necessary updates are required to align protections in the ADA with international human rights standards including as set out in the Yogyakarta Principles. These include changing the protected attribute of homosexuality to “sexual orientation” (to include bisexual, pansexual and asexual people), adding “gender identity” as a protected attribute (to include trans, gender diverse and non-binary people) and adding a protected attribute of “sex characteristics” (to include intersex people). Urgent amendments are also required to narrow the exceptions in the ADA that allow religious organisations to discriminate against students, teachers and staff on the basis of attributes including sexual orientation and gender identity, and those that allow organisations to refuse to provide state-funded or charitable services on the basis of religious belief.

2. Recommendations

AIA recommends that the NSW government:

- 1) Legislates a comprehensive Human Rights Act protecting human rights in NSW,
- 2) Amends the ADA to protect against intersectional discrimination,
- 3) Amends the ADA to express and define disability in accordance with the social model of disability and in line with the CRPD,
- 4) Amends the definition of ‘homosexuality’ and ‘homosexual person’ to protect bisexual, pansexual and asexual people from discrimination,
- 5) Removes references to ‘man’, ‘male sex’, ‘woman’, ‘female sex’, and ‘the opposite sex’ on the definition of the protected attribute of ‘sex’, and amend Part 3 to use the term ‘different sex’ instead of ‘opposite sex,’
- 6) Replaces ‘transgender status’ and ‘transgender person’ with ‘gender identity’ as per the Yogyakarta Principles, and clarify that the protection from discrimination applies to a person regardless of what their registered sex is, whether or not they have modified their body by medical, surgical or other means,
- 7) Adds ‘sex characteristics’ and ‘housing status’ as protected attributes in the ADA,
- 8) Includes volunteers in the definition of employment,
- 9) Ensures exemptions relating to disability discrimination in educational institutions respects the requirement to provide people with disability with reasonable accommodations and to introduce accessibility measures,
- 10) Amends the ADA to remove the ability to lawfully discriminate against LGBTQIA+ staff, teachers, students and those receiving services, and repeal s56(c) and replace it with a far narrower exception, that addresses and protects the customs and doctrines of religions, and balances these without having an undue impact on other rights,
- 11) Repeals s59 of the ADA so there is no specific exemptions for providers of adoption services,
- 12) Replaces the broad provisions that allow religious organisations to discriminate in ways that are not necessary not proportionate with a new exception concerning only religious belief,
- 13) Repeals exemptions allowing for private schools to discriminate against students and prospective students on transgender and homosexuality grounds, and
- 14) Amends the ADA to include a positive duty to eliminate discrimination, sexual harassment and vilification, provisions against hate-based conduct, and allow for special measures

³ Yogyakarta Principles, 2007, Principle 21.

3. International Legal Human Rights Framework

3.1 Article 2 of the ICCPR provides that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

3.2 Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

3.3 The right to live free from discrimination is also protected in Articles 14, 24, and 25 of the ICCPR, Articles 1, 2, 4, and 5 of the ICERD, Article 2 of the CROC, Articles 2, 3, 4 and 15 of the CEDAW, Articles 3, 4, 5, and 12 of the CRPD.

3.4 These pieces of international law and standards form the basis of AIA’s recommendations in this submission.

4. Intersectional discrimination

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

4.1 Studies have shown that people who belong to several marginalised populations are far more likely to report experiencing discrimination.⁴ The ADA should protect against intersectional discrimination to allow for complaints on the basis of more than one protected attribute and to acknowledge the intersecting identities of many people mean they face discrimination on the basis of more than one real or perceived attribute.

4.2 In recent decades human rights bodies have increasingly recognised forms of intersectional discrimination in their work. For example, the Beijing Platform for Action is a framework that recognises that multiple forms of discrimination namely age, disability, social and economic status, ethnicity and race create particular barriers for women.⁵ Similarly, the Committee on Economic, Social and Cultural Rights has stated that at “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”⁶

If so, how should this be achieved?

4.3 No jurisdiction in Australia explicitly protects against intersectional discrimination, however, the ACT recognises multiple discrimination. Section 8(2) and section 8(3) of the *Discrimination Act 1991* (ACT) provides that a person discriminates against someone, indirectly or directly, “because the other person has 1 or more protected attributes.” Section 3.1 of the Canadian Human Rights Act, RSC 1985, c H-6, states that “for greater certainty, a discriminatory practice includes a

⁴ Blackham and Temple, 2020, *Intersectional Discrimination in Australia: An empirical critique of the legal framework*, UNSW Law Journal.

⁵ Committee on the Elimination of Discrimination Against Women, 1995, *Fourth World Conference on Women, Beijing Declaration*.

⁶ Committee on Economic, Social and Cultural Rights, 2009, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*.

practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”⁷

4.4 Although these laws recognise that discrimination can be based on one or more protected attributes, they do not recognise that discrimination can be based on a person’s intersecting identities. To recognise this, Victoria Legal Aid has recommended that the test for discrimination explicitly state that reference to a protected attribute is a reference to one or more protected attributes.⁸

Recommendation 2: Amend the ADA to protect against intersectional discrimination.

5. Disability discrimination

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

5.1 The CRPD adopts the social model of disability, stating in the Preamble that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”

5.2 Although the CRPD doesn’t define disability, Article 1 articulates to whom the Convention applies and reflects the social model. Article 1 states that “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.” The CRPD also acknowledges that disability is an evolving concept.

Recommendation 3: Amend the ADA to express and define disability in accordance with the social model of disability and in line with the CRPD.

6. Discrimination based on homosexuality

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

6.1 The definition of homosexual contained in the ADA means that NSW is the only Australian state or territory to fail to protect bisexual and pansexual people from discrimination.⁹ It also fails to protect people who are asexual.

6.2 AIA supports a change to the ADA definition of homosexuality to give it broader application, given its limitations. The Justice and Equity Centre (then Public Interest Advocacy Centre) recommended that the attribute be changed to ‘sexual orientation’ as in the *Sex Discrimination Act 1984* (Cth)(SDA) and the Northern Territory’s *Anti-Discrimination Act 1992* (NT).¹⁰

⁷ Above n 4.

⁸ Victoria Legal Aid, 2012, *Submission to Attorney-General and Minister for Finance and Deregulation*, Parliament of Australia inquiry into the consolidation of Commonwealth Anti-Discrimination Laws.

⁹ Public Interest Advocacy Centre 2023, *Preliminary Submission to NSWLRC Review of Antidiscrimination Act 1977*, p 5.

¹⁰ Ibid.

6.3 The *Equal Opportunity Act 2010* (Vic) s 6(p) also contains “sexual orientation” as an attribute, defined broadly in s4 to mean ‘a person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender’.

6.4 Amnesty prefers this definition as it is the closest to that used by the Yogyakarta Principles.¹¹

6.5 The Yogyakarta Principles define ‘sexual orientation’ as meaning ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender’.¹² They affirm binding legal standards on the human rights of persons of diverse sexual orientations and gender identities that States must comply with.

6.6 We note that this definition doesn’t explicitly cover asexual people. Equality Australia recommended references to ‘homosexuality’ and ‘homosexual person’ in the ADA be replaced with a new attribute of ‘sexuality’, defined to mean persons whose sexual or romantic attraction is not exclusively heterosexual, or who are asexual or aromantic.¹³

6.7 The Yogyakarta Principles plus 10 (YP+10)⁹, a set of additional principles and state obligations on international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics, adopted in 2017 to supplement the Yogyakarta Principles.

Recommendation 4: Amend the definition of ‘homosexuality’ and ‘homosexual person’ to protect bisexual, pansexual and asexual people from discrimination.

7. Sex discrimination

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

7.1 The ADA currently contains outdated references to binary sex in Part 3, Division 1. References to ‘man’, ‘male sex’, ‘woman’, ‘female sex’, and ‘the opposite sex’ should be removed. These references exclude non-binary, trans and people with innate variations of sex characteristics from protection by these provisions. We also note that Part 3 refers to pregnancy and breastfeeding or expressing milk as characteristics of a woman, which excludes non-binary people and others who breastfeed or are pregnant.

7.2 Amnesty suggests Part 3 could be amended using updated language contained in the SDA. This avoids binary male/female language and uses the term ‘different sex’ instead of ‘opposite sex’. It provides:

Sex discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

¹¹ Above n 2.

¹² Ibid.

¹³ Equality Australia, 2023, *Preliminary Submission to NSWLRC Review of Antidiscrimination Act 1977*.

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person; the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.¹⁴

Recommendation 5: Remove references to ‘man’, ‘male sex’, ‘woman’, ‘female sex’, and ‘the opposite sex’ on the definition of the protected attribute of ‘sex’, and amend Part 3 to use the term ‘different sex’ instead of ‘opposite sex in line with the SDA.

8. Discrimination on transgender grounds

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

8.1 The ADA currently only protects some transgender people, as the definition of transgender is expressed in a binary way, so excludes trans people with non-binary, gender fluid and other transgender identities. This is concerning as some trans people will be excluded from protection from discrimination, and AIA supports the views of other stakeholders who have recommended previously that this definition be updated. For example the current binary definition of transgender may exclude people who have a non-Western identity such as First Nations brotherboys and sistagirls or people who identify as Fa'afafine.

8.2 AIA believes that ‘transgender status’ and ‘transgender person’ should be replaced with ‘gender identity’ as per the Yogyakarta Principles which set out that “Sexual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse.”¹⁵ They use the following definitions:

1. Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

2. Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.¹⁶

8.3 So as to ensure that trans people do not need to undergo surgery or legally update their gender, the definition should clarify that the protection from discrimination applies to a person regardless of what their registered sex is, whether or not they have modified their body by medical, surgical or other means. Amnesty notes that the *Equal Opportunity Act 2010* (Vic) uses ‘gender identity’, which is defined in s 6(d) as:

¹⁴ *Sex Discrimination Act 1985* (Cth), s5.

¹⁵ Above n 2.

¹⁶ *Ibid.*

“a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references”.¹⁷

8.4 The SDA also now uses ‘gender identity’ and defines it as meaning the gender - related identity, appearance or mannerisms or other gender - related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.¹⁸

8.5 The *Anti-Discrimination Act 1998* (Tas) protects ‘gender identity’ and ‘gender expression’, and the *Anti-Discrimination Act 1991* (Qld) has an expansive definition of ‘gender identity’. Other organisations have suggested an attribute of ‘gender diversity’¹⁹ or ‘gender identity and expression’.²⁰

Recommendation 6: Replace ‘transgender status’ and ‘transgender person’ with ‘gender identity’ as per the Yogyakarta Principles, and clarify that the protection from discrimination applies to a person regardless of what their registered sex is, whether or not they have modified their body by medical, surgical, or other means.

9. Potential new protected attributes

Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why?

9.1 Amnesty is of the view that there should be a new protected attribute of ‘sex characteristic’ added into the ADA. This is because currently the Act does not protect intersex people or people with varied sex characteristics from discrimination or vilification.

9.2 AIA is also of the view that housing status should be added as a protected attribute. Article 11(1) of the ICESCR protects the rights to an adequate standard of living, and this includes the right to adequate housing. Article 2(2) of the ICESCR states that rights contained in the Convention all economic, social and cultural rights “are exercised without discrimination of any kind as to ... national or social origin, property, birth or other status,” and this includes housing status.²¹

9.3 Homelessness is a human rights issue, and people experiencing homelessness suffer a range of human rights abuses, not only to their right to adequate housing, but also to their rights to health, to privacy, to security of the person, and more.²² Discrimination is closely linked to homelessness, discrimination can cause homelessness, and those experiencing homelessness are often subject to discrimination, potentially because of both their housing status and a protected attribute.²³ Accordingly, and to realise the right to equality, ‘housing status’ should be added as a protected attribute in the ADA.

¹⁷ S4 *Equal Opportunity Act 2010* (Vic).

¹⁸ S4 *Sex Discrimination Act 1984* (Cth).

¹⁹ Above n 13.

²⁰ Above n10.

²¹ Special Rapporteur on the right to adequate housing, 2020, *Guidelines for the Implementation of the Right to Adequate Housing*.

²² Lynch and Cole, 2003, *Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation*, *Melbourne Journal of International Law*.

²³ Roxani Fragkou and Tsadiras, 2023, *Breaking the Vicious Circle between Discrimination and Homelessness: Homelessness as a Protected Ground of Discrimination*, *International Human Rights Law Review*.

Recommendation 7: Add ‘sex characteristics’ and ‘housing status’ as protected attributes in the ADA.

9.4 The right to housing, as part of the right to an adequate standard of living, should be protected in a Human Rights Act which would impose a positive duty on the NSW government to protect people’s right to housing, and would give people experiencing homelessness a cause of action to remedy the abuses they face.

How should each of the new attributes that you have identified above be defined and expressed?

9.5 Either of the following definitions for ‘sex characteristics’ could be included in the ADA;

- The YP+10 define this attribute as “each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty”.²⁴
- The *Victorian Equal Opportunity Act 2010* (Vic) defines sex characteristics as “a person’s physical features relating to sex, including— (a) genitalia and other sexual and reproductive parts of the person’s anatomy; and (b) the person’s chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty”.²⁵

10. Areas of public life

Should the definition of employment include voluntary workers? Why or why not?

10.1 AIA is a proud People Powered movement founded on the work of volunteers and activists all around the country. People who volunteer are often communities who experience discrimination, including older people, young people, people with disability, and people from marginalised communities. Volunteers do not have the same protections and access to remedies as employees under the *Fair Work Act 2009* (Cth), or trade unions that can represent them if issues arise, including if they experiencing discrimination while volunteering.

Recommendation 8: Include volunteers in the definition of employment.

What changes, if any, should be made to the exceptions relating to disability and age discrimination in educational institutions?

10.2 In accordance with Article 24 of the CRPD, educational institutions are required to provide people with disability with reasonable accommodations to fulfill people’s right to an inclusive education. Article 24 stipulates that the right to inclusive education means education must be accessible to persons with disabilities and take into account “reasonable accommodation of the individual’s requirements.” Failure to provide reasonable accommodations constitutes discrimination and so exemptions relating to disability discrimination in educational institutions in the ADA should not remove this responsibility.

10.3 Under Article 2 of the CRPD, ‘reasonable accommodation’ is defined as the “necessary and appropriate modification and adjustments not imposing a disproportional or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

²⁴ Above n 2.

²⁵ *Equal Opportunity Act 2010* (Vic) s4.

10.4 Article 9 of the CRPD requires governments to facilitate access “to enable persons with disabilities to live independently and participate fully in all aspects of life.” Accordingly, government should introduce accessibility measures, and exemptions in the ADA should not allow educational institutions to not fulfill this requirement.

Recommendation 9: Ensure exemptions relating to disability discrimination in educational institutions respects the requirement to provide people with disability with reasonable accommodations and to introduce accessibility measures.

Religious personnel exemptions

11.1 The legalised discrimination allowed by the broad religious personnel exemption is extends to both people crucial to the expression of a religion (such as ministers of religion) and to large organisations providing goods, services, education and accommodation to the public (such as welfare providers, adoption providers, schools and hospitals run by religious organisations). NSW laws must be amended so that this widespread ability to discriminate against LGBTQIA+ staff, teachers, students and those receiving services is eliminated.

11.2 NSW legislation must be reviewed and updated to eliminate other sources of discrimination against LGBTQIA+ people in NSW. In particular to address the broad provisions that allow religious organisations to discriminate in ways that are not essential (such as the broad powers to discriminate in employment, education and the delivery of services). These changes need to be carefully balanced to ensure that a person's right to hold a religious belief is maintained and that there are appropriate exemptions in place so that religious organisations can still select and appoint people of their faith to roles that are crucial to the faith (such as ministers of religion).

11.3 AIA acknowledges that there are roles within a religious body, such as chaplaincy services, where it is appropriate that those positions are occupied by a person with the same religious beliefs as those which underpin the body's operation. Not all positions in the religious body fall into this category. Religious bodies often receive public funds, contributed to by all members of the community, to provide services to the public at large.

11.4 AIA's firm position is that religious bodies in receipt of public funding or providing services on behalf of the government for hospitals, accommodation services, disability services and aged care facilities, must not discriminate in the provision of those services or in the employment of staff, in ways that would otherwise be unlawful.

Should the ADA provide exceptions for the training and appointment of members of religious orders?

11.5 Yes. In Amnesty's view it is appropriate to have a narrowly defined exemption allowing for discrimination in the training and appointment of members to positions within religious orders with genuine religious duties, where this is reasonable and proportionate. While we are cognisant of the issues and the harmful impact of discrimination against the LGBTQIA community within religious groups, Amnesty notes that the international human rights position supports preservation of the freedom of religious bodies to train and appoint their own religious leaders.²⁶

11.6 The current position in the ADA section 56 (a) to (b) allows religious bodies to discriminate against a person, on the basis of any attribute, in the ordination or appointment of priests, ministers

²⁶ The UN Human Rights Committee clarified that the freedom to manifest religious beliefs included “the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.” See Committee on Civil and Political Rights, 1993, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*.

or members any religious order, as well as in the training or education of persons seeking ordination or appointment in these positions.

11.7 Article 18(1) of the ICCPR protects the right to freedom of thought, conscience and religion, including to have a religion of one's choice and to manifest that religion in worship, observance, practice or teaching. This freedom is qualified by Article 18.3 which says the freedom is subject to limitations including those "necessary to protect... the fundamental rights and freedoms of others."²⁷

Should the ADA provide exceptions for the appointment of any other person in any capacity by a body established to propagate religion? If so, what should these exceptions cover and when should they apply?

11.8 This exception contained in section 56 (c)-(d) of the ADA has been interpreted very broadly and for example, has impacted on state sanctioned foster care assessments by faith-based agencies.²⁸ Amnesty is concerned that same sex couples face discrimination in these areas when religious organisations are carrying out a state function.

11.9 Amnesty's view is, consistent with other civil society and human rights groups and submissions made in the development of and to the Equality Bill 2023²⁹, that s 56(c) should be repealed and should be replaced with a far narrower exception, that addresses and protects the customs and doctrines of religions, and balances these without having an undue impact on other rights.

11.10 We note that this section does not have an equivalent in other states and territories – even though most other jurisdictions' laws provide an exception for religious observance and practice.³⁰ Section 56(c) could be replaced with a more limited exception to clarify its application only to selecting or appointing a person to perform functions relating to or participate in religious observance or practice. For example, Victoria's *Equal Opportunity Act 2010* (Vic) does not allow religious bodies and schools to discriminate against people based on the protected attributes in employment decisions and decisions about school students but does allow religious bodies and schools to discriminate based on religious beliefs, in limited circumstances, if the discrimination is reasonable and proportionate. Amendments to the ADA would bring the NSW exception more in line with carve-outs provided for in the acts of other jurisdictions, such as in Victoria, Tasmania, Queensland, WA, the ACT and the NT, and proposals in SA and ACT.³¹

11.11 Regarding the exception provided for in section 56(d), many other jurisdictions limit the application of a similar exception – by limiting the grounds where the exception would apply,³² the types of organisations it applies to, or the tests that must be met for the exemption to apply.³³

²⁷ ICCPR.

²⁸ *O V v QZ* (No. 2) [2008] NSWADT 115 at [68]-[79] (overturned on appeal, but on different grounds); *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155 at [32]; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 at [30], [34], cited in the Equality Australia submission, above n 10.

²⁹ *Equality Legislation Amendment (LGBTIQ+) Act 2023* (NSW).

³⁰ s82(1)(c) *Equal Opportunity Act 2010* (Vic); s109(1)(c) *Anti-Discrimination Act 1991* (QLD); s72(c) *Equal Opportunity Act 1984* (WA); s51(c) *Anti-Discrimination Act 1992* (NT); s52(c) *Anti-Discrimination Act 1998* (Tas); s32(1)(c) *Discrimination Act 1991* (ACT). Note that South Australia also has an exception allowing discrimination in relation to the administration of a body established for religious purposes in accordance with the precepts of that religion in s 50(1)(ba). However, this exception is different to section 56(c) and the former Liberal South Australian government was committed to its repeal and replacement with a religious practice exception similar to other states and territories.

³¹ s109(1)(c) *Anti-Discrimination Act 1991* (QLD); s52(c) *Anti-Discrimination Act 1998* (Tas); s82(1) *Equal Opportunity Act 2010* (Vic); s72(c) *Equal Opportunity Act 1984* (WA); s32(1)(c) *Discrimination Act 1991* (ACT); s51(c) *Anti-Discrimination Act 1992* (NT); proposed s32(1)(c) *Discrimination Amendment Bill 2022* (ACT); and proposed s50(1)(a) of the Draft *Equal Opportunity (Religious Bodies) Amendment Bill 2020* (SA) cited in EA submission, above n 2.

³² For example in s82A *Equal Opportunity Act 2010* (Vic) and s 52(d) of the *Anti-Discrimination Act 1998* (Tas).

³³ Some states present the 'conform with doctrine' and 'injury to religious susceptibilities' requirements as alternatives (for example, s82(2) *Equal Opportunity Act 2010* (Vic), s 82(2), s72(d) *Equal Opportunity Act 1984* (WA), s50(1) *Equal Opportunity Act 1984* (SA)), other states and territories present the requirements as composite requirements (for example, s109(d) *Anti-Discrimination Act 1991*

Recommendation 11: Amend the ADA to remove the ability to lawfully discriminate against LGBTQIA+ staff, teachers, students and those receiving services, and repeal s56(c) and replace it with a far narrower exception, that addresses and protects the customs and doctrines of religions, and balances these without having an undue impact on other rights.

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

11.12 Amnesty recommends that s59 of the ADA be repealed and there is no specific exception for providers of adoptions services. Amnesty agrees with the positions of many other human rights and advocacy organisations who submit that faith-based agencies should not be permitted to discriminate when providing services for which they receive public funding.

11.13 We note that the NSW Department of Communities and Justice is now the sole provider of local adoption services, having not renewed the contracts of faith-based adoption agencies Anglicare and Family Spirit since 30 June 2024 due to a decline in number of voluntary adoptions. However we note that these organisations are listed under other approved adoption agencies, and still have responsibilities for dual authorisation as a foster carer and adoptive parent, and out-of-home care adoption.

11.14 Amnesty is concerned that faith-based agencies may continue to discriminate based on sexual orientation in adoption eligibility criteria restricting the rights of same-sex, single or divorced prospective adoptive or foster parents, and prospective adoptive or foster parents from different religions. Amnesty is concerned that state sanctioned discrimination continues against prospective foster or adoptive parents based on their sexual orientation or gender identity, where faith-based agencies deliver government funded services. This discrimination is contrary to the principles in international human rights standards that all States have an obligation to protect.

Recommendation 12: Repeal s59 of the ADA so there is no specific exemptions for providers of adoption services.

Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?

11.15 Amnesty's view is that the exceptions under the ADA for private educational authorities are too broad. NSW is the only jurisdiction where anti-discrimination laws allow private educational institutions, even those not established for a religious purpose, to discriminate against students and staff on the basis of a broad range of grounds.³⁴

11.16 As pointed out by the Justice and Equity Centre, the ADA has the broadest exceptions in Australia for nongovernment educational institutions.³⁵ It is the only Australian antidiscrimination law that allows 'private educational authorities' to discriminate against students, teachers, lecturers and other staff, on the basis of the usually protected attributes of sex, transgender status, marital or domestic status, disability or homosexuality, even where that school, college or university is not established for a religious purpose.³⁶

(QLD), s52(d) *Anti-Discrimination Act 1998* (TAS) and s32(1)(d) *Discrimination Act 1991* (ACT). There are also examples of states and territories introducing a proportionately assessment including s82(2) *Equal Opportunity Act 2010* (Vic), and as amended by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), proposed by s32(1)(d) *Discrimination Amendment Bill 2022* (ACT), and ss 25(2)-(8) and 109(2). *Anti-Discrimination Act 1991* (Qld).

³⁴ Justice and Equity Centre. 2021, *Sex, Transgender status, Marital or domestic status, Disability and Homosexuality: Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act*, p 10.

³⁵ *Ibid.*

³⁶ *Ibid.*

11.17 This broad exception is not consistent with international human rights standards including those protecting people from discrimination based on their sexual orientation and gender identity, as set out in the Yogyakarta Principles, nor is it consistent with the rights to work and to enjoy those rights without discrimination, protected in international treaties and standards.³⁷ The United Nations Committee on Economic, Social and Cultural Rights has said the right to work ‘forms an inseparable and inherent part of human dignity’ and is essential for realising other human rights.³⁸

11.18 In Amnesty’s view there is no justifiable reason why private educational authorities should be enabled to discriminate in employment in ways in which would otherwise be unlawful for a provider of services. This is particularly so because they are providing a public service or function, that of education, under the auspices of the government. Amnesty concurs with the Justice and Equity Centre that private educational institutions should be required to comply with the ADA on the same terms as other organisations.

11.19 In relation to religious schools exercising this exemption, Amnesty recommends that the exception allowing religious schools to discriminate against employees or prospective employees on broad grounds be repealed. No teacher in NSW should be fired, or refused a job, due to their sexuality or gender identity, or on other grounds such as disability or marital status. It is also important for LGBTQIA+ children to be able to see teachers like themselves representing similar identities and lived experience. Children generally cannot make decisions about their own schooling, so it is all the more important to protect them from harm at educational institutions where they are required to attend. This includes not only protecting them from discrimination, but from feeling isolated, invisible and unusual. Having teachers that represent diversity in the community of sexual orientation and gender identity will assist LGBTQIA+ students to feel they are seen and belong.

11.20 Amnesty recommends that it be replaced with a new exception on religious belief only. This would allow for discrimination where conforming with the religious beliefs, doctrines or principles is an inherent requirement of the job, the employee cannot meet this due to their religious belief or activity, and the circumstances of the discrimination are reasonable and proportionate.³⁹ This narrower exception for NSW religious schools, along with a requirement to show that infringement on the work rights of a staff member or prospective staff member is necessary, proportionate and suitable to achieve a legitimate end of protecting the right to manifest a religion, would better conform with human rights law standards on balancing rights that infringe on another.

Recommendation 13: Replace the broad provisions that allow religious organisations to discriminate in ways that are not necessary not proportionate with a new exception concerning only religious belief.

Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?

11.21 Research indicates that LGBTQIA+ children and young people are more likely to experience discrimination, bullying and abuse than other children and young people and are significantly more at risk of suicide, self-harm and mental health impacts as a result. Eighty per cent of bullying based on sexual orientation or gender identity of LGBTQIA+ young people occurs

³⁷ Article 23 of the Universal Declaration of Human Rights; Article 2.2, Article 6 and Article 7 of ICESCR; International Labor Organisation, ILO Declaration on Fundamental Principles and Rights at Work and ILO C111 - Discrimination (Employment and Occupation) Convention.

³⁸ Committee on Economic, Social and Cultural Rights, 2006, *General Comment No. 18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, par 1.

³⁹ This would bring the ADA in line with amendments made to Victoria’s *Equal Opportunity Act 2010 (Vic)*.

at school and has a profound impact on their well-being and education.⁴⁰ The 'Preventing Harm, Promoting Justice' report while focussing on LGBT conversion practices in Australia, said that when in religious schools 'students are taught that LGBT students are 'sinful', 'sick' or 'broken', this creates an atmosphere where they feel emboldened to bully LGBT students, with potentially devastating impacts.⁴¹ Supportive, affirming and non-discriminatory environments, including school, have been shown to strongly mitigate the negative impacts of discrimination and abuse.⁴²

11.23 AIA holds the strong position that religious organisations or educational institutions in receipt of public funding or providing services on behalf of the government should not discriminate in the provision of those services in ways that would otherwise be unlawful. AIA also holds the strong position that privately funded schools and organisations providing compulsory education to children or vulnerable adults should not discriminate in the provision of those services in ways that would otherwise be unlawful.

11.24 In order to protect the principle that all LGBTQIA+ people should be protected from discrimination, and the requirements of international human rights law, Amnesty supports the position of many other organisations and advocates for human rights, recommends that exemptions allowing for private schools to discriminate against students and prospective students on transgender and homosexuality grounds, as well as on other grounds, should be repealed.⁴³

11.25 Amnesty maintains that it may be necessary and proportionate for a religious school to discriminate against prospective students - at the point of enrolment only - on the basis of religious belief or activity, where it is reasonable, proportionate and required to conform with the school's religious doctrines, beliefs or principles, such as provided in Victoria's *Equal Opportunity Act 2010*.

Recommendation 14: Repeal exemptions allowing for private schools to discriminate against students and prospective students on transgender and homosexuality grounds.
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Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

11.26 Amnesty's strong position is that there should be no exceptions in the ADA for aged care accommodation providers. The provision in s59 of the ADA to allow providers to discriminate based on sex, marital or domestic status or race should be repealed. There should be no exceptions as part of the general exceptions that allow for religious aged care accommodation providers to discriminate against either staff, prospective employees, or residents or prospective residents. The only narrow exception to this may be in the selection of staff for the roles of chaplain or similar, and this should be limited to religious belief or activity only and be subject to a reasonableness and proportionality test as above.

11.27 Aged care accommodation providers are involved in the provision of housing for older people in the community, who can be vulnerable for a range of physical, psychosocial and neurological health reasons. Older people are exposed to a range of serious risks and infringements of their rights in aged care as exposed by the Aged Care Royal Commission.⁴⁴ The

⁴⁰ National LGBTI Health Alliance, 2014, *Statistics at a Glance*; Australian Human Rights Commission, 2014, *Face the facts: Lesbian, Gay, Bisexual, Trans and Intersex People*.

⁴¹ Jones, Brown, Carnie, Fletcher and Leonard, 2018, *Preventing Harm, Promoting Justice, Responding to LGBT conversion therapy in Australia*, La Trobe University and Human Rights Law Centre, p69.

⁴² Olson, Durwood and McLaughlin, 2016, *Mental health of transgender children who are supported in their identities*, Paediatrics.

⁴³ Above n13.

⁴⁴ Including lack of choice and dignity, right to access medical care, lack of cultural safety, discrimination, abuse, use of restrictive practices including physical and chemical restraints, impacting liberty, autonomy, freedom from degrading treatment, or any form of abuse: Aged Care Royal Commission, 2021, *Volume 1 Executive Summary*,

aged care workforce experiences low pay and difficult working conditions with understaffing, challenging roles and long shifts, in a workforce reliant on vulnerable staff holding temporary visas.⁴⁵ Religious organisations providing aged care receive federal government funding to deliver a public service. Unlike schools, there are not public aged care homes in every local area at which older people can access a guaranteed spot, and there can be waiting lists for aged care. Older people often have no choice to leave an aged care- either another aged care home is not available, or they are unable to make that choice.

11.28 LGBTIQ+ Health Australia submitted to the Royal Commission, "The dominance of faith-based service providers in aged care is a barrier to LGBTI elders accessing services. During LHA's consultations to prepare submissions for Royal Commission into Aged Care Quality and Safety, many people reported experience of discrimination and exclusion where workers express and act on faith-based convictions that being LGBTI is sinful. Participants reported being actively told to suppress their identity and experienced loss of connection with their LGBTI community. The problems are compounded in remote, rural and regional Australia where there are fewer choices for care and, in some circumstances, faith-based service providers are the only provider in the area."⁴⁶

11.29 Aged care providers including those run by religious organisations should be prohibited with no exceptions from discrimination on any attribute by excluding or treating adversely staff in employment, or excluding or treating adversely, residents or potential resident.

12. Promoting substantive equality

12.1 AIA support the addition of a positive duty to eliminate discrimination, sexual harassment and vilification and provisions against hate-based conduct.

12.2 A positive duty is in accordance with the requirement in human rights law that a government takes measures to respect, protect, and fulfill human rights, and alongside a Human Rights Act, would be a critical step to ensuring everyone in NSW can enjoy their human rights. A positive duty will address not only individual but also systematic discrimination, and prevent discrimination by requiring government to address and mitigate discrimination before it occurs. Positive duties currently exist under the SDA which requires organisations and businesses to take proactive action to prevent sexual harassment from occurring in the workplace or in connection to work. A positive duty was also a recommendation in the final report of the Disability Royal Commission, which recommends requiring reasonable and proportionate measures be taken to eliminate disability discrimination, harassment and victimisation.⁴⁷

12.3 Allowing for special measures are also fulfills, for example, the requirement in the CRPD to provide accessibility measures that allow people with disability to fully participate in society.

⁴⁵ The Federation of Ethnic Communities' Councils of Australia, 2020, *Submission to the Royal Commission on Aged Care Quality and Safety, 'The Future of the Aged Care Workforce: Issues arising from the aged care workforce deficit and the increasing reliance on a migrant workforce'*.

⁴⁶ LGBTI Health Alliance 2020, *Submissions to Royal Commission into Aged Care Quality and Safety*.

⁴⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2023, *Final Report: Our vision for an Inclusive Australia and Recommendations*.