



**Aboriginal
Legal Service**
(NSW/ACT) Limited

Submission to Review of the *Anti-Discrimination Act* 1977 (NSW) - Unlawful Conduct

August 2025

About the ALS

The ALS is a proud Aboriginal Community-Controlled Organisation (**ACCO**) and the primary legal assistance provider for Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

More than 350 ALS staff members based at offices in 21 communities support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law. We also deliver a variety of wrap-around programs including bail support, family violence prevention, and child and family advocacy and support. We provide a Visiting Legal Service for Aboriginal children in youth detention centres, represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, and deliver a variety of discrete civil law services including tenants' advocacy, assistance with fines and fine-related debt, and discrimination and employment law.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations and a key partner in Closing the Gap in NSW and the ACT. As an ACCO, we represent community interests in our advocacy for the reform and transformation of systems which impact the lives of Aboriginal and Torres Strait Islander people.

This submission is informed by the experiences of the clients and communities we serve, and the expertise of our legal practice staff and our Aboriginal and Torres Strait Islander staff network.

Introduction

The ALS welcomes the opportunity to provide a submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (**ADA**).

Our Employment Law Service is the first specialist sexual harassment and discrimination legal service in NSW that is for Aboriginal workers and run by an ACCO. The service offers free and confidential legal help to Aboriginal and Torres Strait Islander employees working in any industry or profession in NSW. While our primary focus is on sexual harassment and discrimination, we also provide support in relation to other kinds of workplace problems.

As an ACCO, we take seriously the impact of discrimination, vilification and harassment on Aboriginal and Torres Strait Islander people in NSW. The Consultation Paper discusses many areas of the ADA that require reform. We have confined our response to matters that reflect the experiences of our clients, Aboriginal and Torres Strait Islander staff and staff of our Employment Law Service. The questions we have not responded to are included in the Appendix.

We note that the current structure of the ADA is unnecessarily complex and difficult to navigate. Under the ADA, each attribute is included in a separate part with its own definitions and exceptions. Other Australian jurisdictions use a simpler framework which first sets out the protected attributes and then the areas of public life where discrimination is prohibited, followed by the exceptions.¹ Restructuring the ADA to bring it into line with more recently drafted legislation in other Australian jurisdictions would ensure that the protections in the ADA are clear and accessible.

The ALS is part of a coalition of organisations calling for the adoption of a Human Rights Act for NSW. Reforms to the ADA combined with the introduction of a Human Rights Act would be the most

¹ See e.g., *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1992* (NT) and *Anti-Discrimination Act 1998* (Tas).

effective way to ensure holistic protection of human rights and protection against discrimination in NSW.

Tests for Discrimination

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

The ALS supports removing the comparator test for direct discrimination and replacing it with the unfavourable treatment test used in both Victoria and the ACT.²

The comparator test requires a comparison between the treatment that the complainant has experienced and the treatment that would have been experienced by a real or hypothetical person without the complainant's protected attribute. This is an unnecessarily complex and artificial test that often requires a comparison to be made with a hypothetical "comparator".

The unfavourable treatment test is more appropriate because it focuses on whether the complainant was treated unfavourably because they have one or more protected attributes, rather than comparing the treatment of the complainant with another real or hypothetical person.

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?

The ALS supports removing the comparative disproportionate impact test and replacing it with the disadvantage test used in the ACT.³

The comparative disproportionate impact test is unduly onerous to prove because of the statistical analysis required to show that a substantially higher proportion of people without an attribute can comply with a condition or requirement, compared to people with that attribute. The comparative disproportionate test also requires identification of an appropriate comparator group which presents similar difficulties to the comparator test as discussed above in question 3.1.

The ACT disadvantage model would be more appropriate because it removes the element of comparison and instead focuses on whether a requirement or condition disadvantages a person with a protected attribute.

Question 3.6: Proving 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?

The requirement for complainants to prove every part of the tests for direct and indirect discrimination is a significant barrier to justice. Proving causation is often difficult for our clients where

² *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1).

³ *Discrimination Act 1991* (ACT) s 8(3)–(4).

the discrimination occurred because of unconscious bias or prejudicial stereotypical views. In these situations, where only the respondent knows why they acted in a certain way, the complainant is left to rely on circumstantial evidence and ask the court to draw an inference of racial discrimination.

In relation to direct discrimination, we would support either the adoption of a similar model to the *Fair Work Act 2009* (Cth)⁴ or the Queensland anti-discrimination legislation.⁵ Both models appropriately require the complainant to make out a prima facie case of discrimination before shifting the burden to the respondent to prove that they did not unlawfully discriminate against the complainant.

In relation to indirect discrimination, we support shifting the burden to the respondent to prove that a requirement is reasonable. This is the position in the ACT and Victoria, as well as in various Commonwealth statutes.⁶

Question 3.7: Direct and Indirect Discrimination: (2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

The ALS supports retaining the distinction between direct and indirect discrimination, but it is essential that the ADA is amended to acknowledge that direct and indirect discrimination can overlap. We recommend adopting the ACT model which provides that “discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else.”⁷

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?

The ALS strongly supports amending the ADA to ensure that it protects against intersectional discrimination. Many of our clients experience discrimination based on more than one attribute. The absence of any recognition or protections against intersectional discrimination in the ADA is a significant gap that fails to reflect the lived experiences of Aboriginal and Torres Strait Islander people who experience discrimination.

To protect against intersectional discrimination, we recommend an approach that prohibits discrimination based on the combined effect of two or more protected attributes as supported by the Australian Human Rights Commission, the Law Reform Commission of Western Australia and the Queensland Human Rights Commission.⁸

Question 3.9: Intended Future Discrimination: Should the tests for discrimination capture intended future discrimination?

The ALS supports amendments to the tests for direct and indirect discrimination so that intended future discrimination is covered by the ADA. These changes would bring the ADA in line with other jurisdictions including the ACT, Victoria and Queensland.⁹

4 Sections 351 and 361 of the *Fair Work Act 2009* (Cth) require the employee to prove their employer subjected them to adverse action, which can include being discriminated against, and the employer must then prove that the action was not taken for a prohibited reason.

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

6 *Age Discrimination Act 2004* (Cth) s 15(2); *Disability Discrimination Act 1992* (Cth) s 6(4); *Sex Discrimination Act 1984* (Cth) s 7C; *Discrimination Act 1991* (ACT) s 70; *Equal Opportunity Act 2010* (Vic) s 9(2).

7 *Discrimination Act 1991* (ACT) s 8(1).

8 Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Report, 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* (Report, 2022) rec 3.2.

9 *Discrimination Act 1991* (ACT) s 8(2)-(3); *Equal Opportunity Act 2010* (Vic) ss 8(1), 9(1); *Anti-Discrimination Act 1991* (Qld) ss 10(1), 11(1).

Discrimination: Protected Attributes

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"?

The ALS supports expanding the attribute of carer's responsibilities to include kinship responsibilities. Aboriginal and Torres Strait Islander "families and connections are diverse, dynamic and involve unique networks of family roles and responsibilities."¹⁰ The ADA must be updated to reflect the unique nature of Aboriginal and Torres Strait Islander kinship responsibilities.

It is essential that the Government consult comprehensively and meaningfully with Aboriginal and Torres Strait Islander organisations, communities and people in NSW regarding the most appropriate way to amend the ADA to recognise kinship responsibilities.

Question 4.6: Racial Discrimination

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

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

The ADA does not recognise the unique forms of discrimination experienced by Aboriginal and Torres Strait Islander people as distinct from the experiences of other people of culturally and linguistically diverse backgrounds. The ALS supports the position of the NSW Aboriginal Women's Advisory Network in their preliminary submission that the ADA must be amended to "reflect the language, practices and relationships relevant to Aboriginal and Torres Strait Islander peoples" in NSW.¹¹ The need for reform in this area is particularly urgent given that racism experienced by Aboriginal and Torres Strait Islander people has increased by nearly 40 per cent in the past decade.¹²

One option to address this gap in the ADA would be to introduce a new protected attribute specifically for Aboriginal and Torres Strait Islander people, as proposed in the submission of the First Peoples Disability Network. The ALS recommends that the Government conduct comprehensive consultations with Aboriginal and Torres Strait Islander organisations, communities and people in NSW regarding this proposed new attribute and how it could be implemented within the ADA.

Discrimination: Potential New Protected Attributes

Question 5.2: Potential New Attributes: (1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why?

¹⁰ James C Beaufils, Jacyntha Krakouer, Aunty Leasa Kelly, Aunty Michelle Kelly and Dana Hogg, "We all grow up with our mob because it takes all of us": First Nations collective kinship in Australia' (2025) 169 *Children and Youth Services Review* 4.

¹¹ NSW Aboriginal Women's Advisory Network, *Preliminary Submission to the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)* (28 September 2023) 5.

¹² Dana Morse, 'Survey finds 'significant' rise in racism towards Indigenous people in past decade', *ABC* (online, 24 June 2025) <<https://www.abc.net.au/news/2025-06-24/survey-finds-significant-rise-in-racism-indigenous/105453342>>.

Irrelevant Criminal Record

The ALS supports the addition of irrelevant criminal record as a protected attribute in the ADA. In our practice experience, many of our clients face discrimination in employment due to an irrelevant criminal record. This form of discrimination is a barrier for our clients who are seeking employment and reintegration into the community after release from prison.

Discrimination due to irrelevant criminal record particularly affects Aboriginal and Torres Strait Islander people in NSW due to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal legal system.¹³ Adverse discretionary decision-making by police is directly linked to the over-representation of Aboriginal people at every stage of the criminal legal process. In NSW, police are more likely to use force against Aboriginal people,¹⁴ and more likely to charge Aboriginal people with criminal offences than to utilise diversionary options,¹⁵ leading to a higher likelihood of imprisonment and a criminal record.

The ALS recommends that the NSW Government follow the lead of the ACT, the NT and Tasmania by amending the ADA to prohibit discrimination based on irrelevant criminal record.¹⁶

Domestic and Family Violence

The ALS support clients who have experienced or are at risk of domestic and family violence in all areas of our legal practice. We are supportive of, and play an active role in, efforts to reduce and eliminate domestic, family and sexual violence.

We support the addition of the experience of domestic and family violence as a protected attribute in the ADA to address prejudice and exclusion faced by victim-survivors. Discrimination based on having experienced domestic and family violence is particularly likely to impact Aboriginal and Torres Strait Islander women, as an estimated 3 in 5 Aboriginal and Torres Strait Islander women have experienced physical or sexual violence from a male intimate partner.¹⁷

Discrimination based on domestic or family violence is already prohibited in South Australia, the ACT and the NT.¹⁸

Discrimination: Areas of Public Life

Question 6.1: Discrimination at Work – Coverage:

(1) Should the definition of employment include voluntary workers?

The current gap in the definition of employment under the ADA which means that unpaid workers, including volunteers, trainees and interns, are not protected from discrimination, must be addressed. Voluntary workers should have access to the same legal protections against discrimination as paid workers.

13 NSW Bureau of Crime Statistics and Research, 'Number of adults on remand in NSW the highest on record' *BOCSAR* (online, 14 May 2024) <[NSW Custody Statistics: Quarterly update March 2024 | BOCSAR](#)>.

14 Christopher Knaus, 'NSW police use force against Indigenous Australians at drastically disproportionate levels, data shows' *The Guardian* (online, 31 July 2023) <<https://www.theguardian.com/australia-news/2023/jul/31/nsw-police-use-force-against-indigenous-australians-at-dramatically-disproportionate-levels-data-shows>>.

15 Caitlin Fitzsimmons, "'Like a snare': Indigenous young offenders more likely to be prosecuted for same crimes' *Sydney Morning Herald* (online, 30 November 2022) <<https://www.smh.com.au/national/nsw/like-a-snare-indigenous-young-offenders-more-likely-to-be-prosecuted-for-same-crimes-20221129-p5c20v.html>>.

16 *Anti-Discrimination Act 1992* (NT) s 19(1)(q); *Discrimination Act 1991* (ACT) s 7(1)(k); *Anti-Discrimination Act 1998* (Tas) s 16(q).

17 Our Watch, *Changing the Picture: A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children* (2018) <<https://assets.ourwatch.org.au/assets/Key-frameworks/Changing-the-picture-AA.pdf>>.

18 *Equal Opportunity Act 1984* (SA) s 85T(8); *Discrimination Act 1991* (ACT) s 7(1)(x); *Anti-Discrimination Act 1992* (NT) s 19(1)(jb).

(2) Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment?

The ALS supports amendments to the ADA to adopt a broader approach to discrimination based on the *Sex Discrimination Act 1984* (Cth) model, which prohibits sexual harassment by any person if it is in connection with either the complainant's or respondent's status at work.¹⁹

The *Sex Discrimination Act 1984* (Cth) also imposes a positive duty on organisations and businesses to eliminate, as far as possible, unlawful behaviour including sexual harassment and sex discrimination in connection with work.²⁰ We support the inclusion of a similar positive duty in the ADA to prevent and eliminate unlawful conduct, in particular racial discrimination, harassment and vilification, as discussed further in our answer to question 11.3 below.

Question 6.2: Discrimination in Work – Exceptions: What changes, if any, should be made to the exceptions to discrimination in work?

The ALS supports the removal of the exception for employers with five or less employees. This exception currently applies to all protected attributes except race and age.²¹ Obligations on employers under the ADA must apply equally across all types of businesses to reflect community expectations and ensure equity and consistency in outcomes for all people impacted by discrimination.

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 current areas of public life covered by the ADA do not sufficiently cover circumstances in which people face discrimination in their daily lives. The ALS supports amendments to the ADA to ensure that the legislation applies more broadly in any area of public life. The model in the *Racial Discrimination Act 1975* (Cth) that prohibits racial discrimination “in the political, economic, social, cultural or any other field of public life” is one way this change could be implemented within the ADA.

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

Strata Committees and Owners' Corporations

As noted in the Consultation Paper, the ADA does not generally cover acts of strata committees and owners' corporations. The ADA should be amended to provide a general protection against discrimination by strata committees and owners' corporations. Strata committees and owners' corporations have significant power and influence over people's lives. The lack of protections in the ADA for individuals who experience discrimination from these bodies is a significant gap in the law as illustrated by the following case study from one of our clients.

Case Study: 'Alex' lives in a strata complex. During NAIDOC week they hung an Aboriginal flag on the balcony of their unit. The strata manager asked them to take down the flag claiming it was in breach of the strata by-laws. Other people in the strata complex have previously put up Australian

¹⁹ *Sex Discrimination Act 1984* (Cth) s 28B(5)-(6).

²⁰ *Sex Discrimination Act 1984* (Cth) s 47C.

²¹ *Anti-Discrimination Act 1977* (NSW) ss 25(3)(b), 38C(3)(b), 40(3)(b), 49D(3)(b), 49V(3)(b), 49ZH(3)(b).

flags on Australia day and were not asked to remove those flags. The protections against racial discrimination in the ADA do not cover this conduct by the strata manager.

Civil Protections Against Vilification

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

The vilification protections in the ADA currently apply to a narrower range of attributes than the protections against discrimination. To ensure consistency between the protections against discrimination and vilification, the ALS supports expanding the attributes covered by the vilification protections to include all attributes protected from discrimination (including any new protected attributes that may be implemented following this review).

The ALS also supports the harmonisation of the expressions and definitions in the vilification provisions in the ADA with those used in s 93Z of the *Crimes Act 1900* (NSW).

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

We support the harmonisation of the definition of “public act” in the ADA with the definition in s 93Z of the *Crimes Act 1900* (NSW) which expressly clarifies that a “public act” can include:

- communicating through social media and other electronic means;
- graffiti; and
- acts that occur on private land.

The need to ensure that social media and electronic communications are clearly included within the definition of “public act” is critical to address the prevalence of so called “anti-crime” Facebook pages in Australia.²² Such pages are often used to target Aboriginal and Torres Strait Islander children with racist and extremely violent threats that encourage vigilante violence.²³

The ALS also particularly supports amending the definition of “public act” in the ADA to ensure that it explicitly covers acts that occur on private land, including areas that are not open to the general public.²⁴ For many of our clients who experience racial vilification in relation to their employment, it is unclear whether they can rely on the ADA vilification protections because the conduct took place on private property. Clarifying the definition on this point would ensure that there is no gap in the protections for individuals who experience vilification in these circumstances.

Harassment

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

The ALS supports amending the ADA to ensure that the prohibition against harassment covers all protected attributes, particularly race-based harassment. A recent survey found that over a quarter

²² Chris Cunneen and Sophie Russell, ‘Social Media, Vigilantism and Indigenous People in Australia’ in Katherine Biber and Michelle Brown (eds), *The Oxford Encyclopedia of Crime, Media, and Popular Culture* (Oxford University Press, 2017) 3.

²³ Ibid.

²⁴ See e.g., *Crimes Act 1900* (NSW) s 93Z(5) definition of “public act”.

of the Aboriginal and Torres Strait Islander people who participated reported working in culturally unsafe workplaces.²⁵ The survey found that a major contributing factor to culturally unsafe workplaces is unfair treatment and harassment based on race.²⁶ These results indicate the need for the prohibitions against harassment in the ADA to extend to other attributes, particularly race.

Other Unlawful Acts and Liability

Question 10.1: Victimisation: (1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone?

The ALS supports amendments to the prohibition of victimisation in the ADA to ensure that it covers a situation where a respondent threatens to victimise someone. The ADA currently appears to require someone alleging victimisation to prove that a detriment has already occurred. This is a gap in the ADA that must be addressed. This amendment would bring the ADA in line with anti-victimisation laws in other Australian jurisdictions that already expressly cover threats to victimise someone.²⁷

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?

The ALS supports the removal of the “unauthorised acts” exception to vicarious liability. As noted in the Consultation Paper, the ADA is the only discrimination framework in Australia that includes an “unauthorised acts” exception.

We agree with the statement of the NSW Law Reform Commission in its 1999 review of the ADA that the “reasonable steps” exception is a “practical approach” to the issue of vicarious liability.²⁸ The “reasonable steps” exception is sufficient in providing employers or principals with a potential defence to vicarious liability. The current additional “unauthorised acts” exception tips the balance too far in favour of employers and principals and therefore unduly disadvantages complainants who are less likely to be able to establish vicarious liability.

Promoting Substantive Equality

Question 11.2: Special Measures: Should the ADA generally allow for special measures? And if a general special measures section is added to the ADA, should it replace the existing exemption and certification process?

The ALS supports the inclusion of a process for special measures in the ADA that is not unnecessarily complicated or resource intensive. The existing processes for exemption and certification are complex and difficult for the public to understand.

25 Jumbunna Institute for Indigenous Education and Research (UTS) and Diversity Council Australia, *Gari Yala: Speak the Truth* (Synopsis Report, November 2020) 11.

26 Ibid.

27 See e.g., *Sex Discrimination Act 1984* (Cth) s 47A(2); *Anti-Discrimination Act 1991* (Qld) s 130(1); *Equal Opportunity Act 2010* (Vic) s 104(1); *Equal Opportunity Act 1984* (WA) s 67(1).

28 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [7.209].

We support the addition of a new section to the ADA which would generally allow for special measures.²⁹ Special measures, such as policies that benefit members of a disadvantaged group, are essential to promoting substantive equality in our society and redressing discrimination.

However, there must be clear criteria to identify what constitutes a special measure reflecting international human rights law and recognising the historical and contemporary racism and discrimination experienced by Aboriginal and Torres Strait Islander people.³⁰ This is necessary to ensure that any special measures are implemented for the sole purpose of promoting substantive equality and redressing historical disadvantage.

Although the current processes are not fit for purpose, the ALS does not support the removal of the exemption and certification processes in their entirety. A simplified form of these processes would provide sufficient assurance that there is a genuine need for any actions sought to be taken.

The ALS recommends that further guidance, particularly for employers, be made publicly available on the process and purpose of special measures. Including examples of actions that may constitute special measures in the ADA could also assist in making the process more accessible and easier to understand.

Question 11.3: A Positive Duty to Prevent or Eliminate Unlawful Conduct: Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct?

The ALS supports the introduction of a positive duty to prevent and eliminate unlawful conduct, in particular discrimination, harassment and vilification based on a person's identity as an Aboriginal and/or Torres Strait Islander person. Introducing a positive duty would reduce the burden on individuals who experience discrimination to make a complaint by requiring those in positions of power to proactively take measures to prevent any unlawful conduct in the first place.

The need for a positive duty is evidenced by a recent survey of Aboriginal and Torres Strait Islander people which found that workplace supports for staff experiencing racism are ineffective, with only one third of participants agreeing that they had support when they experienced racism.³¹ This report by the Jumbunna Institute for Indigenous Education and Research also highlighted that anti-discrimination compliance training and formal racism complaint procedures are key to addressing racism in the workplace and that organisational authenticity involving a genuine commitment from words to actions with strong organisational leadership, makes a difference to equity in the workplace.³² However, all of these initiatives and measures are rare in workplaces.³³

We recommend that the positive duty should:

- cover all forms of prohibited conduct under the ADA including discrimination, harassment, vilification and victimisation;³⁴
- cover all protected attributes;³⁵

²⁹ See e.g., *Equal Opportunity Act 2010* (Vic) s 12.

³⁰ See e.g., the approach in *Equal Opportunity Act 2010* (Vic) s 12 and the approaches recommended in NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) Appendix A, Draft Anti-Discrimination Bill 1999, cl 68(c)(i); Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, 2022) recs 4.2 and 4.3.

³¹ Jumbunna Institute for Indigenous Education and Research (UTS) and Diversity Council Australia, *Gari Yala: Speak the Truth* (Synopsis Report, November 2020) 14.

³² *Ibid* 15-16.

³³ *Ibid*

³⁴ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, 2022) 230; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111 (Final Report, 2022) 241.

³⁵ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, 2022) 228.

- apply to all individuals and organisations that have obligations not to engage in discrimination, sexual harassment or victimisation under the ADA;³⁶ and
- cover all areas of public life in which unlawful conduct is prohibited.³⁷

Conclusion

The ALS welcomes this review of the ADA which provides an opportunity for the legislation to be amended to better protect people who experience discrimination, harassment and vilification and promote substantive equality.

Thank you for the opportunity to provide a submission. Please contact _____ if you would like to discuss our submission further.

³⁶ See e.g. the model in *Equal Opportunity Act 2010* (Vic) s 15; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, 2022) 228; Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 81–83.

³⁷ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, 2022) 228.

Appendix – Questions we have not responded to

3. Tests for Discrimination

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?

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?

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?

Question 3.7: Direct and indirect discrimination

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

4. Discrimination: Protected Attributes

Question 4.1: Age discrimination

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

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

Question 4.2: Discrimination based on carer’s responsibilities

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

Question 4.3 Disability discrimination

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

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

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

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”?

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”?

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 sex discrimination?

Question 4.8: Discrimination on transgender grounds

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

Question 4.9: Extending existing protections

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

(2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

5. Discrimination: Potential New Protected Attributes

Question 5.1: Guiding principles

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

Question 5.3: An open-ended list

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

6. Discrimination: Areas of Public Life

Question 6.1: Discrimination at work — coverage

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

Question 6.3: Discrimination in education

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

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

Question 6.4: The provision of goods and services — coverage

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

Question 6.5: Superannuation services and insurance exceptions

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

Question 6.6: The provision of goods and services — exceptions

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

Question 6.7: Discrimination in accommodation — coverage

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

Question 6.8: Discrimination in accommodation — exceptions

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

Question 6.9: Discrimination by registered clubs — coverage

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

Question 6.10: Discrimination by registered clubs — exceptions

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

Question 6.11: Discrimination based on carer’s responsibilities

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

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

7. Wider Exceptions

Question 7.1: Religious personnel exceptions

(1) Should the ADA provide exceptions for: (a) the training and appointment of members of religious orders? (b) “the appointment of any other person in any capacity by a body established to propagate religion”?

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

Question 7.2: Other acts and practices of religious bodies

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

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?

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?

Question 7.5: Private educational authorities employment exceptions

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

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

Question 7.6: Discrimination against students and prospective students

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

(2) If you think it is necessary for the ADA to provide exceptions in this area: (a) what attributes should the exceptions apply to? (b) should they apply to prospective students, existing students, or both? (c) what requirements, if any, should duty holders meet before an exception applies?

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?

Question 7.8: The charities exception

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

Question 7.9: Voluntary bodies exception

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

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?

Question 7.11: The statutory authorities exception

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

8. Civil Protections Against Vilification

Question 8.2: The test for vilification

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

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

Question 8.4: Exceptions

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

Question 8.5: Religious vilification

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

9. Harassment

Question 9.1: The definition of sexual harassment

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

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

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

Question 9.2: Other sex-based conduct

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

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

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

Question 9.3: Sexual harassment in the workplace

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

Question 9.4: Workplace-related laws regulating sexual harassment

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

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

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

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

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

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?

10. Other Unlawful Acts and Liability

Question 10.1: Victimisation

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

Question 10.2: Advertisements

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

Question 10.3: The forms of liability

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

Question 10.5: 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?

11. Promoting Substantive Equality

Question 11.1: Adjustments

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

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

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