



**Submission to the  
Anti-Discrimination Act Review  
by the NSW Law Reform  
Commission**

*by Trans Justice Sydney and the Sydney Bi+  
Network*

22 August 2025

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## **Acknowledgement of Country**

Sydney Bi+ Network and Trans Justice Sydney acknowledge that we organise, campaign, and connect on stolen Aboriginal lands. We pay our respects to Elders past and present, and especially want to acknowledge First Nations LGBTQIA+ people, including Brotherboys and Sistergirls, who continue to lead the way in making change for LGBTQIA+ communities. Australia always was, and always will be, Aboriginal land.

## **About the Sydney Bi+ Network and Trans Justice Sydney**

### Sydney Bi+ Network

Sydney Bi+ Network is a volunteer-run, grassroots organisation dedicated to improving the wellbeing of bi+ people through community building, education and advocacy. While our activities are primarily based across Gadigal, Wangal, Cammeraygal, Bidjigal, Dharug, and Dharawal lands, bi+ people across the state engage with our activities, ideas, and actions.

The term “bi+” in the Network title is an umbrella term used to describe people who are attracted to more than one gender, in any way, to any degree. Bi+ can include (but is not limited to) bisexual, pansexual, omnisexual, polysexual, biromantic, panromantic, queer, fluid, gay, lesbian, and questioning.

### Trans Justice Sydney

Trans Justice Sydney is a location-specific group of the larger Trans Justice Project. The Trans Justice Project is a continent-wide, trans-led organisation whose mission is to push back against anti-trans rhetoric and organising, and build a powerful movement working for freedom, justice and equality for all trans and gender diverse people. We work together with loved ones and allies to bring about a future where all trans and gender diverse people are safe, celebrated, and free.

## **The relatedness and intersections of bi+, trans and gender diverse discrimination**

Our Networks have collaborated on this submission in recognition of the similar and intersecting forms of discrimination that bi+ and gender diverse communities face. Stigma and discrimination against these communities stems from the way they trouble binary logics in everyday life, such as the straight/gay sexuality binary, and the male/female gender binary. Additionally, many in our networks are both bi+ and gender diverse, and collaborating on this submission flows from our intersecting experiences of discrimination and exclusion.

## **How we developed this submission**

This submission was prepared by volunteers from the Sydney Bi+ Network and Trans Justice Sydney. Policy positions were developed through conversations between authors from these networks, and seeking feedback from our Networks for this review by sharing community surveys to our social media. Such surveys generated input from trans, gender diverse and bi+ communities in NSW. The Sydney Bi+ Network also held an in-person community consultation workshop to facilitate verbal input for this review. Additionally, we liaised with a number of similarly minded organisations, and reviewed preliminary submissions to this review, to inform our policy positions.

## **Executive Summary**

Sydney Bi+ Network and Trans Justice Sydney welcome the opportunity to provide input into the NSW *Anti-Discrimination Act* review. Changes to the *Anti-Discrimination Act 1977* (NSW) are long overdue. For decades, community members, legal experts, and advocacy organisations have called for legislative changes which provide meaningful protections for minoritised communities. Despite these efforts, the people of NSW have been left with outdated legislation that fails to address the lived experiences of many who face discrimination, vilification, sexual harassment, and victimisation.

We thank those who came before us to agitate for change. We also acknowledge the tireless work of advocates and organisations focused on the rights of First Nations communities, sex workers, people with innate variations of sex characteristics, people with disabilities, people with refugee and asylum seeker experiences, victim-survivors of domestic, family, and sexual violence, and people impacted by carceral systems. The systems and structures which perpetuate discrimination are interlinked, and the work of these groups intersect with our own. Given the intertwined nature of discrimination, we support submissions to this review that focus on disadvantaged and minoritised communities being collectively considered, to construct a comprehensive picture of what is needed from Anti-Discrimination legislation to meaningfully protect all from harm.

This submission focuses on suggested changes to the *Anti-Discrimination Act* (ADA) with a particular focus on LGBTQIA+ communities.

## Summary of Recommendations

1. Recognise intersectional discrimination in the Act
2. Replace the protected attribute of “homosexuality” with “sexual orientation”
3. Change “marital or domestic status” to “relationship status or style”
4. Investigate new attribute to protect Aboriginal and Torres Strait Islander peoples from discrimination, through comprehensive consultation with First Nations led organisations and communities
5. Replace “sex” with “gender” in the Act
6. Pregnancy, breastfeeding, and chestfeeding should be prohibited separately from sex discrimination
7. Replace the protected attribute of “transgender grounds” with “gender identity”
8. Introduce new protected attributes of sexual orientation, gender identity, sex characteristics, immigration status, sex work and sex worker, victim-survivor of domestic and family violence, health status, irrelevant criminal record and homelessness.
9. Expand definition of employment to include voluntary workers.
10. Ensure police, prisons, and detention centres are classified as a good or service.
11. Remove exceptions which allow superannuation services to unnecessarily and wilfully misgender trans and gender diverse people
12. Remove the employment exception for private educational authorities
13. Remove exceptions for private educational authorities regarding students
14. Remove the sport exception for transgender people
15. Implement a positive duty to take reasonable and proportionate measures to prevent or eliminate discrimination, vilification, sexual harassment, and victimisation
16. Remove the ability of small organisations to evade obligations in the Act due to size
17. Extend the period people can make complaints from 12 months to 6 years
18. Rewrite the Act for accessibility
19. NSW should introduce a Human Rights Act or Charter so human rights of all people are protected in line with international human rights law.

## Responses to Consultation Paper Questions

Please note, we have not responded to all consultation paper questions, and have only included questions in this section that we have responded to.

### 3. Tests for discrimination

<b>Recommendation 1. Recognise intersectional discrimination in the Act</b>
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#### Question 3.8: Intersectional discrimination

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

Yes, we support calls by organisations like the Aboriginal Legal Service NSW/ACT, Community Restorative Centre, NSW Greens, Unions NSW and others for the Act to protect people against intersectional discrimination (Aboriginal Legal Service NSW/ACT 2025; Community Restorative Centre, 2025; NSW Greens, 2023, p.13; Unions NSW, p. 7). We say this, recognising the harm caused by asking bi+, trans and gender diverse community members to artificially divide their identities into segments to have the harm against them legally recognised.

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

We support models that prohibit discrimination based on the combination of two or more grounds (Aboriginal Legal Service NSW/ACT 2025; Unions NSW, 2023, p. 8). This approach is supported by bodies like the Australian Human Rights Commission, the Queensland Human Rights Commission and the Aboriginal Legal Service NSW/ACT (Aboriginal Legal Service NSW/ACT 2025; Australian Human Rights Commission, 2021, p.303; Queensland Human Rights Commission, 2022, p. 20).

### 4. Discrimination: protected attributes

#### 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’?**

<b>Recommendation 2. Replace the protected attribute of “homosexuality” with “sexual orientation”</b>
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NSW was the first jurisdiction in Australia to provide anti-discrimination protections to lesbians and gay men. However, the ADA’s use of “homosexuality” as a protected attribute continues to exclude a broad range of people who experience discrimination, vilification, or harassment on the basis of sexual orientation, for

example (but not limited to) people who are bisexual, pansexual, or asexual. Advocates have long called for the inclusion of additional sexual orientations as protected attributes, and previous work by the NSW Law Reform Commission (from 1999) notes that bisexual people are not included in existing provisions. The ongoing efforts of bi+ people and allies to advocate for inclusion in the ADA reflects a sustained demand for a more inclusive NSW legislative framework.

In a 2020 Bi+ Community Needs Survey by Sydney Bi+ Network, discrimination was named as one of the top issues facing bi+ people. In this survey, 47% of respondents reported they had been treated badly because of their sexuality in the past 12 months. Through this survey, bi+ people shared how discrimination emerges in their lives, highlighting that discrimination against Bi+ people is distinct from discrimination experienced by lesbian and gay counterparts. Many respondents talked about experiencing discrimination from both mainstream spaces as well as from within LGBTQIA+ spaces. For example:

- “How do I know if LGBTQIA+ services are not shit? The staff receive no training in bi+ issues. They do not advertise proactive inclusion of bi+ people specifically. I could be walking into a trap to get biphobic discrimination (sic) and have to just spend my time educating the person on issues they should already know about”.
- “Experiencing discrimination and being misunderstood by the wider community [as one of the top three issues facing bi+ people]”.

In consultation with bi+ people, Sydney Bi+ Network also asked why bi+ inclusion in NSW Anti-Discrimination Legislation is important. Responses include:

- “We have unique experiences and challenges. Biphobia exists and is its own avenue of discrimination”.
- “Because we should be taken care of and treated the same as any other person”.
- “Specific recognition is important so that people who discriminate against bi+ people are accountable for the harm they cause to others. The forms of discrimination bi+ people face (e.g. verbal discrimination) are distinct to monosexual people” (monosexual people are those who are only attracted to one gender).
- “Because we exist. We are not homosexual, so legislation outlawing discrimination on the basis of ‘actual or perceived homosexuality’ doesn't cover us”.
- “I was thinking of another way to support the mental health of (bi+) NSW people which is inclusion in anti-discrimination law and protection against discrimination for sexual orientation. This inclusion can also be very important for mental health for bi+ people”.

In addition to lived experience narratives which indicate bi+ people have distinct experiences of discrimination, existing research also shows a significant number of bi+ people face barriers related to inclusion in the workplace and when accessing health and support services. For instance, only about half of bi+ people (53.6% bisexual and 50.4% pansexual) report feeling accepted “a lot” or “always” at work, and only 43.8% of bisexual and 37.3% pansexual people report feeling accepted “a lot” or “always” when accessing a health or support service (Hill et al., 2020). As a result, we recommend changing the protected ground of homosexuality in the Act to “sexual orientation”, to protect against a broader range of discrimination, vilification and harassment than that covered by “homosexuality”.

#### **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”?**

**Recommendation 3. Change “marital or domestic status” to “relationship status or style”**

We recommend changing this ground to “relationship status or style”, recognising many people in relationships can be discriminated against outside of domestically cohabitating with someone, or being married to them. The language of “relationship style” ensures people who are non-monogamous or polyamorous are protected from discrimination under the legislation.

#### **Question 4.6: Racial discrimination**

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

**Recommendation 4. Investigate new attribute to protect Aboriginal and Torres Strait Islander peoples from discrimination through comprehensive consultation with First Nations led organisations and communities**

We support calls by the Aboriginal Legal Service NSW/ACT, the Aboriginal Women’s Advisory Network (AWAN), the First Peoples Disability Network and the NSW Greens to investigate adding a new protected attribute specifically for Aboriginal and Torres Strait Islander peoples (Aboriginal Legal Service NSW/ACT, 2025; AWAN, 2023, p.5; NSW Greens, 2023, pp.7-8). We say this recognising the unique racism Aboriginal and Torres Strait Islander peoples face in Australia’s settler colonial context, and the ways this differs to the racism faced by other racially minoritised communities in Australia. We support the call by networks and groups we have

named to consult comprehensively with Aboriginal and Torres Strait Islander led organisations and communities in investigating this potential new protected attribute.

#### **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”?**

<b>Recommendation 5. Replace “sex” with “gender” in the Act</b>
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The language of “sex” in the Act should be changed to “gender”, recognising the way in which the “sex” people are assigned at birth by medical professionals is always already imbued with gendered norms (Franke, 1995; Grosz 1994, p.190; Liu 2020, pp. 25-26; Butler 1999, pp.9-11). For instance, children assigned male at birth by doctors will have gendered expectations associated with boys assigned to them (such as being open to more rough play, being interested in playing with trucks, being tough and not crying), making the distinction between sex and gender an artificial one. Recognising this artificiality in the sex/gender distinction in anti-discrimination law, legal scholar Katherine Franke argues, “under close examination, almost every claim with regard to...sex discrimination can be shown to be grounded in normative gender rules and roles” (Franke, 1995, p. 2).

Common understandings of the sex/gender distinction depict sex as an unchanging biological reality, whereas gender is presented as a social construct (Franke, 1995, p. 1). As Katherine Franke puts it, “anti-discrimination law is founded upon the idea that sex, conceived of biological difference, is prior to.. and more real than gender” (Franke, 1995, p. 2). In saying this, we recognise case law, such as *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, which recognises that sex is changeable and has been for a long time (*Tickle v Giggle for Girls Pty Ltd No 2*, 2024). This case involved a woman, Roxie Tickle (the applicant), who was excluded from a social media app for women based on her being trans. The court ruled that this was indirect discrimination under the *Sex Discrimination Act 1984* (Cth). Notably, the respondents in this case attempted to mobilise an outdated understanding of “sex” to justify excluding Ms Tickle from the app, by arguing that one’s “sex” referred to the sex one is assigned at birth, and is limited to the male/female binary. Such an argument by the respondents highlights the necessity of replacing sex with gender under anti-discrimination law, to protect trans and gender diverse people from attempts to delegitimise our identities and misgender us in public life.

In addition to the respondent’s claim about the unchanging nature of the identity one is assigned at birth in the *Tickle v Giggle for Girls Pty Ltd* case, we see daily how the construct of “sex” is weaponised to erase and misgender trans and gender diverse communities, by incorrectly depicting the sex someone is assigned at birth as being the final “truth” of their identity. For example, we have seen the construct of “sex”

being mobilised to place trans women in carceral settings that do not align with their gender in Australia (Simpson et al., 2025, p.388), to exclude trans women from sport domestically and internationally and exclude trans people from bathrooms that align with their gender.

We also make the recommendation to replace sex with gender in recognition of the way in which, in layperson usage, “sex” is a vague and thus unhelpful concept. When “sex” is used in everyday interactions, it is unclear what this term means- is this term referring to the sex someone was assigned at birth, someone’s legal sex (which can be different from the sex someone was assigned at birth), someone’s chromosomes, or someone’s primary and secondary sex characteristics (which may or may not cohere with typical understandings of ‘female’ and ‘male’ bodies) (Morrison et al., 2021, p. 2713; see also Intersex Human Rights Australia, 2022, p. 5)? The reality is that there is no one indicator, or collection of linear indicators (such as chromosomes, gonads, hormone levels, genitalia, secondary sex characteristics and legally recognised sex), which “prove” someone’s “sex” (Morrison et al., 2021, pp.2713-2714; see also Intersex Human Rights Australia, 2022, p. 5). The “proof” of someone’s identity is ultimately how they describe themselves.

We also note that feminist scholarship has long critiqued the sex/gender distinction (wherein ‘sex’ is taken to be the biological truth of someone’s identity) as sexist, given the way it reduces women to their bodily parts and functions (Franke 1994, p. 3) and inhibits the autonomy of women to define their identities- something feminist scholarship has long had an interest in challenging.

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

**Recommendation 6. Pregnancy, breastfeeding, and chestfeeding should be prohibited separately from sex discrimination**

Pregnancy, breastfeeding and chestfeeding should be a separate protected attribute in the Act to sex discrimination. Merely listing “pregnancy and breastfeeding” as a protected attribute is insufficient. This is because not all who feed their baby with bodily milk will do so via breasts, but will do so with their chests. Including the language of “chestfeeding and breastfeeding” is necessary to affirm the language that trans and gender diverse people may use to describe the bodily parts with which they provide their babies with milk (Breastfeeding Public Health Partners, 2024, p. 8).

Additionally, creating a separate protected ground for pregnancy, breastfeeding and chestfeeding is necessary, given the current protection of “pregnancy and breastfeeding” under the protected ground of “sex” fails to recognise the way pregnancy and breastfeeding are not inherently linked to a specific sex, as Unions

NSW pointed out in their 2023 preliminary submission (Unions NSW, 2023, p. 5). For instance, women, non-binary people and men with transgender experiences may all give birth and feed their baby with milk from their bodies. A Network volunteer shared:

I'm a new parent and I am chestfeeding my baby. Many quiet spaces for feeding or expressing are described as places to breastfeed. As a non-binary parent, I'm constantly questioning whether or not I am welcome in these spaces. I am left wondering if policies which are meant to support parents to feed their babies actually apply to me. Not only has this created significant stress, but it also makes me feel isolated from support. Postpartum is already a challenging time and these barriers have made it more difficult to live authentically, which has impacted my mental health in negative ways.

How can I feel supported when I have to educate nurses or lactation consultants about inclusive language? How can I feel protected from discrimination when the language used doesn't align with my lived experience as a non-binary parent? I am feeding my baby with milk from my body and I deserve access to the same protections in all areas of public life as those who are breastfeeding.

#### **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”?**

**Recommendation 7. Replace the protected attribute of “transgender grounds” with “gender identity”**

We recommend the protected attribute of “transgender grounds” in the Act be changed to “gender identity”. This is in alignment with the position of organisations like The Inner City Legal Centre and Equality Australia. The terms “trans” and “transgender” became popularly used in the 1990s (D’Cruz, 2020, p. 308; Stryker, 2006, p. 3), and we note the new transgender ground was inserted into the Act in 1996 (Anti-Discrimination NSW, 2025). We highlight, though, that the term transgender is a Western construct, and is culturally specific rather than culturally universal (Gill-Peterson, 2024). We recognise the plethora of culturally specific terms for gender diverse identities that exist globally and locally, including the terms fa’afafine (Samoa), māhū (Hawaii), waria (Java), hijra (South Asia), and fakaleitī or leitī (Tonga) (Lu, 2019; Dekneef, 2022; Revathi, 2010; Weedon, 2019; Zisin, 2021, p. 11). In Australia, the terms Brotherboy and Sistergirl are sovereign terms used by some gender diverse First Nations people in Australia to describe themselves (Moon, 2020; ACON, 2021). Further to gender diverse identities that are not synonymous with the term transgender, we highlight that some non-binary people do

not describe themselves as transgender (Choudrey, 2022, p.31). We also highlight that the term transgender is narrowly and incorrectly framed in a male/female gender binary way in the Act. Recognising the limits of the term transgender, a new ground of gender identity could better recognise people who are not cisgender but use a different term than transgender to describe themselves.

In our submission, we suggest separate protected attributes of gender (we recommend the current ground of sex should be changed to gender, as explained in our response to question 4.7), sex characteristics and gender identity (Equality Australia, 2023, p. 7; Intersex Human Rights Australia, 2023, p. 9). We provide suggestions for definitions for these terms in our response to question 5.2.

Additionally, the current distinction between a “recognised” and “non-recognised” transgender person in the Act is inappropriate and must be eliminated, given transgender people are transgender irrespective of whether the state recognises them as such. One respondent to the Trans Justice Community survey for this review specifically argued against definitions of “transgender” that rely on, “narrow legal categories that erase our experiences”.

#### *Practical implications of ensuring people are holistically protected on the basis of their gender identity*

We draw attention to the widespread discrimination, harassment and exclusion that trans and gender diverse communities face in Australia, which necessitates that such communities are holistically protected under anti-discrimination legislation through a gender identity ground. We highlight that in the large-scale community survey *Private Lives 3: the health and wellbeing of LGBTIQ people in Australia*, 77.5% of trans and gender diverse adults reported they had been treated unfairly to some degree because of their gender identity in the past 12 months (Hill et al., 2020). We draw attention to the plethora of ways trans and gender diverse people are discriminated against or victimised in everyday life, necessitating an inclusive gender identity ground, including:

- Trans and gender diverse people are regularly misgendered and face exclusion in places of education, workplaces, services and in sports due to their identities (Strauss et al. 2017, pp.40, 41, 53-55; Bailey et al., 2024, p.1434, 1437).
- Trans and gender diverse people are harassed and face violence in public toilets (Herman, 2013). Notably, public toilets are often for men and women only, are policed according to cisgender expectations and norms (Cavanagh, 2013), and gender neutral bathroom options are often not provided for people with non-binary genders. People in trans and gender diverse communities regularly experience UTIs, kidney problems and dehydration due to abstaining

from liquids and holding their bladder to avoid toilets which are not inclusive of their identity (Hill et al., 2021, p.131; Townley & Marjadi, 2024, p.6; Parents for Trans Youth Equity, 2024, p. 2).

A volunteer from our Networks relayed:

Reading the NSW Anti-Discrimination Act as a non-binary person, I am dismayed by the binary framings of trans experiences, and I don't feel protected by this legislation. Despite being very open about my identity, including through wearing pronoun pins and introducing myself with my pronouns, I am regularly misgendered at work and when accessing services, including health services. This has a negative impact on my mental health, and makes me feel angry and alone. In public, there are often no gender neutral bathrooms, which is a form of discrimination against non-binary people. Non-binary people have just as much right to exist in public space as everyone else.

A disabled, agender volunteer from our Networks shared a particularly frustrating experience navigating digital systems with a non-binary gender marker also:

I have mobility issues and I need to apply for accessible parking permits. Going to a Service Centre to do this can be exhausting and cause a symptom flare so, thankfully, this is something that can be applied for online. However, it turns out that having a non-binary gender marker in their system can mess with regular processes and, therefore, a number of features like online applications do not work. Thus, six months ago I sat on the carpeted floor in front of a Service Centre desk while someone processed my application in person, because standing was too exhausting for me. I need to apply for another parking permit soon. Service Centre staff that I speak to are apologetic and kind, and share my frustrations and hopes that systems will improve for next time. However, I don't have faith that any of these systems which force me to do more work than a person with a binary gender will ever change unless there is legislative pressure pushing them to.

#### **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?**

In the past, yes. A person should be protected from discrimination based on the gender they were assigned at birth even if their gender is now different. This can be separate to discrimination based on their current gender identity, and can include discrimination based on a false assumption that they currently are the gender they were assigned at birth.

In the future, yes. If someone is planning to do something that will alter their sex characteristics, for example, they should not be treated differently because of it.

Similar to discrimination based on anticipated parental leave, a workplace with Gender Affirmation Leave entitlements should not be able to discriminate against hiring a known trans employee just because they think they will be using up leave.

Generally, it seems reasonable that discrimination based on a protected attribute that you had or may have in the future is still discrimination and should be protected.

**(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?**

Yes, it would be inappropriate to leave those who support people with protected attributes in any way open to discrimination because of this support.

The below quote is from a respondent to the Trans Justice Sydney community survey for this review, and highlights an instance of discrimination by association to gender diverse people:

[...] I advocated for the inclusion of sexual and mental health support tailored to gender diverse individuals—delivered by gender diverse trainers.

My proposal was immediately shut down with the response: “We don’t do this here”.

Following this, my workload was intentionally increased, and my efforts to embed gender-inclusive and psychologically safe practices in training delivery were systematically dismissed. Shortly after, I was terminated during my probation period.

Upon further investigation, I discovered the owners had posted hate speech targeting LGBTIQ+ communities on Twitter and appeared to hold radical religious views that influenced workplace decisions.

We argue that to effectively combat discrimination, anyone with protected attributes must be able to be directly supported by others who do not hold them, without fear of negative repercussions. Otherwise, such “second-hand” discrimination teaches us that protected attributes are undesirable and to be avoided.

Additionally, we all have some control over our relations and associates, and if someone experiences negative consequences for supporting a person or persons based on a protected attribute, they can be conditioned to see it as less socially desirable to relate or associate with the person with the protected attribute, potentially causing them further isolation.

Harming a person because they support someone with a protected attribute indirectly harms people with the protected attribute, and therefore being a relative or associate should also be protected.

## 5. Discrimination: potential new protected attributes

**Recommendation 8: introduce new protected attributes of sexual orientation, gender identity, sex characteristics, immigration status, sex work and sex worker, victim-survivors of domestic and family violence, health status, irrelevant criminal record and homelessness.**

### Question 5.2: Potential new attributes

#### **(1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, what should be added and why?**

Yes, a number of protected attributes should be added. A community member shared in the Sydney Bi+ Network Anti-Discrimination Legislation Survey, 2025 that the ADA:

should specifically protect non-binary people, bi+ people, asexual people, people with intersex variations and sex workers. The Act needs to be amended to remove the distinction between recognised and non-recognised transgender people.

Another community member shared in this survey: “It [the ADA] could start by widening its protections to cover more than just homosexual people, eg include bi+ and ace folks”.

#### Sexual orientation

We support a new ground of sexual orientation being introduced to replace the current homosexual ground, recognising sexual orientation is more inclusive of sexuality diversity beyond being gay or lesbian, such as being bisexual, pansexual, or asexual.

#### Gender identity

As explained in our response to question 4.8, we support a new ground of “gender identity” being created to replace the current “transgender” ground in the legislation.

#### Sex characteristics

We support the recommendation by InterAction, previously Intersex Human Rights Australia, to introduce “sex characteristics” as a new protected attribute (Intersex Human Rights Australia, 2022, p. 9). The protected ground of sex characteristics would help protect people with innate variations in sex characteristics be protected by the Act. As the organisation InterAction explains, people who have innate variations in sex characteristics have bodies, “that don’t fit medical and social norms for female or male bodies, and that create risks or experiences of stigma, discrimination and harm” (InterAction, 2025). We highlight the numerous forms of discrimination people with variations in sex characteristics face socially, including

invasive, non-consensual medical procedures on their bodies without consent, and facing discrimination and harassment in places of detention (Carpenter, 2021).

People who do not have innate variations in sex characteristics would also be protected against discrimination on the basis of their sex characteristics under this new attribute, such as a woman being protected from discrimination on the basis of having breasts.

#### Immigration status

We recognise the intersecting ways in which LGBTQ+ communities may face discrimination on the basis of their immigration status in everyday life, including by being targeted for being trans, a migrant and a sex worker by law enforcement (Scarlett Alliance, n.d.). For instance, Scarlett Alliance, a sex worker advocacy and support organisation, has detailed how trans migrant sex workers have been targeted on the basis of the intersection of their identities as sex workers, migrants and being trans, and have consequently been detained in immigration detention centres in Australia.

#### Sex work and sex worker

We support the recommendation by sex worker organisations like SWOP and Respect Inc. to add the new protected attributes of sex work and sex worker to the Act (Respect Inc., 2023; SWOP, n.d.). Protection on the basis of being a sex worker *and* doing sex work are both necessary, to cover discrimination on the basis of a socially stigmatised identity (being a sex worker) and a practice undertaken by individuals (doing sex work). As Respect Inc. explains, “sex workers experience high levels of discrimination in both areas” (Respect Inc., 2023, p. 4).

We feel passionately about protections for sex workers in the Act, particularly noting the overrepresentation of trans and gender diverse people who engage in sex work (Sternersen et al., 2025, p. 2134). The International Committee on the Rights of Sex Workers in Europe (ICRSE) has stated that, “the homophobic and transphobic social climate LGBT individuals live in and the social marginalisation they face is one of the main reasons why many LGBT people use sex work as a livelihood option” (ICRSE, 2015, p.3). We recommend sex work and sex workers be protected attributes noting the multiple forms of discrimination that people who engage in sex work face in everyday life, including having their bank accounts cancelled due to their profession, being refused financial services like loans and mortgages, discrimination in acquiring housing and discrimination in non-sex work employment contexts (Respect Inc., 2023; SWOP, n.d.). We recognise the importance of specifically naming sex work and sex workers as protected grounds in the Act, rather than simply protecting people from discrimination on the basis of their profession generally, given the unique forms of stigma and discrimination that sex workers face.

#### Victim-survivors of domestic and family violence

Similarly to the Aboriginal Women’s Advisory Network in their preliminary

submission, we support victim-survivors of domestic and family violence (DFV) being protected by this Act (AWAN, 2023). We recommend this noting the discrimination that victim-survivors can face in relation to the provision of goods and services, for instance, in relation to being penalised for breaching rental contracts as a result of the DFV they experience. We are particularly interested in victim-survivors being protected by this Act, noting the underreporting and erasure of DFV experienced by LGBTQ+ communities. Such underreporting stems from the intersection of discrimination and stigma of being part of LGBTQ+ communities and experiencing DFV. Available evidence from large-scale national research has found that:

- 39% of non-binary, 30.9% of trans men, and 19.6% of trans women reported ever experiencing physical violence from a family member (Hill et al., 2020).
- 59.7% of trans men, 58.1% of non-binary and 42.5% of trans women reported ever experiencing verbal abuse from a family member (Hill et al., 2020).
- 33.2% of pansexual, 33.5% of queer and 26.9% of bisexual participants reported ever experiencing physical violence from a family member (Hill et al., 2020).
- 53.6% of pansexual, 52.1% of queer and 46.5% of bisexual respondents reported ever experiencing verbal violence from a family member (Hill et al., 2020).
- 42.6% of participants who reported ever having experienced violence from an intimate partner or family member felt they were targeted for abuse because of their sexual orientation, gender identity, gender expression, or intersex variations (also known as variations in innate sex characteristics) (Hill et al., 2020).

#### Health status

Similarly to organisations Community Restorative Centre and the NSW Users and AIDS Association (NUAA), we suggest adding the new protected ground of health status (Community Restorative Centre, 2025; NUAA, 2023). This new ground would protect people on the basis of a) mental health status, b) lived and living experience of alcohol and other drugs use, c) blood borne virus status and d) sexually transmitted infection status.

We note that, at present, health status protection in the Act is limited. As per s4(1) of the Act, the ground of “disability” can cover diseases and illnesses, and there is protection against HIV/AIDS vilification (Part 4F of Act). However, many of the attributes we suggest including under the ground of health status are not considered in layperson’s terms to be a disability.

Protection against mental health discrimination for LGBTQ+ communities is particularly significant, given the overrepresentation of mental health support needs by these communities. We recognise the trauma and stressors LGBTQ+ communities can face in relation to things like conversion therapy and targeted hate crimes. A large-scale Australian survey of young trans people called *Trans Pathways*

showed, “trans young people are experiencing clinically significant depressive symptoms at almost ten times the rate of the general young Australian population”(Strauss et al., 2017, p. 24). Additionally, almost a quarter of participants (22.5%) in the survey had been diagnosed with autism, compared to 1–2.5% of the general population in Australia (Strauss et al., 2017, p. 30). Higher mental health support needs have also been recorded amongst bisexual communities (Taylor et al. 2019, p.138). Notably, bisexual people are, “significantly more likely than those of other sexual orientations to be diagnosed with a mental health disorder, have symptoms of depression and anxiety, harm themselves and report suicidal ideation” (Taylor et al. 2019, p.138). Research has indicated various reasons for worse mental health amongst bisexual communities, namely biphobia (including internalised biphobia), identity erasure, and a lack of support from partners they are in “heterosexual” appearing relationships with (Taylor et al., 2019, pp.138, 140).

Protection against discrimination for those with living and lived experience of alcohol and other drug use is also important for LGBTQ+ communities, recognising their higher rates of AOD consumption compared to cisgender and monosexual people (Bailey et al., 2024a, p. 1941; Hill et al. 2021, p. 725; Amos et al., 2023, p. 112). Some commonly suggested reasons for higher rates of AOD consumption for LGBTQ+ communities have included consuming AOD to cope with minority stress, and the centring of bar culture in LGBTQ+ communities (Amos et al., 2023, p.112; Butler, 2025a). Notably, data from a report called *Writing Themselves in 4* shows 33.5% bisexual people had self-identified drug use concerns, compared to 10.3% for lesbian people, and 19.4% of gay respondents (Hill et al. 2021, p. 725). Additionally, trans and gender diverse young people also have disproportionate rates of substance use compared to their cisgender peers (Bailey et al., 2023, p. 1941). We recognise that not all AOD use is harmful, and AOD can be consumed by LGBTQ+ communities for the purposes of pleasure, exploration and community connection (Bailey et al., 2024a, p.1941). However, the higher rates of AOD use by bi+, trans and gender diverse communities does emphasise the significance of a health status protection under the Act.

#### Irrelevant criminal record

We support people being protected on the basis of irrelevant criminal record in NSW. We note that irrelevant criminal record can bar LGBTQ+ communities from work opportunities and accessing services (Community Restorative Centre, 2025). Such a protection is particularly relevant for LGBTQ+ communities, recognising this cohort is overrepresented in the prison system (Walters et al., 2024, p. 40) and has a history and current experience of being targeted by police (Riseman, 2023, pp.34-36; Quayle, 2020; Dwyer, 2011, p.216), heightening LGBTQ+ community vulnerability to discrimination on the basis of irrelevant criminal record.

#### Homelessness

As mentioned in the consultation paper for this review, other jurisdictions like

Queensland and the ACT now protect people from discrimination on the basis of homelessness (Australian Law Reform Commission, 2025, p.86). We support NSW following suit. We say this recognising the overrepresentation of LGBTQ+ communities when it comes to homelessness in Australia (Lim et al., 2025, p. 256). Notably, LGBTQ+ people are estimated to make up 20-40% of those who are homeless, despite only constituting an estimated 5-10% of the population (Fraser et al., 2019, p. 2677). Factors driving higher rates of homelessness include biphobia, homophobia and transphobia, in addition to familial rejection and violence (McNair et al., 2017, p. 25; Victorian Gay and Lesbian Rights Lobby et al., pp. 5-6). A trans person shared examples of suspected housing discrimination in a 2019 report on LGBTQ+ communities and homelessness:

The problem I'm finding is that it's difficult to get housing here because of the agents. They are asking too many identification details from me. That's what I'm not able to provide and that's why I'm not getting the house. Looking at us then they refused to give the houses... we appear as female, but our voice is a male voice. Maybe that is the reason.

Additionally, in the study of trans and gender diverse young people's experiences from 2017 called *Trans Pathways*, an 18-year-old trans boy shared that, "I was told by the person kicking me out [of the house] that it was because I was a circus freak tranny" (Strauss et al., 2017, p. 57). LGBTQ+ communities, particularly trans and gender diverse communities, can face exclusion from housing and homelessness services (Hail-Jares et al. 2021, p. 4), which exacerbates issues of homelessness. We argue that adding the protected attribute of homelessness would be particularly beneficial for LGBTQ+ communities, given they are overrepresented in the homelessness population.

## **(2) How should each of the new attributes that you have identified above be defined and expressed?**

We have provided suggested definitions for some of the new grounds we have recommended below.

### Sexual orientation

Our suggested definition of sexual orientation is a modified version of the definition of sexual orientation in s4(1) of the *Equal Opportunity Act 2010* (Vic):

Sexual orientation means a person's emotional, affectional and/or sexual attraction to, or intimate or sexual relations with, others. Sexual orientation also encapsulates little to no emotional, affectional, and/or sexual attraction to others.

We have added that sexual orientation can include a lack of emotional, affectional and sexual attraction to others to ensure the Act protects people who are asexual (that is, people who may experience little to no sexual attraction) and people who are

aromantic (that is, people who experience little to no romantic feelings for others) (Queensland Human Rights Commission, 2022, pp. 282–283). Ensuring asexual people are protected by anti-discrimination legislation was highlighted as important in community feedback on Queensland’s anti-discrimination legislation (Queensland Human Rights Commission, 2022, pp. 282–283).

### Gender

Gender can be defined as:

How individuals understand themselves in relation to being a man, woman, non-binary person, other culturally specific term or as not experiencing gender.

This definition recognises that culturally specific gendered terms exist outside of being a man, woman or non-binary person, and also that some people describe themselves as being agender- that is, not experiencing gender. While providing a possible definition here, the Commission could consult with LGBTQ+ groups such as BlaQ Aboriginal Corporation and ACON to ensure such a definition respectfully includes Brotherboys, Sistergirls and agender people.

The protected ground of gender would, as Equality Australia puts it, “address gender-based discrimination (including characteristics appertaining or imputed to gender)” (Equality Australia, 2023, p. 7-8). Such discrimination might, for instance, be related to whether somebody is a non-binary person or woman.

### Sex characteristics

Our Networks support the suggested definition of sex characteristics provided by InterAction, previously Intersex Human Rights Australia, in their preliminary submission (Intersex Human Rights Australia, 2022, pp. 8–9). This definition is drawn from a Births, Deaths and Marriages Registration Bill, which is now legislation in Queensland- see s157(2) of *Births, Deaths and Marriages Registration Act 2023* (QLD). The definition from this legislation provides:

sex characteristics, of a person, means the person’s physical features and development related to the person’s sex, and includes—

- (a) genitalia, gonads and other sexual and reproductive parts of the person’s anatomy; and
- (b) the person’s chromosomes, genes and hormones that are related to the person’s sex; and
- (c) the person’s secondary physical features emerging as a result of puberty” (*Births, Deaths and Marriages Registration Act 2023* (QLD)).

### Gender identity

To define gender identity in the Act, our Networks suggest a slightly modified version

of the definition of gender identity put forward in the Yogyakarta Principles. We suggest defining gender identity thus:

Gender identity refers to a person’s deeply felt, individual experience of gender, which may or may not correspond with their gender presumed at birth, including one’s personal sense of the body (which may involve modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

This lightly modified definition from the Yogyakarta Principles ensures the ground of “gender identity” is definitionally inclusive of “gender expression”. Ensuring people are protected on the basis of gender expression is important for, say, a cisgender person who may have a stigmatised gender expression, such as a cisgender man who may have a feminine gender expression.

The ground of gender identity would address discrimination based on whether a person’s gender is different to that assigned to them at birth, and in instances where someone’s gender expression might be stigmatised because it is not in alignment with expected social norms. We recognise, as does Equality Australia in their preliminary submission, that the protected attributes of gender and gender identity, “will overlap to some degree, in the same way that gender discrimination and discrimination based on pregnancy, breastfeeding and family responsibilities can overlap” (Equality Australia, 2023, pp.7-8).

#### Irrelevant criminal record

We defer to submissions by Community Restorative Centre and organisations with legal expertise to provide definitional scope to the ground of “irrelevant criminal record”.

## **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?**

**Recommendation 9. The definition of employment should be expanded to include voluntary workers.**

Yes, people should be protected from discrimination in their volunteer work. One trans community member explained why volunteers needed to be protected from discrimination in response to the Trans Justice Sydney community survey for this review: “many already marginalised people are unable to secure more permanent roles and are at most risk of being mistreated and exploited in more informal roles”.

Additionally, Australia's largest study on LGBTIQ<sup>1</sup> health and wellbeing found that a larger proportion of non-binary people (16.9%), trans men (12.7%), cisgender women (10.9%) and trans women (9.8%) reported being engaged in volunteering compared to cisgender men (5.5%) (Hill et al., 2020).

Earlier research has also found that a higher proportion of LGBTIQ+ people in Australia aged 16 and over provided unpaid assistance to an organisation in the previous 12 months compared to the general population (Australian Bureau of Statistics, 2014; Gates & Hughes, 2023; Leonard et al., 2012). Regardless of the number of people in our communities who engage in volunteering, we deserve protections from discrimination in all areas of public life, including in voluntary work.

We highlight that having non-discriminatory volunteering environments is particularly necessary for LGBTQ+ communities given the mental health benefits that have been linked to volunteering (Volunteering Australia, 2021, p. 2), and the need to address poorer mental health outcomes in LGBTQ+ communities (McGowan et al., 2024, p.879). Research shows the mental health benefits of volunteering can depend on one's satisfaction with the volunteering experience (Volunteering Australia, 2021, p. 2), making non-discriminatory environments particularly important. A study of young trans and gender diverse people found 60% of young people, "felt better about their gender identity... when they participated in activism" (Smith et. al., 2014, p. 82-83). Additionally, volunteering and activism were listed as a major protective factor against adversity and discriminatory environments by young trans and gender diverse people in the large-scale *Trans Pathways* study from 2017 (Strauss et al., 2017, p.67). One young trans man said, "Volunteering shows me hope, freedom and [the] good of the world" (Strauss et al., 2017, p.69). Recognising the mental health and wellbeing benefits of (often unpaid) activist and other volunteer work, the Act should protect LGBTQ+ people from discrimination in the realm of volunteering.

A respondent to the Trans Justice Sydney community survey for this review shared the importance of anti-discrimination protection in volunteering:

I have experienced severe and sustained discrimination, exclusion, and retaliatory conduct while volunteering with a large, volunteer-run events organisation in New South Wales. I am a transgender woman. I had been contributing to this organisation for several years without issue. After coming out and presenting publicly in a visibly feminine way for the first time, I noticed a sharp shift in how I was treated. Despite having held responsibilities for several years, I was suddenly sidelined, spoken over, denied duties I had previously managed, and met with unwarranted suspicion and coldness from both peers and leadership. This marked the beginning of what I believe to be targeted exclusion based on my gender identity... Throughout this process, I faced online harassment, including coordinated posts on anonymous forums

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<sup>1</sup> Note: the use of LGBTIQ in this instance rather than LGBTQIA+ reflects the terminology used in the study

using slurs and misinformation, seemingly designed to defame and dehumanise me as a trans woman.

#### **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”?**

**Recommendation 10. Recognise that police, prisons, and detention centres should fall within the ambit of a good or service, ensuring coverage for LGBTQ+ communities against discrimination**

Police, prisons and detention centres should fall within the ambit of a good or service, to ensure communities held in custody, and those who have interactions with the police, are covered by anti-discrimination law. Such coverage is particularly important for our communities, recognising the mistreatment and discrimination faced by LGBTQ+ communities at the hands of the police, including through being targeted due to perceived gender and sexuality non-normativity (Quayle, 2020; Scott et al. 2025), and the overrepresentation of LGBTQ+ communities in carceral settings (Walters et al. 2024, p. 40).

LGBTQ+ people can be particularly vulnerable to violence and discrimination in carceral settings, which has been linked to prisons being structured around cisnormativity (the assumption that all people are cisgender- that is, not transgender- and that this is the norm) and heteronormativity (the assumption of the normalcy and dominance of heterosexuality) (Walters et al. 2024, p.40). We note that trans and gender diverse people are often placed in prisons that do not align with their gender, and are subject to solitary confinement in prisons, which is justified on the basis of managing their ‘safety’ (Winter, 2024; Simpson et al., 2025). Subjecting trans and gender diverse people to solitary confinement for this purpose breaches the *United Nations Standards for the Minimum Treatment of Prisoners (the Nelson Mandela Rules)*, which states that solitary confinement should only be used in exceptional circumstances, and as a last resort (Rule 45) (United Nations Office on Drugs and Crime, 2015, p. 14). Given the discrimination, vilification and harassment LGBTQ+ communities face in the spaces of policing and incarceration, we support these spaces being considered a good or service under this legislation to enhance their protection.

## Question 6.5: Superannuation services and insurance exceptions

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

**Recommendation 11. Remove exceptions which allow superannuation services to unnecessarily and wilfully misgender trans and gender diverse people**

### Superannuation exception for transgender people

s38Q of the Act permits superannuation providers to treat transgender people as “the opposite sex” to their affirmed gender, “in the administration of a superannuation or provident fund or scheme” (*Anti-Discrimination Act (NSW), 1977*). We recommend this exception be removed. Such an exception enables superannuation providers to unnecessarily and wilfully misgender transgender people. The language of “opposite sex” also inaccurately presupposes a male/female gender binary which erases people with non-binary genders.

## Question 6.12: Additional areas of public life

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

While we do not recommend additional protected areas of *public* life, we do wish to recognise the limitations of anti-discrimination legislation generally being premised on a public/private binary, wherein discrimination needs to occur in a realm of public life to be protected. One response from the Trans Justice Sydney community survey suggested that by not protecting people in “private” settings- such as within family relationships- there were spaces where LGBTQ+ exclusion could flourish unabated. The person shared:

As someone who is both queer and part of a migrant community, I have faced discrimination not only in formal institutions like workplaces and education providers, but also within informal spaces—family, diaspora communities, cultural associations, and faith-based circles. These spaces remain largely unregulated and unaccountable under the current Act. We deserve protection not only in workplaces and schools, but in every corner of our lives—because equality should not stop at the door of a courtroom, office, or classroom.

While the focus of this Act is protection against discrimination in *public* life, this survey response highlights how legislation premised on a public/private binary (wherein public life gains legislative protection, and “private” life does not) can mean spaces where LGBTQ+ communities may experience the most harmful discrimination are not legally regulated. This highlights a broader jurisprudential issue about the public/private divide in legislation, and suggests the need for broader

social change and education to address discrimination occurring outside the legally recognised realm of “public life”.

We also note that, historically, querying the public/private life binary in legislation has been essential in creating legislative and programmatic responses to discrimination, harassment, and violence. From the 1970s onwards, feminist movements have played a key role in reconceptualising domestic, family, and sexual violence from a private matter to broader contexts of gender inequality requiring social intervention, legislative protection and service provision (Einstein, 1991; El-Murr, 2023; Nichols, 2013; Porter, 2020; Theobald, 2011). We note this historic shift in our submission as a way to highlight ongoing issues with public/private divides in legislation and the necessity of investigating ways to address harm that occurs outside the legally recognised realm of “public life” to create safer communities.

## **7. Wider exceptions**

### **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?**

**Recommendation 12: Remove employment exception for private educational authorities**

Private educational authorities who seek employees should not be able to exclude or dismiss employees on grounds like relationship status, sexual orientation, and gender identity, so these exceptions should be removed from the Act. Faith-based educational facilities pride themselves on the qualities of care, inclusion and understanding, and the exclusion or dismissal of employees is discriminatory and traumatising. Private educational authorities are also publicly funded, and should be subject to the same law regarding discrimination as public educational authorities.

### **Question 7.6: Discrimination against students and prospective students**

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

**Recommendation 13: Remove exceptions for private educational authorities in relation to students**

The exceptions for private educational authorities in providing education, particularly faith-based education providers, should be removed from the Act. Article 28 of the the UN Declaration on the Rights of the Child says that education for all children is a right . Regardless of someone’s gender identity or sexual orientation, children should be able to attend any school without any threat to their enrolment, treatment or access to all educational services within that education institution. Education

providers have a duty of care to ensure that students receive an education without being subject to victimisation, trauma, exclusion or the unreasonable threat of expulsion.

### **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?**

**Recommendation 14: remove the sport exception for transgender people**

#### Sport exception for transgender people

s38P(1) of the Act regarding the protection from discrimination for transgender people states:

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

We unequivocally support the right of trans and gender diverse communities to participate in sport without exception, and as such, recommend that this exception in the Act is removed. We believe that in instances where sport is separated along gender lines, trans people have a right to participate in the competition that aligns with their gender. In saying this, we recognise that gender separated sports often neglect to include and recognise the existence of non-binary genders, and that sporting competitions need to proactively better cater to non-binary communities. Listening to the perspectives of non-binary communities to inform this inclusion work is crucial.

Public and political discourse frames trans women as having an unfair advantage in women's sports to legitimate their exclusion from sport, though this discourse is problematic and flawed for a range of reasons, which we have detailed under subheadings below.

#### Research shows no or minimal advantage for trans women competing in women's sports

While assertions are made about trans women having unfair advantage in women's sports, research shows no or minimal advantage for trans women in this field

(Hamilton et al., 2024; Jones et al. 2017, p.701). One peer reviewed study examining the impact of gender affirming hormones on the physical performance of trans women athletes showed that after two years of gender affirming hormone therapy, “no advantage was observed for physical performance measured by running time... in trans women. By 4 years, there was no advantage in sit-ups” (Cheung et al., 2024, p. e455). Additionally, a 2024 peer reviewed publication showed lower performance by trans women compared to cisgender women in relation to a range of metrics, including decreased lung function, which meant more effort needed to be exerted when breathing, lower cardiovascular fitness, and worse performance on countermovement jumping in sport (Hamilton et al., 2024, p. 596). Research also notes a lack of longitudinal research on how gender affirming hormone therapy, in addition to other considerations, impact the performance and physiology of trans athletes over time (Hamilton et al., 2024, p.596). Recognising the research listed, policies and legislation that seek to ban trans people from participating in sport lack a current, consistent and solid evidence base to justify their existence.

#### Sport has never been a level playing field

Focusing on purported competitive advantage by trans people in sport is premised on the incorrect assumption that sporting competition is informed by a level playing field when it comes to physiological differences, which is not true. Differences in strength, stamina, and physique regularly provide sports players with advantages irrespective of gender, and these differences are usually prized in the sporting arena when it comes to cisgender athletes. The heightened focus on purported physiological differences between cisgender women and trans women has to do with transmisogyny (the intersection of misogyny and transphobia), and a transphobic investment in excluding trans and gender diverse people from participation in public life.

#### Trans and gender diverse people face systemic exclusion from sport

Excluding trans people from sport on the basis of perceived competitive advantage detracts attention from the fact that participation rates of trans people in sports are exceedingly low (Moreland et al., 2023, p. 1) and trans people experience a myriad of barriers to sports participation compared to their cisgender peers, including exclusionary policies, a lack of inclusive change facilities and being misgendered (Bailey et al., 2024, p. 1437; Human Rights Campaign, n.d., pp.17-18). Notably, a 2024 report showed LGBTQIA+ communities participate in sport 50% less than their straight, cisgender and endosex peers, and sports researcher Dr Ryan Storr says discrimination is the number one reason for this lower participation rate (Butler, 2025).

Recognising the exclusion from sport faced by trans and gender diverse people, the Australian Football League Gender Diversity Policy for Community Football explicitly says that, “in Community Football, considerations of social inclusion have greater priority than concerns that may exist with respect to competitive advantage in relation to the participation of gender diverse players” (Australian Football League,

2020, p. 15). These guidelines state trans women are able to compete in community women’s competitions, and ensure there is a clear process in place to ensure the safety of all players. Here, the AFL provides an example of where social inclusion is deemed to be more important than perceived competitive advantage.

### Discrimination can rob trans people of the mental health and wellbeing benefits of sport

Research demonstrates the immense benefits to the wellbeing of LGBTQIA+ people being able to participate in sport (Human Rights Campaign, n.d., p. 25; Bailey et al., 2024, p. 1434). For instance, in a study on trans and gender diverse people in Australia, it was revealed that sport participation for this cohort resulted in a, “40% reduction in odds of recent thoughts of self-harm and suicide” (Bailey et al., 2024, p.1434). The study also demonstrated that trans and gender diverse people who were engaging with sport and fitness at the time of being surveyed for the research, “reported statistically significantly lower levels of psychological distress” (Bailey et al., 2024, p.1436). Health researchers Dr Sascha Bailey and others have also identified that trans inclusion in sports, “is a public health priority given the long-standing mental ill health disparities documented among trans and gender diverse communities” (Bailey et al.,2024, p. 1434). Trans and gender diverse people need to be protected from discrimination in sport without exception to support their social inclusion, and help combat the alarming rates of mental health inequities this cohort faces.

We also note the capacity of anti-discrimination legislation to support Australia’s *National Sport Strategy 2024-2034*, which lists inclusion, participation and safety amongst its guiding principles (Office of Sport, 2024, p. 7). Legislation that encourages trans inclusion without exception would complement principles of the *National Sport Strategy 2024-2034*.

## **11. Promoting substantive equality**

### **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?**

**Recommendation 15. Implement a positive duty to take reasonable and proportionate measures to prevent or eliminate discrimination, vilification, sexual harassment, and victimisation**

The ADA should include this duty, recognising the onus placed on minoritised communities through anti-discrimination legislation to prove their claim, and the necessity of educational institutions and employers fostering more inclusive and

non-discriminatory environments, which would lessen the likelihood of discrimination claims.

**(2) If so:**

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

Our Networks support the implementation of duties to take reasonable and proportionate measures to prevent or eliminate unlawful conduct, including discrimination, vilification, sexual harassment, and victimisation against all attributes protected by the Act. These positive duties should apply to everyone who has responsibilities under the Act— such as employers, education providers, providers of goods and services, and accommodation providers. Promoting meaningful equality in NSW requires a proactive policy approach which creates environments that deter harmful behaviours before they occur, rather than solely relying on reactive measures.

As indicated in Equality Australia’s preliminary submission, positive duties in anti-discrimination legislation are already in place across other jurisdictions, such as Victoria, the Northern Territory, and the ACT (Equality Australia, 2023). Examples of positive duties in these jurisdictions include making reasonable adjustments, providing training to staff as a way to address knowledge gaps in working with people from diverse backgrounds, and ensuring policies and procedures do not discriminate against people who have protected attributes (ACT Human Rights Commission, n.d.; Northern Territory Anti-Discrimination Commission, 2024; Victorian Equal Opportunity & Human Rights Commission, n.d.).

Notably, community members in our networks have indicated the importance of positive duties being implemented in meaningful ways, with one community member warning: “it’s easy for provisions like this to be a ‘ticking the box’ exercise”. Community suggestions on what kinds of positive duties would be beneficial are included below:

- Robust, trauma informed policies and procedures which support someone who has experienced discrimination, vilification, sexual harassment, or victimisation to access complaint mechanisms and support
- Investment in education provided by community-led organisations to prevent discrimination, vilification, sexual harassment, and victimisation against people with protected attributes
- Implementation of a system akin to fire wardens or first aid officers, with a focus on knowledge about, and compliance with, anti-discrimination legislation.

## Further recommendations

**Recommendation 16: Remove the ability of small organisations to evade obligations in the Act due to size**

**Recommendation 17: Extend the period people can make complaints from 12 months to 6 years**

**Recommendation 18: Rewrite the Act for accessibility**

**Recommendation 19: NSW should introduce a Human Rights Act or Charter to ensure that the human rights of all people are protected in line with international human rights charters.**

We make four further recommendations about how the Act could be improved in line with the Terms of Reference.

Firstly we support the Australian Law Reform Commission's call in 1999 to eliminate the ability of small organisations (up to 5 employees) to discriminate on various ground in the Act purely because of the small number of staff employed by the organisation (Australian Law Reform Commission, 2025, p. 97; see also Unions NSW, 2023, p. 13). This recommendation relates to point 1 of the Terms of Reference, regarding whether the Act should be modernised to better protect the equal enjoyment of rights. As the Commission is aware, the Act allows small employers to discriminate on grounds such as sex- s25(3)(b), disability-s49D(3)(b), carer responsibilities-s49V(3)(b), marital or domestic status-s 40(3)(b), transgender grounds-s 38C(3)(b) and homosexuality-s 49ZH(3)(b). Discrimination should not be justifiable purely because of the size of a business.

Secondly, similarly to the suggestion made by Unions NSW, we recommend extending the period people can make complaints from 12 months (see s89B) to 6 years (Unions NSW, 2023, p. 15). This suggestion relates to point 9 in the Terms of Reference regarding the adequacy and accessibility of complaints procedures. Unions NSW recognises the 6 year timeframe is in alignment with general civil claims under s544 of the *Fair Work Act 2009* (Cth). Providing extra time recognises that discrimination can be traumatic, and it may take time for people to process this trauma and be in the right psychological state to make a complaint. Additionally, people may want to delay making a complaint in fear of retaliation (Unions NSW, 2023, p.15). We also highlight that, in relation to trans and gender diverse communities, everyday transphobic microaggressions, exclusion and discrimination these communities face are cumulative, overwhelming, and may mean such communities do not have the space or time to make a complaint until after the 12 month mark.

Thirdly, we support calls by organisations such as the Justice and Equity Centre (previously the Public Interest Advocacy Centre) in their preliminary submission to completely rewrite the Act, recognising its convoluted, winding sections and complicated numbering (such as s49ZYX) do not make it accessible to the communities we advocate for (Justice and Equity Centre, 2023, pp. 3, 5). Such a suggestion relates to point 1 in the Terms of Reference, regarding the modernisation and simplification of the Act. As the Justice and Equity Centre have said, “The Act has grown in an ad hoc manner since it was first introduced, with each new attribute added included in a separate Part, with its own definitions, areas of public life covered and exceptions” (Public Interest Advocacy Centre, 2023, p. 4). We support a new structure for the Act, suggested by organisations like the Aboriginal Legal Service NSW/ACT and the Justice and Equity Centre, which firstly lists protected grounds, then areas of public life covered, then exceptions (Public Interest Advocacy Centre, 2023, p. 5).

Lastly, we support calls by organisations like Australian Lawyers for Human Rights, Human Rights For All and the Justice and Equity Centre to create a Human Rights Act or Charter for NSW. Other Australian states and territories have their own Human Rights Acts, and this would bring us into line with these states. The human rights of all people in NSW include the right to be free from discrimination, vilification and harassment and ensure that NSW is fulfilling its obligations under international human rights law.

## **Conclusion**

We thank the Law Reform Commission for reading our submission. Considering and actioning the recommendations we have made in this submission will have immense benefit for bi+, trans and gender diverse communities, who face ongoing discrimination in relation to sexuality, gender identity and intersecting experiences. We welcome further consultation in relation to this review.

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