



# **Submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW)**

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## **About the Inner City Legal Centre**

The Inner City Legal Centre is a not-for-profit community legal centre offering free legal services to residents of Sydney's inner city, eastern, and northern suburbs. It also provides specialised support to the LGBTQI+ community, trans and gender diverse individuals, sex workers, and offers employment law advice across all of New South Wales.

### **The LGBTQIA+ Legal Service**

The ICLC provides an inclusive, and affirming legal advice tailored to the unique needs of LGBTQI+ people in NSW. Our goal is to equip community members with the knowledge and clarity needed to make informed legal decisions.

### **The Trans and Gender Diverse Legal Service**

The ICLC offers free, statewide access to legal assistance for transgender and gender diverse people. Our mission is to empower trans communities through advice and education. We provide essential legal guidance on matters such as how to legally change your name, update gender markers, and discrimination.

### **The Sex Worker Legal Service**

At the ICLC, we believe that sex workers should be free to work without harassment, discrimination, or exploitation. Our sex worker-friendly solicitors provide free legal advice to sex workers across NSW regardless of migration status, employment status, or income.

### **The Employment Rights Legal Service**

The ICLC offers free, confidential, employment-related legal advice to our local community and through the state-wide Employment Rights Legal Service. This service is provided as a collaboration between Kingsford Legal Centre, the ICLC and Redfern Legal Centre.

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*The Inner City Legal Centre acknowledges the Gadigal people of the Eora nation, who's land our office is based on. We pay respects to their Elders – past, present and emerging. Sovereignty was never ceded. Always was, always will be, Aboriginal Land.*

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# 1. RECOMMENDATIONS

## **Recommendation 1**

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- (a) *That the comparator test contained in the Anti Discrimination Act 1977 (NSW)('the ADA') be removed; and*
- (b) *That the ADA be amended so that the existing protections against discrimination on the grounds of a person's transgender status or homosexuality are more inclusive and have modernised terms, such as gender identity and sexuality (noting this is contingent upon the removal of the comparator test).*

## **Recommendation 2**

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*That the ADA include 'sex work activity' as a protected attribute to allow a person to make a complaint on the grounds of indirect or direct discrimination.*

## **Recommendation 3**

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*That the ADA expand the list of protected attributes to include medical condition, irrelevant criminal record, sex characteristics or variations of sex characteristics, political opinion, trade/industrial activity, religion, subjection to family and domestic violence, immigrant or migrant status, geographic location and homelessness or social status.*

## **Recommendation 4**

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- (a) *Amend the ADA to apply broadly to all areas of public life, with a clear exception for private conduct;*
- (b) *If the ADA is not amended as recommended at 4(a), that a further specific area of life be covered, namely 'administration of laws and government programs', with the intention to cover the NSW Police Force.*

## **Recommendation 5**

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- (a) *That the ADA either redefine 'sexual harassment' to include behaviours that would be considered sex-based harassment or hostile workplace environment, or introduce prohibitions around these behaviours in the vein of the Sex Discrimination Act 1984 (Cth) ('SDA');*
- (b) *That section 53 of the ADA be amended in line with section 47A of the SDA;*
- (c) *That the ADA include a positive duty for employers and persons conducting a business or undertaking to prevent and eliminate in a workplace sexual harassment and other unlawful conduct by reason of a person's sex; and*
- (d) *That any positive duty introduced into the ADA be extended to all protected attributes under the ADA, in order to ensure that the ADA ensures protection from the range of harmful and discriminatory behaviour people can experience in public life.*

## **Recommendation 6**

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- (a) *That the ADA be amended to include a positive and express obligation for employers, educators, providers of goods and services, and others to provide reasonable adjustments for a person's disability; and*
- (b) *That the definition of 'disability' in section 4 of the ADA be amended to state that persons with disabilities include those who have long-term physical, mental, intellectual*

or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

#### **Recommendation 7**

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- (a) That the ADA be amended to shift the burden of proof from the complainant to the respondent to show that the unfavourable treatment was not because of the complainant's protected attribute; and
- (b) That any revised or reviewed test for discrimination under the ADA acknowledge intersectionality and systemic discrimination.

#### **Recommendation 8**

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- (a) That no exception applies as to sport for transgender people (or based on 'gender identity').
- (b) In the alternative, that if an exception be retained that it be limited in scope.

#### **Recommendation 9**

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- (a) That the ADA remove exemptions from discrimination in employment for private educational authorities and private households;
- (b) That the ADA review exceptions to discrimination provided to superannuation funds when it comes to a person's sex, marital or domestic status, disability, and age; and
- (c) That section 38Q of the current ADA be removed.

#### **Recommendation 10**

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- (a) That the exception applicable to private educational institutions be removed entirely.
- (d) If an exception for religious educational institutions is included, that it be limited in scope.

## 2. INTRODUCTION

The ICLC welcomes the opportunity to make a submission to the review of the ADA and supports the redrafting of the ADA to reflect contemporary best practice and better promote equality in NSW. We consider that the current ADA remains repetitive and lacks clarity.

ICLC is a community legal centre with a long history of involvement in matters that sit within the ADA's jurisdiction.

The ADA has evolved through successive amendments, with new protected attributes added by simply replicating the original structure in additional Parts. While incremental development is not inherently problematic, the overall coherence and impact of the text has been largely overlooked. As a result, the ADA is overly lengthy and difficult to navigate. For example, areas of life and exceptions for each 'ground of discrimination' can be either overlapping or repetitive with other Parts.

This fragmented approach creates confusion and undermines access to justice for both individuals and organisations.

We consider that the structure of the ADA is outdated and inconsistent with more recently drafted legislation in other Australian states, including the *Equal Opportunity Act 2010* (Vic), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1991* (Qld), the *Anti-Discrimination Act 1992* (NT), and the *Anti-Discrimination Act 1998* (Tas). The ADA could be reformed to take a similar form to these other jurisdictions, including a consolidated list of protected attributes and adopting a simplified definition of discrimination that applies to all protected attributes.

We endorse Equality Australia's previous submissions, particularly their proposals to simplify the test for discrimination and to recognise discrimination based on intersecting attributes.<sup>1</sup> We also endorse the submissions of the Sex Workers Outreach Project NSW ('SWOP'). The sex worker and LGBTIQ+ communities are diverse. They include people who may experience multiple, overlapping forms of discrimination or identity-based discrimination.

We note that the ICLC is a chronically underfunded, frontline community legal service with no dedicated policy staff. Any errors or shortcomings in this submission are the result of us trying to balance our role in responding to our communities, who are often in crisis, with our commitment to supporting reform and improvement of the laws that impact our clients and our community. ICLC has not responded to all questions posed in the consultation paper. We have focused on questions relevant to our work as a Community Legal Centre and the services we provide.

We would warmly welcome increased funding from the NSW Government that would support our capacity to fully and thoroughly participate in important reviews such as this one.

We would like to express our sincere thanks to and acknowledge all the volunteer lawyers, PLT students and ICLC staff who contributed to this submission. Without them this submission would not have been possible.

## 3. MODERNISATION AND SIMPLIFICATION OF THE ADA

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<sup>1</sup> Equality Australia, 30 August 2023, *An Equality Act for NSW Preliminary submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977* (NSW) < [https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD07.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD07.pdf)>.

*Terms of Reference 1: whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards.*

Currently, the Act refers to “transgender grounds” and “homosexuality” as protected attributes. These are outdated and restrictive terms that exclude a wide variety of gender identities and expressions and sexualities, including non-binary people, genderfluid people, and bisexual people among others.

ICLC recommends that the protected attributes be improved to include these characteristics.

We note our, and many other’s, submissions recommending removal of the comparator test. On the basis that the comparator test is removed, we recommend, in line with other state, territory, and federal anti-discrimination legislation, that the ADA be amended to modernise the wording around these protections. We recommend there be clear, distinct protections against discrimination on the basis of a person’s sexuality and gender identity with expansive definitions to account for the diversity within the LGBTQIA+ community.

**Recommendation 1:**

*(a) That the comparator test contained in the ADA be removed; and  
(b) That the ADA be amended so that the existing protections against discrimination on the grounds of a person’s transgender status or homosexuality are more inclusive and have modernised terms, such as gender identity and sexuality (noting this is contingent upon the removal of the comparator test).*

## 4. ADDITIONAL PROTECTED ATTRIBUTES

*Terms of Reference 2: whether the range of attributes protected against discrimination requires reform*

The ADA currently prohibits discrimination on the grounds of:

- Race (Part 2)
- Sex (Part 3)
- Transgender grounds (Part 3A)
- Martial or domestic status (Part 4)
- Disability (Part 4A)
- Carer’s responsibilities (Part 4B)
- Homosexuality (Part 4C)
- Age (Part 4G)

When determining whether to update the current protected attributes defined in the ADA, we had regard to the considerations in the Queensland Human Rights Commission’s 2022 *Building Belonging* report,<sup>2</sup> that is consideration of:

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<sup>2</sup> Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022, Final Report)  
<[https://www.qhrc.qld.gov.au/data/assets/pdf\\_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf](https://www.qhrc.qld.gov.au/data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf)>.

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- Is the group experiencing discrimination that cannot be reasonably and objectively justified?
- Is the group of a comparable nature to people represented by the attributes already recognised by the Act?
- Is the group vulnerable, having suffered and continuing to suffer marginalisation?

We find that the current scope of protected attributes under the ADA fails to encompass the full spectrum of characteristics that warrant protection, which results in inconsistent levels of protection across different vulnerable communities. These gaps are a result of piecemeal and overdue responses to changes to the legislation over time.

The current attributes and definitions are misaligned with modern standards and approaches, including those found in federal anti-discrimination laws and the laws in other States. These inconsistencies may deter people from utilizing the complaint system when they have been discriminated against in NSW.

## 4.1 Introduce ‘Sex Work Activity’ as a Protected Attribute

Sex work was decriminalised in NSW in 1995. Despite this, stigma and discrimination against sex workers remains widespread in NSW. There is a long journey ahead as sex workers continue to experience discrimination in all facets of public life. This includes discrimination in accommodation, employment and dealing with institutions and their processes. Scarlet Alliance has highlighted that the absence of specific anti-discrimination protections for sex workers remains a *‘key barrier to equitable access to the full suite of human rights available to other members of the community’*.<sup>3</sup>

The legal framework for laws relating to sex work in Australia varies across States and Territories. In addition to NSW, sex work is also decriminalised in Victoria and the Northern Territory.

### 4.1.1 Financial Discrimination

Financial discrimination is a fundamental challenge for many sex workers seeking to earn a living from their profession. Sex workers have chronic issues with the banking industry as banking systems often incorrectly ‘flag’ sex workers income or payments, or make unfounded assumptions that sex work is inextricably linked to organised crime, modern slavery, and coercion, categorizing the industry as high risk for financial institutions.

While the National Australia Bank does state that it *‘provides banking services to sex workers as individuals’*... its High Risk ESG (Environmental, Social & Governance) Sectors and Sensitive Areas list *‘prohibits lending or providing banking services to brothels and escort agencies due to the complexity of laws, licensing and oversight regimes across states and territories’*.<sup>4</sup>

We note that there is no fundamental right to banking services in Australia. In an increasingly cash-less society, financial discrimination has a growing impact on sex workers ability to participate in the economy, regularise their work and income, and can create the risks and vulnerabilities associated with only being able to use and access cash-based transactions

<sup>3</sup> Scarlet Alliance Australia Sex Workers Association (2022) Submission on Review of Queensland’s Ant-Discrimination Act: Discussion Paper , <[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0020/38612/Sub.129-Scarlett-Alliance,-Australian-Sex-Workers-Association\\_Final.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0020/38612/Sub.129-Scarlett-Alliance,-Australian-Sex-Workers-Association_Final.pdf)>

<sup>4</sup> NAB’s policies in relation to banking the sex industry 17 January 2023 <<https://news.nab.com.au/news/nabs-policies-in-relation-to-banking-the-sex-industry>>

(such as theft and fraud), that the banking services, and enforcement agencies, and sex workers themselves, would seek to avoid.

### CASE STUDY 1

ICLC recently advised a sex worker on a sexual assault. While advising our client on reporting the incident to the police, it came to light that they had been targeted by their bank who noted and reported a non-standard transaction (related to their sexual assault) to their account, to its internal fraud unit.

The bank appeared to dismiss that the client had earlier brought the unusual transaction to the bank's notice. The client's account was frozen for over a week for further investigation, leaving them without access to funds for that time.

The client was clearly negatively impacted but refused to make a complaint to the financial institution on the grounds of discrimination for fear of further repercussions.

### 4.1.2 Discrimination by members of the NSW Police Force

Changes to the *Crimes Act 1900* (NSW) in consent reform to sexual intercourse laws and the inclusion of 'outing' under the offence of intimidation, together with the Sexuality, Gender Diversity and Intersex Action Plan 2023 – 2026 issued by the NSW Police Force - support the decriminalisation of sex work. The crime of sexual assault by reason of fraudulent inducement is applicable to sex workers who have not been paid for services.

Yet, evidence is strong that sex workers do not feel supported by the police and feel that Police have a victim-blaming mentality, also referred to as victim misidentification, which contributes further to sex worker discrimination. Most importantly, such attitudes act as a barrier to reporting to the police for fear of self-incrimination.

### CASE STUDY 2

A recent sex worker client of the ICLC, who was being advised on sexual assault on the grounds of fraudulent inducement, initially did not want to report the incident to the police. The client did decide to attend the police station to report the assault but was informed by police that their experience of sexual assault was 'not a criminal matter'.

The client then made a second attempt to report, accompanied by an ICLC lawyer who informed the police that the matter came within criminal jurisdiction. Both were turned away while the police 'considered' the matter, leading to the client making a third attempt to finally report the matter. This time the client was finally permitted to provide a statement.

Such a protracted experience demonstrates law enforcement's prejudiced approach towards sex workers.

### 4.1.3 Employment Discrimination

We note that clients report that they experience discrimination on the basis of their sex worker status or a history of sex work in all areas of public life, but most notably, in their employment, i.e. when they are employed or are seeking employment in non-sex-work employment. It is very common for our clients to experience some alteration or impairment in their employment or in the recruitment process when an employer learns of the client being

or having been a sex worker, due to the pervasive, specific and regressive social stigma around sex work in the community. Generally, they are more likely to be dismissed.

The inclusion of a sex-work-specific protected attribute in the ADA would ensure that sex workers, have the same access to enjoy their rights to work as all other NSW employees, free choice of employment, and just and favourable conditions of employment, and a protection against unemployment, as enshrined in the Universal Declaration of Human Rights.

### CASE STUDY 3

Julia\* approached us for employment law assistance and advice after her employer found out about her history of sex work and dismissed her due to perceived conflicts of interest.

This was despite Julia being employed in a professional capacity for many months, always acting in a professional manner, and there being no conflicts of interest as her employer suggested. Her employer even accused her of condoning or encouraging “immoral” behaviour in her clients, which Julia vehemently disagreed with.

Ultimately, Julia’s employment was terminated due to the personal beliefs of her employer, and there was no recourse available to her.

\* name changed for privacy.

#### 4.1.4 New Protected Attributes

The ICLC submits that the ADA should introduce ‘sex work activity’ as a separate and distinct protected attribute. The ICLC considers that ‘*profession, trade or occupation*’ in Victoria<sup>5</sup> or ‘*trade, profession, occupation or calling*’ in the Australian Capital Territory,<sup>6</sup> do not sufficiently protect sex workers. In its submission to the NSW Legislative Assembly on the Equality Bill, SWOP NSW similarly criticised these ‘*generic measures...relating to lawful sexual activity or occupation*’ which have been largely ‘*ineffective*’<sup>7</sup>

In the matter of *Dovedeen Pty Ltd v GK (2013) QCA 116*, the Queensland Court of Appeal found that the respondent’s status as a ‘lawful sex worker’ could be distinguished from the actual ‘*conduct of doing sex work*’ for the purposes of the *Anti-Discrimination Act 1991 (Qld)*. In this case, ‘GK’ – a self-employed sex worker using the Appellant’s motel for her work – was told that she would need to find alternate premises to solicit business.

This case, also cited in SWOP NSW’s ADA reform submissions to the Law Reform Commission, highlights the need to explicitly recognise sex work activity as a distinct protected attribute. Without clear recognition, the court may draw artificial distinctions between a person’s status as a sex worker and the act of engaging in sex work activity, undermining legal protections. Express inclusion and having sex work activity as a distinct protected attribute would remove ambiguity, affirm the legality of sex work as an occupation, and ensure comprehensive protection from discrimination.

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<sup>5</sup> *Equal Opportunity Act 2010 (Vic)* s 6(la).

<sup>6</sup> *Discrimination Act 1991 (ACT)* s 57N

<sup>8</sup> Sex Worker Outreach Project NSW, Submission to NSW Legislative Assembly Committee on Community Services RE: Sex work related provisions within the Equality Legislation Amendment (LGBTIQA+) Bill, 14 April 2024, p. 9 < Submission 33 - Sex Workers Outreach Project NSW.pdf>

In the Northern Territory, ‘*employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work*’ is recognised as a protected attribute.<sup>9</sup> While the Equality Legislation Amendment (LGBTQIA+) Bill 2023 (NSW) (‘Equality Bill’) initially proposed comprehensive anti-discrimination and anti-vilification protections for ‘sex work’ and ‘sex workers’ in New South Wales, these provisions were ultimately omitted from the final draft Equality Bill.

Accordingly, we strongly recommend that the ADA be amended to include ‘sex work activity’ as a protected attribute to address the current legislative gap that leaves sex workers without adequate protection from discrimination.

‘Sex worker’ and ‘sex work activity’ should be defined terms within the ADA. The new protected attribute of ‘sex work activity’ should include protection from discrimination in all the same areas available to other protected attributes, including, employment, education, accommodation, registered clubs and in the provision of goods and services. Grounds must be introduced for seeking relief from discrimination, sexual harassment, and vilification. This would ensure appropriate protections are afforded to sex workers.

#### 4.1.4 Definitions

It is vital that the ADA include new definitions of ‘sex worker’ and ‘sex work activity’. The ICLC endorses the definition of ‘sex work activity’ enshrined in Queensland’s *Anti-Discrimination Act 1991* (Qld),<sup>10</sup> and similarly the definition of ‘sex worker’ submitted by SWOP NSW and Scarlet Alliance,<sup>11</sup> being:

**‘Sex work activity’** means the provision of the following services for payment or reward:

- (i) services that involve the person participating in a sexual activity with another person;
- (ii) services that involve the use of or display of the person’s body for the sexual gratification of another person.

**‘Sex worker’** means a person who engages, has previously engaged, or who is thought to engage in sex work activity.

The definition of sex worker, which includes individuals with past and/or current engagement in sex work, ensures comprehensive protection from discrimination for people who identify as sex workers, or have a history of sex work activity.

Additionally, in its submission to the NSW Law Reform Commission on its Review of the *Anti-Discrimination Act* (NSW) in 2023, SWOP NSW highlighted two important considerations to be reflected in the new definition of sex work.<sup>12</sup> First, sex work is nuanced and may encompass both contact and non-contact work. Secondly, sex work may occur in formal, informal, or opportunistic contexts with compensation that may be non-monetary

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<sup>9</sup> *Anti-Discrimination Act 1992* (NT) s 19(ec).

<sup>10</sup> *Anti-Discrimination Act 1991* (Qld) sch 1.

<sup>11</sup> Sex Worker Outreach Project NSW, Preliminary Submission to the NSW Law Reform Commission on its Review of the Anti-Discrimination Act (NSW), 2023 < PAD77 - Sex Workers Outreach Project NSW>; Scarlet Alliance Australian Sex Workers Association, Preliminary Submissions to the Review of the Anti-Discrimination Act 1977 (NSW), 2023 <PAD74 – Scarlet Alliance, Australian Sex Workers Association>.

<sup>12</sup> Sex Worker Outreach Project NSW, Preliminary Submission to the NSW Law Reform Commission on its Review of the Anti-Discrimination Act (NSW), 2023, pp.2-3 < PAD77 - Sex Workers Outreach Project NSW>.

(e.g. “sex for favours, accommodation, drugs, transport, food or other daily needs”).<sup>13</sup> We support the explicit inclusion of these considerations to ensure the definition of ‘sex work activity’ accurately captures the diverse realities and experiences of sex workers.

**No exceptions** relating to sport, superannuation, insurance, or public health should apply to sex workers, nor should there be broad exemptions for religious, private educational or charitable bodies.

We note the broad exemptions from discrimination currently allowed under the ADA for private educational institutions, religious bodies, charitable organisations and adoption services for existing protected attributes. We do not support the exemption for existing protected attributes (see below) nor do we support the extension of these exemptions to the proposed protected attribute of ‘sex work activity’. There are no circumstances in which it is appropriate to discriminate against sex workers in any area of public life. Such exemptions imply sex workers are less deserving of legal protection, reinforce harmful stigma, and undermine their ability to seek legal recourse. As Scarlet Alliance noted, these exemptions ‘*signal to the community that sex workers are less ‘desirable’ members of the Australian community, which encourages other forms of harm towards sex workers and indifference when they are harmed*’.<sup>14</sup>

**Recommendation 2:** *that the Act include ‘sex work activity’ as a protected attribute to allow a person to make a complaint on the grounds of indirect or direct discrimination.*

## 4.2 Definition of LGBTQIA+ related protected attributes

*Terms of Reference 2: whether the range of attributes protected against discrimination requires reform*

The attributes protected under the ADA must be expanded to ensure they are consistent with contemporary human rights principles and anti-discrimination standards. The current terminology related to LGBTQIA+ communities is outdated and misaligned with language adopted in other state, territory and federal jurisdictions. These outdated definitions have tangible consequences, excluding groups such as bisexual and asexual people from protections based on gender identity, among others. Critically, the ADA also fails to provide explicit protections for people with innate variations of sex characteristics (“intersex people”) from discrimination.

To address these deficiencies, the ICLC endorses Equality Australia’s Preliminary Submissions to the NSW Law Reform Commission’s review of the ADA,<sup>15</sup> which recommend introducing express protections for:

- (a) sexual orientation;
- (b) gender identity and expression; and
- (c) sex characteristics or variations of sex characteristics.

We note the concern about its applicability to the current comparator test and note this recommendation alongside the removal of the comparator test.

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<sup>13</sup> Ibid.

<sup>14</sup> Scarlet Alliance National Sex Workers Association (2023) Anti-Discrimination and Vilification Protections <<https://scarletalliance.org.au/anti-discrimination-and-vilification-protections/>>.

<sup>15</sup> Equality Australia, 30 August 2023, An Equality Act for NSW Preliminary submission to the NSW Law Reform Commission’s review of the Anti-Discrimination Act 1977 (NSW) < [https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD07.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD07.pdf)> .

### 4.2.1 Introducing protection for ‘sexual orientation’

Part 4C of the ADA currently prohibits discrimination on the ground of ‘homosexuality’. The terminology is outdated and inadequate for the purpose of protecting individuals against discrimination on basis of sexual orientation, as it does not appropriately cover other marginalised sexual orientations.

Consistent with the approach adopted in the *Equal Opportunity Act 2010* (Vic),<sup>16</sup> the ICLC recommends introducing “sexual orientation” as a distinct protected attribute within the ADA. The definition should extend beyond same-sex attraction to include all sexual orientations, including bisexuality, pansexuality, asexuality and other identities.

This reform would align the ADA with contemporary human rights standards, reflect the diverse experiences within the LGBTIQ+ community, and recognise that each attribute protects a distinct aspect of identity.

### 4.2.2 Introducing protection for ‘gender identity and expression’

Part 3A of the ADA concerns discrimination on transgender grounds. Under the ADA, being transgender or a transgender person is a protected attribute where a person “identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex” and includes a person “who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”.

This definition problematically conflates the distinct concepts of innate variations of sex characteristics and transgender status. In our experience, these groups have very different needs and experience different barriers when seeking assistance and support with a discrimination complaint. Moreover, this part fails to protect the full diversity of gender identities, including those who identify as gender fluid, gender queer or non-binary. Other jurisdictions adopt broader terminology. The *Gender Equality Act 2020* (Vic) uses the term ‘gender identity’ throughout; the Queensland framework prohibits discrimination based on gender identity;<sup>17</sup> and the Tasmanian approach protects both ‘gender expression’ and ‘gender identity’.<sup>18</sup> The ICLC considers the ADA should be amended to reflect these more inclusive standards.

The current approach also creates legal uncertainty around the attribute of ‘sex’, which narrows its protective scope, particularly for women who are trans or have innate variations of sex characteristics. The distinction in the ADA between ‘transgender persons’ and ‘recognised transgender persons’ (as defined in s 4 of the ADA and linked to *Births, Deaths and Marriages Registration Act 1995* (NSW)) entrenches binary gendered language and implies that only ‘recognised’ transgender individuals are regarded as members of the sex with which they identify.

This presents a significant problem when applying the comparator test under discrimination law, which requires comparing the treatment of a person with the attribute to a person without the attribute. Where the legislation implies that only “recognised” transgender people are to be regarded as members of their affirmed sex, “unrecognised” transgender individuals may be excluded from the comparator group altogether.<sup>19</sup> Recent updates to other legislation in NSW supports self identification for transgender people. This review must remove the outdated distinction of “recognised” and “unrecognised” transgender people and remove references to medical or other procedures as a necessary step towards being recognised and accepted as a transgender person under NSW laws.

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<sup>16</sup> *Equal Opportunity Act 2010* (Vic) s 6(p).

<sup>17</sup> *Anti-Discrimination Act 1991* (QLD) s 7(m).

<sup>18</sup> *Anti-Discrimination Act 1998* (Tas) s 16(ea).

<sup>19</sup> *Anti-Discrimination Act 1977* (NSW), ss 31A(4), 38B(1)(c).

### 4.2.3 Introducing protection for ‘sex characteristics’ and ‘innate variations of sex characteristics’

Given the absence of provisions for people with innate variations of sex characteristics, we recommend that the ADA include a protection against discrimination specifically in regard to a person’s sex characteristics, or innate variations of sex characteristics

The ADA currently prohibits discrimination based on the ground of sex, with coverage extending to characteristics that generally appertain to persons of a particular sex. However, the ADA conflates the distinct concepts of sex, gender identity and gender expression, resulting in inadequate and imprecise protection.

Intersex Human Rights Australia, the peak intersex human rights organisation in Australia, advocates for ‘sex characteristic’ as the preferred protected attribute because this terminology is inclusive of all people and avoids implying that intersex individuals necessarily possess a distinct identity apart from male or female solely by virtue of their intersex variation.<sup>20</sup> This position is supported by the Public Interest Advocacy Centre (‘PIAC’), which is now called the Justice and Equity Centre<sup>21</sup>, which recommended replacing the ‘intersex status’ attribute in the Sex Discrimination Act with ‘sex characteristics’, adopting the definition contained in the Yogyakarta Principles plus 10,<sup>22</sup> and recognised by the United Nations.

### 4.3 Introduce ‘Irrelevant criminal record’ as a protected attribute

ICLC advocates for the inclusion of ‘irrelevant criminal record’ as a protected attribute under the ADA. We strongly agree that the use of an irrelevant criminal record as a form of discrimination disproportionately impacts particular groups due to their higher level of contact with the criminal justice system (itself often a result of stigmatisation and social marginalisation). This includes but is not limited to Aboriginal and Torres Strait Islander people, people experiencing housing insecurity or homelessness, sex workers, people from disadvantaged socio-economic backgrounds, and gender diverse communities.

In our view, the ADA should align with contemporary human rights standards that encourage rehabilitation and reintegration and should consider ways that assist individuals to live a life without prejudice and discrimination. An amendment to the ADA to include ‘irrelevant criminal record’ as a protected attribute would also align NSW with other Australian jurisdictions that already prohibit discrimination based on this (currently unprotected) attribute. In Tasmania, the *Anti – Discrimination Act 1988* (TAS) in section 16 includes as a protected attribute ‘irrelevant criminal record’. In the Australian Capital Territory, the *Discrimination Act 1991* (ACT) also prohibits discrimination because of irrelevant criminal record (as per section 7). Likewise in Northern Territory, the *Anti- Discrimination Act 1992* (NT) section 19 also includes ‘irrelevant criminal record’ as a protected attribute.

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<sup>20</sup> Intersex Human Rights Australia, Preliminary Submission on reform of the Anti-Discrimination Act 1977 (NSW), 2022, <PAD02 – Intersex Human Rights Australia>.

<sup>21</sup> Public Interest Advocacy Centre, Preliminary Submission to NSW Law Reform Commission Review of Anti-Discrimination Act 1977 (NSW), 2023, <PAD82 – Public Interest Advocacy Centre>.

<sup>22</sup> The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, as adopted on 10 November 2017, Geneva <<https://yogyakartaprinciples.org/principles-en/yp10/>>.

The proposed reform would also bring NSW into closer alignment with international human rights obligations and current federal protections under the *Australian Human Rights Commission Regulations 2019*, which prohibit discrimination because of irrelevant criminal record.

This reform would importantly benefit LGBTQIA+ people, sex workers, and First Nations people. It would discourage discrimination, help to reduce systemic barriers and support social inclusion for people who may have a criminal history, but deserve equal opportunities in employment, education and in other areas of public life.

#### CASE STUDY 4

Evan\* client approached us for employment law assistance and advice about how to "clear his record" after a criminal record check ruled him out for a job. The client knew that he had a juvenile criminal record for "sex with a minor". He was convicted after being reported to the police by the parents of his teenage girlfriend. He was 17 and she was 15 at the time and the sexual activity was consensual, however the laws at that time provided that young people under the age of 16 could not consent to sexual activity.

Since then, NSW had in fact introduced a "similar age defence", however that did not cause our clients record or historic conviction to be extinguished. He knew that this record would prevent him from seeking any kind of employment for child related work and had paid for specific training in an area of work, which has no connection to working with children. When his criminal history came up in a pre-employment check and he was asked to disclose information about that conviction, he answered the potential employer honestly. He was told that he was not successful in his application, because his conviction contravened the employers "code of ethics".

\* name changed for privacy reasons.

## 4.4 Harmonising protected attributes with the Fair Work Act 2009 (Cth)

In line with submissions made by several other organisations, ICLC supports the expansion of protected attributes under the ADA, namely the following:

- Medical condition;
- Irrelevant criminal record;
- Political opinion;
- Trade/industrial activity;
- Religion;
- Geographic location;
- Subjection to family and domestic violence;
- Immigrant or migrant status; and
- Homelessness or social status.

The introduction of these new protected attributes increases cohesion of the Act with other state, territory and federal anti-discrimination legislation, in particular the *Fair Work Act 2009* (Cth). Notably, section 351 of the *Fair Work Act 2009* (Cth) provides a broad, expansive list of attributes capable of forming the basis of discrimination, many of which are included in the above list. However, the provision limits the protection against discrimination to any conduct that would also be considered unlawful under any anti-discrimination law in force where the

conduct occurs. This means that cohesion and harmonisation is key for workers in New South Wales to receive the benefit or protections under the Fair Work Act

### CASE STUDY 5

Amir\* approached us for assistance and advice when he was forced to take a period of leave during Ramadan by his employer. His employer refused his request to work from home during Ramadan this year due to a policy change, despite Amir being allowed to work from home previously for many years in the exact same situation. When Amir went to the extent of getting a medical certificate that confirmed that his doctor's advice was for him to work from home during Ramadan and that the physical effect of fasting would negatively impact his commute, his employer directed him to take a period of annual leave and personal/carer's leave.

Amir was put in a position where he had to substantially use his leave because his employer wouldn't allow him to return to the office until his 'capacity' returned to 'normal', i.e. when Ramadan was over. While the *Fair Work Act 2009* (Cth) protects employees from discrimination on the basis of religion, the ADA does not, which acted as a barrier to resolution for Amir.

\*name changed for privacy reasons

**Recommendation 3:** that the Act expand the list of protected attributes to include medical condition, sex characteristics or innate variations of sex characteristics, irrelevant criminal record, political opinion, trade/industrial activity, religion, subjection to family and domestic violence, immigrant or migrant status, geographic location, and homelessness or social status.

## 5. EXPANDING THE AREAS OF PUBLIC LIFE

*Terms of Reference 3: whether the areas of public life in which discrimination is unlawful should be reformed.*

Currently, the ADA only prohibits discrimination in specified areas of public life, namely:

- the workplace and employment related areas;
- education;
- the provision of goods and services;
- accommodation; and
- registered clubs.

The current approach leaves areas of public life where there may be no protection, incomplete protection, or where coverage must be found indirectly:

- The exercise of government functions, and the administration of laws and government programs;
- Access to premises and facilities; and
- Requests for information.

We endorse the PIAC's (now the Justice and Equity Centre) Preliminary Submissions to the review of the ADA, which call for extending the ADA's scope to address existing gaps.<sup>23</sup> A

<sup>23</sup> [https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD82.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD82.pdf)

more effective reform would be to amend the ADA to apply broadly to all areas of public life, with a clear exception for private conduct.

This approach mirrors the *Racial Discrimination Act 1975* (Cth), which includes general anti-discrimination provisions and limits racial vilification provisions to acts occurring 'otherwise than in private'.<sup>24</sup> Such reform would ensure the ADA better reflects the full range of public contexts in which discrimination may occur.<sup>25</sup>

In accordance with Australia's obligations under key international human rights treaties, including the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),<sup>26</sup> the ADA should provide protections against discrimination in all areas of public life.

These treaties affirm that all persons are equal before the law and entitled to its equal protection without any discrimination. This right encompasses effective protection against discrimination and ensures '*an equal footing of human rights... in any other field of public life*'.<sup>27</sup> Expanding the ADA's scope would align domestic law with these international standards.

Communities who are facing systemic discrimination and disadvantage are best in a position to identify that disadvantage. We note that reform to the ADA has always been slow, and that creating a pathway for communities facing discrimination to seek protection under a 'new' ground can be an important mechanism to empower communities to address this.

Opponents to the proposed changes argue that expanding the ADA may intrude unreasonably in private life or dilute genuine discrimination claims.<sup>28</sup> To address these concerns, we recommend introducing safeguards within the ADA to preserve the integrity and quality of discrimination claims. We note that these claims would always be subject to review through the conciliation process and any subsequent review by the Tribunal which should deter claims that are lacking in substance or merit.

As at 5.120 of the NSWLRC's Consultation Paper, we would adopt the test used in South Africa. In addition, we urge the NSWLRC to consider alternative mechanisms, such as a requirement to seek leave from NCAT at first instance to initiate a complaint on a novel or new attribute, or for new attributes to be brought by way of representative complaints only.

Discrimination by NSW Police Force in particular needs to be addressed (see above Section 4.1.2 for an example) and the inclusion of a prohibition on discrimination in relation to (at the very least) the administration of laws and government programs should be adopted, with the intention it covers the NSW Police Force.

#### **Recommendation 4:**

*(a) amend the ADA to apply broadly to all areas of public life, with a clear exception for private conduct;*

<sup>24</sup> *Racial Discrimination Act 1975* (Cth) s 9.

<sup>25</sup> Public Interest Advocacy Centre, *Leader to Laggard: The case of modernising the NSW Anti-Discrimination Act* <<https://jec.org.au/wp-content/uploads/2021/08/PIAC-Leader-to-Laggard-The-case-for-modernising-the-NSW-Anti-Discrimination-Act.pdf>>.

<sup>26</sup> International Covenant on Civil and Political Rights ('ICCPR'), arts 2, 16 and 26 ; International Convenat on Economic, Social and Cultural Rights ('ICESCR'), art 2(2); , articles 1, 2, 4 and 5 of the [Convention on the Elimination of All Forms of Racial Discrimination \(CERD\)](#), article 2 of the [Convention on the Rights of the Child \(CRC\)](#), articles 2, 3, 4 and 15 of the [Convention on the Elimination of All Forms of Discrimination Against Women \(CEDAW\)](#) and articles 3, 4, 5 and 12 of the [Convention on the Rights of Persons with Disabilities \(CRPD\)](#).

<sup>27</sup> <https://www.refworld.org/legal/general/hrc/1989/en/6268> para 3.

<sup>28</sup> PeakCare Queensland Inc submission, 6.

*(b) if the ADA is not amended as recommended at 4(a), that a further specific area of life be covered, namely 'administration of laws and government programs', with the intention to cover the NSW Police Force.*

## **6. SEXUAL HARASSMENT, SEX-BASED HARASSMENT AND THE SEX DISCRIMINATION ACT 1984 (CTH)**

*Terms of Reference 6: the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes*

*Terms of Reference 12: the interaction between the Act and Commonwealth anti-discrimination laws*

Recognising the efforts of civil society and government and the Australian Human Rights Commission to review and modernise the SDA, the ICLC broadly supports harmonisation of the ADA with the SDA. Specifically, we recommend that the ADA be made consistent with the SDA regarding:

- the inclusion of additional prohibitions around sex-based harassment<sup>29</sup> and the creation of workplace environments that are hostile on the basis of sex;<sup>30</sup>
- the introduction of a positive duty for employers and persons conducting a business or undertaking to eliminate sexual harassment, sex discrimination and other types of unlawful conduct including victimisation; and
- the amendment of the vicarious liability provision in the ADA in line with the SDA's equivalent.

The ICLC also recommends that any positive duty introduced into the ADA be extended to all protected attributes under the ADA. This will ensure sufficient protection from the range of harmful and discriminatory behaviour people can experience in public life.

### **Recommendation 5:**

*(a) that the ADA either redefine 'sexual harassment' to include behaviours that would be considered sex-based harassment or hostile workplace environment, or introduce prohibitions around these behaviours in the vein of the SDA;*

*(b) that the ADA amend section 53 of the Act in line with section 47A of the SDA;*

*(c) that the ADA include a positive duty for employers and persons conducting a business or undertaking to prevent and eliminate in a workplace sexual harassment and other unlawful conduct by reason of a person's sex; and*

*(d) that any positive duty introduced into the ADA be extended to all protected attributes under the ADA, in order to ensure that the Act ensures protection from the range of harmful and discriminatory behaviour people can experience in public life.*

<sup>29</sup> SDA, s 28AA.

<sup>30</sup> SDA, s 28M.

## 7. REASONABLE ADJUSTMENTS FOR PEOPLE WITH DISABILITY

*Terms of Reference 7: whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life*

The ICLC supports two main changes to Part 4A of the ADA:

- the introduction of a positive and express obligation for employers, educators, providers of goods and services, and others to provide reasonable adjustments for a person with disability (temporary or ongoing); and
- amending the definition of “disability” contained in section 4 of the ADA to be aligned with the definition under the *Convention on the Rights of Persons with Disabilities*, i.e. that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In our work, we find it is common for organisations to disengage with concerns around disability discrimination when the argument of reasonable adjustments or accommodations are made, citing the lack of requirement under the ADA or claiming that it would cause undue or unjustifiable hardship to provide those adjustments or accommodations. By enshrining a positive obligation to provide reasonable adjustments, people with disabilities able to more fully and equitably participate in all areas of public life.

### CASE STUDY 6

The ICLC assisted Minh\* who required assistance and advice after a lengthy battle with cancer left her unemployed. Minh, following treatment and on the advice of her oncologist, requested to return to work on a two-day-a-week basis, instead of her regular three days.

Her manager reviewed the medical certificate she had provided and informed Minh that she would need to resign, because her request couldn't be accommodated. When Minh followed up by asking for some additional time off in that case, her employer dismissed her because she couldn't perform the inherent requirements of her role. This was despite having worked for her employer for over twenty years.

\*name changed for privacy reasons

### **Recommendation 6:**

- (a) that the ADA be amended to include a positive and express obligation for employers, educators, providers of goods and services, and others to provide reasonable adjustments for a person' with disability (temporary or ongoing) ;*
- (b) that the definition of 'disability' in section 4 of the ADA be amended to state that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

## 8. TESTS FOR DISCRIMINATION

*Terms of reference 4: whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination*

ICLC supports a review of the current tests for discrimination under the ADA, which are considered complex and confusing. The ADA is intended to promote equality in society and provide redress for communities facing additional disadvantage. Given this, we support the following amendments be made to the tests for discrimination under the ADA:

- the removal of the comparator test;
- shifting the burden of proof from the complainant to the respondent to show that the unfavourable treatment was not because of the complainant's protected attribute; and
- recognising that any test for discrimination must acknowledge intersectionality and systemic discrimination.

The *Equality Act 2010* (UK) model offers a robust and balanced framework that could ensure the ADA is effectively applies to discrimination across all areas of public life, while also filtering unmeritorious or vexatious claims.

Crucially, the burden-shifting mechanism contained in the UK model enhances access to justice by recognising the evidentiary challenges claimants often face. Requiring the claimant to first establish a prima facie case, before shifting the burden to the respondent, strikes an appropriate balance between protecting against frivolous claims and uncovering genuine instances of discrimination, particularly those that are unconscious or systemic.

This was acknowledged in the UK case of *Barton*, where the court noted:

*"It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*

Such reasoning highlights the value of an inference-based model as it allows tribunals to consider circumstantial and contextual evidence, thereby exposing unconscious or covert discriminatory practices that would otherwise remain unaddressed. This is especially important in public life, where decision-making power often lies with institutions capable of masking discriminatory outcomes beneath ostensibly neutral policies.

Moreover, the UK approach aligns with other international human rights jurisdictions including the European Union, and Canada. Its efficacy has been endorsed domestically. Both the ACT Law Reform Commission and the Consolidation of Commonwealth Discrimination Laws inquiry have recommended adopting this model in Australia.

**Recommendation 7:**

- (a) That the comparator test contained in the ADA be removed;
- (b) That the ADA be amended to shift the burden of proof from the complainant to the respondent to show that the unfavourable treatment was not because of the complainant's protected attribute; and
- (c) That any revised or reviewed test for discrimination under the ADA acknowledge intersectionality and systemic discrimination.

## 9. EXCEPTIONS TO DISCRIMINATION IN SPORT

*Terms of Reference 8: exceptions, special measures and exemption processes*

### 9.1 Exceptions

Currently, the ADA provides an express exception that permits discrimination against transgender people who wish to play the sport with people of their gender.<sup>31</sup> This exception does not apply:

- (a) to the coaching of persons engaged in any sporting activity, or
- (b) to the administration of any sporting activity, or
- (c) to any sporting activity prescribed by the regulations for the purposes of this section.<sup>32</sup>

No sports are currently listed in the Regulations – not even horseback riding, trampolining, yachting, motorsports, bowling, billiards, fishing, competitive pole dancing, and other sports that have minimal contact and in which strength or genetic makeup or of limited relevance.

ICLC endorses ACON's Preliminary Submissions to the NSW Law Reform Commission's Anti-Discrimination Act Review,<sup>33</sup> which argue that the current exemption permitting discrimination against transgender people in sport is unjustified, inequitable, and must be removed.

ICLC's goal is grounded in a commitment to maximising participation and inclusion, consistent with Australia's international human rights obligations. Participation in sport can be recognised as a human right under the terms of the United Nations Universal Declaration of Human Rights, as a component of 'participation in the life of community'.<sup>34</sup> States are required to take action informed by the guiding principles of human rights, equity and public health evidence.<sup>35</sup> In accordance with the United Nations' 2030 Agenda for Sustainable Development, countries must promote inclusion and equitable access to sport and physical activity, ensuring 'no one is left behind'.<sup>36</sup> We support the principle that where sport is organised along gendered categories, transgender people should be entitled to participate in teams that aligns with their affirmed gender.

The ADA exemption compounds existing barriers to participation and entrenches the marginalisation of transgender people from sport at all levels. Transgender people already experience substantial barriers to engaging in sport and fitness, including stigma, transphobia, prejudice, discrimination and violence arising from their gender identity.<sup>37</sup> These realities underscore the necessity of inclusion of transgender people to be a key priority for policy-makers towards dismantling these barriers.

It is imperative to create an inclusive sporting environment, given the established mental and physical health benefits of physical activity. The recognised physical benefits include reduced risk of cancer, diabetes, cardiovascular disease and early mortality.<sup>38</sup> Beyond these physiological outcomes, sport and physical activity are known to foster a sense of perceived

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<sup>31</sup> ADA s 38P(1).

<sup>32</sup> ADA s 38P(2).

<sup>33</sup> ACON Preliminary Submissions to NSW Law Reform Commission - Anti-Discrimination Act Review, September 2023 <[https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD44.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD44.pdf)>.

<sup>34</sup> Universal Declaration of Human Rights, art 27.

<sup>35</sup> World Health Organisation. Global action plan on physical activity 2018-2030. 2018.

<sup>36</sup> United Nations. 41. Transforming our world: the 2030 agenda for sustainable development. 2015.

<sup>37</sup> Claes L, Bouman WP, Witcomb GL, et al, 'Non-suicidal self-injury in trans people: associations with psychological symptoms, victimization, interpersonal functioning and perceived social support', *The Journal of Sexual Medicine* 2015 12(1) 168.

<sup>38</sup> Poteat TC, Divsalar S, Streed CG Jr, et al, 'Cardiovascular Disease in a Population-Based Sample of Transgender and Cisgender Adults' *American Journal of Preventative Medicine* 2021 61(6) :804.

control, body autonomy and confidence. Sport also functions as a powerful site of affirmation, identity expression, and social connection. These elements are essential to psychological well-being and play a critical role in combating withdrawal and social isolation.<sup>39</sup>

Most importantly, in the context of anti-discrimination protections, sport is a significant part of community life. Restriction from participating in community support (whether because of racism, ableism, sexism or transphobia) represents a significant loss of ability to be included in community. Australia recognises the significant impact sport plays in our cultural landscape, through the investment in stadiums, the participation in Olympics, the promotion of sport in schools, and thousands of Australians watch some sport or other live or online every year. To exclude an otherwise protected community group from involvement in sporting life is a significant loss in being seen as valued, belonging and a part of the Australian community itself.

Currently, there is **no** consistent and reliable evidence that transgender athletes undergoing hormone therapy have a competitive advantage.<sup>40</sup> Opposition to transgender participation in sport is most often directed at trans women competing in women's competitions. While the topic has attracted significant public attention, much of the debate relies on exaggerated claims about physical advantages that transgender women supposedly have over cisgender women.

These claims are unsupported by scientific evidence. In fact, a recent Canadian review concluded '*there is currently no substantial research evidence of any biological advantages that would impede the fairness of trans women competing in elite women's sport.*'<sup>41</sup>

Additionally, it must be acknowledged that there is a great variation in physical traits among all people, and that in general transgender people '*fall within the spectrum of physical traits found in athletes of their transitioned gender, allowing them to compete fairly and equitably.*'<sup>42</sup>

ICLC's recommendation is for the removal of the exemption that permits discrimination against transgender people who wish to participate in sport in accordance with their gender identity.

## 9.2 Exclusions

### 9.2.1 Approval by the Anti-Discrimination Board

In the alternative, should the removal of the exception excluding transgender people from sport not be recommended in the NSWLRC's final report, we make the following commentary on the limits and applicability to any proposed exception.

One option is that where a sporting governing body seeks to exclude a transgender person from participating in a sporting activity with others of their gender, it must first obtain

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<sup>39</sup> Lauryn Stewart, Paul O'Halloran & Jennifer Oates (2024) 'Trans Women's Experiences Participating in Sport', *Sport in Society* <<https://www.tandfonline.com/doi/full/10.1080/17430437.2025.2539816?src=exp-la#d1e144>>.

<sup>40</sup> ACON (2022), *Fact sheet: trans health and wellbeing*. <[https://www.transhub.org.au/sport?rq=sport;https://pmc.ncbi.nlm.nih.gov/articles/PMC5357259/pdf/40279\\_2016\\_Article\\_621.pdf](https://www.transhub.org.au/sport?rq=sport;https://pmc.ncbi.nlm.nih.gov/articles/PMC5357259/pdf/40279_2016_Article_621.pdf)>.

<sup>41</sup> Erik Pringle and Richard Denison, 'Majority of Female Athletes Support the Inclusion of Transgender Women', *Sydney Morning Herald* (online 19 April 2022), .

<sup>42</sup> Bethany Alice Jones et al, 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies' *Sports Medicine Journal* (2017) 47(1) 701.

approval from the Anti-Discrimination Board of NSW. Such approval should only be granted where the Anti-Discrimination Board of NSW is satisfied that a statutory test has been met.

This test may be strictly confined to adults competing at a high-performance level in competitive sports where strength, stamina, or physique is highly relevant, and where the exclusion is reasonable and proportionate in all the circumstances. We note that these cases are rare. Exceptions to the existing provisions for coaching, umpiring and administration must be retained.

This approach aligns with the Transgender and Gender-Diverse Inclusion Guidelines for High Performance Sport, developed jointly by the Australian Institute of Sport and the Australian Human Rights Commission.<sup>43</sup> Sporting bodies must consult with affected individuals and provide the Anti-Discrimination Board of NSW with a detailed evidentiary basis for any proposed exclusion.

We note, however, concerns regarding the term 'competitive sports', as it risks overly broad interpretation and the unjust exclusion of transgender people from their right to participate in sport. To be clear, 'community' or 'casual' sport should not be included in an exception.

Any exception should be narrowly targeted to avoid sports codes becoming competitive by introducing token prizes, in a context that is otherwise casual or community or 'for fun'. 'Competitive' could be replaced with wording such as 'elite'. For example, soccer can be played at a casual grade for people whose main goal is community, fitness and fun. This could be distinguished from a team representing Australia internationally, where the internationally agreed rules may have consequences for transgender players wishing to compete. There is then a plethora of grades in between. Careful consideration to limit any exception to a tiny fraction of these 'grades' must inform legislative drafting in this area.

While we disagree for the basis on which a distinction be made between certain leagues or codes or sports, any distinction that is based on considerations such as 'strength, stamina or physique', should be constructed to be limited in application to a tiny fraction of sports in Australia and at the elite level only. Arguably all sports rely on players strength, stamina or physique.

We note that proponents of discrimination against trans people in sport often cite harm or injury as a reason. An alternative criterion that addresses this 'concern' and also limit the applicability of an exception would be where a sport is high-contact and has high risk of player-to-player injury (for example - distinguishing between swimming and boxing).

The far-reaching implications and harmful consequences of excluding transgender people from sport must be recognised. Exclusion from any space or activity is inherently damaging, with well-documented adverse effects on an individual's physical health, emotional wellbeing, and sense of belonging, particularly when they are denied access to affirming spaces and communities.

The ICLC maintains that the ADA must be underpinned by the principles of inclusion and participation. This aligns with a rights-based approach which recognises participation in sport and physical activity as a fundamental human right.<sup>44</sup>

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<sup>43</sup> Australian Sports Commission, (June 2019) *Transgender & Gender-Diverse Inclusion Guidelines for HP Sport* <<https://ascwrstorageprod001.blob.core.windows.net/assets/Trans-and-gender-diverse-guidelines-KYKyNPYEGkPQGXcWPdNLQ.pdf?sv=2025-05-05&st=2025-08-14T06%3A40%3A59Z&se=2025-08-14T06%3A55%3A59Z&sr=b&sp=r&sig=L%2BSQaSKZI9pT2LIWd9LfHKwVpR7knnf%2BMPTDmVehupl%3D>>.

<sup>44</sup> International Charter of Physical Education, Physical Activity and Sport (2015) <<https://www.unesco.org/en/sport-and-anti-doping/international-charter-sport>>.

## 9.2.2 Children and Youth

There have been proposals to amend the ADA's provisions so that transgender children under the age of 12 cannot be excluded from participation in gender-segregated sport in their affirmed gender category.

The ICLC contends that such protections must extend to all transgender children and young people, without arbitrary age restrictions. In accordance with international human rights standards, a child is defined as any person under the age of 18 years old. All transgender children and youth should be able to participate in sport.

Under Article 2 of the *Convention on the Rights of the Child* ('the CRC'), Australia is obligated to ensure all children are protected from discrimination on any ground, including gender identity. Article 31 recognises the right of every child to rest, leisure, and participation in recreational activities. Arbitrary age-based exclusions are incompatible with these obligations and undermine the fundamental principle of equality before the law.

Participation in sport is not a privilege, but a recognised human right. For children, including transgender children, participation in sport enhances social skills, fosters a sense of belonging, and supports mental and physical health and wellbeing. It also plays a broader role in combating social exclusion and addressing systemic exclusion. However, research demonstrates that transgender children experience transphobic discrimination in sporting contexts, particularly in school physical education settings and disproportionately report feeling unsafe in public sporting venues, including gyms.<sup>45</sup> Allowing sporting bodies to exclude transgender children sends a harmful message that their identities are less valid, and entrenches stigma.

### CASE STUDY 7

Zara\* has been playing in her local soccer team competition since she was seven. The soccer competition is gender-segregated. Over the years, Zara has developed strong friendships and a sense of belonging through the game.

When Zara turns twelve, the sport's governing body informs her that because her birth certificate records her gender as 'male', and she has reached the age threshold, she can no longer compete in the girls' category. This exclusion will prevent her from playing with her friends and sever the strong connections and community ties. Zara is a girl.

The consequence of this exclusion is profound. It denies Zara the well-established physical and psychological benefits of sport, including improved mental health, enhanced self-esteem and physical fitness. It also risks reinforcing feelings of isolation and rejection, which are already disproportionately experienced by transgender children.

\*name changed for privacy reasons

If the ADA introduces age-based exclusions, many transgender children will face similar disruptions to their social, emotional and physical development. These exclusions signal at a formative age that their identity is less valid and less worthy of recognition in community life. This approach fundamentally undermines the principles of inclusion, equality and non-discrimination and is inconsistent with Australia's human rights obligations.

Alternatively, if the Commissioner were to proceed with implementing an age-based exclusion, the ICLC submits that any such threshold should be set at a higher age. A low

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<sup>45</sup> Ryan Storr et al, 'Game to Play? Exploring the Experiences and Attitudes Towards Sport, Exercise and Physical Activity Amongst Same Sex Attracted and Gender Diverse Young People' (Research Report, Western Sydney University, 2020).

age significantly risks excluding children at a formative stage in their physical, psychological, and social development, with potentially long-lasting detrimental effects.

Parallels can be drawn from current legal and policy discourse on raising the minimum age of criminal responsibility in Australia, which emphasises the developmental science that younger children lack the cognitive maturity to be held fully accountable for their actions.<sup>46</sup> This commentary highlights the dangers inherent in setting legal thresholds arbitrarily. These include the failure to account for the evolving capacities of children, and the broader social implications of prematurely imposing exclusionary rules. Applying these principles in the sporting context underscores that a lower age-based exclusion would be arbitrary, and contrary to Australia's human rights obligations to promote inclusion, participation and equality.

**Recommendation 8:**

*(a) That no exception applies as to sport for transgender people (or based on 'gender identity').*

*(b) In the alternative, that if an exception be retained that it be limited in scope.*

## 10. EXCEPTIONS TO DISCRIMINATION IN EMPLOYMENT

### *Terms of Reference 8: exceptions, special measures and exemption processes*

There are several exemptions provided in the ADA in regard to discriminatory behaviours. Broad, overarching exemptions to the ADA as a whole are contained at Part 6, some of which we have discussed earlier in these submissions, but in addition to these, there are other, worrying exemptions provided in the ADA, particularly regarding discrimination in employment. These include exemptions for private educational authorities, private households and employers who employ fewer than 5 people. These exemptions can apply to discrimination in employment that occurs due to a person's race, sex, transgender status, marital or domestic status, disability, carer's responsibilities, homosexuality, and age.

The ICLC has advised many clients employed in private educational institutions or private households, including teachers, support staff and childcare workers. Behaviours they report include misgendering in the workplace, denial of flexible working arrangements, differential treatment, microaggressions, and racial and sexist abuse from coworkers, students or members of the household. These behaviours would be considered discrimination if they were employed by any other employer or in any other industry, yet due to the exceptions in the ADA, they are placed in a position where they have no legal recourse.

Additionally, these exemptions exist wholly and absolutely without any exceptions or guidance as to what would be considered appropriate or inappropriate behaviour in the workplace, and without any test as to reasonableness or necessity. For example, the exclusion of employers who employ fewer than 5 employees from the anti-discrimination

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<sup>46</sup> Law Council of Australia and Australian Medical Association, *Recommendation to raise minimum age of criminal responsibility welcomed*, (Media Release, 23 August 2024) <[https://www.ama.com.au/sites/default/files/2024-08/AMA\\_Media\\_Release\\_Youth\\_Justice\\_Report.pdf](https://www.ama.com.au/sites/default/files/2024-08/AMA_Media_Release_Youth_Justice_Report.pdf)>.

provisions means that a third of all employers in New South Wales remain unprotected,<sup>47</sup> which is a significant and uncalled for exemption. Given that private educational authorities, private households and employers with fewer than 5 employees, are all able to lawfully employ workers and are therefore bound by other workplace laws, such as the *Fair Work Act 2009* (Cth), there is no reason why they should be exempted from unlawful discrimination in employment.

Where the ADA purportedly protects the basic human rights and dignities of workers in New South Wales, removal of these exceptions is key to ensuring that all workers are afforded the same rights and protections.

The ICLC supports a review of exceptions to discrimination provided to superannuation funds when it comes to a person's sex, marital or domestic status, disability, and age, and whether these remain appropriate and practical exceptions. The ICLC also specifically supports the removal of section 38Q of the ADA, which allows a superannuation fund to treat a transgender person as being of the opposite sex to the sex with which the transgender person identifies.

**Recommendation 9:**

- (a) That the ADA remove exemptions from discrimination in employment for private educational authorities and private households;
- (b) That the Act review exceptions to discrimination provided to superannuation funds when it comes to a person's sex, marital or domestic status, disability, and age; and
- (b) That section 38Q of the ADA be removed.

## 11. EXCEPTIONS TO DISCRIMINATION IN RELIGIOUS INSTITUTIONS

*Terms of reference 8: exceptions, special measures and exemption processes*

The ADA currently broadly exempts religious institutions from adhering to discrimination prohibitions when such discrimination is an act or practice that conforms to their religious doctrine or when it is necessary to prevent injury to the religious susceptibilities of that faith's adherents.<sup>48</sup> The ADA also allows religious bodies to discriminate in the appointment of any person in any capacity.<sup>49</sup>

The application of this exception is unusual and extreme, and particularly contributes to the marginalisation of women, LGBTQIA+ people, and people with disabilities and their carers.

### 11.1: Defining 'religious doctrines and susceptibilities'

The religious exception applies broadly to a body that is established to propagate religion.

<sup>47</sup> <https://www.asbfeo.gov.au/small-business-data-portal/location-australias-small-businesses-state-and-territory/new-south-wales>

<sup>48</sup> ADA s 56(d).

<sup>49</sup> Ibid s 56(c).

The definition of ‘religious doctrines and susceptibilities’ have also been interpreted broadly. Even within the same faith and denomination, different adherents and faith leaders express distinct views on what constitutes valid religious belief.

## 11.2 Compatibility with Human Rights

Under the ICCPR, the right ‘*either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching*’ can be subject to limitations, as article 18(3) makes clear, ‘*as prescribed by law*’ and which ‘*are necessary to protect safety, order, health, or morals or the fundamental rights and freedoms of others*’.

The manifestation of religious belief is clearly subject to limitations and must be balanced against the rights and freedoms of persons who will be impacted by that exercise. The manifestation of religion should not be protected at the expense of other rights and freedoms, which is the current position under the ADA.

The current exceptions are outdated. These exceptions violate fundamental principles of human rights law<sup>50</sup> and allow for profoundly harmful environments where employees must conceal their protected attribute to avoid discrimination. The right of freedom of religion does not include a right to enforce one’s religious views on others or to discriminate against LGBTQIA+ people and other communities fundamental human rights to non-discrimination and employment and education equity. We note recent amendments to other NSW laws that criminalise conversion practices expressly forbid religious and other institutions from attempts to change, reform or “rehabilitate” a person on the basis of their gender or sexuality, which has gone some way towards removing the freedom of religiously motivated organisations to impose their beliefs in a way that can be harmful and oppressive towards LGBTQIA+ people and communities. This has been a wonderful step in the right direction in support of the safety and freedom for our communities, but there is more to be done.

The ICLC’s recommendation is to remove the sections ss 56(c) - (d).

## 11.3 Alternative amendments

If this recommendation is not adopted, or the Commission seeks to redraft an exception on the basis of religion, we would suggest the following.

Any alternative must narrow the scope of the current ss 56(c) - (d) significantly. These exceptions should be confined to the ‘status’ of an individual as a faith holder, rather than continuing to permit discrimination on vague and overly broad terms, such as ‘the doctrine of that religion’ and ‘religious susceptibilities’. Religious institutions should be permitted to make only hiring decisions limited to a person’s status as a faith holder where being a member of that faith is inherent to the role. This is important to protect people who are members of a faith, or hold the status of a person of that faith, rather than asking the judiciary (or indeed anyone outside of the religion) to define what is the true or correct beliefs of that religion,

To provide a hypothetical – a divorced women who is a member of a particular faith should not be discriminated against in seeking employment as a teacher (or enrolling her children) in a school of that faith. There may be a variety of opinion within that faith as to the ethical implications of divorce, but the woman herself must still be recognised as a person of that faith.

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<sup>50</sup> ICCPR arts 9 and 26.

We have seen in ICLC’s casework, and through some of the case studies highlighted below a significant pattern where even within a faith group, significant variety of individual differences of opinion on matters relating to sex, gender equity, relationships and sexuality, reproductive rights, transgender rights, and LGBTQIA+ issues. Where religious institutions have blanket exceptions from anti-discrimination protections, we see individual opinions and individual principals or employers often weaponizing religious-based exceptions. As Equality Australia observed, there are no equivalent provisions to s 56(c) in any other state or territory laws.<sup>51</sup> Moreover, while some jurisdictions have provisions comparable to s 56(d), those provisions are significantly more limited in scope and application.<sup>52</sup>

Any proposed reform in this area should reinforce the principle that human rights are ‘universal, indivisible and interdependent and interrelated.’<sup>53</sup> The ICLC cautions against any outcome that would permit the expression of religious belief in a manner that enables forms of discrimination currently prohibited under federal anti-discrimination law.

## 11.4 Religious Schools Exceptions to Discriminate

### 11.4.1 Incompatible with Australia’s Human Rights Obligations

The exceptions which provide private educational institutions the ability to discriminate against applicants, employees and students on the basis of transgender status or homosexuality (as well as attributes of sex, marital or domestic status, disability and age) are in direct violation of Australia’s international human rights obligations.<sup>54</sup> They must be removed and should not be included in any future NSW anti-discrimination law.

Children have special rights under human rights law, taking into account their particular vulnerabilities.

Article 28 of the *CRC* enshrines the right to education for all. States have an active obligation to ‘empower the child by developing their skills, learning, and other capacities, human dignity, self-esteem and self-confidence’.<sup>55</sup> Discrimination, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from education opportunities.

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<sup>51</sup> Equality Australia, 30 August 2023, *An Equality Act for NSW Preliminary submission to the NSW Law Reform Commission’s review of the Anti-Discrimination Act 1977* (NSW) <[https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD07.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD07.pdf)>.

<sup>52</sup> *Equal Opportunity Act 2010* (Vic) ss 39, 61, 82A, 83, 84; *Discrimination Act 1991* (ACT) s 32, 33B, 33C (as amended by *Discrimination Amendment Act 2023* (ACT) ss 9, 10); *Anti-Discrimination Act 1992* (NT) ss 35A, 37A, 40(3)-(6) (as amended by *Anti-Discrimination Amendment Act 2022* (NT) ss 16-18); *Anti-Discrimination Act 1998* (Tas) Pt 5, Div 8; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022, Final Report) <[https://www.qhrc.qld.gov.au/data/assets/pdf\\_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf](https://www.qhrc.qld.gov.au/data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf)>.

<sup>53</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at [5].

<sup>54</sup> *ADA* ss 38C(3)(c), 38K(3), 49ZH(3)(c), 49ZO(3).

<sup>55</sup> United Nations Committee on the Rights of the Child, *General Comment no. 1 (2001) Article 29(1) The Aims of Education* <<https://digitallibrary.un.org/record/447223?ln=en&v=pdf#files>>.

Under Article 2 of the *CRC* states must respect and ensure the rights of children without discrimination. This non-discrimination obligation requires states to actively identify individual children and groups of children the recognition and realisation of whose rights may demand special measures. Reviews of research from around the world has consistently established that LGBTQIA+ students suffer disproportionate violence and discrimination within the education system compared to other students.<sup>56</sup> Discrimination and segregation contribute to higher rates of school dropout and trauma among young individuals from sexual minority groups.<sup>57</sup>

The ADA is incompatible with the object and purpose of the *CRC*. The current exceptions compound and exacerbate expectations of heteronormativity and contribute to discrimination. Not only does the ADA fail to provide adequate protection for LGBTQIA+ children and youth, but it perpetuates tolerance of harm and creates an unsafe environment that adversely affects the mental and emotional well-being of these students, heightening the risk of disengagement from formal education.

Under Article 3 of the *CRC*, the best interests of the child must be the primary consideration in all actions concerning children. As noted by the Parliamentary Joint Committee on Human Rights, the rights of the child are to be taken as a primary consideration when different interests are being considered.<sup>58</sup> Any laws that are open to interpretation must be interpreted in a way which most effectively serves the child's best interest.

Research establishes that religious and private schools which take '*a conservative approach to gender and sexuality... negatively impact the wellbeing of not only LGBTIQ+s but most students. Anti-LGBTIQ+ messaging is in short aligned with poor education, poor wellbeing... 83.6% of people exposed to gay conversion messaging at school consider suicide.*'<sup>59</sup>

#### 11.4.2: Needs of children

Education is an essential and compulsory service for all children. Many families, particularly those in remote, rural, and regional parts of NSW, have limited schooling options. Furthermore, there can be, in some cases, a notable gap in the educational quality provided by public schools versus private religious schools: NSW public schools consistently underperform due to their lack of funding compared to private institutions. In the last decade, funding increases to Australian private (including religious) schools were over three times as high as to public schools, underscoring how they are especially privileged in Australia.<sup>60</sup>

The material reality of inequity in our schooling system, and the position this puts parents in when electing which school to enrol their child must be taken into consideration in forming a position on LGBTQIA+ (and disability) anti-discrimination protections in schools under NSW law. The number of students in private schools across Australia make up 36.7% of all students.<sup>61</sup>

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<sup>56</sup> Law Council of Australia, Justice Project – Final Report (August 2018), LGBTI+ Chapter, 8-10; 14-17.

<sup>57</sup> Australian Human Rights Commission, 'National Consultation Report, Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights'(2015), 15 citing William Leonard et al, 'Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians' (Monograph Series Number 86, The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012).

<sup>58</sup> Parliamentary Joint Committee on Human Rights, Guide to Human Rights (June 2015), 47.

<sup>59</sup> Dr Tiffany Jones, 'Non-Discrimination is students' 'best interests': A Submission to the inquiry by the Senate Legal and Constitutional Affairs Committee on the Discrimination Amendment (Removing Discrimination Against Students) Bill (Submission 233, January 2019).

<sup>60</sup> Trevor Cobbold, 'Private Schools Had the Biggest Funding Increases and the Biggest Falls in School Results' (2023), Canberra: SOS Australia <<https://saveourschools.com.au/funding/private-schools-had-the-biggest-funding-increases-and-the-biggest-falls-in-school-results/>>.

<sup>61</sup> See Australian Bureau of Statistics website: <https://www.abs.gov.au/statistics/people/education/schools/latest-release>

Consequently, the ability of religious schools to discriminate against its students creates a barrier to vulnerable children accessing non-discriminatory educational opportunities and further entrenches the socio-economic disadvantages of marginalised groups.

### CASE STUDY 8

*The ICLC advised a client who was the mother of one transgender child and one child with a disability. The rural town that they lived in only have one public school and one religious school. The public school lacked resources to support the needs of her child's disability as well as having frequent on-site violence and poor educational outcomes.*

*However, the private school clearly communicated that they would not be accepting of her transgender child. These limitations placed our client in a situation where as a single parent she would have to drive her two children to two different schools, risk the wellbeing of one child by enrolling them together, or leave town.*

Religious schools, as with all other educational institutions, have a duty to ensure children's safety and wellbeing. All teachers, schools and education authorities owe students a duty of care to take reasonable action to protect them from all foreseeable risks of harm.<sup>62</sup> This duty of care extends to ensuring that children are protected from bullying,<sup>63</sup> including protection from transphobic and homophobic abuse by teachers and peers. This also encompasses a duty to educate children against homophobia and transphobia, while combating heterosexist stereotypes.<sup>64</sup>

This duty is in direct conflict with the ADA's discrimination exemptions. The ability to discriminate makes schools unsafe for some children as it compromises their mental health, undermines adequate safeguards against bullying, and denies children a safe means to disclose harm to adults. Children have limited legal autonomy; in many cases, they are unable to choose the school they attend and attempts to extricate themselves from an unsafe school situation may hamper their ability to complete their studies.

### CASE STUDY 9

*Madison\* was a high school student who took the brave step of reaching out to ICLC for legal advice. She, like many other teenage girls, kissed another female student one weekend. This should have been a normal part of exploring romance and sexuality as a teenager. Madison went to a religious school and was keenly aware that, in her words, 'the entire school hated gays'. She had seen firsthand a student be bullied for being gay, receive no support or intervention from teachers, and eventually leave the school.*

*Madison's parents also shared anti-LGBTQIA views, and Madison felt unsafe to tell them about her experience. A few years earlier, her older sister had been kicked out of the family home for being lesbian, and this meant she was unable to finish her HSC. She loved her parents and wanted to make them proud by doing well in the HSC.*

*Then, the student she had kissed started to harass her – she received coercive messages, constant threats to 'out' Madison to other students, the school and her parents, and demands for nude pictures. Madison felt sorry for this other student and knew that she was lashing out and trying to control her because she too was under the pressures of a homophobic environment.*

<sup>62</sup> *Richards v State of Victoria* (1969) VR 136.

<sup>63</sup> *Oyston v St Patrick's College* (2013) NSWCA 135.

<sup>64</sup> Christopher Kendall and Naomi Sidebotham, 'Homophobic Bullying in Schools: Is there a Duty of Care?', *Australia and New Zealand Journal of Law and Education* (2004) 9(1) 71.

*Madison felt that she couldn't get help from her school or from her parents, so she sought out a lawyer. ICLC had to inform this young person that the school did have an obligation to keep her safe but was entitled to discriminate against her because she kissed a girl.*

*As a high school student, we had to advise her that she had limited options to take legal action that would not result in her parents or the school finding out (and risk her education, housing and safety). We helped her explore her support network, priorities, and ways to keep herself safe.*

\*name changed for privacy reasons.

Discrimination exemptions for religious schools create legal inconsistencies that disadvantage not only the victims of discrimination but their peers. Permitting schools to exercise an ethos of discrimination creates a precedent of conduct for students to follow that is inconsistent with the standards of their future workplaces and communities, where such conduct will be unlawful. While religious education is a vital part of religious expression, limitations must be placed when such education promotes unlawful activity.

### **CASE STUDY 10**

*Malcolm\* goes to his local Catholic high school in a regional area. Malcolm is a transgender young man and uses he/him pronouns at school and in his community. His mother assisted him to communicate his needs to the school when he enrolled and when he started to use the boy's name 'Malcolm', and he/him pronouns. He has been 'out' as transgender at his school for one and a half years.*

*During this time, he has been using the boy's bathroom. A new teachers aide joined the school, and one day follows Malcolm to the bathrooms, and stops him from entering the boys' bathroom, telling him he is not allowed to use it.*

*From that day on, the school leadership informs Malcolm (and weeks later his mother), that he must use the disabled bathrooms. Malcolm believes that this is at the behest of the new teacher aide, who does not like Malcolm or respect his gender identity. The school says this is because of 'safety issues', but does not explain what those safety issues are, nor why this has suddenly changed after 18 months, nor that any incident or problem has recently occurred to initiate the change in rules.*

*The school is large and spread out. There is only one disabled bathroom on the school grounds, and it is often far away from Malcolm's classes. He starts to be late to class, and other students notice he is using the disabled bathroom and not the boys', and ask him uncomfortable questions about his gender, and about if he has a disability. Malcolm's mother organises a meeting with the school to discuss the issues and her concerns about bullying and isolation from his peers. His mother is keenly aware that not only is the school emboldened to discriminate against transgender students, and to introduce such arbitrary rules, but that they could expel Malcolm for being trans, for which there are no anti-discrimination protections.*

\* name changed for privacy reasons.

### **CASE STUDY 11**

*Amelia's\* parents enrolled her in their local religious school. As Amelia is trans, her parents had worked for two years with the school's leadership to ensure that she was accepted by the school, teachers and other students. The parents were keenly aware that they had no alternative, as the school, under current anti-discrimination protections, were empowered to discriminate against their child because she is trans.*

*The school put up many barriers, but over time Amelia's parents hard work paid off and Amelia was able to identify as a girl and use the name Amelia in class. Her parents worked*

*very hard to hide from her how much work they had to put in, and how much resistance they faced from the school in order to protect her from transphobia.*

*The school planned a 2-night excursion trip for Amelia's grade. Through early communication and discussion the school and Amelia's parents arranged for Amelia to sleep over in the same room as other female students, with whom Amelia's parents were friends and supportive of Amelia.*

*Three weeks before the school excursion, there was a change of leadership in the school. The new leadership expressly did not support transgender people, and was not supportive of Amelia at all. Two weeks before the excursion the new leadership informed Amelia's parents that they would have to personally attend the school excursion and share a segregated room with Amelia, away from the other students. Amelia's parents both worked and could not do this. The alternative was that the school would not allow Amelia to attend the excursion at all.*

*Amelia's parents were aware that under the current exemption for private schools there was nothing they could do, except plead with the school to not exclude and isolate their daughter.*

*They were at a loss of how to explain this to their child, and were very worried how the sudden exclusion from school and friends would effect their daughter.*

\* name changed for privacy reasons.

This case study highlights two important points. First, that anti-discrimination protections must have children's best interest and wellbeing at their core. Exceptions to anti-discrimination protections for private schools puts individuals who sit at two key demographics – having a protected attribute and being a child (or young person) - unprotected from harm. **It's unconscionable that adults who have protected attributes are better protected from discrimination than young people.**

The second point this case study illustrates is that a blanket exception based on 'belief' that emboldens the choice to exclude LGBTQIA+ children (and women, and carers, and people with disabilities) by religious organisations creates uncertainty. This case shows how two leaders from the same faith (noting part of the job selection criteria includes commitment to religious values) had opposing personal opinions on how to treat transgender children.

The status of being a religious person, and the ability to practice that religion are key human rights that need to be harmonised with the human rights of women and girls, people with disability and LGBTQIA+ people's rights to education (and in the case of children and young people the right to safety, wellbeing and support in their development).

Schools are an essential service, providing the space for a key human right to education. They are government funded. Schools play an important role in shaping young people into law-abiding, community-minded Australian adults, and as such, equitable access to schooling must be the priority.

There are many important aspects of religious life – worship, religious study, spiritual practice, annual events, religious discussion and debate, use of dress or symbols, and living through your religious ethos in daily life that should be protected. To do so in a way that breaches others basic human right to education, and in a way that endangers children (such as trans children's safety and wellbeing), or excludes them from access to a quality, safe education (including children with disability or with support needs) is not balanced or reasonable.

#### **Recommendation 10:**

*(a) that the exception applicable to private educational institutions be removed entirely.*

*(b) if an exception for religious educational institutions is included, that it be limited in scope.*

Thank you for taking the time to consider our submissions for this long overdue review of the ADA. We appreciate the NSWLRC's time and expertise in considering our submissions, that support an Act that is simplified, modernised and fit to meet the diverse and changing needs of those in our community who are most likely to experience discrimination, stigma and persecution for who they are or things that they might have done.

We would be delighted to attend further consultations to discuss or clarify our position on any of our above recommendations.