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

#### **Acknowledgement of Country**

The Australian Centre for Disability Law 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.

#### **Introduction**

The Australian Centre for Disability Law (ACDL) is a specialist community legal centre based in New South Wales. We provide legal assistance to clients who are vulnerable and disadvantaged, and who often experience multiple forms of social and economic exclusion. Our vision is for a society in which people with disability live with dignity, and their human rights and fundamental freedoms are recognised, respected, protected, and fulfilled.

ACDL offers free legal advice, information, referrals, and representation to people with disability across New South Wales, focusing primarily on disability discrimination and related civil law issues. In 2022–2023, 53% of our disability discrimination casework related to education, followed by 20% in employment and 15% in the provision of goods, services, and facilities.

The *Anti-Discrimination Act 1977 (NSW)* is complex, inconsistent, and outdated. In its current form, it creates significant barriers to the realisation of the human rights of people with disability.

Comprehensive reform is essential to ensure the legislation reflects contemporary understandings of disability, aligns with national and international human rights standards, and provides effective protections.

Despite our expertise in disability discrimination, we rarely rely on the Anti-Discrimination Act 1977 (NSW) (ADA) to pursue allegations of disability discrimination (clients make this decision). While the ADA was groundbreaking at its start, its effectiveness has diminished —particularly when compared with its federal counterpart, the Disability Discrimination Act 1992 (Cth) (DDA) and the Disability Standards for Education 2005 (last reviewed by the Commonwealth in 2020). The DDA, which is currently under review, is more comprehensive, particularly in setting out the duties of educational institutions to make reasonable adjustments and prevent discrimination.

In contrast, the ADA lacks clear provisions outlining the obligations of (or in) educational settings. This gap makes it difficult for individuals to rely on the ADA when seeking learning support or lodging complaints with Anti-Discrimination NSW. Its effectiveness is further undermined by multiple exemptions across public life—most notably for private educational authorities.

Complaint data reflects these limitations. Anti-Discrimination NSW reports that disability remains the most frequently cited ground of discrimination—accounting for 818 enquiries in 2023–2024 (25.6% of all enquiries)—yet only 9.9% of these enquiries related to education. By comparison, 40.8% related to goods and services, 29.8% to employment, and 9.0% to accommodation.<sup>1</sup>

We welcome the opportunity to contribute to the NSW Law Reform Commission’s Review of the Anti-Discrimination Act 1977 – Unlawful Conduct. This submission draws on our experience supporting clients who have experienced disability discrimination and responds to the questions outlined in the consultation paper.

All case studies have been de-identified with pseudonyms to protect client confidentiality.

## **Our Key Recommendations:**

### **1. Impose positive duties on duty holders**

Require duty holders to:

- Provide reasonable adjustments for people with disability.

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<sup>1</sup> Anti-Discrimination NSW - [Annual Report](#) 2023-24 (13). In 2023-2024 43% of complaints to the Australian Human Rights Commission were lodged under the DDA. Of these complaints, 29% were regarding employment, 33% were regarding goods and services and facilities, 11% regarded education, see Australian Human Rights Commission, [2023-24 Complaint statistics](#) (accessed 12 August 2025).

- Take reasonable and proportionate measures to prevent harassment, discrimination, vilification, and victimisation.
2. **Implement the Disability Royal Commission’s recommendations**  
Adopt the reforms in *Volume 4* of the Disability Royal Commission relating to the *Disability Discrimination Act 1992 (Cth)*, including shifting the onus of proof from the complainant to the respondent.
  3. **Reform the discrimination test**  
Replace the comparator test for direct discrimination with a *detriment test* and remove the distinction between direct and indirect discrimination to simplify and strengthen protections.
  4. **Adopt a human rights model of disability**  
Ground the legislation in a human rights model of disability, with a modern and inclusive definition reflecting the social model of disability.
  6. **Remove discriminatory exemptions**  
Repeal the exemption allowing private educational authorities to discriminate on the basis of certain attributes.
  7. **Enact a Human Rights Act for NSW**  
  
This reform is essential to reinforcing the amended anti-discrimination legislation and ensuring NSW laws fully comply with Australia’s international human rights obligation.

These reforms are necessary to create a fairer, more inclusive legal framework that upholds the rights, dignity, and equal participation of people with disability in all aspects of public life.

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

The following improvements are recommended by ACDL:

1. **Reverse the burden of proof**—after the complainant shows a disability and resulting disadvantage, the respondent must prove their actions were not disability discrimination.
2. **Replace the comparator test with a detriment test** in section 49B(1)(a). Although the detriment test is mentioned in relation to indirect discrimination in the next section, it should also apply to direct discrimination.
3. **Include a duty to make reasonable adjustments** as part of the test for direct discrimination, similar to the Disability Discrimination Act 1992 (Cth) (DDA), where failure to make reasonable adjustments is recognised as a form of direct and indirect discrimination.

Currently, the Disability Discrimination Act 1992 (Cth) (DDA) imposes legal obligations on duty-holders to prevent discrimination, while the ADA lacks equivalent provisions. Instead, section 49(4) of the ADA provides an exception where a person with a disability requires 'services or facilities' not needed by others and providing them would cause 'unjustifiable hardship' to the educational provider.

Additionally, the application of *Purvis v New South Wales [2003] HCA 62* in NSW has led to a narrow interpretation of the comparator in disability discrimination cases. This approach places an excessive evidentiary burden on complainants, requiring them to prove not only the existence of a disability but also that a hypothetical person without the disability would not have been treated the same way. This unfairly disadvantages people with disability by failing to fully consider the broader context of differential treatment.

### **Question 3.2: Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?**

The **comparator test** requires an assessment of whether a person with a protected attribute has been treated less favourably than a real or hypothetical person—the comparator—in the same or materially similar circumstances. In many cases, the comparator is entirely hypothetical. Constructing such a comparator can be complex and is often poorly understood by complainants, particularly those who are unrepresented. This requirement diverts attention from the actual impact of the conduct on the complainant and creates significant barriers to bringing a claim. It is especially problematic in cases involving multiple protected attributes, where it may be impossible to find a suitable comparator.

ACDL supports the adoption of the *detriment test*, as applied in Victoria and the ACT, in place of the comparator test. The detriment test is based on the principle that discrimination occurs when a person is treated unfavourably because of one or more protected attributes. It provides a clearer and more accessible legal standard, particularly for complainants with disability or those facing intersectional discrimination. The detriment test also aligns more closely with an intersectional analysis, recognising that the effects of multiple attributes are compounding rather than merely additive.

Under this test, the focus is placed on the detrimental effect of the conduct on the complainant, rather than on hypothetical comparisons. ACDL also supports the development of a guidance or a code of practice to guide the assessment of whether 'unfavourable treatment' has occurred.

Case law applying the detriment test provides useful clarification:

- In *Worrall v ACT Health* [2006] ACTDT 1, the Tribunal held that the complainant must prove a clear causal link between the unfavourable treatment and the protected attribute. The treatment must occur because of the attribute—not due to unrelated factors.
- In *Ferris v Department of Justice and Regulation (Human Rights)* [2017] VCAT 1771, the Tribunal found that to establish unfavourable treatment, it must be shown that the alleged discriminator was aware, or ought reasonably to have been aware, of the likely adverse consequences the complainant would suffer as a result of having the attribute.
- In *Martin v Padua College (Human Rights)* [2014] VCAT 1652 and *Hwang v Registrar of Business Licensing Authority* [2024] VCAT 71, the Tribunal confirmed that while the protected attribute must be a substantial reason for the treatment, it need not be the only or dominant reason. *Hwang* also affirmed that the motive of the discriminator is irrelevant to the question of whether discrimination has occurred.

This body of case law confirms that the detriment test provides a clearer, fairer, and more consistent framework for assessing discrimination. It is particularly beneficial for complainants who experience compounded disadvantage due to multiple intersecting attributes, and it enhances access to justice for people with disability.

### **Question 3.3 What are your views on the 'not able to comply' part of the indirect discrimination?**

The current test for indirect discrimination imposes a substantial evidentiary burden, which can be especially onerous for self-represented complainants who often lack the necessary resources or legal expertise to satisfy its requirements. For instance, a person with a disability may be able to comply with a condition, but only with considerable difficulty, effort, or hardship. This results in an unjust and disproportionate burden being placed on persons with disabilities to meet conditions not imposed on their non-disabled counterparts. As an alternative to requiring complainants to demonstrate an inability to comply, we recommend that they only be required to demonstrate that they have experienced a disadvantage.

### **Question 3.4: Should the reasonableness standard be part of the test for indirect discrimination?**

ACDL recommends the reasonableness standard be removed. This aligns with Recommendation 4.24 of the Disability Royal Commission, which calls for reform to the *Disability Discrimination Act 1992 (Cth)*. ACDL recommends the introduction of a disadvantage-based test, which would assess

whether a requirement, condition, or practice has, or is likely to have, the effect of disadvantaging the complainant.

Under this approach, the complainant would have to prove that their inability to follow the relevant requirement, condition, or practice—due to their protected attribute—results in detriment or disadvantage.

**Question 3.5: Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?**

ACDL supports the approach adopted in the ACT, which requires proof of disadvantage only in relation to the individual with the protected attribute, rather than the broader group. Requiring evidence that an entire group is disadvantaged unnecessarily narrows the test and imposes an unduly high evidentiary burden on complainants. For people with disability, disadvantage is often highly individualised—particularly in relation to the adjustments they may require. As the examples below illustrate, the experience of disadvantage is unique to each person’s circumstances and the specific nature of the discrimination they face.

**Case study – refusal of enrolment at tertiary level**

Jess, who has cerebral palsy, epilepsy, and a mild intellectual disability, was enthusiastic about enrolling in a vocational course at her local college. By age 23, she had already completed one course and was eager to further develop her skills and interests. Jess arranged a meeting with the course facilitator to discuss adjustments, as she uses a wheelchair, has use of only one hand, and communicates via a speech-generating device. Despite Jess clearly saying that she wanted to participate for personal development rather than employment, the facilitator expressed concern about her ability to meet industry standards because of her disabilities.

**Case Study – attendance restrictions**

Blake is an 11-year-old boy with autism, ADHD, and anxiety. He attends a specialist disability school but is currently allowed to attend only 15 minutes per day. During this time, he is expected to greet staff politely and speak and walk in a ‘normal’ way, meaning he is not allowed to flap his hands, skip, hop, jump, or run. His mother must remain at the school gate, within his line of sight, throughout the visit. The school has said that Blake must meet these expectations for four consecutive days before they will consider increasing his attendance. His mother believes these requirements set him up to fail, as many of the behaviours they are trying to prevent are direct manifestations of his disability.

### **Question 3.6: Should the ADA require respondents to prove any aspects of the direct or indirect discrimination test?**

ACDL supports shifting the onus of proof from the complainant to the respondent, requiring respondents to demonstrate that a condition or requirement found to be discriminatory is reasonable in the circumstances. We recommend adopting an amendment similar to that proposed by the Disability Royal Commission (Recommendation 4.24) for the DDA, which states:

*‘Subsection (1) or (2) does not apply if avoiding the discrimination would impose an unjustifiable hardship on the alleged discriminator.’*

ACDL considers that the concept of ‘unjustifiable hardship’ should apply to both direct and indirect discrimination tests. Once the complainant establishes the existence of a disability and either unfavourable treatment (direct discrimination) or disadvantage due to a requirement (indirect discrimination), the burden should shift to the respondent to justify their conduct. This removes the need for the person with disability to prove causation. The respondent must show that their conduct was for a non-discriminatory reason (direct discrimination) or that the requirement is reasonable and appropriate (indirect discrimination).

This shift would alleviate the significant challenge complainants face in proving the reason behind someone else’s conduct.

This change would be particularly beneficial for children and young people who experience disability discrimination in education. In our experience, they are often denied access to education based on an education provider’s belief that the student cannot ‘derive any substantial benefit from the educational program.’ This form of gatekeeping is common and often reflects the limitations of the education providers rather than the abilities of the students.

Gatekeeping may include outright refusal to enrol a student, limiting enrolment to part-time attendance, or imposing restrictive conditions such as requiring a parent or aide to be present. Frequently, students are only allowed partial attendance with no clear pathway to full-time enrolment.

Requiring education providers to justify such conditions by showing that accommodating the student would impose an unjustifiable hardship would reduce reliance on vague or subjective assessments of what is ‘reasonable.’ This reform would help ensure that children with disability are

not excluded or restricted in their access to education based on discriminatory assumptions, which can have lifelong consequences.

### **Question 3.7: Should the ADA retain the distinction between direct and indirect discrimination?**

At ACDL, we recognise that many clients with disability find the ADA complex and challenging to navigate. This complexity can discourage individuals from lodging complaints, even when discrimination is evident. A frequent example is the need to distinguish between direct and indirect discrimination—a distinction that is often confusing and creates unnecessary barriers. It is common for complainants to allege one type of discrimination when, in fact, the other may be more appropriate. In our experience, the provisions relating to indirect discrimination are underutilised and difficult to establish.

What matters most is that the law enables individuals to show when they have been subjected to unfavourable or disadvantageous treatment. Retaining a rigid distinction between direct and indirect discrimination may impose an unnecessary burden on complainants and undermine access to justice.

ACDL therefore supports further consideration of adopting a single, unified definition of discrimination that focuses on whether a person with a disability has experienced less favourable treatment or disadvantage. A model worth examining is that used in the Australian Capital Territory, where the Discrimination Act 1991 (ACT) provides: *‘For this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else’* (s 8(1)).

### **Question 3.8: Should the ADA protect against intersectional discrimination?**

The Disability Royal Commission recognised that people with disability often experience multiple, intersecting forms of discrimination, not only on the basis of disability but also in connection with other personal characteristics.<sup>2</sup> The Commission specifically acknowledged the compounded disadvantage experienced by First Nations people with disability, people from culturally and linguistically diverse backgrounds, LGBTQA+ individuals with disability, and women with disability.

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<sup>2</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. (2023). *Final Report - Executive Summary, Our vision for an Inclusive Australia and Recommendations*.

Intersectionality is also recognised under the Convention on the Rights of Persons with Disabilities (CRPD), which states that 'women and girls with disabilities are subject to multiple discrimination' (Article 6(1)).

In practice, many of our clients find it difficult to determine whether the discrimination they have experienced is based solely on disability, or on a combination of other attributes. This complexity highlights the need for the law to better reflect the realities of intersectional discrimination.

ACDL recommends that the ADA be amended to explicitly recognise and address intersectional discrimination. We support the approach adopted in the Australian Capital Territory, where discrimination is defined as treating a person 'unfavourably because the other person has one or more protected attributes' (*Discrimination Act 1991 (ACT)*, s 8(2)).

### **Question 3.9: Should the tests for discrimination capture intended future discrimination?**

ACDL recommends that the test for direct discrimination be expanded to include circumstances where a duty holder proposes to treat a person unfavourably or proposes to impose a requirement or condition that would amount to indirect discrimination in the future.

This amendment would bring the ADA into alignment with equivalent legislation in the ACT, Victoria, Queensland, the Northern Territory, and under the Age Discrimination Act 2004 (Cth).

Including proposed or intended future discrimination within the statutory test would allow the law to address discriminatory conduct before it occurs. This is particularly important for preventing foreseeable harm to people with disability. For example, a school that announces its intention to convert its only accessible toilet into a storage area could, under such a provision, be held liable for proposed future discrimination.

## **DISCRIMINATION: PROTECTED ATTRIBUTES**

### **~~Question 4.1: Age discrimination~~**

### **~~Question 4.2: Discrimination based on carer's responsibilities~~**

### **Question 4.3 Disability discrimination: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of 'disability'?**

ACDL agrees that the current definition of disability in the ADA is outdated and grounded in deficit-based, medicalised language. The definition should be modernised to reflect the social model of disability, which understands disability as arising from the interaction between individuals with

impairments and attitudinal and environmental barriers that hinder full and equal participation in society.

The Act should also be amended or redrafted to incorporate a human rights-based model of disability, which affirms the inherent dignity and equal rights of people with disability, and promotes a society in which those rights are recognised, respected, protected, and fulfilled.

ACDL recommends that the definition of disability be updated in line with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which defines disability as:

*Any impairment, including a physical, mental, intellectual, cognitive, neurological, learning, communication, or sensory impairment, or a functional limitation, whether permanent, temporary, or episodic in nature, whether evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society.*

This definition reflects the social model of disability and should be adopted in full.

Any revised definition must be developed in close consultation with people with disability and their representative organisations, in accordance with the principle of *'nothing about us without us.'*

In addition, the definition should be consistent with the Disability Discrimination Act 1992 (Cth), particularly in relation to the recognition of assistance animals. ACDL also recommends incorporating language from the DDA that recognises disability as including a disability that:

- presently exists.
- previously existed but no longer exists.
- may exist in the future (including because of a genetic predisposition); or
- is imputed to a person.

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

Protection against discrimination based on genetic information has become increasingly important with the growing availability of genetic screening and access to genetic and medical records. Such information can reveal a person's predisposition to medical conditions or other attributes—such as sex characteristics, mental illness, genetic markers, or personality traits—which may expose them to unfair treatment.

The current definition of discrimination includes references to 'past, future and presumed disability,' which provides inherent protection against genetic information discrimination. However, there is

concern that this protection is not sufficiently explicit and could be interpreted narrowly by the courts.

Introducing a separate attribute for genetic status could increase legislative complexity and risk separating it from the concept of disability. A preferable, non-exclusionary approach would be to amend the existing definition to make clear that protection against discrimination based on genetic information is included.

### **What changes, if any, should be made to the public health exception?**

The current public health exception under section 49P of the ADA is limited to infectious diseases and discrimination that is reasonably necessary to protect public health. In 1999, the NSW Law Reform Commission recommended broadening this exception to include acts done in compliance with the Public Health Act or the Mental Health Act. ACDL supports this recommendation.

### ~~Question 4.4: Discrimination based on homosexuality~~

### ~~Question 4.5: Discrimination based on marital or domestic status~~

### ~~Question 4.6: Racial discrimination~~

### ~~Question 4.7: Sex discrimination~~

### ~~Question 4.8: Discrimination on transgender grounds~~

### **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?

### **(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?**

Discrimination against a person because they are a relative or associate of someone with disability is an issue we regularly encounter in our casework at ACDL. However, the current legislation contains a significant gap: while the disability attribute is extended to associates in some contexts, it does not form part of the test for indirect discrimination.

### **Case study – indirect discrimination against a relative**

Ali, a 9-year-old student with anxiety, ADHD, autism, and oppositional defiant disorder, required adjustments to participate fully in school programs and activities. One such adjustment was the use of noise-cancelling headphones to help him manage stress and reduce aggression in noisy, crowded, or chaotic environments. The school refused to allow this adjustment. On occasion, Ali

became agitated and aggressive towards his teacher and other students, resulting in multiple suspensions. These events have had a significant impact on his parents' mental health. His mother has permanently reduced her working hours, and both parents have been prescribed antidepressant medication.

ACDL recommends amending the ADA to ensure that relatives and associates of a person with disability are protected under both the direct and indirect discrimination provisions. This would align the ADA with the Disability Discrimination Act 1992 (Cth) (DDA), which applies to a person who has an associate with a disability in the same way it applies to a person with the disability.<sup>3</sup>

We also support introducing a standalone attribute prohibiting discrimination on the basis of being a relative or associate of a person with disability, consistent with protections in other jurisdictions. Such a reform would close a current legislative gap and provide comprehensive protection against this form of discrimination.<sup>4</sup>

#### DISCRIMINATION: POTENTIAL NEW PROTECTED ATTRIBUTES

~~Question 5.1: Guiding principles~~

~~Question 5.2: Potential new attributes~~

~~Question 5.3: An open-ended list~~

#### DISCRIMINATION: AREAS OF PUBLIC LIFE

~~Question 6.1: Discrimination at work—coverage~~

~~Question 6.2: Discrimination in work—exceptions~~

**Question 6.3: What changes, if any, should be made to the definition and coverage of the protected area of 'education'?**

Providing adequate support to students with disability within educational settings fosters an inclusive environment that enriches the learning experience for all students. It prepares young people for life in a diverse society—one that values difference and embraces the unique contributions of every individual. Importantly, the benefits of inclusive education extend beyond students with disability. It promotes empathy, understanding, and acceptance across the entire school community, contributing to broader societal change.

Many measures that support students with disability also improve educational outcomes for the whole cohort.<sup>3</sup> Examples include implementing a variety of teaching styles and materials, permitting the use of fidgets or other sensory tools, providing breakout spaces, allowing movement breaks, delivering explicit teaching and instructions, offering clear explanations, and giving advance notice of changes to schedules or routines. These strategies represent best practice in education<sup>4</sup> yet they are often framed merely as ‘adjustments’ for children with disability.

Despite these well-established benefits, ACDL regularly receives complaints from children and their families about experiences of disability discrimination in schools and other educational settings.

Unlike the DDA, the ADA does not contain a provision clearly setting out the obligations of educational authorities to support students with disability. This creates a significant gap in the protection available under state law and limits the ability of students and families to seek appropriate learning support or pursue disability discrimination complaints through NSW’s legal framework.

In response to Question 11.1 of the Review, ACDL recommends that the ADA be amended to incorporate a **standalone positive duty** on educational settings to make reasonable adjustments for individuals and groups with disability. This duty should mirror the intent of the DDA and provide a clear, enforceable standard of inclusion.

ACDL also supports expanding the definition of ‘educational authority’ under the ADA. In line with the recommendations of the Law Reform Commission of Western Australia (LRCWA), the definition should include organisations responsible for developing, regulating, or accrediting curricula and examinations. These bodies play a critical role in shaping the educational environment and should therefore be subject to the same obligations to prevent discrimination and ensure access for students with disability.

### Relevant conduct

ACDL supports the recommendation of the Law Reform Commission of Western Australia (LRCWA) that the definition of relevant conduct in education should expressly include discrimination in the selection or evaluation of student applications. In our experience, a usual form of such discrimination is ‘gatekeeping’, whereby children and young people with disability are denied access to education—often at the enrolment stage. This practice poses a significant barrier

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<sup>3</sup> NSW Department of Education, *Inclusive Education Statement for students with disability*, NSW Government, 2021 (accessed 21 August 2025).

<sup>4</sup> NSW Department of Education, [Inclusive Education Strategies](#), NSW Government, (accessed 21 August 2025).

to inclusive education and undermines the right of students with disability to participate fully in mainstream educational settings.

### **Case study – partial enrolment**

Lawson is a 10-year-old boy with an intellectual disability. In kindergarten, he was severely hurt by another student, which left him fearful of school and other children.

His mother arranged a transition program with a nearby religious school, starting with a few hours twice a week. Over two years, Lawson gradually increased his attendance to four days a week, developed friendships, and became part of the school community. When his mother sought partial and then full enrolment, the school verbally refused, claiming Lawson would be a burden on other students and that they lacked funding for a full-time aide. However, Lawson's mother later learned from her local MP that funding for an aide was in fact available.

We also receive complaints from parents and caregivers regarding discriminatory treatment of students with disability through the use of exclusionary disciplinary practices such as suspensions and expulsions.

### **Case study – suspensions and expulsions**

Omar is a 13-year-old Year 7 student at a public school. He has autism, ADHD, ODD and anxiety, and a behavioural management plan designed to help him regulate his emotions and behaviour. Due to his disabilities, he sometimes swears or lashes out when distressed.

The school enforces a strict discipline policy: any swearing or physical behaviour results in automatic suspension, with suspensions increasing in length for repeat incidents. Throughout Year 7, Omar received progressively longer suspensions for relatively minor incidents, culminating in a 20-day suspension for what staff and students described as "clowning around," not a genuine threat. The incident was not reported to his parents until after the suspension was issued.

Omar's mother repeatedly asked the school to apply alternative consequences in line with his behavioural plan, such as detention. The school refused. After his final suspension, Omar again misbehaved and was threatened with expulsion.

This is particularly concerning in early education settings, where we have observed a growing trend of young children being suspended or expelled from preschool or kindergarten. These early exclusions often have long-term negative impacts, entrenching disadvantage from the outset of a child's educational journey.

Many of these disciplinary actions could be avoided through the implementation of appropriate adjustments—such as individualised behaviour management plans. Exclusionary discipline does not address the underlying causes of behavioural issues and can, in fact, exacerbate them.<sup>5</sup>

Removing a student from their learning environment not only disrupts their education but can also cause emotional distress, impair academic progress, and foster a sense of rejection or insecurity.

Accordingly, ACDL recommends that the definition of relevant conduct in education be expanded to include discrimination through exclusionary discipline. Stronger safeguards are necessary to limit the use of such measures and ensure that schools uphold their obligations to support, rather than exclude, students with disability.

### Early childhood education and care

Despite the well-documented benefits of inclusive early childhood education and care (ECEC) for children, families, and society, ACDL frequently hears from families reporting disability discrimination in these settings. We regularly hear from parents about the impact of enforced part-time attendance on their ability to earn sustainable wages that allows them to afford a decent standard of living and meet the needs of their family. Complaints from parents and caregivers of children with disabilities fall into the following categories:

- Gatekeeping or refusal to enrol a young child with a disability.
- Failure to implement reasonable adjustments, such as refusing onsite therapy or treatment, denying access to a quiet or safe space for a child with sensory needs, or not adapting educational activities (e.g., excursions).
- Exclusionary disciplinary practices, including suspension, expulsion, or enforced part-time attendance.
- Exclusion from school events, such as excursions.
- Failure to provide medication in accordance with an agreed medication plan.
- Less favourable treatment on the grounds of disability, in ways not listed above.

#### **Case study – Refusal to make adjustments without a formal diagnosis**

Liam, aged two, had attended an early learning centre since he was one. Over time, he showed signs of speech and feeding delays and relied heavily on milk for nutrition, as he struggled to consume solids. The centre had a policy of not providing milk to children over the age of two. Initially, his parents supported staff efforts to encourage solids and reduce milk intake. However,

<sup>5</sup> Avery-Overduin, B. L., & Poed, S. (2023). Breaking the culture of school suspension: alternatives to external suspension and exclusion for P-6 students. *Emotional and Behavioural Difficulties*, 28(4), 249–262. <https://doi.org/10.1080/13632752.2023.2276023>

when Liam continued to refuse solids, the centre would not offer milk as an alternative, leaving him hungry and distressed. The centre also refused to move Liam into the 2–3-year-old room because he had not weaned from the bottle. His parents eventually withdrew him from the centre, and shortly afterwards, Liam was assessed as being on the autism spectrum.

Under the ADA, discrimination is only prohibited in relation to the initial terms and conditions of the service offered by ECEC. In contrast, the proposed *Disability Standards for Education Amendment Standards 2025* would treat most ECEC services as education providers, offering stronger and ongoing protections. Services covered would include Childcare Subsidy–approved providers and those required under state or territory law to follow an approved learning framework — such as Centre Based Day Care, Family Day Care, Outside School Hours Care, and In Home Care.<sup>6</sup>

If the proposed *Disability Standards for Education Amendment Standards 2025* are enacted, ACDL recommends that the ADA be amended to classify early childhood education and care (ECEC), including out-of-school-hours care, as DDA and ensure that children and families in NSW receive consistent and equal protection from disability discrimination under both state and federal law. Further, the ADA should either incorporate the *Disability Standards for Education* or establish equivalent standards to provide ongoing protections.

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

ACDL supports the removal of all exceptions to disability discrimination in educational settings, particularly the exemption that permits private educational authorities to discriminate on the basis of certain attributes.

We strongly support the introduction of a positive duty to provide reasonable adjustments, with the onus placed squarely on the respondent to demonstrate that making the adjustment would impose an unjustifiable hardship (see **Question 11.1** below). The definition of ‘unjustifiable hardship’ in section 49C of the ADA should be amended to include an expanded list of factors that must be considered before such a claim can be made.

In particular, an education provider should be prohibited from relying on unjustifiable hardship unless it can provide clear, documented evidence that it has taken all reasonable steps to facilitate the student’s enrolment and to implement appropriate adjustments. This should include proof that

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<sup>6</sup> Department of Education, *Consultation paper: Changes to the Disability Standards for Education 2005 To include early childhood education and care services and outside school hours care services*, January 2025.

the decision was based on objective evidence, considered the student's individual circumstances, and explored all viable options for inclusion. Without these safeguards, unjustifiable hardship risks becoming a default excuse for exclusion rather than a narrowly applied exception. Strengthening the provision in this way would promote genuine accountability and ensure that decisions affecting students with disability are both transparent and defensible.

#### **Question 6.4: What changes should be made to the definition and coverage of the protected area of 'the provision of goods and services'?**

Being prevented from accessing public premises constitutes discrimination and can have a profound impact on the lives of people with disability. However, the Anti-Discrimination Act 1977 (NSW) does not currently provide effective protection in this area.

ACDL recommends that the ADA be amended to align with section 23 of the Disability Discrimination Act 1992 (Cth), which makes it unlawful to refuse a person with disability access to, or use of, premises or their facilities—both in relation to the terms and conditions of such access and the means by which access is provided.

A specific 'access to premises' provision in the ADA would ensure that people with disability have a clear and enforceable right to access public spaces, consistent with Commonwealth protections.

#### Policing and justice

A significant omission in both the DDA and the ADA is that the definition of 'services' excludes those provided by police officers when performing their policing duties and powers. The Disability Royal Commission has documented the poor experiences of people with disability within the justice system and emphasised that, if police discriminate against a person with disability, they should be held accountable—particularly in matters involving a person's right to liberty and security or when in police custody. ACDL supports Recommendation 8.19 of the DRC, which calls for the DDA to be amended to expressly include 'services provided by police officers in the course of performing policing duties and powers' within the definition of 'services.'<sup>7</sup> The ADA should be amended accordingly, to mitigate the issues identified in the DRC.

#### Strata schemes

Strata schemes should be expressly recognised under the ADA as providers of 'goods and services', particularly in relation to the management of common property and the creation and

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<sup>7</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. (2023). *Final Report – Volume 8, Criminal justice and people with disability* (276)

enforcement of by-laws. Clear legislative wording confirming that an owners corporation is providing services within a strata scheme would remove ambiguity and ensure consistent application of the law. This reform would provide certainty for residents, owners corporations, and strata managers, and strengthen protections against discrimination in strata living.

~~**Question 6.5: Superannuation services and insurance exceptions**~~

~~**Question 6.6: The provision of goods and services — exceptions**~~

**Question 6.7: What changes should be made to the definition and coverage of the protected area of 'accommodation'?**

ACDL supports the recommendations of the NSW Law Reform Commission to:<sup>8</sup>

1. Amend the ADA to bring the provisions relating to discrimination in accommodation on the grounds of disability into alignment with the *DDA* by prohibiting a refusal to permit a person to make reasonable alterations to premises they occupy.
2. Insert a definition of 'accommodation' in the ADA consistent with that in the *Residential Tenancies Act 1987* (NSW), to expressly include caravans and mobile homes.

~~**Question 6.8: Discrimination in accommodation — exceptions**~~

**Question 6.9: What changes should be made to the definition and coverage of the protected area of 'registered clubs'?**

ACDL recommends that the definition of 'club' in the Anti-Discrimination Act 1977 (NSW) be amended to align with the definition in the Disability Discrimination Act 1992 (Cth). Under the DDA, a 'club' is defined as an association of persons that funds and maintains its facilities from the association's own funds—an indicator that the club operates in a public capacity. Aligning the definitions would promote consistency across jurisdictions and ensure that clubs with a public character are subject to anti-discrimination obligations.

~~**Question 6.10: Discrimination by registered clubs — exceptions**~~

~~**Question 6.11: Discrimination based on carer's responsibilities**~~

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<sup>8</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [4.218], [4.219], rec 24.

## **Question 6.12: Should the ADA apply generally 'in any area of public life'? Why or why not?**

ACDL acknowledges the principle, advanced by the Justice Equity Centre (formerly the Public Interest Advocacy Centre), that the ADA should be broadened to apply comprehensively to all areas of public life. This approach would replace the current piecemeal process of adding and amending specific provisions, delivering stronger, clearer, and more accessible protections against discrimination.

To be effective, however, such reform must be accompanied by clear legislative guidance distinguishing between 'public' and 'private' life. Without this, a single, generalised definition risks leaving 'hybrid' areas—where public and private life intersect—open to judicial determination rather than proactive policy-making. This would reduce certainty by diminishing reliance on established case law, increase litigation over the scope of 'public' life, and potentially generate inconsistent interpretations. Ultimately, it would make the law less accessible for those it is designed to protect.

Hence, ACDL recommends expanding the areas of public life included in the legislation to close critical protection gaps and ensuring that the ADA remains fit for purpose in addressing contemporary forms of discrimination. We specifically recommend inserting clear wording around the provision of services by an owners corporation within a strata scheme (see Question 6.7); and the provision of services by police officers when performing their policing duties and powers (see Question 6.4)

### WIDER EXCEPTIONS

~~**Question 7.1: Religious personnel exceptions**~~

~~**Question 7.2: Other acts and practices of religious bodies**~~

~~**Question 7.3: Exceptions for other forms of unlawful conduct**~~

~~**Question 7.4: Exceptions for providers of adoption services**~~

## **Question 7.5: Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?**

The current exceptions for private educational authorities in employment under the ADA are out of step with contemporary community standards and should be removed.

ACDL acknowledges that, in limited circumstances, it may be appropriate for religious educational institutions to make employment decisions based on religious belief or activity. Any such exceptions should be narrowly drafted, subject to strict safeguards, and applied only where they are reasonable and proportionate to the institution's genuinely held religious beliefs. There is no

legal or policy basis for permitting private educational authorities, including religious educational authorities, to discriminate on the ground of disability.

We recommend that any future legislative amendment be modelled on the approach taken in Victoria under section 83 of the *Equal Opportunity Act 2010* (Vic). This provision allows religious bodies and schools to make employment decisions based on religious belief or principles only where:

- the discrimination is reasonably necessary to comply with the doctrines, beliefs or principles of the religion; or
- the discrimination is directly related to the inherent requirements of the position (s 83(3)); and
- in either case, the conduct must be reasonable and proportionate in the circumstances (per s 9, which governs the test for indirect discrimination and informs proportionality assessments throughout the Act).

This model appropriately balances the right of religious institutions to maintain their religious ethos with the rights of staff and prospective employees to be free from unjust discrimination. It also introduces a clearer legal standard that improves transparency and accountability in employment decisions.

**Question 7.6: Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?**

All exceptions permitting private educational authorities to discriminate on the ground of disability should be removed from the ADA and excluded from any future NSW anti-discrimination legislation. The Act should be amended to ensure that private education providers, including religious schools, are fully subject to the same obligations as public education authorities in relation to disability discrimination.

From our casework, ACDL is acutely aware that the enrolment process for students with disability is often far from straightforward, even when parents and schools are working cooperatively toward a positive outcome. However, we have observed a particular reluctance among some religious schools to enrol students with psychosocial or intellectual disabilities. This reluctance often manifests early in the enrolment process and may include attempts to steer students into segregated, specialised schools rather than admitting them into mainstream educational settings.

In one matter we assisted with, a religious primary school that had previously educated four of a family's children refused to enrol the fifth child on the basis of that child's disabilities. This decision caused significant distress for the family, who were actively engaged in their local school and religious community.

In our clients' experience, while the formal enrolment process may appear accessible on its face, exclusionary practices such as gatekeeping, delay tactics, or selective application of enrolment criteria can serve to effectively deny students with disability admission to their school of choice.

These practices undermine the rights of children with disability to inclusive education and perpetuate segregation and discrimination in contravention of Australia's obligations under the *Convention on the Rights of Persons with Disabilities* (CRPD). The continued availability of legislative exemptions for private educational authorities enables these discriminatory practices to persist with little accountability.

To ensure equitable access to education, the ADA must be amended to remove exemptions for private education providers. All educational institutions—regardless of governance structure or religious affiliation—must be equally bound by obligations to provide inclusive, non-discriminatory educational opportunities to all students.

### **Case study – refusal of enrolment**

Tobias attended a Faith-based primary school through to Year 6 and subsequently applied to enrol in its nearby high school. Tobias has mild autism and global developmental delay. Despite this, the local Diocese education office refused his application to the school of his choice, stating that he would be unable to cope with the curriculum and that they could not make the necessary adjustments to accommodate his needs.

Tobias then applied to a second high school within the same Diocese. However, despite multiple follow-ups by his parents, the Diocese's education office failed to respond to the application. As no formal refusal was issued, Tobias and his family were unable to access the formal appeals process available through the diocese.

Instead, Tobias was offered a place at a 'special school' within the diocese for students with significantly higher support needs and lower intellectual capacity. Tobias' treating doctor confirmed that this placement was not appropriate for his level of functioning. His father wrote to the Diocese's Director of Education, who responded with an apology but advised that they believed Tobias would be better suited to a public school.

This experience had a significant negative impact on Tobias' self-esteem. He internalised the rejection, expressing that he felt 'too stupid' to attend this Faith-based school.

ACDL supports the position of the Justice and Equity Centre (formerly PIAC), which recognises that there may be a limited case for allowing religious schools to give preference to students of a particular faith at the point of enrolment. This narrow exception acknowledges the role of religious schools in fostering faith-based communities and enabling parents to educate their children within their religious tradition.<sup>2</sup>

However, to ensure that students are protected from discrimination on the basis of their religious belief (or lack thereof), any such exception must be strictly confined to the point of enrolment. Once a student is admitted, they should enjoy the same rights and protections as any other student, regardless of their faith background. Discrimination on the basis of religious belief should not be permitted beyond the enrolment stage.

**Question 7.7: Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?**

ACDL recognises that this exception is similar to that found in the Disability Discrimination Act 1992 (Cth). However, we recommend that the exception be amended or redrafted in line with section 57 of the Discrimination Act 1991 (ACT).

Under the ACT model, the exception is limited to competitive sporting activities, and does not extend to the coaching, administration, or officiating (umpiring/refereeing) of those activities. This ensures that participation in non-playing roles remains inclusive and free from discrimination on the basis of disability.

From our casework, we know that people with disability are discriminated against in sport, particularly children. Adopting the ACT approach would provide greater clarity and consistency, while reinforcing the principle that people with disability should not be excluded from broader involvement in sporting communities, particularly in roles that do not rely on physical capacity in the same way as competitive play.

### **Case study – discrimination in sport**

Jai, aged 8, is a lower-limb amputee who wears a prosthetic leg. He is an active and skilled sports player, regularly participating in cricket, basketball, soccer, athletics, and unstructured play at school with his peers—without the need for adjustments or experiencing exclusion.

Jai has been a member of his local Rugby League club since the age of 6. However, at the start of the current season, he was excluded from participating due to his disability. Specifically, he was not permitted to continue playing with his team as they transitioned from the non-contact ‘tag’ format to full-contact tackle rugby.

Despite proposing a reasonable adjustment—namely, wearing a foam cover over his prosthetic leg, which was custom-designed by his prosthetist to enable safe participation in tackle rugby—Jai remained excluded from the team. His medical team had expressly supported his involvement in the sport, deeming him capable of participating safely and fully.

This exclusion constitutes discrimination. It isolates a child with disability who, with appropriate support and based on expert medical advice, was fully capable of inclusion and participation.

~~**Question 7.8: The charities exception**~~

~~**Question 7.9: Voluntary bodies exception**~~

~~**Question 7.10: Aged care accommodation providers exception**~~

~~**Question 7.11: The statutory authorities exception**~~

### **CIVIL PROTECTIONS AGAINST VILIFICATION**

**Question 8.1: What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?**

People with disability face persistent vilification and harassment on the basis of their disability. This includes both physical and verbal abuse, which may be perpetrated by strangers, organised groups, or individuals known to them. In NSW, disability is understood to be the most common attribute cited in discrimination complaints.<sup>9</sup> Despite this, disability remains excluded from vilification protections under the law and in practice.

Therefore, ACDL supports the protection of people with disability against civil vilification under the ADA. We believe that this should be in line with DRC Recommendation 4.30 which recommends

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<sup>9</sup> Anti-Discrimination NSW - [Annual Report](#) 2023-24 (13).

that because of disability, it is unlawful for a person (the first person) to do an act otherwise than in private, if:

(a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people.

(b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and

(c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.<sup>3</sup>

Protections against vilification of people with disability under the ADA should also be mirrored in the *Crimes Act*, ensuring that people with disability are protected from publicly threatening behaviour and incitement to violence.

~~**Question 8.2: Should NSW adopt a 'harm-based' test for civil vilification? If so, should this replace or supplement the existing 'incitement-based' test?**~~

~~**Question 8.3: What changes, if any, should be made to the definition of 'public act' in the test for vilification in the ADA?**~~

~~**Question 8.4: What changes, if any, should be made to the exceptions to the vilification protections in the ADA?**~~

~~**Question 8.5: Religious vilification**~~

## HARASSMENT

~~**Question 9.1: The definition of sexual harassment**~~

~~**Question 9.3: Sexual harassment in the workplace**~~

~~**Question 9.4: Workplace-related laws regulating sexual harassment**~~

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

~~**Question 9.6: The private accommodation exception**—Should sexual harassment be prohibited~~

**Question 9.7: If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?**

ACDL recommends that the harassment provisions in the ADA be broadened to cover the same areas and attributes that are currently protected from discrimination, in order to ensure consistency and comprehensive protection. Crucially, these provisions should be extended to explicitly cover harassment on the ground of disability.

We note Recommendation 4.29 of the Disability Royal Commission (DRC), which proposes that the DDA be amended to include a provision making it unlawful for a person to engage in offensive behaviour on the basis of disability. The proposed provision would make it unlawful for a person (the 'first person') to do an act, otherwise than in private, if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- the act is done because of the disability of the other person, or because some or all of the people in the group have, or are perceived by the first person to have, a disability.

For the purposes of this provision, an act is not taken to be done in private if it:

- causes words, sounds, images, or writing to be communicated to the public.
- is done in a public place; or
- occurs within sight or hearing of people who are in a public place.

The term 'public place' is to be defined broadly, including any place to which the public has access, whether by right or invitation, and regardless of whether an admission charge applies.

ACDL supports incorporating a similar provision into a revised ADA. Such a reform would strengthen protections for people with disability from harassment and offensive conduct—regardless of how many times the behaviour occurs, the setting in which it takes place, or whether it occurs in person or online. This provision should also extend protection to cyber environments, where online harassment of people with disability is increasingly prevalent. However, social media and public online spaces should be explicitly referred to in the wording of the provision.

To address the political and legislative challenges that have historically hindered similar reforms—such as the controversy surrounding the *Racial Discrimination Act 1975* (Cth)—ACDL suggests that more conservative and targeted wording may need to be considered in order to facilitate the passage of the amendment.

To ensure that the provision captures serious online harassment, we suggest the following wording:

*'It is unlawful for a person to disseminate material through a carriage service that amounts to offensive behaviour on the basis of disability.'*

*'The person must have known, or ought reasonably to have known, that the behaviour would have a serious effect on the person targeted.'*

In addition, ACDL recommends that specific reference to bullying in educational settings be included within the scope of protections against disability-based harassment. This is critical given the widespread prevalence of such behaviour. A 2023 survey by Children and Young People with Disability Australia (CYDA) found that 75% of students with disability had been bullied in the previous year.<sup>2</sup> This statistic highlights the urgent need for stronger legislative safeguards for children and young people with disability in schools.

#### ~~OTHER UNLAWFUL ACTS AND LIABILITY~~

~~**Question 10.1: Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone?**~~

~~**Question 10.2: Advertisements**~~

~~**Question 10.3: The forms of liability**~~

~~**Question 10.4: The exceptions for liability**~~

~~**Question 10.5: Liability and artificial intelligence**~~

#### PROMOTING SUBSTANTIVE EQUALITY

**Question 11.1: Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?**

In our view, this is a critical amendment.

The ADA should be amended to incorporate a standalone positive duty to make adjustments for individuals and groups with disability. This reform would align with Australia's international obligations in relation to people with disability, embed the social model of disability within the statutory framework, and provide a mechanism for systemic reform. It would shift the legal emphasis from reactive, complaint-based enforcement to proactive compliance and inclusion.

Currently the ADA does not impose a standalone duty on duty-holders to make adjustments to enable the equal participation of persons with disability in public life. This is in contrast to equivalent legislation in other jurisdictions, including the ACT and Victoria.

In addition, the existing definitions of direct and indirect discrimination under the ADA place the evidentiary burden on complainants to prove that the alleged conduct occurred because of their disability. This framework perpetuates a deficit-based approach, underpinned by a formal equality paradigm that requires comparisons with persons without disability. Such an approach fails to address the structural and systemic barriers experienced by people with disability and does not achieve substantive equality in practice.

This proposal is consistent with Recommendation 4.26 of the *Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, which recommends inserting into the *Disability Discrimination Act 1992 (Cth)* (DDA) the following standalone duty:

*It is unlawful for a person to fail or refuse to make an adjustment for:*

*(a) a person with a disability; or*

*(b) a group of persons with disability,*

*unless making the adjustment would impose an unjustifiable hardship on the person.*

ACDL recommends that the ADA be amended to include a substantively equivalent provision. The onus should rest with the respondent to demonstrate that making the adjustment would impose an unjustifiable hardship, as defined in the Act. This reversal of the evidentiary burden is essential to ensure that duty-holders cannot avoid compliance through inaction or refusal.

This positive duty should apply to all duty-holders. In ACDL's experience, it would have particular significance in the education context. At present, NSW education providers are under no positive statutory obligation to make adjustments. While families may request adjustments, there is no corresponding legal duty on schools to comply, and the burden of initiating and pursuing a complaint rests on the child or their family. Embedding a positive duty in the ADA would reverse this dynamic: education providers would be required to make reasonable adjustments in the first instance, with legal proceedings arising only where they fail to comply. This would improve access to education for students with disability and reduce reliance on individual enforcement.

To support this duty, the ADA should contain clearly articulated statutory criteria for determining what constitutes unjustifiable hardship. These criteria must be sufficiently precise to provide certainty to duty-holders and adjudicators, while retaining flexibility to apply across varied factual circumstances.

#### **~~Question 11.2: Special measures~~**

#### **Question 11.3: Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct?**

ACDL strongly supports the introduction of a positive duty on all duty-holders to take reasonable and proportionate measures to prevent harassment, discrimination, vilification, and victimisation across all attributes protected under the ADA.

The current anti-discrimination framework in New South Wales is reactive, requiring individuals to lodge complaints after experiencing harm. ACDL recommends that the ADA be amended to impose a proactive obligation on all duty-holders—including landlords, education providers, transport operators, and service providers—to take reasonable steps to eliminate discrimination, harassment, vilification, and victimisation against all protected groups before it occurs.

This approach was recommended by the Disability Royal Commission (DRC) with regard to the disability discrimination. Recommendation 4.27 states that the DDA be amended to include a positive duty on all duty holders to eliminate disability discrimination, harassment, and victimisation. Similarly, in 2022, the *Sex Discrimination Act 1984* (Cth) was amended to introduce a positive duty requiring organisations to take active and reasonable steps to prevent sexual harassment and sex-based discrimination.

Introducing a comparable duty under the ADA would shift the framework in NSW from a reactive to a preventative model, shifting some of the burden to organisations and institutions to actively prevent discriminatory conduct. It would foster greater inclusion, promote awareness of rights and obligations, and drive cultural and institutional change.

The imposition of such a duty also acknowledges the structural power imbalances between duty-holders and individuals with protected attributes—such as those between children and education providers. Embedding this duty in legislation would reduce the procedural and evidentiary burdens currently placed on individuals seeking redress and better enable equal participation by reducing the barriers they must overcome to have their rights realised.

ACDL supports the test recommended by the DRC, and that adopted under Victorian anti-discrimination law, which provides that a person must take 'reasonable and proportionate measures to eliminate discrimination on the ground of disability.' The DRC's proposed legislative amendment includes guidance on the factors to be considered in determining whether a measure is reasonable and proportionate. ACDL further recommends that practical examples be included in the legislation or accompanying materials—for instance, an example of what constitutes a 'reasonable and proportionate' measure in the context of schools or other education settings. In addition, codes of practice should be developed to outline the specific steps duty-holders are expected to take to satisfy the duty.

In Victoria, the positive duty does not currently give rise to a standalone cause of action, meaning that individuals cannot lodge a complaint based solely on a breach of the duty. Rather, failure to comply with the duty may be considered during the course of a dispute and inform the terms of any settlement, including agreements to undertake future positive measures. ACDL is of the view that

this approach undermines the intended strength of the duty to prevent discrimination, harassment, and victimisation.

To give full effect to the duty in NSW, ACDL strongly recommends amending the ADA to confer on Anti-Discrimination NSW (ADNSW) explicit powers to investigate and enforce compliance. These powers should include the ability to conduct own-motion investigations, enter into enforceable compliance agreements, and monitor systemic issues. To exercise these functions effectively, ADNSW must be adequately and sustainably resourced. In our view, such reforms would be transformative in addressing discrimination, shifting the system from reactive complaint-handling to proactive prevention and systemic change.

### **ACDL supports further consideration of the introduction of a Public Sector Equality Duty (PSED) in New South Wales.**

We note that in the United Kingdom, the PSED—established under the Equality Act 2010—requires public authorities to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between people who share a protected attribute and those who do not. This duty inserts a proactive and preventative step into the policymaking process, requiring public authorities to assess how their decisions and actions may affect individuals with different protected attributes.

In practice, the PSED requires meaningful engagement with affected communities, including listening to their experiences and incorporating their perspectives into the development of policies and the delivery of public services.

A notable example of the PSED in operation is the response to the Windrush Scandal.<sup>10</sup> Following that event, the UK Equality and Human Rights Commission exercised its enforcement powers to require the Home Office to strengthen its compliance with the PSED. As part of that process, the Home Office implemented several systemic reforms, including:

- Comprehensive PSED training for all staff.
- Improved guidance and advice on PSED compliance for Ministers.
- Regular audits of PSED-related risks; and
- Senior-level ownership and accountability for PSED compliance.

This example shows the PSED's ability to promote institutional accountability and embed equality considerations into public decision-making. ACDL considers that the introduction of a similar duty

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<sup>10</sup> Home Office, [Windrush Lessons Learned Review: progress update](#) (2022), UK Gov.

in NSW calls for sincere consideration and could form a vital part of a modernised anti-discrimination framework.

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