



**AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™**

Australian Lawyers for Human Rights (ALHR)

**Submission in relation to the NSW Law Reform Commission
Consultation paper: Unlawful Conduct**

Anti-Discrimination Act 1977 (NSW) (ADA) Review

29 August 2025

NSW Law Reform Commission

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1. Acknowledgement

Australian Lawyers for Human Rights (**ALHR**) acknowledges the traditional owners and custodians of the lands, rivers and seas on which we work, live and travel across New South Wales as the first people of this country. We recognise that the land belonging to these peoples was never ceded. We pay our deep respect to Elders past and present. We recognise that human rights apply to all individuals and have a special significance for Aboriginal and Torres Strait Islander peoples — the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.¹

2. About Australian Lawyers for Human Rights (ALHR)

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

3. Executive Summary

ALHR is grateful for the opportunity to make the following submission in relation to the NSW Law Reform Commission (**Commission**) 'Consultation Paper: Unlawful Conduct' (**Consultation Paper**) concerning the *Anti-Discrimination Act 1977* (NSW) (**ADA**) Review (**Review**).

ALHR made a submission, dated 28 September 2023, to the Commission in relation to the Review of the ADA. That submission is referenced in the Consultation Paper and is listed in Appendix A: Preliminary submissions as PAD62 (**PAD62**). We also attach that submission to this submission as Schedule 1 to this submission.

¹ Preamble (7), *Human Rights Act 2004* (ACT).

ALHR continues to endorse the submissions and recommendations made within PAD62. It will also be referenced in this submission. In recent years, ALHR has also engaged in a number of important consultations on anti-discrimination issues. This has included playing a leading role in public debate surrounding the previous Commonwealth Government's Religious Discrimination Bill(s).²

Noting the inadequacy of current anti-discrimination protections in New South Wales, we commend the NSW Government on its commitment to reviewing the ADA and its regulatory framework to determine whether it needs to be modernised and simplified to better promote the equal enjoyment of the human right to live free from discrimination, and to reflect contemporary community expectations.

The ADA has been in force for almost half a century. While it was progressive at the time of its enactment, it now requires significant amendment to better promote and protect evolved societal standards and values, and to comply with Australia's international human rights law obligations.

In this submission ALHR makes key recommendations to modernise the ADA and ensure that it effectively works to better protect people in NSW from discrimination consistently with Australia's obligations under the core United Nations human rights treaties.

We recommend that the ADA be restructured for clarity, eliminating redundancy, and improving accessibility. This should include consolidating protected attributes into a concise list with uniform discrimination provisions to enhance understanding and compliance.

While it may be beyond the scope of this Consultation Paper, ALHR also submits that modernisation of the ADA alone is not enough to adequately protect the rights and wellbeing of the people of NSW. The ADA delivers an essential framework for protection from discrimination but, by its very nature, it is limited to making it unlawful to discriminate against people on the grounds of a specific list of attributes, and only if the discriminatory treatment occurs in the context of a limited range of circumstances (employment or education for example), and only if the person experiencing discrimination fits within the scope of the specific attributes, and only if exemptions do not apply. Even where a person can establish that unlawful discrimination took place, they can only access a limited range of remedies in response.

While ALHR's recommendations address some of these limitations within the context of amendments to the ADA, we also submit that introduction of a Human Rights Act for NSW is an absolutely essential step if NSW is to establish a legal framework that provides holistic, comprehensive and impactful protection from discrimination in NSW. Given Australia's status as the only Western liberal democracy without a federal Human Rights Act or Bill of Rights and NSW's failure to follow the leadership of jurisdictions including Victoria, the Australian

² See for instance: <https://alhr.org.au/religious-discrimination-bill-fundamentally-flawed-must-rejected/>.

Capital Territory and Queensland by introducing a Human Rights Act, the people of NSW live with some of the least comprehensive human rights protections in the Western world.

In line with Australia's international human rights law obligations to protect all human rights equally for everyone and to ensure that people in NSW are not left to fall through legislative cracks, modernisation of the ADA should be accompanied by the introduction of a comprehensive Human Rights Act for NSW.

This submission is grounded on the principles set out in Article 26 of the International Covenant on Civil and Political Rights (ICCPR),³ to which Australia is a party, and which provides that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...[t]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.”

and Article 2(1), which states:

“Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind such as race colour, sex, language, religious, political or other opinion, national or social origin, property birth or other status.”

Discrimination undermines the principles of human dignity and equality, which are fundamental to the ICCPR, all of the other core United Nations human rights treaties and the *United Nations Declaration on the Rights of Indigenous Peoples*. NSW should strive to implement robust, world-leading anti-discrimination legislation in order to uphold human rights, promote social cohesion and foster inclusive and equitable social practices across the state that align with evolved community expectations.

In ALHR's view, the extent of amendments required to modernise the ADA would best be dealt with via the repeal of the current Act and the drafting of a new anti-discrimination law, based on best practice from other jurisdictions.⁴ Such a reform should draw on community and expert input and include a public inquiry into exposure draft legislation. As noted above, a new ADA should be accompanied by a Human Rights Act for NSW to ensure that the people of NSW have comprehensive and meaningful protection of the universal, indivisible and interdependent human rights that Australia is bound to uphold at international law.

³ UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966

⁴ As recommended in PAD84 Australian Discrimination Law Experts Group 2023 and PAD82 Public Interest Advocacy Centre 2023.

4. Recommendations.

1. **ALHR recommends that the NSW Law Reform Commission recommend the repeal of the current Act and the drafting of a new NSW anti-discrimination law, based on best practice from other jurisdictions, and drawing on community consultation and expert input.**

ALHR further recommends:

2. **Amend the structure of the ADA:** Restructure the ADA for clarity, eliminating redundancy, and improving accessibility. Consolidate protected attributes into a concise list with uniform discrimination provisions to enhance understanding and compliance.
3. **A NSW Human Rights Act:** The introduction of a NSW Human Rights Act is crucial to align NSW with international human rights obligations, provide broader protections against discrimination and reflect the indivisible, interdependent and intersectional nature of human rights.
4. **Expand the range of attributes protected:** Broaden the protected attributes to, at a minimum, bring NSW into line with other States and Territories.
5. **Introduce a positive duty for reasonable adjustments:** Impose a positive obligation on employers, educators, and service providers to make reasonable adjustments for individuals with disabilities, promoting equality and participation.
6. **Revise the direct discrimination test:** Replace the comparator test with a "detriment test".
7. **Unify discrimination definitions:** Streamline discrimination definitions to eliminate the distinction between "direct" and "indirect" discrimination.
8. **Amend the burden of proof** so that once a complainant demonstrates they were treated unfavourably the burden should shift to the respondent to demonstrate that the complainant was not treated unfavourably because of a protected attribute.
9. **Replace “homosexuality” with “sexual orientation”:** ALHR recommends replacing the existing ground of “homosexuality” with “sexual orientation” and adopting an inclusive definition that reflects the diversity of sexual orientation.
10. **Definition of disability:** Update the way in which the ADA expresses and defines disability in line with the Convention on the Rights of Persons with Disabilities and in consultation with the disability community.
11. **Genetic Information Discrimination:** A new attribute be created to protect against

genetic information discrimination. This should be separate from disability.

12. **Marital or domestic status:** The outdated reference to “marital or domestic status” should be amended to “relationship status” to include different types of relationships that are not captured within the current definition of the ADA (e.g. polyamorous relationships or de facto partners who live separately).
13. **Racial Discrimination:** Caste-based discrimination is an “intersectional system of discrimination” with wide-ranging and severe impacts that should be further recognised as a protected attribute in the ADA. Alternatively, caste-based discrimination could be recognised separately.
14. **Sex Discrimination:** (a) Menstruation discrimination should be included as discrimination on the basis of sex, in that it is a condition linked to reproductive organs and associated with stereotyped assumptions about the inferiority of people who menstruate; and (b) pregnancy and breast/chest-feeding be protected as standalone attributes.
15. **Discrimination on Transgender grounds:** The term “transgender” should be amended to “gender identity” to ensure a more inclusive category encompassing both transgender and non-binary people.
16. **Associates and Relatives:** The ADA should identify being an “associate” of someone with a protected attribute, as a protected attribute.
17. **Include explicit protections against intersectional discrimination:** This reform is essential to ensure that the ADA reflects the complex and compounding nature of discrimination experienced by many individuals and complies with Australia’s obligations under international human rights law.
18. **Amend sexual harassment provisions:** Revise the definition of sexual harassment, expand its scope to cover online interactions, and include a positive duty on employers to prevent harassment.
19. **Clarify religious exceptions:** Limit the broad religious exemptions in section 56(d) of the ADA to ensure compliance with international human rights standards and core international legal principles.
20. **Amend the private school exception:** Remove the exemption allowing private educational authorities to discriminate based on various attributes, promoting inclusivity and adherence to core international human rights law principles.
21. **Repeal adoption services and superannuation exemptions:** The adoption services (s 59A) and “transgender” superannuation exemptions (s 38Q) within the ADA cannot be justified and must be repealed immediately.

22. **Reform sport exemption:** The specific exemption in relation to transgender people and sport should be reformed to ensure a trans-inclusive approach to sport in NSW.
23. **Introduce a positive duty to prevent discrimination:** Implement positive duties that require proactive measures to prevent discrimination.
24. **Decision-making supports:** Introduce a positive duty on public and private bodies to provide decision-making supports.
25. **Align vilification provisions with the Crimes Act:** Ensure that the ADA's vilification provisions align with the *Crimes Act 1900* (NSW) to provide consistent protection against vilification.
26. **Expand vilification protections to include** psychosocial disability and disabling mental health challenges.
27. **Areas of public life:** The ADA should apply more broadly to additional areas of public life to ensure that all individuals in NSW are afforded equal protection from discrimination, regardless of the context in which it occurs.

5. Responses to Questions in the Consultation Paper

1. Tests for discrimination

Question 3.1: Direct discrimination

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

ALHR RECOMMENDATION: Revise the direct discrimination test and replace the comparator test with a "detriment test".

ALHR recommends replacing the existing comparator-based test with a more accessible and unfavourable treatment test, as adopted in the *Discrimination Act 1991* (ACT) and the *Equal Opportunity Act 2010* (Vic).

The comparator test, which requires complainants to establish that they were treated less favourably than a hypothetical person without the protected attribute in similar circumstances, is legally complex, difficult to apply, and inaccessible to many complainants, particularly those who are self-represented or from marginalised communities.

The Consultation Paper notes *Purvis v New South Wales* [2003] HCA 62, 217 CLR 92 at [236] in which the High Court accepted an argument that the claimant had been excluded from school because of their violent behaviour, not because of their disability. Despite the claimant's behaviour being caused by his disability, the High Court also accepted that the

relevant comparator should be a student who exhibited the same violent behaviour, but without the claimant's disability. This has been described as "the separation of a protected trait and a manifestation of the trait".⁵

From a human rights perspective, the comparator test fails to adequately reflect the principle of substantive equality, which requires that laws and policies account for the real-world disadvantages faced by individuals and groups.

The comparator model imposes an unnecessary evidentiary burden on complainants, who are often required to infer the treatment of a hypothetical comparator without access to relevant information and evidence to meet the legal test. This imbalance is exacerbated when respondents are institutions with significant legal resources such as government agencies, employers, and education providers who are better positioned to argue technical interpretations of the law.

The unfavourable treatment test offers a more straightforward and equitable approach. It focuses on whether a person was treated unfavourably because of a protected attribute, without requiring comparison to another individual. This test:

- Aligns with international human rights standards by centring the experience of the rights-holder.
- Reduces procedural and evidentiary barriers to justice.
- Enhances clarity and accessibility for complainants and respondents.
- Better accommodates intersectional and systemic forms of discrimination.

ALHR recommends the adoption of the unfavourable treatment test for direct discrimination under the ADA. This reform would promote a more inclusive, accessible, and rights-based anti-discrimination framework in New South Wales, consistent with Australia's obligations under international human rights law and the lived realities of those affected by discrimination.

Question 3.6: Proving indirect discrimination

ALHR RECOMMENDATION: Amend the burden of proof so that once a complainant demonstrates they were treated unfavourably the burden should shift to the respondent to demonstrate that the complainant was not treated unfavourably because of a protected attribute.

ALHR supports reforming the ADA to introduce a reversal of the onus of proof in discrimination matters, akin to the reverse onus that applies in general protections claims under the *Fair Work Act 2009* (Cth). This reform is essential to ensure that the ADA reflects

⁵ Belinda Smith, 'From Wardley to Purvis: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3, 20.

contemporary understandings of discrimination, aligns with international human rights obligations, and promotes substantive equality for all individuals, particularly those facing systemic disadvantage.

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

ALHR supports amending the ADA to require respondents to disprove causation once a complainant has established that they were treated unfavourably and that the treatment occurred in circumstances giving rise to a reasonable inference of discrimination.

We recommend an approach that is consistent with the recommendation of the ACT Law Reform Advisory Council (2015), which proposed that:

“Complainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the complainant (sic) [discriminator] at the time of the unfavourable treatment.”⁶

An amendment which reverses the onus would better reflect the reality of discrimination in circumstances where the reasons for discriminatory treatment are often known only to the respondent and may be influenced by unconscious bias or systemic practices.

The effect, in our submission, would be improved access to justice, as many complainants, particularly those from marginalised communities (e.g. people with disability, First Nations peoples, migrants and refugees), face significant barriers in accessing evidence to prove intent or causation.

Finally, reversing the onus of proof in discrimination matters could proactively reduce discrimination through greater transparency and accountability. By requiring respondents to demonstrate that their actions were based on lawful and unbiased reasons, it would encourage more rigorous record-keeping and compel decision-makers to critically assess whether unconscious bias may have influenced their choices.

Question 3.7: Direct and indirect discrimination

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

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

⁶ ACT Law Reform Advisory Council Inquiry into the Discrimination Act 1991 (ACT), Final Report, 14 December 2015, p.143 at: <https://www.austlii.edu.au/au/other/lawreform/ACTLRAC/2015/3.pdf>.

ALHR RECOMMENDATION: Unify discrimination definitions. Streamline discrimination definitions to eliminate the distinction between "direct" and "indirect" discrimination.

ALHR submits that the ADA should be amended to remove the rigid formal distinction between direct and indirect discrimination, or at a minimum, redefine the relationship between them to clarify that discrimination may be direct, indirect, or both.

This amendment is necessary to ensure that the ADA reflects the real-world experiences of discrimination, which often do not fit neatly into binary legal categories. In practice, acts of discrimination frequently involve overlapping elements. The current framework forces complainants to artificially categorise their experiences, which can be confusing, inaccessible, and ultimately unjust.

ALHR supports the adoption of a unified definition of discrimination, as used in the *Discrimination Act 1991* (ACT), which allows for a more flexible and inclusive approach. This model reduces complexity and improves accessibility for complainants, particularly those from structurally disadvantaged groups who may struggle to articulate their experiences within these two rigid legal categories of discrimination.

ALHR is of the view that retaining the current distinction risks perpetuating formalism at the expense of justice. A modern anti-discrimination framework must be responsive to the lived realities of discrimination and capable of addressing its complex and intersectional forms.

Question 3.8: Intersectional discrimination

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

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

ALHR RECOMMENDATION: Include explicit protections against intersectional discrimination. This reform is essential to ensure that the ADA reflects the complex and compounding nature of discrimination experienced by many individuals and complies with Australia's obligations under international human rights law.

ALHR supports the inclusion of explicit protections against intersectional discrimination in the ADA. This reform is essential to ensure that the ADA reflects the complex and compounding nature of discrimination experienced by many individuals and complies with Australia's obligations under international human rights law.

The ADA currently adopts rigid, and arbitrary distinctions, between discrimination on the basis of different attributes. This does not reflect the reality of lived experiences that discrimination may be on the basis of multiple attributes at the same time (such as race and sex) or because of a particular intersection between attributes (for example, because

someone is a woman of colour).⁷ As noted by the Justice and Equity Centre and many other organisations, in practice, this creates problems both where a complainant may select the ‘wrong’ attribute when making a complaint, and where a complainant is unable to make out discrimination on a particular attribute; including because of the operation of the comparator test.⁸

ALHR submits that the ADA should be amended to:

1. Include a definition of discrimination that recognises it may occur because of one or more protected attributes; and
2. Provide that discrimination based on a combination of attributes is unlawful.

A more inclusive framework would empower complainants to articulate their experiences more accurately and reduce procedural barriers. Such an approach would reflect the lived experience of individuals who face discrimination at the intersection of multiple identities, such as race and gender, or disability and gender.

This amendment would better align NSW law with international human rights standards, including the principles of equality and non-discrimination under the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* and the *Convention on the Rights of Persons with Disabilities (CRPD)*.

ALHR supports the model adopted in the *Discrimination Act 1991 (ACT)*, which provides a flexible and inclusive framework for recognising discrimination based on one or more protected attributes. This model offers a practical and rights-compliant pathway for reform in NSW.

ALHR further notes that the Australian Discrimination Law Experts Group has recommended that consideration be given to the approach taken in Canada under section 3.1 of the *Canadian Human Rights Act*, RSC 1985, 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.*”⁹

2. Discrimination: protected attributes

Question 4.3 Disability discrimination

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

⁷ PAD82 above

⁸ Ibid.

⁹ PAD84 above

ALHR RECOMMENDATION: Definition of disability: update the way in which the ADA expresses and defines disability in line with the Convention on the Rights of Persons with Disabilities and in consultation with the disability community.

As noted in our submission PAD62 ALHR reiterates its view that an open discussion with the disability community should be had to ascertain whether the definition of "disability" in the ADA should be updated. The Act currently uses terminology such as "malfunction, malformation or disfigurement" which reflects outmoded medical models of disability that are not consistent with the *United Nations Convention on the Rights of persons with Disabilities (CRPD)* and are inconsistent with evolved understanding of disability. The ADA should not be framed in a way that perpetuates outmoded, archaic and negative stereotypes around what it means to live with a disability. ALHR supports the definitions that reflect the language of the CRPD:

Preamble: *"Disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."*

Article 1: *"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

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

ALHR RECOMMENDATION: A new attribute be created to protect against genetic information discrimination.

See the section of this submission addressing the inclusion of new attributes in the ADA.

Question 4.4: Discrimination based on homosexuality

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

ALHR RECOMMENDATION: Replace "homosexuality" with "sexual orientation". ALHR recommends replacing the existing ground of "homosexuality" with "sexual orientation" and adopting an inclusive definition that reflects the diversity of sexual orientation

The ADA currently prohibits discrimination on the ground of "homosexuality", defined narrowly as applying to male or female homosexuals. This terminology "*focuses only on binary genders – covering people whose sex was designated as male at birth, but now identify as female (and vice versa)*". It does not cover other people along a more inclusive

spectrum, including people who do not identify exclusively as either male or female.”¹⁰ This restrictive terminology also fails to protect people with other sexual orientations – such as bisexual, pansexual, asexual and heterosexual individuals against discrimination. This outdated approach undermines the objective of anti-discrimination laws and fails to reflect contemporary understandings of sexual orientation and the fact that the Australian Census will, in 2026, ask Australians about their sexual orientation.

ALHR submits that this protected attribute should be amended to “sexual orientation” and that “sexual orientation” be defined in an inclusive and accessible way.

In other Australian jurisdictions, “sexual orientation” has been defined in a variety of manners. For example, the ACT legislation defines “sexuality” as including heterosexuality, homosexuality and bisexuality but ensures scope for interpretation beyond the listed categories through its non-exhaustive definition. This definition provides practical clarity for users of the legislation.

In contrast, the international Yogyakarta Principles¹¹ adopted in other jurisdictions such as Victoria, define “sexual orientation” more expansively, avoiding reliance on fixed labels and allowing for cultural and personal diversity in how sexuality is understood.

“Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”¹²

This definition emphasises that sexual orientation is about a person’s *capacity* for attraction and relationships, not just behavior, and it affirms that such orientation is an inherent aspect of human diversity that must be protected under international human rights law.

ALHR supports the adoption of a definition that integrates the benefits of both approaches.

Question 4.5: Discrimination based on marital or domestic status

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

ALHR RECOMMENDATION: The outdated reference to “marital or domestic status” should be amended to “relationship status” to include different types of relationships that are not captured within the current definition of the ADA (e.g. polyamorous relationships or de facto partners who live separately).

¹⁰ Alastair Lawrie, *What’s Wrong With the NSW Anti-Discrimination Act 1977?* at: <https://alastairlawrie.net/2016/02/25/whats-wrong-with-the-nsw-anti-discrimination-act-1977/>

¹¹ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007

¹² *Ibid*

Question 4.6: Racial discrimination

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

ALHR RECOMMENDATION: Caste-based discrimination is an “intersectional system of discrimination” with wide-ranging and severe impacts that should be further recognised as a protected attribute in the ADA.

Race is currently defined under the ADA to include “*colour, nationality, descent and ethnic, ethno-religious or national origin*”. Like the NSW Council for Civil Liberties, ALHR agrees with the previous submission of the NSW Law Society that caste-based discrimination is an “*intersectional system of discrimination*” with wide-ranging and severe impacts that should be further recognised as a protected attribute.¹³

ALHR submits that immigration status should be added to the ADA as a new protected attribute.

Question 4.7: Sex discrimination

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

ALHR RECOMMENDATION: Menstruation discrimination should be included as discrimination on the basis of sex, in that it is a condition linked to reproductive organs and associated with stereotyped assumptions about the inferiority of people who menstruate.

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

ALHR RECOMMENDATION: Pregnancy and breast/chest-feeding be protected as standalone attributes.

ALHR endorses recommendations made by the Justice and Equity Centre (PAD82)¹⁴ recommending that pregnancy and breast/chest-feeding be protected as standalone attributes, noting that trans men and non-binary people may also become pregnant and breast/chest-feed. Such an approach would be consistent with the *Sex Discrimination Act 1984* (Cth) as well as in most other States which already deal with breastfeeding as a

¹³ Law Society of NSW PAD31.

¹⁴ Public Interest Advocacy Centre PAD82.

separate ground of discrimination. NSW is the only state or territory not to deal with pregnancy as a separate attribute of discrimination.

Question 4.8: Discrimination on transgender grounds

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

ALHR RECOMMENDATION: the term “transgender” should be amended to “gender identity” to ensure a more inclusive category encompassing both transgender and non-binary people.

ALHR submits that the use of the term “transgender status” in the current legislation is limited insofar as it only captures people who identify as a member of the opposite sex to what that person was assigned at birth. This does not protect non-binary people and doesn’t protect people based on gender expression — for example, how someone dresses or presents themselves.

Amending the term “transgender” to “gender identity” is a more inclusive category encompassing both transgender and non-binary people.

A number of jurisdictions have adopted a definition of “Gender identity” that accords with the Yogyakarta Principles:

“Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”¹⁵

As noted by Equality Australia, another option is how the *Sex Discrimination Act 1984* (Cth) defines “gender identity”, as meaning gender related identity, appearance or mannerisms.

ALHR submits that either approach would significantly improve on the current use of the term “transgender status.”

Question 4.9: Extending existing protections

(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?

ALHR RECOMMENDATION: The ADA should identify being an “associate” of someone with a protected attribute, as a protected attribute.

¹⁵ Op.Cit

The United Nations protects against discrimination that affects individuals based on the status, activities, or beliefs of their associates or relatives.¹⁶ ALHR endorses the position of the NSW Council for Civil Liberties in its submission to this Review that the ADA should identify being an “associate” of someone with a protected attribute, as a protected attribute itself covering both relatives and associates under both the direct and indirect discrimination tests.

3. Discrimination: potential new protected attributes

Question 5.2: Potential new attributes

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

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

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

ALHR RECOMMENDATION: Expand the range of attributes protected. Broaden the protected attributes to, at a minimum, bring New South Wales into line with other States and Territories.

In addition to the new attributes noted in our submission PAD62, ALHR is supportive of the Justice and Equity Centre’s (formerly PIAC) proposed list of additional protected attributes within its 2023 submission to this Review.¹⁷

These include:

- Sex characteristics;
- Sex work;
- Accommodation status (eg homelessness);
- Genetic information (which may reinforce other protected attributes, including sex characteristics);
- Subjection to domestic or family violence;
- Irrelevant criminal record;
- Employment activity or status;
- Immigration status;
- Political conviction/opinion;

¹⁶ International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (entered into force 3 January 1976)

¹⁷ Public Interest Advocacy Centre PAD82

- Socio-economic status;
- Industrial activity/trade union activity;
- Profession, trade or occupation;
- Lawful sexual activity;
- Physical features;
- Medical record; and
- Expunged historical homosexual convictions.

In addition to this list ALHR recommends that the following protected attributes be added to the ADA:

- Geographic location;
- Language;
- Origin and ethnicity.

Sex characteristics

ALHR submits that the ADA should introduce “sex characteristics” as a protected attribute to ensure appropriate and inclusive protection for people with innate variations of sex characteristics.

The ADA refers to people of “indeterminate sex” within the definition of “transgender person”. This definition fails to provide explicit and adequate protection for people with innate variations of sex characteristics as distinct from gender diverse persons.

ALHR supports the inclusion of “sex characteristics” as a distinct protected attribute. This language mirroring international human rights best practice applies to all people and focuses on the physical attributes without making assumptions about identity or gender expression. This step in protecting people with intersex variations has already been made by most States and Territories. The Australian Capital Territory, Northern Territory, Queensland, Victoria and Tasmania have all implemented such protection without any controversy.

As noted by the Justice and Equity Centre in PAD82,¹⁸ the term “intersex status” which is used in the *Sex Discrimination Act 1984* (Cth) is no longer regarded as best practice, including by peak intersex organisation Interaction for Health and Human Rights. Instead, they call for a protected attribute of “sex characteristics”, to ensure all people born with variations of sex characteristics are protected.

ALHR endorses the views of Interaction for Health and Human Rights and the Justice and Equity Centre that the *Anti-Discrimination Act 1991* (Qld) provides an appropriate definition of “sex characteristics”.

¹⁸ Public Interest Advocacy Centre PAD82.

Sex work

At present, the ADA fails to protect individuals from discrimination on the basis of their involvement in lawful sexual activity or sex work. This legislative gap leaves sex workers – both current and former – without recourse when they are denied services, excluded from employment, or otherwise treated unfairly due to stigma or disapproval of their lawful occupation. Some jurisdictions, such as Tasmania, have already recognised the need for explicitly including “lawful sexual activity” as a protected attribute.

ALHR submits that the ADA should be amended following the lead of Queensland, Tasmanian and Victorian legislators who have incorporated “lawful sexual activity” as a protected attribute. ALHR further submits that “sex work” should also be defined as a protected attribute to acknowledge that past and present sex workers may experience discrimination.

Religious belief and religious activity

ALHR submits that “religious belief and activity” should be included as a protected attribute in the ADA and that protection must include the right not to hold a religious belief or view and the right not to engage in or refuse to engage in a lawful religious activity.

Currently, the ADA fails to include religious beliefs or activities as a protected attribute. This omission places NSW significantly behind most other Australian jurisdictions, all of which provide some form of protection from discrimination based on religion. This creates a serious gap in the legal framework for protecting freedom of thought and belief, especially when discrimination based on religion remains a prevalent issue in Australia.

While the recent commencement of the *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) makes it unlawful to incite hatred, or severely ridicule a person based on religion or lack thereof, this Act does not address broader discrimination. This leaves people in NSW with inadequate protection or redress.

In Tasmania, the *Anti-Discrimination Act 1998* (Tas) protects both “religious belief or affiliation” and “religious activity”. The protection is defined to include holding **or not** holding a religious view as well as engaging in or not engaging in a religious activity. This approach is clear, inclusive and respects the right of every person to determine their beliefs free from discrimination. ALHR urges the NSW government to adopt a similar approach to Tasmania’s protection against discrimination on the basis of religion.

Irrelevant Criminal Record

ALHR endorses the recommendation of the Redfern Legal Centre that “irrelevant criminal record” be added as a protected attribute. Individuals should not face ongoing discrimination

in employment, education, or access to services on the basis of past convictions that have no bearing on the role or context at hand. Such discrimination hinders rehabilitation, entrenches social and economic disadvantage, and disproportionately harms marginalised groups—particularly First Nations people, who are over-policed and over-represented in the criminal justice system. Protecting against discrimination on the grounds of irrelevant criminal record would also bring NSW into closer alignment with jurisdictions like Tasmania, where these safeguards are already in place.

Subjection to domestic of family violence

ALHR supports the inclusion of protection against discrimination on the basis of having been or being subjected to domestic or family violence. We note the recommendations made by the Australian Discrimination Law Expert Group (**ADLEG**) in their 2022 submission to the Northern Territory Consultation Draft Anti-Discrimination Amendment Bill 2022, noting that such a provision could be drafted in the following terms:

*“a person shall not discriminate against another person on the ground of the person’s subjection to domestic violence”;*¹⁹

and with regard to the meaning of “discrimination”:

“discrimination includes: any distinction, restriction, exclusion or preference made on the basis of a person’s subjection to domestic violence’.

*ADLEG notes that there can be concern about the use of the language of ‘victim’ with ‘survivor’ being a preferred term for some.”*²⁰

Geographic Location

ALHR recommends that the ADA make provision for protection against discrimination on the ground of “geographic location” in remote or very remote areas of NSWs. As noted by ADLEG:

“The UN Committee on Economic, Social and Cultural Rights in its General Comment no 20 dealt expressly with barriers to equality rights because of location, stating ‘disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution of the availability and quality of primary, secondary and palliative health-care facilities’.²¹ Evidence indicates significant barriers to equality of opportunity for people in remote and very remote areas, particularly in relation to health, education and other essentials services and particularly for Aboriginal people and Torres Strait Islanders.⁵² The attribute could

¹⁹ Submission: Australian Discrimination Law Expert Group (ADLEG) in their 2022 submission to the Northern Territory Consultation Draft Anti-Discrimination Amendment Bill 2022.

²⁰ Ibid.

²¹ UN Committee on Economic, Social and Cultural Rights, *General Comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* 42nd sess, UN Doc E/C.12/GC/20 (2 July 2009) [34].

be 'location' and be defined as meaning 'past or present location in a remote or very remote area of the Northern Territory'.²²

Language

ALHR endorses in general recommendations made by the Discrimination Law Expert Group in its submission to the Northern Territory Consultation Draft Anti-Discrimination Amendment Bill 2022 that language be included as a protected attribute and that language be defined as including language group, dialect, sign language, non-verbal language and accent.²³

Origin and Ethnicity

Under the ADA race is defined as including colour, nationality, descent and ethnic, ethno-religious or national origin. None of these terms are defined in the Act.

ALHR is of the view that this current definition of race is rightly interpreted broadly to include all discrimination based on ethnicity and origin; however, to ensure that the ADA maximises coverage for all forms of discrimination:

1. ALHR recommends that origin be introduced as a protected attribute to the ADA to close a critical gap in the current provisions. While the Act already prohibits discrimination based on race, nationality and national origin, it does not explicitly provide protection against discrimination attributed more broadly to a person's origin. Introducing origin as its own standalone category would remove this ambiguity and ensure protection where nationality is not directly relevant but an individual's specific background is. For example a person from a minority ethnic group who does not identify with a broader racial category (including as an example, Roma people in Australia or a person from a small Pacific Islander community) may not be fully protected under the ADA's current definition of race.
2. ALHR recommends that the ADA be amended to introduce ethnicity as its own standalone protected attribute. While the Act as it stands recognises ethno-religious and national origin under the definition of race, it does not specifically identify ethnicity as a protected attribute. Ethnicity reflects cultural identity, shared heritage and traditions that may not fall neatly into racial or national categories. Discrimination may still occur on the basis of cultural practices or community belonging, and continuing to omit a separate category of ethnicity risks under-enforcement and inconsistency. Introducing ethnicity as its own category would strengthen protections, provide greater clarity and reflect Australia's commitment to recognising and valuing cultural diversity.

²²Australian Discrimination Law Expert Group (ADLEG) Op.Cit. See also 2025 031 Judy H NSW ADA survey; Darwin Community Legal Service 2022 submission to the Northern Territory Consultation Draft Anti-Discrimination Amendment Bill; and Tangentyere Council 2022 submission to the Northern Territory Consultation Draft Anti-Discrimination Amendment Bill.

²³ ADLEG Ibid

3. As noted above, ALHR further recommends that caste-based discrimination is an “intersectional system of discrimination” with wide-ranging and severe impacts that should be further recognised as a protected attribute in the ADA.

Question 5.3 An open-ended list

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

ALHR endorses the recommendation of the NSW Council for Civil Liberties supporting the adoption of a prohibition on discrimination based on any other attributes that meet certain criteria (other than those specifically recognised in the ADA).

International human rights law prohibits discrimination based on an undefined category of ‘other status, enabling’ the extension of principles to new concepts of discrimination. For instance, articles 2(1) and 26 of the ICCPR explicitly include “other status”.

4. Discrimination: Areas of public life

Question 6.12: Additional areas of public life

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

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

ALHR RECOMMENDATION: The ADA should apply more broadly to all areas of public life to ensure that all individuals in New South Wales are afforded equal protection from discrimination, regardless of the context in which it occurs.

The current approach of limiting the ADA’s application to a closed list of areas of public life (work, education, provision of goods and services, accommodation and registered clubs) has created significant gaps in protection, leaving individuals vulnerable to discrimination in critical public-facing interactions where no legal recourse is available.

In many cases it is not clear whether certain interactions with government departments and agencies amount to the provision of a “service” under the ADA.

In defending discrimination claims, for example, NSW Police will frequently contend that interactions with Police, including investigatory decisions and the exercise of powers such as apprehension and arrest, are not classified as the provision of services. As a result, individuals (often among the most vulnerable) who experience discrimination in these contexts may be left without a legal remedy.

Dealings with quasi-public bodies, such as strata committees, owners' corporations, and professional licensing boards, which exercise significant control over individuals' rights and opportunities are not clearly covered by the ADA .

The ADA does not expressly include sport as an area of public life in which discrimination is prohibited.

The current patchwork of coverage under the ADA is inconsistent with Australia's international human rights obligations, particularly under the ICCPR and CERD, which require States to prohibit discrimination in all areas of public life.

ALHR recommends that the ADA be applied broadly across all areas of public life without limitation to specific areas of public life.

However, to ensure clarity and guidance we do propose retaining the existing protected areas namely employment, education, access to goods and services, accommodation and registered clubs. We further recommend that the ADA be expanded to explicitly cover discrimination in the following additional areas:

- the exercise of government functions and administration of laws;
- sporting activities; and
- competitions.

The drafting for these additional areas of public life can be modelled on the *Discrimination Act 1991* (ACT).

This approach would close existing protection gaps, uphold Australia's human rights obligations, and reflect ALHR's commitment to a fair, inclusive, and rights-respecting legal framework.

5. Wider exceptions

Question 7.1: Religious personnel exceptions

(1) Should the ADA provide exceptions for:

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

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

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

Question 7.2: Other acts and practices of religious bodies

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

ALHR agrees with the Australian Discrimination Law Experts Group that “*The proliferation of exceptions to the coverage of an anti-discrimination statute undermines its credibility, compromises its normative effect and, most importantly, exposes vulnerable people to discrimination without sufficient justification.*”²⁴

ALHR RECOMMENDATIONS:

Clarify religious exceptions: Limit the broad religious exemptions in section 56(d) of the ADA to ensure compliance with international human rights standards and core international legal principles.

Amend the private school exception: Remove the exemption allowing private educational authorities to discriminate based on various attributes, promoting inclusivity and adherence to core international human rights law principles.

The ADA contains a range of broad exceptions that significantly weaken the operation of the vilification and discrimination provisions. These exceptions create unjust pathways for perpetrators to escape liability and undermine the Act’s purpose to protect vulnerable groups. In particular, exceptions that apply to private educational institutions, religious bodies, adoption services, voluntary associations, small employers and sporting bodies operate in a way that permits ongoing discrimination under the guise of institutional autonomy.

Two of the most concerning examples are the exemptions afforded to religious bodies and private educational institutions.

ALHR submits that exemptions to the ADA must be strictly limited and justified by a legitimate objective. The breadth of the current religious exemptions undermine the purpose of the ADA. As noted by Alastair Lawrie:

“These loopholes allow religious organisations to discriminate against lesbian, gay and transgender people in a wide variety of circumstances, and are so generous that they substantially, and substantively, undermine the overall purpose of the legislation (which is supposedly ‘[a]n Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons’).”²⁵

ALHR’s primary concern is that Australian legislation and judicial decisions should adhere to international human rights standards. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights.

²⁴ PAD84, above.

²⁵ Ibid.

As noted in ALHR's submissions regarding the previous federal government's Commonwealth Religious Discrimination Bills,²⁶ it is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not "trump" other rights, such as the right to live free from discrimination, but rather must be considered in context and proportionately balanced with the rights of others. A secular democratic government should not privilege the right to act on religious views above other human rights.

In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.

It must also be recognised that while the right to believe is an absolute personal right which is exercised internally, the right to manifest or act upon one's religious belief externally so as to impact upon others is never absolute.

The ADA permits private educational authorities to discriminate against students, teachers, and staff on the basis of sex, transgender status, homosexuality, marital or domestic status, and disability. The continued operation of these exemptions is outdated and unjustifiable.

The ADA contains the broadest exceptions for "private educational authorities" of any anti-discrimination law in Australia. As noted by the Justice and Equity Centre in their 2023 preliminary submission to this review (**PAD82**):

"This is because these exceptions:

- *Apply to all private schools and colleges;*
- *Do not impose any test to determine whether they apply in certain circumstances, but are instead blanket exceptions. For example, s49ZO(3) simply states 'Nothing in this section applies to or in respect of a private educational authority', thereby allowing discrimination against lesbian and gay students without having to provide any apparent justification for this discrimination; and*
- *Apply across a broad range of attributes, including sex, transgender status, marital or domestic status, disability and homosexuality."*²⁷

ALHR shares the Justice and Equity Centre's view that these exceptions are excessive, unjustified and should be repealed.

ALHR similarly recognises:

²⁶ See for example:

<https://alhr.org.au/wp-content/uploads/2022/02/07-01-2022-ALHR-Submission-2021-Religious-Discrimination-Legislative-Package-Senate-Inquiry-1.pdf> and

<https://alhr.org.au/wp-content/uploads/2022/02/21-12-2021-ALHR-Submission-2021-Religious-Discrimination-Legislative-PackageF-1.pdf>.

²⁷ Public Interest Advocacy Centre, PAD82.

*'...the role for a specific and targeted exception to allow religious schools to discriminate on the basis of religious belief (but not other attributes) at the point of enrolment, in recognition of the right of communities of faith to form schools to educate their children. But, just as importantly, this should not allow for discrimination against students on the basis of their religious belief, or lack of belief, beyond enrolment – this is essential to protect the rights of children to an education, their mental and physical health and their own rights to question, develop and express religious beliefs as they grow older.'*²⁸

Further, section 56(d) of the ADA permits religious organisations to discriminate against individuals in employment and service delivery on the basis of any protected attribute. These services may include services not of a religious nature including education, healthcare, housing, and social services.

In this regard, ALHR again endorses the position expressed in PAD82, that:

- *“These broad-based exceptions fall short of contemporary community standards, in allowing discrimination on the basis of all protected attributes under the Act (including race, sex, disability, homosexuality, transgender and marital or domestic status).*
- *The general exception in section 56 should be narrowed significantly, such that it allows only for discrimination:*
 - *In relation to the appointment of ministers of religion, and*
 - *Where it is directly related to religious observance (eg through participation in a religious service).*
- *Beyond this, we do not support an exception in relation to people accessing services, other than to allow discrimination by religious schools against students on the basis of religious belief at enrolment (see 8.1 above).*
- *In employment, including at religious schools and faith-based service providers across health, housing, disability and other community and welfare services, we submit that the Commission should consider models according to the following criteria:*
- *Discrimination should be allowed only on the basis of religious belief not for any other attributes (including sex, sexual orientation, gender identity and relationship status);*
- *The discrimination must be directly connected to an inherent requirement of the role; and*
- *The discrimination is reasonable and proportionate in the circumstances.*²⁹

²⁸ Alastair Lawrie 'What's Wrong with the NSW Anti-Discrimination Act 1977?' 25 February 2016 (edited 11 March 2023)
<https://alastairlawrie.net/2016/02/25/whats-wrong-with-the-nsw-anti-discrimination-act-1977/>.

²⁹ Public Interest Advocacy Centre, PAD82.

Exceptions for providers of adoption services and superannuation

ALHR RECOMMENDATIONS:

The adoption services (s59A) and “transgender” superannuation exemptions (s38Q) within the ADA cannot be justified and must be repealed immediately.

The specific exemption in relation to transgender people and sport (s38P) must be reformed.

ALHR also supports reforming the specific exception in relation to transgender people and sport which is currently significantly broader than equivalent laws in other jurisdictions. We endorse the Justice and Equity Centre’s 2023 PAD82 recommendations that:

- removes the the ability to discriminate against children under 12;
- limits the exception to competitive sporting activities rather than all sport (save that ALHR recommends the appropriate distinction should be made in elite or professional sport rather than all sport);
- removes the ability to discriminate against umpires or referees; and
- adding a test to ensure that any discrimination against trans athletes is reasonable and proportionate in all the circumstances of the case.³⁰

6. Harassment

Question 9.2: Other sex-based conduct

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

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

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

ALHR RECOMMENDATION: Amend sexual harassment provisions: Revise the definition of sexual harassment, expand its scope to cover online interactions, and include a positive duty on employers to prevent harassment.

The current definition of sexual harassment under the ADA does not adequately capture the full spectrum of sex-based harassment. It narrowly focussed on conduct “of a sexual nature” and fails to recognise hostile, humiliating or offensive environments created based on a person’s sex. This limitation has been criticised by the Australian Human Rights Commission,

³⁰ Ibid.

particularly in the Respect@Work report which recommended the inclusion of a prohibition of sex-based harassment. Echoing the recommendation made by the AHRC, ALHR recommends that the ADA be amended to include sex-based harassment as well as sexual harassment.

7. Promoting substantive equality

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

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

(2) If so:

(a) What should duty holders be required to do to comply with the duty?

(b) What types of unlawful conduct should the duty cover?

(c) Who should the duty holders be?

(d) What attributes and areas should the duty apply to?

ALHR RECOMMENDATION:

Introduce a positive duty to prevent discrimination: Implement positive duties that require proactive measures to prevent discrimination.

Introduce a positive duty on public and private bodies to provide decision-making supports.

Introduce a positive duty for reasonable adjustments: Impose a positive obligation on employers, educators, and service providers to make reasonable adjustments for individuals with disabilities, promoting equality and participation.

ALHR strongly supports the introduction of a positive duty to prevent unlawful conduct into the ADA. As noted by ADLEG, “*This is an important way of strengthening discrimination law to become proactive and to achieve structural change.*”³¹ Embedding such a duty would represent a vital step toward ensuring that NSW’s anti-discrimination framework reflects contemporary human rights standards and best practice legislative models.

Unlike reactive complaint-based systems that place the burden on individuals to report discrimination or harassment after harm has occurred, a positive duty imposes a proactive obligation on duty holders to take reasonable and proportionate steps to prevent and

³¹ Submission: Australian Discrimination Law Expert Group (ADLEG), above.

eliminate unlawful conduct before it arises. This approach is already embedded in the *Sex Discrimination Act 1984* (Cth), following the landmark Respect@Work report, and has been endorsed by the Australian Human Rights Commission as a transformative mechanism to address systemic inequality and workplace harm.

ALHR recommends that the positive duty in the ADA should require duty holders to take “reasonable and proportionate measures” to prevent and eliminate all forms of unlawful conduct, including discrimination, vilification, victimisation, and sexual harassment.

To ensure the duty is effective and comprehensive, we recommend that it apply to:

- Employers;
- Education providers;
- Providers of goods and services;
- Government departments; and
- Statutory bodies and authorities, including the NSW Police Force.

We further recommend that the ADA adopt the model of positive duties set out in the *Discrimination Act 1991* (ACT) and the *Sex Discrimination Act 1984* (Cth). A critical feature of both legislative models is the inclusion of contextual factors for assessing what constitutes “reasonable and proportionate” compliance. These include:

- The size, nature, and circumstances of the organisation;
- The duty holder’s resources; and
- The practicability and cost of the measures.

These considerations are essential to ensuring that the duty is both fair and adaptable, allowing organisations of varying sizes and capacities to implement tailored compliance strategies.

Further, we echo the submission of Being Mental Health Consumers in noting that the CRPD requires, and the recent Disability Royal Commission recommends, that Australia implement better supported decision-making supports³² The ADA should impose a positive obligation on public and private bodies to ensure that supported decision-making is made available to people with disability, including all those who access mental health care. As noted by Being Mental Health Consumers, “*We fail to respect the inherent dignity of others when we fail to provide every opportunity to them to make decisions about their own lives and treatment.*”

In addition, we further echo the concern of Being Mental Health Consumers and other organisations that the ADA currently places the onus on individuals to lodge a complaint with

³² Being Mental Health Consumers submission to this Review 2025 at <https://being.org.au/wp-content/uploads/2025/08/Anti-Discrimination-Act-Submission-August-2025-FIN-AL.pdf>.

AntiDiscrimination NSW. Resultingly, unlike in other jurisdictions like Victoria, under the ADA duty holders such as employers, educators, providers and others currently do not have any positive obligations to ensure reasonable accommodations are provided.³³

In line with recommendations from the Disability Royal Commission,³⁴ Being Mental Health Consumers,³⁵ the Justice and Equity Centre,³⁶ the Australian Human Rights Commission³⁷ and others, ALHR recommends the creation of a positive obligation for duty holders to provide reasonable accommodations.

Introducing a positive duty would not only modernise the ADA but also align NSW with national and international human rights obligations, including Australia's commitments under the ICCPR and CEDAW. It would also promote a culture of accountability and prevention, shifting the focus from redress to structural change.

Conclusion

ALHR submits that comprehensive modernisation of the ADA is necessary to ensure it offers extensive protection to vulnerable, marginalised and disadvantaged groups. ALHR urges the NSW Law Reform Commission to consider the importance of Australia's international human rights obligations in its review of the ADA.

As noted in the Executive Summary of this submission ALHR shares the view of expert organisations like ADLEG and the Justice and Equity Centre that the extent of the reforms required calls for a fresh start and a new ADA, guided by expert input and community consultation This approach will facilitate a new ADA, one that *“responds to significant changes in society, is informed by recent extensive reviews and reforms of similar laws in Australia and by international practice, and that adopts contemporary positive measures to reduce if not prevent the occurrence of discrimination, harassment and vilification.”*³⁸

We strongly advocate for the modernisation of the ADA to be accompanied by the introduction of a NSW Human Rights Act. This comprehensive legislative approach is essential to safeguarding the human rights of all individuals in NSW and creating a society that values dignity, equality, inclusivity, and diversity.

ALHR is happy to provide any further information that may assist the Commission.

³³ Ibid.

³⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 308.

³⁵ Op.Cit

³⁶ i Public Interest Advocacy Centre (now the Justice and Equity Centre), ‘Leader to Laggard’, Pg. 6, Available at:

<https://jec.org.au/wp-content/uploads/2021/08/PIAC-Leader-to-Laggard-The-case-formodernising-the-NSW-Anti-Discrimination-Act.pdf> (Accessed on 15 August 2025)

³⁷ Australian Human rights commission, ‘Free and Equal and Reform Agenda for Federal Discrimination Laws’, Pg.70, Available at: [ahrc_free_equal_dec_2021.pdf](https://www.aahr.org.au/files/2021/08/Free-and-Equal-and-Reform-Agenda-for-Federal-Discrimination-Laws.pdf) (Accessed 15 August 2025)

³⁸ ADLEG, Op.Cit and at <https://drive.google.com/file/d/1xPr2rebt0C6iWdEKHMD9H439ICf4W8IZ/view>

If you would like to discuss any aspect of this submission, please email ALHR President Nicholas Stewart

Yours faithfully

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Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.

SCHEDULE 1

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

2023 SUBMISSION IN RESPONSE TO THE AUSTRALIAN LAW REFORM COMMISSION'S REVIEW OF THE *ANTI-DISCRIMINATION ACT 1977 (NSW)*

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ABOUT AUSTRALIAN LAWYERS FOR HUMAN RIGHTS (ALHR)

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

EXECUTIVE SUMMARY

ALHR is grateful for the opportunity to make the following submission in response to the NSW Law Reform Commission's inquiry into NSW anti-discrimination laws, particularly the inadequacy of the

Anti-Discrimination Act 1977 (NSW) ('ADA'). We commend the NSW Government on its commitment to reviewing the ADA and regulatory framework to determine whether it needs to be modernised and simplified to better promote the equal enjoyment of human rights, and reflect contemporary community standards.

The ADA has been in force for almost half a century. While it was progressive at the time of its enactment, it now requires significant amendment to better promote and protect societal standards and values, and to comply with Australia's international human rights obligations. Ultimately, we submit that implementing a NSW Human Rights Act is a necessary step for NSW to conform with Australia's international human rights obligations, and to make an impactful legislative change in support of anti-discrimination in NSW.

This submission is grounded on the principles set out in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, which provides that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...[t]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.'

And Article 2(1), which states:

'Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind such as race colour, sex, language, religious, political or other opinion, national or social origin, property birth or other status.'

Discrimination undermines the principles of human dignity and equality, which are fundamental to the ICCPR and many other human rights instruments. New South Wales should strive to implement robust anti-discrimination legislation in order to uphold human rights, promote social cohesion and foster inclusive and equitable social practices across the state.

Recommendations:

1. **Amend the structure of the ADA:** Restructure the ADA for clarity, eliminating redundancy, and improving accessibility. Consolidate protected attributes into a concise list with uniform discrimination provisions to enhance understanding and compliance.
2. **Expand the range of attributes protected:** Broaden the protected attributes to bring into line with other States and Territories.
3. **Introduce a positive duty for reasonable adjustments:** Impose a positive obligation on employers, educators, and service providers to make reasonable adjustments for individuals with disabilities, promoting equality and participation.
4. **Revise the direct discrimination test:** Replace the comparator test with a "detriment test".
5. **Unify discrimination definitions:** Streamline discrimination definitions to eliminate the distinction between "direct" and "indirect" discrimination.
6. **Amend sexual harassment provisions:** Revise the definition of sexual harassment, expand its scope to cover online interactions, and include a positive duty on employers to prevent harassment.
7. **Clarify religious exceptions:** Limit the broad religious exemptions in Section 56(d) of the ADA to ensure compliance with international human rights standards.
8. **Amend the private school exception:** Remove the exemption allowing private educational authorities to discriminate based on various attributes, promoting inclusivity.

9. **Introduce a positive duty to prevent discrimination:** Implement positive duties that require proactive measures to prevent discrimination.
10. **Align vilification provisions with the Crimes Act:** Ensure that the ADA's vilification provisions align with the *Crimes Act 1900* (NSW) to provide consistent protection against vilification.
11. **A NSW Human Rights Act:** The introduction of a NSW Human Rights Act is crucial to align NSW with international human rights obligations and provide broader protections against discrimination.

REFORM TO THE ANTI-DISCRIMINATION ACT 1977 (NSW)

ALHR submits that the ADA currently fails to provide adequate protection against discrimination. The range of groups protected by the ADA are too narrow and further limited by use of outdated terminology. The current test to determine whether discrimination has occurred is poorly drafted, giving rise to uncertainty as to the application of the ADA. The exceptions permitting discrimination are too broad and allow for certain organisations and people to discriminate in circumstances which do not conform with community standards. The ADA is also overly complex and repetitive, making it difficult to understand, this is particularly concerning as it may impede access to justice for persons affected by discrimination, due to an inability to understand and use the ADA, which is inconsistent with the rule of law. The ADA may also result in organisations, businesses and NGOs, being unaware of, or misunderstanding, their obligations under the ADA

The current ADA has regularly been the subject of criticism for its deficiencies in addressing contemporary discrimination issues.³⁹ Recent amendments, like the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW), have been considered too broad and potentially infringing on freedom of expression without adequately distinguishing between criticism of ideas and vilification of individuals based on their religious beliefs.

Moreover, the patchwork approach to amending the Act has resulted in limited and fragmented protections, which are difficult for individuals to understand and access. ALHR advocates for a comprehensive reform of the Act, to ensure it provides robust and effective protections, for all individuals in NSW.

ALHR RECOMMENDATIONS

1. Amend the structure of the ADA

The ADA is overly complex and repetitive. The Act does not provide one concise list of protected attributes and then set out the areas in which discrimination is prohibited.⁴⁰ Rather, the ADA divides each attribute into separate parts and subsequently sets out under each part the areas in which discrimination is prohibited and the exceptions that apply for that protected attribute. This layout results in the ADA being overly repetitive as many of the provisions are essentially the same. The minor inconsistencies between each part make it difficult to determine how the ADA applies in these circumstances and whether the subtle differences in wording are intended to result in a different interpretation of each provision. The ADA should be amended to expand the attributes protected against discrimination, but implement a more uniform approach to discrimination that is easier to

³⁹ See Public Interest Advocacy Centre (PIAC)'s *Leader to Laggard: The case for modernising a NSW Anti-Discrimination Act* 6 August 2021 <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90act/>

⁴⁰ This alternative approach is taken by Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory.

access and understand, with improved capacity to address all forms of discrimination, promote substantive equality, and implement Australia's international obligations.

2. Expand the range of attributes protected against discrimination

At present, the ADA only prohibits discrimination based on race, sex, transgender status, homosexuality, age, marital or domestic status, disability, and responsibilities as carer. This very limited range of protected attributes provides insufficient protection to the broader community as well as many vulnerable, marginalised, and disadvantaged groups. There have been recent amendments to make it unlawful to, “*by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, because of their religious belief, affiliation or activity*”. People who do not have a religious belief or affiliation or do not engage in religious activity are also protected under the new law. In any event, this patchwork approach is indicative of the ADA requiring a complete review.

Sex Characteristics

The list of protected attributes in the ADA should be amended to include “sex characteristics” as it currently fails to protect intersex people (people with variations of sex characteristics). This demonstrates a failure to keep pace with advances in society as the Commonwealth, Tasmania, South Australia, and the Australian Capital Territory all recognise this as an attribute in need of protection, having included it within their anti-discrimination legislation.⁴¹

The reference to “homosexuality” is a significantly limiting term. It fails to ensure bisexual, pansexual, omnisexual, asexual, or heterosexual people are protected against discrimination. NSW is the only state in Australia which does not offer this protection. The term “homosexuality” should at least be replaced with “sexual orientation” which would make the terminology consistent with the *Sex Discrimination Act 1984* (Cth), however, we suggest a broader definition encapsulating bisexuality and asexuality,⁴² to ensure greater protection is afforded to all persons.⁴³

Gender Identity

The use of the term “transgender status” in the current legislation is limited insofar as it only captures people who identify as a member of the opposite sex to what that person was assigned at birth. This does not protect non-binary people. Amending the term “transgender” to “gender identity” is a more inclusive category encompassing both transgender and non-binary people.

Religious belief or activity

The protected attributes do not include discrimination based on religious belief (including no belief), an activity which is protected in all Australian jurisdictions except NSW, South Australia, and the Commonwealth. This is significant because religious discrimination is a major societal issue which Australia continues to struggle with. A recent example can be seen from a report released by the Australian Human Rights Commission in 2021 which revealed that 80 per cent of Australian Muslims have experienced prejudice or discrimination. ALHR submits that ‘religious belief and activity’ should be included as a protected attribute in the ADA and that protection should include not holding a religious belief or view and not engaging in, or refusing to engage in a lawful religious activity.

⁴¹ Other Australian states are currently looking at amending their legislation to include “sex characteristics” as a protected attribute.

⁴² ALHR endorses the definition proposed by Equality Australia.

⁴³ ALHR endorses Alastair Lawrie ‘*What’s Wrong with the NSW Anti-Discrimination Act 1977?*’ 25 February 2016 (edited 11 March 2023)
<https://alastairlawrie.net/2016/02/25/whats-wrong-with-the-nsw-anti-discrimination-act-1977/>

Relationship status

The outdated reference to “marital or domestic status” should also be amended to “relationship status” to include different types of relationships.

Lawful sexual activity and sex work

The ADA does not contain any references to lawful sexual activity and sex work. ‘Lawful sexual activity’ is included in Queensland, Tasmanian and Victorian anti-discrimination legislation, however, we suggest the inclusion of both ‘lawful sexual activity’ and ‘sex work’, defined separately to acknowledge that past and present sex workers face specific discrimination and unfair treatment across a broad range of areas.⁴⁴

Disability

An open discussion with the disability community should be had to ascertain whether the definition of ‘disability’ in the ADA should be updated. It currently uses terminology such as ‘malfunction, malformation or disfigurement’ which may be considered offensive and inconsistent with our current understanding of disability.

3. Introduce a positive duty to make reasonable adjustments

The ADA only prohibits discrimination, making no effort to actively promote equality. For example, whilst the ADA prohibits disability discrimination, it does not require steps be taken to make reasonable adjustments to accommodate a person’s disability.

ALHR strongly believes that the ADA needs to be amended so that it imposes a positive obligation on employers, educators, providers of goods and services and others to make reasonable adjustments. Whilst the requirement to make reasonable adjustments is implicit in the requirement to avoid indirect discrimination, introducing an explicit obligation would arguably assist and motivate more employers, educators, and other bodies, to develop clear policies on reasonable adjustment. This would promote equality by enabling the full and equal participation of people with disability in all areas of public life.

4. Avoid requiring the use of a comparator test in establishing “direct discrimination” and instead use a detriment test as is used in the *Discrimination Act 1991* (ACT)

ALHR submits that a major problem with the current test for discrimination is that it requires a ‘comparator’. For example, section 24 of the ADA sets out what constitutes discrimination on the ground of sex and provides that conduct or treatment is discriminatory against a woman if the perpetrator treats the woman less favourably than they treat or would treat a man in the same situation. This is a confusing and problematic test as it involves a theoretical question of how a person would allegedly behave. It also results in many practical difficulties because what may be considered discriminatory to a woman would not be considered discriminatory to a man. It is an entirely unnecessary element of the legislation and should be replaced with the “detriment test” as is legislated by the *Discrimination Act 1991* (ACT) which defines discrimination as a person being treated *unfavourably* because that person has one or more protected attribute(s). ALHR submits that this amendment is necessary to ensure that the ADA is accessible and provides adequate protection against discriminatory conduct by providing a simple and clear definition of discrimination.

5. Unify the definition of “direct discrimination” and “indirect discrimination”

⁴⁴ See Scarlett Alliance, ‘Briefing Paper: Anti-Discrimination and Vilification Protection for Sex Workers in Australia’ February 2022 https://scarlettalliance.org.au/wp-content/uploads/2022/07/Anti_Discrim2022.pdf

Another practical difficulty with the ADA is the implicit separation of discrimination into “indirect discrimination” and “direct discrimination”.⁴⁵ It is often very difficult to identify which actions amount to direct or indirect discrimination as there is often an element of both and it is an unnecessary distinction. ALHR submits that this definition should be unified to make it clearer and more consistent with the objects of the legislation. Alternatively, the test for discrimination should be amended to make it clearer that discrimination can be direct, indirect or both. At present, the test appears to require that the aggrieved person suffer either direct or indirect discrimination.

6. Amend the definition of sexual harassment and extend the prohibition

ALHR submits that the definition of sexual harassment in the ADA fails to capture the different forms of sex-based harassment. Section 22A of the ADA defines sexual harassment as ‘*an unwelcome sexual advance... an unwelcome request for sexual favours or... other unwelcome conduct of a sexual nature... in circumstances in which a reasonable person... would have anticipated that the other person would be offended, humiliated or intimidated.*’ Unlike the *Sex Discrimination Act 1984* (Cth) (SDA), ‘conduct of a sexual nature’ is not defined. The SDA contains an expansive definition of ‘conduct of a sexual nature’ to include ‘making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.’ The ADA should include a similarly expansive definition of ‘conduct of a sexual nature’ that should expand the definition in the SDA to include making a statement of a sexual nature to a person, or in the presence of a person *or about a person whether or not in that person’s presence...*’.

The Australian Human Rights Commission noted that a clear limitation of this definition is that it does not extend to prohibit creating or facilitating an environment which is intimidating, hostile, humiliating, or offensive to another sex.⁴⁶ ALHR submits that the definition needs to be amended to expressly include sexual harassment in this context. One effect of this amendment would be to extend liability for the prohibition of sexual harassment in the workplace and incentivise employers to take more accountability in ensuring they are not fostering an environment conducive of sexual harassment. Notably, ALHR is of the view that a positive duty on employers to take measures to address and prevent discrimination should be explicitly incorporated into the protections for each protected attribute.

In the current climate of remote work and online interactions between workplace participants, the definition of workplace should be expanded to clearly include online or virtual places where workplace participants interact including social media.

The ADA does not prohibit sexual harassment in all areas of public life. The Act makes sexual harassment unlawful in employment, qualifying bodies, employment agencies, educational institutions, provision of goods and services, accommodation, land, sport and state laws and programs. This can make it difficult for a person to demonstrate they have been sexually harassed in an area covered by the ADA. For example, the Act makes it unlawful for a workplace participant to sexually harass another workplace participant in the same workplace. It defines workplace participant to mean volunteers and unpaid trainees, however, it does not extend to other unpaid workers. It also does not contemplate the fact that the digital world has the effect of a “workplace” extending beyond bricks and mortar.

The prevalent nature of sexual harassment in modern day society highlights the need for sexual harassment protections to extend to all persons regardless of the situation. Queensland and Tasmania have legislated to make it unlawful to sexually harass another person in all circumstances. ALHR recommends that the ADA be amended to provide the same blanket protection as this would simplify

⁴⁵ Section 24 of the ADA provides an example of the implicit separation of discrimination.

⁴⁶ Recommendation 16. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020.

the operation of the Act, increase its effectiveness, and send a clear message that sexual harassment is unacceptable in all circumstances.

7. Clarify the religious exceptions

ALHR submits that the broad exemption provided to religious organisations under section 56(d) of the ADA which allows religious organisations to discriminate against people accessing their services and employees based on any protected attribute should be amended to limit the operation of this exemption. This exemption permits religious organisations to discriminate in the provision of and access to a wide range of services including religious educational institutions, healthcare centres, accommodation and housing, disability, and other social services. This is particularly concerning in circumstances where many healthcare and educational organisations in NSW are religious organisations. This is inconsistent with current societal standards and values, particularly where the service being provided is a public service receiving government funding.

In addition, section 56(d) of the ADA in its current form is inconsistent with Article 18 of the ICCPR and other normative principles of International Human Rights Law. ALHR believes that this exemption is outdated and unjustified. Accordingly, we submit that the exemption be removed from the Act.

8. Amend the private school exception

The ADA currently allows private educational authorities to discriminate against students, lecturers, teachers, and other staff based on sex, transgender status, homosexuality, marital or domestic status, and disability. This exemption applies irrespective of whether the private educational institution is religious. The ADA is the only anti-discrimination legislation in Australia to provide such an exemption. ALHR strongly believes that this exemption is outdated and unjustified. Accordingly, we submit that the exemption be removed from the Act.

9. Introduce a positive duty to prevent discrimination

Positive duties reduce the burden on those experiencing discrimination by requiring preventative measures to be in place. This approach requires duty holders to take reasonable steps to address systemic issues and eliminate unlawful discrimination before it happens, possibly reducing the number of complaints over time.

There is an established approach under Commonwealth law, where certain entities have a positive duty to prevent sex discrimination and sexual harassment in workplaces.⁴⁷ Victoria, the Northern Territory and the Australian Capital Territory have also introduced positive duties in their anti-discrimination framework and Queensland and Western Australia are considering similar reforms.⁴⁸

VILIFICATION PROVISIONS NEED TO BE ALIGNED WITH THE *CRIMES ACT 1900* (NSW)

ALHR commends the NSW Government on the amendments it made to the *Crimes Act 1900* (NSW) in 2018 which introduced a criminal offence for '*publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status*', with a maximum penalty of 3 years. This demonstrates the seriousness with which the Government treats vilification and hate crimes and reflects the community's condemnation of such conduct. However, the ADA provisions are inconsistent with the *Crimes Act* provisions.

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

⁴⁸ *Equal Opportunity Act 2010* (Vic) Part 3; *Anti-Discrimination Act 1992* (NT) Part 2A; *Discrimination Act 1991* (ACT) Part 9; Queensland Human Rights Commission (2022) [Building Belonging Report](#), rec 15 and at 230; Queensland Government (2022) [Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991](#), items 15.1-15.3. Law Reform Commission of Western Australia (2022) [LRCWA Report](#), recs 121, 125 and at 239, 241; The Hon John Quigley, Attorney General (2022) ['WA's anti-discrimination laws set for overhaul'](#), 16 August.

The ADA provides that it is ‘*unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons*’ on grounds of race, transgender status, homosexuality, and HIV/AIDS status. This provides significantly less protection than the *Crimes Act* provisions as it does not protect people from vilification based on their religious views, sexual orientation, gender identity, or intersex status. This inconsistency means that people may be protected under criminal law against vilification but have no civil recourse under the ADA. The ADA should be amended to provide the same protections afforded by the *Crimes Act*.

While the ADA should include a provision prohibiting religious vilification, it must ensure that it sufficiently distinguishes between freedom of expression regarding ideas and beliefs of a religion, as opposed to vilification against people because of religious beliefs they have or express. This issue was highlighted by the former UN Special Rapporteur on Freedom of Religion or Belief, outlining the need for governments who are attempting to combat intolerance and incitement to violence based on religion to ensure an appropriate balance is struck between freedom of expression and freedom of religion.

ALHR submits that the vilification provisions need to clearly outline what constitutes racial vilification and clearly distinguish it from freedom of expression.

Victoria, Queensland, the Australian Capital Territory, and a significant proportion of the Western democratic world have all legislated a Human Rights Act which assists in governing the inter-relationship between freedom of religion and free speech in the context of promoting and protecting human rights. This has proved to be a useful legislative instrument in the context of providing appropriate safeguards against racial vilification which supports ALHR’s submission that a Human Rights Act is needed to advance NSW current anti-discrimination laws and ensure they keep up with modern times.

The ALHR did not support the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW), while prohibiting religious vilification is welcome in principle, it is our view that the wording was too vague and we would have preferred protections to be excluded for unlawful activity and organisations.

A NSW HUMAN RIGHTS ACT IS NECESSARY TO PROVIDE APPROPRIATE AND EFFECTIVE PROTECTIONS AGAINST DISCRIMINATION

ALHR endorses the need to examine the protections, processes, and enforcement mechanisms in other Australian and international anti-discrimination and human rights laws, including those in place in other states. While Victoria, Queensland, and the Australian Capital Territory have enacted Human Rights Acts, NSW remains an outlier in this regard. ALHR submits that the introduction of a NSW Human Rights Act is essential to ensure a comprehensive legislative framework for the protection of human rights and to demonstrate NSW’s commitment to upholding its international obligations.

ALHR strongly believes that a NSW Human Rights Act is the most effective means of aligning NSW laws with Australia’s international human rights obligations under the core human rights treaties to which Australia is a party. A NSW Human Rights Act can serve as the necessary mechanism to integrate these obligations into domestic law, providing a clear and comprehensive framework for the protection and promotion of human rights in the state. It would ensure that fundamental rights such as the right to equality and freedom from discrimination are protected for all people in all areas of life, thus fostering a culture which supports human rights and ensuring that laws and policies are developed in line with human rights principles.

A Human Rights Act would require the NSW parliament to consider the impact of current and future laws on human rights and consider human rights when developing policies. It would enable NSW courts to consider the compatibility of NSW laws with human rights standards and therefore promote

and encourage a more inclusive, open, and transparent dialogue on the Government's compliance with anti-discrimination laws and how laws can and should operate to safeguard against discrimination.

Anti-discrimination protections must be accompanied by a legal framework that comprehensively provides for the protection and articulation of human rights for the people of NSW. The Anti-Discrimination Act is not a substitute for a Human Rights Act. NSW's *Anti-Discrimination Act* only provides protection against discrimination for people who can demonstrate that they have been discriminated against based on a limited number of protected attributes within a restricted number of areas of public life. For instance, discrimination based on race is only prohibited in relation to work, education, provision of goods and services, accommodation, and participation in registered clubs. A Human Rights Act would offer protection for all persons against discrimination in a broader set of circumstances, such as areas affecting a person's right to life, right to vote, right to be free from torture and everyone's right to equality before the law. All these rights are not currently explicitly protected by legislation in NSW.

A Human Rights Act would promote equality and access to justice, ensuring the NSW government of today, and importantly in years to come, safeguards against discrimination. Therefore, it offers greater protection for everyone in NSW against the unjust or arbitrary exercise of public power which could negate the benefits offered by the *Anti-Discrimination Act*. It also offers a greater range of enforceable remedies and an avenue for justice to anyone who has had their human rights violated.

The introduction of a Human Rights Act which clearly sets out the human rights every person in NSW is entitled to and the responsibilities of organisations and businesses in upholding and promoting these rights would foster greater community awareness and respect for these rights.

We strongly believe that a NSW Human Rights Act, in addition to other steps, can satisfy NSW's obligations to make laws consistent with Australia's international human rights obligations and offer all persons in NSW with the best protection against discrimination.

CONCLUSION

ALHR submits that comprehensive reform of the ADA is necessary to ensure it offers extensive protection to vulnerable, marginalised and disadvantaged groups. ALHR urges the NSW Law Reform Commission to consider the importance of Australia's international human rights obligations in its review of the ADA. We strongly advocate for the adoption of a NSW Human Rights Act as the most appropriate way to ensure that NSW's laws are consistent with these obligations. This comprehensive legislative approach is essential to safeguarding the human rights of all individuals in NSW and creating a society that values equality, inclusivity, and diversity.

Thank you for considering our submission. We would be very willing to meet with and discuss our preliminary submission with the New South Wales Law Reform Commission to help inform your research and we look forward to contributing to further consultations in the future.