

# **Submission**

in response to the

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

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## Introduction

This submission focuses the questions raised in the *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct: Consultation Paper* ('the Consultation Paper') released in May 2025 by the New South Wales Law Reform Commission ('NSWLRC').

This submission is strongly informed by previous submissions made by the Australian Discrimination Law Experts Group ('ADLEG') to law reform inquiries and processes. ADLEG is a group of legal academics with significant experience and expertise in discrimination and equality law and policy. Those submissions are all available on the website of ADLEG.<sup>1</sup> The author of this submission is an active member of that group and has contributed extensively to those previous submissions. I acknowledge the extensive and expert work of my colleagues in ADLEG and the benefit I have from that collaboration. I also acknowledge the work done by many members in considering the current review and, in particular, acknowledge Emma Graham.

I urge the review team to consider all of ADLEG's previous submissions as they deal extensively with a number of the issues raised in this review. I also urge the review team to consider a fundamental reframing of the ADA NSW to modernise it.

In this submission, I have only been able to respond to some of the issues and the Part numbers follows those in the issue paper.

This submission may be published.

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<sup>1</sup> Australian Discrimination Law Experts Group, *Submissions* (2024) <<https://www.adleg.org/submissions>>.

## Glossary

### ***Federal and state laws***

RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
SDA	<i>Sex Discrimination Act 1984 (Cth)</i>
AHRCA	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
Age DA	<i>Age Discrimination Act 2004 (Cth)</i>
FWA	<i>Fair Work Act 2009 (Cth)</i>
2021 SDA Amending Act	<i>Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth)</i>
DA (ACT)	<i>Discrimination Act 1991 (ACT)</i>
HRA (ACT)	<i>Human Rights Act 2004 (ACT)</i>
ADA (NT)	<i>Anti-Discrimination Act 1992 (NT)</i>
ADA (QLD)	<i>Anti-Discrimination Act 1991 (Qld)</i>
ADA (Tas)	<i>Anti-Discrimination Act 1998 (Tas)</i>
EOA 2010 (Vic)	<i>Equal Opportunity Act 2010 (Vic)</i>
EOA 1995 (Vic)	<i>Equal Opportunity Act 1995 (Vic)</i>
EOA 1984 (SA)	<i>Equal Opportunity Act 1984 (SA)</i>
NSW ADA	<i>Anti-Discrimination Act 1977 (NSW)</i>

### ***International laws***

ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
CERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
CRC	<i>Convention on the Rights of the Child</i>
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
ILO No 111	<i>Discrimination (Employment and Occupation) Convention</i>

## **Organisations**

AHRC	Australian Human Rights Commission
ADB	NSW Anti-Discrimination Board
ADLEG	Australian Discrimination Law Experts Group
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
ILO	International Labour Organization
NCAT	NSW Civil and Administrative Tribunal
VCAT	Victorian Civil and Administrative Tribunal

## 3. Tests for discrimination

### 3.1: Direct Discrimination

**Consultation paper question:** Could the test for direct discrimination be improved or simplified? If so, how?

The inclusion of a comparator in the definition of direct discrimination has made analysis of complaints cumbersome and has distorted the definition of direct discrimination. It is also likely to deter intersectional discrimination complaints. Establishing that a comparator without an attribute has been treated more favourably is merely one way of providing evidence that a decision has been based on a prohibited ground or attribute. It should not obscure the real question, which is simply whether there has been discriminatory treatment.

This is best addressed by adopting an ‘unfavourable treatment’ test, similar to that adopted in the Victorian and ACT Acts.<sup>2</sup>

### 3.2 & 3.3: The comparative disproportionate impact test and inability to comply

**Consultation paper question:** Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

**Consultation paper question:** What are your views on the “not able to comply” part of the indirect discrimination test? Should this part of the test be removed? Why or why not?

The comparative disproportionate impact test for indirect discrimination should be removed and replaced with a test that prohibits the imposition of ‘any condition, requirement or practice that has or may have the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment’.<sup>3</sup>

The existing definition of indirect discrimination in the NSW ADA was added in 1981. Since then, definitions have been amended in many jurisdictions as a result of advancing understandings of the nature of indirect discrimination. That definition tends to divert inquiry into marginal questions such as the degree of disproportionate impact that must be proved, and whether it is substantial, and what is required for the claimant to prove non-compliance with the requirement.

More modern formulations of indirect discrimination such as those in the SDA focus instead on the effect of disadvantage that flows from an apparently neutral requirement for people with

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<sup>2</sup> *Discrimination Act 1991* (ACT) s 8(2), *Equal Opportunity Act 2010* (Vic) s 8(1).

<sup>3</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1, Australian Treaty Series 1983 No 9 (entered into force 3 September 1981, entered into force for Australia 27 August 1983) (‘CEDAW’). See also *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (known as *Meiorin*, after the applicant).

a particular attribute.<sup>4</sup> In this formulation there is no need to show inability to comply, for two main reasons. First, the disproportionate impact on the affected group is in itself a concern the law should address. Secondly, a claimant who can comply with the requirement is unlikely to take the time and trouble to challenge it, so that non-compliance can be assumed in a situation of litigation.

I recommend the adoption of a definition of indirect discrimination that focusses attention on the central inquiry, that is whether a condition, requirement or practice has, or is likely to have, a disadvantaging effect on another person because they have one or more protected attributes, that is, the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment' with no requirement to prove disproportionate impact or inability to comply.

### 3.4: Indirect discrimination and the reasonableness standard

**Consultation paper question:**

- (1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?
- (2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

The reasonableness standard has been the subject of sustained criticism by discrimination law scholars because of the risk that it perpetuates the status quo. That is, it increases the likelihood that conditions, requirements or practices that are longstanding or widespread, will, by virtue of their entrenched nature, be found to be reasonable, even if they disadvantage persons with one or more protected attributes. This criticism can be seen, for example, in scholarship that highlights the considerable latitude granted to employers by courts when determining what constitutes reasonable conduct in sex discrimination claims.<sup>5</sup>

For this reason, I recommend serious consideration be given to replacing the reasonableness test with a proportionality test. This would better align the NSW ADA with international best practice and human rights instruments.

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<sup>4</sup> Sex Discrimination Act 1984 (Cth) ('SDA') s 5(2).

<sup>5</sup> This scholarship also concerns the approach of courts when considering the conduct of employers under industrial legislation, see; Barbara Ann Hocking, 'Is the Reasonable Man the Right Man for the Job' (1995) 17(1) *Adelaide Law Review* 77, 93–106; Anna Chapman, 'Qantas Airways Ltd. v. Christie' (1998) 22(3) *Melbourne University Law Review* 743, 759–760; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 345; Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27(3) *UNSW Law Journal* 914, 918; Sara Charlesworth, 'A Snapshot of Sex Discrimination in Employment: Disputes and Understandings' in Sara Charlesworth et al (eds), *Women and Work 2005: Current RMIT University Research* (RMIT Publishing, 2006) 81, 82; Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31, 48–50; Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) 33(1) *Adelaide Law Review* 39, 58; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018), 155.

### 3.5: Indirect discrimination based on a characteristic

**Consultation paper question:**

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

The NSW ADA should adopt the more modern and clearer approach of listing all grounds of discrimination in a single provision. This should include protection of people who are associates of, or believed to be associates of, people with an attribute listed in that section (see 4.9 below). The scope of attributes should also be defined as inclusive of past, present or future attributes, imputed attributes (including the imputation of a future attribute) and characteristics of people with the attribute generally, or imputed or presumed characteristics of people with the attribute.

### 3.6: Proving indirect discrimination

**Consultation paper question:**

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

Yes, the burden of proof should shift to respondents in respect of some aspects of the direct discrimination test. Currently the burden of establishing that discrimination has occurred falls solely on a complainant. This leads to considerable uncertainty for both parties as most, sometimes all, of the relevant evidence is held by respondents. A lack of proof—and the burden of proof—are major barriers to discrimination claims in Australia.<sup>6</sup> Shifting the burden of proof in discrimination claims in Australia could therefore be ‘incredibly beneficial’ to claimants.<sup>7</sup>

Comparable jurisdictions such as Canada, the US, the UK, and all of the European Union require a complainant to establish an arguable case, and then shift to the respondent the evidentiary burden of establishing the reason/s for the impugned conduct or conditions. They do so on the basis of the well-documented and widely appreciated difficulty of one party’s having to prove the other party’s motivation for acting, where little or none of the evidence about subjective motivation is likely to be in their control. A shifting onus has a long and unremarkable history in Australian industrial law and continues in sections 361 and 783 of the *Fair Work Act 2009* (Cth) (‘FWA’).

In the UK, the burden of proof shifts once a claimant has established a prima facie case. The *Equality Act 2010* (UK) says:

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<sup>6</sup> Alysia Blackham, ‘Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law’ (2020) 42(1) *Sydney Law Review* 1; Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

<sup>7</sup> Ibid.

## 136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory, and will lead to clearer case law which will provide better guidance on the law.

To ‘prove otherwise’, the respondent could provide evidence of a lawful reason for the treatment, or could challenge the allegation that the behaviour was unfavourable. The respondent would also have access to exemptions and defences.

A shifting burden of proof is only likely to be determinative in finely balanced cases with very particular fact scenarios. However, given the respondent typically controls most relevant information, it is appropriate for the burden of proof to shift once a prima facie case has been established.

I recommend that the review adopt the rebuttable presumption modelled on section 136 of the *Equality Act 2010* (UK).

### 3.7: Direct and indirect discrimination

#### Consultation paper question:

- (1) How should the relationship between different types of discrimination be recognised?
- (2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

The distinction between ‘direct’ and ‘indirect’ discrimination in the NSW ADA is conceptually difficult for parties (and sometimes for decision-makers) to understand. As has been emphasised in other comparable jurisdictions, the distinction is difficult to justify because few cases can be neatly characterised as either one or the other. A rule requiring all employees to attend work on Fridays may equally be classified as direct discrimination as it entirely precludes people whose religious beliefs prevents them working on Fridays or indirect discrimination because it is characterised as a neutral rule which disadvantages one group of people based on their religious belief.<sup>8</sup>

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<sup>8</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 [27] (McLachlin J).

A neat distinction between the two has also been said to be unrealistic in the modern age, as few duty-bearers frame discriminatory rules utilising explicitly discriminatory language.<sup>9</sup> This conceptual difficulty can result in complainants pleading both types of discrimination in the alternative, which adds unnecessary complexity and cost to the complaints process.

In addition to being a costly and time-consuming technical barrier to the resolution of complaints, the distinction between direct and indirect discrimination detracts from the central inquiry of whether the impugned conduct was unfavourable or disadvantageous to a person or group of persons with protected attribute/s. It shifts the inquiry further from the question of whether a member of a stigmatised group is experiencing conduct founded in prejudicial views of that group. Simplification is needed in the form of a unified test that recognises that discrimination can take the form of both direct and indirect discrimination. The strict distinction between the two types of discrimination fails to advance substantive equality because claims can slip through the cracks of the distinction and fails to appreciate the lived reality of discrimination and disadvantage by requiring human experience to fit into neat and separate legal categories.

I recommend that the definition of unlawful discrimination in the NSW ADA should be a streamlined statement that avoids a mutually exclusive distinction between direct and indirect discrimination. The approach taken in the ACT provides clarity and clearly encompasses the concepts of both direct and indirect discrimination.<sup>10</sup>

I recommend that the definition of unlawful discrimination in the NSW ADA be streamlined to express the general underlying idea of discrimination and make clear that the concepts can overlap and are not mutually exclusive. Nor should they be seen as the totality of the experience of discrimination that should be able to be challenged under the NSW ADA. The direct/indirect distinction does not appear in the *Racial Discrimination Act 1975* (Cth) ('RDA'), and I recommend that consideration also be given to an approach similar to that of the RDA should be applied more broadly.<sup>11</sup> The RDA definition, based on the *International Convention on the Elimination of All Forms of Racial Discrimination*, follows the international law approach and provides a model that already exists in Australian legislation.

A single encompassing definition will ease the regulatory burden and will assist understanding and compliance. In addition, a single definition of discrimination will more closely align the NSW ADA with internationally recognised definitions of discrimination, better fulfilling our international human rights treaty obligations.<sup>12</sup>

Accordingly, I note the following definition, based on the International Labour Organization *Discrimination (Employment and Occupation) Convention* ('ILO No 111') (which appears in section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRCA')) and the

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<sup>9</sup> Ibid [29].

<sup>10</sup> *Discrimination Act 1991* (ACT) ('DA ACT') s 8.

<sup>11</sup> *Racial Discrimination Act 1975* (Cth) ('RDA') s 9.

<sup>12</sup> Such an approach reflects the current approach in Canada, New Zealand and the USA, which makes no formal definitional distinction between direct and indirect discrimination.

*Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'). This definition offers an inclusive approach, which clearly encompasses both direct and indirect discrimination:

**Discrimination** includes:

- (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of nullifying or impairing equality of opportunity or treatment, and
- (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.<sup>13</sup>

The NSW ADA should provide that discrimination occurs when what is done has more than one 'purpose or effect', provided that the discriminatory purpose or effect is substantial.<sup>14</sup> For consistency with current case law, it should also make clear that the respondent's intention or awareness of the discriminatory purpose or effect is not an element of the action.

Work needs to be done to achieve a comprehensive test that offers a much more sophisticated and nuanced understanding of the nature and scope of discriminatory conduct, including behaviours that are based in stereotypes and prejudice. Evidence from psychology indicates that prejudice-based conduct takes different forms depending on the attribute of the person being exposed to the conduct.<sup>15</sup> For example, for many people with disabilities, children and older people, prejudice manifests in pity or low expectations, or in behaviours that are over-protective, patronising, over-managing and that exclude people from exercising agency and legal capacity. This conduct can result in segregation in the name of protection, limited access to the same range of life experiences and opportunities (including work and education) and exclusion from consultation, collaboration, and decision-making in the design and implementation of systems and processes affecting them.

People with other attributes, such as race, similarly experience different forms of prejudice-based behaviour, with long-standing evidence that experiences differ between cohorts within the 'race' definition. For example, people of Asian or Jewish backgrounds are more likely to experience conduct motivated by envy, while people of African or First Nations backgrounds are more likely to experience conduct motivated by fear.

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<sup>13</sup> Recognition in this definition of the discriminatory effect of requirements and conditions reflects the wording of section 5(2) of the SDA (n 5)..

<sup>14</sup> See for example *Disability Discrimination Act 1992* (Cth) s 10.

<sup>15</sup> See, eg, Susan T Fiske et al, 'Category-based and attribute-based reactions to others: Some informational conditions of stereotyping and individuating processes' (1987) 23 *Journal of Experimental Social Psychology* 399; Peter Glick and Susan T Fiske, 'The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism' (1996) 70(3) *Journal of Personality and Social Psychology* 491; Susan T Fiske et al, '(Dis)respecting versus (Dis)liking: Status and interdependence predict ambivalent stereotypes of competence and warmth' (1999) 55(3) *Journal of Social Issues* 473; Amy J C Cuddy, Susan T Fiske and Peter Glick, 'The BIAS map: Behaviors from intergroup affect and stereotypes' (2007) 92(4) *Journal of Personality and Social Psychology* 631.

The one area of discrimination law where (largely successful) attempts have been made to provide greater explanation of the nature of the conduct that is prohibited is sexual harassment law. Decision makers are provided with a much clearer articulation of they are looking for in terms of conduct that is prohibited. Similar work can and should be done to achieve the same level of guidance for decision makers, many of whom have limited experience of the day-to-day experiences of discrimination across the diversity of people for whom protection has been legislated.

This idea has been explored in detail by Banks in her PhD thesis on reforms to discrimination law.<sup>16</sup> Banks concluded that these contemporary understandings of the range of forms that discrimination takes could be incorporated into discrimination law through broader framing:

*Table 1: Nature of discrimination experienced by people with protected attributes*

<b>Attribute</b>	<b>Character of discrimination - conduct that:</b>
<b>All</b>	reflects commonly held stereotyped views of people with that attribute, including by responding negatively to people whose behaviour does not conform to those stereotypes results in barriers to equal opportunity because of deliberate or inadvertent failure to account for the specific needs of particular attribute groups
<b>Race</b>	indicates the person/group is perceived as having different core values indicates the person/group is perceived as less competent indicates the person/group is perceived as less able to fit into a particular setting indicates a view that the person/group poses a threat of some kind
<b>Sex</b>	indicates the person is perceived as weaker is over-protective rejects women being assertive or ambitious rejects men being nurturing or unambitious
<b>Disability</b>	is over-protective indicates that the person is perceived to be less capable of engaging in the full range of activities over-rides a person’s decision-making choices separates or segregates the person from the broader community or group, irrespective of the stated intention of this separation limits a person’s opportunities to demonstrate new skills or capacities indicates a view that the person/group poses a threat of some kind

<sup>16</sup> Robin Banks, *A rose is a rose is a rose: but not all discrimination smells the same. An exploration of the capacity of the psychology of stigma, prejudice and discrimination to enhance discrimination law* (PhD Thesis, University of Tasmania, 2023).

Attribute	Character of discrimination - conduct that:
Age	<p>indicates the person is perceived to be less capable of engaging in the full range of activities</p> <p>over-rides a person’s decision-making choices</p>

The various manifestations of bias, prejudice and discrimination outlined above need to be better dealt with by contemporary discrimination laws.

### 3.8: Intersectional discrimination

**Consultation paper question:**

- (1) Should the ADA protect against intersectional discrimination? Why or why not?
- (2) If so, how should this be achieved?

Yes. The ADA should protect against intersectional discrimination.

There is a fundamental disconnect between the legal framework, which focuses on separate and distinct ‘grounds’ of discrimination, and how people actually experience discrimination in practice, which is multiple and overlapping in nature.<sup>17</sup> Disadvantage is compounded by having multiple protected characteristics; indeed, multiple discrimination, across multiple contexts, affects a substantial proportion of the population.<sup>18</sup> Intersectional discrimination complaints are rare in Australia; the current legal framework means those who bring a discrimination complaint are generally forced to focus on their strongest ground or attribute-based claim.<sup>19</sup> This is inconsistent with individuals’ holistic and authentic identities. As the Australian Capital Territory Law Reform Advisory Council has noted ‘[i]n practice, it can be difficult or inaccurate to try to ascribe to a single attribute the reason for conduct, or the reason for suffering the effect of a requirement.’<sup>20</sup>

There are two reforms that would better accommodate intersectionality in the ADA. Firstly, I recommend adopting tests for all protected grounds that incorporate the nature of discrimination experienced by people with different (and multiple attributes). Second, I reiterate ADLEG’s previous suggestion to this inquiry that NSW adopt a modern style of drafting for the ADA, which does not address different attributes in different parts of the Act.

<sup>17</sup> Alysia Blackham and Jeromey Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43(3) *UNSW Law Journal* 773.

<sup>18</sup> Julia Mansour, ‘Consolidation of Australian Anti-discrimination Laws: An Intersectional Perspective’ (2012) 21(2) *Griffith Law Review* 533, 545.

<sup>19</sup> Alysia Blackham and Jeromey Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43(3) *UNSW Law Journal* 773.

<sup>20</sup> Australian Capital Territory Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report* (Australian Capital Territory, 2015).

Further, I recommend the ADA make explicit provision for claims on the basis of two or more protected characteristics. This could be done by including a provision modelled on section 3.1 of the *Canadian Human Rights Act*, RSC, 1985, c H-6, which says:

For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

Again, consideration should be given to expressly requiring decision makers to consider how multiple attributes can result in different forms of conduct.

### 3.9: Intended future discrimination

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

The NSW ADA should ensure that both future discrimination and discrimination on the basis of future attributes are prohibited. The first of these ensures that proposed conduct can be challenged in advance of the conduct being implemented. This can be particularly important when reversing the impact of the conduct is more costly in time or other resources. For example, a person with disability should be able to challenge a proposal to implement physically inaccessible infrastructure, rather than have to wait until such infrastructure is in place and more costly to remedy.

The second ensures that decisions based on a view or belief that a person will, at some time in the future, have a particular attribute or attributes, can be challenged even where the attribute is not currently present. One pressing example of this is discrimination based on family medical history or a person's genetic data or genomic sequence.

## 4. Discrimination: Protected attributes

### 4.3 Disability discrimination

**Consultation paper question:**

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

I note the recently announced review of the *Disability Discrimination Act 1992* (Cth) (‘DDA’) that will provide an opportunity to modernise the definition of disability in that Act. It would be premature for the NSW review to adopt changes that may be inconsistent with the outcomes of that review.

I also note the commonly expressed view that the definition of disability found in that Act and largely consistent across discrimination laws in Australia is a ‘deficit’ or ‘medical model’ definition. I challenge that view. Rather, it is a definition of a diverse range of physiological differences or impairments. Such a definition is necessary to ensure protection from discrimination for the diversity of people who have or are imputed to have such differences or impairments.

The social model of disability and the more recent human rights model of disability have been important developments in understandings of the experiences of people with physiological differences and supporting advocacy around their marginalisation and exclusion. Neither is, however, a workable definition for the purposes of discrimination law. This is because, under the social model, disability (or ‘being disabled’) is the term used to describe the interactions of societal structures and practices on people with impairments, many of which are forms of discrimination. To require a person to establish that they have disability under the social model would be to add a further element to the test they have to satisfy to succeed with a discrimination claim. They would not only have to demonstrate they have an impairment, but also that they experience disadvantage because of the interaction of that impairment with societal structures and attitudes and that they have been treated less favourably because of that disadvantage. To my knowledge, the current approach to defining disability has not resulted in people being excluded from protection on the basis they have been unable to establish the threshold of having disability. While some early cases may have tested this in relation to drug dependency and learning disorders, this has not been a focus of challenges.

While consideration may usefully be given to whether the language used to describe the diversity of physiological differences can be amended, it is vital that such amendments not be seen to be reducing the range of physiological differences that are encompassed. Another potential risk of fundamental changes to the approach taken to disability discrimination prohibitions is that it would move from an asymmetrical to a symmetrical model, which would not benefit people with disability and would remove the potential to focus on the structural and systemic nature of much of the discrimination experienced by people with disability.

**Consultation paper question:**

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

I note that this exception, found in section 49P of the NSW ADA, is substantively the same as that found in the DDA section 48.<sup>21</sup> Similar provisions are also found in the EOA SA and the ADA Tas, while most other discrimination laws contain a broader public health exception. There is no equivalent or similar provision in the EOA WA.

Other comparable jurisdictions do not have exceptions in similar forms. The *Equality Act 2010* (UK) contains a provision in Schedule 3 permitting discrimination in relation to accepting a donation of blood where the refusal is based on ‘an assessment of the risk to the public’ and requires ‘clinical, epidemiological or other data’ from a reliable source.<sup>22</sup> The *Canadian Human Rights Act (RSC 1985 c.H-6)* has no exception of this sort. The *Human Rights Act 1993* (NZ) contains exceptions for situation where there is a ‘risk of infecting others with an illness.’<sup>23</sup>

The handful of cases that have relied on or referred to NSW Act exception or the federal level have been early cases involving HIV status,<sup>24</sup> immunisation status of children in a child-care setting,<sup>25</sup> and more recently immunisation mandates in respect of the COVID-19 pandemic.<sup>26</sup>

The current NSW provision is a balanced approach to ensuring public health is not compromised in situations of pandemics or other infectious disease risks. The one concern with this current framing is the use of the term ‘reasonable’ which is, arguably, too vague in terms of what are relevant factors to consider. I recommend that consideration be given to including factors that need to be considered when determining whether or not the discrimination was reasonable. This could usefully include urgency of action, severity of risk (both in terms of the way(s) in which the infectious disease is spread and the impact of infection), and available

<sup>21</sup> Similar provisions in other discrimination laws in Australia are *Equal Opportunity Act 1984* (SA) (‘EOA SA’) s 79A, *Anti-Discrimination Act 1998* (Tas) (‘ADA Tas’) s 47. Other discrimination laws have different provisions that are not specific to infectious disease and/or disability: *Discrimination Act 1991* (ACT) (‘DA ACT’) s 56 - a broader public health exception on the ground of disability; *Anti-Discrimination Act 1992* (NT) (‘ADA NT’) s 55 - similar scope to ACT; *Equal Opportunity Act 2010* (Vic) (‘EOA Vic’) s 86(1)(a) - a broader health and safety exception in relation to physical features or disability; *Anti-Discrimination Act 1991* (Qld) (‘ADA Qld’) s 107 – a broader exception relating to acts ‘reasonably necessary to protect public health’ and not limited to particular grounds;

<sup>22</sup> *Equality Act 2010* (UK) sch 3 cl 13.

<sup>23</sup> *Human Rights Act 1993* (NZ) ss 29, 36, 37, 39, 41, 43, 49, 56, 60.

<sup>24</sup> *X v Department of Defence* [1995] HREOCA 16 (29 June 1995); *Sydney Local Health Network v QY and QZ* [2011] NSWCA 412 (20 December 2011). See also, *M v Dental Board of Queensland* [2011] QCAT 373 (10 August 2011); *NC and others v Queensland Corrective Services Commission* [1997] QADT 22 (30 September 1997).

<sup>25</sup> *Beattie (on behalf of Kiro and Lewis Beattie) v Maroochy Shire Council* [1996] HREOCA 40 (20 December 1996).

<sup>26</sup> *Petek v TAFE NSW* [2022] NSWCATAD 105 (25 March 2022); *Abrego v Secretary, Department of Education* [2022] NSWCATAD 145 (5 May 2022). See also, *Kunc v National Australia Bank Limited (Corrected) (Human Rights)* [2024] VCAT 1174 (13 December 2024); *Nicholson v State of Queensland (Department of Education)* [2022] QIRC 271 (13 July 2022); *Kos v Deltapath Pty Ltd* [2024] QCAT 107 (13 March 2024); *Triplow v Leidos SAR Services Pty Ltd* [2024] QIRC 12 (30 January 2024); *Sue Jacobs v Adelaide Theosophical Society Inc (New Dimensions Bookshop)* [2022] FWCFCB 79 (25 May 2022);

treatments for the disease. That said, it should be clear that public health officials should be permitted to apply a precautionary approach to newly emerging infectious diseases.

#### 4.4: Discrimination based on homosexuality

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

The attribute of ‘homosexuality’ defined in ss 4(1) and 49ZF of the ADA includes only male and female homosexuality, or perceived homosexuality. Sexuality is far more diverse than this outdated and narrow definition allows. For instance, bisexuality, where a person is attracted to persons of both the same and opposite sexes; pansexuality, where a person feels sexual attraction towards persons regardless of their sexual orientation; and asexuality, where a person feels little to no sexual attraction to any persons, are not protected under this ground.<sup>27</sup>

People identifying as bisexual, pansexual or asexual, or a more fluid sexuality such as ‘queer’, are left with no protection under the NSW ADA. This is a substantial proportion of the LGBTIQ+ community. In a 2016 study of LGBT students at the University of Western Australia, 7% of respondents self-identified their sexual orientation as asexual, 8.5% as ‘other’ (which included ‘pansexual’), and 22.9% as ‘queer’ or ‘questioning’.<sup>28</sup> Similarly, in a 2017 survey of more than 12,000 LGBTIQ+ teenagers in the United States, 14% of respondents self-identified their sexual orientation as pansexual, 5% as asexual, and 4% as queer.<sup>29</sup>

Proposed reforms in Queensland now provide best practice in prohibiting discrimination on the basis of ‘sexual orientation’. The proposed definition, included in the *Respect at Work and Other Matters Amendment Act 2024* (Qld), defines ‘sexual orientation’ as the ‘person’s capacity, or lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender’.<sup>30</sup> This definition is very similar to the definition adopted in Victoria in 2021<sup>31</sup> except that it also includes a person’s *lack of capacity* for sexual attraction and sexual relations, which offers important protection to persons who identify as asexual.

The NSW ADA should adopt this definition.

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<sup>27</sup> Liam Elphick, ‘Sexual Orientation and “Gay Wedding Cake” Cases Under Australian Anti-Discrimination Legislation’ (2017) 38 *Adelaide Law Review* 149, 180–4.

<sup>28</sup> Duc Dau and Penelope Strauss, *The Experience of Lesbian, Gay, Bisexual, and Trans Students at The University of Western Australia* (2016) <[http://www.hr.uwa.edu.au/\\_data/assets/pdf\\_file/0004/2948530/UWALGBT\\_Report-Final-for-Web.pdf](http://www.hr.uwa.edu.au/_data/assets/pdf_file/0004/2948530/UWALGBT_Report-Final-for-Web.pdf)> 12–13.

<sup>29</sup> Human Rights Campaign, *LGBTQ Youth Report* (2018) <<https://www.hrc.org/resources/2018-lgbtq-youth-report>> 24.

<sup>30</sup> *Respect at Work and Other Matters Amendment Act 2024* (Qld) sch 1, which upon commencement will amend the *Anti-Discrimination Act 1991* (Qld).

<sup>31</sup> *Equal Opportunity Act 2010* (Vic) (‘EOA Vic’) s 4.

## 4.6: Racial discrimination

### Consultation paper question:

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “race”?
- (2) Are any new attributes required to address potential gaps in the ADA’s protections against racial discrimination?

I recommend that the definition of race be an inclusive definition to ensure that people of diverse ethnic and racial backgrounds are protected from discrimination. Though the ADA defines race non-exhaustively and utilises the word ‘includes’ meaning that it is not intended to be limited to only the terms used in the definition, the definition could usefully be expressly expanded to emphasise that characteristics related to race but are not currently explicitly listed such as ancestry, immigration or migration status, language and accent are included.

In its review into Queensland discrimination laws, the Queensland Human Rights Commission recommended expanding the definition of race in the Queensland *Anti-Discrimination Act 1991* (Qld) to include immigration or migration status.<sup>32</sup> While the Report acknowledged that the status could be inferred from the attribute of race, the QHRC noted that in other jurisdictions (specifically the United Kingdom) have concluded that immigration status is not captured for protection under the attribute of race in the *Equality Act 2010* (UK).<sup>33</sup>

## 4.8: Discrimination on transgender grounds

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

Protection of transgender people is important and must remain in the NSW ADA. However, the way that the provision is currently drafted is unduly narrow and lags behind several other Australian jurisdictions<sup>34</sup> in failing to protect gender-diverse and non-binary people from discrimination. Many gender-diverse and non-binary people have gender identities that do not fit within this purported gender ‘binary’. In a 2017 survey of more than 12,000 LGBTIQ+ teenagers, more respondents identified as non-binary or genderqueer/gender non-conforming (n = 2,570) than as being transgender (n = 2,129).<sup>35</sup>

Victoria provides best practice in prohibiting discrimination on the basis of gender identity. In recent amendments which took effect in October 2021, gender identity is now defined as:

a person’s gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical

<sup>32</sup> Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (July 2022) 296-7.

<sup>33</sup> *Taiwo v Olaigbe (and another) and Onu v Akwivu (and another)* [2016] UKSC 31.

<sup>34</sup> Including the ACT, the Commonwealth, South Australia, Tasmania and Victoria.

<sup>35</sup> Human Rights Campaign, LGBTQ Youth Report (2018) <<https://www.hrc.org/resources/2018-lgbtq-youth-report>> 24.

intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.<sup>36</sup>

This definition not only protects people who identify as transgender, but also those who identify as gender-diverse or non-binary. In doing so, it recognises and reflects the gender diversity of the broader LGBTIQ+ community.

The NSW ADA should adopt this definition.

## 4.9: Extending existing protections

### **Consultation paper question:**

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

See response above in respect of future discrimination.

### **Consultation paper question:**

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

It is important to understand that the prejudice, stigma and discriminatory conduct directed at people with protected attributes is not uncommonly also experienced by people who are related to or associated with people who have or are assumed to have a protected attribute.

Given a core purpose of discrimination law is to protect people against decisions or actions based on irrelevant characteristics and stereotyped views of people with those characteristics, it is important to ensure that the stigma and prejudice attaching to those who are relatives or associates of people with such characteristics are also protected.

Such protection exists under the ADA Tas and has been an important aspect of challenging prejudice-based behaviour, including in relation to associates of people in respect, for example, of political belief and irrelevant criminal record. Discrimination against associates is clearly an unjustified limitation on a person's equality rights and should be clearly encompassed within the protections of discrimination law. This protection is most effectively achieved by having a catch-all attribute for associates as is found in the ADA Tas at section 16(s): 'association with a person who has, or is believed to have, any of these attributes'. The ADA NT has very similar protection in section 19(r). Similar but narrower protection is found, for example, in the EOA 2010 (Vic) in section 6(q). This protection is narrower in that it does not include protection of a person who is believed to have an attribute. For this reason, the Tasmanian approach is preferred.

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<sup>36</sup> *Equal Opportunity Act 2010* (Vic) ('EOA Vic') s 4.

## 5. Discrimination: Potential new protected attributes

### 5.2 Potential new attributes

**Consultation paper question:**

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

The ADA NSW should provide protection against discrimination on a range of additional attributes to bring it into line with the protections available to people in other states and territories of Australia.

At minimum, this should include the following attributes:

- religious belief, affiliation and activity,
- political belief, affiliation and activity,
- criminal record, including an record under historical homosexual and related offence provisions,
- genetic characteristics,
- medical record,
- industrial activity,
- gender identity,
- variations of sex characteristics,
- location,
- lawful sexual activity,
- employment and accommodation status, and
- being subjected to domestic violence or family violence.

The following table provides an overview of recommendations from previous reviews and amendments to discrimination laws in relation to attributes covered.

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
accommodation status, including homelessness	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(a)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(ea)</p>	<p>Julian Gardner, <i>An Equality Law for a fairer Victoria: Equal Opportunity Review final report</i> (State of Victoria, Department of Justice, June 2008) rec 46.</p> <p>ACT Law Reform Advisory Committee, <i>Review of the Discrimination Act 1991 (ACT): Final report</i> (2015) 78–79.</p> <p>Department of Attorney-General and Justice (Northern Territory), <i>Discussion Paper: Modernisation of the Anti-Discrimination Act</i> (Government of the Northern Territory, September 2017) Q6.</p> <p>Queensland Human Rights Commission, <i>Review of Queensland’s Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q38.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 126.</p>
association with a person with a protected attribute	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(c)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(r)</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(p)</p> <p><i>Equal Opportunity Act 1984</i> (SA) s 29(2)(d), (2a)(d), (3)(d), (4)(d), 51(d), 66(f), 85A(d), 85T(2)(d), (4)(d), (5), (6)(d), (7)(d), (8)(d)</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(s)</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(q) (personal association’)</p>	<p>Scrutiny of Acts and Regulations Committee, Parliament of Victoria, <i>Review of the Equal Opportunity Act 1984: Final Report</i> (1993) rec 8.</p> <p>Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) recommended.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 125.</p>
citizenship		<p>Considered in Attorney-General’s Department (Commonwealth), <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> (Government of Australia, September 2011)</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
criminal record	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(k) ('irrelevant criminal record')</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(q) ('irrelevant criminal record'); (qa) ('person's details being published under section 66M of the <i>Fines and Penalties (Recovery) Act 2001</i>')</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(q) ('irrelevant criminal record')</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(pb) ('spent conviction')</p> <p><i>Equal Opportunity Act 1984</i> (WA) pt IV ('publication of relevant details of persons on Fines Enforcement Register's website')</p>	<p>Julian Gardner, <i>An Equality Law for a fairer Victoria: Equal Opportunity Review final report</i> (State of Victoria, Department of Justice, June 2008) rec 48.</p> <p>Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q30.</p> <p>Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) recommended.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 121.</p>
scope of 'disability' protection	<p><i>[DDA re assistance animals, ADA Tas re guide dogs, EOA Vic re assistance dogs</i></p>	<p>Consideration given to extending the definition of disability to include 'medically recognised symptoms where the underlying cause is unknown' and 'genetic predisposition' in Attorney-General's Department (Commonwealth), <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> (Government of Australia, September 2011)</p> <p>Julian Gardner, <i>An Equality Law for a fairer Victoria: Equal Opportunity Review final report</i> (State of Victoria, Department of Justice, June 2008) rec 52.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 6.2.</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
subjected to domestic violence or family violence	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(x)  <i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(jb)  ('subjected to domestic violence')</p>	<p>ACT Law Reform Advisory Committee, <i>Review of the Discrimination Act 1991 (ACT): Final report</i> (2015) 77-78.  Department of Attorney-General and Justice (Northern Territory), <i>Discussion Paper: Modernisation of the Anti-Discrimination Act</i> (Government of the Northern Territory, September 2017) Q5.  Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q37.  Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 128.</p>
employment activity	<p><i>Equal Opportunity Act 2010</i> (Vic) s 6(c)</p>	<p>Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q33.</p>
employment status	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(f)  <i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(eb)</p>	<p>ACT Law Reform Advisory Committee, <i>Review of the Discrimination Act 1991 (ACT): Final report</i> (2015) 78-79.  Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 120.</p>
expunged homosexual conviction	<p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(pa)  (irrelevant criminal record is defined as including 'expunged homosexual conviction')  <i>Equal Opportunity Act 2010</i> (Vic) s 6(pa)</p>	<p>Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q30.</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
gender identity	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(g)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(ba)</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(m)</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(ea)</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(d)</p>	
genetic condition or similar	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(h) ('genetic information')</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(e) (disability, defined as including genetic predisposition)</p>	<p>Consideration given to extending the definition of disability to include 'genetic predisposition' in Attorney-General's Department (Commonwealth), <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> (Government of Australia, September 2011)</p>
immigration status	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(i)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(a) (race, which is defined as including 'that the person is or has been an immigrant')</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(a) (race, which is defined as including the 'status of being, or having been an immigrant')</p>	<p>ACT Law Reform Advisory Committee, <i>Review of the Discrimination Act 1991 (ACT): Final report</i> (2015) 81.</p> <p>Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q32.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 127.</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
industrial activity	<i>Discrimination Act 1991</i> (ACT) s 7(1)(j) <i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(k) ('trade union or employer association activity') <i>Anti-Discrimination Act 1991</i> (QLD) s 7(i) ('trade union activity') <i>Anti-Discrimination Act 1998</i> (Tas) s 16(l) <i>Equal Opportunity Act 2010</i> (Vic) s 6(f)	Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i> , Discussion Paper No Project 111 (2021) 119..
intersectionality		Considered in: Attorney-General's Department (Commonwealth), <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> (Government of Australia, September 2011) Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q7.
kinship responsibilities	<i>Discrimination Act 1991</i> (ACT) s 7(1)(l)	ACT Justice and Community Safety Directorate, <i>Inclusive, progressive, equal: Discrimination law reform: Discussion paper 1: Extending the protections of discrimination law</i> (ACT Government, October 2021)
language, including sign language	<i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(ab)	
lawful sexual activity	<i>Anti-Discrimination Act 1991</i> (QLD) s 7(l) <i>Anti-Discrimination Act 1998</i> (Tas) s 16(d) <i>Equal Opportunity Act 2010</i> (Vic) s 6(g)	Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i> , Discussion Paper No Project 111 (2021) 124.

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
location/place of residence		Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) ‘place of residence’ not recommended.
medical record and related	<p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(p) (‘irrelevant medical record’), (ja) (‘HIV/hepatitis status’)</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(ja) (‘HIV/hepatitis status’)</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(r) (‘irrelevant medical record’)</p>	<p>Consideration given to extending the definition of disability to include ‘medically recognised symptoms where the underlying cause is unknown’ and ‘genetic predisposition’ in Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) including workers’ compensation history recommended;</p> <p>Attorney-General’s Department (Commonwealth), <i>Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper</i> (Government of Australia, September 2011);</p> <p>Queensland Human Rights Commission, <i>Review of Queensland’s Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q31;</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 122.</p> <p>Recommendation to include HIV status as a protected ground in the South Australian Act: Brian Martin, <i>South Australia: Legislative review of the Equal Opportunity Act 1984: Report of Brian Martin</i> (October 1984) #3(ii).</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
physical features	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(m)</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(j)</p>	<p>Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) recommended.</p> <p>Queensland Human Rights Commission, <i>Review of Queensland's Anti-Discrimination Act: Discussion Paper</i> (November 2021) Q34.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 118.</p>
political belief, affiliation and activity	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(n) ('political conviction')</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(n) ('political opinion, affiliation or activity')</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(j) (political belief or political activity')</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(m) ('political belief or affiliation'); s 16(n) ('political activity')</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(k) ('political belief or activity')</p> <p><i>Equal Opportunity Act 1984</i> (WA) s 53 ('political conviction')</p>	<p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 114.</p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
profession, trade, occupation, or calling	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(p)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(ec) ('employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work')</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(l) ('sex work activity')</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(la) ('profession, trade or occupation')</p>	
religious belief, affiliation and activity	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(t) ('religious conviction' defined to include 'cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people' and engaging in these)</p> <p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(m) ('religious belief or activity')</p> <p><i>Anti-Discrimination Act 1991</i> (QLD) s 7(i) ('religious belief or religious activity')</p> <p><i>Anti-Discrimination Act 1998</i> (Tas) s 16(o) ('religious belief or affiliation'); s 16(p) ('religious activity')</p> <p><i>Equal Opportunity Act 2010</i> (Vic) s 6(n)</p> <p><i>Equal Opportunity Act 1984</i> (WA) s 53 (religious conviction')</p>	<p>Change to scope of religious protection recommended in ACT Justice and Community Safety Directorate, <i>Inclusive, progressive, equal: Discrimination law reform: Discussion paper 1: Extending the protections of discrimination law</i> (ACT Government, October 2021). Similar was included in recommendation 38 of the NSW Law Reform Commission, <i>Report 92 (1999) - Review of the Anti-Discrimination Act 1977 (NSW)</i>. Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 114.</p>
sex characteristics	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(v)</p>	<p>ACT Law Reform Advisory Committee, <i>Review of the</i></p>

Protected attributes	Other Acts	Examined/recommended previous law reform inquiry
	<p><i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(ca) <i>Anti-Discrimination Act 1991</i> (QLD) s 7(o) <i>Anti-Discrimination Act 1998</i> (Tas) s 16(eb) <i>Equal Opportunity Act 2010</i> (Vic) s 6(oa)</p>	<p>Discrimination Act 1991 (ACT): <i>Final report</i> (2015) 82. Department of Justice (Tas), <i>Review of the Complaints Handling and Dispute Resolution Provisions of the Anti-Discrimination Act 1998: Final Report (Recommended Position Paper)</i> (Government of Tasmania, September 2009) pos 35.</p>
<p>sexual orientation:            (a) heterosexuality            (b) homosexuality            (c) bisexuality            (d) emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender, a different gender or more than one gender</p>	<p><i>Discrimination Act 1991</i> (ACT) s 7(1)(w) ('sexuality' defined as including (a), (b) and (c))  <i>Anti-Discrimination Act 1992</i> (NT) s 19(1)(c) (defined similar to (d))  <i>Anti-Discrimination Act 1991</i> (QLD) s 7(n) (defined as including (a), (b) and (c))  <i>Equal Opportunity Act 1984</i> (SA) pt 3 (not defined)  <i>Anti-Discrimination Act 1998</i> (Tas) s 16(c) (defined as including (a), (b) and ©)  <i>Equal Opportunity Act 2010</i> (Vic) s 6(p) (defined similar to (d))  <i>Equal Opportunity Act 1984</i> (WA) s 35O (defined as including (a), (b) and (c))  <i>Sex Discrimination Act 1984</i> (Cth) s 5A (defined as including (a), (b) and (c))</p>	<p>Scrutiny of Acts and Regulations Committee, Parliament of Victoria, <i>Review of the Equal Opportunity Act 1984: Final Report</i> (1993) rec 4.</p>

<b>Protected attributes</b>	<b>Other Acts</b>	<b>Examined/recommended previous law reform inquiry</b>
socio-economic status / social origin		<p>Equal Opportunity Commission (WA), <i>Review of the Equal Opportunity Act 1984: Report</i> (Commissioner for Equal Opportunity, May 2007) social origin including profession, occupation, trade or calling recommended.</p> <p>Julian Gardner, <i>An Equality Law for a fairer Victoria: Equal Opportunity Review final report</i> (State of Victoria, Department of Justice, June 2008) rec 47.</p> <p>Department of Attorney-General and Justice (Northern Territory), <i>Discussion Paper: Modernisation of the Anti-Discrimination Act</i> (Government of the Northern Territory, September 2017) Q8.</p> <p>Law Reform Commission of Western Australia, <i>Review of the Equal Opportunity Act 1984 (WA)</i>, Discussion Paper No Project 111 (2021) 123.</p>

## 6. Discrimination: Areas of public life

### 6.1: Discrimination at work – coverage

**Consultation paper question:**

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

Protection against all forms of discrimination should extend to volunteers and others in unpaid work (such as work placements and interns). There is no good reason to exclude volunteers who are engaged in the work or activities of an organisation from this protection. Extending such protection is consistent with legislation in other jurisdictions, and other workplace protections including workplace health and safety protections.<sup>37</sup>

### 6.3: Discrimination in education

**Consultation paper question:**

- (1) What changes, if any, should be made to the definition and coverage of the protected area of “education”?
- (2) What changes, if any, should be made to the exceptions relating to: (a) single-sex educational institutions? and (b) disability and age discrimination in educational institutions?

I endorse the submission of Dr Peta Spyrou in respect of the issues raised in relation to education.

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<sup>37</sup> See, for example, *Anti-Discrimination Act 1998* (Tas).

## 7. Wider exceptions

### 7.1: Religious personnel exceptions

**Consultation paper question:**

- (1) Should the ADA provide exceptions for:
  - (a) the training and appointment of members of religious orders?
  - (b) “the appointment of any other person in any capacity by a body established to propagate religion”?
- (2) If so, what should these exceptions cover and when should they apply?

The ADA should retain exceptions for the training and appointment of members of religious orders. These are uniform exceptions that are found in near-identical language in all other Australian discrimination laws, and they are appropriately targeted to core religious practices for core religious institutions. They should be retained as defences to claims of unlawful conduct under NSW discrimination law.

Section 56(c) of the NSW ADA should be amended. While the ADA should retain an exception for the appointment of persons to religious bodies, it should be limited to the exercise of duties or functions by those persons for, or in relation to, religious observance or practice. The exception as it is currently drafted in the ADA is unnecessarily broad, applying to the appointment of persons *in any capacity*. Limiting the exception to religious practice and observance will bring the ADA in line with provisions in other Australian discrimination laws<sup>38</sup> and it ensure it is appropriately targeted to core religious practices for core religious institutions.

As noted at [7.22] of the Consultation Paper, the current drafting of section 56(c) is broad enough that it might encompass the appointment of a person to a role the functions of which do not have a religious character. There is also the possibility for overlap between this provision and other exceptions for private educational authorities. In the interests of ensuring both that the provision is appropriately adapted to the purpose of protecting core religious practices and that the legislation is clear and comprehensible, section 56(c) should be limited to the appointment of people to perform functions relating to religious observance or practice and separate provisions should be included in the ADA to address exceptions to the prohibition on discrimination by religious educational institutions. The form and content of such exceptions will be addressed in the next section.

### 7.2: Other acts and practices of religious bodies

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

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<sup>38</sup> See for example *Anti-Discrimination Act 1998* (Tas) s 52(c), *Anti-Discrimination Act 1991* (ACT) s 32(c), *Equal Opportunity Act 1984* (WA) s 72(c), *Equal Opportunity Act 2010* (Vic), s 82(1)(c).

The questions in the Consultation Paper pertaining to religious body and religious educational institution exceptions [7.2, 7.5 and 7.6] are best dealt with together.

Religious body and religious educational institution exceptions in discrimination laws should only be permitted where they can be justified when balanced with the fundamental rights and freedoms of others. International human rights law requires that discriminatory conduct not be permitted unless there is a legitimate purpose for the discriminatory conduct, and the means by which that purpose is achieved is proportionate.

The current exceptions for religious bodies and private educational authorities within the ADA do not adopt this approach. As noted in ADLEG's preliminary submission, the NSW ADA is a clear example of a discrimination statute with a proliferation of exceptions to coverage that undermine its credibility, compromises its normative effect and, most importantly, exposes marginalised people to discrimination. For example, it is still permissible in NSW for private educational authorities to discriminate against students with disability, students who are unmarried (or living with a same-sex partner) and students who are (or are perceived to be) homosexual or transgender.<sup>39</sup>

Reforms recently introduced to the *Equal Opportunity Act 2010* (Vic) adopt the preferred international human rights law approach. These reforms narrowed and/or removed general exceptions to the prohibition of discrimination for religious bodies, religious educational institutions and religious individuals and replaced them with specific exceptions as follows;

- Allow religious schools to discriminate on the ground of the religion of the prospective student in the admission of students, but not at any later stage.<sup>40</sup> This limitation protects the right of religious schools to build a community of faith through the admission of its students.
- Allow religious bodies to discriminate in relation to the employment of a person in a particular position, but only where conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an *inherent requirement* of that position *and* the employee or prospective employee cannot meet those inherent requirements because of their religious belief or activity.<sup>41</sup>
  - As noted in the second reading speech to the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic), the inherent requirement test 'is a well-understood concept used in almost all discrimination legislation across Australia, as well as internationally'.
  - The test of 'inherent requirement' enables religious schools to be flexible when determining the extent to which conformity to religious belief is necessary for different roles within each school, but it is a concept to be assessed *in practice*. This means that religious schools cannot circumvent the prohibition on

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<sup>39</sup> See sections 38A, 38K(3), 46A, 49L(3)(a), 49ZF and 49ZO(3).

<sup>40</sup> *Equal Opportunity Act 2010* (Vic) s 39. See also *Anti-Discrimination Act 1998* (Tas) s 51A.

<sup>41</sup> *Equal Opportunity Act 2010* (Vic) s 83A. See also *Anti-Discrimination Act 1998* (Tas) s 51.

discrimination in employment by describing conformity to religious belief as an inherent requirement within *every* job description.

- Even if the inherent requirement test is satisfied, it is still unlawful under this provision for a religious school to discriminate against an employee because they have a protected attribute that is inconsistent with the doctrines of the religion of the religious body. Lawful discrimination is limited to situations in which employees or prospective employees cannot meet the inherent requirements of a role because of their own religious beliefs or activities.
- Allow the government-funded provision of goods and/or services by religious bodies to discriminate on the basis of the religious belief or activity of the person seeking goods or services, where that discrimination conforms with the doctrines, beliefs or principles of the provider's religion or where the discrimination is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>42</sup>
- Allow the non-government-funded provision of goods and/or services by religious bodies to discriminate on multiple grounds, including sexual orientation and gender identity (of the person seeking goods or services) where that discrimination conforms with the doctrines, beliefs or principles of the provider's religion or where the discrimination is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>43</sup>
- Require that *all conduct* permitted by these exceptions be reasonable and proportionate.<sup>44</sup>

The reasonable and proportionate test provides an objective basis to assess whether the action proposed to be taken is just or unjust and includes consideration of the consequences to the person who is being discriminated against and the rights of the religious body. This in turn allows discrimination law to strike an appropriate balance between the right to equality and the right to religious belief.

Unlike Victoria, Tasmanian discrimination law draws no distinction between government funded goods and services and non-government funded goods and services. This position is preferable. There is no justified reason why, for instance, it should be permissible to discriminate against LGBTIQ+ people in the provision of certain goods and services but not others. The principled position is that such discrimination should not be permitted regardless of whether the provision of those goods and service is government-funded or not.

New South Wales has the opportunity to take these reforms even further, by combining the most effective and principled parts of the respective Victorian and Tasmanian approaches and thereby become the new best practice jurisdiction on religious body defences to unlawful conduct allegations.

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<sup>42</sup> *Equal Opportunity Act 2010* (Vic) s 82B.

<sup>43</sup> *Equal Opportunity Act 2010* (Vic) s 82(2).

<sup>44</sup> See, for example, *Equal Opportunity Act 2010* (Vic) ss 82B(e), 83A(1)(c), s 82(2) and s 83(2).

In doing so, the NSW ADA can appropriately reflect international human rights law and adopt targeted defences allowing religious organisations to discriminate on the basis of religion (but no other grounds) where religion is inherent to the conduct in question and the conduct is both reasonable and proportionate.

I recommend that the religious body and religious educational institution defences (exceptions) in the NSW ADA:

- require that conduct be reasonable and proportionate in order to be permitted under religious body and religious educational authority exceptions;
- require that discrimination only be permitted on the ground of the religion of the employee, prospective employee, student or service user under religious body and religious educational authority exceptions, and not on the basis of any other grounds;
- require that employment discrimination only be permitted under religious body and religious educational authority defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those inherent requirements because of the person's religion; and
- only permit religious educational authorities to discriminate against students on the basis of the student's religion at the point of admission, and not at any later stage.

### 7.3: Exceptions for other forms of unlawful conduct

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

Religious exceptions in the ADA should only apply to discrimination. While individuals, religious bodies and religious educational institutions must be free to express their genuine religious beliefs, this should not extend to a right to harass, victimise or vilify others on the basis of any protected attribute.

If note the discussion in the Consultation Paper at [7.65] and [7.66] of the role that exceptions might play in protecting genuine religious teaching and religious freedom. However, these concerns are best addressed through the implementation of a general exception to the prohibition on vilification that excludes liability for conduct that is done for a legitimate purpose, reasonably and in good faith. Such a general exception would strike an appropriate balance between protection from harmful conduct and free speech, without the need for a specific exemption for religious institutions.<sup>45</sup>

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<sup>45</sup> See for example *Racial Discrimination Act 1975* (Cth) s 18D.

## 7.4: Exceptions for providers of adoption services

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

In respect of adoption, the best interests of the child are paramount. There may be circumstances in which it is appropriate for providers of adoption services to engage in discrimination to ensure the suitability of a child's placement.<sup>46</sup> However, that discrimination should only be permissible where it is reasonable and proportionate for ensuring the best interests of the child and not where it occurs because of the religion of the service provider. On that basis, section 59A of the ADA should be repealed.

## 7.5: Private educational authorities employment exceptions

**Consultation paper question:**

- (1) Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?
- (2) If you think the Act should provide exceptions in this area:
  - (a) what attributes should the exceptions apply to?
  - (b) what requirements, if any, should duty holders meet before an exception applies?

See response to [7.2] above.

## 7.6: Discrimination against students and prospective students

**Consultation paper question:**

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

**Consultation paper question:**

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

See response to [7.2] above.

## 7.9: Voluntary bodies exception

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

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<sup>46</sup> See for example the exception in *Discrimination Act 1991* (ACT), s 25A.

The ADA NSW should not provide an exception for voluntary bodies. There is no clear rationale for exceptions for voluntary bodies.

### **7.11: The statutory authorities exception**

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

No, the ADA NSW should not provide an exception for acts done under statutory authority.

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# 11. Promoting substantive equality

## 11.1: Adjustments

### Consultation paper question:

- (1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?
- (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?

A positive duty to provide adjustments should apply in relation to accommodating another person's particular needs arising from one or more of any protected attribute under the Act, as has been provided under section 74 of the *Discrimination Act 1991* (ACT). The failure to provide an adjustment, for any reason, should be unlawful under the ADA and be able to be the basis, on its own, of a complaint of unlawful conduct.

A positive duty to provide adjustments would orient the ADA towards the achievement of substantive equality and be more consistent with the modern approach to discrimination law as adopted, for example in the UN *Convention on the Rights of Persons with Disabilities*.

I note the proposal in the recently announced review of the *Disability Discrimination Act 1992* (Cth) that such adjustments simply be referred to as 'adjustments' rather than 'reasonable adjustment', a term that causes confusion. This issue was considered by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('the Disability Royal Commission') with Senior Counsel assisting, Kate Eastman SC submitting:

... the adjective 'reasonable' is completely irrelevant in terms of the way the law is applied in Australia in the DDA. So a reasonable adjustment is any adjustment that does not impose unjustifiable hardship on the employer. It's got nothing to do with the reasonableness of the way somebody might behave, the way somebody might act, or whether an employer thinks what they have done is reasonable.<sup>47</sup>

Disability Royal Commission Chair Ronald Sackville QC noted concern about the continuing confusion about 'reasonable' in terms of adjustments or accommodations, stating:

... under the Act, 'an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person'.

The provisions in discrimination laws dealing with these adjustments could usefully exclude the word 'reasonable' and simply refer to the obligation to make those adjustments needed in a particular case, to ensure to persons do not experience discrimination of any kind in the circumstance, and that the obligation must be fulfilled up to the point of unjustifiable hardship. That is the fact that fully adjusting, or adopting one form of adjustment would impose an

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<sup>47</sup> Transcript of Proceedings, Public hearing 19: Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 22 November 2021) 44–45 (emphasis added).

unjustifiable hardship should not preclude a different or modified adjustment being made where it would not impose unjustifiable hardship and would go as far as possible to achieving a non-discriminatory arrangements.

I recommend that the ADA be amended to incorporate a stand-alone duty to provide adjustments in respect of all protected attributes and that the term used should be ‘adjustments’, rather than ‘reasonable adjustments’ or ‘accommodations’. I recommend that consideration be given to amending the ADA to include the following drafting (based on section 24 of the DA ACT):

**B Failure to accommodate need arising as a result of an attribute**

- (1) In addition to the obligations under section Z [Discrimination by failing to provide adjustments for people with impairments], for the purposes of the Act a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an attribute if:
- (a) because of the attribute, the aggrieved person requires adjustments; and
  - (b) the discriminator does not make, or proposes not to make, adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make adjustments and the attribute of the aggrieved person.

- (2) For the purposes of subsection (1):
- (a) a failure or refusal to make an adjustment for a ~~special~~ need of another person includes making inadequate or inappropriate provision to accommodate the ~~special~~ need; and
  - (b) a failure make an adjustment takes place when a person acts in a way which unreasonably fails to provide for the ~~special~~ need of another person if that other person has the ~~special~~ need because of an attribute.
- (3) Whether a person has unreasonably failed to provide for the ~~special~~ need of another person depends on all the relevant circumstances of the case including, but not limited to:
- (a) the nature of the ~~special~~ need; and
  - (b) the cost of making the adjustment for the ~~special~~ need and the number of people who would benefit or be disadvantaged by making the adjustment; and
  - (c) the financial circumstances of the person; and
  - (d) the disruption that making the adjustment for the ~~special~~ need may cause;
  - (e) the nature of any benefit or detriment to all persons concerned; and

(f) the important public purpose of eliminating discrimination.