



NSWCCL SUBMISSION

NSW LAW REFORM COMMISSION

REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

CONSULTATION PAPER: UNLAWFUL CONDUCT

August 2025

NSWCCL

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Introduction

1. The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to contribute to the NSW Law Reform Commission (Commission) 'Consultation paper: Unlawful Conduct' (Consultation paper) concerning the *Anti-Discrimination Act 1977 (NSW) (ADA) Review (Review)*.
2. NSWCCL made a submission, dated 28 September 2023, to the Commission in relation to the Review of the ADA. That submission is referenced in the Consultation Paper and is listed in Appendix A: Preliminary submissions as PAD21 (PAD21).
3. NSWCCL continues to endorse and relies on the comments and recommendations made in PAD21. It will also be referenced in this submission.
4. It is noted that the terms of reference, in this Consultation paper, consider issues relating to the tests for discrimination, who is protected, the areas in which discrimination is prohibited and exceptions. It also considers harassment, civil vilification and other unlawful acts, as well as liability and measures to promote substantive equality.
5. It is also noted that whether NSW should have a Human Rights Act is beyond the scope of the review of the ADA. NSWCCL expects that, as such, there will be greater emphasis on the ADA to be far more comprehensive and all-encompassing than discrimination legislation in other jurisdictions.
6. Responses to relevant questions in the terms of reference questions are addressed below.

Tests for discrimination

Question 3.1: Direct discrimination

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

7. NSWCCL supports the replacement of the comparator test with a causation requirement.¹ The comparator requirement has proven to be a significant barrier to establishing claims of direct discrimination. The consultation paper refers to the *Purvis* case² in which the High Court accepted the argument that the claimant was excluded from school because of his violent behaviour, not his disability. It was also accepted that the relevant comparator should be a student who exhibited the same violent behaviour, but without the claimant's disability. This was the case even though the claimant's behaviour was caused by his disability. This has been described as 'the separation of a protected trait and a manifestation of the trait'.³
8. Causation is identified by the Commission as often difficult to prove in bringing discrimination complaints. This is significantly more difficult when establishing algorithmic discrimination. Weaknesses in the traditional framework for dealing with discrimination are exposed by AI systems. For example, traditional forms of direct discrimination normally provide a signal to victims that discrimination has occurred unlike in algorithmic systems. 'The increasing use of algorithms disrupts traditional legal remedies and procedures for detection, investigation, prevention, and correction of discrimination which have predominantly relied upon intuition.'⁴
9. NSWCCL, therefore, supports an unfavourable treatment test that asks if the complainant was treated unfavourably 'because of' or 'as a result of' one or more protected attributes.

¹ see para 54 PAD21.

² *Purvis v New South Wales [2003] HCA 62, 217 CLR 92 [236]*.

³ Belinda Smith, 'From Wardley to Purvis: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3, 20.

⁴ Sandra Wachter, Brent Mittelstadt and Chris Russell 'Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI' (2021) 41:105567 *Computer Law & Security Review* 5, 2.

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?

10. Indirect discrimination tends not to be a preferred route for claims in Australia, in part because of the complexity and technicality of the legal provisions; and given indirect discrimination (unlike direct discrimination) can generally be justified in some way.⁵ 'Claimants variously struggle to establish relevant groups for comparison, their own inability to comply with the requirement, or to establish that the requirement was unreasonable'.⁶
11. NSWCCCL recommends the replacement of the disproportionate impact test for indirect discrimination, with the disadvantage test. That is, whether a requirement or condition disadvantages or potentially disadvantages a person with a protected attribute.

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?

12. NSWCCCL is in favour of the disadvantage test, as explained above, which does not require complainants to prove they are unable to comply with a requirement or condition.

Question 3.4: Indirect discrimination and the reasonableness standard

(1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?

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

13. PAD 21 set out in detail the NSWCCCL argument of the problems with a reasonableness test. 'The problem with the reasonableness test is, by being so 'open textured' it creates a risk that decisions of courts and tribunals fail to give full weight to the beneficial purpose of the legislation and its ambition' of promoting a more equal society.⁷ 'Because of its open texture, the test of reasonableness can be a vehicle for the transmission of traditional views of social practices, and the rejection of any requirement to change.'⁸
14. Substantive understanding of the right to equality requires the context of disadvantage to be taken into account. 'For this reason, the motive of the perpetrator is irrelevant. Rather, the UK courts have established a 'but for' test which founds liability on the simple causative assessment that 'but for' the applicant's protected characteristic, she would not have been treated less favourably. Because motive and intention are excluded in the UK formulation of direct discrimination, the 'but for' test is left to focus on the effect of the action rather than on why the perpetrator acted.'⁹
15. NSWCCCL supports the replacement of reasonableness with a higher standard and agree that the ADA would benefit from adopting the United Kingdom's proportionality test, that is, whether the impugned conduct is a proportionate means of achieving a legitimate aim.

⁵ Alysia Blackham 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) *Melbourne University Law Review* 16; (2023) 47(1) *Melbourne University Law Review* 63, 104.

⁶ Alysia Blackham 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) *Melbourne University Law Review* 16; (2023) 47(1) *Melbourne University Law Review* 63, 104.

⁷ Para 60 PAD21.

⁸ Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionments and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 918.; para 59 PAD21.

⁹ Fredman FBA KC, Sandra, III Indirect Discrimination in 'Legal Concepts: Direct, Indirect Discrimination, and Beyond', *Discrimination Law*, 3rd edn, Clarendon Law Series (Oxford, 2022; online edn, Oxford Academic, 19 Jan. 2023).

16. For the reasons given, NSWCCCL therefore opposes factors being set out in the ADA to determine reasonableness.

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?

17. In order to prevent and remedy unfairness and to promote equality caused by discriminatory conduct, legislation needs to be substantive and not merely a formal concept of discriminatory treatment. There needs to be a clear and comprehensive definition of discrimination that applies to all protected attributes that is substantive and not merely formal.¹⁰
18. If the legislation were to adopt a single unified test, consisting of a single substantive concept of discrimination then indirect discrimination would also extend to characteristics that people with protected attributes either generally have or are assumed to have.
19. The Supreme Court of Canada has acknowledged that the divide is often unclear and ‘it has been keen to streamline defences and remedies so that little hangs on the initial classification. The ECtHR and the ECJ¹¹, in their recent case law, are similarly flexible about the divide.’¹²
20. NSWCCCL therefore supports the approach that it should never be lawful to discriminate based on attributes or characteristics.

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?

21. There are significant problems for establishing causation in cases of direct discrimination, which difficulties of proof are likely to be catastrophic in Australian jurisdictions without a reverse burden of proof.¹³ The reverse onus reflects the fact that it can be very difficult for an applicant to prove the reason for the respondent’s action because the reasons for discrimination are singularly within the knowledge of the discriminator.
22. In EU and UK discrimination law, once a claimant establishes a prima facie case of direct discrimination, the burden shifts to the respondent to provide a non-discriminatory explanation for their actions.¹⁴ As explained in the Consultation paper the reverse burden is limited in Australian direct discrimination law, for example, the *Fair Work Act* adverse action provisions.¹⁵

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

23. The point of the prohibition of indirect discrimination is that policies adopted with no discriminatory intent will be caught if their impact on those with protected characteristics is greater than their impact on others. Whether the legislature intended to create a disparate impact is irrelevant.

¹⁰ See paras 46-43 PAD21.

¹¹ European Court of Human Rights and European Court of Justice respectively.

¹² Fredman FBA KC, Sandra, III Indirect Discrimination in 'Legal Concepts: Direct, Indirect Discrimination, and Beyond', *Discrimination Law*, 3rd edn, Clarendon Law Series (Oxford, 2022; online edn, Oxford Academic, 19 Jan. 2023).

¹³ Alysia Blackham 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) *Melbourne University Law Review* 16; (2023) 47(1) *Melbourne University Law Review* 63102

¹⁴ *Equality Act 2010 (UK)* ss 136(2)–(3).

¹⁵ *Fair Work Act 2009 (Cth)* s351, s 361(1).

24. Problems encountered in using indirect discrimination law include evidentiary difficulties in establishing disadvantage that is relevant. The lack of transparency in AI systems, for example, exacerbates the difficulty in getting information about the disparate impact on a protected group.¹⁶
25. The UK Equality Act 2010 states that indirect discrimination can be justified if the respondent can show that the measure is 'a proportionate means of achieving a legitimate aim'.¹⁷
26. NSWCCCL agrees that the law should change so that respondents bear the burden of proving some aspects of the tests for discrimination. If it is accepted that the direct and indirect tests are unified, indirect discrimination should not be subject to a reasonableness test.

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?*

27. NSWCCCL supports the adoption of a single definition that does not include the concepts of direct and indirect discrimination.¹⁸

Question 3.8: Intersectional discrimination

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

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

28. It is appropriate for the ADA to cover more instances of discrimination and reflects the many ways discrimination can occur. Each separate factor may compound and magnify existing unlawful discrimination significantly.
29. NSWCCCL favours the test in the *Canadian Human Rights Act* which protects against discrimination on 'one or more prohibited grounds ... or on the effect of a combination of prohibited grounds'.¹⁹

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?

30. Algorithmic discrimination often displays the characteristics of future indirect discrimination. It can be far-reaching, particularly due to the propensity of AI systems to reproduce and reinforce previous patterns of discrimination. For example, predictive policing and sentencing recommendations standardise the prediction of an individual engaging in criminal behaviour in the future, based on analyses of historical data of the offender's past behaviour.
31. NSWCCCL recommends that the test for discrimination also cover the situation of when someone proposes to impose a requirement, condition, or practice, which effectively captures intended future indirect discrimination.

4. Discrimination: protected attributes

Question 4.1: Age discrimination

(1) *What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "age"?*

(2) *What changes, if any, should be made to the age-related exceptions?*

Question 4.2: Discrimination based on carer's responsibilities

¹⁶ Alysia Blackham 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) *Melbourne University Law Review* 16; (2023) 47(1) *Melbourne University Law Review* 63, 104.

¹⁷ *Equality Act 2010 (UK)* s13(1), s136.

¹⁸ Para 52 PAD21.

¹⁹ *Canadian Human Rights Act 1985 (Canada)* S3.1.

(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “responsibilities as a carer”?

(2) Should the ADA separately protect against discrimination based on someone’s status of being, or not being, a parent?

Question 4.3 Disability discrimination

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

32. NSWCCCL considers that reform to the ADA should include consideration of terms such as 'malfunction', 'malformation', 'disfigurement' which are inappropriate and should be reviewed. The ADA should not be framed in a way that perpetuates negative stereotypes around what it means to live with a disability.²⁰

33. NSWCCCL favours the definition in the *Convention on the Rights of Persons with Disabilities* (CRPD) which states:

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

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

34. NSWCCCL agrees that genetic information discrimination should be based on “health status”, separately from disability.

(3) What changes, if any, should be made to the public health exception?

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

Question 4.4: Discrimination based on homosexuality

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

36. Currently sexual orientation under the homosexuality ground of protection fails to protect multi-gender attracted people. This refers to the wide umbrella of sexualities including bisexuality (commonly as bi+), polysexuality, omnisexuality, multisexuality, pansexuality, and others. While multi-gender attraction is becoming increasingly reported in younger Australians, they are absent in strategies for combating the confronting nature of negative and stigmatising familial/peer attitudes.

Question 4.5: Discrimination based on marital or domestic status

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

36. Traditional measures of marital status are commonly used to examine differences in relationships and socioeconomic outcomes, but do not adequately capture the diversity of relationship experiences. The term marital suggests a status restricted to state sanctioned registration of a relationship.

37. NSWCCCL supports a change to the term ‘relationship status’ as the appropriate protected attribute. This would allow for greater inclusivity and visibility of sexual minorities and unmarried persons, including but not limited to queer individuals, families, and communities, as well as consensual nonmonogamous relationships.²¹

²⁰ See para 29 PAD21.

²¹ D’Lane Compton, Gayle Kaufman, Looking beyond marital status: What we can learn from relationship status measures, *Journal of Marriage and Family*
<https://onlinelibrary-wiley-com.wwwproxy1.library.unsw.edu.au/doi/full/10.1111/jomf.13021>

Question 4.6: Racial discrimination

(1) *What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “race”?*

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

38. At the current time, race is defined under the ADA to include ‘colour, nationality, descent and ethnic, ethno-religious or national origin’. NSWCCCL agrees with the previous submission of the NSW Law Society that ‘caste-based discrimination is an ‘intersectional system of discrimination’ with wide-ranging and severe impacts that should be further recognised as a protected attribute.’²²
39. NSWCCCL also supports specific protections to be enacted for people based on their immigration/migration status. Visa holders and migrants are highly vulnerable to discriminatory and other objectionable conduct, for example, difficulties in obtaining essential services.
40. With important exceptions, the definition of race under s 4 of the ADA should be extended to include immigration or migration status or a standalone ground for immigration/migration status.²³

Question 4.7: Sex discrimination

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

41. NSWCCCL recommends the inclusion of menstruation discrimination as discrimination on the basis of sex, in that it is a condition linked to female reproductive organs and associated with stereotypes about women’s inferiority.

(2) *Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?*

42. NSWCCCL agrees that pregnancy and breastfeeding should be standalone protected attributes. This may serve to clarify and strengthen the prohibitions against discrimination on those grounds. Breastfeeding is dealt with as a separate ground of discrimination under the Sex Discrimination Act 1984 (Cth) as well as in most other States. Pregnancy is dealt with as a separate attribute of discrimination in all states and territories (except NSW).

Question 4.8: Discrimination on transgender grounds

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

43. In PAD21²⁴ NSWCCCL made it clear that intersex and non-binary status should be expressly included as protected attributes in the Act. This express inclusion falls under the joint ownership of universal UN human rights agendas and non-confrontational protections for the intersex community ensuring that they are in a position to be supported when circumstances of discrimination arise. NSWCCCL advocates for the reversion of potential high stake harms that are likely to occur in the future if intersex and non-binary are left excluded.
44. ‘Accordingly, in order to ensure reform can address as many of the issues as possible, we recommend the inclusion of express protections for non-binary persons, and a standalone protection against discrimination on grounds of sex characteristics. In addressing the last of these two protections, we consider an appropriate, straightforward, solution would be to follow the approach taken in Victoria in the *Equal Opportunity Act 2010* (Vic), which includes the following definition:
- sex characteristics** means 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

²²Law Society of NSW PAD31.

²³ as occurs in the ACT legislation; PAD31.

²⁴ Paras 30-33 PAD21.

emerge as a result of puberty.²⁵

45. NSWCCCL agrees with the amendment of the protected attribute of ‘transgender grounds’ along the lines of Queensland legislation which aligns with international human rights law principles²⁶ on sexual orientation and gender identity. NSWCCCL in tandem with numerous activist groups such as Trans Rights, Equality Australia and Inner City Legal Centre believe in a better use of terminology: ‘gender identity’ is far more encapsulating than the current ground of transgender protection. According to the Yogyakarta Principles gender identity refers to an individual’s deeply felt internal experiences even if it differs from their sex assigned at birth. In widening this definition, various forms of discrimination are prevented for those with non-binary genders accordingly. A detailed explanation of gender identity is defined as being:

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

46. NSWCCCL does not agree with retention of the comparator test so this would not be a barrier to changing the definition in line with gender identity.

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?*

47. Using algorithmic discrimination, as an example, one may not be aware, until sometime in the future, of discriminatory behaviour. Therefore, the fundamentals essential to bringing a claim, such as the composition of the disadvantaged and advantaged group, the severity and type of harm suffered, and requirements for the relevance and admissibility of evidence, will be problematic.²⁷ For example, feedback loops are biases in predictions that are exacerbated over time, when predictions made by algorithms become the basis for future training datasets (as often used in policing).²⁸

(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?*

48. NSWCCCL agrees that the ADA should identify being an “associate” of someone with a protected attribute, as a protected attribute itself covering both relatives and associates under both the direct and indirect discrimination tests.

49. The United Nations protects against discrimination that affects individuals based on the status, activities, or beliefs of their associates or relatives.²⁹

5. Discrimination: potential new protected attributes

Question 5.1: Guiding principles

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

Question 5.2: Potential new attributes

²⁵ paras 30-33 PAD21.

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

²⁷ Sandra Wachter, Brent Mittelstadt and Chris Russell ‘Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI’ (2021) 41:105567 *Computer Law & Security Review* 5, 1.

²⁸ European Union Agency for Fundamental Rights, *Bias in Algorithms Artificial Intelligence and Discrimination Report* (2022) < <https://fra.europa.eu/en/publication/2022/bias-algorithm>>.

²⁹ International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

- (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?

50. NSWCCCL relies on the recommendations in PAD21. This included the addition of the new protected attributes of intersex, nonbinary and sex characteristics; protections for sex workers; and irrelevant criminal record. The advocates of sex workers' access to health, safety and welfare in our sex industry is instrumental. NSWCCCL, therefore, joins Scarlet Alliance and SWOP (Sex Workers Outreach Project NSW) calls for sex work to be recognised as a newly standalone protected attribute to ensure clear and specific legal protections against discrimination and vilification.
51. In addition to those attributes NSWCCCL would generally be supportive of PIAC's proposed list of additional protected attributes, with some minor exceptions.
52. 'First, protection for political conviction/opinion should be treated under the Act in a similar way to religious belief and affiliation. That is, we would not oppose tailored protections that would prohibit, for example, an employer terminating an employee's employment on the basis of political belief in appropriate circumstances (for example, there may cases where it is appropriate for employers to base employment decisions on the basis of political belief, such as where a political organisation is the employer). But we are opposed to general protections or exemptions in the Act that would prevent political groups or parties from being criticised for their views, and would not be supportive of protections on political grounds that would supersede other protections in the Act.

Secondly, and similarly, while we agree with PIAC that discrimination on the basis of industrial activity/trade union activity should be prohibited, as with religious and political affiliation, we think this protection should clearly attach to the individual and not become a mechanism by which trade union organisations may be insulated from criticism/debate.³⁰

Question 5.3: An open-ended list

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

53. NSWCCCL supports the adoption of a prohibition on discrimination based on any other attributes that meet certain criteria (other than those specifically recognised in the ADA).
54. International human rights law prohibits discrimination based on an undefined category of 'other status'. This has provided various conventions with the ability to extend principles to new concepts of discrimination.³¹
55. New attributes may arise in novel ways. For example, AI can generate new categories of people based on innocuous characteristics, such as web browser preference or address, combining many data points. This kind of differentiation could still be discriminatory if it reinforces social inequality. Discrimination due to information linked to protected attributes e.g. by targeted advertising, could create classes that might suffer indirect discrimination. Grouping people according to their assumed interests rather than solely their personal traits may still contain sensitive information like ethnicity, gender, sexual orientation or religious beliefs that can lead to discriminatory inferences about them. These classes could remain outside the scope of non-discrimination law but still be deserving of legal protection.³²

³⁰ paras 42-43 PAD21.

³¹ The ICCPR preserves the rights of all people to non-discrimination and equality before the law. e.g. ICCPR Art 2(1) and Art 26, which extend the principles in the ICCPR to SOGI on 'other status' grounds. International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (entered into force 3 January 1976) art 2(2).

³² Sandra Wachter 'Affinity Profiling and Discrimination by Association' (2020) 35(2) *Berkeley Technology Law Journal* 1-64.

6. Discrimination: Areas of public life

Question 6.1: Discrimination at work — coverage

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

56. Government should have to comply with its own discrimination standards and prohibit discrimination in the administration of state and local government laws and programs, and the functions and powers of local government.
57. Furthermore, all areas of public life should be covered unless a clear and compelling public policy reason exists for excluding a given area. This would provide consistency across the protected attributes, unless an exception applies and would enable the ADA to evolve to meet society's needs, without requiring legislative change each time another area is identified.

Question 6.2: Discrimination in work — exceptions

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

Question 6.3: Discrimination in education

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

Question 6.4: The provision of goods and services — coverage

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

Question 6.5: Superannuation services and insurance exceptions

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

Question 6.6: The provision of goods and services — exceptions

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

Question 6.7: Discrimination in accommodation — coverage

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

Question 6.8: Discrimination in accommodation — exceptions

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

Question 6.9: Discrimination by registered clubs — coverage

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

Question 6.10: Discrimination by registered clubs — exceptions

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

Question 6.11: Discrimination based on carer's responsibilities

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

Question 6.12: Additional areas of public life

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

58. See 6.1 above

7. Wider exceptions

Question 7.1: Religious personnel exceptions

- (1) *Should the ADA provide exceptions for:*
 - (a) *the training and appointment of members of religious orders?*

(b) "the appointment of any other person in any capacity by a body established to propagate religion"?
(2) If so, what should these exceptions cover and when should they apply?

Question 7.2: Other acts and practices of religious bodies

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

59. NSWCCCL supports the view that the freedom to choose religious leaders and teachers, and to establish religious schools should be limited in certain circumstances, including to protect other people's human rights. Freedom of religion or belief should never be used to justify ends that are inconsistent with any human rights instruments.³³ Inconsistencies such as these would lead to violations of human rights persisting and thus the anti-thesis of what anti-discrimination acts intend to relieve.
60. As stated in PAD21, in our view 's 56, and s 56(d) in particular, is too broad and should be removed from the Act. As it stands, we consider there to be a real risk that the Act operates in a way that promotes the interests of religious or religiously-affiliated organisations at the expense of other important social aims, particularly the welfare of children and freedom from unfair discrimination and unequal treatment. Finally, we note that generalised exceptions permitting discrimination on grounds of religion in the provision of goods or services should also not be allowed in any reformed version of the Act. The licence to discriminate enshrined within the current Act must be removed upon any consequent reform'.³⁴

Question 7.3: Exceptions for other forms of unlawful conduct

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

61. Harassment and vilification is not acceptable or justifiable by religious institutions and organisations and the general exception for religious bodies should not continue to apply.

Question 7.4: Exceptions for providers of adoption services

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

62. Section 8 (1) (a) of the Adoption Act 2000 requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration. That section does not apply to a child who is adopted.³⁵
63. NSWCCCL considers that this exception should be removed. We do not think it is appropriate that there should ever be anything other than the needs of the child taken into account in the provision of adoption services.³⁶
64. NSWCCCL also submits that faith-based adoption services should not be allowed to discriminate in the provision of services for which they receive public funding.

Question 7.5: Private educational authorities employment exceptions

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

(2) If you think the Act should provide exceptions in this area:

(a) what attributes should the exceptions apply to?

(b) what requirements, if any, should duty holders meet before an exception applies?

Question 7.6: Discrimination against students and prospective students

³³ A Shaheed, Report of the Special Rapporteur on Freedom of Religion or Belief: Gender-Based Violence and Discrimination in the Name of Religion or Belief, UN Doc A/HRC/43/48 (24 August 2020) [60].

³⁴ Paras 104-105 PAD21.

³⁵ Para110 PAD21

³⁶ Para 110 PAD21

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

(2) If you think it is necessary for the ADA to provide exceptions in this area:

(a) what attributes should the exceptions apply to?

(b) should they apply to prospective students, existing students, or both?

(c) what requirements, if any, should duty holders meet before an exception applies?

65. The ADA is the only Australian discrimination law with exceptions for 'private educational authorities' which is able to discriminate on a wide range of grounds, even where the authority is not established for a religious purpose.
66. NSWCCCL recommends that faith-based educational authorities should be allowed to give preference to prospective students or staff on the basis of religion, or sex in the case of single-sex educational authorities. This would not permit private educational authorities to refuse to admit, or expel, students on the basis of other protected attributes (such as sexual orientation or transgender status). Nor would it permit private educational authorities to terminate someone's employment on the basis of other protected attributes.
67. Protecting young people and students should be a priority of the ADA. Students, and younger people more generally, are in a position of heightened vulnerability compared to adults. Any reform to the Act should therefore ensure that students in private educational authorities are protected from this kind of discrimination.³⁷
68. NSWCCCL contends that no private educational authority receiving government funding should be permitted to discriminate against students and staff.
69. NSWCCCL agrees that the existing private educational authority employment exceptions should be repealed, and a more general employment exception introduced with provision that exceptions be justified.

Question 7.7: Exceptions relating to sport

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

70. NSWCCCL supports:
- (a) A repeal of s38P so that the Act prohibited discrimination against transgender persons in amateur or junior sport and in coaching or administration at a professional level; and
 - (b) The inclusion in the Act of a new mechanism by which professional sport bodies could apply to the Board for an exemption to make rules, codes of conduct and the like which govern participation by transgender persons in professional sport.
71. NSWCCCL recommends, with limited reasonable and justifiable exceptions, the removal of disability and age-related exemptions.

Question 7.8: The charities exception

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

Question 7.9: Voluntary bodies exception

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

72. NSWCCCL supports the narrow exception similar to the ACT legislation which only applies if:
- the club or body is established to benefit a class of people sharing a protected attribute, and
 - the discrimination is reasonable, proportionate and justifiable in the circumstances.³⁸

³⁷ Paras 100-101 PAD21.

³⁸ *Discrimination Act 1991 (ACT)* s 31. See also Law Reform Commission of Western Australia, Review of the Equal Opportunity Act 1984 (WA), Project 111, Final Report (2022) rec 72.

Question 7.10: Aged care accommodation providers exception

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

73. NSWCCCL agrees with the NSWLRC position that this exception be repealed. People should not be arbitrarily excluded from accommodation based on race, sex or marital status, other than in relation to 'special measures' to accommodate the needs of particular group.

Question 7.11: The statutory authorities exception

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

8. Civil protections against vilification

Question 8.1: Protected attributes

(1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?

(2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

Question 8.2: The test for vilification

(1) Should NSW adopt a "harm-based" test for civil vilification? If so, should this replace or supplement the existing "incitement-based" test?

(2) What, if any, other changes should be made to the incitement-based test for civil vilification?

74. An incitement based test has disadvantages, being uncertain and vague. NSWCCCL supports a harm based test for civil vilification.

Question 8.3: The definition of "public act"

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

Question 8.4: Exceptions

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

Question 8.5: Religious vilification

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

75. NSWCCCL is concerned that the ADA could go beyond protecting individuals and groups against vilification based on their religious beliefs or views. The relevant section of PAD21 is reproduced below:

'Section 49ZE(1)(b) replicates existing provisions of the Act that prohibit the vilification both of persons and of 'groups of persons'. We do not think it is appropriate simply to adopt that language in the context of religious beliefs or affiliation. Doing so risks effectively extending the protection of the Act to religious institutions or organisations – that is, there is a risk that the Proposed Amendment would create a situation in which severe ridicule or vilification of institutions such as the Catholic Church or the Anglican Church may be taken to constitute severe ridicule or vilification of persons who belong to those organisations, and thus made unlawful. It is essential that citizens remain free to criticise religious organisations or institutions, even if that criticism amounts to severe ridicule or vilification, because those institutions often hold important social and political influence. A functioning participatory democracy depends on debate and criticism as a means of promoting institutional accountability. We are also mindful, in this context, that religious groups and organisations come in many shapes and sizes and the 'beliefs' they hold may be diametrically opposed to one another. For example, it is not clear how s 49ZE(1)(b) would regulate a situation where someone on religious grounds holds and wishes to propagate a belief that persons of a different religious group are subordinate or evil.

For the same reason, the Act should also be amended to make clear that, contrary to the default rule of statutory interpretation,³⁴ where the Act refers to an aggrieved 'person', this does not extend to a corporation or body corporate.

NSWCCCL would not, however, be opposed to limited and clear protection for engagement in otherwise lawful religious activity accepted as practice by the faith group and genuinely held by the person. Any such reform should be appropriately adapted to make clear that protections are for individuals only and do not extend to religious institutions, and should never operate so as to

supersede other protected rights under the Act.³⁹

76. NSWCCCL supports the repeal of s49ZE(1) in the context of holistic reform. The relevant section of PAD21 is reproduced below.

‘[T]he focus of anti-discrimination law and the existing provisions of the Act is to protect an individual from being subject to unfair treatment by reason of characteristics that are generally innate or immutable or associated with entrenched disadvantage. While freedom of religion is an important individual right protected under international law and under the Australian *Constitution*— and a person’s religious beliefs may be deeply meaningful to them and an important constituent of cultural and familial ties – those beliefs are not innate characteristics. They are ideas, albeit ideas that can have a profoundly important impact on a person’s life. We see considerable risk in the Religious Vilification Amendment because it fails to recognise this distinction and instead simply mimics the legislative protections that the Act provides to individuals based on their innate characteristics. One danger we therefore foresee is that the Religious Vilification Amendment could operate to prohibit the vilification or severe ridicule of beliefs or views themselves, not only the vilification or severe ridicule of persons on the basis that they hold particular beliefs or views’.⁴⁰

9. Harassment

Question 9.1: The definition of sexual harassment

(1) *Should the reasonable person test be expanded to include the “possibility” of offence, intimidation or humiliation? Why or why not?*

77. NSWCCCL sees the merit in a broader approach along the lines of the Queensland anti-discrimination legislation.⁴¹

78. NSWCCCL does not recommend that the reasonableness standard be replaced or changed in the context of sexual harassment. ‘This is because it is used in a different way. In the sexual harassment provisions, reasonableness does not operate as a defence or justification available to the alleged perpetrator. Instead, it is simply the touchstone by which the effect of the conduct on the aggrieved person is to be judged – specifically, whether a reasonable person would have anticipated that the conduct would cause the aggrieved person to feel ‘offended, humiliated or intimidated’. On balance, we think it is appropriate that that remain an objective standard rather than a subjective one – i.e., it should not be enough to show that, subjectively, the aggrieved person felt offended, humiliated or intimidated.’⁴²

(2) *Should the ADA expressly require consideration of an individual’s attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?*

(3) *Does the ADA need to define “conduct of a sexual nature”? Why or why not?*

Question 9.2: Other sex-based conduct

(1) *Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?*

(2) *Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?*

(3) *Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?*

Question 9.3: Sexual harassment in the workplace

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

79. NSWCCCL prefers the Australian Law Reform Commission recommendation that the Sex Discrimination Act should prohibit sexual harassment in all areas of public activity.

Question 9.4: Workplace-related laws regulating sexual harassment

³⁹ para 74 PAD21.

⁴⁰ para 72 PAD21.

⁴¹ *Anti-Discrimination Act 1991* (Qld) section 117.

⁴² paras 90-91 PAD21.

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

(2) Should the ADA and workplace-related sexual harassment laws be more aligned?

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

(1) Should the ADA continue to limit the areas of life where sexual harassment is unlawful? Why or why not?

(2) Should sexual harassment be unlawful in other areas of life? For example:

(a) areas of life that are protected from discrimination

(b) all areas of public life, or

(c) any area of life, public or private?

80. NSWCCCL recommends the prohibition of sexual harassment in all areas of public life.

Question 9.6: The private accommodation exception

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

Question 9.7: Attribute-based harassment

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

81. NSWCCCL considers that the ADA should be amended to proscribe harassment on the basis of all protected attributes.

10. Other unlawful acts and liability

Question 10.1: Victimisation

(1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?

82. The ADA should clearly prohibit any conduct, actual or threatened, which would undermine its purposes, including enabling people to bring complaints.

(2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

Question 10.2: Advertisements

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

Question 10.3: The forms of liability

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

Question 10.4: The exceptions for liability

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

Question 10.5: Liability and artificial intelligence

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

83. NSWCCCL supports provision that decisions made by a computer program, used by an individual or body corporate, be attributed to that individual or body corporate.

11. Promoting substantive equality

Question 11.1: Adjustments

(1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?

(2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?

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

84. The NSWCCCL supports imposing an obligation on employers and the other organisations and

Bodies, who are subject to the ADA, to take reasonable steps to prevent discrimination, harassment and vilification. It is appropriate and consistent with the ADA's objectives for reasonable obligations to be placed on employers, organisations and bodies to prevent the conduct prohibited.

Question 11.2: Special measures

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

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

(3) If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

85. NSWCCCL also agrees with the adoption of the special measure definition in human rights law.⁴³
86. NSWCCCL also agrees, in line with Victorian legislation, that a person should be allowed to take a special measure for the purpose of promoting or achieving substantive equality for members of a group with a protected attribute. To be a special measure, the action must be:
- undertaken in good faith for achieving substantive equality
 - reasonably likely to achieve this purpose
 - a proportionate means of achieving this purpose, and
 - justified because members of the group have a particular need for assistance.⁴⁴
87. In PAD 21, NSWCCCL noted that, depending on the wording of the special measures provision, there is potential for overlap with the exemptions regime and, if adopting a provision like s 12 of the Victorian legislation, consideration should be given of the extent to which the exemptions regime could be reconfigured.

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

(1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

(2) If so:

(a) What should duty holders be required to do to comply with the duty?

(b) What types of unlawful conduct should the duty cover?

(c) Who should the duty holders be?

(d) What attributes and areas should the duty apply to?

88. NSWCCCL supports a positive duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct. Duties need to shift the responsibility for advancing equality to organisations, not individuals.
89. Positive duties are well-established features of equality law in the UK, though as mentioned by the Commission, they only apply to public authorities. Other Australian jurisdictions impose positive duties on employers.⁴⁵
90. NSWCCCL suggests that there needs to be a positive duty in the private sector if, for example, algorithmic discrimination is to be tackled. The Victorian duty requires that those with a duty not to engage in discrimination 'take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible'.⁴⁶ Whether a measure is

⁴³ Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4); Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1); International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

⁴⁴ Equal Opportunity Act 2010 (Vic) s 12.

⁴⁵ *The Sex Discrimination Act 1984 (Cth)* ('Sex Discrimination Act'), *Discrimination Act 1991 (ACT)* and *Anti-Discrimination Act 1992 (NT)*.

⁴⁶ Equal Opportunity Act (Vic) s 15(2).

reasonable and proportionate depends on the size, nature, circumstances, resources and priorities of the business; and the practicability and cost of the measures.⁴⁷

This submission was prepared by _____ on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Law Reform Commission .

Yours sincerely,

Adam Connor
Secretary
NSW Council for Civil Liberties

Alysia Blackham 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) Melbourne University Law Review 16; (2023) 47(1) Melbourne University Law Review 63.