

Submission into the Review of the Anti- Discrimination Act 1977 (NSW) – Unlawful Conduct

August 2025



Anti-Discrimination
New South Wales

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

Submission into the Review of the Anti-Discrimination Act 1977 (NSW) – Unlawful Conduct

Published by Anti-Discrimination NSW

antidiscrimination.nsw.gov.au

First published: August 2025

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Glossary of abbreviations

Abbreviation	Term
ACT	Australian Capital Territory
<i>ACT Discrimination Act</i>	<i>Discrimination Act 1991 (ACT)</i>
ADA	<i>Anti-Discrimination Act 1977 (NSW)</i>
<i>Anti-Discrimination Regulation</i>	<i>Anti-Discrimination Regulation 2019 (NSW)</i>
ADNSW	Anti-Discrimination NSW
AHRC	Australian Human Rights Commission
<i>Companion Animals Act</i>	<i>Companion Animals Act 1988 (NSW)</i>
<i>Conversion Practices Ban Act</i>	<i>Conversion Practices Ban Act 2024</i>
CRDP	<i>Convention of the Rights of People with a Disability</i>
<i>Disability Discrimination Act</i>	<i>Disability Discrimination Act 1992 (Cth)</i>
<i>Equality Act</i>	<i>Equality Legislation Amendment (LGBTIQ+) Act 2024 (NSW)</i>
<i>Fair Work Act</i>	<i>Fair Work Act 2009 (Cth)</i>
ITAR	<i>United States International Traffic in Arms Regulations</i>
LRCWA	Law Reform Commission of Western Australia
NCAT	NSW Civil and Administrative Tribunal
NSWADT	NSW Administrative Decisions Tribunal
NSWCCL	NSW Council for Civil Liberties
<i>NSW Crimes Act</i>	<i>Crimes Act 1900 (NSW)</i>
NSWLRC	NSW Law Reform Commission
QHRC	Queensland Human Rights Commission
<i>Queensland Anti-Discrimination Act</i>	<i>Anti-Discrimination Act 1991 (Qld)</i>
<i>Tasmanian Anti-Discrimination Act</i>	<i>Anti-Discrimination Act 1998 (Tas)</i>
<i>Racial Discrimination Act</i>	<i>Racial Discrimination Act 1975 (Cth)</i>
<i>Sex Discrimination Act</i>	<i>Sex Discrimination Act 1984 (Cth)</i>
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
<i>Victorian Equal Opportunity Act</i>	<i>Equal Opportunity Act 2010 (Vic)</i>
<i>Western Australia's Equal Opportunity Act</i>	<i>Equal Opportunity Act 1984 (WA)</i>
VCAT	Victorian Civil and Administrative Tribunal

Introduction

Anti-Discrimination NSW (ADNSW) thanks the NSW Law Reform Commission (the NSWLRC) for the opportunity to make a submission in response to its first consultation paper in its review of the *Anti-Discrimination Act 1977 (ADA) - Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper).

ADNSW administers the ADA which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. Sexual harassment, as well as vilification on the grounds of race, transgender status, religion, homosexuality and HIV/AIDS is also unlawful.

ADNSW also administers the civil complaints scheme under the *Conversion Practices Ban Act 2024 (NSW) (Conversion Practices Ban Act)* which prohibits conversion practices that are directed to an individual which seek to change or suppress an individual's sexual orientation or gender identity.

ADNSW works to eliminate discrimination in NSW by:

- answering enquiries
- resolving complaints
- raising awareness about discrimination and its impacts
- managing applications for exemptions from the ADA
- advising the government about discrimination issues
- administering the civil complaints scheme under the *Conversion Practices Ban Act*.

Since its commencement on 1 June 1977, the ADA has provided protection from discrimination to the NSW community on certain grounds and in areas of public life. Although the ADA was pioneering when it was introduced almost 50 years ago, it has fallen behind best practice standards locally and internationally. The protection against discrimination, harassment, and vilification available to people in NSW should be no less than at the federal level, or in other state and territories around Australia.

In responding to the questions raised by the NSWLRC in its Consultation Paper, ADNSW has been guided by the following general principles:

- The ADA should be amended to align better with other laws in NSW and with anti-discrimination laws in other state and federal jurisdictions
- Many of the provisions in the ADA are outdated and should be updated to align with contemporary community standards
- The ADA should be clear and easy to navigate and understand for people affected by discrimination and by duty holders

- Communities and people affected by and with lived experience of discrimination, harassment, vilification, and victimisation should be consulted in this process and inform how laws that affect them are drafted
- Exceptions from discrimination laws should be reasonable and proportionate and not result in discrimination against people and groups with protected attributes under the ADA.

For questions about this submission, please email the Manager, Governance and Advice, Anti-Discrimination NSW at adbcontact@justice.nsw.gov.au.

Tests for Discrimination

Direct Discrimination

Question 3.1: Direct discrimination

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

ADNSW has considered whether the current ‘comparator’ test should be replaced by an ‘unfavourable treatment’ test. On balance, our view is that it would be preferable to move to an unfavourable treatment test, as discussed below.

The ‘comparator test’

The process of identifying an appropriate comparator can be difficult and commentators have raised several concerns about the application of this test,¹ including that it:

- is confusing, complex, and difficult to interpret and apply for courts, tribunals, parties, and the community.²
- undermines the objects and purposes of anti-discrimination legislation.³
- is not aligned with contemporary community standards as it is underpinned by a formal rather than substantive model of equality.⁴
- does not reflect that anti-discrimination legislation should be interpreted beneficially.⁵
- is unfavourable to those with manifestations of a disability, (see discussion below in relation to the ‘Purvis’ case).⁶
- deprives those with certain manifestations of a disability from protections from direct discrimination, regardless of whether the manifestation causes any detriment.⁷

¹ See, eg, Colin D Campbell, ‘A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)’, [2007] *FedLawRw* 4.

² Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 89; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 54-55.

³ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 89-90; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 53.

⁴ Belinda Smith, ‘From Wardley to Purvis: How Far Has Australian Anti-Discrimination Law Come in 30 Years?’ (2008) 21(1) *Australian Journal of Labour Law* 3; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.41]-[3.44].

⁵ Kate Rattigan, ‘Purvis v New South Wales (Department of Education and Training): A Case for Amending the Disability Discrimination Act 1992 (Cth)’ (2004) 28(2) *Melbourne University Law Review* 532, 547-9.

⁶ The requirement to find an appropriate comparator and argue against the ‘unjustifiable hardship’ defence may be too onerous for complainants, especially for self-represented litigants; See, eg, Colin D Campbell, ‘A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator under the Disability Discrimination Act 1992 (Cth)’ (2007) 35(1) *Federal Law Review* 111; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 53.

⁷ This may include people with manifestations of a disability where there is no threat of violence to anyone but are nevertheless excluded from protections from direct discrimination. As an example, for someone who has Tourette’s syndrome who has a physical tic (sudden, repetitive, and involuntary movements or sounds), the

- deems identical treatment, even if it was detrimental, as not resulting in discrimination.⁸

Purvis v New South Wales

In *Purvis v New South Wales*,⁹ the High Court considered direct discrimination under the *Disability Discrimination Act 1992* (Cth) (*Disability Discrimination Act*). The majority of the High Court held that a student who was suspended and excluded due to behaviour resulting from his disability was not discriminated against under the *Disability Discrimination Act*, and in determining differential treatment, the comparator would be a person without a disability who engaged in the same behaviour.¹⁰

Purvis has been applied in NSW by courts and tribunals in relation to the definition of ‘disability’ and in applications of the ‘comparator test’ in direct discrimination under the ADA.¹¹ For example, the then NSW Administrative Decisions Tribunal (NSWADT) followed *Purvis* in *Chinchen v NSW Department of Education and Training*.¹² The Applicant alleged that their son was discriminated on the ground of his learning disability, dyspraxia. Applying the ‘comparator’ test from *Purvis*, the NSWADT found that “the correct comparison in the present case is between [the young person] and an ‘able student’ (either actual or hypothetical) in the extension class who is in the same, or not materially different, circumstances (‘comparable circumstances’), in other words, a student that has difficulty completing their tasks in class for a reason other than the particular disability.”¹³

Some have argued that the lack of an ‘unjustifiable hardship’ defence could have been responsible for the approach the High Court took in *Purvis*.¹⁴ Following *Purvis*, the definition of disability in the *Disability Discrimination Act* was amended in 2009 to expressly include “behaviour that is a symptom or manifestation of the disability.”

Substituting the ‘comparator test’ with the ‘unfavourable treatment’ test

As explained in the Consultation Paper, the ACT and Victoria use the ‘unfavourable treatment test’ in their definitions of direct discrimination. Proposed reforms to introduce a similar test have been

physical tic may be considered as a manifestation of a disability and therefore excluded from protections from direct discrimination; See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 90.

⁸ See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [3.31]-[3.34], where the following example is provided: where “a particular organisation may make its services or benefits available only to a particular group, say people with disabilities. If a person with a disability is treated detrimentally because of his or her disability, there may be no discrimination despite an apparent connection between the treatment and the ground.”

⁹ *Purvis v New South Wales* [2003] HCA 62; 202 ALR 133.

¹⁰ *Purvis v New South Wales* [2003] HCA 62; 202 ALR 133 [29], [183], [219-32].

¹¹ *Peng v Secretary for the NSW Ministry of Health in respect of the NSW Health Service, NSW Health Pathology Division* [2018] NSWCATAD 210.

¹² *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180.

¹³ *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180 [252].

¹⁴ Elizabeth Dickson, ‘Disability Discrimination in Education: *Purvis v New South Wales* (*Department of Education and Training*), Amendment of the Education Provisions of the *Disability Discrimination Act 1992* (Cth) and the Formulation of Disability Standards for Education’ (2005) 24(1) *University of Queensland Law Journal* 213, 219.

enacted in Queensland which were due to commence on 1 July 2025. The commencement date of this legislation has been postponed.¹⁵

Ten years after Victoria enacted legislation changing from the ‘comparator test’ to the ‘unfavourable treatment test’ in 2010, research was conducted on the effect of the change.

Interviewees including legal professionals and staff of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) staff reported that:

- the change had a positive effect,
- the test had a ‘cleaner’ and more accessible definition,
- the test was easier to explain to clients, and
- the test removed some of the artificial complexity of the ‘comparator test’.¹⁶

The ‘unfavourable treatment test’ is thought to be simpler to understand and apply than the ‘comparator test.’ Some other advantages of an ‘unfavourable treatment test’ may include:

- that it encompasses unfavourable treatment towards behaviour that is a manifestation of a disability.¹⁷
- it does not prevent complainants from presenting their case by identifying a genuine comparator if this will assist in demonstrating unfavourable treatment.¹⁸
- the test focuses on the impact on an affected group, rather than a comparison with a hypothetical group.¹⁹

The ‘unfavourable treatment’ test is not without complexity, with some debate remaining about whether an ‘unfavourable treatment’ test necessarily removes the need for complainants to identify a comparator.²⁰ In *Aitken v Victoria*, the Court of Appeal of the Supreme Court of Victoria remarked the “question whether a comparator group is required under the *Equal Opportunity Act 2010* (Vic) remains an unresolved question of law in Victoria.”²¹ In contrast, decisions in the then

¹⁵ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper No 24 (2025) [3.21].

¹⁶ Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)’ (2021) 44(2) *Melbourne University Law Review* 284 – 287.

¹⁶ In this review, 19 solicitors, 4 barristers and 12 Victorian Equal Opportunity Victorian Equal Opportunity and Human Rights Commission staff were interviewed.

¹⁷ The matter of *Slattery v Manningham City Council* [2013] VCAT 1869 illustrates that for Victoria, the ‘unfavourable treatment’ test operates differently compared to the ‘comparator test’ where the treatment towards behaviours as a manifestation of a disability was considered as unfavourable treatment; Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)’ (2021) 44(2) *Melbourne University Law Review* 483-484.

¹⁸ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 134.

¹⁹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 93.

²⁰ *Review of the Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 133-135.

²¹ *Aitken v Victoria* [2013] VSCA 28, [46].

Administrative Appeals Tribunal of the ACT confirmed that no comparator is required under the ACT anti-discrimination legislation.²²

The ‘unfavourable treatment’ test may also invite a range of interpretations, including a ‘setback to interests’ approach, a ‘reasonable expectations’ approach, and a ‘value-based’ approach.²³

The ‘setback to interests’ approach requires the complainant to only establish their treatment was adverse to their interests (this may be over-inclusive as these interest may span from financial interests to personal interests such as maintaining self-esteem).²⁴ The ‘reasonable expectations’ approach requires the complainant to only establish that a reasonable expectation on the part of the complainant is disappointed as a result of the treatment.²⁵ The ‘value-based’ approach depends on the values underlying existing prohibitions on discrimination and requires the complainant to only establish those values being infringed.²⁶

How does this affect ADNSW?

While ADNSW does not make decisions on whether discrimination has occurred in relation to complaints lodged under the ADA, improved clarity around the tests for discrimination would help ADNSW staff explain the legislation and enable individuals to better understand and assert their rights under anti-discrimination law.

For example, uncertainty around whether unfair treatment relates to a characteristic or manifestation of a disability, or identifying an appropriate comparator, may discourage individuals from lodging complaints. If a matter proceeds to conciliation, this ambiguity may also act as a disincentive to a settlement. Where unresolved matters are referred to the NSW Civil and Administrative Tribunal (NCAT), the process may be particularly burdensome for self-represented complainants.

ADNSW receives enquiries and complaints about behaviours manifesting from psychological or neurological disabilities.²⁷ As there is a risk that protections under the ADA may not apply, ADNSW may refer some complaints to the Australian Human Rights Commission (AHRC) if the alleged

²² *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729, 736; *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* provides: “[The unfavourable treatment test does] not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with.”

²³ Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91.

²⁴ Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91, 4 – 14.

²⁵ Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91, 14 – 17.

²⁶ Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91, 17 – 34.

²⁷ For example, where children are excluded from childcares and educational facilities because of extremely violent or dangerous behaviours.

discrimination relates to behavioural manifestations of a disability. ADNSW has also accepted complaints under s 89B of the ADA and, following further investigation, declined them under s 92 for similar reasons.

Finding the balance

ADNSW acknowledges the challenges faced by respondents in managing situations where the manifestation of a person's disabilities results in behaviours that are dangerous, violent, or abusive. In these situations, it can be difficult for employers, educators, and service providers to meet the needs of the person with disability whilst also providing a safe environment for staff, carers and other students. Consideration should be given to introducing an 'unjustifiable hardship' defence to the test for direct discrimination, to enable the President and the NCAT to consider all relevant circumstances in the management of complaints.

Causation

Defining characteristics

To establish causation for direct discrimination under the ADA, a complainant must prove that a reason they received the less favourable treatment was because they either had:

- a protected attribute or
- a characteristic that people with that attribute have or are presumed to have.

Identifying whether a characteristic is protected is not always straightforward. In the NSWLRC's 1999 review of the ADA, it suggested the following changes to how characteristics are defined, suggestions that ADNSW considers remain relevant today. The NSWLRC suggested that the ADA should:

- specify that a characteristic may appertain generally to a particular class if it appertains to a subset of that class.²⁸ ADNSW has received complaints from individuals, belonging to a subset of a race, alleging they have been discriminated against by people of their own race.²⁹
- The ADA should specify that the characteristic need not be unique to one particular group. It should be sufficient that the characteristic is disproportionately found within, or imputed to, that group.³⁰

²⁸ For example, to make a particular drug available to "post-menopausal" women only; See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [3.60].

²⁹ As hypothetical examples, individuals from the same race alleging they were discriminated by people from a different tribe, nation, clan, or region.

³⁰ For example, sickle-cell anaemia can be largely found in people of a particular racial grouping, but it is not unique to that group; See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [3.61].

One of the reasons and dominant or substantial reason

ADNSW supports retaining the language in s 4A of the ADA, which establishes that if an act is done for 2 or more reasons, one of which is discriminatory, then regardless of whether the discriminatory reason is the ‘dominant or substantial reason’ for doing the act, the act is taken to be done for the discriminatory reason.

In Queensland’s review of its discrimination legislation, the use of the phrase ‘a substantial reason’ in that state’s anti-discrimination legislation was criticised, with a preference for the wording ‘one of the reasons’.³¹ Western Australia’s review of its discrimination legislation supported retaining ‘a substantial reason’, while clarifying that it need not be the sole or dominant reason for the treatment.³² The ADA’s current definition ensures that a complainant need only demonstrate that discrimination was a reason for a decision, without needing to establish that it was a substantial reason. ADNSW considers this to be an appropriate threshold.

Knowledge and motive

ADNSW considers it would be helpful to explicitly exclude irrelevant considerations in the definition of direct discrimination.

The *Anti-Discrimination Act 1998* (Tas) also clarifies that for direct discrimination to take place it is not necessary that the person who discriminates either:

- regards the treatment as unfavourable; or
- has any particular motive in discriminating.³³

The absence of ill intent or knowledge that conduct is discriminatory should not excuse discriminatory conduct. The definition of direct discrimination in the ADA should be expanded to specify that it is not necessary to prove motive, and not relevant whether the respondent considered the treatment to be unfavourable.

Indirect Discrimination

Question 3.2: The comparative disproportionate impact test

Should the comparative disproportionate impact test for indirect discrimination be replaced?

If so, what should replace it?

ADNSW supports a reconsideration of the comparative disproportionate impact test, given the complexity that arises in applying the test and the high evidentiary burden it imposes on complainants. Further, as noted by the NSWLRC, many jurisdictions across Australia have replaced the comparative disproportionate impact test with a test that requires a person to

³¹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 95-96; See also *Anti-Discrimination Act 1991* (Qld) s 10.

³² Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 57.

³³ *Anti-Discrimination Act 1998* (TAS) s 14(2).

establish that a respondent's imposition of a condition or requirement puts the person with a protected attribute at a disadvantage. ADNSW supports aligning the test for indirect discrimination in the ADA with other legislative regimes that have adopted this test.

ADNSW prefers the approach in s 8 of the ACT *Discrimination Act* which provides that:

A person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.³⁴

The condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.³⁵

As discussed by the Queensland Human Rights Commission (QHRC) in its review, the important distinction between the ACT legislation and other jurisdictions is that the test only requires 'the person' with the protected attribute to be unreasonably disadvantaged, rather than 'persons' who share the attribute. If the test involves a consideration of whether 'persons with the attribute' are disadvantaged, this may place an additional burden on complainants to prove how a condition or requirement affects people with their protected attribute generally, rather than them individually.³⁶

Question 3.3 Indirect discrimination and inability to comply

What are your views on the "not able to comply" part of the indirect discrimination test?

Should this part of the test be removed? Why or why not?

ADNSW's view is that the 'not able to comply' part of the indirect discrimination test should either be amended or removed.

As identified in the QHRC in its review of Queensland's *Anti-Discrimination Act 1991* (Queensland *Anti-Discrimination Act*), there is a risk that the words "not able to comply" will be interpreted literally, even though courts and tribunals have consistently given a broader interpretation.³⁷

As explained above, one of the general principles guiding ADNSW is that the ADA should be clear and easy to navigate and understand for people affected by discrimination and by duty holders.

ADNSW would support the removal of this part of the test, which would bring the ADA into line with the tests for indirect discrimination in the ACT, Victoria, Tasmania, and the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*).

³⁴ *Discrimination Act 1991* (ACT) s 8(3).

³⁵ *Discrimination Act 1991* (ACT) s 8(4) – (5).

³⁶ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 100.

³⁷ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022), 96.

Alternatively, ADNSW would support amending the test to clarify that a requirement that puts people with the attribute at a disadvantage would be enough to satisfy this part of the indirect discrimination test.

Question 3.4: Indirect discrimination and the reasonableness standard

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

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

To establish indirect discrimination under the ADA, a complainant must show that the rule or requirement is not reasonable in the circumstances of the case, whilst in other jurisdictions the respondent has the responsibility for proving the requirement is reasonable.³⁸

ADNSW supports retaining a reasonableness element in the test for indirect discrimination but would support aligning the ADA with other discrimination laws that place the onus on the respondent to prove that a requirement was reasonable.

ADNSW considers that the ADA should set out a non-exhaustive list of factors to be considered when considering reasonableness, similar to the approach in Victoria which explains that consideration of whether a requirement, condition or practice is reasonable depends on all the relevant circumstances, including:

- the nature and extent of the disadvantage resulting from its imposition, or proposed imposition
- whether the disadvantage is proportionate to the result sought by the duty-holder who seeks or proposes to impose it
- the cost of any alternative
- the financial circumstances of the duty-holder imposing it, or proposing to, and
- whether reasonable adjustments or reasonable accommodation could be made to reduce the disadvantage caused.³⁹

Similar factors are reflected in some NSW tribunal decisions dealing with indirect discrimination.⁴⁰ ADNSW considers that setting out these factors within the legislation itself would provide clearer guidance to duty-holders about the extent of their responsibilities under anti-discrimination law, and improve their understanding of, and compliance with, those responsibilities.

³⁸ *Age Discrimination Act 2004* (Cth) s 15; *Disability Discrimination Act 1992* (Cth) s 6; *Sex Discrimination Act 1984* (Cth) s 7B; *Discrimination Act 1991* (ACT) s 8; *Equal Opportunity Act 2010* (Vic) s 9; *Anti-Discrimination Act 1991* (Qld) s 11.

³⁹ *Equal Opportunity Act 2010* (Vic) s 9(3).

⁴⁰ *Bonella v Wollongong City Council* [2001] NSWADT 194 [95]–[111]; *Gardiner v WorkCover Authority of NSW* [2004] NSWADTAP 1 [24]–[41].

The NSWLRC supported a similar approach in its 1999 review of the ADA.⁴¹

Question 3.5: Indirect discrimination based on a characteristic

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

As the Consultation Paper explains,⁴² while the test for direct discrimination extends protection against discrimination based on characteristics that people with protected attributes generally have or are presumed to have, there is no equivalent ‘characteristic extension’ test for indirect discrimination.

Some jurisdictions do not distinguish between direct and indirect discrimination when offering protection for such characteristics, although this may be achieved in different ways. For example, in the ACT the ‘characteristic extension’ is created by including characteristics and presumed characteristics within the definition of protected attribute⁴³, while in Victoria, it appears within the definition of discrimination.⁴⁴

There appears to be no basis for differing levels of protection from characteristic-based discrimination depending on whether the discrimination was direct or indirect. ADNSW supports amending the ADA to include protection against indirect discrimination where the rule or requirement results in unfavourable treatment based on characteristics that people with protected attributes have or are assumed to have.

Question 3.6: Proving indirect discrimination

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

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

Under the ADA complainants have the burden of proving discrimination. This can place complainants at a further disadvantage in circumstances where there is often already a significant power imbalance between the parties, for example between an individual employee and a corporate employer. Some complainants may find it difficult to obtain evidence to prove their case, and often the reasons for discriminatory conduct are known only to the respondent.

⁴¹ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 6, [3.104].

⁴² NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper No 24 (2025) [3.68], 33 (‘Consultation Paper’).

⁴³ See, eg, *Anti-Discrimination Act 1991 (ACT)* s 7(2).

⁴⁴ *Equal Opportunity Act 2010 (Vic)* s 7(2).

ADNSW would support amending the ADA so that respondents bear the burden of some aspects of the discrimination.

The Consultation Paper provides alternate models, including:

- the shifting burden of proof model used in the *Fair Work Act 2009 (Cth)* (*Fair Work Act*) where the complainant must establish that their employer subjected them to adverse action, with the onus then switching to the employer to prove that the treatment was not for a prohibited reason,⁴⁵ and
- the model used in the UK⁴⁶ and Queensland⁴⁷ in which:
 - If there are facts from which the court/tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned, the court/tribunal must hold that the contravention occurred.
 - But this rule does not apply if the respondent shows that they did not contravene the provision.

The UK/Queensland model applies to all complaint proceedings, including direct and indirect discrimination complaints.

In the UK/Queensland model, the complainant is required to establish a prima facie case – not just to allege that the respondent took an action for a particular reason. The *Fair Work Act* threshold is lower, if a complainant alleges that unfavourable treatment occurred for a particular reason, that is presumed to be the reason for the unfavourable treatment unless the respondent proves otherwise.

On balance, ADNSW prefers the model adopted in the UK and Queensland as it appears to provide a fairer balance between the parties.

Question 3.7: Direct and indirect discrimination

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

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

The concepts of direct and indirect discrimination can be difficult to understand for people affected by discrimination and for people who are trying to comply with the Act and avoid discriminating. In addition, courts and tribunals have interpreted direct and indirect discrimination to be mutually exclusive,⁴⁸ which can add to the complexity of establishing that discrimination has occurred, particularly for self-represented litigants.

⁴⁵ *Fair Work Act 2009 (Cth)* s 351, s 361.

⁴⁶ *Equality Act 2010 (UK)* s 136.

⁴⁷ *Anti-Discrimination Act 1991 (Qld)* s 204.

⁴⁸ See, eg, *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, [14]-[18].

ADNSW recognises that retaining the concepts of direct and indirect discrimination may serve an educative function, as referred to by the ACT Law Reform Advisory Council in its 2015 review of the ACT's anti-discrimination legislation. We also recognise that strict separation of direct and indirect discrimination may overlook the fact that some cases may give rise to both direct and indirect discrimination, as observed by the Canadian Supreme Court in its 'unified test' approach and discussed in the preliminary submission made to the NSWLRC by the NSW Council for Civil Liberties (NSWCCL).⁴⁹

The NSWCCL goes on to say,

“The important thing, in our view, is that the Act has a clear and comprehensive definition of discrimination that applies to all protected attributes and is substantive and not merely formal. In that circumstance, we would embrace a reform of the Act either:

- (a) to include a single definition of discrimination along the lines developed in Canada; or
- (b) to adopt the definition proposed by ACTLRAC, namely that discrimination is conduct that occurs directly, indirectly, or both directly and indirectly, with the Act then to provide examples of direct and indirect discrimination.”⁵⁰

ADNSW would support amending the ADA in line with either of the models suggested by the NSWCCL to make it clear that direct and indirect discrimination are not mutually exclusive, and that they can overlap.

Intersectional discrimination

Question 3.8: Intersectional discrimination

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

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

ADNSW regularly receives enquiries and complaints where different forms of discrimination (e.g., based on race, gender, disability, sexuality) overlap and compound, creating unique experiences of disadvantage. It is common for complainants to make the argument that they were treated more unfavourably due to the intersectionality of their attributes.

Currently, complaints can be brought on multiple grounds, however each ground of complaint is treated separately, and the complainant must establish that discrimination has occurred on each ground. This artificial separation increases the burden on individuals to make a successful

⁴⁹ NSW Council for Civil Liberties, *Preliminary Submission PAD21*, 14.

⁵⁰ NSW Council for Civil Liberties, *Preliminary Submission PAD21*, 14.

discrimination claim and makes it difficult for ADNSW to efficiently and effectively manage the complaint.

The ‘comparator’ test in direct discrimination is an issue in these cases. For example, if a pregnant Aboriginal woman experiences discrimination, what is the appropriate comparator? However, as discussed above, ADNSW is in favour of replacing the ‘comparator test’ with the ‘unfavourable treatment’ test.

The ACT is currently the most progressive Australian jurisdiction in recognising intersectionality, with the *Discrimination Act 1991 (ACT) (ACT Discrimination Act)* now explicitly allowing for complaints based on one or more protected attributes (e.g., race and gender). ADNSW supports prohibiting discrimination based on the combined effect of two or more protected attributes, as recommended by the AHRC, Law Reform Commission of Western Australia (LRCWA) and QHRC.⁵¹

Question 3.9: Intended future discrimination

Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

The tests for discrimination in the ADA should capture intended future discriminatory conduct, to prevent discrimination from occurring. This is particularly relevant for complaints relating to disability discrimination where plans to construct a public space or building may be made, which are not accessible to people with a disability. Under the current provisions in the ADA, because a contravention has not occurred, the conduct would not be covered.

In 1999, the NSWLRC cited the example of *Woods v Wollongong City Council*⁵² where the Tribunal dismissed a complaint involving an approved development application for a retail complex, that did not have wheelchair access, because there had been no provision of services to the complainant prior to construction. The complainant made a subsequent complaint after the complex was built which resulted in reconstruction work.⁵³

If future discrimination is covered, the advantages are that NCAT could make performance type orders which may prevent the above scenario from occurring.

ADNSW supports extending the test for direct discrimination to include when a duty holder “proposes to treat” someone unfavourably, to align with the ACT, Victoria, the Northern Territory, and the *Age Discrimination Act 2004 (Cth) (Age Discrimination Act)*. Further, indirect discrimination

⁵¹ Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) [4.7(c)]; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 13; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 3.2.

⁵² (1986) EOC 92-174.

⁵³ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.58], rec 4.

should cover circumstances where someone proposes to impose a requirement, condition, or practice.

Discrimination: protected attributes

The ADA currently makes it unlawful to discriminate against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. ADNSW agrees with the concerns raised by many stakeholders in their preliminary submissions that the way the ADA expresses and defines several of the protected attributes is outdated and results in gaps in coverage for vulnerable people and communities. Therefore, ADNSW supports reform to the existing protected attributes, as outlined below.

Age

Question 4.1: Age discrimination

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

ADNSW supports moving the compulsory retirement provisions (in Part 4E of the ADA) with the other age discrimination related provisions, as having these provisions in a separate part of the legislation is confusing for the public to navigate.

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

The age-related discrimination provisions provide several complex and overlapping exceptions in all areas of life. As well as the general exceptions to age discrimination in Pt 4G div 4 of the ADA, there are also several exceptions that are unique in each area of life, making these provisions challenging to interpret. ADNSW supports the removal of several of the exceptions, as discussed below, and a simplified structure and numbering to enable the public to more easily understand their rights and obligations in this area.

Exceptions in work

The exception in s 49ZYI which relates to junior employees should be reconsidered. ADNSW notes that in 1999 the NSWLRC recommended that this section should cease to operate in December 2000.⁵⁴ Section 49ZYI provides a broad exception from the age discrimination provisions in work in relation to employees under the age of 21:

- 1) Nothing in section 49ZYB (1) applies to or in respect of the offering of employment to persons who are under 21 years of age or the terms on which employment is offered to persons who are under 21 years of age.
- 2) Nothing in section 49ZYB (2) (a) applies to or in respect of the terms or conditions of employment that are afforded to employees who are under 21 years of age.
- 3) This section ceases to operate on a day appointed by proclamation published on the NSW legislation website for the purposes of this section, being a day that is not earlier than 2 years after the date of commencement of this Part.

⁵⁴ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 72.

ADNSW notes that there are no minimum legal age restrictions for starting work in NSW,⁵⁵ therefore, more young people may be engaged in employment who are not aware of their rights under the law. Exceptions from discrimination laws in work related areas in other Australian states are confined to allowing an employer to pay an employee under the age of 21 according to their age.⁵⁶ Other states limit the exception to circumstances where the young worker is being offered a lower wage in accordance with an industrial award or agreement. ADNSW view is that consideration should be given to narrowing the exception in the ADA to only apply to wages, rather than a broader exception for all ‘terms and conditions’ of employment. Minimum wages and conditions for junior employees are governed by industrial relations legislation, therefore any changes to the ADA should be made with this context in mind.

Section 49ZYJ provides an exception to the age discrimination provisions in circumstances where being a certain age is a genuine occupational qualification for a job. Section 49ZYJ(3) states that being a person of a particular age or age group is a genuine occupational qualification for a job, or a job of a class or description, when prescribed by the regulations.

ADNSW is not aware of any regulations being made in relation to s 49ZYJ(3) and its view is that this section is redundant when considering s 49ZYJ(1) which provides:

Nothing in this Division renders unlawful discrimination against a person on the ground of the person’s age if being a person of a particular age or age group is a genuine occupational qualification for the job.

Exceptions in accommodation

Section 49ZYO(3)(c) provides an exception from the age discrimination provisions in accommodation when the accommodation is “provided with a concession provided in good faith to a person” based on the person’s age. ADNSW’s view is that this exception would be covered by the special measures provisions in section 49ZYR, or a general special measures provision if introduced, discussed further in ADNSW’s response to [Question 11.2](#).

Special need programs and activities

Section 49ZYR provides an exception from the age discrimination provisions for special needs programs and activities:

Nothing in this Part applies to or in respect of anything done to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities.

ADNSW’s view is that many aspects of this provision are not clear, for example, what comes within the meaning of ‘opportunities’ and whether this includes employment opportunities. Furthermore, as discussed later in ADNSW’s submission, ADNSW supports the introduction of a general special

⁵⁵ NSW Government, *Starting work: Your rights and responsibilities*, <https://www.nsw.gov.au/employment/rights-responsibilities/starting-work>, accessed 6 August 2025.

⁵⁶ *Anti-Discrimination Act 1991* (Qld) s 33; *Equal Opportunity Act 2010* (Vic) s 28A.

measures provision under all prohibited grounds of discrimination, which would make this exception redundant.

Exceptions in sport

Section 49ZYW provides a broad exception from the age discrimination provisions that it is not unlawful to exclude people of particular ages from participation in any sporting activity. This does not apply to coaching, administration and any sporting activity prescribed by the regulations for the purposes of s 49ZYW. ADNSW's view is that this exception is not justified given its breadth which covers "any sporting activity" and believes it should be reconstrued and narrowed. Other Australian jurisdictions provide exceptions from unlawful discrimination based on age only in competitive sporting activities. Generally, "competitive sporting activities" do not extend to coaching, umpiring and sports administration.⁵⁷ This is discussed further in ADNSW's response to [Question 7.7](#).

Regulation making power in section 49ZYX

Section 49ZYX provides that certain activities may be prescribed lawful by the regulations. ADNSW is not aware of any activities being prescribed lawful by the regulations pursuant to s 49ZYX, since it was introduced in 1993, therefore considers that this exception should be removed.

Carer's Responsibilities

Question 4.2: 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"?

ADNSW agrees with the concerns raised by stakeholders that the current framing of the attribute of "responsibilities as a carer," including the definition of "immediate family member" in the ADA, does not capture the diversity of modern family structures and caregiving relationships that exist in NSW society today. The ADA provisions cover a person's responsibilities to care for, or support:

- 1) their child or stepchild, who is dependent on them or in need of care or support
- 2) any child or adult in need of care or support, if they are an authorised carer or guardian, or have parental responsibility under legislation, or
- 3) any immediate family member in need of care or support.⁵⁸

ADNSW's view is that the protected attribute of "responsibilities as a carer" should allow for the following:

- a variety of family, caring and kinship relationships that reflect the diversity of contemporary family structures;
- flexibility for a range of care arrangements, including part-time, intermittent, or episodic care; and
- both paid and unpaid caring arrangements.

⁵⁷ *Equal Opportunity Act 2010* (Vic) s 72; *Anti-Discrimination Act 1991* (Qld) s 111.

⁵⁸ *Anti-Discrimination Act 1977* (NSW) s 49S.

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

ADNSW supports the introduction of a separate ground in the ADA that provides protection based on parental status. As noted by the NSWLRC, this is consistent with laws in other Australian states and territories.⁵⁹ Arguably, parents that experience discrimination could have protection under the existing ground of “carer’s responsibility” in the ADA. However, ADNSW’s view is that parent’s face distinct forms of discrimination, particularly in the workplace, and an express protection on this ground would strengthen laws in this area.

As stated by the NSWLRC in the Consultation Paper, the ADA does not recognise the status of ‘not’ being a parent. Protections under the existing attribute of carer’s responsibilities do not cover people without children. Evidence shows a steady decline in Australia’s birth rate since the 1970s,⁶⁰ as economic and environmental factors influence people’s decision whether to have children. For many, the decision not to be a parent is outside their control. Anecdotal evidence suggests that people without children may experience discrimination, such as pressure to work during holidays, such as the Christmas period, or during school holidays.⁶¹

The introduction of a separate ground of “parental status” is clearer and leaves less room for ambiguity. ADNSW’s view is that the law should keep pace with evolving social trends, such as the increase in people not having children and the discrimination they may face.

Disability

Question 4.3 Disability discrimination

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

ADNSW agrees with concerns raised by stakeholders that the language used in the definition of “disability” in the ADA is outdated and is supportive of adopting more modern and inclusive language. Under the ADA “disability” is defined as:

- (a) total or partial loss of a person’s bodily or mental functions or of a part of a person’s body, or
- (b) the presence in a person’s body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person’s body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.⁶²

⁵⁹ *Equal Opportunity Act 2010* (Vic) s 4 definition of “parental status”, s 6(i); *Anti-Discrimination Act 1998* (Tas) s 3 definition of “parental status”, s 16(i); *Anti-Discrimination Act 1991* (Qld) s 7(d), sch 1 definition of “parental status”.

⁶⁰ Australian Bureau of Statistics, *Births, Australia*, <https://www.abs.gov.au/statistics/people/population/births-australia/latest-release>, 16 October 2024.

⁶¹ Australian Broadcasting Corporation, *The pressure to work holiday periods when you don’t have kids*, <https://www.abc.net.au/news/2024-12-23/the-pressure-to-work-holiday-periods-when-you-dont-have-kids/104651918>, 23 December 2024.

⁶² *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “disability”.

ADNSW's view is that any changes to the definition of disability in the ADA should be done in consultation with people with lived experience of a disability and with the disability community.

Exception for persons addicted to prohibited drugs

ADNSW's view is that consideration should be given to removing the exception which allows discrimination against people addicted to prohibited drugs at work as this exception is outdated and stigmatising. Currently, the protections against disability discrimination do not apply if:

- the disability relates to a prohibited drug; and
- the person who is being discrimination against is addicted to a prohibited drug at that time.⁶³

ADNSW agrees with the NSWLRC that concerns about work suitability or performance could be addressed through the inherent requirements exception, which allows duty holders to discriminate against someone who cannot carry out the inherent requirements of a job.

Assistance Animals

The ADA provides limited and inconsistent coverage against discrimination for users of assistance animals when compared with other state and federal laws in this area, and ADNSW supports reform to better support people using an assistance animal.

The ADA does not provide a definition of an assistance dog or animal. Rather, s 49B(3) of the ADA treats the use of an assistance dog as a 'characteristic' that is generally held by people with a disability related to vision, hearing, or mobility:

The fact that a person who has a disability of or relating to vision, hearing or mobility has, or may be accompanied by, a dog which assists the person in respect of that disability, is taken to be a characteristic that appertains generally to persons who have that disability.

However, the ADA does not provide protection to people:

- using an assistance animal that is not a dog; and
- who experience disabilities not related to vision, hearing, or mobility.

As noted by the NSWLRC, the provisions in the ADA do not cover people who have assistance animals to alleviate the effects of other types of disabilities including mental or psychosocial disabilities. The provisions are also limited to "dogs" and although dogs are the most common type of assistance animal, people with a disability may use other types of animals to assist them.

The ADA is also inconsistent with other state and federal law that relate to the use of assistance animals. Unlike the ADA, the *Disability Discrimination Act* covers all people with a disability. The definition of an assistance animal in s 9(2) of the *Disability Discrimination Act* is also broader and includes any animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or

⁶³ *Anti-Discrimination Act 1977* (NSW) s 49PA.

- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or
- (c) trained:
 - i. to assist a person with a disability to alleviate the effect of the disability; and
 - ii. to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Moreover, the *Companion Animals Act 1988 (NSW)* (*Companion Animals Act*) which governs the management of pet cats and dogs in NSW and includes the use of assistance animals, is also broader than the ADA. The *Companion Animals Act* uses the same definitions of an assistance animal and disability as the *Disability Discrimination Act*.⁶⁴ Section 59 of the *Companion Animals Act* provides that a person with a disability is entitled to be accompanied by an assistance animal into any building or place open to or used by the public or on any public transport.⁶⁵

Inconsistencies between the ADA, the *Disability Discrimination Act* and the *Companion Animals Act* create confusion and uncertainty in NSW for both users of assistance animals and service providers including businesses, accommodation, and transport operators about what their rights and responsibilities are under the law. The choice of jurisdiction in which to make a discrimination complaint (either to ADNSW or the AHRC) is important when there are differences in the coverage and remedies available in different jurisdictions to people subject to discrimination.

Evidence shows that discrimination against users of assistance animals is very prevalent. A survey by Guide Dogs Australia in 2022 found that one in three guide dog handlers across Australia have reported being denied access to a public venue or form of transport because of their guide dog in the past year.⁶⁶ Despite this, discrimination complaints to ADNSW related to assistance dogs have been relatively low. Social and economically disadvantaged members of the community often lack the resources to take legal action. Further, ADNSW staff frequently refer people making enquiries involving assistance animals to the AHRC given the broader coverage provided in the *Disability Discrimination Act*.

In the last five years, ADNSW has received approximately 62 complaints of discrimination concerning the use of assistance dogs.⁶⁷ These complaints statistics reflect a very small proportion of the issues that arise from using an assistance animal in NSW. Complaints are primarily received from people trying to access goods and services including medical facilities, hospitality venues such as bars and hotels, transportation including trains, taxis and ride share services and government services. Complainants commonly report feeling distressed when a service is refused and have said they tend to retreat from public life due to the barriers and discrimination that they encounter.

⁶⁴ *Companion Animals Act 1988 (NSW)* s 5; *Disability Discrimination Act 1992 (Cth)* s 9.

⁶⁵ *Companion Animals Act 1988 (NSW)* s 59.

⁶⁶ Guide Dogs Australia, *One in three Guide Dog Handlers put in danger when refused access or service because of their Guide Dog*, <https://nsw.guidedogs.com.au/news/one-in-three-guide-dog-handlers-put-in-danger-when-refused-access-or-service-because-of-their-guide-dog/>, 27 April 2022.

⁶⁷ Due to the limitations of ADNSW's complaints database this figure may not capture all complaints received by ADNSW concerning assistance animals.

Anecdotal trends that have arisen in complaints and enquiries received by ADNSW include:

- Business operators seeking advice about whether they can restrict access to someone with an assistance animal or ask a person for registration documents.
- Refusal by respondents to accept that an animal is an assistance animal despite registration documents presented.
- Confusion for both parties because there is no uniform accreditation/registration process in NSW or nationally (and the falsification of registration documents is common).
- Respondents to complaints that are smaller, individual operators (such as ride-share drivers or small businesses) are less likely to understand and comply with their obligations under anti-discrimination laws.
- Complaints against more well-resourced large corporate entities such as airlines tend to have more favourable outcomes for complainants, including changes in practices and compensation.
- Some food operators and taxi/ride share drivers cite cultural and religious considerations or obligations under health and safety legislation to restrict access to assistance animals.

Case Study

Jessica lives with a hearing impairment and has an assistance dog. Jessica was leasing a property and when the real estate agent became aware that she had a dog she received an eviction notice. Under her rental agreement pets were allowed for an additional fee. Jessica considered that she should not have to pay the fee because the dog was an assistance animal and not a pet.*

Jessica provided the real estate agent with evidence to support that the dog was an assistance animal, including a medical certificate, NSW Pet Registry details, a letter to the local council and a letter from Transport for NSW confirming she had an Assistance Animal Permit. However, the real estate agent did not accept that the dog was an assistance animal.

Jessica obtained an interim order from the NSW Civil and Administrative Tribunal (NCAT) and was not evicted from the property. However, she moved out of the property because of the treatment she received.

ADNSW attempted to resolve the matter through conciliation. However, it could not be resolved and ADNSW referred the matter to the NCAT.

ADNSW's supports making the provisions concerning assistance animals in the ADA consistent with those in the *Disability Discrimination Act*. Many of ADNSW's complaints in this area concern access to transportation including domestic air, train, and bus travel, which causes confusion for

both duty holders and complainants when the law in NSW differs to the federal law and to other states and territories.

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

The ADA currently provides protection against discrimination for a disability that may occur in the future.⁶⁸ The definition of disability in the *Disability Discrimination Act* also includes future disability and explicitly includes a disability that may exist in the future because of a genetic predisposition to that disability. ADNSW's view is that protection against genetic information discrimination in the ADA should be consistent with federal anti-discrimination law and made explicit in the definition of disability.

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

Section 49P of the ADA provides an exception to the disability discrimination provisions that:

Nothing in this Part renders unlawful discrimination against a person on the ground of disability if the disability concerned is an infectious disease and the discrimination is reasonably necessary to protect public health.⁶⁹

ADNSW supports the inclusion of the public health exception, which is consistent with the *Disability Discrimination Act* and other state and territory laws. However, ADNSW has some concerns that the exception is too broad and that “reasonably necessary” lacks objective criteria, a clear test, and appropriate safeguards against discriminatory action. ADNSW agrees with the recommendations by the NSWLRC in 1999 that the exception should be more targeted and involve a consideration of whether actions taken are reasonable and proportionate to the risks.⁷⁰

ADNSW is concerned that duty holders may rely on the exception to make precautionary exclusions that go beyond what is required for community safety. For example, in its 1999 report the NSWLRC refers to HIV patients being required to wear distinguishing arm bands in hospitals. The AIDS Council of NSW argued that this exposed HIV patients to discrimination and was not proportionate to the risks presented.⁷¹ ADNSW supports a re-examining of the exception to ensure that it strikes the right balance between protecting public health and safety and the right to non-discrimination.

Homosexuality

Question 4.4: Discrimination based on homosexuality

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

⁶⁸ *Anti-Discrimination Act 1977* (NSW) s 49A(d).

⁶⁹ *Anti-Discrimination Act 1977* (NSW) s 49P.

⁷⁰ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*(NSW), Report 92 (1999) rec 86.

⁷¹ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*(NSW), Report 92 (1999) [6.276].

ADNSW supports amending the ground of “homosexuality” to provide protections for people with a broader range of sexual orientations, including (but not limited to) people who are bisexual, pansexual, and asexual.

“Homosexuality” should be replaced with “sexual orientation”

The term “sexual orientation” would better reflect contemporary language and society, and be consistency with other legislation, including the *Sex Discrimination Act*, s 93Z of the *Crimes Act 1999* (NSW) (*NSW Crimes Act*) and other state and territory legislation. A definition of “sexual orientation” should include wording to cover people with different gender identities.⁷² This would also bring the ADA in better alignment with the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) (*Equality Act*). ADNSW has had to decline complaints or refer people to the AHRC who allege that they have been vilified or discriminated against based on their bisexuality or other sexual orientations that are not captured under the ADA.

ADNSW considers that the wording used in the *Equal Opportunity Act 2010* (Vic) (*Victorian Equal Opportunity Act*), which is based on the *Yogyakarta Principles*, is preferable in defining “sexual orientation.” This wording would allow protections from discrimination and vilification for individuals with a broader range of sexualities, including those who are bisexual or pansexual.⁷³ This definition also takes into account that sexual orientation and gender identity can be fluid.⁷⁴ Since this definition is not tied to specific identities, this would allow the ADA to remain current as terminology around sexual orientation may change. It would also allow protections for people who identify outside of heterosexual, homosexual, and bisexual identities.⁷⁵

Marital or domestic status

Question 4.5: Discrimination based on marital or domestic status

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

ADNSW supports amending the definition of marital or domestic status to the more inclusive expression “relationship status.”

Race

Question 4.6: Racial discrimination

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

⁷² See, Anti-Discrimination NSW, *Preliminary Submission PAD83*, 7.

⁷³ Currently, the definition of sexual orientation in the ADA is limited to homosexual men and women; See: ADA s 49ZF, s 49ZG, s 4(1) definition of “homosexual”.

⁷⁴ ‘An Activist’s Guide to The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’: http://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf.

⁷⁵ For example, a people who are non-binary in a relationship, or people in a pansexual relationship.

Ethno-religious origin

Ethno-religious origin is included in the definition of “race” in s 4 of the ADA. ADNSW considers that religion or religious belief should be a separate protected ground of discrimination in the ADA. This would allow better protections for individuals, for example, those who identify as Jewish, Muslim or Islamic. This is discussed further in ADNSW’s response to [Question 5.2](#).

Since 1994, courts and tribunals have consistently accepted that Jewish and Sikhs people share ‘ethno-religious origins’, however, the caselaw for Muslim groups has been less consistent.⁷⁶ This means that Jewish people experiencing antisemitism have a clear pathway to lodge complaints of race discrimination under the ADA in circumstances where Muslims experiencing Islamophobia might experience uncertainty.⁷⁷ Nonetheless, ADNSW considers that ‘ethno-religious origin’ should be retained in the ADA in the definition of “race” to ensure wider protections.⁷⁸

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

ADNSW supports expanding the definition of “race” to clearly include caste and ancestry. ADNSW also supports including immigration status or migration in the definition of “race” or alternatively as a separate protected attribute. Expanding the definition of “race” would strengthen legal safeguards for individuals who may otherwise experience unlawful discrimination, reflect contemporary standards and align the ADA with other existing legal frameworks.

Caste

As recognised in the AHRC’s *National Anti-Racism Framework Scoping Report 2022*, caste discrimination is increasingly recognised as a serious and systemic form of racial discrimination in Australia.⁷⁹

Ancestry

The Northern Territory, Queensland, South Australia, and Victoria include ancestry in their respective definitions of race in their anti-discrimination legislation. For the Northern Territory,

⁷⁶ See *Mandla v Dowell Lee* [1983] 2 A.C. 548; *Jones and Harbour Radio Pty Ltd v Trad* (EOD) [2011] NSWADTAP 19; *Jones and Harbour Radio Pty Ltd v Trad* (No 2) [2011] NSWADTAP 62.

⁷⁷ See Anti-Discrimination NSW, *Submission to the Inquiry into Antisemitism in New South Wales* (Submission, April 2025) https://antidiscrimination.nsw.gov.au/documents/submissions/ADNSW_submission_to_Inquiry_into_Anti_semitism_in_NSW_April_2025.pdf; In *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 (‘*Ekeremawi*’), the Tribunal considered the question of whether Australian Muslims are an ethno-religious group under the ADA. The term ‘ethno-religious’ have been given a narrow interpretation previously before in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131. However, the Tribunal in *Ekeremawi* preferred the wider approach of the Appeal Panel in *Jones and Harbour Radio Pty Ltd v Trad* (No 2) [2011] NSWADTAP 62 which involved a consideration of a number of factors that may be relevant to determining whether a particular group shares an ethno-religious origin. The evidence that is provided to the NSW Civil and Administrative Tribunal (NCAT) about these factors will therefore be the key issue in deciding whether or not a group shares an ethno-religious origin. This makes it difficult for ADNSW to provide clear advice to members of the public about the when the ADA applies to Muslims.

⁷⁸ Review of the *Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 107-106.

⁷⁹ Australian Human Rights Commission, *National Anti-Racism Framework Scoping Report* (Report, December 2022) https://humanrights.gov.au/sites/default/files/document/publication/national_anti-racism_framework_scoping_report_2022.pdf, 74 .

Queensland and Victoria, the definition of race includes both descent and ancestry.⁸⁰ LRCWA also recommended that race should include ancestry in its review of Western Australia's anti-discrimination legislation.⁸¹

Immigrant status, or immigration or migration status

People who have been immigrants, migrants, refugees or asylum seekers who experience discrimination should be protected by the ADA. Anecdotally, ADNSW has observed in enquiries and complaints that it receives that discrimination based on immigration status affects people being able to access the job market, with people being rejected from jobs or being forced to accept lower wages and poor working conditions because of their immigration status. Some people have reported not being able to access online services because they do not hold an Australian passport.

ADNSW prefers the definition of "immigration status" the way it has been defined in the ACT *Discrimination Act*, which includes "being an immigrant, a refugee or an asylum seeker, or holding any kind of visa".⁸²

A person's immigration status may limit if and under what conditions they can legally work. Arguably, the general exception under s 54 of the ADA would ensure the ADA is compatible with other legislation that imposes these restrictions, but ADNSW prefers a specific exception, not least because the general exception under s 54 is very wide (see discussion below). However, ADNSW considers that having a specific exception in relation to this would be preferable, so that it is clear to the community, employers and education providers what activities are not discriminatory under the ADA.

ADNSW have granted exemptions under s 126 of the ADA for applications seeking an exemption in order to obtain and use certain race related information in employment to comply with regulatory and contractual obligations under the *United States International Traffic in Arms Regulations* (ITAR).⁸³ These exemption orders usually relate to discrimination on the basis of citizenship status only.⁸⁴

Language (including someone's accent)

ADNSW receives many complaints and enquiries relating to discrimination based on language (race). A substantial number of these relate to people being told not to speak a particular language (other than English) while at work.⁸⁵ ADNSW has observed that discrimination based on language

⁸⁰ *Anti-Discrimination Act 1992* (NT) s 4 definition of "race"; *Anti-Discrimination Act 1991* (Qld) s 4 definition of "race"; *Equal Opportunity Act 1984* (SA) s 5 definition of "race"; *Equal Opportunity Act 2010* (Vic) s 4(1) definition of "race".

⁸¹ *Review of the Equal Opportunity Act 1984* (WA): Project 111 Discussion Paper, 107.

⁸² *Discrimination Act 1991* (ACT) s 7(1)(i).

⁸³ According to our Annual Reports and internal records, ADNSW received at least 8 exemption applications related to ITAR from 2020 FY to 2025 FY. These exemptions are usually required for organisations to prevent a breach of US Regulations and for applications to avoid significant criminal and civil penalties.

⁸⁴ See for example: *Anti-Discrimination NSW, Current Exemptions* (3 July 2025) <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/current-exemptions.html>.

⁸⁵ ADNSW recognises that also the use of a particular language by a group of individuals in a workplace setting may have a potentially exclusionary effect on other people.

and communication barriers can affect individuals' ability to participate fully in work and public life. People have reported being discouraged from speaking their native language at work, facing negative treatment due to their accent, or being denied appropriate support such as Auslan interpretation or clear communication in essential services.

Case Study

Wang Wei is a student. He was born overseas and moved to Australia when he was 11.*

Wang Wei applied to study accounting at an institution. Wang Wei was asked to provide proof of his proficiency in English when other local students were not asked. Wang Wei felt that he was being discriminated against because of his race, and that the institution had assumed he had poor English proficiency because of his name.

Wang Wei lodged a complaint with ADNSW.

ADNSW wrote to the institution seeking their response to the complaint. They said that the staff member had handled Wang Wei's application in accordance with the relevant policy, but they realised from this incident that the policy was inadequate.

The institution apologised to Wang Wei. They undertook to amend their policy on English requirements for the admission of local students and review all their other policies where English proficiency requirements were specified.

**Name has been changed to protect the privacy of the individual.*

Expressly including “language” in the definition of race may make it clear to the community what falls under race discrimination.⁸⁶ ADNSW recognises that individuals can experience discrimination because of the language they speak, including their accent, fluency or use of non-dominant language as a characteristic of their race. Contrastingly, the ability to use languages can also be a skill independent of race. Therefore, it would be important to recognise situations where there should be an exception to discrimination based on language, for example, where the proficiency in a particular language is required to adequately perform a job, or tests relating to someone's language skills in education.⁸⁷

On balance, ADNSW's view is that “language” does not need to be included in the definition of race because “language” is covered by the ADA as a “characteristic” of race.⁸⁸

⁸⁶ See *Anti-Discrimination Act 1992* (NT) s 19(1)(ab).

⁸⁷ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 108–109.

⁸⁸ See, eg, *Vuong v Casabake Pty Ltd* [2009] NSWADT 279; *Dharmalingham v Western NSW Local Health District* [2015] NSWCATAD 74 [174]; See also, *Hamzy v Commissioner of Corrective Services NSW* [2022] NSWCA 16, 107 NSWLR 544 [55].

Clans

ADNSW receives complaints from people alleging they have been discriminated based on their family group or Aboriginal clan or being discriminated by members of other clans. Arguably, the ADA does not expressly protect discrimination based on clans. However, the definition of “race” in the ADA does include the related concept of “descent” and “national origin”, which may refer to where someone was born. “Ancestry” may also cover clans.

Discrimination between groups of the same race

ADNSW has also received complaints from people alleging they have been discriminated by people of the same race as them (for example, between people of the same nationality, but different national origin, or people from different provinces of the same country). It can be unclear who the appropriate comparator would be in these situations. With wider proposed reforms to replace the ‘comparator’ test with the ‘unfavourable treatment’ test for direct discrimination, this may allow broader protections for people in these situations.

Aboriginal and Torres Strait Islander people

ADNSW recognises that Aboriginal and Torres Strait Islander people experience discrimination under many different contexts, including on a systemic level. Aboriginal and Torres Strait Islander people and communities should be consulted by the NSWLRC about how they can be better protected from discrimination in the ADA.

Question 4.7: Sex discrimination

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

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

The ADA conflates the concepts of sex, gender identity and gender expression. ADNSW’s view is that “sex”, “sex characteristics” and “gender identity” should be three distinct protected attributes in the ADA, consistent with the approach taken in Victoria’s anti-discrimination legislation.⁸⁹ NSW policies also recognise that “sex”, “sex characteristics” and “gender identity” are distinct concepts.⁹⁰ ADNSW will discuss the new potential protected ground of “gender identity” in its response to [Question 4.8](#) (transgender discrimination).

Protections should cover:

- People assigned a sex at birth, people designated a sex as well as people who identify as a particular sex,
- People with variations of sex characteristics, and

⁸⁹ *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “gender identity” and “sex characteristics” s 6.

⁹⁰ *Australian Government Guidelines on the Recognition of Sex and Gender* (2015) [11], [13],[14]; Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (Web Page, 14 January 2021) <https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>.

- Non-binary, genderqueer, gender neutral, agender or other gender identity.

Changes to the protected attribute of “sex”

The ADA currently protects people from “sex discrimination”.⁹¹ “Sex” is not defined in the ADA. However, the ADA defines “man” as a member of the male sex, and “woman” as a member of the female sex.⁹² The ADA does not refer to gender.⁹³ Sex discrimination in the ADA uses binary language, referring to “a person of the opposite sex”.⁹⁴

A broader definition of “sex” should be adopted that clarifies that “sex” can include people assigned a sex at birth, being designated a sex in legal processes and people who identify as a particular sex. This could also be clarified through including explanatory notes in the ADA. Binary language should be replaced with neutral terminology to better align the ADA with existing legislation.

Courts have acknowledged that sex is changeable and not necessarily binary.⁹⁵ The term sex has been interpreted in a biological and social context and as a classification. In *AB v Western Australia*,⁹⁶ the High Court considered the meaning of gender characteristics under the *Gender Reassignment Act 2000* (WA), recognising “social recognition” as the relevant test and held that two trans men, who had undergone a bilateral mastectomy and testosterone therapy could be registered as the male sex. Further, in *Tickle v Giggle for Girls Pty Ltd (No 2)*,⁹⁷ the Federal Court found that sex is not limited to a biological concept, sex is not limited to a binary, and sex is changeable.⁹⁸ This case also confirmed that discrimination on the basis of gender identity is a constitutionally valid ground under the *Sex Discrimination Act*.⁹⁹

The QHRC opposed a narrow interpretation “sex” in its review of its anti-discrimination legislation, providing examples of how this would be unfavourable.¹⁰⁰ ADNSW supports adopting a flexible and wide interpretation of “sex” consistent with existing caselaw. Binary language in the ADA should be replaced with more neutral language. This is consistent with existing caselaw and would also bring the ADA in better alignment with existing legislation.¹⁰¹

⁹¹ *Anti-Discrimination Act 1977* (NSW) Part 3.

⁹² *Anti-Discrimination Act 1977* (NSW) s 23.

⁹³ This is except for s 51 of the ADA where “the use of a word, which by reason of its gender” denotes sex in relation to unlawful discrimination in advertisements.

⁹⁴ *Anti-Discrimination Act 1977* (NSW) s 24(1), 31, 31A, 34A.

⁹⁵ *AB v The State of Western Australia* [2011] HCA 42; (2011) 244 CLR 390 402 [23]; *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [1]; *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960.

⁹⁶ (2011) 244 CLR 390; [2011] HCA 42.

⁹⁷ [2024] FCA 960.

⁹⁸ *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960 [55] and [62].

⁹⁹ See *Sex Discrimination Act 1984* (Cth) s 5B.

¹⁰⁰ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 280.

¹⁰¹ For example, under the *Births, Deaths and Marriages Registration Act 1995* (NSW), people can nominate a “sex descriptor” such as “non-binary” in their record of their sex.

Sex characteristics

ADNSW supports the introduction of “sex characteristics” as a separate protected attribute in the ADA. Academic and policy literature recognises that “sex” is not strictly binary.¹⁰² Sex characteristics, including chromosomes, hormones, and reproductive anatomy, can vary among individuals, challenging the classification of individuals as only male or female. Furthermore, sex characteristics are not always fixed at birth; they can develop or change over time.¹⁰³ The Joint Statement from NHMRC & the Commonwealth Department of Health similarly urges researchers to consider sex as variable, and to treat variations of sex characteristics as a distinct but overlapping concept in health and medical research design in Australia.¹⁰⁴

As noted by the NSWLRC, in *New South Wales Registrar of Births, Deaths and Marriages v Norrie*,¹⁰⁵ the High Court held that the NSW Registrar of Births, Deaths and Marriages can record a person’s sex as ‘non-specific’ rather than male or female.

Exemptions for non-binary people

ADNSW has received enquiries and applications from businesses seeking certifications and exemptions under ss 126 and 126A to primarily increase the workforce participation rate of non-binary people or people who identify as LGBTQIA+. In these scenarios, ADNSW has provided information relating to the limited and binary nature of the protections in the ADA, which do not allow for targeted initiatives to achieve substantive equality for some groups belonging to these communities, affected by discrimination.

Pregnancy and breastfeeding

People who breastfeed or experience pregnancy or childbirth should be protected from unlawful discrimination. ADNSW supports including “pregnancy” and “breastfeeding” as separate protected attributes in the ADA.

Currently, under s 24 in the ADA, pregnancy, childbirth and breastfeeding are protected under direct discrimination as a “characteristic” of sex discrimination.¹⁰⁶ Under the ADA, potential pregnancy is likely covered since the test for sex discrimination includes the language “the fact that a woman may become pregnant”.¹⁰⁷

¹⁰² Sarah Larkin et al, ‘Anatomy Textbooks Should Show Sex as a Spectrum to Include Intersex People’ (2021) *UNSW Newsroom* (online, 27 October 2021) <https://www.unsw.edu.au/newsroom/news/2021/10/anatomy-texts-should-show-sex-as-a-spectrum-to-include-intersex->.

¹⁰³ National Health and Medical Research Council and Department of Health (Cth), *Statement on Sex, Gender, Variations of Sex Characteristics and Sexual Orientation in Health and Medical Research* (July 2024) 6.

¹⁰⁴ National Health and Medical Research Council and Department of Health (Cth), *Statement on Sex, Gender, Variations of Sex Characteristics and Sexual Orientation in Health and Medical Research* (July 2024).

¹⁰⁵ (2014) 250 CLR 490, [2014] HCA 11.

¹⁰⁶ *Anti-Discrimination Act 1977* (NSW) s 24(1)–(1A).

¹⁰⁷ *Anti-Discrimination Act 1977* (NSW) s 24(1B).

Jurisdictions across Australia recognise pregnancy and breastfeeding as separate attributes, not tied to sex discrimination.¹⁰⁸ Listing “pregnancy” and “breastfeeding” as separate attributes would bring the ADA in better alignment with other Australian jurisdictions, and compatibility with contemporary understandings of “sex”, “sex characteristics” and “gender identity”. Pregnancy should continue to be defined to include “potential pregnancy”, including where a person:

- is or may be capable of bearing children;
- has expressed a desire to become pregnant; and
- is likely, or perceived as being likely, to become pregnant.

The binary language in the ADA in relation to “pregnancy” and “breastfeeding” should be replaced with more neutral language. Consideration could also be given to providing protections to people who experience “characteristics” associated with pregnancy, for example, childbirth, recovery after childbirth and post-natal care. This may have some overlap with discrimination on the basis of care responsibilities.

Exception for pregnancy, childbirth and breastfeeding

Section 35 of the ADA provides that it is not unlawful discrimination “against a man” that a person grants “a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding”.¹⁰⁹ ADNSW acknowledges that this provision is designed to allow differential treatment for women who have child-bearing responsibilities. However, ADNSW’s view is that this provision could have consequences that are out of step with contemporary practices, such as allowing employers to provide paid parental leave to women only and not men. Giving equal access to paid parental leave to both primary caregivers is an approach taken by many businesses in NSW and contributes towards achieving gender equality. Providing paid parental leave for men supports women to return to the workforce without having to access paid childcare and gives men more caregiving responsibilities in the home. ADNSW’s view is that any differential treatment designed to address gender inequality associated with pregnancy, childbirth or breastfeeding could be covered by a general special measures provision, instead of by this provision.

Question 4.8: Discrimination on transgender grounds

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

The ADA prohibits discrimination based on “transgender grounds”. “A person being transgender or a transgender person” is defined as a person:

¹⁰⁸ See for definition of “pregnancy”: *Sex Discrimination Act 1984* (Cth) s 7; *Discrimination Act 1991* (ACT) s 7(1)(o); *Equal Opportunity Act 2010* (Vic) s 6(b); *Anti-Discrimination Act 1991* (Qld) s 7(c); *Equal Opportunity Act 1984* (WA) s 10; *Anti-Discrimination Act 1998* (Tas) s 16(g); *Anti-Discrimination Act 1992* (NT) s 19(f); *Equal Opportunity Act 1984* (SA) s 85T(4); See for definition of “breast feeding”: *Sex Discrimination Act 1984* (Cth) s 7AA; *Discrimination Act 1991* (ACT) s 7(d); *Equal Opportunity Act 2010* (Vic) s 6(l); *Anti-Discrimination Act 1991* (Qld) s 7(e); *Equal Opportunity Act 1984* (WA) s 10A; *Anti-Discrimination Act 1998* (Tas) s 16(h); *Anti-Discrimination Act 1992* (NT) s 19(h); *Equal Opportunity Act 1984* (SA) s 85T(5), s 87B(1).

¹⁰⁹ *Anti-Discrimination Act 1977* (NSW) s 35.

- who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.

This includes reference to a person being thought of as a transgender person. It also applies to people who are not a “recognised transgender person”.¹¹⁰ The current definition of “transgender” uses binary language and excludes people who are not identifying, seeking to live or living as a “member of the opposite sex”. It also does not consider a person’s gender expression. The definition of “transgender grounds” also conflates concepts of intersex status and transgender status even though these are unrelated.

For these reasons, ADNSW supports “transgender grounds” being amended to provide protections for people based on their “gender identity”. This would bring the ADA in better alignment with discrimination laws across Australia which include “gender identity” as a protected attribute.¹¹¹ This would also bring the ADA in better alignment with the *Sex Discrimination Act* and s 93Z of the *NSW Crimes Act*.

“Gender identity” should cover:

- Where a person self identifies as a particular gender, whether or not it corresponds with the sex assigned to the person at birth
- Gender expression (including dress, speech, mannerisms, names and personal references),
- Explanatory notes which include a non-exhaustive list of gender identities (for example, “including transgender, or genderqueer or another gender identity”).

ADNSW prefers the definition of “gender identity” to align with the definition in the *Yogyakarta Principles*, and the wide definition in Queensland’s anti-discrimination legislation.¹¹² “Gender identity” should not include an exhaustive list of identities as the language around gender identity may evolve in the future.

ADNSW has received enquiries and complaints from people alleging that they were vilified or discriminated based on gender identities that are not captured under the ADA, including non-binary people and had to decline complaints or refer people to the AHRC.

¹¹⁰ *Anti-Discrimination Act 1977* (NSW) s 4(1) and s 38A.

¹¹¹ *Sex Discrimination Act 1984* (Cth) s 5B; *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16; *Discrimination Act 1992* (NT) s 19; See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022).

¹¹² *Anti-Discrimination Act 1991* (Qld) sch 1 definition of “gender identity”; International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007)6. See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 276, rec 22.1.

Sex characteristics

“Gender identity” and “sex characteristics” are distinct concepts (See [Question 4.7](#)).¹¹³ ADNSW considers that a separate protected attribute for “sex characteristics” would allow better protections for people with variations of sex characteristics (See [Question 5.2](#)).

Question 4.9: Extending existing protections

(1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?

ADNSW generally supports protecting against discrimination based on any protected attribute someone has had in the past or may have in the future, for both direct and indirect discrimination. This includes an attribute a person is planning or proposing to adopt in the future. In ADNSW’s view, this would:

- streamline and simplify the ADA
- make it clear what attributes are protected
- make the ADA consistent with other Australian legislation which protects against discrimination based on an attribute that someone has had in the past
- capture situations where people are subjected to discriminatory conduct because of an attribute they had in the past or may have in the future. For example, where a person is discriminated towards because they were homosexual in the past, may become pregnant,¹¹⁴ or plan to become pregnant, or propose to adopt a different sex, and
- reflect that some attributes ADNSW recommends for inclusion in the ADA, such as criminal record, religion, gender identity and sexual preference, are changeable over time.

(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?

ADNSW supports extending protections to relatives and associates of people with a recognised attribute for all protected attributes. ADNSW sees no reason for this protection not to apply to carer responsibilities or indirect discrimination. ADNSW supports using the term “personal association” along with “(whether as a relative or otherwise)” consistent with the approach of other Australian legislation, including Victoria, and the ACT.¹¹⁵ This is because, this definition would more clearly protect individuals from discrimination based on their relationship with someone who has a protected attribute.

¹¹³ See also, Intersex Human Rights Australia, *Preliminary Submission PAD02*.

¹¹⁴ *Anti-Discrimination Act 1977* (NSW) s 24(1B).

¹¹⁵ *Equal Opportunity Act 2010* (Vic) s 6(q); *Discrimination Act 1991* (ACT) s 7(c).

Discrimination: potential new protected attributes

As outlined by the NSWLRC, no new protected attributes have been recognised in the ADA since discrimination based on carer’s responsibilities was added in 2000. Laws in other jurisdictions cover a much wider range of attributes meaning there are significant gaps in protection for the people of NSW. ADNSW supports the inclusion of several new attributes, as outlined below.

Guiding principles

Question 5.1: What principles should guide decisions about what, if any, new attributes should be added to the ADA?

ADNSW believes that all decisions about the wording and scope of the amended ADA should be based on principles of:

- clarity
- consistency and coherence
- enforceability
- inclusiveness
- proportionality and necessity (targeting demonstrable patterns of harm)
- human dignity and respect
- equity
- sustainability (making laws future-proof).

ADNSW strongly supports greater consistency between protected attributes under NSW law and those protected under other Australian laws. ADNSW also strongly supports better recognition in the ADA of discrimination that occurs on multiple and intersecting grounds.

Any additional grounds should be drafted in genuine consultation with people and communities with lived experiences to ensure the definitions and scope are fit for purpose.

New attributes

Question 5.2: Potential new attributes

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

As discussed in response to Questions [4.4](#), [4.7](#) and [4.8](#) ADNSW strongly supports the addition of the new protected grounds of gender identity, sex characteristics (intersex status) and sexual orientation. The replacement and extension of the current grounds of “homosexuality” and “transgender status” is needed to bring the law into line with contemporary language and society, as well as the *Sex Discrimination Act*, and s 93Z of the NSW *Crimes Act* and Queensland, Tasmania, South Australia and ACT laws.

ADNSW also supports the introduction of the following grounds:

- Religious identity, belief or activity
- Political conviction¹¹⁶

Based on enquiries, complaints and community feedback ADNSW has received, as well as the protections available in other Australian jurisdictions and relevant research, ADNSW can also see potential benefits in the addition of the following grounds, if clearly defined:

- irrelevant criminal record
- menopause
- lawful sexual activity
- physical appearance

Religious identity, belief or activity

ADNSW supports the addition of the ground of religious identity, belief or activity. NSW is currently the only Australian state that does not protect against religious discrimination in key areas such as employment, education, or provision of goods and services. The inclusion of vilification but not discrimination on the ground of religion causes confusion and inconsistency.

ADNSW receives many enquiries and complaints that involve unfair and harmful conduct which do not fall clearly under the race discrimination provisions as currently defined, nor under religious vilification. There has been uncertainty and inconsistency in decisions around whether race discrimination provisions cover particular ethno-religious communities, for example people who identify as Muslim, as discussed in ADNSW's response in Question 4.6.

Evidence from Australia spanning the last two decades demonstrates the racialisation of Muslims, where anti-Muslim sentiment is conveyed via stereotypes, perceptions of threat, inferiority and otherness. These negative sentiments inform a spectrum of Islamophobic actions from refusal of applications for mosque development, discrimination in employment to racist violent acts against Muslims which ultimately corrupts belonging and citizenship for Muslim Australians.¹¹⁷

The impact of religious discrimination on health and well-being on the life course has also been well documented.¹¹⁸ Feedback from community stakeholders to ADNSW have highlighted the stressors placed on those individuals and community groups who are not properly protected by the race discrimination provisions. Inclusion of religion ensures cohesive and inclusive protections for

¹¹⁶ "Political conviction" is already referred to in s 119 of the *Anti-Discrimination Act 1977* (NSW) which gives the Anti-Discrimination Board powers to carry out investigations, research and inquiries relating to discrimination.

¹¹⁷ Kevin M Dunn, Natascha Klocker and Tanya Salabay, 'Contemporary Racism and Islamophobia in Australia: Racialising Religion' (2007) University of Wollongong; Kevin Dunn, Randa Itaoui and Susan Ngui, 'Planning and Islamophobia in Australian Cities' in Dorina Pojani (ed), *Planning for Religious Minorities* (Routledge, 2022) 110–124.

¹¹⁸ Mienah Z Sharif et al, 'The Association Between Experiences of Religious Discrimination, Social-Emotional and Sleep Outcomes Among Youth in Australia' (2021) 15 *SSM – Population Health* 100883 <https://doi.org/10.1016/j.ssmph.2021.100883>.

all members of the community without subjective qualifications. For the above reasons ADNSW thinks that religious identity, belief or activity should be a standalone protected attribute.

Irrelevant criminal record

ADNSW occasionally receives enquiries each year from people who have been denied or dismissed from employment because of a criminal record. Due to traditional bias in the justice system and other factors, this may affect certain groups such as Aboriginal and Torres Strait Islander people disproportionately. The need to add this to the protected attributes has been recognised in other state and federal laws, including Queensland.¹¹⁹

Menopause

ADNSW supports consideration being given to whether menopause should be a standalone protected attribute in the ADA and in anti-discrimination laws across Australia. As outlined in ADNSW's submission to the Australian Senate Community Affairs References Committee's inquiry into issues relating to menopause and perimenopause, ADNSW is concerned that not clearly accounting for and responding to the needs of women experiencing menopause in legal protections, particularly in relation to the workplace, risks entrenching long term gendered inequality.¹²⁰ There is inconsistent international case law on whether menopause can come under existing sex, age or even disability discrimination provisions, as discussed in ADNSW's above submission.

As discussed in the submission, ADNSW located one case across Australian federal, state and territory jurisdictions that deals with discrimination and menopause. In *Sareen v Queensland Rail*¹²¹ Ms Sareen alleged that Queensland Rail discriminated against her based on her disability under the Disability Discrimination Act. Her application to the Federal Circuit Court was out of time, however, the decision deals with an application for summary dismissal by the respondent.

In her application to the AHRC, Ms Sareen described herself as a 50-year-old female professional who had migrated from India. She worked as a senior internal auditor for Queensland Rail and alleged that she was treated poorly by her manager who put her on a performance management plan, insulted her in front of colleagues and made demeaning comments about her English language proficiency. At the time she states that her 'body was going through lot of changes and [she] was having significant health issues'.¹²²

In his decision to dismiss the matter, Judge Jarrett made the following findings:

¹¹⁹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 29; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 262.

¹²⁰ Anti-Discrimination NSW, *Submission to the Australian Senate Community Affairs References Committee's inquiry into issues relating to menopause and perimenopause*, 16 February 2024.

¹²¹ [2017] FCCA 2439 (6 October 2017).

¹²² *Sareen v Queensland Rail* [2017] FCCA 2439 (6 October 2017) [7].

Without more, I would be surprised if the matters of which Ms Sareen complains could be properly characterised as a disorder, illness, disease, malfunction, malformation or disfigurement. She did not suggest that there was any particular symptom from which she suffered that through its manifestation amounted to a disability for the purposes of the Act. Whilst the definition of disability is wide and it is not inconceivable that “hormonal changes and body changes” might, given the consequences of such changes in a particular case, amount to an illness or disease, I doubt very much that the Legislature envisaged that the changes brought about by menopause could properly be described as a disability for the purposes of the Disability Discrimination Act.¹²³

Clearly recognising menopause as a protected attribute would be in line with the principles of clarity, intersectionality and equity.

Lawful sexual activity

Through its community engagement work, ADNSW has heard that sex workers in NSW experience discrimination in accommodation, employment and accessing goods and services. Sex workers have reported being evicted from their rental houses and having their bank accounts frozen.¹²⁴

Although sex work is mostly decriminalised in NSW, it is still subject to laws and regulations. ADNSW supports the introduction of lawful sexual activity as a protected ground in the ADA, similar to the approaches taken in Tasmania and Victoria, which cover engaging, not engaging or refusing to engage in lawful sexual activity.¹²⁵

Physical appearance

ADNSW receives enquiries and complaints each year that involve discrimination because of physical appearance such as height, weight, tattoos, headwear or hair style. These are often in employment but also accommodation, education and the provision of goods and services. These often intersect with sex, race or disability discrimination. The AHRC has recognised that appearance-based bias can lead to unfair treatment. Academic research has also found that discrimination based on looks affects hiring decisions, often reinforcing gender and racial stereotypes.¹²⁶

Definition and expression of new attributes

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

¹²³ *Sareen v Queensland Rail* [2017] FCCA 2439 (6 October 2017) [20].

¹²⁴ ADNSW staff attended the Sydney Lord Mayor Clover Moore’s LGBTI+ Safety Summit 2023 – 2024.

¹²⁵ *Anti-Discrimination Act 1998* (Tas) s 3 definition of “sexual activity”; *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “lawful sexual activity”.

¹²⁶ Physical Appearance Research Team, Melbourne School of Psychological Sciences, University of Melbourne, <https://psychologicalsciences.unimelb.edu.au/research/msps-research-groups/physicalappearance-research-team/lab>, accessed 6 August 2025; All Together Now, Racism in Australia, <https://alltogethernow.org.au/racism/racism-in-australia/>, accessed 6 August 2025.

ADNSW recommends consistency as far as possible between ADA definitions and those in other relevant legislation including s 93Z of the NSW *Crimes Act* for all protected grounds. In addition, in general ADNSW prefers the model in the Victorian legislation for the drafting of protected attributes, as it provides broad and clear definitions of the attributes.

Religious identity, belief or activity

ADNSW prefers the definition of “religious belief or affiliation” in the serious vilification provisions of s 93Z of the *Crimes Act*, “holding or not holding a religious belief or view”.

Political conviction

ADNSW prefers the way the Victorian legislation confines the protection for political conviction to a “lawful political belief” and “lawful political activity”.¹²⁷

Irrelevant criminal record

If irrelevant criminal record is introduced in NSW, ADNSW’s view is that the ACT legislation provides a good definition, except for the inclusion of extinguished homosexual convictions, which should be differentiated and possibly treated as a separate protected attribute. The ACT *Discrimination Act* defines irrelevant criminal record as:

- a record relating to an alleged offence where the proceedings were not finalised
- a record relating to an alleged offence where the individual was acquitted
- instances where the individual was served with an infringement notice
- instances where the individual had a conviction for an offence, but the circumstances of the offence were not directly relevant to the situation in which discrimination arose, and
- spent convictions (which includes extinguished homosexual convictions).¹²⁸

Menopause

ADNSW notes that there may be challenges in drafting a definition of menopause, given the range and breadth of symptoms, which can overlap with other conditions.

Lawful sexual activity

As discussed above, ADNSW’s view is that the definition and expression of lawful sexual activity in the ADA should be modelled on the Tasmanian and Victorian legislation, which covers engaging, not engaging or refusing to engage in lawful sexual activity.¹²⁹

¹²⁷ *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “political belief or activity”.

¹²⁸ *Discrimination Act 1991* (ACT) s 2 definition of “irrelevant criminal record”.

¹²⁹ *Anti-Discrimination Act 1998* (Tas) s 3 definition of “sexual activity”; *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “lawful sexual activity”.

Physical appearance

In ADNSW’s view, the Victorian and ACT legislation provide a good model for the definition of “physical appearance” which are both broadly defined to mean a person’s height, weight, size or other bodily characteristics.¹³⁰

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

Specific, limited and well-defined exceptions may be required. For example, in relation to the ground of religious belief or activity, it may be necessary to allow some exceptions for religious bodies to recognise the need for a fair balance between religious freedom and protections from discrimination.

ADNSW supports the idea that any exceptions should be more limited in relation to any goods and services, employment or education that receives government funding.

Question 5.3: Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

ADNSW believes that the principles referred to in response to [Question 5.1](#), particularly clarity, consistency and coherence, weigh against having an open-ended list of protected attributes in the ADA.

¹³⁰ *Equal Opportunity Act 2010* (Vic) s 4(1) definition of “physical features”; *Discrimination Act 1991* (ACT) s 2, dictionary definition of “physical features”.

Areas of public life

The ADA prohibits discrimination in specific areas of public life, including work, education, the provision of goods and services, accommodation and in registered clubs.¹³¹ However, the scope of protections afforded under the ADA, including the exceptions which limit the protections, varies across different attributes and areas of public life resulting in inconsistencies and gaps in coverage. ADNSW supports reform in this area to address these gaps in coverage, which is discussed below.

Employment

Question 6.1: Discrimination at work - coverage

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

ADNSW recommends expanding the definition of employment to explicitly include volunteers, unpaid workers and people engaged in non-traditional work arrangements. As highlighted in several preliminary submissions to the NSWLRC's review of the ADA, the ADA does not cover all forms of working relationships.¹³² The ADA's definition of employment is limited and may not cover volunteers, people engaged in informal or non-traditional forms of labour, or people working in the gig economy which creates a significant gap in protection. The ADA protects volunteers and trainees from sexual harassment in s 22B(9), resulting in inconsistencies in coverage.

This gap leaves many people in NSW without protection, as statistics show that participation in volunteering is high in the state. In 2023, approximately 4.3 million NSW residents aged 15 and over (or 63.9% of the NSW population) engaged in volunteer work. Across 12 months of 2023, the economic value of volunteering to the state of NSW was \$178 billion.¹³³

Providing explicit protection for volunteers would also bring the ADA in alignment with other states, such as the Victorian *Equal Opportunity Act* and the ACT's *Discrimination Act*. The LRCWA's recent review of its *Equal Opportunity Act 1984 (WA)* (Western Australia's *Equal Opportunity Act*) also recommended expanding the definition of employment to include unpaid and voluntary workers.¹³⁴

ADNSW receives enquiries from volunteers, interns and gig economy workers regarding their rights at work and what protections are available under the ADA. A common concern raised is the lack of protections in the ADA for individuals engaged in non-traditional or informal work arrangements.

(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?

¹³¹ *Anti-Discrimination Act 1977* (NSW).

¹³² Law Society of New South Wales, *Preliminary Submission PAD31*, 10; Kingsford Legal Centre, *Preliminary Submission PAD35*, 3; Anonymous, *Preliminary Submission PAD89*, 13.

¹³³ NSW Government, *NSW State of Volunteering Report 2023*, accessed 4 August 2025.

¹³⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 130.

ADNSW acknowledges that framing discrimination at work in the ADA in the same way that the *Sex Discrimination Act* prohibits sexual harassment may benefit complainants. Currently, the ADA covers situations where a person with authority at work discriminates against someone without that authority. The *Sex Discrimination Act* prohibits sexual harassment by any person if it is in connection with either the complainant's or respondent's status at work.¹³⁵ This approach would remove the requirement to establish a specific employment relationship with the alleged discriminator and shift the focus to how and under what circumstances someone has been discriminated against at work. If this approach is taken, more instances of discrimination would be covered under the provisions, and more people are protected from discrimination.

However, ADNSW can also see potential issues with this approach. There are practical considerations, including that it may be difficult for ADNSW to locate or identify a respondent, particularly if they are a customer or visitor who may be less likely to engage in conciliation. A broadening of the law in this way could also lead to an increase in discrimination complaints, some of which may be frivolous or vexatious. If this broad approach is taken, ADNSW would need more resourcing to deal with the potential increase in enquiries and complaints to its service.

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

ADNSW's view is that local government members should be protected from age discrimination while working in their official capacity. The rationale for excluding age as a protected attribute from the anti-discrimination provisions applicable to local government members is unclear. Although the amendment was introduced in 1994, the second reading of the legislation does not provide a clear explanation for this exclusion.¹³⁶

Question 6.2: Discrimination in work – exceptions

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

The ADA contains several exceptions to protection against discrimination in work, many of which ADNSW thinks should be reconsidered.

Employment for private households

The protections against discrimination for applicants and employees do not apply to employment for a private household.¹³⁷ ADNSW's view is that these exceptions should be narrowed. As discussed by the AHRC in its *Free and Equal* paper, more forms of work are now performed in the

¹³⁵ *Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).

¹³⁶ NSW, *Parliamentary Debates*, Legislatives Council, Second Reading Speech, 4 May 1994.

¹³⁷ *Anti-Discrimination Act 1977* (NSW) s 8(3), s 25(3)(a), s 49D(3)(a), s 49ZYB(3), s 38C(3)(a), s 49ZH(3)(a), s 40(3)(a), s 49V(3)(a).

home, such as through the gig economy or disability support services, and the treatment of these workers should be covered in discrimination law.¹³⁸

Employment by small businesses & discrimination by small partnerships

The ADA provides an exception to employers with five or less employees. Furthermore, the prohibitions against discrimination by partnerships only apply to firms of six or more partners. ADNSW recommends removing these exceptions, particularly given that these entities contribute significantly to employment opportunities. ADNSW can identify no current policy rationale that supports retaining these exceptions.

Persons addicted to prohibited drugs

As discussed in response to [Question 4.3](#), ADNSW's view is that consideration should be given to removing this exception.

The “inherent requirements” and “unjustifiable hardships” exceptions

As noted by the NSWLRC, the Disability Royal Commission found that the ‘inherent requirements’ exception in the *Disability Discrimination Act* discourages employers from discussing adjustments with employees with a disability. In ADNSW's experience, access to adjustments is key to improve accessibility to the job market for people with a disability. ADNSW agrees with the Disability Royal Commission's recommendation that employers should have to consider two more factors when determining whether a person with disability is able to meet a role's inherent requirements including:

- the nature and extent of any adjustments made, and
- the extent of consultations with the person with disability concerned.¹³⁹

As discussed in response to [Question 11.1](#), ADNSW is in favour of introducing a positive duty to provide adjustments in the ADA. Additionally, ADNSW supports adopting the model in the ACT which imposes a positive duty, but provides an exception when despite the adjustments, the person cannot meet the inherent requirements of the role and the discrimination is reasonable, proportionate and justifiable in the circumstances.¹⁴⁰

Exceptions based on “genuine occupational qualifications”

ADNSW's agrees with the recommendations made by the NSWLRC in 1999 that s 31(2)(i) of the ADA could be removed from the list of “genuine occupational qualifications” in the sex discrimination provisions in the ADA because it is outdated. Section 31(2)(i) provides an exception from the sex discrimination provisions in circumstances where being a person of a particular sex is

¹³⁸ Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 278.

¹³⁹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 7, Inclusive education, employment and housing, Part B, rec 7.26, 438.

¹⁴⁰ *Discrimination Act 1991* (ACT) s 33C.

a genuine occupational qualification for a job when the job is one of two to be held “by a married couple”.

ADNSW prefers the approach taken in the ACT *Discrimination Act* which uses a single broad exception to cover genuine occupational qualifications. It provides that discrimination is not unlawful if:

- it is a genuine occupational qualification that the position be filled by a person with a particular protected attribute, and
- the discrimination is reasonable, proportionate and justifiable.¹⁴¹

This allows flexibility in the provisions and will allow them to keep up with evolving social trends.

Discrimination against young people

As discussed in ADNSW’s response to [Question 4.1](#) of the Consultation Paper, ADNSW’s view is that the exception in s 49ZYI of the ADA should be narrowed and only apply to wages.

Education

Question 6.3: Discrimination in education

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

ADNSW considers that the definition of “educational authority” in the ADA is too narrow and supports adopting the broader approach in the *Disability Discrimination Act*. The ADA definition of an “educational authority” includes a person or body administering a school, college, university or other institution at which education or training is provided.¹⁴² Under the *Disability Discrimination Act*, “education provider’s” include organisations which develop or accredit curricula.¹⁴³ In addition, ADNSW believes that the ADA should expressly cover discrimination in selecting or evaluating student applications, in line with the recommendation by the LRCWA.¹⁴⁴

(2) What changes if any, should be made to the exceptions relating to: (a) single-sex educational institutions, and (b) disability and age discrimination in educational institutions?

Single-sex institutions

ADNSW agrees that the exception for single-sex educational institutions which provides that they can lawfully refuse, or fail to accept, an application from someone of the opposite sex, should clearly state that this does not allow discrimination against transgender students.

¹⁴¹ *Discrimination Act 1991* (ACT) s 33B.

¹⁴² *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of “educational authority”.

¹⁴³ *Disability Discrimination Act 1992* (Cth) s 4 Interpretation.

¹⁴⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 128, rec 58.

Disability and age discrimination

ADNSW's view is that any recommended changes to the disability discrimination exceptions in education should be made in consultation with people with lived experience of a disability. ADNSW has indicated that it supports a positive, stand-alone duty to provide adjustments on the ground of disability in response to [Question 11.1](#), however, notes that the duty should be subject to limitations.

Goods and services

Question 6.4: The provision of goods and services – coverage

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

Under the ADA, it is unlawful to discriminate in the provision of goods and services.¹⁴⁵ The ADA does not define “goods”. Australian courts and tribunals have traditionally given a broad meaning to “services”. The High Court in *IW v City of Perth*¹⁴⁶ found that the term ‘services’ should not be given a narrow interpretation when used in anti-discrimination legislation.

The manner in which goods and services are provided

The provision of goods and services only applies to the terms and conditions initially offered and does not apply to the manner in which the goods and services are provided. ADNSW considers that this is a limitation in the ADA and believes that NSW should adopt a broader approach, consistent with other Australian jurisdictions.¹⁴⁷ In 1999, the NSWLRC recommended that the ADA be amended to prohibit discrimination in the “manner” of providing goods and services, expanding scope of protections provided by the ADA.¹⁴⁸

There are several case examples which demonstrate how this gap in coverage has disadvantaged complainants. For example, in *Gyawali v Peniazeff Pty Ltd t/a Polaris Real Estate*¹⁴⁹ a real estate agent made offensive, racially charged remarks while carrying out repairs at the complainant's rental property. However, the NCAT determined that there was no evidence showing the complainant experienced any disadvantage in the ‘terms on which’ the services were delivered. All tenants received repair services equally, without differentiation. There may have been adverse consequences in the manner in which those services were provided, however, ‘manner of service’ is not covered under the ADA.

¹⁴⁵ *Anti-Discrimination Act 1977* (NSW), s 19, s 22F, s 33, s 38M, s 47, s 49M, s 49ZP, s 49ZYN.

¹⁴⁶ [1997] HCA 30; [1997-97] 191 CLR 1.

¹⁴⁷ *Anti-Discrimination Act 1991* (Qld) s 46; *Anti-Discrimination Act 1992* (NT) s 41; *Discrimination Act 1991* (ACT) s 20(c); *Equal Opportunity Act 1984* (WA) s 66K(c).

¹⁴⁸ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*(NSW), Report 92 (1999) rec 17.

¹⁴⁹ [2021] NSWCATAD 139.

Access to premises

ADNSW agrees that the ADA should more clearly prohibit discrimination relating to someone's ability to access and use premises, and prefers the approach taken in the *Disability Discrimination Act* and the Victorian *Equal Opportunity Act* which include a separate, protected area involving 'access to premises'.¹⁵⁰

Question 6.5: Superannuation services and insurance exceptions

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

As noted by the NSWLRC, insurance and superannuation are regulated by federal legislative schemes, therefore, any reform in this area will require careful consideration. However, ADNSW believes that the NSWLRC should consider aligning the ADA with other jurisdictions (for example the ACT). ADNSW recommends that the exceptions for insurance or superannuation services should be based on:

- actuarial or other statistical data, or other relevant information
- when it is reasonable to rely on that data or documents; and
- when the discrimination is reasonable, proportionate and justifiable in the circumstances.¹⁵¹

Question 6.6: The provisions 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?

Section 33(2) of the ADA provides that it is not unlawful for someone to exercise a skill in relation to men or women only, when they commonly exercise that skill in a different way for men and for women. ADNSW's view is that this exception is outdated and not in keeping with current community standards.

Accommodation

Question 6.7: Discrimination in accommodation — coverage

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

The definition of “accommodation” should be updated and extend to strata committees and owners corporations. Moreover, discrimination should be prohibited in the sale and disposition of land. Recently, the NSW government implemented new guidelines to strata laws which involve changes to enable a person with a disability to have access to their property or common property

¹⁵⁰ *Disability Discrimination Act 1992* (Cth) s 23; *Equal Opportunity Act 2010* (Vic) s 57.

¹⁵¹ See *Discrimination Act 1991* (ACT) s 28(2).

and making easier for strata residents to own assistance animals.¹⁵² ADNSW has received complaints against owners' corporations and strata management companies, which cannot be processed due to the limited coverage in the ADA.

Additionally, ADNSW supports aligning the ADA with other Australian jurisdictions which expressly provide that accommodation providers must allow a person with a disability to make reasonable alterations to accommodation.

Question 6.8: Discrimination in accommodation — exceptions

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

Private households

ADNSW supports retaining the exception for private households which apply if the accommodation is for six people or less, and the person providing the accommodation, or their near relative, lives there. In 1999, the NSWLRC recommended limiting the exception to only apply to the main home, clarifying that a granny flat would not be exempt.¹⁵³ Limiting the number of occupants to six or less could be problematic given that some families do not necessarily fit in the Australian standard household size.¹⁵⁴

Age-based accommodation

As indicated in response to [Question 11.2](#), ADNSW supports the introduction of a general special measures provision, which if introduced would allow specific age-based accommodation.

Registered clubs

Question 6.9: Discrimination by registered clubs — coverage

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

The definition of a “registered club” is construed narrowly in the ADA and is defined as a club that holds a club licence granted under the *Liquor Act 2007* (NSW). ADNSW recommends that the definition be broadened to include community and sporting clubs and voluntary bodies, regardless of their size or whether they sell alcohol or not. ADNSW supports adopting the *Disability Discrimination Act*'s definition of a “club” which distinguishes between the private and public sphere by treating any association that raises funds and has their own facilities, as public.¹⁵⁵

¹⁵² NSW Government, *Guide to 2025 strata law changes*, <https://www.nsw.gov.au/housing-and-construction/strata/guide-to-2025-strata-law-changes>, accessed 18 August 2025.

¹⁵³ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*(NSW), Report 92 (1999) rec 26.

¹⁵⁴ See Australian Government, Australian Institute of Family Studies, *Population, households and families*, accessed 15 August 2025.

¹⁵⁵ *Disability Discrimination Act 1992* (Cth) s 4(1) definition of “club”.

Question 6.10: Discrimination by registered clubs — exceptions

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

The ADA provides exceptions for registered clubs to discriminate based on the grounds of sex, race, age and disability. ADNSW agrees with the recommendations made by the NSWLRC in 1999 to remove the exceptions from the ADA which allow registered clubs to discriminate against people of other races, disabilities or ages, including in relation to who they accept as members.

ADNSW prefers the approach taken in s 31 of the ACT's *Discrimination Act* which allows clubs to discriminate when:

- the club is established to benefit people who share a protected attribute, and
- the discrimination is reasonable, proportionate and justifiable.

Question 6.11: Discrimination based on carer's responsibilities

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

ADNSW recommends that discrimination based on carer's responsibilities should be prohibited in all areas of public life unless an exception applies. Anecdotally, ADNSW receives enquiries and complaints based on discrimination on the ground of carer's responsibility that occurs in other areas of public life other than employment that ADNSW has cannot accept under the ADA. For example, ADNSW has received complaints from people alleging that they have been discriminated against in education because they have not been able to complete an assignment on time due to their caring responsibilities.

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

ADNSW supports prohibiting discrimination in all protected areas for all protected attributes unless an exception applies.

Question 6.12: Additional areas of public life

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

The application of the ADA to 'any area of public life' could be difficult for ADNSW to administer. It would be challenging to identify who is a duty holder and what their obligations are under the law. Further, due to the uncertainty in the law it may be difficult for duty holders to comply with their obligations. As highlighted by the NSWLRC in 1999 there are practical and conceptual difficulties

that arise in having a general prohibition, rather than a specific list of protected areas of public life.¹⁵⁶

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

ADNSW view is that the protected areas of public life in the ADA are limited, and the gaps leave some sectors of the community unprotected from discrimination. ADNSW supports considering expanding the existing protected areas to incorporate the following or introducing new additional areas:

- Government functions and the administration of laws;
- Sporting activities;
- Strata committees and owner's corporations;
- The disposal of interested in land; and
- Requests for information.

¹⁵⁶ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977(NSW)*, Report 92 (1999) [4.19]-[4.29].

Wider Exceptions

The ADA contains a broad range of exceptions, many of which are outdated and no longer align with contemporary community standards. Some of the exceptions apply across the ADA, while others only apply to discrimination and are specific to certain attributes and areas of life. Due to the complexity in how the exceptions are structured and drafted in the ADA, many stakeholders have stated that it is difficult to navigate the provisions in ADA and effectively interpret their rights and responsibilities. As outlined below, ADNSW supports amending and more narrowly construing many of the existing exceptions in the ADA.

Exceptions for religious bodies and personnel

Question 7.1: Religious personnel exceptions

Some exceptions to anti-discrimination laws are necessary to support religious freedom and belief and enable churches and other religious bodies to operate in accordance with their convictions, doctrines, tenets and beliefs. However, ADNSW shares the concerns of many stakeholders that the breadth of the current exceptions in the ADA for religious bodies and personnel has the potential to undermine protections afforded to groups with other protected attributes under the ADA.

The ADA provides the following broad exceptions for religious bodies in s 56:

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

(1) Should the ADA provide exceptions for:

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

ADNSW supports retaining the exceptions in s 56 (a) and (b), provided the provisions are reformulated to reflect the diverse nature of contemporary Australian society and are inclusive of all religions. As noted by the NSWLRC, this was recommended by the NSWLRC in 1999 which found that although the exception relating to the training and appointment of religious personnel should be retained, it should be amended to adopt more inclusive language and not be limited to the Christian faith.¹⁵⁷ Similarly, recently the Australian Law Reform Commission (ALRC)

¹⁵⁷ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*(NSW), Report 92 (1999) rec 46.

recommended that the equivalent exception under the *Sex Discrimination Act* should be revised to ensure it encompasses religious leaders across a diverse range of faiths.¹⁵⁸

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

ADNSW shares the concerns of many stakeholders that the exception in s 56(c) of the ADA, which permits the appointment of “any other person in any capacity by a body established to propagate religion”, is too broad. As noted by the NSWLRC, the breadth of the exception allows for the appointment to roles that may not be religious in character. Moreover, the term “a body established to propagate religion” is not defined in the ADA leading to ambiguity about what can be classified as a religious body. The term may extend to include social services, educational institutions and health care providers affiliated with religious organisations.

ADNSW reiterates its position outlined in its preliminary submission to the NSWLRC that s 56(c) should be narrowed. Any exception for religious institutions to discriminate on the basis of religious belief or activity should strike the appropriate balance between religious freedom and the right to non-discrimination.¹⁵⁹

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

ADNSW notes that the NSWLRC has outlined several options to narrow the scope of the exception under s 56(c). One option includes only permitting discrimination in employment where an inherent requirement (or genuine occupational requirement) of the position involves the teaching, observance or practice of religion. A narrower option involves adopting the model proposed in the *Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) (Equality Bill)*, which limits the exception to the selection or appointment of people to perform duties or functions in relation to “religious observance or practice.”¹⁶⁰

However, ADNSW prefers an approach with stronger safeguards to protect people with other protected attributes under the ADA, such as those belonging to the LGBTIQ+ community, from discrimination. ADNSW supports adopting an approach consistent with other anti-discrimination laws, by introducing further conditions that religious bodies must satisfy. ADNSW prefers the model in Victoria outlined by the NSWLRC,¹⁶¹ and the recommendations made by the QHRC in its review of anti-discrimination laws. These involve an additional requirement that the discrimination is ‘reasonable and proportionate in the circumstances’.¹⁶²

¹⁵⁸ Australian Law Reform Commission, *Maximising the Realisation of Humans Rights: Religious Education Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 2.

¹⁵⁹ Anti-Discrimination NSW, *Preliminary Submission PAD83*.

¹⁶⁰ *Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW)*, First Print, sch1 [40].

¹⁶¹ *Equal Opportunity Act 2010 (Vic)* s 83A(1).

¹⁶² As recommended by the Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 39.1 - 39.2.

Question 7.2: Other acts and practices of religious bodies

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

ADNSW believes that the exception provided to religious bodies in s 56(d) of the ADA is too wide and should be amended to ensure that it does not undermine other protections provided in the ADA.

ADNSW supports limiting the scope of this provision in the following ways:

- Limit the exception to only allow religious bodies to discriminate based on religious belief or activity; and
- Introduce a requirement that the discrimination be reasonable and proportionate in the circumstances.¹⁶³

ADNSW also supports limiting the ability of religious bodies to rely on exceptions when delivering publicly funded services, particularly in sectors such as health and education.¹⁶⁴ Social services, that receive government funding, should be equally accessible to all people in NSW who require assistance.

ADNSW is in favour of having a list of factors to consider when determining if discrimination is reasonable and proportionate, similar to the ones recommended by the QHRC in its review of anti-discrimination laws. These included whether religious organisation operates in commercial manner, reasonable availability of alternative services or whether services are essential services.¹⁶⁵

Question 7.3: Exceptions for other forms of unlawful conduct

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

ADNSW supports limiting the general exception for religious bodies in s 56. As noted by the NSWLRC, under international human rights law providing exceptions for other forms of unlawful conduct, including harassment and victimisation, is not justified. ADNSW recommends limiting the scope of the exception of s 56 and adopting a more limited approach consistent with the model adopted in Victoria.¹⁶⁶

¹⁶³ In line with the *Equal Opportunity Act 2010* (Vic) s 82(2) and Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 75–76; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 38.1.

¹⁶⁴ South Australian Law Reform Institute, *“Lawful Discrimination”: Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status*, Report (2016) rec 2.

¹⁶⁵ Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 38.2.

¹⁶⁶ *Racial and Religious Tolerance Act 2001* (Vic) s 11(1)(b)(i), s 11(2).

Exceptions for providers of adoption services

Question 7.4: Exceptions for providers of adoption services

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

The ADA contains an exception for faith-based organisations that provide adoption services. For the purposes of this exception, a “faith-based organisation” is an organisation established or controlled by a religious organisation, which is accredited under the *Adoption Act 2000* (NSW) to provide adoption services.

ADNSW supports a reconsideration of the exception for faith-based organisations to discriminate in providing adoption services. ADNSW shares the concerns raised by stakeholders that faith-based adoption services that receive public funding should not be allowed to discriminate against people based on a protected attribute.

Exceptions for private educational authorities

Question 7.5: Private educational authorities employment exceptions

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

The ADA is the only anti-discrimination law in Australia that has exceptions for private educational authorities to discriminate in employment based on almost any protected attribute. ADNSW shares the concerns raised by many stakeholders in their preliminary submissions that these broad exceptions for private educational institutions can be used to discriminate against vulnerable groups, are outdated and leave people in NSW with less protection than in other parts of Australia.

As noted by the NSWLRC, the NSW parliamentary inquiry into *Children and Young People with Disability in New South Wales Educational Settings* made recommendations that consideration be given to removing the exceptions which allow private educational institutions to discriminate against a person on the basis of disability.¹⁶⁷

ADNSW supports reform in this area, however as noted by the NSWLRC, limiting the exception only for religious educational authorities would have very little impact on the scope of the exception, given the number of students at non-government schools and the religious affiliation held by most independent schools. Therefore, ADNSW supports additional ways to limit the exception, as discussed below.

¹⁶⁷ NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 24.

(2) If you think the Act should provide exceptions in this area: (a) what attributes should the exceptions apply to? (b) what requirements, if any, should duty holders meet before an exception applies?

ADNSW prefers the narrower approach taken in Tasmania, the ACT and Victoria that only allow educational institutions to discriminate in work based on religious belief or activity, not based on other protected attributes.¹⁶⁸ ADNSW notes that this approach is contingent on the introduction of a new protected attribute in the ADA based on religious belief or activity.

ADNSW supports additional requirements for duty holders to meet before the exception applies and prefers the approach taken in Victorian legislation. ADNSW's view is that this approach strikes the appropriate balance between upholding the right to freedom of thought, conscience and religion and protecting vulnerable groups in our society from discrimination. This approach confines the exception for positions where the role involves being a religious leader or teacher in a school where conformity to a religious doctrine or belief is central to the role. To rely on an exception in employment, religious educational authorities should only be able to discriminate when:

- Conformity with the doctrines of the religion is an inherent requirement of the role;
- The person cannot meet the inherent requirement because of their religious belief or activity; and
- It is reasonable and proportionate based on the circumstances.¹⁶⁹

Question 7.6: Discrimination against students and prospective students

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

ADNSW's shares concerns that allowing private educational authorities to discriminate against students in the provision of education is harmful to vulnerable students. Further, as noted by stakeholders these exceptions are outdated and unjustified.¹⁷⁰ Moreover, schools that receive public funding should be inclusive and safe for all students, regardless of their personal attributes. ADNSW supports limiting the exception to religious educational authorities, and thinks further safeguards against discrimination should be included in the exception.

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

(a) what attributes should the exceptions apply to?

¹⁶⁸ *Anti-Discrimination Act 1998 (Tas)* s 51(2); *Discrimination Act 1991 (ACT)* s 46(2); *Equal Opportunity Act 2010 (Vic)* s 83A.

¹⁶⁹ *Equal Opportunity Act 2010 (Vic)* s 83A.

¹⁷⁰ Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 7.

ADNSW prefers the approach of most other jurisdictions across Australia which have adopted a narrower approach, permitting discrimination in education only on the basis of religious belief. As noted above, this is contingent on the introduction of this protected attribute in the ADA.

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

Exceptions should only apply to prospective students in line with other Australian anti-discrimination laws which only permit discrimination at the point of admission or enrolment, but not once a student is already enrolled.

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

ADNSW supports the approach taken in Victoria, which in ADNSW's view provides an appropriate balance between allowing religious educational institutions to discriminate based on religious belief or activity with providing the strongest safeguards to protect groups with other protected attributes under the ADA from discrimination. The Victorian *Equal Opportunity Act* allows religious educational institutions to discriminate based on religious belief or activity, provided that the discrimination is reasonable and proportionate in the circumstances. It must also either:

- conform with the doctrines, beliefs, or principles in accordance with which the religious educational institution is to be conducted, or
- be reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion in accordance with which the religious educational institution is to be conducted.¹⁷¹

Exceptions in sport

Question 7.7: Exceptions relating to sport

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

ADNSW supports the inclusion of exceptions to discrimination or vilification in sport, however, the scope of the current exceptions is too broad, and ADNSW thinks they should be narrower and align with anti-discrimination laws in other jurisdictions.

Sex

The ADA provides that it is not unlawful to exclude people of one sex from participating in any sporting activity. ADNSW supports retaining an exception for sex discrimination in sporting activity. However, the exception should be subject to the following limitations:

- to competitive sporting activities;
- where the strength, stamina, or physique of the competitors is relevant to the activity;
- where the restriction is reasonable, proportionate and justifiable in the circumstances; and
- to people aged 12 years and over.

¹⁷¹ *Equal Opportunity Act 2021* (Vic) s 83(2), s 39.

This reform would bring the ADA into alignment with contemporary standards and anti-discrimination laws across Australia, ensuring that exceptions in sport are narrowly tailored and grounded in legitimate physical distinctions rather than broad categorical exclusions.

Transgender discrimination

As previously outlined in its preliminary submission, ADNSW supports a reconsideration of the exception in s 38P, which provides for unconditional transgender discrimination in any sporting activity for members of the sex with which the transgender person identifies. In line with other state, territory and federal discrimination laws ADNSW supports limiting this exception (at a minimum) to:

- people aged 12 year and over;
- to competitive sporting activity;
- where the strength, the stamina or physique of the competitors is relevant; and
- not apply to coaching, umpiring or refereeing roles.

Disability

The ADA provides an exception from the disability discrimination provisions in sporting activities in the following circumstances:

- (a) if the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity, or
- (b) if the persons who participate or are to participate in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities relevant to the sporting activity and relative to each other, or
- (c) if the sporting activity is conducted only for persons who have a particular disability and the person does not have that disability.

ADNSW supports narrowing the scope of the exception in sport based on disability consistent with approaches adopted in other states and territories.¹⁷² The exception should only apply in the context of competitive sporting activities, and only where the discrimination is reasonable, proportionate, and justifiable. The exception should clearly exclude non-playing roles such as coaching, administration, and umpiring.

Age

Section 49ZYW of the ADA provides that it is lawful to exclude people of particular ages from participating in any sporting activity, other than coaching or administration. ADNSW supports

¹⁷² *Discrimination Act 1991* (ACT) s 57; *Equal Opportunity Act 2010* (Vic) s 72(2)(c); *Anti-Discrimination Act 1992* (NT) s 56(1)(d); *Anti-Discrimination Act 1991* (Qld) s 111(1)(d); *Anti-Discrimination Act 1998* (Tas) s 43; *Equal Opportunity Act 1984* (SA) s 81; *Equal Opportunity Act 1984* (WA) s 66N(3).

narrowing this exception so that it applies only to competitive sporting activities where the strength, stamina and physique of the competitors is relevant.

Racial discrimination and vilification

The ADA also permits discrimination and vilification based on nationality, place of birth or length of residence in:

- selecting people to represent a place in any sport or game, or
- the eligibility to compete, under the rules of any competition, in a sport or game.¹⁷³

ADNSW supports the recommendation made by the NSWLRC in 1999 to remove this exception from the ADA. Permitting the formation of clubs on racial grounds risks fostering division rather than promoting inclusion. A more narrowly framed exception could facilitate the establishment of cultural clubs that play a vital role in addressing disadvantage and improving access to opportunities for minority groups.

The charities exception

Question 7.8: The charities exception

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

ADNSW supports narrowing the exception relating to charitable benefits in s 55, given that it has the potential to permit discriminatory action in the process of conferring charitable benefits.

Section 55 provides an exception from the ADA in relation to:

- a. a provision of a deed, will or other instrument, whether made before or after the day appointed and notified under section 2 (2), that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in this Act, or
- b. an act which is done in order to give effect to such a provision.

The limitations placed on this exception as framed in the LRCWA's review of its anti-discrimination legislation provide a good model. It recommended that the only acts exempt from the provisions be:

- consistent with the stated purpose of the relevant charity; and
- reasonable and proportionate to the public benefit that the charity is trying to achieve.¹⁷⁴

¹⁷³ *Anti-Discrimination Act 1977 (NSW)* s 22.

¹⁷⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 71.

ADNSW's view is that this approach achieves the appropriate balance between allowing charitable bodies to provide public benefits through positive discrimination towards disadvantaged groups, with protecting other groups and people from discrimination.

The voluntary bodies exception

Question 7.9: Voluntary bodies exception

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

ADNSW's view is that the exception in s 57 of the ADA is too broad and supports either removing it or significantly narrowing its scope. The exception 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.¹⁷⁵

While some argue that the exception is necessary because voluntary bodies operate in the private sphere, ADNSW believes that these organisations should fall under the ADA, given that some voluntary bodies receive substantial public funding, the community service role that they play in society and the public benefit that they deliver. ADNSW prefers the model in the ACT where the exception applies only in the following limited circumstances:

- the body is established to benefit a class of people sharing a protected attribute, and
- the discrimination is reasonable, proportionate and justifiable in the circumstances.¹⁷⁶

The aged care accommodation providers exception

Question 7.10: Aged care accommodation providers exception

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

ADNSW agrees with the recommendations made by the NSWLRC in 1999 that s 59, which deals with an exception for aged care accommodation providers, be removed from the ADA. Section 59 provides:

Nothing in this Act affects any rule or practice of an establishment which provides housing accommodation for aged persons, whether by statute or otherwise, whereby admission to the establishment is restricted to persons of a particular sex, marital or domestic status or race.

ADNSW supports the introduction of a general special measures provision and believes that providers who establish accommodation to specifically support older Australians, would be covered by this.

¹⁷⁵ *Anti-Discrimination Act 1977* (NSW) s 57(2).

¹⁷⁶ *Discrimination Act 1991* (ACT) s 31.

The statutory authorities exception

Question 7.11: The statutory authorities exception

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

The exception for acts done under statutory authority in s 54 should be narrowed. Section 54 provides an exception from the ADA for anything that is necessary to comply with a requirement of:

- any other Act, whether passed before or after the ADA
- any regulation, ordinance, by-law or other instrument made under any other Act, or
- an order of the NSW Civil and Administrative Tribunal (NCAT)
- any court order, aside from those made by bodies with the power to fix minimum wages, or other terms and conditions of employment.¹⁷⁷

Anti-discrimination legislation has been in force for decades in NSW and the NSW government should be committed to making all new legislation compatible with anti-discrimination laws.

¹⁷⁷ *Anti-Discrimination Act 1977* (NSW) s 54.

Vilification

ADNSW welcomes this review of the effectiveness of civil vilification provisions in the ADA, as some aspects of the legislation make it difficult to pursue a complaint of vilification, as discussed in ADNSW's *Submission on serious racial and religious vilification - NSW Law Reform Commission review into the effectiveness of section 93Z of the Crimes Act (NSW)*.¹⁷⁸

The ADA's civil vilification provisions require a complainant to establish harm to a higher threshold than s 18C of the *Racial Discrimination Act 1975 (Cth) (Racial Discrimination Act)* which requires the conduct to "be reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" another person or group. The ADA requires the offending conduct to "incite hatred, serious contempt or severe ridicule" which requires the conduct to elicit a response from a wider audience, not just from members of the affected group. Unlike the federal provisions which focus on the effect of the conduct on the target group, such as whether the individual is "offended" or "insulted", the test for civil vilification in the ADA doesn't allow consideration of the harm suffered by an individual or group targeted on the ground of their protected attribute.

The test in the ADA's civil vilification provisions does not require a person to actually be incited to violence, it is an objective test requiring consideration of whether the conduct is *capable* of inciting reasonable members of the public to hate, have serious contempt for, or severely ridicule the targeted group.

The protected attributes

Question 8.1: Protected attributes

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

People who are presumed or perceived to be of a particular race or religion are not covered in the ADA provisions, which is at odds with other provisions in the ADA. ADNSW considers that all vilification provisions in the ADA should be made consistent and should extend to include persons vilified on the ground of a presumed or imputed characteristic. The NSW Parliament's Standing Committee on Law and Justice's 2013 *Inquiry into racial vilification law in NSW* recommended that the NSW Government should amend the ADA's racial vilification provisions "to include persons of a presumed or imputed race".¹⁷⁹

¹⁷⁸ Anti-Discrimination NSW, *Submission on serious racial and religious vilification to the NSW Law Reform Commission review into the effectiveness of section 93Z of the Crimes Act (NSW)*, April 2024.

¹⁷⁹ Standing Committee on Law and Justice, NSW Parliament, Report 50 – December 2013, *Racial vilification law in New South Wales*
<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2260/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>.

It is inconsistent and confusing that people presumed to be homosexual or infected with HIV/AIDS are protected under sections 49ZF, 49ZXB and 49ZXC of the ADA but people subjected to racism or derogatory comments because it is assumed they are of a particular race or religion are not able to make a complaint, even though the harm may be the same as if they did actually belong to that race or religion.

(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?

The ADA provides limited protection against vilification based on the following attributes:

- being HIV/AIDS infected (actually or presumed)
- homosexuality
- race
- religious belief, affiliation or activity (including not having one)
- transgender grounds.

ADNSW strongly supports expanding civil vilification protections to all protected attributes in the ADA, including sex and disability. ADNSW also supports aligning the civil vilification provisions in the ADA with the criminal vilification grounds in s 93Z of the NSW Crimes Act, by adding sexual orientation, gender identity or intersex status. Sexual orientation and gender identity are also already protected in Victoria, Queensland, Tasmania and the ACT.

Test for vilification

Question 8.2: The test for vilification

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

As well as supporting stronger protections from vilification, including extending protections to more groups targeted by hate, ADNSW supports including legal tests that better recognise the harms that vilification causes.

The ADA’s civil vilification provisions require a complainant to establish harm threshold that is higher than other comparable models such as the Commonwealth model. Section 18C of the Racial Discrimination Act provides that it is unlawful for a person to do an act that is reasonably likely ‘to offend, insult, humiliate or intimidate another person or a group of people’.

In contrast to the federal law’s threshold requiring the conduct to ‘offend, insult, humiliate or intimidate’ another person or group, the equivalent provisions in the ADA require the offending conduct to “incite hatred, serious contempt or severe ridicule”. This high threshold of harm may constitute a barrier to complainants being able to establish the conduct amounted to vilification under NSW law.

ADNSW considers it preferable to expand, rather than replace, the ‘incitement’ test, as it has a well understood meaning and there is established case law on this aspect of vilification.

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

ADNSW believes that consideration should be given to adopting the Victorian approach which will lower the incitement-based test to cover a public act that is “likely” to incite. ADNSW’s view is that the current threshold, which requires vilifying to elicit a response from a wider audience, not just from members of the affected group, is too high. There have been very few successful vilification claims before NSW tribunals and courts.

ADNSW supports expanding the definition of “incite” to incorporate terms such as “promote”, “advocate” or “urge”.

Definition of “public act”

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

ADNSW believes the definition of ‘public act’ in the ADA should be updated to make it easier for people in NSW to understand the law and its coverage, and to make it consistent with the NSW *Crimes Act* and other laws.

A ‘public act’ in the ADA includes:

- a. any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, or
- b. any conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, or
- c. the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of a person or group of people based on a protected ground.

It is important that the s 93Z definition of “public act” can operate seamlessly alongside the ADA definition. Given the proliferation of hate speech online, through social media and other online platforms, ADNSW supports a broad and clear definition of “public act” that is capable of capturing a wide range of scenarios, including livestreamed events or conferences.

The definition in NSW criminal law clarifies that conduct can be considered public even if it occurs on private land. An updated definition in the ADA could reflect decisions such as *Ekeremawi v Commissioner of Police, NSW Police Force*¹⁸⁰ (a police exercise in a public station was a public act, even though it was closed to the general public at the time) and *Wolf v Secretary, Department of*

¹⁸⁰ [2019] NSWCATAD 79267.

*Education*¹⁸¹ (comments made while teaching a class in a NSW High School were a “public act” that constituted racial vilification).

Exceptions for vilification

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

Each of the public interest exceptions in the ADA apply to public acts, done reasonably and in good faith, for:

- academic, artistic, scientific or research purposes, or
- other purposes in the public interest including discussion or debate about, and expositions of, any act or matter.¹⁸²

ADNSW believes these adequately protect the right to free speech.

Public interest exceptions

The Victorian Legislative Assembly Legal and Social Issues Committee’s *Inquiry into Anti Vilification Protections* recently recommended that the exception for acts done for any “purpose in the public interest” should also be confined to “genuine” purposes.¹⁸³

Religious discussion or instruction purposes

ADNSW’s view is that the public interest exceptions from vilification for religious discussion or instruction purposes should be removed. ADNSW agrees with the assessment made by the LRCWA that people can express their religious views and opinions, without this conduct amounting to vilification.¹⁸⁴

Religious vilification

Question 8.5: Religious vilification

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

The religious vilifications provisions in s 49ZE make it unlawful, by public act, to incite hatred towards, serious contempt for or severe ridicule of a person, or group of people, because they:

- have or do not have a religious belief or affiliation, or
- engage, or do not engage, in religious activity.

¹⁸¹ [2023] NSWCATAD 20227.

¹⁸² *Anti-Discrimination Act 1977* (NSW) s 20C(2)(c), s 38S(2)(c), s 49ZE(2)(c), s 49ZT(2)(c), s 49ZXB(2)(c).

¹⁸³ Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 12, 126.

¹⁸⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 231.

Since the *Anti-Discrimination Amendment (Religious Vilification) Act 2023* came into force on 12 November 2023, ADNSW has recorded approximately 40 enquiries and 40 complaints of religious vilification. Only a small number of these complaints have been able to be resolved through conciliation, but this is in line with all kinds of vilification, largely attributed to the lack of an ongoing relationship between the parties.

ADNSW's view is that the ADA should adopt the definition of "religious belief or affiliation" from s 93Z(5) of the *Crimes Act* which defines the term as "holding or not holding a religious belief or view".

ADNSW reiterates that the definition of "public place" in the religious vilification provisions should more explicitly include online conduct.

ADNSW notes the concerns raised by stakeholders outlined by the NSWLRC that the current religious vilification provisions may allow religious organisations, including churches, to seek redress for being vilified as an organisation. The provisions include reference to "persons" or a "group of persons" and in NSW, a "person" includes "an individual, a corporation and a body corporate or politic".¹⁸⁵ Organisations are arguably unable to be characterised as having a race, sexuality, gender identity or HIV/AIDS status, but can be characterised as "religious".¹⁸⁶ ADNSW also shares some of these concerns, including that powerful religious bodies could take action against less well-resourced individuals, and stifle public debate.

However, under Queensland anti-discrimination law organisations can bring vilification complaints but only if the organisation has a primary purpose to promote the interests or welfare of persons of a particular race, religion, sexuality, or gender identity.¹⁸⁷ Further limitations include that:

- the complaint is made in good faith; and
- the allegation is about conduct that has affected or is likely to affect people whose interests and welfare is a primary purpose of the organisation to promote; and
- it is in the interests of justice to accept the complaint.¹⁸⁸

The QHRC noted the benefits of this approach including that it reduces the burden on individuals to make a complaint and it has the capacity to address systemic issues.¹⁸⁹ In the last 10 years, the QHRC has received five complaints from organisations including from community legal centres and advocacy organisations.¹⁹⁰

¹⁸⁵ *Interpretation Act 1987* (NSW) sch 4 definition of "person".

¹⁸⁶ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper No 24 (2025) [8.156]

¹⁸⁷ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 177.

¹⁸⁸ *Anti-Discrimination Act 1991* (Qld) s 134(3)-(5).

¹⁸⁹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 174.

¹⁹⁰ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 177.

ADNSW has also received complaints from organisations alleging vilification on other protected grounds, however, the organisation has not met the characteristic requirement in s 88 of the ADA. Section 88 provides that a vilification complaint can only be made if each person on whose behalf the complaint is made has the protected characteristic. In these scenarios, there are often sensitivities involved, and individuals have opted out of pursuing complaints due to the personal toll involved in making a complaint and the risk of victimisation. In ADNSW's view, some of these matters may be in the public interest.

On balance, ADNSW sees advantages in allowing organisations to make complaints when they are in the public interest, provided there are appropriate safeguards. The QHRC's assessment of the existing pathway for organisations to make vilification complaints in that jurisdiction does not suggest that individuals have been targeted through the complaints process or that complaints have been used to stifle public debate. ADNSW's view is that consideration should be given to allowing organisational complaints on all protected grounds, however, to put limitations on this like the Queensland jurisdiction and safeguard against the risks associated with organisational complaints highlighted by stakeholders.

Harassment

The sexual harassment provisions were introduced in the ADA in 1997. Despite significant law reform particularly in the federal jurisdiction to the *Sex Discrimination Act* following the AHRC's *Respect@Work: Sexual Harassment National Inquiry Report*, the provisions in the ADA have not been amended. ADNSW's view is that several aspects of sexual harassment laws in NSW could be simplified and reformed to better align with developments in other Australian jurisdictions.

Definition of sexual harassment

The ADA only prohibits sexual harassment and not harassment based on other protected attributes in the ADA. Under the ADA a person sexually harasses another person if:

- (1) the person makes an unwelcome sexual advance or an unwelcome request for sexual favours, or
- (2) the person engages in other unwelcome conduct of a sexual nature in relation to the other person

in circumstances in which a reasonable person, having regard to all the circumstance, would have anticipated that the person would be offended, humiliated or intimidated.¹⁹¹

Question 9.1: The definition of sexual harassment

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

ADNSW considers that the threshold of the “reasonable person” standard in the ADA should be lowered to align with the *Sex Discrimination Act*. ADNSW's view is that requiring a reasonable person to anticipate the “possibility” that the person harassed would be offended, humiliated or intimidated would better support alleged victims of sexual harassment.

(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?

As noted above, the definition of “sexual harassment” in the ADA requires that a reasonable person would have anticipated that another person would be offended, humiliated or intimidated by the conduct having regard to “all the circumstances”. However, the ADA does not specify what those circumstances are. In contrast, the *Sex Discrimination Act* provides a non-exhaustive list of matters to be considered in making this determination.¹⁹² Queensland adopts a similar approach.¹⁹³

¹⁹¹ *Anti-Discrimination Act 1977* (NSW) s 22A.

¹⁹² *Sex Discrimination Act 1984* (Cth) s 28A(1A)

¹⁹³ *Anti-Discrimination ACT 1991* (Qld) s 120.

Furthermore, in its recent review of the *Equal Opportunity Act* the LRCWA recommended adopting the definition in the *Sex Discrimination Act*.¹⁹⁴

ADNSW considers that adopting the approach in the *Sex Discrimination Act* could benefit complainants by expressly requiring consideration of their individual circumstances and the intersectionality of their protected attributes. This is particularly relevant given that certain groups may experience harassment differently. As noted in foreword of the AHRC's *Speaking from Experience* report, workplace sexual harassment is rarely only an issue of gendered power. It often involves complex intersectionality where sexual harassment may intersect with other forms of discrimination, including race, migration status, sexuality, gender identity, disability, First Nations status and age.¹⁹⁵ To strengthen the effectiveness of this approach, ADNSW supports consideration being given to the Australian Discrimination Law Experts group recommendation that s 28A(1A) of the *Sex Discrimination Act* be amended to *require* decision makers to take into account intersectional factors when determining unlawful sexual harassment.¹⁹⁶

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

ADNSW view is that statements of a sexual nature are likely to be covered by the ordinary meaning of “other unwelcome conduct of a sexual nature”. However, ADNSW supports including statements in the definition of “conduct of a sexual nature” as set out in the *Sex Discrimination Act* to make it clear in the legislation. Anti-discrimination legislation in other jurisdictions such as Victoria and the ACT either define the term or provide examples of what “conduct of a sexual nature” may entail.¹⁹⁷

Other sex-based conduct

Question 9.2: Other sex-based conduct

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

As noted by the NSWLRC, the ADA does not currently prohibit harassment “on the ground of sex”. ADNSW acknowledges that there may be some gaps in protection, for example, under the current provisions a complaint involving gendered based abuse in a workplace may not constitute sexual harassment or sex discrimination.¹⁹⁸ The introduction of sex-based harassment may enable complainants to pursue claims involving conduct that may not necessarily fall within the existing

¹⁹⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report 214.

¹⁹⁵ Australian Human Rights Commission, *Speaking from Experience: What needs to change to address workplace sexual harassment* 6.

¹⁹⁶ Australian Discrimination Law Experts Group, *Submission to the Australian Human Rights Commission, National Inquiry into Sexual Harassment in Australian Workplaces* (4 March 2019) 23.

¹⁹⁷ *Equal Opportunity Act 2010* (Vic) s 92(2); *Discrimination Act 1991* (ACT) s 58(2); *Anti-Discrimination Act 1991* (Qld) s 119.

¹⁹⁸ Australian Discrimination Law Experts Group, *Submission to the Australian Human Rights Commission, National Inquiry into Sexual Harassment in Australian Workplaces* (4 March 2019) 10.

definitions of sex discrimination or sexual harassment and would bring the ADA into alignment with legislative developments in other Australian jurisdictions.¹⁹⁹

However, as outlined by the NSWLRC, there are several concerns with prohibiting sex-based harassment, including that it could create confusion for complainants about which law applies to the conduct. Furthermore, several criticisms have been made about the model in the *Sex Discrimination Act*, including that the requirement that the conduct be demeaning is inconsistent with the current sex discrimination and sexual harassment provisions. There is also the concern about the introduction of harassment based on sex, and not on other protected attributes, which may suggest that harassment based on other attributes is not as serious and harmful as sex-based harassment.

The concern about new provisions being confusing could be addressed through targeted education and awareness initiatives to ensure the community understand the scope and application of the law.

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

ADNSW acknowledges that views are divided about whether the inclusion of a prohibition against hostile workplace environments on the ground of sex in s 28M of the *Sex Discrimination Act* is effective in protecting individuals from harassment. Some stakeholders view the provisions in the *Sex Discrimination Act* as beneficial, while others consider them potentially onerous for complainants. As noted by the NSWLRC, the Australian Discrimination Law Experts group have raised that the requirement in s 28M for a “person to subject another person to a workplace environment that is hostile” still means a person’s actions must affect another person, limiting its effectiveness to address hostile environments.²⁰⁰

Some of the limitations in prohibiting the creation of a hostile work environment are that it may be difficult to establish who is liable for creating the environment and whether bystanders who did nothing to address the behaviour are culpable (although they could arguably be held liable through the aiding and abetting provisions). ADNSW sees practical difficulties in administering these potential provisions as it may be challenging to establish who the appropriate respondents are in some cases.

As outlined by the federal Attorney General’s Department in its 2022 *Respect@Work* consultation paper and the QHRC, Australian discrimination case law recognises that subjecting an employee to a hostile work environment that is sexual in nature, even if they are not the direct target, can

¹⁹⁹ *NSW Young Lawyers Human Rights Sub-Committee, Preliminary Submission PAD49.*

²⁰⁰ Australian Discrimination Law Experts Group, *Submission to the Senate Standing Committees on Legal and Constitutional Affairs, Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) 16.

constitute sexual harassment or sex discrimination.²⁰¹ However, the AHRC's *Respect@Work Report* observed that the concept of a hostile work environment was not routinely recognised and cases often turn on individual circumstances.²⁰²

On balance, at this time ADNSW thinks that a prohibition on hostile work environments should not be introduced in the ADA. ADNSW considers that the model in the *Sex Discrimination Act* needs further clarification before it can be used effectively and consistently. ADNSW believes that given the coverage in this area in other jurisdictions, non-legislative options such as education and awareness campaigns, can be used by ADNSW to encourage behaviour change, provided it is given appropriate resources.

(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?

ADNSW is not aware of any other suitable options or models that could fall in the gap between sex discrimination and sexual harassment, so makes no response to this question.

Sexual harassment at work

Question 9.3: Sexual harassment in the workplace

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

ADNSW supports adopting the *Sex Discrimination Act's* approach to prohibiting sexual harassment in connection with person's status as a worker or as a person conducting a business or undertaking. The ADA's current coverage of sexual harassment prohibition in relation to workers is inconsistent and has limitation in terms of the types of workers that are covered. The *Sex Discrimination Act's* approach to workplace sexual harassment is comparatively broader in scope and simpler.²⁰³ ADNSW considers that adopting the *Sex Discrimination Act's* model would enhance protections for NSW residents. By simplifying the types of workers and types of working relationships that are covered, this would assist complainants in navigating the complaint process, ensuring greater accessibility to legal protections.

Question 9.4: Workplace-related laws regulating sexual harassment

²⁰¹ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 139 – 140; Australian Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (February 2022) 10 – 11.

²⁰² Australian Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (February 2022) 12 – 13.

²⁰³ *Sex Discrimination Act 1984* (Cth) s 28B.

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

As noted by the NSWLRC, employment and work health safety laws in the Fair Work Act and the *Work Health and Safety Act 2011* (NSW) cover a broader range of workers and offer more protections than the ADA. ADNSW supports aligning the definitions of sexual harassment with the definitions in these laws.

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

As outlined above, the workplace-related sexual harassment laws currently provide broader protection than those in the ADA. It would be beneficial for the ADA to align to these laws to ensure the ADA adequately addresses and protects against the same types of harassment.

Expanding coverage for sexual harassment

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

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

ADNSW notes that sexual harassment is currently only unlawful in employment, education, goods and services, accommodation, land dealings, sport, state programs, bodies that confer trade or occupational qualifications, and employment agencies. ADNSW's view is that sexual harassment should not be tolerated in any context and supports expanding the areas of life where sexual harassment is unlawful.

(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?

At a minimum, sexual harassment should be unlawful in all areas of public life currently protected from discrimination. Further to this, ADNSW thinks that serious consideration should be given to expanding the protections to any area of life, whether public or private.

ADNSW has considered arguments made against sexual harassment being unlawful in all areas of life, including that discrimination law should not regulate purely private conduct. In 1999 the NSWLRC recommended against expanding the areas of life where sexual harassment is unlawful based on the ADA's foundational distinction between public and private spheres of life, which it thought may present challenges to adopting a more expansive framework. ADNSW also notes the practical difficulties of enforcing a general prohibition. For example, for sexual harassment that occurs by a person who is unknown to a potential complainant on the street it may be difficult for ADNSW to contact the person and to engage in conciliation.

However, on balance ADNSW finds the argument in favour of expanding prohibitions on sexual harassment to any area of life more compelling. It would bring the ADA into alignment with other jurisdictions, including Queensland which has adopted a broader model that prohibits sexual

harassment wherever it happens. The QHRC have indicated that the provisions are “working well”.²⁰⁴ Further, the Australian Law Reform Commission recently recommended that the prohibitions on sexual harassment in the *Sex Discrimination Act* apply universally.²⁰⁵ ADNSW is persuaded by the reasons given by the Australian Law Reform Commission:

Prohibiting sexual harassment in more contexts would be more consistent with Australia’s international obligations. It would provide greater access to justice and facilitate more just outcomes for people experiencing sexual violence. It would reduce the extent of arbitrary distinctions between sexual harassment that is prohibited, and sexual harassment that is lawful simply because of the context in which it occurs. It would reduce the complexity of disputes to the extent it would no longer be necessary to demonstrate that the sexual harassment occurred in a relevant context.²⁰⁶

As noted by the NSWLRC, prohibiting sexual harassment to all areas of public life would simplify and clarify the ADA. It would address instances of sexual harassment that are widespread yet not currently prohibited under the ADA.

It may now be appropriate for the NSWLRC to reconsider its earlier position, which ADNSW supports considering evolving societal expectations and the growing need for comprehensive legal protection.

Question 9.6: The private accommodation exception

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

The ADA prohibits sexually harassing someone while providing, or offering to provide, accommodation to them. However, this does not apply to accommodation in a private household.²⁰⁷

ADNSW agrees with the NSWLRC’S 1999 recommendation that the exception for sexual harassment that occurs in private accommodation should be removed from the ADA.

Question 9.7: Attribute-based harassment

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

Harassment based on other protected attributes is not currently prohibited under the ADA. There are some compelling arguments in favour of prohibiting harassment based on attributes, including

²⁰⁴ Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 130.

²⁰⁵ Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 49.

²⁰⁶ Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) 459.

²⁰⁷ *Anti-Discrimination Act 1977* (NSW) s 22G.

that it would offer greater protection and simplify the complaints process for complainants. Currently, if an individual experiences treatment that amounts to both sexual harassment and race discrimination concurrently, they must lodge multiple complaints under the ADA. Introducing a prohibition on attribute-based harassment would more accurately reflect people's experiences and may only require them to satisfy one legal test.

There is currently no uniform national model for protection against harassment based on protected attributes across Australia. Some jurisdictions only provide protection from harassment based on selected attributes, while the Northern Territory prohibits harassment across the same attributes and areas of life as it does for discrimination.²⁰⁸ This approach appears to benefit complainants by providing clarity as to when harassment and discrimination are unlawful.

²⁰⁸ *Anti-Discrimination Act 1992* (NT) s 20(1)(b).

Other unlawful acts and liability

Victimisation

Question 10.1: Victimisation

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

As outlined by the NSWLRC someone would be victimised under the ADA if they were subjected to any “detriment” because they had:

- brought proceedings under the ADA
- given evidence or information in connection with proceedings under the ADA
- alleged that someone had done something that contravened the ADA, or
- otherwise done anything under or by reference to the ADA

Victimisation also occurs when someone is subjected to a detriment because the respondent knew that they intended to do any of these things, or suspected they had done them.²⁰⁹

ADNSW’s view is that the ADA should expressly cover situations where a person threatens to victimise someone, consistent with other Australian jurisdictions.

(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?

The ADA should provide that victimisation is unlawful even if it was done for two or more reasons.

ADNSW’s view is that the best way to achieve this is to amend s 4A to include victimisation. Section 4A of the ADA provides that an act is taken to be done for a discriminatory reason, in circumstances where an act is done for two or more reasons, and one reason was unlawful discrimination.

Advertisements

Question 10.2: Advertisements

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

Under s 51(2) of the ADA, a person must not publish an advertisement that indicates an intention to do an unlawful act under the ADA. However, s 51(4) provides a defence to this in circumstances where the person reasonably believed publication was not unlawful.

ADNSW’s view is that the scope of the defence in s 51(4) should be more clearly defined to ensure that a person’s belief can be held to an objective standard.

²⁰⁹ *Anti-Discrimination Act 1977 (NSW) s 50(1).*

If a defence for publishing an unlawful advertisement remains in the ADA, ADNSW prefers the approach in Queensland and Victoria which provide a defence in circumstances where reasonable precautions were taken to prevent the publication.²¹⁰

Forms of liability

Question 10.3: The forms of liability

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

ADNSW has no concerns or issues to raise with the provisions that deal with the various forms of liability in the ADA.

Question 10.4: The exceptions for liability

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

As stated by the NSWLRC, the ADA provides two defences for employers or principals. The onus is on the employer or principal to prove that they either:

- took all reasonable steps to prevent the agent or employee from breaching the ADA, or
- did not authorise the agent or employee to do the act.²¹¹

The “reasonable steps” exception to vicarious liability is common to all Australian discrimination laws, however, the “unauthorised acts” exception is unique to the ADA.

ADNSW supports removing the exception in s 53(1) of the vicarious liability provisions in the ADA that relate to unauthorised conduct.

Liability and artificial intelligence

Question 10.5: Liability and artificial intelligence

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

ADNSW has not dealt with any complaints that allege discrimination during the use of automated decision-making technology. However, it recognises that the increased use of AI in decision making has the potential to result in discrimination, particularly in relation to access to services and recruitment.

ADNSW supports the approach outlined by the NSWLRC which involves amending the ADA to provide that decisions made by a computer program used by an individual or body corporate would be attributed to that individual or body corporate.

²¹⁰ See *Equal Opportunity Act (Vic)* s 182, 183; *Anti-Discrimination Act (Qld)* s 127(2).

²¹¹ *Anti-Discrimination Act 1977 (NSW)* s 53(1)-(3).

Promoting substantive equality

Anti-discrimination legislation introduced in Australia in the 1970s has worked to reduce overt discrimination in workplaces, education and in the provision of goods and services. However, discrimination is still prevalent in our society today, often carried out in more subtle forms. Anti-discrimination legislation based on an individualised complaints process has limitations to address systemic discrimination. In ADNSW's experience, confidential conciliation processes which result in private settlement agreements have limited effect in prompting more widespread change. ADNSW supports more proactive and positive mechanisms being introduced into the ADA to address entrenched and systemic forms of discrimination.

Adjustments

Question 11.1: Adjustments

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

The ADA should impose a positive duty to provide adjustments and ADNSW supports this being a stand-alone duty. The adoption of a stand-alone duty is consistent with legislation in other states and territories including Victoria, the Northern Territory and South Australia. In addition, it is consistent with recommendations made by the LRCWA and the QHRC in their law reform processes of anti-discrimination laws, and by the AHRC in its *Free and Equal* process (discussed further below).

Currently, the ADA does not include a clear duty to provide adjustments or accommodations. Instead, it provides exceptions to the disability discrimination provisions (in the areas of work, accommodation, education, the provision of goods and services and in registered clubs) in circumstances where providing a particular arrangement for a person would impose an 'unjustifiable hardship' on the duty holder. Similar exceptions apply to the carer's responsibility discrimination provisions in employment.²¹²

The recent NSW parliamentary inquiry into *Children and Young People with Disability in New South Wales Educational Settings* made recommendations that the NSW Government seek to amend the ADA to include a positive duty on educational institutions to provide reasonable adjustments for a person with disability.²¹³

ADNSW's preliminary view is that the duty to provide adjustments should only extend to the grounds of disability and carer's responsibility, however, believes that the views of key stakeholders should be considered when evaluating what attributes the duty should apply to.

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

²¹² *Anti-Discrimination Act 1977* (NSW) s 49C, s 49U.

²¹³ NSW, Legislative Council Portfolio Committee No 3, *Children and Young People with Disability in New South Wales Educational Settings*, Report 52 (2024) rec 25.

As stated above, ADNSW’s view is that a duty to provide adjustments should be a positive, stand-alone duty and not form part of the tests for discrimination. There are several reasons to support that a stand-alone duty is preferable.

Firstly, a stand-alone duty to provide adjustments is consistent with Australia’s obligations under international law. Article 2 of the *Convention of the Rights of People with a Disability (CRPD)* defines “reasonable accommodation” as:

Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 5 of the CRPD emphasises that state parties should take all reasonable steps to ensure that reasonable accommodation is provided.

Additionally, significant concerns have been raised about the way the law operates in the *Disability Discrimination Act*, which includes the duty to provide adjustments in the tests for discrimination. In the *Disability Discrimination Act* the duty to provide reasonable adjustments is included in the definitions of both direct and indirect discrimination.²¹⁴ As noted by the NSWLRC, concerns have been raised that the effect of the Full Federal Court’s interpretation of the provisions in *Skavos v Australian College of Dermatologists*²¹⁵ has weakened the duty and created additional barriers for people with a disability who require adjustments. In *Skavos* the court found that the reason a duty holder does not provide an adjustment must be because of the person’s disability for discrimination to occur under s 5(2) of the *Disability Discrimination Act*. As a result, the AHRC has indicated its support for amending the *Disability Discrimination Act* to have a positive standalone provision to restore the original intent of the reasonable adjustment provisions.²¹⁶

A standalone provision is also consistent with the laws in Victoria and the Northern Territory and consistent with recommendations made by the LRCWA and the QHRC’s in their law reform processes of anti-discrimination laws.²¹⁷ A positive stand-alone duty arguably prompts duty holders to take proactive steps to prevent discrimination before it occurs. A stand-alone duty would also provide clarity to parties about their obligations.

ADNSW notes that there are arguments against having a positive stand-alone duty. It may create an additional burden on duty holders and be difficult for some businesses and employers that are not well resourced to comply with. However, limitations on the duty could be used to reduce this burden, as discussed below. A stand-alone duty is also outside the tests for direct and indirect discrimination, therefore creating a separate type of discrimination, which may cause some confusion.

²¹⁴ *Disability Discrimination Act 1992* (Cth) s 5(2), s 6(2).

²¹⁵ [2017] FCAFC 128.

²¹⁶ Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021), 292.

²¹⁷ Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 5, 129; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 67, 152.

There is also an argument that there is already an implicit obligation in the indirect discrimination provisions to make reasonable accommodations on all grounds in all areas, therefore a stand-alone duty is not required. However, ADNSW's view is that an express positive stand-alone duty provides stronger protection against discrimination for people with a disability and would provide more clarity to the community about what their rights and obligations are under anti-discrimination laws.

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

ADNSW is aware that in other Australian jurisdictions that have a duty to provide adjustments, there may be some uncertainty about what prompts the duty, including any obligations on the person affected to advise that they require an adjustment.

Under the Victorian *Equal Opportunity Act*, a duty holder “must” make reasonable adjustments in specified areas of life for a person with a disability. In the area of employment, this applies in circumstances where the person requires adjustments to perform the genuine reasonable requirements of the employment.²¹⁸ Practitioners working in the area have indicated that it is not clear how the obligation is triggered and what the expectations are of duty holders.²¹⁹

The Victorian Civil and Administrative Tribunal (VCAT) has provided some guidance in this area. In *Muller v Toll Transport Pty Ltd (2)*,²²⁰ VCAT found that “an employee needs to articulate what he or she needs and expects from an employer by way of adjustment so as to enable him or her to perform the genuine and reasonable requirement of the particular job”.²²¹

To provide clarity to both duty holders and people who require adjustments, ADNSW supports a mechanism in the ADA that prompts people to provide information about the type of adjustment that they may require. However, ADNSW's view is that the inclusion of any obligation to provide information should be drafted in consultation with the disability community and take into account the sensitivities in disclosing private and personal health information.

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

ADNSW's view is that if a stand-alone duty to provide adjustments was introduced in the ADA, it should have limitations, not unlike the current unjustifiable hardship provisions in the ADA, which consider the benefits and detriments to the person with a disability, duty holders other people concerned.

Currently in the ADA, the disability discrimination and the carer responsibility (in work only) provisions provide an exception where making arrangements for the person would impose an

²¹⁸ *Equal Opportunity Act 2010 (Vic)* s 20(1)(b).

²¹⁹ Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459.

²²⁰ [2014] VCAT 472.

²²¹ *Muller v Toll Transport Pty Ltd (2)* [2014] VCAT 472 [51].

unjustifiable hardship on the duty holder. The test for unjustifiable hardship in the disability discrimination provisions in s 49C includes a consideration of the following:

- The nature of the benefit or detriment to any person concerned.
- The effect of the disability on the person concerned.
- The financial circumstances of the respondent.

Other jurisdictions

Models in other jurisdictions broadly frame (or have proposed to frame) the limits on the positive obligation to provide adjustments:

- With an exception from the obligations in circumstances where compliance would result in unjustifiable hardship on the duty holder; or
- With an exception in circumstances where providing the adjustment would not be reasonable.

The model in the Victorian jurisdiction includes exceptions to the duty to make adjustments in circumstances where it would not be “reasonable”. Different elements need to be considered in each area of public life in which the duty applies. For example, on the ground of responsibilities as a parent or carer in the area of employment, whether an employer’s actions are reasonable will be determined by consideration to a number of factors, such as the financial circumstances of the employer and the impact on its business, the nature of the employee’s role and the consequences on the employee of not making the accommodation.²²²

The QHRC review concluded that while the concept of ‘unjustifiable hardship’ should be retained in the legislation, consistent with the approach of Victoria and the Northern Territory, the provisions did not need to refer to the term ‘unjustifiable hardship’. It recommended the introduction of a positive, standalone duty to make reasonable accommodations and a non-exhaustive list of criteria for assessing whether an accommodation is reasonable, similar to the Victorian model.²²³ The LRCWA’s review noted that many other Australian jurisdictions define the reasonableness of proposed adjustments by reference to the justifiability of the hardship it will impose. It noted that the use of “reasonable” may be redundant, as any adjustment that does not result in unjustifiable hardship, should arguably be considered reasonable.²²⁴

ADNSW sees advantages to retaining the term “unjustifiable hardship” as this is consistent with the *Disability Discrimination Act* and is already a familiar term in NSW. ADNSW’s view is that whatever terminology is recommended by the NSWLRC, the limit on the duty to provide adjustments should involve a consideration of the following:

- The person’s circumstances, including the nature of the person’s disability;

²²² *Equal Opportunity Act 2010* (Vic) s 19(2).

²²³ Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) rec 5.

²²⁴ Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022), 155 – 156.

- The nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- The financial circumstances of the duty holder and the consequences on them to make the adjustments; and
- The financial assistance available to the duty holder.

Special measures

Question 11.2: Special measures

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

ADNSW supports the introduction of general special measures provisions in the ADA given the issues with the current scheme (discussed below) and to be consistent with anti-discrimination laws federally and in other states and territories.

ADNSW's view is that special measures should be framed as a positive measure to achieve substantive equality, rather than an exception to the law, similar to the Victorian and federal legislation.²²⁵

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

ADNSW prefers the approach taken in Victoria. Section 12 of the *Equal Opportunity Act* defines a special measure as one that is “for the purpose of promoting or realising substantive equality for members of a group with a particular attribute”. The *Equal Opportunity Act* provides that, to be a special measure, the action must be:

- undertaken in good faith for achieving substantive equality
- reasonably likely to achieve this purpose
- a proportionate means of achieving this purpose, and
- justified because members of the group have a particular need for assistance.²²⁶

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

ADNSW's view is that a general special measures section should replace the current processes. If the exemption process is retained, ADNSW's supports giving NCAT powers to grant exemptions rather than ADNSW, for the reasons outlined below. However, ADNSW is also aware that consideration needs to be given to having a distinct process for conduct that is not a special measure but where other public interest and commercial factors exist, such as exemptions that allow certain employers to discriminate to comply with US export policies.²²⁷

²²⁵ *Equal Opportunity Act 2010* (Vic) s 12.

²²⁶ *Equal Opportunity Act 2010* (Vic) s 12.

²²⁷ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper No 24 (2025) [11.60].

Issues with the current scheme

There are several issues with the current scheme which support that these processes should not be retained. In its Consultation Paper the NSWLRC outlined three issues (raised by ADNSW and others) that the current process is:

- Resource intensive for both ADNSW and for applicants
- Difficult for the public to understand due to the overlap between what is covered by each process, and
- Inconsistent with the laws in all other states and territories, creating complexities for businesses operating across Australia.

If a general special measures provision were introduced and the current processes are retained, ADNSW is concerned that this could lead to more confusion and complexity in this area. ADNSW is concerned that people will not understand what laws are applicable to their proposed conduct and what they need to do to comply with the law.

ADNSW receives applications for exemptions and certifications that clearly fall within the meaning of a special needs program under s 21 or s 49YZR or within one of the exceptions in the ADA. For example, s 14 provides an exception from the ADA for providing persons of a particular race with 'services for the purpose of promoting their welfare where those services can most effectively be provided by a person of the same race'. Section 31 allows discrimination on the ground of sex where being a person of a particular sex is a genuine occupational qualification for the job.

However, applicants want certainty and request confirmation from ADNSW that an exception applies to their conduct to reduce their potential liability. In these circumstances the current processes may be used as an insurance policy, creating an administrative burden on ADNSW. ADNSW cannot make determinations about whether conduct is discriminatory, including whether future intended conduct contemplated in exemption and certification applications will constitute discrimination. Therefore, there is no mechanism for ADNSW to provide certainty to applicants. ADNSW's advises applicants that if they wish to rely on an exception or the special needs programs provisions, they must be confident that they can defend the conduct by relying on that provision if someone makes a complaint.

ADNSW is concerned that if the current processes are retained and a general special measures provision introduced, some applicants will be reluctant to rely on the special measures provision or be under a misconception that they require an exemption or certification and apply under the current process. This would undermine the purpose of a special measures provision, especially if the general special measure is framed as a positive measure to promote equality rather than an exception.

ADNSW submits that there are further issues with the current provisions. Under s 126A certifications can be granted indefinitely. Several of the certifications currently listed on ADNSW's website that were granted indefinitely are for organisations that no longer exist.²²⁸ Certifications can

²²⁸ See <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/current-certifications.html>.

be granted indefinitely to organisations that may cease to exist in the future, which creates uncertainty. Further, ADNSW agrees with comments made by the NSWLRC in 1999, that there is no justification for having provisions related to special needs programs for people based on race and age where no certification is needed, compared with the other protected attributes which require the Minister to provide certification.²²⁹

ADNSW can also identify issues with the exemption process in s 126, including that several elements of s 6 of the *Anti-Discrimination Regulation* are not clear. For example, s 6(1)(b) provides that the President must consider whether the proposed exemption is necessary. ADNSW has interpreted this as meaning whether the exemption is necessary to avoid a contravention of the ADA. However, applicants regularly interpret this to mean whether the exemption is necessary to address discrimination issues.

ADNSW acknowledges that one advantage of the current process in the ADA is that prior to undertaking conduct intended to positively benefit a protected group, a person can apply for an exemption or certification, which provides a mechanism for ADNSW to assess the conduct and provides safeguards against potentially unlawful discrimination. If exemptions are retained, ADNSW's considers the Victorian model is preferable where organisations can apply directly to VCAT for an exemption.²³⁰ If someone applies for an exemption to VCAT or it is raised as a defence to a complaint, then VCAT can make a determination about whether the conduct is a 'special measure' thereby providing certainty to the applicant and the community about the conduct.²³¹

Positive duty

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

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

(2) If so:

- a. What should duty holders be required to do to comply with the duty?**
- b. What types of unlawful conduct should the duty cover?**
- c. Who should the duty holders be?**
- d. What attributes and areas should the duty apply to?**

To address substantive equality, some anti-discrimination laws in Australia and overseas are moving towards positive duties to prevent discrimination. For example, in 2010 the Victorian *Equal Opportunity Act* was introduced and includes the obligation to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation. In December 2022, the *Sex Discrimination Act* was amended to include a positive duty to eliminate, as far as possible, sex discrimination, sexual harassment and victimisation at work. In addition, several recent law reform

²²⁹ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 50 and 51.

²³⁰ *Equal Opportunity Act 2010* (Vic) s 89.

²³¹ Austlii Communities, *Victorian Discrimination Law – Special Measures*, <http://austlii.community/foswiki/VicDiscrimLRes/Specialmeasures>, accessed 6 August 2025.

processes have recommended the introduction of a positive duty, including the LRCWA and the QHRC's reviews of their respective state anti-discrimination laws.²³²

ADNSW recognises that there are many positives which support the introduction of a positive duty in the ADA. It would provide an alternate way of addressing discrimination other than through individual enforcement (which has its limitations), address systemic discrimination issues and contribute towards raising awareness and educating the community about duties under anti-discrimination laws. ADNSW is aware that the number of complaints it receives only represents a fraction of the discrimination, vilification and harassment that occurs in NSW society, therefore a positive duty would allow more proactive measures to address endemic forms of discrimination.

However, ADNSW also acknowledges the views of opponents to the introduction of positive duties including that there are already positive duties in other legislation, such as work health and safety legislation, and that new laws may create inconsistency, confusion and greater regulatory burdens for duty holders. Further, there are concerns that a positive duty regime would be too costly and onerous on educational providers, businesses and employers.

If the NSWLRC is minded to recommend that the ADA should include a positive duty, ADNSW notes the limitations with enforcement in the Victorian jurisdiction. Although a duty holder can be subject to an investigation by VEOHRC, VCAT has confirmed that it has no jurisdiction to hear an application that s 15 of the *Equal Opportunity Act* has been breached. Supporters of the scheme still reiterate that the positive duty has symbolic significance as a tool of persuasion.²³³

ADNSW notes the conflict between giving ADNSW powers to enforce a positive duty in the ADA with its role as an impartial complaint handling body. If a positive duty is introduced, ADNSW's preference is for it to be given the role of regulator, noting the issues outlined in the QHRC's review of its anti-discrimination laws that having a separate complaints body and regulator in Northern Ireland has resulted in the enforcement body having limited effectiveness as it has no oversight over complaints which could inform action to address systemic change.²³⁴ Measures can be put in place to manage the conflicting roles, such as establishing separation so that staff undertaking dispute resolution are not involved in enforcement functions. However, if ADNSW's remit is extended to functions and powers of proactively promoting compliance with positive duties in the ADA, ADNSW would need commensurate resources to carry out these functions.

²³² Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 15; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 121.

²³³ Assoc Prof Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010 (Vic)*' (2021) 44(2) *Melbourne University Law Review*.

²³⁴ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 235.

Further information

For questions about this submission, please email the Manager, Governance and Advice, Anti-Discrimination NSW at adbcontact@justice.nsw.gov.au.

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

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