

# **SUBMISSION:**

## **NSW Law Reform Commission Review of the *Anti-Discrimination Act 1977 (NSW)***

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**AUSTRALIAN CHRISTIAN LOBBY**

### **About Australian Christian Lobby**

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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## Overarching comments

### **The Consultation Paper is ambitious in expanding the ADA, when its excesses need to be corrected**

1. The ACL is extremely concerned that the Consultation Paper contemplates the expansion of the ADA on a vast scale, without focusing on changes that are urgently needed to confine some of the existing excesses of the ADA.
2. The ADA needs to be brought more in line with international law, especially in support of the freedoms of religion and expression, and to avoid the prohibitions being too far-reaching. The Consultation Paper is not concerned with achieving this. Instead, it invites comment on innovations which would trigger civil liability more easily, under widened or novel provisions for which there does not exist an appropriate human rights justification, and in many cases the proposals have no precedent in Australia. It contemplates an expansion of antidiscrimination law that would encroach on the right to freedom of religion (article 18), which Australia, as signatory to the International Covenant on Civil and Political Rights (ICCPR), is bound to protect. For clarity, article 18 secures the rights to “manifest one’s religion or beliefs”, including in community with others. Any restriction on the right must be prescribed by law and necessary for particular purposes, “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. The ICCPR holds that freedom of religion is so fundamental to the maintenance of a democratic society that it may not be derogated from, even in times of public emergency.
3. To understand why existing discrimination provisions of the ADA are already sufficient, if not excessive, it is important to grasp some vital differences which exist between the approaches to discrimination under the ADA and under international law. It is not suggested that the international law model be replicated in the ADA. However, the ACL strongly urges that the ADA provisions, at the very least, be adjusted to produce outcomes more consonant with international law principles. This would involve balancing more effectively than at present the protection against discrimination (and related rights) with the freedoms of religion and expression. It involves not triggering liability at too low a threshold, or across excessively wide prohibitions, and it also requires greater recognition for these freedoms in exceptions and exemptions.

### **How the ADA and international law approaches differ in the meaning of discrimination**

4. As is well known, articles 2 and 26 of the ICCPR require discrimination to be prohibited, but the meaning of discrimination under the ADA and the ICCPR differ materially. Excluded from the meaning of “discrimination” in the ICCPR is differentiation where the criteria applied are reasonable and objective and the aim is to achieve a purpose which is legitimate under the ICCPR.<sup>1</sup> The reference to “a purpose that is legitimate under the ICCPR” gives clear recognition to other ICCPR rights that may be engaged. These include the freedom of religion in article 18, and freedom of expression in article 19. The ADA is not currently drafted in a way that admits space to these ICCPR freedoms. The ADA (like similar legislation in other states) is cast in the form of prohibitions and exceptions by fixed category, with the result that an appropriate balance is not achieved for the freedoms of expression and religion (in exceptions). The options discussed in the Consultation Paper would further prejudice those freedoms by expanding the prohibitions on a major scale and reducing the exceptions. Insufficient emphasis is given to restoring these freedoms in the ADA, only to undermining them.

### **Issues concerned with gender and sexuality-related definitions**

5. A phenomenon which the Consultation Paper does not seek to correct but instead aggravates is the powerful position in Australian legislation of definitions like “gender identity” – incorporating a concept of “gender” which displaces established, biologically-based references to “sex”.<sup>2</sup>

*Protection of biological females*

6. The ACL is concerned to ensure that in future the ADA gives proper support to the rights of women and girls (defined by female biology). They are the intended beneficiaries of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Yet a number of proposals discussed in the Consultation Paper would put women and girls at a significant disadvantage, relative to biological males who identify as women.

*Viewpoint suppression is achieved by wide definitions and prohibitions*

7. The ADA has the potential to limit public discussion and expression of different viewpoints, especially on matters of gender and sexuality. It is of utmost importance that this be addressed in the current review, especially to allow freedom of expression and religion their proper scope. The vilification provisions, and discrimination provisions in the ADA must respect the freedom of expression (in article 19 of the ICCPR) by not extending beyond the limits set out in article 19(3).
8. The incidence of claims made in different states and territories as a result of excessively low-threshold discrimination and vilification legislation is of major concern. They have been brought in response to: simple advocacy for the rights of women (Kirrallie Smith, Senator Claire Chandler), or the rights of children (Katrina Tait, Lyle Shelton); the expression of religious doctrine by a Catholic Archbishop (Julian Porteous); and where a psychiatrist raised concerns about the use of puberty blockers and cross sex hormones in connection with gender distress (Jillian Spencer). These and further examples of individuals targeted unjustly for their faith are attached as Appendix A.
9. The result of legislation enabling such claims (whether they succeed or not) is self-censorship on a scale that cannot be measured. The relevant standard of free speech that needs to be recovered in the ADA goes beyond the implied freedom of political communication. It should reach the minimum standards for the freedoms of expression and religion, which Australia is bound to secure under the ICCPR.

*Social division should be avoided*

10. A further major concern is that antidiscrimination law in Australia is becoming socially divisive. Some of the emerging definitions of “gender identity” and “sexual orientation” operate to enforce conformity with the ideas embedded in those definitions. Few Australians can be taken to be aware of, still less share or support, a reimagining of the ordinary understanding of male/female difference expressed in such definitions. When evolving ideas about gender have the force of law in legislative prohibitions, the result is that widely held understandings based on binary norms are not only swept aside but themselves are considered harmful when expressed, because they are seen as discriminatory, hostile or hateful towards those whose attributes are protected. The effect of over-enlarged antidiscrimination legislation is to put in conflict with the law those who hold religious or traditional beliefs, or who are of a more conservative mindset, simply because they express opinions which do not affirm the tenets of gender identity incorporated within those definitions.
11. The substance and boundaries of international law should be observed so that discrimination and vilification laws do not have such overreach.

**General**

12. The above concerns relate especially to the use of unnecessarily broad gender and sexuality-related definitions, the excessive scope of discrimination and vilification prohibitions, their operation at too low a threshold, and the expansion of harassment-related provisions beyond the scope of “sex” in its binary biological sense.

## Responses to Consultation Paper questions:

### 3 Tests for discrimination

#### **Q3.1: Direct discrimination – Could the test for direct discrimination be improved or simplified? If so, how?**

13. Yes. The test for direct discrimination could (and should) be improved by narrowing it to achieve outcomes consistent with international law (see Overarching Comments above).
14. As to the Consultation Paper's question about replacing the current "comparator test" with an "unfavourable treatment" test, we note a Federal Law Review article<sup>3</sup> which explains that the most common understanding of an "unfavourable treatment" test would render it "radically over-inclusive". Adopting such a test would also make the ADA inconsistent with the law in some other Australian jurisdictions.<sup>4</sup>
15. We also oppose the test being "improved" or "simplified" in any way which effectively widens it.

#### **Q3.2: The comparative disproportionate impact test – Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?**

16. No. The test for indirect discrimination could (and should) be improved, by narrowing it to achieve outcomes consistent with international law (see Overarching Comments above).

#### **Q3.3: Indirect discrimination and inability to comply – What are your views on the "not able to comply" part of the indirect discrimination test? Should this part of the test be removed? Why or why not?**

17. There is no pressing need to remove any part of the existing indirect discrimination test to widen it.

#### **Q3.4: Indirect discrimination and the reasonableness standard**

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

18. The test for indirect discrimination could (and should) be improved by narrowing it to achieve outcomes consistent with international law (see Overarching Comments above).

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

19. See response to Q3.4 (1).

#### **Q3.5: Indirect discrimination based on a characteristic – Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?**

20. No. The existing prohibition on indirect discrimination is sufficient. It should not be extended in that way.

### **Q3.6: Proving indirect discrimination**

*(1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?*

21. No. None of the arguments advanced in the Consultation Paper justify shifting the burden of proof to respondents.

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

22. No. See response to Q3.6(1) above.

### **Q3.7: Direct and indirect discrimination**

*(1) How should the relationship between different types of discrimination be recognised?*

23. The ADA does not need to recognise the relationship between different types of discrimination in any new way. As discussed in our response to Q3.7(2) below, the existing provisions already recognise that there is a distinction between direct and indirect discrimination, and this should not change.

*(2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?*

24. Yes. The ADA should retain the existing distinction between direct and indirect discrimination.

25. While some may argue that it would reduce confusion to clarify that the two concepts are not mutually exclusive,<sup>5</sup> doing so could also potentially create confusion as these concepts have been treated distinctly in NSW.

### **Q3.8: Intersectional discrimination**

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

26. No. We strongly oppose the ADA protecting against “intersectional discrimination”. Currently, the ADA has separate sections which set out the tests for discrimination for each attribute. There is no need to introduce intersectional discrimination protections simply because the ADA does not explicitly acknowledge that people may have more than one attribute.<sup>6</sup> Ultimately, the ADA already provides sufficient protection against discrimination based on each attribute.

27. Entrenching the concept of ‘intersectionality’ in the ADA would also encourage people to see discrimination in a way that is unbalanced and excessively victim-focused.

28. Intersectional discrimination protections would be even more concerning if the ‘burden of proof’ were shifted to respondents in any way (as suggested by Q3.6 above).

29. We also agree with the point made in the Consultation Paper that “allowing complaints to be based on overlapping attributes may increase complexity”.<sup>7</sup> As the Consultation Paper also acknowledges, this change “could also mean the ADA covers more instances of discrimination”,<sup>8</sup> which we oppose.

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

30. This should not be achieved. See answer to Q3.8(1) above.

### **Q3.9: Intended future discrimination – Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?**

31. No. The ADA does not currently protect against intended future discriminatory conduct,<sup>9</sup> and it should not be extended on this basis.

## **4. Discrimination: protected attributes**

### **Q4.1: Age discrimination**

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

32. None. We note that the NSWLRC did not receive any options in preliminary submissions suggesting any changes to the definition or scope of this attribute.<sup>10</sup>

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

33. None. No changes should be made to the age-related exceptions.

### **Q4.2: Discrimination based on carer’s responsibilities**

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

34. None. There is no need to change how the ADA expresses and defines the protected attribute of ‘responsibilities as a carer’. We are not aware of any evidenced suggestion that this definition does not already cover any carer relationships that it otherwise should.

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

35. No – the ADA should not separately protect against discrimination based on parental status.

### **Q4.3 Disability discrimination**

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

36. None. No changes are needed.

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

37. No. The Consultation Paper discusses the possibility of adding “a genetic predisposition” to disability in the definition of “disability” or adding “genetic information” as a separate protected attribute. The Consultation Paper notes that in some cases, the ADA can already protect against discrimination based on genetic information, as it covers discrimination based on a possible future disability.<sup>11</sup> We are not aware of any suggestion this is actually occurring, to justify broad legislative protections.

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

38. We do not support any changes to the existing public health exception to narrow it in any way.

### **Q4.4: Discrimination based on homosexuality – What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “homosexuality”?**

39. The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* added a new definition to the Sex Discrimination Act 1984 (Cth) (SDA) for “sexual orientation”, meaning “a person's sexual orientation towards (a) persons of the same sex; or (b) persons of a different sex; or (c) persons of the same sex and persons of a different sex”. (“Sex” must be understood in its biological sense.) The SDA definition would suffice for the purposes of the ADA. It has the

advantage of including heterosexuality, which is important. The UK's Equality Act 2010 defines "sexual orientation" in terms of orientation towards persons of the same, opposite, or either sex (this is consistent with the SDA).

40. Victoria's definition should not be adopted in the ADA, of "a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender".<sup>12</sup> It extends beyond matters understood as relating to "orientation", to particular behaviours (intimate or sexual relations) which should not be the subject of attribute-based protection.
41. The NSWLRC also should not adopt any of the more "flexible" options discussed in the Consultation Paper, which "include" certain sexuality and/or sexual orientations, but are not limited to those specifically listed.<sup>13</sup>
42. We also oppose any new definition of "asexuality", because no case has been made out for it, and it is not found in other jurisdictions, i.e. a "lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relation" with others.<sup>14</sup>

**Q4.5: 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"?**

43. We would oppose any changes that widen the existing definition.

**Q4.6: Racial discrimination**

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

44. None. There is no need to make any changes to prohibit discrimination based on caste and language (including someone's accent).<sup>15</sup> If "immigrant status" were added, it could seriously limit public discussion on issues of immigration, and the existing coverage of colour, nationality, descent, ethnic origin, ethnoreligious origin, and national origin is sufficient.<sup>16</sup>

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

45. No.

**Q4.7: Sex discrimination**

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

46. **Gender vs sex discrimination:** The definition of "sex" should be clarified so that it is explicitly confined to biological sex, to the exclusion of any concept of "gender", the meaning of which is unstable, reflecting gender-fluid and other 'non-binary' ideological concepts. Such clarification is necessary for as long as "sex" in the SDA imports gender ideology by being "changeable and not necessarily binary" (as the recent judgment in *Tickle v Giggle* indicates). The beliefs on which the concept of "gender" is now based are contested in many spheres and stand in stark contrast to traditional views about gender and sexuality. See Overarching comments above.
47. **Binary vs non-binary language:** The Consultation Paper asks whether the ADA should still use "binary concepts" to define sex discrimination, including defining 'man' and 'woman'. The answer is yes, where the intention is to safeguard the rights of biological females as expressed in CEDAW, and in other circumstances when it is appropriate to differentiate between males and females.

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

48. No. There is no need to separately prohibit discrimination based on pregnancy and breastfeeding independently of sex discrimination. Public discussion about breastfeeding, should not constitute discrimination or vilification.

**Q4.8: 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”?**

49. The Consultation Paper raises the potential to replace “transgender grounds” with an alternative protected attribute of “gender identity”.<sup>17</sup> We strongly oppose anything like the current SDA or QLD definitions of “gender identity”,<sup>18</sup> as problematic, for the reasons we have given in our Overarching comments above, particularly under the headings “Protection of biological females”, “Viewpoint suppression is achieved by wide definitions and prohibitions” and “Social division should be avoided”. Those Overarching comments should be treated as repeated here. The SDA and QLD definitions reflect a firm commitment to the denial of heteronormativity and heteronormative assumptions. They are also associated with a strongly anti-religious (especially anti-Christian) belief system.
50. In the UK, instead of the concept of “gender identity” the relevant protected characteristic is “gender reassignment”, i.e. “if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”. The UK definition is confined and far easier to understand than most Australian definitions and should be adopted.<sup>19</sup>
51. The Yogyakarta Principles do not have the legal authority of international law too often attributed to them.<sup>20</sup> They are not consistent with international law if they conflict, as they do in the SDA and QLD definitions, with CEDAW and the ICCPR. The ADA should be aligned with ICCPR and Australia’s international treaty obligations, not with the Yogyakarta Principles.

**Q4.9: 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?*

52. No. The Consultation Paper mentions that the ADA currently protects against discrimination based on someone’s past or future disability, or their past or future carer’s responsibilities, and raises the potential of extending this feature to other attributes protected from discrimination.<sup>21</sup> The case for such an extension has not been made out. We especially oppose protections for attributes that a person merely “may have in the future”, as it covers attributes a person may not actually ever have.
53. The Consultation Paper also discusses the potential to only extend discrimination to an attribute that someone is actually “planning” or “proposing” to adopt in the future. This is not shown to be necessary and is only based on one isolated recommendation in WA.<sup>22</sup>

*(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?*

54. No. As the Consultation Paper mentions, the ADA already provides relevant protections.<sup>23</sup>

## 5. Discrimination: Potential new protected attributes

### Q5.1: Guiding principles – What principles should guide decisions about what, if any, new attributes should be added to the ADA?

55. The NSWLRC should proceed very cautiously in making decisions about adding any new attributes. It should be guided by an underlying principle which favours no widening the ADA other than in exceptional cases where the case for change has been clearly made out.

### Q5.2: 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?*

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

#### *The need to add a new ADA protection against discrimination on the basis of religious attributes*

56. We strongly advocate for one new attribute to be added to the ADA prohibiting discrimination on the basis of religious attributes.
57. Our former submission set out the case for this. We explained that it would bring the ADA into line with the approach in almost every other Australian jurisdiction and address a deficiency identified in previous reviews.<sup>24</sup> Religion is recognised as a protected attribute in article 26 of the ICCPR, which establishes the right to equality before the law and equal protection under the law.
58. NSW is one of only two jurisdictions which do not protect religious belief or activity in its relevant anti-discrimination act (the other jurisdiction being SA). The ADA should also clearly prohibit discrimination on the basis of religious attributes. There is an evident need to provide proper protection against discrimination on such grounds in NSW law.
59. Firstly, this would better promote the equal enjoyment of rights by ensuring that religious attributes attract similar protections to those which currently exist for other attributes protected by the ADA. A person's religion and their identity as a person of faith are just as important as any other protected attribute in anti-discrimination law.<sup>25</sup> It is therefore deserving of the same protection afforded to other protected attributes. This would also better reflect contemporary community standards. In this context, NSW is clearly the 'outlier' as most other jurisdictions protect religious attributes. This deficiency in NSW law clearly requires correcting.
60. Previous reviews have highlighted the need for NSW anti-discrimination laws to protect religious attributes. For example, in 2017, the Federal Government appointed an Expert Panel into Religious Freedom, chaired by the Hon Philip Ruddock ('Ruddock Review'),<sup>26</sup> to examine whether Australian law adequately protects the human right to freedom of religion.<sup>27</sup> The Panel provided a report in 2018 ('Report'),<sup>28</sup> which explicitly recommended this outcome in NSW.<sup>29</sup>
61. The Consultation Paper mentions by way of context, "existing religious protections" under the ADA, relating to race (ethno-religious discrimination), and the religious exceptions with a limited scope. They do not provide protection on the basis of religious attributes, comparable to other protected attributes under the ADA.

#### *Other options for new protected attributes raised in the Consultation Paper*

62. The Consultation Paper raises a range of other options for new protected attributes,<sup>30</sup> which we do not support.

63. **Irrelevant criminal record:** We align with the 1999 NSWLRC recommendation against including lapsed criminal convictions as an attribute, as other laws deal with spent convictions and when a criminal record must be disclosed.<sup>31</sup> We also note the concerns of the QLD Government that such an attribute could affect government decision-making on issues such as weapons licensing, police protection notices or security provider licensing.<sup>32</sup>
64. **Domestic and family violence ('DFV'):** The Consultation Paper raises concern about discrimination against victim-survivors of DFV regarding accommodation, work and education. However, it also points out that the AHRC, while supportive of a new prohibition, thought its framing needed further consideration.<sup>33</sup> We suggest consideration not be given to this issue at this stage, until the issue is fully developed.
65. **Health status:** As the ADA's definition of disability is likely to cover people with HIV/AIDS and some cases of drug or alcohol addiction,<sup>34</sup> there is little reason to add a new "health status" attribute.
66. **Irrelevant medical record:** The potential for overlap with discrimination based on medical history, as an aspect of disability discrimination, weighs against this proposal.
67. **Industrial activity:** As this is already protected by industrial laws, it need not be the subject of an additional attribute.<sup>35</sup>
68. **Political belief, conviction, opinion, affiliation or activity:** The Consultation Paper raises the potential to protect political belief, conviction, opinion, affiliation and/or activity. This would be a positive step, given that political opinion is a prohibited ground of discrimination in the ICCPR. As with all forms of protection against discrimination, there should be no protection for the beliefs, convictions, ideologies etc. themselves.
69. **Physical features/appearance:** We agree with the NSWLRC's 1999 conclusion that this concept could not be articulated clearly.<sup>36</sup>
70. **Intersex status/sex characteristics:** The ACL is not opposed to protection on the ground of "intersex status" where it is defined specifically, unambiguously and narrowly, to refer to medically recognised intersex status related genitalia at birth, chromosomal issues, and endocrine function. It must not extend to and be confused with broader "sex characteristics", e.g. of biological males who identify as transwomen, and who qualify for protection under a separate ground. "Sex characteristics" is an attribute which is much wider than intersex status and has unclear scope. It should not be used in any ADA changes. It has great potential to undermine the "sex"-based rights of biological females.
71. **Sex work, lawful sexual activity and occupation:**
  - a. **Specific protections for 'sex workers':**<sup>37</sup> ACL supports the Nordic model approach to prostitution, which involves punishing the purchase of sexual services, and promoting exit programs for sex workers, recognising their economic vulnerability. The Nordic model is premised on sex work being inherently exploitative and degrading. The creation of a new ground of protection for "sex workers" would create legal blindness to the vulnerabilities of women in the sex industry and their children. It would stand in the way of the implementation of the Nordic model, because practical support is taken to be provided on the basis that the beneficiaries are in some way afflicted or pathologised.

In response to a previous suggestion to legislate protection from discrimination for sex workers, the NSW Legislation Review Committee observed that, given the ambiguity of the characteristics to be protected (i.e. characteristics which might be said to generally pertain to or be imputed to sex workers), the prohibition could have broad application, potentially limiting "the rights of individuals including employers, educational authorities, providers of goods and services, and registered clubs, including the freedom of association and contract."<sup>38</sup> A new ground of protection

for “sex workers” also raises particular concerns regarding the protection of children, since it prevents measures being imposed, when they need to be, in connection with premises used as brothels, which are different from other workplaces where children live. Related issues concern the location of brothels, such as their proximity to schools.

The Bill effectively extends similar anti-discrimination protections under the Act on the grounds of age, sex and race to a group of persons identified by a certain employment history, being sex work. As they are modelled on existing anti-discrimination laws, these new anti-discrimination provisions cover all circumstances of employment and other areas of life where discrimination may be present. The Committee notes that the Bill makes it unlawful to discriminate on a characteristic that generally pertains or is imputed to sex workers. Given the ambiguity of what may amount to such a characteristic, the Bill may have a broad application. Therefore, the Bill may limit the rights of individuals including employers, educational authorities, providers of goods and services, and registered clubs, including the freedom of association and contract.

- b. **Protections for ‘lawful’ sexual activity:**<sup>39</sup> ACL opposes such an additional ground of protection. As with “sex workers”, “lawful sexual activity” is not an identity but an activity or behavioural choice. The additional ground would treat measures which properly limit sexual activity as discriminatory, including conduct codes and policies in schools and other sensitive environments. The effect of such an additional ground would be to enforce social acceptance of sexual activity and behaviors beyond community standards. We also note that jurisdictions with protections of this kind have repealed exceptions that allowed people to refuse accommodation to someone intending to use it for lawful commercial sexual activity.<sup>40</sup>
  - c. **Wider protection for ‘profession’, ‘trade’, ‘occupation’ or ‘calling’:**<sup>41</sup> Such an additional ground may have the same effect as the specific protections for “sex workers” which we could not support, because they do not protect sex workers in the way that is needed, but instead facilitate their exploitation.
72. **Socio-economic status:** The Consultation Paper discusses the potential to prohibit discrimination based on certain features relating to socio-economic status (accommodation status, homelessness, employment status, social origin)<sup>42</sup> to “help protect the rights of some of the most vulnerable members of the community.”<sup>43</sup> There is little precedent for specific protection in such forms. More importantly, discrimination law is not considered to be the appropriate means for helping protect those in need because of their socio-economic status.
  73. **Scope of protection/Definition of ‘religious belief’, ‘religious affiliation’ or ‘religious activity’:** In our view, religious attributes in the ADA should include both religious belief, affiliation and/or conviction and religious activity and/or conduct, and potentially also other characteristics related to religion such as religious appearance or dress.
  74. As discussed in response to Q5.2(1), we note that other Australian jurisdictions protect religious belief, activity, conviction and/or affiliation, and (in SA) religious appearance or dress. The ICCPR requires protection against discrimination, under articles 2 and 26, on grounds of “religion”. The Ruddock Review expressly recommended that NSW protect against discrimination on the basis of a person’s ‘religious belief or activity’.
  75. Protection should extend to legal entities, since they are the vehicles through which fundamental rights concerning religion and belief are enjoyed, and religious communities are organised.
  76. Whatever protection is extended under the ADA on religious grounds, ACL would emphasise that it must not itself impose any new restrictions on the expression of religious or other views. Discrimination legislation should not have such an effect, but if wrongly conceived, it could well do. We

therefore recommend close liaison with religious stakeholders to ensure this cannot happen in any amending legislation.

77. We would be concerned about definitions covering *not* holding a religious belief and *not* engaging in religious activity. It seems illogical to protect those who do not hold a religious belief or engage in religious activity in a protected ground intended for people with religious attributes. Any proposals for change must not enlarge the power of anti-religious activism against those who hold and practise religious beliefs, e.g. by treating as discriminatory the private or public critique, deconstruction, or critical evaluation of non-religious beliefs, ideas, ideologies, theories, philosophies, practices and policies.
78. **Lawfulness:** The Consultation Paper mentions laws which only prohibit discrimination based on “lawful” religious activities and/or beliefs.<sup>44</sup> We do not support this qualification. It is unnecessary and imposes uncertainty as to the laws in question (including international law).<sup>45</sup>
79. **ATSI religious beliefs:** The Consultation Paper considers explicitly recognising the rights of ATSI peoples, e.g. in a definition that would include “Aboriginal spiritual belief or activity”.<sup>46</sup> In our view this is unnecessary, and the definition should not recognise only one type of religious belief.
80. **Religious appearance or dress:** The Law Reform Commission of WA (‘LRCWA’) recently recommended such a ground be included,<sup>47</sup> and as noted above we would support it.
81. **Broader attribute:** The Consultation Paper discusses the addition of a broader attribute that protects freedom of thought, conscience and religion.<sup>48</sup> This could partially implement article 2 of the ICCPR if it meant a prohibition against the discriminatory enjoyment of the freedom of thought, conscience and religion. We would potentially support this, but would need greater clarity on the proposal.
82. **Relationship with race discrimination:** ACL is of the view that there are benefits in maintaining the definition of ‘race’, provided broader protections are extended to people of faith.<sup>49</sup>

*(3) If any of new attributes were to be added to the ADA, would any new attribute specific exceptions be required?*

83. If religious attributes are added to the ADA, the answer to whether a new attribute-specific exceptions may be required depends on the text and its impact.

**Q5.3: An open-ended list – Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?**

84. No. The ADA should only recognise a specific and fixed list of attributes in respect of discrimination.

## **6. Discrimination: Areas of public life**

### **Q6.1: Discrimination at work — coverage**

*(1) Should the definition of employment include voluntary workers? Why or why not?*

85. No. The definition of employment should not be expanded to include voluntary workers.
86. The relationship between employers and unpaid workers or volunteers is inherently different from other employment relationships, and volunteer work should not be discouraged or prevented by unnecessary discrimination obligations.

*(2) Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment? Why or why not?*

87. No. The ADA should not adopt any broader approach to discrimination in work. We generally oppose any broader approach to discrimination, for the reasons given above, in our Overarching comments.

*(3) Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not?*

N/A

## **Q6.2: Discrimination in work — exceptions**

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

88. We generally oppose the exceptions being removed or narrowed for the reasons given above, in our Overarching comments, and would also make the following specific comments.
89. **Employment for private households:** The protections against discrimination for applicants and employees do not apply to employment for a private household.<sup>50</sup> Most other discrimination laws in Australia contain a similar exception.<sup>51</sup> The purpose of the exception is to protect privacy, which discrimination law should not intrude upon.
90. **Employment by small businesses:** Another exception applies to employers with 5 or less employees, which covers all protected attributes except for race and age. The NSW Treasury Policy and Guideline Paper TPP22-08 defines a business as having an aggregated annual turnover or less than \$10 million and fewer than 20 FTE employees.<sup>52</sup> This is also the definition adopted by the Australian Bureau of Statistics. We recommend that this definition should be reflected in the NSW exception. Small businesses provide employment opportunities, which should be encouraged.
91. **Discrimination by small partnerships:** Prohibitions against discrimination by partnerships only apply to firms of 6 or more partners. For the same reason, we also oppose the removal of this exception.
92. **Persons addicted to prohibited drugs:** The disability discrimination protections do not apply if the disability relates to addiction to a prohibited drug, and the person discriminated against is addicted to it at that time.<sup>53</sup> We consider it is entirely reasonable that discrimination may occur in respect of a person because they are currently addicted to a prohibited drug. There is no need to remove the exception. Particularly since other states have legislated the use of some illicit drugs, there should be the ability for NSW employers, for example, to require employees to remain free of drug influence in the conduct of their duties, without this being regarded as unlawful discrimination.
93. **“Inherent requirements” and “unjustifiable hardships” exceptions:** We note that the ADA allows some duty holders to discriminate against someone who is unable to carry out the “inherent requirements” of the role. This applies to discrimination based on disability and carer’s responsibilities. It also applies if someone requires services, facilities or arrangements to meet inherent requirements, and it would cause “unjustifiable hardship” to provide them.<sup>54</sup> We would oppose any reform which places additional burden on duty holders regarding the “inherent requirements” exception (which would again essentially extend the reach of the ADA). We note the Consultation Paper’s acknowledgement that the FWA also contains an “inherent requirements” exception to its protections,<sup>55</sup> and evidently, the Disability Discrimination Act 1992 (Cth) also does.
94. **Genuine occupational requirement (‘GOR’) exceptions:** Broad exceptions apply to certain attributes considered an occupational qualification (e.g. permitting discrimination based on race, sex or age for “authenticity” in entertainment, art, performance, or provision of food or drink; or to provide welfare or similar services to people of that same race, sex or age).<sup>56</sup> We do not support removing or narrowing such exceptions.

95. **Discrimination against young people:** Exceptions to age discrimination apply to the employment of people under 21 years old (an exception which can be removed by proclamation).<sup>57</sup> We oppose the removal or narrowing of this exception. As the Consultation Paper points out, the FWA already specifies that modern awards can include minimum wages, including wage rates for junior employees.<sup>58</sup>
96. **Discrimination against married couples:** The Consultation Paper notes that it is not unlawful to discriminate based on marital or domestic status, if a job is one of two to be held by a married couple. We would oppose the exception being restricted, as other discrimination laws have similar exceptions.<sup>59</sup>
97. **Employment outside NSW:**  
N/A

### **Q6.3: Discrimination in education**

*(1) What changes, if any, should be made to the definition and coverage of the protected area of “education”?*

98. None. There does not appear to be sufficient justification for changes to the definition and coverage.

*(2) What changes, if any, should be made to the exceptions relating to:*

*(a) single-sex educational institutions*

99. We strongly oppose the addition of text in the ADA prohibiting discrimination against transgender-identifying students by single-sex schools (as proposed in the Consultation Paper). If any change is made, the exception should be amended to expressly clarify that single-sex schools are not acting unlawfully in excluding students of the opposite-sex.
100. The Consultation Paper summarises the position that the prohibition against sex discrimination does not apply to single-sex educational institutions, including both public and private schools. An institution is considered single-sex even if it admits transgender people who identify with the sex of those for whom the institution functions. They can lawfully refuse, or fail to accept, an application from someone of the opposite sex.<sup>60</sup> It is also important that such schools not be forced to accept or affirm the tenets of transgender ideology, even indirectly.

*(b) disability and age discrimination in educational institutions?*

101. None. We are not aware of any compelling need for reform in this area.

### **Q6.4: 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”?**

102. None. We are not aware of any compelling need for reform in this area.

### **Q6.5: Superannuation services and insurance exceptions**

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

103. None. We are not aware of any compelling need for reform in this area.

**Q6.6: The provision of goods and services — exceptions**

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

104. None. We are not aware of any compelling need for reform in this area. The ADA should not interfere with the provisions of gifts or wills, and there may be justification for providing holiday tours and concessions to people of a certain age.

**Q6.7: Discrimination in accommodation — coverage**

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

105. None. We are not aware of any compelling need for reform in this area.

**Q6.8: Discrimination in accommodation — exceptions**

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

106. None. We are not aware of any compelling need for reform in this area.

**Q6.9: Discrimination by registered clubs — coverage**

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

107. None. We are not aware of any compelling need for reform in this area.

**Q6.10: Discrimination by registered clubs — exceptions**

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

108. **New exception for religious clubs:** Whether or not religious protected attributes are added, an exception is appropriate to permit religious discrimination by clubs established for people of a particular religion or belief (as recommended by the NSWLRC in 1999), so they have the same protections as cultural groups.<sup>61</sup>

109. **Exceptions to sex discrimination:** The Consultation Paper asks whether the exception which allows clubs for members of one sex to exclude someone of the opposite sex should be repealed. We would not support the repeal of this exception. We also support the exception allowing clubs to discriminate against members based on sex if it is not practicable to offer the club’s benefits or services to men and women simultaneously or to the same extent. We would agree with the view of the NSWLRC that there could be legitimate reasons for applying the exception, including where it would be inappropriate for women and men to share facilities simultaneously.<sup>62</sup>

**Q6.11: Discrimination based on carer’s responsibilities**

*(1) Should discrimination based on carer’s responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why?*

110. We are not aware of any compelling need for reform in this area.

*(2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?*

111. No. Discrimination should not generally be prohibited in all protected areas for all protected attributes. It is important that anti-discrimination law apply only where, and in a manner that is justified to address unlawful discrimination (i.e. where there are no objective and reasonable grounds for differential treatment).

#### **Q6.12: Additional areas of public life**

*(1) Should the ADA apply generally “in any area of public life”? Why or why not?*

112. No. The ADA should not apply generally “in any area of public life”. That would expand the application of the ADA without proper restraint. It is important that anti-discrimination law apply only where, and in a manner that is justified to address unlawful discrimination (i.e. where there are no objective and reasonable grounds for differential treatment).

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

113. No. The ADA should not specifically cover any additional protected areas. We are not aware of any compelling need for reform to that end.

## **7. Wider exceptions**

### **Q7.1: Religious personnel exceptions**

*(1) Should the ADA provide exceptions for:*

*(a) the training and appointment of members of religious orders?*

114. Yes – The ADA should provide exceptions regarding the training and appointment of members of religious orders. We would support s56(a) and (b) being broadened, but not narrowed in any way.

115. The Consultation Paper acknowledges that such exceptions “are closely tied to the exercise of religious freedom”,<sup>63</sup> which underscores their critical importance. It also notes that most other Australian discrimination laws have similar exceptions, and that preliminary submissions generally supported excluding the appointment and education of religious leaders from discrimination prohibitions.<sup>64</sup>

116. However, the Consultation Paper mentions that the exceptions might be amended to better reflect “the diversity of descriptions of religious leaders across religions”, and/or “not focus on the Christian faith alone”. That in principle would be acceptable.

117. The ACL is concerned that requiring the “discrimination” to be necessary to comply with the doctrines, tenets or beliefs of a religion for the exception to apply, in s.56(d), is already narrow, and the exception should not be narrowed further. The word “discrimination” is in inverted commas to make the point that under international law, any conduct falling within the religious exceptions does not amount to discrimination in the first place, as explained in our Overarching comments above.

*(b) “the appointment of any other person in any capacity by a body established to propagate religion”?*

118. Yes. The ADA should provide exceptions regarding the appointment of any other person in any capacity by a body established to propagate religion. We do not support the exception in s56(c) being narrowed in any way.

119. The Consultation Paper discusses ADA s56(c) and “a range of ways it could be changed” if it is considered too broad.<sup>65</sup> For example, it notes that the ADA does not explain what a “body established

to propagate religion” is, and this has been found to include charitable institutions established by churches.<sup>66</sup> It could potentially also include religious educational institutions (REIs/REAs),<sup>67</sup> and is wide enough to cover appointments to roles that do not have a religious character.<sup>68</sup> We reject any assertion that the existing exception is too broad.

120. The Consultation Paper specifically discusses options for inherent requirements, reasonableness and proportionality tests, adherence to religious beliefs and/or practices, and duties relating to religious observance/practice. We understand that each of these proposals would significantly narrow the existing exception, and we therefore specifically oppose each of them. In our view, it is entirely appropriate that any body established to propagate religion (including charitable institutions established by churches, and REIs) should have the benefit of a wide exception regarding appointments to any role, as even roles that do not have a specifically religious character can still be, and are, important to the functioning and mission of a body established to propagate religion. If the NSWLRC does recommend changes to narrow the exception, it should preference the broadest possible alternative, in close liaison with stakeholders.

*(2) If so, what should these exceptions cover and when should they apply?*

121. As discussed above in Q7.1(1)(a) and (b), the exceptions should not be narrowed in any way (they should be broadened to meet the requirements of international law).

**Q7.2: Other acts and practices of religious bodies – Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?**

122. Yes. The ADA should provide an exception for other acts or practices of religious bodies.

123. The Consultation Paper claims that s56(d) has “wide” scope.<sup>69</sup> It does not, in light of the meaning of “discrimination” in international law, and the obligation to give effect to article 18 of the ICCPR (see our Overarching comments above). The exceptions should give more ample effect to article 18, at least in general terms, or in an acknowledgment that article 18 is fully supportive of the exemptions (even if inadequately expressed in them).

124. We agree with the views expressed in other submissions<sup>70</sup> that the current religious exceptions should be retained because they safeguard freedom of thought, conscience and religion (at least they do so to a minimal extent). We disagree that any narrowing of the scope of s56(d) is possible while respecting freedom of religion, given the lack of any other positive protections for religious freedom under the ADA.

125. We understand that each of these proposals in the Consultation Paper would significantly narrow the existing exception, and we therefore specifically oppose each of them. (These include expressly excluding REIs from the exception; limiting the exception to certain attributes; requiring reasonableness and proportionality even within the narrow scope of the exclusions; applying special rules for religious bodies providing public goods and services; and replacing the exception with area-specific exceptions). In our view, it is entirely appropriate that any body established to propagate religion (including charitable institutions established by churches, aged care services run by religious organisations and REIs) should have the benefit of a wide exception.

**Q7.3: Exceptions for other forms of unlawful conduct – Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?**

126. Yes. Consistent with the above comments, the general exceptions for religious bodies should continue to apply across the ADA, including to all forms of unlawful conduct (including discrimination, harassment, victimisation and vilification).

127. The UN Special Rapporteur on freedom of religion or belief has explicitly warned against state intrusion into the affairs of religious institutions:

*Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long-term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution.<sup>71</sup>*

Further,

*Questions of how to institutionalise community life may significantly affect that religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions ... It cannot be the business of the State to shape or reshape religious traditions.<sup>72</sup>*

128. The failure by the government to allow for religious schooling on terms that support article 18 would be a major shortcoming.

**Q7.4: Exceptions for providers of adoption services – Should the ADA have a specific exception for providers of adoption services? If so, what should it cover and when should it apply?**

129. Yes. The ADA should retain the existing exception for providers of adoption services.
130. This exception is important to faith-based adoption agencies because same-sex adoption is incompatible with some religious views. Whilst many children live in family structures that do not contain both a mother and father, this is often by tragic circumstance or desertion. Alternate family structures do not necessarily preclude good outcomes for children, but faith-based adoption agencies should not be required to facilitate a situation that from the outset does not include both a mother and father, especially where there are many willing couples and few children in need of adoption. The “best interests of the child” are paramount, and views differ over how this is achieved.

**Q7.5: 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?*

131. Yes. The ADA should contain exceptions for private educational authorities (PEAs). We are especially motivated to ensure that exceptions continue to exist for REIs, but the exceptions should also apply to PEAs. This includes (but is not limited to) exceptions regarding employment.

*The case for retaining exceptions for both PEAs and REIs generally*

132. As expressed in our former submission, a clear case exists for PEAs and REIs having access to exceptions under the ADA. As our former submission discussed,<sup>73</sup> we support the fact that the ADA effectively does not apply to certain acts of “discrimination” by private schools under the existing provisions (noting they are not acts of “discrimination” under international law). Private schools are by their very nature private communities. They are set up for the specific purpose of creating distinct schooling environments which reflect certain (religious) attributes among their employed staff and

student cohorts. They are not areas of public life in respect of which discrimination on the grounds of employment or other matters such as sex, transgender grounds, marital or domestic status, disability, homosexuality, or age should be unlawful. Otherwise, there would be very little distinction between such schools and other educational authorities, undermining the very reason for their existence, based on religious ethos. There has also been no discernible problem regarding the existence or operation of the existing provisions in this regard since the ADA was introduced in NSW in 1977. There is therefore no compelling rationale for amending those provisions.

133. We would also agree with the other preliminary submissions which are referred to in the Consultation Paper as having supported exceptions for REIs in particular because they allow:<sup>74</sup> protection of the right to freedom of thought, conscience and religion; schools to maintain their ethos and identity in all aspects of school life, including by employing staff and preferring families whose values align with the school's ethos; parents the freedom to choose a faith-based schooling environment for their child, that aligns with their religious and moral convictions; and schools to teach a distinctive worldview.
134. Australian Bureau of Statistics data shows that non-government schools are far from 'outdated' in Australia. Over the last five years, enrollments to Catholic and independent schools together have steadily increased as a percentage of overall student figures, showing these are a popular choice for parents.<sup>75</sup> In NSW, enrollments to Christian schools have increased by more than 30% in the last decade.<sup>76</sup> While there may be many reasons for this, including the lack of government schools in areas of new development, it provides a strong indication that contemporary community standards still predominantly reflect religious values.
135. The Consultation Paper mentions the argument that religious schools should be subject to secular laws since they receive public funding and tax benefits.<sup>77</sup> Government funding is provided for religious schools in recognition of the fact that parents of students in faith-based schools also fund public education through their taxes and that any other outcome would be inequitable, particularly given that religious schools alleviate the burden on the public education system significantly. The fact that religious schools receive government funding is not a license for the state to limit or extinguish their religious character. If this occurred and religious schools shut down, this would necessitate an enormous additional cost and burden to the public education system and tax payer.

*Protections for both PEAs and REIs:*

136. **REIs:** It is essential that REIs be allowed to operate consistently with a religious ethos. The core purpose of REIs is to educate students in accordance with the tenets of a faith, primarily through the staff they employ. REIs must not be forced to reflect only a nominal faith, led by staff who are not fully supportive of and cannot exemplify the doctrines of the faith concerned. No REI could build a genuine "community of faith" in such circumstances. The Consultation Paper notes that most other Australian discrimination laws (including the SDA) contain specific work-related exceptions for REIs.<sup>78</sup> The narrowing of exemptions, for example in Victoria, has caused significant concern about government over-reach and illegitimate interference with the internal affairs of REIs. The current NT Government has indicated that it plans to reintroduce the targeted REIs' employment exception, to "restore religious freedoms".<sup>79</sup>
137. **PEAs:** A similar rationale also exists for retaining exceptions regarding employment/work for PEAs more broadly. PEAs are also set up to create distinct schooling environments that reflect a particular culture and ethos.

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

*(a) what attributes should the exceptions apply to?*

138. The exceptions should not be amended to apply to any narrower scope of attributes. If any new attributes are added to the ADA prohibitions (or existing attributes amended to widen their scope), the exception may also need to be broadened or otherwise adjusted.

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

139. None. No further requirements should be added for the exceptions to apply.

140. We are concerned that some of the approaches proposed in the Consultation Paper would significantly impact the ability of REIs to operate consistently with the faith for which they were established. For example, it would be a serious matter if REIs were only able to discriminate in relation to appointments directly related to religious education (and not other positions), given the importance of REIs having a staff cohort which is consistently able to model religious beliefs and behaviours to the school community. It is vital to many REIs that all staff practice, reinforce and support the religious values and ethos of the REI. Only allowing them to discriminate in the selection, but not also retention, of staff could also be problematic, where those who profess religious belief during their selection are later found unsuitable.

#### **Q7.6: Discrimination against students and prospective students**

*(1) Should the ADA contain exceptions for [PEAs] in education? Should these be limited to [REIs]?*

*The context of education in PEAs and REIs specifically*

141. **REIs:** REIs must be able to favour students for enrolment from families whose faith matches that of the REI. It is also essential that REIs be able to express their religious beliefs in certain decisions about students. REIs should not be forced to conform the fundamental teachings of their religion to inconsistent beliefs or practices, including in some respects when asserted by students. The school's beliefs may also be reflected in conduct and dress codes. We echo other arguments noted in the Consultation Paper that exceptions for REIs are important to protect religious freedom, enabling religious schools to uphold their ethos and values, and give families a choice of education for their children, which supports retention of the exceptions.<sup>80</sup> We also note the Consultation Paper's acknowledgement that some other Australian discrimination laws have exceptions to discrimination in education that apply (only) to REIs.<sup>81</sup>

142. **PEAs:** A similar rationale also exists in relation to retaining exceptions for PEAs more broadly. PEAs should also be able to make decisions about the student cohort which reflect their ethos and values, and support their maintenance of a distinct schooling environment.

143. For these reasons, we support the retention of exceptions for both PEAs and REIs in education.

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

*(a) what attributes should the exceptions apply to?*

144. The exceptions should not be amended to apply to any narrower scope of attributes. If any new attributes are added to the ADA (or existing attributes amended to widen their scope), the exceptions may also need to be broadened or otherwise adjusted.

145. Ultimately, in our view, the exceptions should not be amended to apply to any narrower scope of attributes than currently provided under the ADA, nor should they only apply to REIs but also to PEAs. As topics relating to gender, sex and sexual activity may involve matters of deep religious conviction, any expansion of attributes should also be covered by the existing exceptions, e.g. where expanded from 'homosexuality' (to 'sexual orientation' or 'sexuality' as raised in Q4.4), 'sex' (to 'gender' as raised

in Q4.7), 'transgender grounds' (to 'gender identity' as raised in Q4.8), or by the addition of other relevant new attributes raised in Q5.2, e.g. 'lawful sexual activity'.

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

146. The exceptions should apply to both prospective and existing students. This is appropriate and should not change, for reasons already given.

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

147. None. No further requirements should be added for the exceptions to apply for reasons already given in response to Q7.6.

**Q7.7: 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?**

148. Yes. The ADA should provide exceptions to discrimination and vilification in sport. These are vital, including to ensure sporting competitions remain fair and safe. The existing exceptions should not be narrowed in any way but should cover the same grounds and apply in at least the same circumstances they already do. The exceptions may need to be broadened if other aspects of the ADA's protections are amended to incorporate a wider scope.

*Sex discrimination exception*

149. Under the ADA, it is lawful to exclude people of one sex from participating in any sporting activity (apart from coaching or administration).<sup>82</sup> The Consultation Paper discusses options for more limited exceptions, following the SDA, which only apply to competitive sporting activities for those over 12, where the strength, stamina or physique of competitors is relevant to the activity, and/or where the restriction is "reasonable, proportionate and justifiable in the circumstances".<sup>83</sup> It should be noted that the rewording of the SDA referred to here – and guidelines for transgender inclusion in sport developed subsequently on the basis of asymmetric consultation with transgender advocacy groups (to the exclusion of women's groups) – is the subject of ongoing controversy.<sup>84</sup> Numerous studies from Australia, Holland, Portugal, Greece, Poland and Norway indicate pre-pubertal male advantage in aerobic fitness, strength (including explosive strength of upper and lower limbs and hand-grip strength), speed, agility, cardiovascular endurance, muscle endurance and hand-eye co-ordination. An analysis of 175 track, field and swimming records published by the NSW Department of Education showed a difference of 1%–4% between the performances of boys and girls aged 12 or under, compared with a difference of 10%–17% after the age of 12.<sup>85</sup> Although not as significant as post-pubertal sex-differences, pre-pubertal sex differences in sporting performance are still significant enough for a removal of the sex bar to reduce the opportunities for sporting success available to girls in NSW. It is crucial that "sex" be understood in the binary, biological sense, and not import aspects of "gender", or apply to "gender identity" or "sex characteristics".

150. We strongly support the ADA exception in its current form. It should be lawful to facilitate single-biological sex sporting activities (without further limitation), in social and casual sport (not just competitive sport), for all ages, including for reasons of safety, fairness and opportunity, and competitiveness and congeniality among matched participants.

*Transgender discrimination and vilification exception*

151. Under the ADA, an exception permits the exclusion of a transgender person from sporting activities, except coaching or administration, "for members of the sex with which the transgender person identifies". This applies to the protections against discrimination and transgender vilification.<sup>86</sup>

152. We strongly support the existence of this exception in its current form.

*Disability discrimination exception*

153. This exception is reasonable and appropriate and we do not support it being repealed or narrowed.

*Age discrimination exception:*

154. This exception is reasonable and appropriate and we do not support it being repealed or narrowed.

**Q7.8: The charities exception – Should the ADA provide exceptions relating to charitable benefits? If so, what should they cover and when should they apply?**

155. Yes – the ADA should provide exceptions for charitable benefits. The existing exceptions should not be narrowed but cover the same grounds and apply in the same circumstances as they already do.

156. The exception applies across the ADA in relation to a provision of a deed, will or other instrument that confers charitable benefits on people of a class identified by reference to one or more attributes.<sup>87</sup> We agree with the view of the NSWLRC in 1999 that an exception of this type is important, including because it seeks to ensure the ADA does not intrude into the private sphere.<sup>88</sup> A wide scope should be allowed, to ensure charitable acts are not discouraged by restrictions which prevent people giving according to specific wishes. All charitable purposes should be broadly encouraged and facilitated, and the exception should continue to apply in respect of both individuals and registered charities.

**Q7.9: Voluntary bodies exception – Should the ADA provide an exception for voluntary bodies? If so, what should it cover and when should it apply?**

157. Yes. The ADA should provide an exception for voluntary bodies. The existing exception should not be narrowed but cover the same grounds and apply in the same circumstances as it already does.

158. The ADA has a broad exception for non-profit bodies (such as a surf lifesaving club or social tennis group), which provides that nothing in the ADA applies to any rule or practice of a body that restricts admission to membership, and the provision of benefits, facilities or services to members of that body.<sup>89</sup>

159. We agree with the view that they should be exempt from discrimination law as they operate within the private sphere, and need independence so that they can maintain a specific organisational culture or associational autonomy.<sup>90</sup> We disagree with a view that they should be covered by the ADA because they often receive substantial public funding and benefits and provide important community services.<sup>91</sup>

**Q7.10: Aged care accommodation providers exception – Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?**

160. Yes. The ADA should provide an exception for such providers. The existing exception should not be narrowed but should cover the same grounds and apply in the same circumstances as it already does.

161. Aged care providers with religious affiliations may have specific reasons based upon their religious convictions to restrict admission to people of a particular marital or domestic status. WA has not implemented a recommendation to repeal its similar exception, so NSW is not the only state in which such an exception exists.

162. The Consultation Paper suggests that aged care providers with religious affiliations may be able to access the general exceptions for religious bodies, and that if the aged care exception is repealed, consideration should also be given to whether s56(c) and s56(d) should be amended.<sup>92</sup> If so, we oppose any amendments to narrow the general exceptions for religious bodies.

**Q7.11: The statutory authorities exception – Should the ADA provide an exception for acts done under statutory authority? If so, what should it cover and when should it apply?**

N/A.

**8. Civil protections against vilification**

**Q8.1: Protected attributes**

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

163. None. No changes should be made to the way the ADA expresses and defines the attributes currently protected against vilification, and certainly nothing should be done to broaden their scope.
164. It is well established under international law that action aimed at addressing hate speech must be consistent with all fundamental human rights affected. As it concerns the treatment of freedom of expression, it requires any restriction on the freedom be the exception, and necessary to prevent harm on the grounds stated in article 19(3) of the ICCPR.
165. It is important to understand where current vilification protection sits in the scheme of things. The *United Nations Strategy and Plan of Action on Hate Speech* distinguishes between three levels of hate speech: “top” level, “intermediate” level, and “bottom” level. Only the “top” and “intermediate” levels should be the subject of prohibition, and only then if the relevant provisions satisfy the conditions in article 19(3) when in operation. ADA vilification prohibitions are situated in the “intermediate” level, and must not reach into the “bottom” level at all. The following italicised text describes those levels and is quoted from UNESCO’s summary of the Strategy and Plan of Action.<sup>93</sup>
- *“The severest – or top level – forms of hate speech are prohibited under international law as defined by Article 20.2 of the [ICCPR] and Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination. An expression advocating incitement to discrimination, hostility or violence is deemed severe enough to amount to a criminal offence when it fulfils all the criteria in the six-part threshold test set out in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”*  
This is the description of hate speech appropriate for consideration in the NSW *Review of criminal law protections against the incitement of hatred*. In its submission to that Review, ACL recommended that criminal measures correspond to the requirements of the Rabat Plan and other international law stipulations as required for the “severest” or “top level” forms of hate speech.
  - *“Intermediate forms of hate speech may be prohibited under international law even if they do not reach the abovementioned threshold of incitement in specific circumstances”. Existing civil protections in NSW against vilification under the ADA are capable of qualifying in this intermediate category of hate speech that may be prohibited, but only if they allow restrictions that meet the criteria of article 19(3),<sup>94</sup> and do not allow any restrictions that do not meet those criteria.*
  - *“The least severe – or bottom level – forms of hate speech cannot be subject to legal restrictions under international law, including expressions that are offensive, shocking or disturbing, that condone or deny historical events, that are blasphemous and that can be classed as disinformation, misinformation or malinformation.”*
166. Existing ADA vilification provisions generally cover a public act that “incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the [relevant] ground of the person

or members of the group". At present, they extend too far, inasmuch as they are triggered by the following types of speech (which generally cannot be restricted):

- i. Speech that ridicules or merely offends. As explained by the UN *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, the term "ridicule" is "extremely broad and [is] generally precluded from restriction under international human rights law, which protects the rights to offend and mock."<sup>95</sup>
- ii. Speech that is simply offensive or characterised by prejudice. The Special Rapporteur explained that although this type of speech may raise serious concerns of intolerance it may often not meet a threshold of severity to merit any kind of restriction: "There is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups. Such sentiments would not be subject to prohibition under the [ICCPR] or the International Convention on the Elimination of All Forms of Racial Discrimination" but it is appropriate to address them by other means."<sup>96</sup>
- iii. Speech that otherwise falls in the "bottom level" of hate speech. Any amendments to the ADA as a result of the current review must not extend the ADA prohibitions to capture any more "bottom" level speech than it already does.

167. Existing ADA vilification provisions should therefore not be widened. Because they are too wide already, they should instead be reviewed for their compliance with the criteria in article 19(3). In applying article 19(3), the following principles enunciated by the Human Rights Committee should be observed:

- i. Restrictions imposed by law must conform to the strict tests of necessity and proportionality.
- ii. Restrictions must be "necessary" for a legitimate purpose.
- iii. Restrictions must be directly related to the specific need on which they are predicated.
- iv. Restrictions must not be overbroad.
- v. Restrictive measures must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve that function; they must be proportionate to the interest to be protected.
- vi. The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.
- vii. A "law" must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.
- viii. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not."<sup>97</sup>
- ix. Another important principle is that "[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".<sup>98</sup>

168. In 2019, ACL made a submission to the ALRC's 'Freedom Inquiry'. Among other things, the section regarding anti-vilification laws<sup>99</sup> explained that:<sup>100</sup>

- i. Free and open debate is essential in a democratic society. In a diverse multicultural society, there is going to be disagreement on controversial issues, and people will take offence at the opinions of others. But whether the disagreement is about religion, politics, ethnicity, or

anything else, it is essential that the law protects the rights of people to hold their opinions without interference. While vilification legislation is intended to promote tolerance and social cohesion, its effect can be the very opposite. Courts and tribunals may be dragged into great political controversies through such laws.

- ii. Anti-vilification laws present a significant threat to religious freedom and freedom of thought conscience and expression generally in Australia. Too often there are inadequate protections such as exemptions for religious organisations and individuals. Religious leaders and laity should be free to express their doctrines and their comparative view of other doctrines. We should not resolve differences about religious views in our community with lawsuits. In this way, vilification laws pose a danger to the future of multiculturalism. They cause collateral damage to religious freedom, given their chilling effect on legitimate religious activity even where the outcome of a complaint is to declare the religious expression to have been lawful. The punishment lies not in the penalties but in the necessity to defend against claims of a breach. The prospect of a costly litigation against a claim can have a more crippling effect than the law itself, even when litigation would fail because the act was lawful. Vilification laws threaten free and open debate on religion, and also have the potential to scare people into remaining silent rather than risk a lawsuit. The classic example of this is *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006). The case was brought by activists, the decision that there was vilification or the like was overturned on appeal, but Catch the Fire Ministries suffered massive inconvenience and incurred significant legal costs.
- iii. Another source of collateral damage is ‘where people wrongly believe the law to be more restrictive than it is, an impression that is fuelled by uncertainty in the law, and the operation of the law at low thresholds. This is an additional stifling effect on free speech in public discourse and extends the unintended effects of the law even further. Similarly when organisations employ ‘risk-averse management’, interpreting narrowly drafted laws much more widely to avoid going anywhere near the boundary.

169. The Consultation Paper asks explicitly whether NSW should harmonise the expressions and definitions in the ADA’s civil protections with the criminal protections in s93Z.<sup>101</sup> There are differences in relation to the attributes that are not related to race.<sup>102</sup> In particular, compared to the ADA, s93Z covers:<sup>103</sup> sexual orientation (as opposed to “homosexuality” in the ADA); gender identity (as opposed to “transgender grounds” in the ADA); and people of intersex status (who are not covered at all in the ADA).

170. As discussed in our Overarching comments above, we do not support ADA definitions for ‘sexual orientation’ or ‘gender identity’ which incorporate gender- or other ideology that is incompatible with or excludes a binary and biological view of sex/gender.

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

171. No. As discussed in our Overarching comments, and in response to Q4.4, 4.7 and 4.8, we oppose the ADA protecting against vilification on a wider range of attributes, with some qualifications mentioned in our responses.

#### **General principles to guide decision-making about protected attributes**

172. See our Overarching comments above. The Consultation Paper notes the “cautious approach” taken by the NSWLRC in 1999 regarding this issue, given arguments that vilification laws can have a chilling effect on free speech, and that wider protections may increase complaints, which can have resource implications.<sup>104</sup> We are not aware of any evidence which has been presented demonstrating the need

for new protections, whether in more recent reviews, or the review by the Law Commission of England and Wales, mentioned in the Consultation Paper.

**Consistency between discrimination law and civil vilification law; Consistency between the civil and criminal law; and Identifying gaps based on the coverage of other civil vilification laws**

173. See our response to Q8.1(1), which differentiates between top, intermediate and bottom level speech, in terms of severity. We consider this is what should guide the criminal (“top” level) response, and civil (“intermediate” level) response in the ADA, provided the ADA does not extend at all to “bottom” level speech. Given the recurring instances of inappropriate claims made on gender-related grounds (mentioned in our Overarching comments), there is a strong case for wide vilification exceptions to prevent this, and utmost care in defining the protected attributes (as discussed in response to Q4.4, 4.7 and 4.8).
174. We agree with the 1999 view of the NSWLRC that the merits and problems of extending vilification protections to each group should be considered specifically.<sup>105</sup> It is important that the evidence base for reform is central, rather than any assumption that all groups protected against discrimination also require protection against vilification.
175. As our second submission to that review of s93Z summarised, it is inappropriate to follow state/territory legislation when international standards are the most relevant and achieve the necessary balance between the rights engaged, while state/territory legislation does not. When assessing available options, we caution against following the pattern of the more easily triggered prohibitions in state/territory legislation, and express opposition to measures which do not meet the requirements of the ICCPR.<sup>106</sup>

**Q8.2: The test for vilification**

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

176. No. We strongly oppose NSW adopting a ‘harm-based’ test for civil vilification.
177. A harm-based test that measures the effect on the alleged victim by the standard of a “reasonable person” taken from the victim group is especially resisted. It is highly controversial. It would, in practice, violate the requirements stated in UNESCO’s *Guide to policymakers: addressing hate speech through education*, “[i]nternational standards on the protection of freedoms of opinion and expression cover, among other things, criticism or speech that is offensive, disturbing, demeaning or shocking”.<sup>107</sup> Among the range of restrictions that are impermissible are “those imposed solely on the basis of a comment that has caused a particular individual or identity-based group to take offence”.<sup>108</sup>
178. The threshold at which a “harm-based” test would apply is not appropriate. The track record of misuse of legislation with such a test speaks for itself, particularly as it has been invoked in Tasmania (under the Anti-Discrimination Act 1998 (Tas), s17), where it was applied against Archbishop Julian Porteous merely for distributing a tract providing guidance to members of the Catholic Church, or Senator Claire Chandler, when expressing concern in support of the rights of biological women, in connection with single-sex spaces and sports. The fact that claims are made (and officially processed) in response to such expressions of political or other opinion and belief indicates the degree to which free speech is unjustifiably restricted by a prohibition framed around a “harm-based” test.
179. The fact that the implied freedom of political communication is capable of being infringed by such speech clearly indicates that the threshold created by such harm-based models is manifestly inappropriate.<sup>109</sup>

180. In practice, harm-based provisions are likely to insulate beliefs and ideologies from criticism and expose the expression of conflicting beliefs to claims of vilification where they are associated with particular attributes. For example, as noted in our Overarching comments above, certain gender theories are closely associated with, or expressed in, definitions of “gender identity” and “sexual orientation”. As protected attributes in vilification provisions such definitions can and do have an exclusionary effect. For example, the expression of ideas based on suppositions or beliefs about biological sex being binary, fixed and/or important, conflict with definitions of attributes which are premised on the notion that gender represents the “true self”, may be non-binary and varies independently of biological sex. The expression of certain binary beliefs about the important place of biology in certain aspects of life can be taken to offend, or seriously demean, or otherwise intrude upon the rights of those of a particular gender identity.
181. A harm-based test lacks the necessary justification under established international law principles. It also fails in the requirement that the law be certain and foreseeable in its operation. It is difficult for any person to foresee whether their actions will expose them to liability based on how someone else, taken from the victim group, will perceive them. It is also likely to incentivise socially divisive activism and lawfare.
182. The Consultation Paper also raises the suggestion that harm-based tests better reflect how members of the community understand and experience vilification, as they consider how the target group experiences the conduct.<sup>110</sup> The inciting of others to hatred is the relevant harm to consider. We note that the NSWLRC in 1999 did not recommend changes to the incitement-based test.<sup>111</sup>

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

183. None. We oppose any other changes to the incitement-based test for vilification which would lower the relevant thresholds. The Consultation Paper raises various options for reform, e.g.:
- That an alternative to a harm-based test would be to lower the threshold in the ADA’s incitement-based test to cover a public act that is “likely” to incite. This would effectively cover conduct that may far less clearly be harmful.
  - Confirm that the conduct may consist of a single occasion or a number of occasions over time and occur in or outside the state.<sup>112</sup> This would add additional complexity to vilification matters and would also give the provisions an inappropriate extra-territoriality.
  - Change the conduct that is prohibited to:<sup>113</sup> commit a public act that expresses (rather than incites) hostility against, brings into contempt or ridicules a person with a protected attribute; engage in conduct that is likely to create, promote or increase animosity towards, threaten, seriously abuse or severely ridicule; or threaten vilification. We also oppose these for creating far too low a bar for unlawful conduct.

**Q8.3: The definition of “public act” – What changes, if any, should be made to the definition of “public act” in the test for vilification in the ADA?**

184. No changes should be made to the definition of ‘public act’ that would effectively broaden its scope. However, it should be amended to clarify that such acts must originate in or be carried out in NSW. This would help avoid some of the excesses of activist scouring for offensive comments on which to base an action.<sup>114</sup> Also, there is not sufficient need to restrict private communications and this would unjustifiably intrude into the private sphere.<sup>115</sup> The NSWLRC, in its recent review of s93Z, determined not to amend the definition of “public act” in the criminal vilification offence, for similar reasons.

#### Q8.4: Exceptions

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

185. No changes should be made to the exceptions to the vilification protections (e.g. “fair report”, “absolute privilege for defamation”, “public interest”), except to widen the public interest exception to achieve a better balance with freedom of expression, and to avoid the sort of claims mentioned in our Overarching comments above.
186. We oppose options to narrow the exceptions by requiring “genuineness” for an academic, artistic, scientific, religious or research purpose (the approach in Victoria, the NT and the RDA) and/or any “purpose in the public interest” (Victoria).<sup>116</sup> This would create avoidable uncertainty, and there are already qualifications within the exception, including that the public act is done reasonably and in good faith.
187. We oppose any proposal to repeal the exception for “religious discussion or instruction purposes”. It provides essential, though inadequate, support for legitimate religious freedom of a very basic and non-intrusive nature. It should be broadened to support that freedom more effectively.

#### Q8.5: Religious vilification

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

188. The ACL did not support the introduction of religious vilification provisions in the ADA generally. If these provisions remain in the ADA, then they should not be amended so that claims may be brought against religious groups for voicing their opposition to certain ideological beliefs. As our former submission discussed,<sup>117</sup> we recognise that people must have the ability to criticise religion and all types of belief. Anti-vilification laws are inappropriate instruments to attempt to regulate this field of human activity and life.
189. We are concerned that anti-religious or non-religious activists could use religious vilification protection to bring legal actions (based on their ideological or anti-religious beliefs) against people who do sincerely hold and express religious views. This would compound the concerns already mentioned in the context of vilification on the basis of certain attributes, that gender ideology and certain traditional religious beliefs are incompatible with each other.
190. Religious vilification provisions should be made to apply only in respect of people who are vilified because they positively hold a specific religious belief or religious view. Existing vilification provisions do not operate in a way which would cover a person who is *not* of a particular race, *not* transgender, *not* homosexual or does *not* apparently have HIV/AIDS status.

### 9. Harassment

#### Q9.1: The definition of sexual harassment

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

191. The Consultation Paper suggests that the ADA may be amended to place “greater emphasis on victims, gender and intersectionality”, in accordance with amendments to the SDA at a federal level in recent years.<sup>118</sup> We repeat our comments on “intersectionality” in response to Q3.8 above in the context of discrimination law:
- Currently, the ADA has separate sections which set out the tests for discrimination for each attribute. There is no need to introduce intersectional discrimination protections simply because the ADA does not explicitly acknowledge that people may have more than one attribute.<sup>119</sup>

Ultimately, the ADA already provides sufficient protection against discrimination based on each attribute.

- Entrenching the concept of ‘intersectionality’ in the ADA would also encourage people to see discrimination in a way that is unbalanced and excessively victim-focused.
- Intersectional discrimination protections would be even more concerning if the ‘burden of proof’ were shifted to respondents in any way (as suggested by Q3.6 above).
- We also agree with the point made in the Consultation Paper that “allowing complaints to be based on overlapping attributes may increase complexity”.<sup>120</sup> As the Consultation Paper also acknowledges, this change “could also mean the ADA covers more instances of discrimination”,<sup>121</sup> which we oppose.

192. As to following the SDA model in respect of “gender”, we note that recent Federal Court decision-making has demonstrated how erroneous the SDA harassment provisions are, insofar as they related to “sex”, given that “sex, as it is deployed in the SDA...is changeable and not necessarily binary”.<sup>a</sup> It means the harassment provisions incorporate notions of “gender” and are capable of strongly advantaging one side of the politically charged tension between the respective rights of biological females and trans-identifying males. Harassment provisions were developed in the important context of the protection for biological females under CEDAW, and that protection should not be diluted or confused.
193. The reasonable person test should not be expanded to include the “possibility” of such matters (as in the SDA). The threshold in the SDA for harassment is extremely low, at whether “a reasonable person...would have anticipated the possibility” etc. Just how peculiarly low is only apparent when compared with more tested and long-standing models, such as exist in the Council of the European Union Equality Directive, followed in the UK’s Equality Act 2010. The UK definition is at a much higher threshold where “the conduct has the purpose or effect of...violating [a person’s] dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment”. It is far removed from any standard like “anticipating the possibility”, etc. The SDA should not be followed in this respect.
194. The SDA standard is also highly problematic in the hostile workplace provisions, prohibiting hostile workplace environments on the ground of sex (SDA s.28M) and imposing a new positive duty to eliminate SDA breaches in broad terms (SDA s.47C). People of faith may be expected, like anyone else, to be unequivocally opposed to acts constituting “sexual harassment”, understood in CEDAW terms, where “sex”/“sexual” have a simple male/female distinction (i.e. not incorporating ideological notions of “gender identity”). However, for as long as “sex” in the SDA imports gender ideology by being “changeable and not necessarily binary” (as the judgment in *Tickle v Giggle* indicates), it creates obligations that could require religious schools and other organisations to purge their workplace of anything that does not unequivocally affirm non-binary gender ideology and its norms. The term “sex” is not confined to biological male/female differentiation, but it includes subjective aspects of self-determined “gender”. In practice, it raises the expectation that in the workplace the affirmation of non-binary assumptions may be required on pain of severe adverse consequences. This leaves little space for the assumptions or beliefs of religious organisations or individuals about biological male/female differentiation.
195. We therefore oppose the lowering or expansion of the existing test generally, given the breadth of the existing provisions.

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<sup>a</sup> *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (23 August 2024), Bromwich J.

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

196. No – the ADA should not expressly require consideration of such matters. The Consultation Paper notes that the SDA lists matters to be considered in determining whether a reasonable person would anticipate the possibility of offence, insult or humiliation, being:<sup>122</sup> the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, disability, race, colour or national or ethnic origin of the person harassed; the relationship between the person harassed and the harasser; and any other relevant circumstance. In contrast, the ADA says that the reasonable person would have regard to “all the circumstances” (without specifying what those circumstances could include).<sup>123</sup>
197. The most obvious impact that having regard to an individual's characteristics would have (following the SDA approach) is to strongly advantage those with particular attributes and disadvantage those with other attributes. It would erode the protection that harassment provisions are meant to afford on the basis of biological “sex”, to further disadvantage biological females relative to those trans-identifying males. It would exacerbate the situation of religious organisations by demanding that religious workplaces be purged of all evidence of their own beliefs where they are incompatible with ideologies underpinning the emerging definitions of certain attributes.

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

198. The Consultation Paper mentions that the SDA and ADA take a different approach to the term “conduct of a sexual nature”. In the SDA, this includes making an oral or written statement of a sexual nature to a person or in the presence of a person. In contrast, the ADA does not define this term.<sup>124</sup> It is crucial that “conduct of a sexual nature” retain its essential sexual character, no matter how this is done.

## **Q9.2: Other sex-based conduct**

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

199. The Consultation Paper points out that, unlike the ADA, the SDA also prohibits harassment “on the ground of sex”.<sup>125</sup> This differs from sexual harassment in that the conduct does not need to be sexual in nature.<sup>126</sup> “Harassment on the ground of sex” occurs when a person engages in unwelcome, demeaning conduct in relation to the complainant because of the complainant's sex. A reasonable person must anticipate the possibility that the conduct would offend, humiliate or intimidate the complainant.<sup>127</sup>
200. See our comments in response to Q9.1(1), expressing real concern at reference to the mere “possibility” that conduct would have certain effects, and at the inclusion within the term “sex” of gender concepts, since “sex” is not explicitly defined in terms of female/male binary biology. The implications for religious organisations are equally applicable here. See also our Overarching comments above. We also note that remedies are already available under the SDA, so there is no need for the ADA to match them.

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

201. No. For the same reasons as those noted above in response to Question 9.1(1) in connection with religious schools and other organisations, we oppose any provisions that concern hostile workplaces which are not concerned with hostility solely on the ground of “sex”, meaning biological sex.

202. We would also note that “anticipating the possibility” in the SDA (s.28M) defines what it means to “subject” another to a workplace environment that is hostile on the ground of sex. It contrasts with the UK’s Equality Act definition (that also regulates the workplace environment) of “unwanted conduct of a sexual nature” which has the “purpose or effect” of violating dignity or “creating an intimidating, hostile, degrading, humiliating or offensive environment.” The SDA threshold is too low. It also should not be used as a basis for widening the concept of indirect discrimination.
203. See also our Overarching comments above on the burden this would place on religious organisations to purge themselves of their own ethos and beliefs. We also note that remedies are already available under the SDA, so the ADA does not need to match them.

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

204. We do not support the introduction of any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment.

### **Q9.3: Sexual harassment in the workplace**

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

205. No – the ADA should not adopt the SDA’s approach, as it would broaden the existing protection unnecessarily.

### **Q9.4: Workplace-related laws regulating sexual harassment**

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

206. See our responses to Q9.1 and Q9.2 above.

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

207. No – there is no need for the ADA and workplace-related sexual harassment laws to be more aligned. Each of these laws has a different scope, overall purpose and in some cases differing jurisdictional applications.

### **Q9.5: Expanding the areas of life where sexual harassment is prohibited**

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

208. Yes. The ADA should continue to limit the areas of life where sexual harassment is unlawful. We oppose any broadening of the ADA.

*(2) Should sexual harassment be unlawful in other areas of life? For example: (a) areas of life that are protected from discrimination (b) all areas of public life, or (c) any area of life, public or private?*

209. No. For our comments on not extending harassment-related prohibitions see our responses to Q9.1 and Q9.2 above. The result of such expansion would be to take the ADA beyond the coverage of protection provided in comparable jurisdictions overseas (e.g. the UK and EU).

**Q9.6: The private accommodation exception – Should sexual harassment be prohibited in private accommodation? Why or why not? If an exception for private accommodation is required, how wide should it be?**

210. No. The existing private accommodation exception for sexual harassment should remain in its current form in the ADA and should not be narrowed or repealed, as that would result in excessive restriction in the private sphere.

**Q9.7: Attribute-based harassment**

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

211. As our former submission discussed,<sup>128</sup> there is no evident need for the ADA to cover harassment based on other protected attributes. For reasons given in response to Q9.1 and Q9.2 it would be seriously problematic if harassment provisions were extended to attributes beyond “sex” in its narrowest sense. Protection is already adequately provided in the form of prohibitions against unlawful discrimination, vilification, intimidation and workplace bullying.<sup>129</sup>

**10. Other unlawful acts and liability**

**Q10.1: Victimisation**

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

212. The existing prohibition of victimisation in the ADA should not be extended, including to expressly cover threats to victimise. A sufficient need to do so does not exist.

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

213. The existing prohibition of victimisation in the ADA should not be extended, including to expressly cover where someone was victimised for two or more reasons. A sufficient need to do so does not exist.

**Q10.2: Advertisements**

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

214. The existing defence to publishing an unlawful advertisement should be retained in its current form. A sufficient case does not exist to remove or narrow it.

**Q10.3: The forms of liability**

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

215. We have some concerns that the ADA’s approach to liability is generally too wide. The Consultation Paper summarises in detail the provisions in the ADA and relevant case law regarding liability for unlawful behaviour.<sup>130</sup> Our main concern is the wide scope of the different forms of liability, including not just direct or personal liability and vicarious liability (as well as joint and several liability), but even accessorial liability. Accessorial liability may be relevant in respect of people who even just indirectly assisted, or merely could have prevented, an unlawful act.<sup>131</sup> This includes a person who even just knowingly places someone in a situation where there is a real possibility that unlawful conduct will

occur,<sup>132</sup> and can be used to hold a fellow employee (not just employer) liable.<sup>133</sup> We query whether accessorial liability in particular creates too wide a scope of potential liability.

#### **Q10.4: The exceptions for liability**

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

216. The ADA should continue to provide the existing two exceptions to vicarious liability. In particular, the “unauthorised acts” exception should not be removed. We do not support the removal of this exception because it is reasonable for an employer or principal to have access to a defence if they did not authorise an agent or employee to do an unlawful act. We note that the onus is on the employer or principal to prove this.<sup>134</sup> A person would still be able to pursue other relevant parties under the ADA who may otherwise be liable. Existing case law prevents the defence from being too wide.<sup>135</sup>
217. We note the Consultation Paper’s point that under the “reasonable steps” exception, the employer or principal must take “all” reasonable steps, not just “some” reasonable steps. For instance, the mere existence of a policy or training addressing the unlawful behaviour is not necessarily enough. The policy or training must be adequate, implemented and brought to the attention of the employee or agent.<sup>136</sup> We would at least query whether this sets too high a bar if this is to be the only available defence.

#### **Q10.5: Liability and artificial intelligence**

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

218. We do not support liability under the ADA being extended to cover automated AI decision-making. The Consultation Paper suggests that automated decision-making by AI may pose an issue when making decisions that affect people’s rights (e.g. in recruitment processes). It notes that if there is limited human involvement, this could make it difficult to assign liability.<sup>137</sup> It therefore raises an option to amend the ADA to clarify the law on attributing acts to an individual or body corporate. While the Consultation Paper asserts (in apparent support of reform) that similar provisions exist in other Australian laws,<sup>138</sup> it only references the *Migration Act 1958* (Cth) and *Social Security (Administration) Act 1999* (Cth),<sup>139</sup> not other Australian anti-discrimination Acts. As this is an evolving subject, it is too early to consider amending the ADA.

### **11. Promoting substantive equality**

#### **Q11.1: Adjustments**

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

219. No. The ADA should not impose any requirements for duty holders to provide adjustments. Problems associated with this include additional cost-burdens to be carried by not-for-profits and charities and potential conflict with freedom of religion. If any such duties are imposed, it is critical that charities, religious bodies, voluntary bodies and adoption services (including faith-based organisations) and private educational authorities be excluded.
220. The Consultation Paper itself sets out an example of an adjustment that would clearly conflict with the religious convictions of certain organisations, i.e. a duty holder being required to provide a student with a uniform that corresponds with their gender identity.<sup>140</sup> This exemplifies our concern about how a duty to provide adjustments may be legitimately untenable for religious organisations. In this connection, see our responses to Q4.8, Q9.1 and Q9.2, and our Overarching comments above.

221. Our opposition to any duty to provide adjustments is as discussed in our former submission:<sup>141</sup> Schools, charities, welfare and other organisations, bodies or associations that operate out of a religious mission or with not-for-profit purposes could be adversely affected. If a religious school or charity or even a church is required to make the specified adjustments, this could force them to compromise their deeply held religious convictions and practices. Such duties would also place an unreasonable burden on religious and not-for-profit organisations in particular those whose very purposes would be frustrated by such obligations. It would stretch their capacity beyond their resources and mission.
222. However, if any such duties are imposed, it is critical that charities, religious bodies, voluntary bodies and adoption services (including faith-based organisations) and private educational authorities be excluded from these duties at least. Any positive obligations ultimately included in the ADA would have to be accompanied by protections for such entities, so that religious bodies are not forced to act contrary to their religious convictions or in excessive limitation of their rights under article 18 of the ICCPR.
223. We would also particularly oppose any duty being introduced which covers the range of attributes currently protected (or which may in future be protected) by the ADA. We agree with the Consultation Paper's acknowledgement that applying the duty to all protected attributes would be a significant change in NSW, where duty holders may be less familiar with the concept of adjustments.<sup>142</sup> If any duty to provide adjustments is introduced, it should be strictly limited in scope, applying only to certain specific protected attributes and contexts (in addition to carving out charities, religious bodies, voluntary bodies, adoption services, faith-based organisations, etc.).
224. For example, we note the Consultation Paper's discussion about Victoria prohibiting employers from unreasonably refusing to accommodate an employee's responsibilities as a parent or carer.<sup>143</sup> We also note discussion of an LRCWA recommendation that the obligation cover, at minimum, people with needs arising from family responsibilities or carer obligations, pregnancy and breastfeeding, as well as people with disability. In our view, these more selective approaches would likely be preferable to a duty which covers all attributes protected under the ADA, if any duty must be introduced. Ideally, we would advocate that if any duty to provide adjustments is imposed, it would be limited to the attribute of disability, which seems the least contentious reform in this context.

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

225. No duty to provide adjustments should be imposed (see our response to Q11.1(1)).

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

226. No duty to provide adjustments should be imposed (see our response to Q11.1(1)). However, if any such duty is imposed then we consider it entirely reasonable that a person with a protected attribute should first have to request an adjustment before the obligation to provide one arises. This would not only prompt duty holders to be aware of their obligations but would also facilitate open communication and cooperation between the parties.

*(4) What test should be used to determine the scope of, including any limits to, the obligation to provide adjustments?*

227. No duty to provide adjustments should be imposed (see our response to Q11.1(1)). However, if any such duty is imposed, then the test used should be as narrow as possible.

### **Q11.2: Special measures**

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

228. No. The ADA should not generally allow for special measures. Among other things, we have concerns about the underlying rationale for introducing special measures. For example, the Consultation Paper discusses how special measures are benefits, programs or policies that support some or all members of a “disadvantaged group”. They are implemented “for the sole purpose of promoting substantive equality and redressing historical disadvantage”.<sup>144</sup> However, this approach is necessarily selective, and advantages members of certain groups over others on the basis of apparent ‘historical disadvantage’. The Consultation Paper acknowledges that this involves “treating people differently”, so that they can exercise freedoms “equally with others”.<sup>145</sup> However, the underlying assumption is that there remains some historical disadvantage for such groups, which is yet to be fully redressed, and this may not hold true in the context of Australia’s developed society. It is also implicitly divisive – envisioning different groups in society according to historical divisions. Furthermore, people’s experiences of advantage (or otherwise) do not necessarily reflect society’s assumptions or historical trends.
229. In light of existing ADA special needs exceptions, exemptions process and certifications processes, we query whether there is any compelling rationale for introducing special measures.

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

230. While we do not support the introduction of any special measures provisions regardless of their framing, if special measures are legislated then in our view the criteria should reflect international human rights law.

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

231. No. The existing exemption and certification processes should be retained. The Consultation Paper acknowledges concerns about removing the existing exemption and certification processes if the ADA provides for special measures more generally,<sup>146</sup> since they provide important safeguards (e.g. Attorney General oversight), or may not qualify as special measures.

### **Q11.3: 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?*

232. No. The ADA should not require duty holders to take positive steps to prevent or eliminate unlawful conduct, including discrimination, sexual harassment, vilification or victimisation. Such a positive duty would be extremely broad and burdensome beyond justification given the pre-existing obligations concerning discrimination, sexual harassment, vilification or victimisation. It would compound the concerns already expressed on behalf of religious organisations (e.g. in response to Q9.1 and Q9.2, and in our Overarching comments). It would create a positive obligation that could require those responsible for workplaces, including those with religious ethos, to purge themselves of it if it creates an environment that is not unequivocally affirming of non-binary gender norms.
233. Our opposition to any positive duties is also discussed in our former submission.<sup>147</sup> Positive duties would place an unreasonable burden on religious and not-for-profit organisations in particular, whose very purposes would be frustrated by such obligations. It would stretch their capacity beyond their resources and mission.
234. We also agree with the views summarised in the Consultation Paper that<sup>148</sup> existing duties are sufficient, and any new duties could conflict with existing duties. New duties could be too onerous.

*(2) If so:*

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

235. No positive duties should be imposed (see our response to Q11.3(1)). However, if any positive duties are imposed, the ADA must allow for an approach tailored to the circumstances of the duty holder.

236. The Consultation Paper discusses what any duty could require and states that the most common approach in other Australian discrimination laws is to require duty holders to take “reasonable and proportionate” steps to prevent or eliminate unlawful conduct.<sup>149</sup> In our view, even this approach demonstrates the onerous nature of what could be required of duty holders, including to:<sup>150</sup> implement policies to prevent unlawful behaviour; provide training on ADA obligations; develop inclusion targets; keep records in incident management and complaints systems; and review policies and procedures, develop action plans and collect and monitor data.

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

237. No positive duties should be imposed (see our response to Q11.3(1)). However, any positive duty which is imposed should, at most, only cover discrimination and/or sexual harassment (and not any further harassment-related obligations).

238. The Consultation Paper suggests that a positive duty could address discrimination, harassment, vilification and/or victimisation.<sup>151</sup> It notes that such duties in other Australian discrimination laws cover discrimination and sexual harassment, while only some also cover vilification, and some cover victimisation.<sup>152</sup> The duty in the SDA also only covers discrimination and other forms of conduct related to sex.<sup>153</sup>

*(c) Who should the duty holders be?*

239. No positive duties should be imposed (see our response to Q11.3(1)). However, if this does occur, then the duty holders should be strictly limited. Charities, religious bodies, voluntary bodies and adoption services (including faith-based organisations) and private educational authorities must be excluded (as our former submission discussed,<sup>154</sup> so that they are not put in conflict with the beliefs and ideologies associated with certain attributes, and their article 18 rights are preserved).

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

240. No positive duties should be imposed (see Q11.3(1)). However, if this does occur, then as narrow a scope of protected attributes and areas should be covered as possible.

## Appendix A

**Kirralie Smith** advocates for traditional family values and beliefs. Kirralie has been the target of multiple legal battles as a result of her campaigning for women's sport to be restricted to women only. She has been placed under a two-year apprehended violence order after an appeal overturned an earlier ruling in her favour. Kirralie had never intended or threatened violence against this person. The AVO is held by a person who has never met Kirralie and is located hundreds of kilometres away.

**Senator Claire Chandler** advocated for women's rights and safety. Senator Chandler said that sports, changing rooms and toilets were designed for people of the female sex and should remain that way. She was the target of a vilification complaint in Tasmania. The complaint was eventually withdrawn. Senator Chandler was also summoned by the Tasmanian Equal Opportunity Commission for her statements on free speech and sex-based rights.

**Katrina Tait** signed an online petition that opposed 'Drag Queen Story Time' in local Brisbane public libraries. Katrina posted about the petition on her social media accounts, which was seen by an LGBTQ+ activist. The activist threatened Katrina that they would make a homosexual vilification complaint under NSW laws despite Katrina being based in Queensland. The activist sent Katrina an e-mail with a purported media release that named her, her business, her previous address and her mobile phone number. One of the emails received contained a photo of Katrina's young daughter. A few months later, Katrina received an e-mail from the NSW Anti-Discrimination Board enclosing a complaint from the activist. The HRLA represented Katrina and the complaint was withdrawn.

**Lyle Shelton** is a Christian commentator and politician who had a case brought against him by two drag queens alleging vilification under Queensland's anti-discrimination laws. Lyle questioned a "drag queen story time" event for children at a public Brisbane library, stating in a blog post that drag queens were not good role models for children. In 2023, QCAT dismissed the complaint, determining that Lyle's comments "did not, and do not amount to vilification". Lyle is currently awaiting the verdict of an appeal hearing in the Queensland and Administrative Tribunal.

**Archbishop Julian Porteous** faced a complaint under the Tasmanian Anti-Discrimination Act for distributing a booklet articulating the Catholic view of marriage. That matter was eventually withdrawn after months of legal wrangling and public pressure. Archbishop Porteous also received backlash for a letter distributed to Catholic schools in which he reiterated his stance on Catholic views of marriage, and ensuring that those whose values did not align with Catholicism were not forced to teach or be a student within the Catholic education system.

**Dr Jillian Spencer** expressed a conscientious objection to Queensland Children's Hospital's gender affirmation model, particularly around the prescription of puberty blockers without sufficient psychological assessment. Despite Jillian having more than 20 years' experience as a medical practitioner and over ten as a specialist

child psychiatrist, she was barred from clinical duties following a complaint about her treatment of children with gender dysphoria. Jillian has faced numerous unwarranted investigations by the Australian Health Practitioner Regulation Agency.

**The below stories have been obtained by the Australian Christian Lobby through our webpage on the New South Wales Anti-Discrimination Inquiry (link). The participants' identifying information has been removed and explicit consent has been given for use within this submission.**

**A Catholic employee** was targeted for his faith in his workplace when his colleagues displayed a derogatory mural stating 'God loves you [name omitted] you God fearing f---wit' in a public and prominent location. This mural was approved by upper management. The same man has been called a 'paedophile' and 'paedophile protector' due to his Catholic beliefs.

**A teacher at a public school** attended a staff meeting where they were asked to share controversial issues identified in the school. During this meeting, the principal referred to Christians holding traditional values as "religious extremists" and implied that such beliefs were not compatible with operating within the school. The Christian teacher felt powerless to engage in the conversation and share their position.

**A parent** raised concern over a school bus at the front of a public primary school which displayed rainbow colours and the slogan 'RIDE WITH PRIDE'. On raising their concern, the headmaster advised if they were to take the matter further they would lose their job.

**A university student** received a video containing a death threat for sharing their faith online. The student was also the target of an online petition which sought to have them expelled for sharing their beliefs online. A YouTube video was also circulated which made defamatory and unfounded claims.

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<sup>1</sup> Similarly with indirect discrimination, for example, where a measure that is neutral on its face disproportionately affects those in a particular group, without reasonable and objective justification.

<sup>2</sup> *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 (23 August 2024) [58].

<sup>3</sup> Campbell C, Smith D. Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment. *Federal Law Review*. 2015;43(1):91-118. DOI:10.22145/flr.43.1.4. Accessible online at <https://www.cambridge.org/core/journals/federal-law-review/article/abs/direct-discrimination-without-a-comparator-moving-to-a-test-of-unfavourable-treatment/68E527301020E0F23D86ECE46CD185E0> and <https://journals.sagepub.com/doi/10.22145/flr.43.1.4>.

<sup>4</sup> See paragraph 3.24 of the Consultation Paper.

<sup>5</sup> See paragraph 3.90 of the Consultation Paper.

<sup>6</sup> See paragraph 2.37 of the Consultation Paper.

<sup>7</sup> See paragraph 3.100 of the Consultation Paper.

<sup>8</sup> See paragraph 3.100 of the Consultation Paper.

<sup>9</sup> See paragraph 3.101 of the Consultation Paper.

<sup>10</sup> See paragraph 4.11 of the Consultation Paper.

<sup>11</sup> See paragraph 4.60 of the Consultation Paper.

<sup>12</sup> See paragraph 4.71 of the Consultation Paper.

<sup>13</sup> For example, see paragraph 4.75 of the Consultation Paper.

<sup>14</sup> See paragraphs 4.73 and 4.74 of the Consultation Paper.

<sup>15</sup> See paragraph 4.83 of the Consultation Paper.

<sup>16</sup> See paragraph 4.81 of the Consultation Paper.

<sup>17</sup> See paragraphs 4.108 to 4.113 of the Consultation Paper.

<sup>18</sup> The SDA's definition of "gender identity" is:

"the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth."

QLD's definition of "gender identity" is

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

<sup>19</sup> UK Equality Act 2010, s.7: "Gender reassignment. (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment..."

S.11: "Sex. In relation to the protected characteristic of sex—(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman..."

S.12: "Sexual orientation. (1) Sexual orientation means a person's sexual orientation towards—(a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex..."

<sup>20</sup> [Yogyakarta Principles](#) (2007) and Yogyakarta Principles + 10 (2017) [website]. Accessed 22/08/25. According to supporting documentation, "[t]he Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity are meant to be a coherent and comprehensive articulation of the obligations of states and non-state actors to respect, protect, and fulfill the human rights of all persons regardless of sexual orientation and gender identity." (Sheila Quinn, "An Activist's Guide to the Yogyakarta Principles", 2010). Australia's Federal Senate Legal and Constitutional Affairs Legislation Committee, reporting on the Parliamentary Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, has stated that "the Yogyakarta Principles have no legal force either internationally or within Australia. They were developed by a group of human rights experts, rather than being an agreement between States." ([Report on the Inquiry into Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Bill 2013 \[Provisions\]](#), Commonwealth of Australia, 14 June 2013, n. 3.41, 26).

<sup>21</sup> See paragraph 4.117 of the Consultation Paper.

<sup>22</sup> See paragraph 4.118 of the Consultation Paper.

<sup>23</sup> See paragraph 4.119 of the Consultation Paper.

<sup>24</sup> See pages 4 to 7 of our former submission.

<sup>25</sup> [Christian Youth Camps Ltd and Anor v Cobaw Community Health Services Ltd and Anor \[2014\] VSCA 75 \(CYC v Cobaw\)](#) at [559]-[563].

<sup>26</sup> Australian Government Attorney-General's Department's website: See [this link](#).

<sup>27</sup> See page iii of the Expert Panel's report: [This link](#).

<sup>28</sup> Australian Government Attorney-General's Department's website: See [this link](#).

<sup>29</sup> See Recommendation 16 on pages 5 and 95-96 of the Ruddock Review report.

<sup>30</sup> See paragraphs 5.27 to 5.117 of the Consultation Paper.

<sup>31</sup> See paragraph 5.30 of the Consultation Paper.

<sup>32</sup> See paragraph 5.31 of the Consultation Paper.

<sup>33</sup> See paragraph 5.38 of the Consultation Paper.

<sup>34</sup> See paragraph 5.43 of the Consultation Paper.

<sup>35</sup> See paragraph 5.50 of the Consultation Paper.

<sup>36</sup> See paragraph 5.67 of the Consultation Paper.

<sup>37</sup> See paragraphs 5.96 to 5.98 of the Consultation Paper.

<sup>38</sup> Legislative Review Digest, Summary of Conclusions, Legislative Review Committee, Parliament of NSW, 12 September 2023, 16.

<sup>39</sup> See paragraphs 5.99 to 5.101 of the Consultation Paper.

<sup>40</sup> See paragraph 5.100 of the Consultation Paper.

<sup>41</sup> See paragraphs 5.102 to 5.105 of the Consultation Paper.

<sup>42</sup> See paragraphs 5.106 to 5.117 of the Consultation Paper.

<sup>43</sup> See paragraph 5.106 of the Consultation Paper.

<sup>44</sup> See paragraph 5.79 of the Consultation Paper.

<sup>45</sup> See paragraph 5.79 of the Consultation Paper.

<sup>46</sup> See paragraph 5.80 of the Consultation Paper.

<sup>47</sup> See paragraph 5.81 of the Consultation Paper.

<sup>48</sup> See paragraph 5.82 of the Consultation Paper.

<sup>49</sup> See paragraph 5.84 of the Consultation Paper.

<sup>50</sup> See paragraph 6.24 of the Consultation Paper.

<sup>51</sup> See paragraph 6.24 of the Consultation Paper.

<sup>52</sup> NSW Treasury Policy and Guidelines Paper No. TPP22-08, issued 28 February 2022.

<sup>53</sup> See paragraph 6.31 of the Consultation Paper.

<sup>54</sup> See paragraphs 6.34 and 6.35 of the Consultation Paper.

<sup>55</sup> See paragraph 6.40 of the Consultation Paper.

<sup>56</sup> See paragraph 6.47 of the Consultation Paper.

<sup>57</sup> See paragraph 6.56 of the Consultation Paper.

<sup>58</sup> See paragraph 6.59 of the Consultation Paper.

<sup>59</sup> See paragraph 6.61 of the Consultation Paper.

<sup>60</sup> See paragraph 6.72 of the Consultation Paper.

<sup>61</sup> See paragraph 6.153 of the Consultation Paper.

<sup>62</sup> See paragraph 6.157 of the Consultation Paper.

<sup>63</sup> See paragraph 7.15 of the Consultation Paper.

<sup>64</sup> See paragraph 7.16 of the Consultation Paper.

<sup>65</sup> See paragraph 7.22 of the Consultation Paper.

<sup>66</sup> See paragraph 7.20 of the Consultation Paper.

<sup>67</sup> See paragraph 7.21 of the Consultation Paper.

<sup>68</sup> See paragraph 7.22 of the Consultation Paper.

<sup>69</sup> See paragraph 7.34 of the Consultation Paper.

<sup>70</sup> See paragraph 7.40 of the Consultation Paper.

<sup>71</sup> Report to the General Assembly of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt A/69/261 (2014), para 41.

<sup>72</sup> Report to the General Assembly of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/68/290, 7 August 2013, [58–60].

<sup>73</sup> See page 8 of our former submission.

<sup>74</sup> See paragraph 7.74 of the Consultation Paper.

<sup>75</sup> [Schools: Data on government and non-government students, staff and school](#), Australian Bureau of Statistics [website]. Accessed 20/08/25.

<sup>76</sup> Caitlin Cassidy, [“SW religious schools see 30% rise in enrolments in a decade – and not necessarily due to beliefs”](#), The Guardian, 31 July 2025.

<sup>77</sup> See paragraph 7.77 of the Consultation Paper.

<sup>78</sup> See paragraph 7.88 of the Consultation Paper.

<sup>79</sup> See paragraphs 7.89 to 7.91 of the Consultation Paper.

<sup>80</sup> See paragraph 7.115 of the Consultation Paper.

<sup>81</sup> See paragraph 7.112 of the Consultation Paper.

<sup>82</sup> See paragraph 7.133 of the Consultation Paper.

<sup>83</sup> See paragraphs 7.134 and 7.135 of the Consultation Paper.

<sup>84</sup> [A Fair Playing Field: Protecting Women’s Single-Sex Sport](#), Women’s Forum Australia, 2022.

<sup>85</sup> John Whitehall, [“Guidelines for the Destruction of Female Sport”](#), Quadrant, 3 October 2019

<sup>86</sup> See paragraph 7.137 of the Consultation Paper.

<sup>87</sup> See paragraph 7.151 of the Consultation Paper.

<sup>88</sup> See paragraph 7.155 of the Consultation Paper.

<sup>89</sup> See paragraph 7.159 of the Consultation Paper.

<sup>90</sup> See paragraph 7.162 of the Consultation Paper.

<sup>91</sup> See paragraph 7.163 of the Consultation Paper.

<sup>92</sup> See paragraph 7.169 of the Consultation Paper.

<sup>93</sup> UNESCO’s *Guide to policymakers: addressing hate speech through education*, at p.23, summarizing the detailed guidance for United Nations field presences on implementation of the United Nations Strategy and Plan of Action on Hate Speech, pp.13-16, available at: [https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech\\_Guidance%20on%20Addressing%20in%20field.pdf](https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf)

<sup>94</sup> Note the following observation from the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, para 20: “For content that involves the kind of speech as defined in the United Nations Strategy on Hate Speech, that is, speech that is hateful but does not constitute incitement, article 19 (3) of the Covenant provides appropriate guidance. Its conditions must be applied strictly, such that any restriction – and any action taken against speech – meets the conditions of legality, necessity and proportionality, and legitimacy. Given its vagueness, language similar to that used in the Strategy, if meant to guide prohibitions under law, would be problematic on legality grounds, although it may serve as a basis for political and

social action to counter discrimination and hatred. Any State adopting such a definition would also need to situate a restriction among the legitimate grounds for limitation. In most instances, the rights of others, as defined in article 19 (3), may provide the appropriate basis, focused on rights related to discrimination or interference with privacy, or protecting public order. However, in each case, it would remain essential for the State to demonstrate the necessity and proportionality of taking action, and the harsher the penalty, the greater the need for demonstrating strict necessity.”

<sup>95</sup> Ibid, para 17.

<sup>96</sup> Ibid, para 24.

<sup>97</sup> Human Rights Committee, General Comment 34, paras. 22, 25, 33-34.

<sup>98</sup> Ibid, para 35.

<sup>99</sup> See page 17 onwards of the submission.

<sup>100</sup> See the submission itself and its footnotes for further details and supporting references.

<sup>101</sup> See paragraph 8.30 of the Consultation Paper.

<sup>102</sup> See paragraph 8.34 of the Consultation Paper.

<sup>103</sup> See paragraph 8.35 of the Consultation Paper.

<sup>104</sup> See paragraph 8.46 of the Consultation Paper.

<sup>105</sup> See paragraph 8.57 of the Consultation Paper.

<sup>106</sup> See pages 2 and 5 of our previous submission dated 28 June 2024: <https://lawreform.nsw.gov.au/documents/Current-projects/s93z/options-Consultation-Paper-submissions/SV56.pdf>.

<sup>107</sup> UNESCO’s *Guide to policymakers: addressing hate speech through education*, 15.

<sup>108</sup> Ibid.

<sup>109</sup> See public sector guidance sheet by the Attorney-General’s Department on the right to freedom of opinion and expression: [This link](#).

<sup>110</sup> See paragraph 8.83 of the Consultation Paper.

<sup>111</sup> See paragraph 8.76 of the Consultation Paper.

<sup>112</sup> See paragraph 8.100 of the Consultation Paper.

<sup>113</sup> See paragraph 8.101 of the Consultation Paper.

<sup>114</sup> See page 20 of our former submission.

<sup>115</sup> See paragraphs 8.102 and 8.103 of the Consultation Paper.

<sup>116</sup> See paragraphs 8.134 and 8.135 of the Consultation Paper.

<sup>117</sup> See pages 10 to 13 of our former submission.

<sup>118</sup> See paragraphs 9.2 and 9.3 of the Consultation Paper.

<sup>119</sup> See paragraph 2.37 of the Consultation Paper.

<sup>120</sup> See paragraph 3.100 of the Consultation Paper.

<sup>121</sup> See paragraph 3.100 of the Consultation Paper.

<sup>122</sup> See paragraph 9.20 of the Consultation Paper.

<sup>123</sup> See paragraph 9.21 of the Consultation Paper.

<sup>124</sup> See paragraphs 9.24 and 9.25 of the Consultation Paper.

<sup>125</sup> See paragraph 9.26 of the Consultation Paper.

<sup>126</sup> See paragraph 9.27 of the Consultation Paper.

<sup>127</sup> See paragraph 9.28 of the Consultation Paper.

<sup>128</sup> See pages 13 and 14 of our former submission.

<sup>129</sup> See paragraph 9.79 of the Consultation Paper.

<sup>130</sup> See paragraphs 10.20 to 10.30 of the Consultation Paper.

<sup>131</sup> See paragraph 10.28 of the Consultation Paper.

<sup>132</sup> See paragraph 10.28 of the Consultation Paper.

<sup>133</sup> See paragraph 10.29 of the Consultation Paper.

<sup>134</sup> See paragraph 10.31 of the Consultation Paper.

<sup>135</sup> See paragraph 10.35 of the Consultation Paper.

<sup>136</sup> See paragraph 10.34 of the Consultation Paper.

<sup>137</sup> See paragraphs 10.37 and 10.38 of the Consultation Paper.

<sup>138</sup> See paragraph 10.39 of the Consultation Paper.

<sup>139</sup> See footnote 39 on page 222 of the Consultation Paper.

<sup>140</sup> See paragraph 11.6 of the Consultation Paper.

<sup>141</sup> See page 14 of our former submission.

<sup>142</sup> See paragraph 11.30 of the Consultation Paper.

<sup>143</sup> See paragraph 11.28 of the Consultation Paper.

<sup>144</sup> See paragraph 11.32 of the Consultation Paper.

<sup>145</sup> See paragraph 11.33 of the Consultation Paper.

<sup>146</sup> See paragraph 11.58 of the Consultation Paper.

<sup>147</sup> See page 14 of our former submission.

<sup>148</sup> See paragraph 11.66 of the Consultation Paper.

<sup>149</sup> See paragraph 11.72 of the Consultation Paper.

<sup>150</sup> See paragraph 11.72 of the Consultation Paper.

<sup>151</sup> See paragraph 11.75 of the Consultation Paper.

<sup>152</sup> See paragraph 11.76 of the Consultation Paper.

<sup>153</sup> See paragraph 11.77 of the Consultation Paper.

<sup>154</sup> See page 14 of our former submission.