

NSW Law Reform Commission's Review of the *Anti-Discrimination Act 1977*

29 August 2025

OUTLINE OF SUBMISSIONS IN RESPONSE TO CONSULTATION PAPER

NSW BUSINESS CHAMBER LIMITED AND AUSTRALIAN BUSINESS INDUSTRIAL

NSW Business Chamber Limited (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the *Industrial Relations Act 1996* (NSW), as well as a recognised organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

For nearly 200 years BNSW has been advocating to create a better NSW and Australia by representing the needs of businesses to create the economic conditions that allow our members to grow and drive NSW and the nation forward.

Australian Business Industrial (**ABI**) is the industrial relations affiliate of BNSW.

ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State and Federal tribunals.

Both ABI and BNSW work closely with members, partners, stakeholders, local, state and federal government to advocate for practical policy solutions to ensure Australian businesses of all sizes can prosper.

1. RELEVANT BACKGROUND

Commencement of the Review

- 1.1 In June 2023, the NSW Attorney General asked the NSW Law Reform Commission (**the NSWLR Commission**) to review and report on the *Anti-Discrimination Act 1977* (NSW) (**ADA**) in accordance with the terms of reference issued by the Attorney-General (**the Review**).¹
- 1.2 The Review is being conducted in two parts:
- (a) Part 1 focuses on the conduct that is prohibited under the ADA.
 - (b) Part 2 considers issues relating to the procedures for enforcing the ADA.

Part 1 – Conduct that is Prohibited under the ADA

- 1.3 In May 2025, the NSWLR Commission published its first consultation paper in the Review entitled: *“Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct”* (**Consultation Paper**).
- 1.4 The Consultation Paper emphasises the reference to the ‘modernisation’ and ‘simplification’ of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) with a view to *“better promote the equal enjoyment of rights and reflect contemporary community standards”*.²
- 1.5 The Consultation Paper targets four areas:³
- (a) the types of acts and conduct that should be prohibited, and the circumstances in which the prohibition should apply;
 - (b) the people and groups who should be entitled to the ADA’s protections;
 - (c) the people and organisations who should be held responsible for unlawful conduct, and when (if ever) their actions should be exempt from the ADA, and

¹ Law Reform Commission Act 1967 (NSW) s 10. See “Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct” (NSW Law Reform Commission, Consultation Paper 24, May 2025) ix (**Consultation Paper**).

² Consultation Paper, 2.

³ Consultation Paper, 4.

(d) whether the ADA should do more to promote substantive equality.

- 1.6 At the outset of the Consultation Paper, the NSWLR Commission emphasises that the options and issues presented do not represent final views about positions or recommendations: they are raised “*for the purpose of discussion only*”.⁴
- 1.7 Many of the options for reform set out in the Consultation Paper were informed by development in discrimination law in other states, territories and at the federal level.⁵
- 1.8 Recommendations will be set out in a Final Report presented to the NSW Attorney-General.

Part 2 - Enforcement

- 1.9 The next stage of the Review will commence once submissions in relation to Part 1 have closed.

Submissions

- 1.10 Interested parties were invited to file submissions by 15 August 2025.
- 1.11 On 8 August 2025, the NSWLR Commission granted ABI an extension to file its submission by Friday, 29 August 2025.
- 1.12 ABI and BNSW thank the NSWLR Law Reform Commission for the opportunity to participate in the Review.

⁴ Consultation Paper, 4.

⁵ Consultation Paper, 4.

2. INTRODUCTION

- 2.1 Consistent with Australia's federal structure, Australian discrimination law is not uniform. Multiple pieces of legislation address, and seek to protect against, discrimination, adverse action and harassment. Federal, state and territory laws regulate lawful and unlawful discriminatory conduct.⁶ The often overlapping but distinct and numerous legislation constitutes a complex legislative framework in which businesses operate, especially those with national operations.
- 2.2 A number of the questions in the Consultation Paper propose aligning the ADA with approaches taken in different state, territory and federal jurisdictions. For example, it asks whether the definition of 'sexual harassment' in the ADA should be aligned with the definition which appears in the *Sex Discrimination Act 1984* (Cth). Another suggested approach is to incorporate 'future discrimination' into the definition of discrimination in the ADA, as found in other jurisdictions.⁷
- 2.3 Taking steps to harmonise the anti-discrimination laws across the different state, territory and federal jurisdictions would generally greatly assist with reducing part of the complexity which businesses face. It is an appropriate area of focus in Part 1 of the Review.
- 2.4 In the pursuit of 'modernisation' and 'simplification', however, care must be taken to ensure that any recommendations do not extend beyond alignment with other jurisdictions, where relevant. To do so would embed uncertainty into the protections and obligations set out in the ADA. Caution should be taken with respect to the proposals that:

⁶ For example, see the Fair Work Act 2009 (Cth) (FW Act), Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), Australian Human Rights Commission Act 1986 (Cth), Anti-Discrimination Act 1977 (NSW), Equal Opportunity Act 2010 (VIC), Anti-Discrimination Act 1991 (QLD), Equal Opportunity Act 1984 (WA), Equal Opportunity Act 1984 (SA), Anti-Discrimination Act 1998 (TAS), Discrimination Act 1991 (ACT) and Anti-Discrimination Act (NT).

⁷ See: Discrimination Act 1991 (ACT) s 8(2); Equal Opportunity Act 2010 (Vic) s 8(1); Anti Discrimination Act 1992 (NT) s 20(2); Anti-Discrimination Act 1991 (Qld) s 10(1); Age Discrimination Act 2004 (Cth) s 14.

- (a) go beyond alignment of the ADA with legislative provisions in other jurisdictions and propose extension of such provisions to contexts not previously contemplated in discrimination legislation; and
- (b) seek to cover the field of possible prohibitions by inserting open-ended lists of protected attributes into the ADA.⁸

2.5 ABI and BNSW will amplify its submissions below by addressing five issues:

- (a) Issue 1: The general need for certainty in the law.
- (b) Issue 2: Protection against future discrimination.
- (c) Issue 3: Extending existing protections in relation to possible future protected attributes.
- (d) Issue 4: A non-exhaustive list of protected attributes.
- (e) Issue 5: A general positive duty to prevent unlawful conduct.

⁸ See e.g, Question 5.3 of the Consultation Paper.

3. ISSUE 1: THE GENERAL NEED FOR CERTAINTY IN THE LAW

- 3.1 The importance of legal certainty is not merely a practical preference for employers and businesses, but a foundational principle to the concept of the rule of law. Not only is certainty necessary for persons (including legal persons such as corporations) in the conduct of commercial and personal activity, basic norms of justice require that persons know (or can find out) prospectively what conduct is or is not proscribed or unlawful. Uncertainty undermines commercial activity and the rule of law if persons are unsure of what is lawful. The proposed extensions beyond mere alignment with existing law endangers that certainty.
- 3.2 The principle of, and desire for, legal certainty has been considered in case law and other sources. Some examples include as set out below:
- (a) In the decision of *Coco v The Queen*⁹, the High Court stated that the most satisfactory means of manifesting a legislative intent is by express and specific words - *“The courts do not impute to the legislature an intention to interfere with fundamental rights... in the absence of unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.”*¹⁰ The decision reinforces the principle that any significant change to legal rights or obligations must be made in clear and certain terms.
 - (b) The then Chief Justice of the Federal Court, Allsop CJ has stated extra-curially that *“Certainty is often seen (and rightly so) as a natural goal for a civilised legal system”*¹¹, *“the need for certainty is part of the human search for order and security... In order to regulate the use of power – a fundamental aspect of the*

⁹ (1994) 179 CLR 427.

¹⁰ As above at [10].

¹¹ Allsop J, 'Uncertainty as Part of Certainty: Appreciating the Limits of Definitional Clarity and Embracing the Uncertainty Inherent in Any Matter of Complexity', 23 August 2018.

law – lawyers and jurists often seek to impose certainty through the reduction of legal principle into textually expressed statements of logical rules.”¹².

3.3 Basic norms of justice require that law, enforcement of which is backed by the State’s monopoly on the use of lawful force, be grounded in express certainty. Legal certainty is:

- (a) widely regarded as a crucial goal of the law (i.e. to be able to rely on the law to regulate behaviour);
- (b) integral to a just legal order, because if persons (including corporations) cannot predict with reasonable confidence what the law requires, a person’s ability to comply with the law is seriously undermined in circumstances where the person is exposed to legal liability;
- (c) necessary to provide consistent and reliable guidance as to what is or is not lawful.

3.4 When legislative standards become speculative, for example, requiring compliance based on possible future events, or perceived intentions, there is a real risk of creating a potential situation where employers are left to navigate unclear expectations, unbounded liability and further complexity.

3.5 Without legal certainty, there is a genuine risk that:

- (a) Compliance becomes impractical (i.e. there is no clear standard to meet);
- (b) Risk management is undermined, as employers cannot predict how laws will be applied;
- (c) Overcorrection and defensive practices may occur, harming both business efficiency and inclusive employment outcomes.

Some of the questions and issues raised in the Consultation Paper, if considered without regard to the fundamental principle of legal certainty, risk creating uncertainty and imposing liability unjustly.

¹² Allsop J, ‘Uncertainty as Part of Certainty: Appreciating the Limits of Definitional Clarity and Embracing the Uncertainty Inherent in Any Matter of Complexity’, 23 August 2018.

4. ISSUE 2: PROTECTION AGAINST FUTURE DISCRIMINATION

- 4.1 The Consultation Paper asks: Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?¹³
- 4.2 The ADA currently does not make unlawful conduct which has not yet occurred.¹⁴
- 4.3 Typically, a complaint can only be made after an actual contravention of the Act has occurred.
- 4.4 We agree the tests for discrimination should capture intended future discrimination to align with other Australian laws and enable early practical remedies.¹⁵
- 4.5 However, any reform should keep the relevant test objective, preserve existing exceptions and make motive irrelevant.

Why addressing the gap is needed?

- 4.6 The NSWLR Commission in 1999 recommended that the test for direct discrimination should include future discrimination, allowing a potential victim to complain if aware of intended discrimination. This was in response to the problem that relief was unavailable until an actual contravention occurred.
- 4.7 The NSWLR Commission referred to the decision of *Woods v Wollongong City Council* EOC 92-174. In that case a complaint regarding the absence of wheelchair access to a proposed retail complex was dismissed, because services had not yet been provided. However, once the complex was built as planned, a subsequent complaint was upheld.

Recommended amendments

- 4.8 Should the ADA be amended to align with other jurisdictions, ABI and BNSW submit that the recommendations below be considered in relation the proposed amendments.

¹³ Consultation Paper, Question 3.9

¹⁴ NSW Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW), Report 92 (1999) [3.58], rec 4.

¹⁵ See: Discrimination Act 1991 (ACT) s 8(2); Equal Opportunity Act 2010 (Vic) s 8(1); Anti Discrimination Act 1992 (NT) s 20(2); Anti-Discrimination Act 1991 (Qld) s 10(1); Age Discrimination Act 2004 (Cth) s 14.

Mirror the wording used in the drafting with other jurisdictions

- 4.9 The ADA currently, unlike other jurisdictions, does not provide a uniform test of direct and indirect discrimination applicable for all protected attributes.¹⁶
- 4.10 If the ADA is going to be expanded to cover future discrimination, consideration should be given to using a uniform test.
- 4.11 Our further submission is that the ADA should utilise wording that is common across legislation in other jurisdictions, which have already incorporated protections for future direct and indirect discrimination.
- 4.12 By way of illustration, the wording used in the Victorian legislation is extracted below:

*(1) Direct discrimination occurs if a person **treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.***

Examples

- 1. An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.*
- 2. A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.*

(2) In determining whether a person directly discriminates it is irrelevant—

(a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;

*(b) whether or not the attribute is the only or dominant reason for the treatment, **provided that it is a substantial reason. (Emphases added)***

¹⁶ Discrimination Act 1991 (ACT) s 8(2); Equal Opportunity Act 2010 (Vic) s 8(1); Anti Discrimination Act 1992 (NT) s 20(2); Anti-Discrimination Act 1991 (Qld) s 10(1).

No comparator test

- 4.13 The comparator test tests whether discrimination has occurred by determining whether a person with a protected attribute is treated less favourably than another person who does not have such an attribute.
- 4.14 Currently, of the jurisdictions that have incorporated protections for future discrimination in their respective anti-discrimination legislation, only the Northern Territory (i.e. *Anti Discrimination Act 1992 (NT)*) has retained the comparative assessment test.¹⁷
- 4.15 The *Equal Opportunity Act 2010 (Vic)* (**the EO Act**) altered the test for discrimination. Previous legislation tested whether discrimination occurred by assessing “*less favourable treatment*” by reference to a comparator. The new legislation utilised a test which focused on “*unfavourable*” treatment, which was not dependant on a comparator.¹⁸
- 4.16 The explanatory memorandum to the *Equal Opportunity Bill 2010 (Vic)* (**the Bill**) explained the difference between the use or non-use of a comparator test as follows:

“Clause 8 differs from section 8 of the Equal Opportunity Act 1995 as it removes the requirement to prove that the treatment was less favourable than the person would treat someone without the attribute or with a different attribute, in the same or similar circumstances and replaces that ‘comparator test’ with a new test based on unfavourable treatment. The intention of the new definition is to overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred.

Subclause (2) is similar to section 8(2) of the Equal Opportunity Act 1995 but paragraph (a) refers to ‘unfavourable treatment’ instead of ‘less favourable treatment’ to reflect the removal of the ‘comparator test’.”¹⁹

¹⁷ See s 20(2) of the Anti-Discrimination Act 1992 (NT).

¹⁸ Equal Opportunity Act 2010 (Vic) s 8(1); Equal Opportunity Act 1995 (Vic) s 8(1).

¹⁹ Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 12-13.

4.17 The Victorian legislation now relies on the “*Unfavourable Treatment*” test, which was adopted from the similarly phrased provision under the Discrimination Act 1991 (ACT).²⁰ In short, this test does not require consideration as to whether a person was treated “*less favourably*” than another person; rather, a determination as to whether adverse behaviour was directed towards a person based on an attribute. This is made apparent in the Second Reading Speech for the EO Act 2010 the Attorney-General spoke of the changed definition as follows:

“The bill clarifies the meaning of discrimination so that it is easier to understand for both duty-holders and complainants, and so that a complaint will no longer fail on unnecessary technicalities.

*The bill provides that direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute unfavourably because the other person has the attribute. This definition removes the technical difficulties associated with the current requirements to compare the treatment of the person with a person in the same or similar circumstances.”*²¹

4.18 The comparator test has been recognised as complex and difficult to apply. Due consideration ought to be to ensuring a comparator test is not implemented should future discrimination be made unlawful. This will ensure consistency with other jurisdictions and avoid unnecessary confusion in the courts as to what to a “*fair*” comparator is, which has the potential to result in inconsistent decisions due to the subjective nature of the test.

Clarifying ‘intention’ and ‘motive’ are not factors for consideration

4.19 If the ADA does make unlawful future discrimination, it should be clarified in the ADA whether or not a person’s subjective motives and intentions are a relevant consideration for determining whether future discrimination occurred.

²⁰ Discrimination Act 1991 (ACT) s 8(2).

²¹ Equal Opportunity Bill 2010, Second Reading, Mr Hulls, Attorney General, 786.

- 4.20 Commonly, intention to discriminate is generally *not* a necessary element of direct discrimination.²²
- 4.21 However, the current case law highlights current confusion in this area of the law. For example, the majority in *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92, which considered the application of s 22 of the *Disability Discrimination Act 1992* (Cth),²³ doubted that distinctions between motive, purpose, or effect "*will greatly assist the resolution of any problem about whether treatment occurred or was proposed 'because of' disability*".²⁴ Gummow, Hayne, and Heydon JJ clarified that the "*central question*" is always "why" the aggrieved person was treated as they were, and whether it was "*because of*" their disability.²⁵ While motive, purpose, and effect "*may all bear on that question*," they stressed that it would be a mistake to treat these words as substitutes for the statutory expression "*because of*".²⁶
- 4.22 Importantly, the decision in *Purvis* was a by a slim majority one (4-3) and was specific to the *Disability Discrimination Act 1992* (Cth) and does not provide general clarity.
- 4.23 In *Human Rights & Equal Opportunity Commission v Mount Isa Mines Ltd* (1993), Lockhart J, in considering the phrase "*by reason of*" in s 5(1) of the *Sex Discrimination Act 1984* (Cth), which has similar meaning to "*on the ground of*" as used the ADA, did not prohibit the consideration of intent or motive.²⁷ However, his honour noted that the inquiry into discrimination is objective and may involve considering subjective material such as intention or motive, but its significance will vary from case to case. Lockhart J explained that intent may be "*central*" in some cases (e.g. direct dislike), but "of little, if any, relevance" in others where a policy is inherently discriminatory. He cautioned

²² *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176-7 Deane and Gaudron JJ; *Waters v Public Transport Corp* (1991) 173 CLR 349 at 359, 382, Mason CJ, Gaudron and Deane JJ.

²³ Referring to the prohibition of discrimination in the workplace, specifically in education.

²⁴ (2003) 217 CLR 92, [236] Gummow, Hayne and Heydon JJ.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ (1993) 46 FCR 301, 324- 325.

against polarising objective and subjective tests, stating that excluding intent or state of mind entirely would offend common sense and the language of the section.²⁸

- 4.24 A relevant analogy can be drawn from sexual harassment claims, where it is not necessary to show that the harasser intended to sexually harass.²⁹ It is sufficient that the conduct was unwelcome to the person being harassed, and the test does not require an inquiry into the subjective mind of the harasser.
- 4.25 Importantly, the legislation in the Northern Territory, Queensland, Tasmania, and Victoria explicitly provides that a person's motive for discrimination is irrelevant.³⁰
- 4.26 Relevantly, s 20C of the ADA (i.e. concerning racial vilification) has been determined the term "incite" does not require evidence of "intention".³¹
- 4.27 We recommend the focus should be on the on the objective basis of the proposed action, rather than the subjective state of mind.
- 4.28 If the ADA makes unlawful future discrimination, we recommend making it clear that intention or motive is not a necessary element to establish unlawful discrimination. This ensures consistency with established legal principles and aligns with other jurisdictions. The legislation should focus on the objective "*basis*" of the proposed action or the "*true basis*" of the decision, rather than the subjective state of mind of the employer, to determine whether discrimination has occurred.

²⁸ Ibid.

²⁹ Sex Discrimination Act 1984 (Cth) s 28A; Anti-Discrimination Act 1977 (NSW) s 22A.

³⁰ (NT) Anti-Discrimination Act 1992 s 20(4); (QLD) Anti-Discrimination Act 1991 s 10(3); (TAS) Anti-Discrimination Act 1998 s 14(3)(c); (VIC) Equal Opportunity Act 2010 s 10.

³¹ Kazak v John Fairfax Publications Ltd [2000] NSWADT 77 [25]- [28].

5. ISSUE 3: EXTENDING EXISTING PROTECTIONS IN RELATION TO POSSIBLE FUTURE PROTECTED ATTRIBUTES

5.1 The ADA currently protects against discrimination based on someone's past or future in relation only to two specific attributes: disability and carer's responsibilities.³² It is not difficult to see why it is only these two attributes which attract protection against discrimination based on an attribute a person may have in future (for example, a pregnant woman may not currently have carer's responsibilities but soon will). Beyond those attributes the protection under the ADA does not extend to consideration of attributes previously held or that may be held in the future.

Consideration Past Attributes

5.2 Protections against discrimination based on protected attributes that have been held in the past are not novel. Discrimination legislation in the ACT, Victoria, Queensland and the Northern Territory prohibit discrimination based on a past attribute.

5.3 Similar wording is adopted across those jurisdictions. For example, the wording adopted in the NT Act:

*"discrimination takes place if a person treats or proposes to treat another person who has **or had, or is believed to have or had...**"*³³

5.4 The wording adopted in the Victorian Act is also extracted below:

(2) Discrimination on the basis of an attribute includes discrimination on the basis—

(a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;

(b) of a characteristic that a person with that attribute generally has;

(c) of a characteristic that is generally imputed to a person with that attribute;

³² Anti-Discrimination Act 1977 (NSW) s 49A(c), s 49A(d), s 49S(2).

³³ Anti-Discrimination Act 1992 (NT) s 20(2).

*(d) that a person is presumed to have that attribute or to have had it at any time.*³⁴

5.5 Were the ADA to adopt past attributes as a protected attribute, alignment with other jurisdictions would promote greater consistency between the state and territory legislative schemes.

Consideration Future Attributes

5.6 The same reasoning, however, does not apply in relation to the question of extending protection from discrimination to attributes a person “*may have in their future*”. A past attribute is capable of determination: the protected attribute did or did not exist. An attribute which may or may not come into being is by definition uncertain and contingent.

5.7 There does not appear to be wide (or any) adoption of an extension of protections under discrimination legislation across jurisdictions to the possible possession of a future attribute.

5.8 Notwithstanding a recommendation made by the Law Reform Commission of Western Australia to this effect, the *Equal Opportunity Act 1984 (WA)* was not amended. The basis for the recommendation was to extend protections to persons that “*might be proposing to have the attribute in the future*” and as a consequence of that circumstance risk discrimination.³⁵ However, the recommendation was not adopted.

5.9 ABI and BNSW submit that – because of the inherent uncertainty – a future possible possession of an attribute should not be able to ground an unlawful discrimination claim. If there is any proposed extension of the protections to future attributes, they should be considered attribute by attribute and supported by clear, cogent and specific evidence that such an extension is needed. Any extension is also particularly problematic, when consideration is also being given to an introduction of a new and far-reaching positive duty (see below).

³⁴ Equal Opportunity Act 2010 (Vic) s 7(2).

³⁵ Law Reform Commission of Western Australia, Review of the Equal Opportunity Act 1984 (WA), Project 111, Final Report (2022) rec 14.

- 5.10 This is not merely a 'modernisation' or 'simplification' of discrimination law in NSW. It is a major, novel change unaligned with other jurisdictions, and NSW would be the first jurisdiction to go down this road.
- 5.11 To extend protections to the possibility of any and all future attributes contemplated by an individual embeds uncertainty into an otherwise clearly defined protection: protected attributes held or previously held.

6. ISSUE 4: A NON-EXHAUSTIVE LIST OF PROTECTED ATTRIBUTES

6.1 The ADA currently identifies a series of recognised attributes as falling with the protection of the law. These include:

- (a) age;
- (b) disability;
- (c) homosexuality;
- (d) marital status or domestic status;
- (e) race;
- (f) ethno-religion;
- (g) sex;
- (h) transgender status; and
- (i) carer's responsibilities (employment only).

6.2 The Consultation Paper raises the question "*an open-ended*" or "*non-exhaustive*" list as an alternative. Two iterations of the alternative are referred to:³⁶

- (a) inclusion of an undefined category (e.g. "*other status*"); or
- (b) establishing a list of criteria by which further grounds could be captured with the legislative remit if satisfied.

6.3 ABI and BNSW opposes a legislative mechanism in either form.

6.4 To enable compliance with the discrimination law, the protected grounds must be capable of identification: it must be certain.³⁷

6.5 Certainty about what the protected grounds are is pivotal for employers that hold duties under the ADA. For example, the framework that currently exists for establishing unlawful discrimination by an employer is consistent and clear for each ground. The formula is as follows:

³⁶ Consultation Paper page 25.

³⁷ See generally, Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991 (2022)* 31.

“Discrimination against applicants and employees

(1) It is unlawful for an employer to discriminate against a person on [recognised category] grounds--

(a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or

(b) in determining who should be offered employment, or

(c) in the terms on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on [recognised category] grounds--

(a) in the terms or conditions of employment that are afforded to the employee, or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or

(c) by dismissing the employee or subjecting the employee to any other detriment.”

- 6.6 Compliance with the ADA requires employers to set up processes that do not include conduct that is inconsistent with the ADA.
- 6.7 The ability to clearly identify protected grounds and the corresponding obligations that apply to each ground is critical to enabling employers the ability to review and audit their process and systems to ensure conduct that is not compliant with the ADA is not engaged.
- 6.8 If an open-ended ground was to be inserted into the ADA, the following uncertainty arises:
- (a) how can an employer undertake arrangements regarding advertisement and recruitment that are free from an undefined and unknown ground?
 - (b) how can an employer avoid making hiring decision that are not influenced by an undefined and unknown ground?

- (c) how can an employer avoid including terms and conditions in an employment contract or agreement that are contrary to an undefined and unknown ground?
- (d) how can an employer review its internal processes and procedures to make sure they are free from discrimination in relation to an undefined and unknown ground?
- (e) how can the employer be conscious of risk of non-compliance in relation to dismissal if the ground is undefined and unknown?

6.9 These rhetorical questions underscore the danger of introducing an open-ended list of protected attributes. It would significantly increase an employer's uncertainty and thereby have the potential of stultifying an employer's recruitment activity.

6.10 If an open-ended list were to be adopted, instead of the ADA offering meaningful protection, this mechanism could lead to misuse or overextension, including an increase in speculative or unfounded claims. Such outcomes risk eroding confidence in the law and detracting from its effectiveness in addressing genuine cases of discrimination.

6.11 A non-exhaustive list of protected attributes prevents an employer from having confidence that they are fully compliant with the ADA. That is an entirely unfair and unjustified burden to put on employers. Especially is this so in circumstances where non-compliance carries the risk of steep penalties for both businesses and individuals.

6.12 Consistent with discrimination law practices throughout Australia, the ADA should maintain its current structure of extending protections only to a discrete, exhaustive list of recognised grounds.

7. ISSUE 5: A GENERAL POSITIVE DUTY TO PREVENT UNLAWFUL CONDUCT

7.1 The Consultation refers to the possible inclusion of a positive duty to prevent or eliminate “*unlawful conduct, including discrimination, sexual harassment, vilification or victimisation*”.

“Unlawful conduct” is too broad

7.2 The reference to “*unlawful conduct*” suggests consideration is being given to application of the duty to all forms of unlawful conduct in the ADA. That is a significant proposal that is yet to be implemented in any jurisdiction (including at the Commonwealth level) in Australia.

7.3 ABI and BNSW oppose the creation of a positive duty that applies to all forms of unlawful.

7.4 Unlike provisions that prohibit engaging in certain conduct, a positive duty requires a duty holder to take ‘positive’ steps. If modelled off the positive duty under the *Sex Discrimination Act 1984* (Cth), this would include a requirement to take “*all reasonable and proportionate*” steps to eliminate or prevent the unlawful conduct.

7.5 This would increase the administrative burden on businesses in NSW. Many of whom have already taken extensive measures arising from the introduction of the positive duty under the *Sex Discrimination Act 1984* (Cth) and in relation to the new psychosocial risk obligations in the *Work Health and Safety Regulations 2017* (NSW).

7.6 The existing legislative provisions are sufficient. Relevantly, NSW’s current work health and safety legislation imposes clear and enforceable obligations on employers to provide a safe workplace, which includes preventing harassment, bullying, and discriminatory conduct. This legislation already requires a positive duty element for duty holders to conduct risk assessments, appropriate training, effective reporting mechanisms, and corrective action, many of which would likely overlap with the anticipated requirements under the proposed under this notion. Because this is a PCBU-specific exercise, businesses can tailor and calibrate risk mitigation strategies. A broad positive duty necessarily extends to all unlawful conduct, whether or not there is risk in the particular business. Any new duties could conflict with and add to existing duties.

7.7 Accordingly, the creation of a ‘new’ positive duty with respect to all unlawful conduct under the ADA would most likely be too onerous and burdensome on duty holders (excessive administrative and financial burden on businesses). Further, implementing policies, conducting risk assessments, delivering ongoing training, and maintaining compliance frameworks would be resource-intensive for duty holders, particularly in circumstances where existing legislative provisions already exist.

Confined Positive Duty

7.8 As stated at the outset of these submissions, consistency across Australian anti-discrimination law is considered can assist with clarity of obligations. For that reason, if a positive duty was to be inserted to the ADA, it should not go further than the scope of the positive duty under the *Sex Discrimination Act 1984* (Cth).

7.9 The Federal legislation is identified as an appropriate point for alignment because NSW businesses are already required to take steps in this space. This would have the effect of harmonising the state and federal scheme and enhance clarity about the obligations of businesses in this space.

This submission is prepared on behalf of ABI and BNSW:

Nigel Ward

CEO + Director

Australian Business Lawyers & Advisors

Alana Rafter

Senior Associate

Australian Business Lawyers & Advisors

29 August 2025