THE LAW SOCIETY
OF NEW SOUTH WALES

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1 September 2025

Mr Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Locked Bag 5000
PARRAMATTA NSW 2150

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst,

REVIEW OF THE *ANTI-DISCRIMINATION ACT 1977* (NSW) – UNLAWFUL CONDUCT

Thank you for the opportunity to provide a submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (**ADA**). The Law Society's Employment Law, Human Rights, Public Law, Indigenous Issues and Property Law Committees contributed to this submission.

The Law Society continues to support a comprehensive review of the ADA to ensure that discrimination protections in NSW are strengthened and modernised. As noted in our preliminary submission to the NSW Law Reform Commission (**NSWLRC**), we consider that the ADA in its current form has not kept pace with changes in societal understandings of discrimination, nor the increasing body of evidence on its wide-ranging and harmful impacts.[1] Piecemeal amendments to the ADA have resulted in legislation that is structurally and conceptually complicated.

In considering the unlawful conduct provisions, the Law Society's responses to the questions posed in the Consultation Paper are aimed at ensuring a comprehensive anti-discrimination regime which, where possible, is consistent with the protections against discrimination, vilification and harassment found in federal anti-discrimination laws. However, proposed amendments to the ADA should not be limited by what has been enacted at the Commonwealth level.[2] We consider that a review of the ADA presents the opportunity to ensure that NSW has a comprehensive and leading regime which takes account of intersectionality and addresses systemic discrimination on the basis of protected attributes.

The Consultation Paper highlights the complex and extensive exceptions which currently exist in the ADA. We appreciate that there will inevitably be differences of opinion across the community, including within our own membership, on the appropriate scope of exceptions as well as the way in which these exceptions should be framed. Our responses have been guided by the principle that there must be a genuine and persuasive

[1] Law Society of NSW, Preliminary Submission to the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (29 September 2023).
[2] We also note that the Commonwealth Government is currently conducting a review of the *Disability Discrimination Act 1992* (Cth), particularly as regards implementation of recommendations made by the Disability Royal Commission.

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justification for any exception, in line with the primary purpose of the ADA, which is 'to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons'.[3]

The Law Society recognises that the ultimate strength of the anti-discrimination regime in NSW will depend on whether the community is able to understand its operation and rely on it to protect against unlawful discrimination and other damaging conduct. We therefore welcome the development of the NSWLRC's second Consultation Paper which we understand will be directed to these important aspects of the regime.

Our responses to the questions in the Consultation Paper are set out at Attachment A.

Thank you for the opportunity to comment. Questions at first instance may be directed to Vicky Kuek, Director, Policy and Practice

Yours sincerely,

Jennifer Ball
President

[3] *Anti-Discrimination Act 1977* (NSW).

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ATTACHMENT A

REVIEW OF THE *ANTI-DISCRIMINATION ACT 1977* (NSW) – UNLAWFUL CONDUCT

CHAPTER 3: TESTS FOR DISCRIMINATION

Question 3.1: Direct discrimination

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

The Law Society considers that the test for direct discrimination under the *Anti-Discrimination Act 1977* (NSW) (**ADA**) can be improved. The ADA currently uses the comparator test for direct discrimination. For example, under s 24, it must be established that the aggrieved person (a woman) is treated less favourably than a man would be treated in the same circumstances, or in circumstances which are not materially different. As noted in the Consultation Paper:

> *The comparison of the treatment must be undertaken by considering a comparator in the same, or mostly the same, circumstances. Where there is no real person to be a comparator, a hypothetical person in those same circumstances may be used.*[4]

The comparator test is reported by our members to create conceptual difficulties, particularly in matters which are factually dense. It is also of concern that the comparator test is artificial, and a fair or realistic comparison may not always be possible. For example, when a comparison is made between the treatment of an Aboriginal or Torres Strait Islander person and a person who is not an Aboriginal or Torres Strait Islander, such an analysis may omit a nuanced consideration of history and context. These conceptual difficulties may be compounded in cases where a person is experiencing intersectional disadvantage (i.e., they have multiple, intersecting protected attributes), where it can be difficult to identify an appropriate comparator.

The Law Society supports the introduction of an unfavourable treatment test, as is in place in Victoria,[5] and the ACT.[6] This test removes the requirement of the hypothetical comparator, and focuses on whether the person has been treated unfavourably because of the relevant attribute or attributes. While lawyers arguing a matter may seek to make out 'unfavourable treatment' by making comparisons with a person without the relevant attribute/s, the fact that evidence of how a comparator would have been treated is not mandatory would lend the ADA greater clarity and flexibility.[7] We suggest that simplifying the test in this way would promote understanding of direct discrimination and access to justice.

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[4] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 23 [3.15], referring to relevant case law, including *Commissioner of Police v Mohamed* [2009] NSWCA 432 [25]-[26].
[5] *Equal Opportunity Act 2010* (Vic) s 8(1).
[6] *Discrimination Act 1991* (ACT) s 8(2).
[7] For an example of how the 'unfavourable treatment' test has been applied, see *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132 [22] where the test was explained as follows: 'The ACT Discrimination Act... does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or if the conditions imposed or proposed would

Question 3.2 The comparative disproportionate impact test

1. **Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?**

The ADA currently uses what has been described as the 'comparative disproportionate impact test' for indirect discrimination. Our members, particularly those who work on disability discrimination matters, have pointed out that this test causes difficulties because of the statistical information required to make out this ground. The high evidentiary burden established by the test is particularly prohibitive for complainants who are self-represented and may not have the relevant resources, such as statistics and data, or expertise to address the requirement.

We are of the view that the disadvantage-based test would be preferable. This can be seen in other jurisdictions including Victoria[8] and the ACT,[9] as well as federally under the *Disability Discrimination Act 1992* (Cth) (**DDA**)[10] the *Age Discrimination Act 2004* (Cth) (**Age Discrimination Act**)[11] and the *Sex Discrimination Act 1984* (**SDA**).[12] The disadvantage-based test considers whether a condition or requirement has, or is likely to have, the effect of disadvantaging a complainant because they have the protected attribute.

We prefer the definition in the ACT, as it requires the disadvantage to be in relation to 'the person' with the attribute/s, rather than 'persons with the attribute'. This reduces the burden on the complainant to make out that disadvantage would be experienced by all persons with their particular attribute. It may also benefit self-represented applicants, who could experience conceptual difficulties in making appropriate comparisons between their own situation and that of a wider group with the protected attribute.

Question 3.3: Indirect discrimination and inability to comply

1. **What are your views on the "not able to comply" part of the indirect discrimination test? Should this part of the test be removed? Why or why not?**

To prove indirect discrimination, complainants need to show that they do not, or cannot, comply with the requirement or condition.[13] In the experience of our members, the 'inability to comply' element does not typically raise difficulties in practice. As set out in the Consultation Paper, this is because, '(g)enerally, the fact that a complainant does not comply with a requirement or condition can be assumed'.[14]

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disadvantage that person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person'.
[8] *Equal Opportunity Act 2010* (Vic) s 9(1).
[9] *Discrimination Act 1991* (ACT) s 8(3).
[10] *Disability Discrimination Act 1992* (Cth) s 6(1).
[11] *Age Discrimination Act 2004* (Cth) s 15(1).
[12] *Sex Discrimination Act 1984* (Cth) s 7B.
[13] *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).
[14] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 30 [3.51].

However, we acknowledge concerns raised in recent reviews of other state and territory anti-discrimination laws that there is a risk of literal interpretation of the 'inability to comply' part of the test (for example, where a person of Sikh faith could technically remove their turban, despite being unable to do so in the practice of their religion).[15] For clarity and to prevent unforeseen circumstances, we therefore suggest that this requirement be removed. We note that the requirement is not part of the test in the ACT, Victoria, Tasmania or under the SDA.[16]

Question 3.4: Indirect discrimination and the reasonableness standard

1. **Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?**

2. **Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?**

To make out indirect discrimination, the complainant is required to demonstrate that the requirement is 'not reasonable having regard to the circumstances of the case'.[17] The Law Society shares the concerns raised in Commonwealth anti-discrimination law reviews that the reasonableness test is ambiguous and may give rise to different interpretations, given the difficulties of identifying 'the limits of indirect discrimination claims using this approach'.[18]

We support the introduction of a non-exhaustive list of factors to consider when determining whether a requirement is reasonable, noting that the decision-maker should be required to consider the circumstances of both the complainant and the respondent. For example, in addition to the financial and economic circumstances/business interests of the respondent and their ability to accommodate the needs of the complainant, the nature and extent of the disadvantage to the complainant should also form part of the analysis. We suggest that the approach in Victoria, where the reasonableness of a requirement, condition or practice depends on all the relevant circumstances, is an appropriate test, and support the items included on its non-exhaustive list.[19]

[15] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 98 referring to *Mandla v Dowell Lee* [1983] ICR 385; [1982] UKHL 7.
[16] *Discrimination Act 1991* (ACT) s 8(3)–(4); *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B.
[17] *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).
[18] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 296; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Report, December 2008) [11.13], [11.17].
[19] *Equal Opportunity Act 2010* (Vic) s 9(3).

Question 3.5: Indirect discrimination based on characteristics

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

The Law Society supports extending the prohibition on indirect discrimination to characteristics that people with protected attributes either generally have or are assumed to have. As a matter of principle, and to ensure as far as possible consistency with the test for direct discrimination, we consider such a change to the ADA to be appropriate.[20]

Question 3.6: Proving direct and indirect discrimination

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

2. **Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?**

Under the ADA, the complainant bears the onus of proof i.e., they must prove each part of the test for discrimination. In the experience of our members, there are considerable difficulties faced by complainants in terms of gathering evidence and proving causation. Typically, it is the respondent who possesses knowledge and records around their policies, practices and decision-making, including for example the effects of their requirements and the extent to which they are being complied with.

In terms of possible changes with respect to direct discrimination, the Consultation Paper refers to two models for consideration, namely that used under ss 351 and 361 of the *Fair Work Act 2009* (Cth) (**FWA**) in relation to adverse action, and the more recently implemented model in Queensland, which is said to reflect what occurs under the *Equality Act 2010* (UK).[21]

Both these models involve a reversal of the onus of proof. We suggest it is fair that the complainant is required to make out a prima facie case that they have been subjected to discrimination, before the onus shifts to the respondent. This would bring NSW into alignment with other jurisdictions, including the United Kingdom (**UK**), European Union and Canada.[22] In our view, the FWA model is more simply and clearly stated than the Queensland model. We note, however, that the term 'adverse action' is specific to the FWA, and any changes to the ADA would need to reflect the relevant language around direct discrimination.

Further, authorities such as *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 549 cast some doubt on the weight given to the subjective intention of a decision-maker in carrying out adverse action. This makes general protections claims difficult for applicants to make out. We therefore suggest it would be appropriate for subjective intention to be relevant in determining unlawful

[20] This approach is adopted in the ACT. See *Discrimination Act 1991* (ACT) s 7(2)(a)–(b).
[21] *Anti-Discrimination Act 1991* (Qld) s 204.
[22] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 205.

discrimination under the ADA, and should be modelled on the changes to s 213(5)(c) introduced by the *Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025* (NSW).[23]

In terms of indirect discrimination, we agree that it is overly burdensome for complainants to prove each part of the test. Rather, the respondent should be required to show that the particular requirement or condition was reasonable in the circumstances. This will bring NSW in line with the Commonwealth and other state and territory jurisdictions.[24]

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?**

Discrimination is defined in the ADA by establishing two distinct types of discrimination, namely direct and indirect discrimination. An example of the tests for direct and indirect discrimination can be seen in s 24 of the ADA, which concerns discrimination on the ground of sex:

> *(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of sex if the perpetrator—*
>
> (a) *on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or*
>
> (b) *requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.*

The distinction between direct and indirect discrimination is maintained in all state and territory jurisdictions in Australia, although at the federal level, both s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) and s 9(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**) do not make this distinction.

Some stakeholders have previously pointed out that there are limitations to the direct/indirect distinction, particularly from an access to justice perspective, with 'people not understanding the different types of discrimination and not correctly identifying which type applies to their particular case'.[25] Others have pointed to

[23] Note that s 213(5)(c) of the *Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025* (NSW) provides that '...the Commission may have regard to conscious and unconscious factors for the alleged matter when determining if the alleged matter was not a substantial and operative cause of the detrimental action.'
[24] *Age Discrimination Act 2004* (Cth) s 15(2); *Disability Discrimination Act 1992* (Cth) s 6(4); *Sex Discrimination Act 1984* (Cth) s 7C; *Discrimination Act 1991* (ACT) s 70; *Equal Opportunity Act 2010* (Vic) s 9(2).
[25] Public Interest Advocacy Centre (now Justice and Equity Centre), *From Leader to Laggard: The Case for Modernising the NSW Anti-Discrimination Act* (Position Paper, 6 August 2021) 5.

international jurisdictions where direct and indirect discrimination are combined into one definition, for example Canada, South Africa, the United States of America, and New Zealand.[26]

On balance, the Law Society considers that the distinction between direct and indirect discrimination should be maintained. It is possible that a definition that combines both forms of discrimination would lead to greater confusion, particularly given the development of Australian jurisprudence on the concept to date. However, the clarity of the ADA should be improved by defining discrimination as occurring when a person discriminates either directly or indirectly, or both directly and indirectly, against another person.[27] In addition, both direct and indirect discrimination should be expressly defined.

Question 3.8: Intersectional discrimination

1. **Should the ADA protect against intersectional discrimination? Why or why not?**

2. **If so, how should this be achieved?**

The way in which the ADA is currently structured means that, to be unlawful, direct or indirect discrimination must occur on the basis of one protected attribute (e.g. on the ground of the aggrieved person's sex). Contemporary approaches to anti-discrimination law recognise that making discrimination contingent on a single attribute (rather than multiple attributes) fails to recognise intersectional experiences of discrimination (e.g. a person may experience discrimination because of the combined grounds of sex, race and disability).[28]

While experienced lawyers representing applicants may be adept at pleading multiple alternative grounds, self-represented litigants may struggle with the task of addressing each attribute separately. Further, as set out in the Consultation Paper, there is currently no protection for the cumulative effect of discrimination based on a combination of attributes.[29] An example provided in the context of the review of Queensland's anti-discrimination laws was the refusal of a lease where the complainant noted 'it was impossible to tell if the refusal was due to their Aboriginality, parental status, or family responsibilities, or a combination of these attributes'.[30]

As noted above, we consider that direct and indirect discrimination should be defined, and the definitions should provide that discrimination can occur on the basis of one or more attributes, or because of the effect of a combination of attributes. This would mirror the reforms that were proposed in Queensland.[31]

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[26] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 86.
[27] *Discrimination Act 1991* (ACT) s 8(1).
[28] Australian NGO Coalition, *Joint NGO Report on behalf of the Australian NGO Coalition* (2025): <https://www.hrlc.org.au/app/uploads/2025/07/Report-UPR-2025-26-Joint-NGO-Australia-Submission.pdf>.
[29] The Consultation Paper gives the example of an employer who does not employ women of colour. See NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 38 [3.97].
[30] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 52.
[31] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7A, inserting *Anti-Discrimination Act 1991* (Qld) s 8(2) (not yet commenced).

Question 3.9: Intended future discrimination

1. **Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?**

The current definition of discrimination does not encompass intended future conduct. To overcome this limitation, the Law Society recommends the definitions of direct and indirect discrimination cover future conduct, e.g. where a person treats or proposes to treat another person, or where a person imposes or proposes to impose a certain condition or requirement.

We suggest that this would align the anti-discrimination regime with other areas of jurisprudence, noting, for example, the recent High Court decision in *Qantas Airways Limited v Transport Workers Union of Australia* 278 CLR 571, which found that the general protection provisions of the FWA extend to circumstances where an employer takes adverse action against an employee who asserts a future workplace right.

CHAPTER 4: DISCRIMINATION: PROTECTED ATTRIBUTES

Question 4.1: Age Discrimination

1. **What changes, if any, should be made to the way in which the ADA expresses and defines the protected attribute of "age"?**

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

We consider that the definition and scope of the protected attribute of age under the ADA are appropriately expressed and defined, noting their close alignment with the Age Discrimination Act.

The ADA allows for the creation of regulations to declare any otherwise unlawful age discrimination lawful.[32] The *Anti-Discrimination Regulation 2019* (NSW) currently contains one example of the application of this regulation-making power, with cl 4 making it lawful for a registered club to give a benefit to a member based on age.

We are concerned that broad regulation-making powers pertaining to exceptions are vested in the Executive. Given that exceptions to anti-discrimination provisions may affect individual rights and liberties, we suggest democratic oversight by the Parliament is important.

We therefore suggest that age-related exceptions could be included in the text of the Act itself, rather than through the regulations. Alternatively, if greater flexibility is required, we support a process akin to s 44 of the Age Discrimination Act, whereby a person may apply to the Australian Human Rights Commission (**AHRC**) for a temporary exemption. We suggest that Anti-Discrimination NSW could perform this role, provided that any decision is for a limited timeframe and subject to judicial review in appropriate circumstances.

Question 4.2: Discrimination based on carer's responsibilities

1. **What changes, if any, should be made to the way in which the ADA expresses and defines the protected attribute of "responsibilities as a carer"?**

2. **Should the ADA separately protect against discrimination based on someone's status of being, or not being, a parent?**

We consider that the definition of 'responsibilities as a carer', particularly the exhaustive list of what constitutes immediate family, is defined too narrowly and should be reconsidered. We note that family responsibilities are similarly narrowly defined in the SDA.[33]

NSW is a diverse multicultural society, and family and caring relationships often extend well beyond considerations of biology. It is important that this ground reflect the diversity of such relationships, for example the situation where a person receiving care is not part of the carer's immediate family. We note that this issue

[32] *Anti-Discrimination Act 1977* (NSW) s 49ZYX.
[33] *Sex Discrimination Act 1984* (Cth) s 4A.

is particularly relevant to Aboriginal and Torres Strait Islander people. We therefore suggest that the ground extend to kinship obligations as well as family and carer responsibilities.

The Law Society supports recognition of a variety of relationships as occurs in the ACT, where 'parent, family, carer, or kinship responsibilities' are recognised, but those terms are left undefined.[34] We suggest that this is preferable to the Victorian definition which requires someone to be 'wholly or substantially dependent for ongoing care and attention' (emphasis added).[35] In our view, this definition is too narrow, and may exclude certain categories of carer e.g., the carer of an adult person who suffers from severe but episodic (as opposed to ongoing) mental ill-health. It may also be too narrow to capture care arrangements in diverse cultural groups, for example where a range of adults may assume responsibility for different aspects of a child's care.

We also consider it appropriate to enact a separate protection against discrimination based on not being a parent or carer.

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"?**

Disability is currently defined under s 4 of the ADA as follows:

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

We recommend that the NSWLRC consult with people with disabilities and organisations that support people with disabilities on the appropriateness of this definition, and take account of any changes recommended as a result of the ongoing inquiry by the Commonwealth Attorney-General's Department into the DDA, including the definition under s 4. This would help to ensure alignment to the greatest extent possible with the DDA to promote consistency and provide greater certainty for duty bearers.

We also support express recognition in the ADA of the rights of people with assistance animals, noting that there is currently no protection for a person with an assistance animal other than a dog assisting a person with a disability relating to vision, hearing or mobility.[36] We suggest that the current provision in the DDA, which

[34] *Discrimination Act 1991* (ACT) s 7(1)(l).
[35] *Equal Opportunity Act 2010* (Vic) s 4 (Definition of 'carer').
[36] *Anti-Discrimination Act 1977* (NSW) s 49B(3).

has sufficient breadth to capture all people with disability using an appropriately accredited/trained assistance animal, is appropriate and should be adopted in the ADA.[37]

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

We suggest that given advances in technology as well as the need to ensure that people are free to participate in clinical research involving genetic testing, there is benefit in expressly providing for a protection against discrimination based on genetic information. We note this has been a live issue in insurance law, for example, and the Australian Government has announced that it will move to ban the use of adverse predictive genetic test results in life insurance.[38]

We suggest a separate attribute would be preferable rather than including 'genetic predisposition' in the existing definition, in order to cover situations where genetic information is used for purposes beyond predicting disability.

3. **What changes, if any, should be made to the public health exception?**

We support the 1999 recommendation of the NSWLRC that the public health exception could be more narrowly defined.[39] The current definition, which allows for discrimination that is reasonably necessary to protect public health, is drawn broadly, and a more principled approach would ensure that any act done on the basis of the public health exception is based on expert opinion and proportionate to the risks posed from transmission.

Question 4.4: Discrimination based on homosexuality

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

The current ground of 'homosexuality' is narrow and fails to protect people of other sexual orientations, including people who are bisexual or asexual. We consider that 'sexual orientation' is a more contemporary and inclusive term that should be preferred over a definition tied to a specific identity.

Sexual orientation is defined in the SDA as a person's sexual orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex.[40] This definition has also been adopted in s 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**). We note, however, that the definition provided for by the *Yogyakarta Principles* may be more inclusive:

[37] *Disability Discrimination Act 1992* (Cth) ss 8, 9(2).
[38] The Treasury, Parliament of Australia, *Ban on the use of adverse genetic testing results in life insurance* (Consultation Paper, February 2025).
[39] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) rec 66.
[40] *Sex Discrimination Act 1984* (Cth) s 4.

> Sexual orientation is understood to refer to 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.[41]

This definition represents best practice in terms of international legal standards and has been adopted in Victoria.[42] We support its adoption in NSW, including expanding the definition to include people who feel attraction towards all persons irrespective of their gender (pansexuality) and people who experience no sexual attraction to any persons (asexuality).

Question 4.5: Marital or domestic status

1. **What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "marital or domestic status"?**

We consider that the language of marital or domestic status be updated to 'relationship status' to reflect more contemporary language. It would be appropriate for any definition of relationship status to be non-exclusive to ensure that a variety of contemporary forms of relationship are covered, including those forms of relationship which are excluded by the current definition of 'marital or domestic status' including, for example, civil partnerships.[43]

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?**

At the current time, race is defined under the Act to include 'colour, nationality, descent and ethnic, ethno-religious or national origin'.[44] As noted in the Consultation Paper, the definition of race does not expressly prohibit discrimination based on caste, immigration status and language.[45]

As outlined in recent submissions to the Australian Human Rights Commission's (**AHRC's**) National Anti-Racism Framework Scoping Report, caste-based discrimination is an 'intersectional system of discrimination' with wide-ranging and severe impacts.[46] We agree that this should be included in the definition of race or, preferably, recognised as a stand-alone, protected attribute.

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[41] International Commission of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, 6.
[42] *Equal Opportunity Act 2010* (Vic) s 4(1).
[43] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 55 [4.79].
[44] *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of 'race'.
[45] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 56 [4.83].
[46] Australian Human Rights Commission, *National Anti-Racism Framework Scoping Report* (Report, 6 December 2022) 73.

Further, we are of the view that specific protections should be enacted for people based on their immigration/migration status. While the current definition of race under s 7 has been interpreted to be non-exhaustive (see *SUPRA v Minister of Transport Services* [2006] NSWADT 83), explicit recognition of immigration/migration status would be of assistance in the interest of clarity. In the experience of our members working with visa holders and migrants, this group is highly vulnerable to discriminatory and other objectional conduct e.g. underpayment and difficulties in obtaining essential services in the areas of accommodation and banking.

One option would be to extend the definition of race under s 4 of the ADA to include immigration or migration status. This aligns with the Tasmanian and NT approaches.[47] The other option is to enact a standalone ground for immigration/migration status as occurs in the ACT legislation.[48] If either of these options are accepted, careful consideration would have to be given to relevant exceptions that take into account federal and state immigration and citizenship laws, including the provisions of the *Migration Act 1958* (Cth).

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"?**

We consider that as sex discrimination is well-established in Australian law, and to ensure to the greatest extent possible harmonisation with the Commonwealth scheme, it is appropriate to maintain the language of 'sex' as opposed to 'gender' discrimination. However, as set out below, we do support adding 'gender identity' as a protected attribute for the purposes of discrimination and vilification.

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

We consider that making pregnancy and breastfeeding standalone protected attributes (rather than subsets of the protected attribute of sex) may serve to clarify and strengthen the prohibitions against discrimination on those grounds.

Breastfeeding is dealt with as a separate ground of discrimination under the SDA[49] as well as in Victoria,[50] Queensland,[51] Western Australia[52], Tasmania,[53] the ACT,[54] and the NT,[55] and pregnancy is dealt with as a separate attribute of discrimination in all states and territories (except NSW). It is therefore also in the interests of harmonisation that pregnancy and breastfeeding are stand-alone attributes in NSW.

[47] *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4.
[48] *Discrimination Act 1991* (ACT) s 7(1)(i).
[49] *Sex Discrimination Act 1984* (Cth) s 7AA.
[50] *Equal Opportunity Act 2010* (Vic) s 6(b).
[51] *Anti-Discrimination Act 1991 (*Qld) s 7(e).
[52] *Equal Opportunity Act 1984* (WA) s 10A.
[53] *Anti-Discrimination Act 1998* (Tas) s 16(h).
[54] *Discrimination Act 1991 (*ACT) s 7(d).
[55] *Anti-Discrimination Act 1992* (NT) s 19(h).

Question 4.8: Transgender Grounds

1. **What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "transgender grounds"?**

Under s 38A of the Act, a transgender person is defined as a person:

> (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
>
> (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
>
> (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
>
> and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

This definition, which takes a binary approach to gender, is not in keeping with contemporary understandings as it omits coverage of people with non-binary or gender diverse identities. We are of the view that it would be preferable that the protected attribute is changed to 'gender identity' (as opposed to 'transgender status'). We suggest that any definition of gender identity should not be tied to specific identities, given that the LGBTQIA+ community recognises a broad number of terms not limited to transgender and non-binary, but also, for example, genderqueer and genderfluid. Any definition should take into consideration the Yogyakarta definition as follows:

> Gender identity is understood to refer to 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.[56]

We note that in Queensland, the *Anti-Discrimination Act 1991* (Qld) adopts a definition of 'gender identity' which reflects this lived reality of gender diverse people.[57]

We are also concerned that the current definition confuses gender identity and intersex status (see s 38A(c) of the ADA). Further, the term 'indeterminate sex' is not generally used by persons with variations of sex characteristics and may compound stigma. We suggest that 'sex characteristics' should be a new, stand-alone attribute to avoid this confusion.

As suggested in our response to Part 3 of the Consultation Paper (see above), an unfavourable treatment test would be preferable to the comparator test to make out direct discrimination. However, if this suggestion is not

[56] International Commission of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, 6.
[57] *Anti-Discrimination Act 1991* (Qld) Sch 1 Definition of 'gender identity'.

to be adopted, the Federal Court approach in *Tickle v Giggle for Girls Pty Ltd* is appropriate, where the comparator is someone who identifies as a different gender identity to the complainant.[58]

Question 4.9: Extending existing protections

1. **Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?**
2. **Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?**

We suggest that it is appropriate to protect against discrimination based on any protected attribute that a person had in the past or may have in the future, noting this is already the case for the protected attributes of disability and carer's responsibilities.

Similarly, in the manner of discrimination laws in Victoria[59], the ACT[60], Northen Territory[61], Tasmania[62] and Queensland[63], we suggest that being an 'associate' of someone with a protected attribute should function as a stand-alone protected attribute.

[58] *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, 333 IR 296 [74], noting the discussion of the 'comparator' in this case was in relation to indirect discrimination.
[59] *Equal Opportunity Act 2010* (Vic) s 6(q).
[60] *Discrimination Act 1991* (ACT) s 7(c).
[61] *Anti-Discrimination Act 1992* (NT) s 19(r).
[62] *Anti-Discrimination Act 1998* (Tas) s 16(s).
[63] *Anti-Discrimination Act 1991* (Qld) s 7(q).

CHAPTER 5: DISCRIMINATION: POTENTIAL NEW PROTECTED ATTRIBUTES

Question 5.1: Guiding Principles

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

We suggest that the approach of the Queensland Human Rights Commission in identifying guiding principles in relation to protected attributes, including identifying where there is a gap in protection and whether the proposed attribute is comparable to what is already protected by the legislation, is appropriate.[64] Regard should also be had to best practice approaches in other state and territories, particularly Tasmania, the ACT, Victoria and the NT, for consistency but also to identify where improvements could be made to existing models. Consistency with attributes protected under the Commonwealth regime is also desirable.

We note that while it may be desirable to add a range of protected attributes to the ADA, for example all attributes protected under international human rights instruments, it is equally important to focus on access to remedies under the ADA for existing protected attributes, given the recognised difficulties faced by complainants in accessing justice under the current ADA. In our view, enacting a greater range of protected attributes will only be beneficial if persons facing discrimination can enforce their rights and access justice in NSW. We understand that these issues will form part of a second Consultation Paper to be released by the NSWLRC.

Question 5.2: Guiding Principles

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 of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?**

In our view, there are meritorious reasons to add the protected attributes listed in the Consultation Paper to existing prohibitions on discrimination in the ADA. These include irrelevant criminal record, health status and irrelevant medical record, industrial activity or political belief or activity, physical features or appearance, religious belief or activity, homelessness or accommodation status, sex characteristics, sex work, lawful sexual activity and occupation and socio-economic status.

In our view, the purpose of a civil anti-discrimination regime is to give effect to the international human rights principles of equality before the law and non-discrimination and, as a matter of principle, the legislation should provide appropriate protection and remedies for groups that are experiencing significant discrimination across different areas of public life (e.g., accommodation, employment, access to financial services).

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[64] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 310.

Of those additional attributes set out in the Consultation Paper, we suggest that the following should be prioritised for protection:

Religious belief or activity

The fact that the ADA does not protect against discrimination on the basis of religion makes NSW, along with South Australia, an outlier among the states and territories. While the ADA's definition of race does incorporate 'ethno-religious origin' (s 4), this concept has given rise to definitional difficulties and has been held not to extend to certain religious groups such as people of the Muslim faith.[65] Such decisions mean that it is difficult for lawyers to advise their clients who have experienced religious discrimination on their rights.

Residents of NSW subjected to discrimination in employment on the basis of religion may have protection under the AHRC Act and the FWA. Despite these federal provisions, residents of NSW do not enjoy the same level of protection against discrimination on the ground of religion as residents of most other states and territories.

We suggest that if included, the attribute should be defined to provide clarity and certainty. Section 93Z(5) of the Crimes Act is instructive, providing that 'religious belief or affiliation means holding or not holding a religious belief or view.' In our view, it is appropriate for protections against discrimination based on religious belief and/or activity to cover holding or not holding a religious belief, and engaging, or not engaging, in religious study.[66]

We also consider that the definition should be explicitly limited to natural persons, as the appropriate rights-holders under discrimination legislation – similar to the approach taken in defamation law.[67] We note that this issue arises uniquely for religious belief or activity, as compared with other attributes protected or sought to be protected under the ADA. The ability of faith-based organisations to bring complaints as representative complainants for natural persons who allege discrimination, would be unaffected by this limitation.[68]

The Law Society is of the view that if the Government were to introduce religion/religious belief as an additional protected attribute, this should be defined in such a way so as not to override discrimination on other existing/potential grounds, such as sex, sexual orientation, gender identity and relationship status. We have discussed these issues further in our responses to the questions posed in Chapter 7 of the Consultation Paper, which relate to exceptions for religious institutions.

Innate variations of sex characteristics

Our members have noted discrimination faced by people born with atypical sex characteristics, particularly with regard to accessing health services. As noted above, however, the current ground of 'transgender status' conflates the concepts of gender identity and sex characteristics. It is more appropriate to separate these grounds.

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[65] *Ekermawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29.
[66] See, for example, *Equal Opportunity Act 2010* (Vic) s 4(1) definition of 'religious belief or activity'.
[67] *Defamation Act 2005* (NSW) s 9.
[68] *Anti-Discrimination Act 1977* (NSW), ss 87A and 87C.

While the SDA uses the language of 'intersex status', a more appropriate definition of 'sex characteristics' can be sourced from the Yogyakarta Principles plus 10,[69] which is reflected in the Victorian definition.[70]

Irrelevant criminal record

Given the historical over-representation of certain vulnerable or marginalised groups in the criminal legal system, we consider that the attribute of irrelevant criminal record is particularly important for separate protection in the ADA. Our members are acutely aware of the lifelong impacts that involvement with legal systems may have on a person, including presenting barriers to housing and employment.

Exceptions to this ground would need to be carefully framed to ensure that the connection of any criminal record to the inherent requirements of the role are articulated. Protections for this attribute in the NT [71] and ACT[72] are instructive, as are the anti-discrimination guidelines produced by the AHRC.[73]

Homelessness or accommodation status

People living in informal or unstable housing arrangements may be particularly vulnerable to discrimination and in need of specific protection under the ADA. We consider that if this attribute were to be introduced into the ADA, it would be best to adopt the definition of accommodation status in s 4 of the *Anti-Discrimination Act 1992* (NT) which includes being a tenant, boarder, lodger, licensee, transient or homeless, or a resident in aged care, disability, or supported accommodation. This attribute should also be protected under anti-vilification provisions, reflecting the high levels of stigma and hostility often directed at people who are, or are perceived to be, homeless.

Other attributes

In addition to those attributes canvassed in the Consultation Paper[74], we encourage consideration of a new protected attribute around subjection to domestic violence. It is widely recognised that being subject to domestic or family violence can render a victim-survivor vulnerable to discrimination. As noted by the Committee on the Elimination of Discrimination against Women:

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[69] International Commission of Jurists, *Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to complement the Yogyakarta Principles*, 10 November 2017, 6, which defines 'sex characteristics' as 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty'.

[70] *Equal Opportunity Act* (2010) (Vic) s 4(1) definition of 'sex characteristics' which refers to 'a person's physical features relating to sex, including— (a) genitalia and other sexual and reproductive parts of the person's anatomy; and (b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty'.

[71] *Anti-Discrimination Act 1992* (NT) ss 4(1), 19(1)(q) and 37.

[72] *Discrimination Act 1991* (ACT) s 7(1)(k) and Dictionary, definition of 'irrelevant criminal record'.

[73] Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*, <https://humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.

[74] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 70-89.

> *Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.*[75]

There is evidence that victim-survivors may experience particular difficulties in relation to accommodation (e.g. receiving poor references, refusal of requests to make reasonable adjustments for security reasons etc.) as well as in the workplace (e.g. not allowing a victim survivor to take time off work to attend court or move into a shelter; or having employment terminated for reasons relating to the domestic violence).[76]

The AHRC has previously pointed to a number of benefits to recognising domestic and family violence as a ground of discrimination, noting that this could strengthen existing discrimination protections; decrease the social and economic costs of violence against women; serve an educative function; and complement other strategies.[77]

We note that the attribute of 'subjection to domestic or family violence' is protected in the ACT, following a recommendation by the ACT Law Reform Commission.[78] Further, the Queensland Law Reform Commission and the Western Australian Law Reform Commission, in their recent reviews of anti-discrimination legislation in Queensland and Western Australia respectively, both recommended a new attribute of 'subjection to domestic or family violence'.[79] We consider the ADA should reflect these recommendations.

[75] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence Against Women*, 11th sess, U.N. Doc. A/47/38 (30 January 1992) [1].
[76] Australian Human Rights Commission, *Fact sheet: Domestic and family violence - a workplace issue, a discrimination issue* (Report, 4 December 2014).
[77] Ibid.
[78] *Anti-Discrimination Act 1991* (ACT) s 7(1)(x).
[79] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 333; Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report* (Report, May 2022) 124.

CHAPTER 6: DISCRIMINATION: AREAS OF PUBLIC LIFE

Question 6.1: Discrimination at work — coverage

1. Should the definition of employment include voluntary workers? Why or why not?

We support expanding the definition of 'employment' under the ADA to encompass voluntary or unpaid work, work experience, vocational placements and apprenticeships. This would reflect the definition of 'work' in the Queensland Act, which expressly protects these categories of worker.[80] We note that young unpaid interns or older post-retirement volunteers may be particularly vulnerable to discrimination, and ensuring their protection under the ADA should therefore be prioritised.

We suggest the definition of employment should be drafted in such a way as to respond flexibly to future types of work. Given the expansive notion of a 'worker' or 'employee' in contemporary society, for example gig economy workers, the definition of employment under the ADA should not be dependent on the existence of a contract or compensatory arrangements. We consider this to be particularly important, given that rapid technological change may see more people displaced from the traditional workforce to engaging in 'non-traditional' work that does not depend on a contractual relationship.

2. Should the ADA adopt a broader approach to discrimination in work, like the way the *Sex Discrimination Act 1984* (Cth) approaches harassment? Why or why not?

The SDA prohibits sexual harassment by any person if it is in connection with either the complainant's or respondent's status at work.[81] By contrast, the ADA definition is limited to those circumstances where a person with authority at work discriminates against someone without that authority.[82]

As matter of principle, we consider that the relationship between the parties should not be determinative of whether a person is or is not protected from discrimination and would therefore support an approach which broadens the category of persons who may be found to have unlawfully discriminated at work. However, whether such a change is necessary, would depend on whether there are amendments to other sections of the ADA, including vilification and harassment provisions, including whether these sections are extended to cover vilifying and harassing conduct which takes place within workplaces.

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

We support protecting local government members against age discrimination while performing work in their official capacity. There is no principled reason why the ADA currently protects local government members from discrimination in relation to all attributes except age.

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[80] *Anti-Discrimination Act 1991* (Qld) sch 1 definition of 'work'.
[81] *Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).
[82] *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of 'contract worker', definition of 'principal', ss 8-13.

Question 6.2: Discrimination in work — exceptions

1. **What changes, if any, should be made to the exceptions to discrimination in work?**

We support the NSWLRC's 1999 recommendations in relation to the following exceptions:

- Employment by small businesses – five or less employees
- Discrimination by small partnerships
- Exceptions based on "genuine occupational qualifications" where the job is one of two to be held by a married couple, or involves providing people of a particular sex with personal services relating to welfare or education, and they might object to someone of another doing that.
- Discrimination against young people[83]
- Employment outside NSW[84]

Employment for private household purposes

We suggest that the exceptions around employment for a private household be limited to the selection of the worker and should not cover treatment that occurs during employment for private household purposes.[85] Australia's ageing population suggests that there will be an increased uptake of caregiving arrangements in private households. Household cleaners and carers can often come from a migrant background and are particularly vulnerable to discrimination, for example on account of language barriers and a lack of familiarity with the Australian legal system. Ageing clients are also a vulnerable group.

Employment for private household purposes therefore presents an intersection between two vulnerable groups, and we are concerned that there is a possible gap in the ADA in failing to protect domestic service providers and ageing clients from discrimination which occurs in the context of an employment relationship occurring in a private household.

Question 6.3: Discrimination in education

1. **What changes, if any, should be made to the definition and coverage of the protected area of "education"?**

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

We support extending the definition of "education providers" to cover organisations whose purpose is to develop or accredit curricula. This would reflect the definition under the DDA.[86] As recognised by the Western

[83] If this is unfeasible, and noting that the NSWLRC's 1999 report recommended that this exception is eventually reconsidered, the suggestion in the Consultation Paper whereby the exception would be limited to where the young worker is being offered a lower wage in accordance with an industrial award or agreement seems appropriate.
[84] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999).
[85] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 278.
[86] *Disability Discrimination Act 1992* (Cth) s 4(1) definition of 'education provider'.

Australian Law Reform Commission, this is important given the role of such bodies in setting rules of curricula and exams which may give rise to discrimination.[87] We also support including private training organisations and informal or community-based learning settings.

While we do not oppose the prohibition against sex discrimination for the purposes of single-sex educational institutions, both public and private, we support express provision in the ADA that discrimination against transgender and non-binary students is not permitted for the purpose of this exception.

We encourage the NSWLRC to consult with disability groups in relation to whether the exceptions relating to disability in educational institutions are appropriate, and take account of any recommendations made in the course of the ongoing review by the Commonwealth Attorney General's Department in relation to the DDA.

Question 6.4: The provision of goods and services — coverage

1. **What changes, if any, should be made to the definition and coverage of the protected area of "the provision of goods and services"?**

The ADA prohibits discrimination in the provision of goods or services. This only applies to a refusal to provide goods and services, and the terms on which goods and services are initially offered. It does not prohibit discrimination in the manner, or the way in which the good or service is provided after the terms and conditions are agreed. We agree with the concerns raised in the Consultation Paper that this represents a gap in coverage and support broader protections. In our view, the ADA should prohibit discrimination in the manner or way in which the good or service is provided, including after the terms and conditions have been agreed.[88]

As identified in the Consultation Paper, a person's ability to access and use premises particularly affects persons with disability. We therefore support expanding the definition of 'services' in line with the 1999 recommendations of the NSWLRC to prohibit discrimination relating to:

- someone's access to any place, vehicle or facility that members of the public are entitled to use
- the terms on which access is allowed
- the provision of means of access, and
- the requirement to leave or stop using any place, vehicle or facility.[89]

We further note that it would be useful to ensure that the provision of goods and services extends to the services carried out by NSW Government agencies, including the police in their interaction with all persons in the course of their duties. Our members have noted that a lack of clarity around the definition of 'services'

[87] Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report* (Report, May 2022) 127, rec 57.
[88] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) rec 17, [4.140]–[4.143], [4.152], [4.163].
[89] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) [4.198], rec 23. Note that this issue may also be raised in the Commonwealth Attorney General's Department's review of the *Disability Discrimination Act 1992* (Cth).

means that it is often difficult to run matters involving discrimination by police.[90] This is particularly important for Aboriginal and Torres Strait Islander communities, who may be the target of discriminatory policing. Alternatively, administration of state laws and programs should form an additional protected area of public life (see below).

Question 6.5: Superannuation services and insurance exceptions

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

The ADA permits sex, age and disability insurance services to discriminate in relation to insurance terms and conditions.[91] Superannuation funds are permitted to discriminate in their terms and conditions based on sex, marital or domestic status, age or disability.[92] As set out in the Consultation Paper, this generally applies if the terms or conditions:

- are based on actuarial or statistical data on which it is reasonable to rely, and
- are reasonable having regard to the data and any other relevant factors.[93]

We are concerned about the breadth of these exceptions, and favour the model in the ACT which allows insurers and superannuation providers to discriminate against a person with the protected attribute if:

- the discrimination is based on actuarial or other statistical data, or other relevant documents,
- it is reasonable to rely on that data or documents, and
- the discrimination is reasonable, proportionate and justifiable in the circumstances.[94]

We consider the onus should be on the insurer or superannuation provider to justify their decision, and we support the safeguard in the ACT which requires the insurer or superannuation provider to provide such a written explanation for individuals upon request.[95]

[90] See *Commissioner of Police (NSW) v Mohamed and Others* (2009) 262 ALR 519 at 536, [87] which states that initial investigations of complaints of violence and the protection of victims of violence provide services, but this does not mean decisions around prosecution or arresting alleged perpetrators are also services within s 19 of the Act.
[91] *Anti-Discrimination Act 1977* (NSW) ss 37, 49Q, 49ZYT.
[92] *Anti-Discrimination Act 1977* (NSW) ss 36, 49, 49Q, 49ZYS(1)(c)–(e).
[93] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 111 [6.105].
[94] *Discrimination Act 1991* (ACT) s 28(2).
[95] *Discrimination Act 1991* (ACT) s 28(3).

Question 6.7: Discrimination in accommodation — coverage

1. **What changes, if any, should be made to the definition and coverage of the protected area of "accommodation"?**

We support the recommendations of the NSWLRC in its 1999 report in relation to expanding the definition of 'accommodation' to include:

- caravans and mobile homes;[96] and
- a requirement for accommodation providers to allow persons with disability to make reasonable alterations to accommodation, in line with the requirements under the DDA.[97]

To ensure protection of persons with disabilities, we also support the introduction of provisions designed to protect persons with assistance animals from accessing accommodation, noting that this issue is being considered in the ongoing review of the DDA.

Question 6.8: Discrimination in accommodation — exceptions

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

We support the NSWLRC's recommendation in 1999 to clarify that a self-contained granny flat should not be exempt. [98] As was recognised at that time, a self-contained granny flat often operates akin to a business and therefore should not be excluded from the ambit of the ADA.[99]

We also consider that the exception for private household accommodation should be reformed, given the expansion and commercialisation of services like Airbnb. We suggest that the exception be limited to a genuinely private household context, where three or fewer people are accommodated in addition to the person who provides or proposes to provide the accommodation or a near relative of the person resides and intends to continue to reside on those premises. This reflects the approach in other jurisdictions.[100]

The exception for age discrimination should also be removed, provided that a special measures provision is included for the age attribute or more generally. This would allow the development and provision of genuinely tailored accommodation services, such as youth refuges or age care facilities.

[96] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) [4.218], [4.219], rec 24.
[97] Ibid., [4.221]– [4.222], rec 25.
[98] Ibid., [4.227], rec 26.
[99] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) [4.225].
[100] *Sex Discrimination Act 1984* (Cth) s 23(3)(a)(ii); *Age Discrimination Act 2004* (Cth) s 29(3)(b); *Disability Discrimination Act 1992* (Cth) s 25(3)(a)(ii); *Equal Opportunity Act 2010* (Vic) s 59(1)(b); *Equal Opportunity Act 1984* (WA) s 21(3)(a)(ii).

Question 6.9: Discrimination by registered clubs — coverage

1. **What changes, if any, should be made to the definition and coverage of the protected area of "registered clubs"?**

In our view, the current definition of registered club under the ADA is too limited, as it is restricted to clubs which hold a liquor licence under the *Liquor Act 2007* (NSW). We support the ADA adopting the definition of 'club' from the DDA.[101] This defines a 'club' as an association of people:

- who associate for social, literary, cultural, political, sporting, athletic or other lawful purposes, and
- which provides and maintains its facilities using the funds of the association.

Discrimination should be prohibited not just in the process of admitting or expelling members, but also in the way services, club benefits or opportunities, or other facility aspects are provided to members and guests. We consider that this definition and coverage is more contemporary and appropriately distinguishes between the public and private spheres through the requirement that the association provide and maintain facilities.

Question 6.10: Discrimination by registered clubs — exceptions

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

We suggest that these exceptions should be repealed, in line with the contemporary understandings reflected above, and suggest that genuine attempts to create safe spaces for certain groups should be dealt with by including a special measures provision in the ADA, either generally or for specific attributes. An alternative is to adopt the approach from the ACT, which specifically provides an exception for clubs or voluntary bodies established to benefit a class of people sharing a protected attribute.[102]

If no applicable special measures provision or ACT equivalent is included in the ADA, organisations should apply to the Anti-Discrimination Board for an exemption if they wish to discriminate. Any exemption should be assessed on a case-by-case basis. We suggest that the Anti-Discrimination Board should consider principles in assessing applications that are aligned with the international principles of 'special measures'.[103]

[101] *Disability Discrimination Act 1992* (Cth) s 4(1) definition of 'club'.
[102] *Discrimination Act 1991* (ACT) s 31.
[103] See, for example, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

Question 6.11: Discrimination based on carer's responsibilities

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

We support prohibiting discrimination based on a carer's responsibilities in all protected areas of public life, noting that the ADA currently only prohibits discrimination based on a carer's responsibilities in work.[104] We support the AHRC's view that such an approach would be more consistent and less complex than having different protections for different attributes.[105]

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

The way in which the ADA is currently structured means that it differentiates between the scope of protection offered to people with a different protected attribute. For example, people are protected from racial discrimination in the areas of work (Div 2), education (s 17), the provision of goods and services (s 19), accommodation (s 20) and registered clubs (s 20A). By contrast, people are protected on the ground of their responsibilities as a carer only in the area of work (s 49V).

The current piecemeal structure of the ADA leads to an inconsistent and unduly complex approach to dealing with the question of coverage. We refer to legislation in other Australian jurisdictions such as in Victoria, Queensland, Tasmania, the ACT, and the NT, where all attributes are protected across relevant areas of public life. In our view, this approach is preferred, as it takes account of the variety of settings where discrimination occurs and promotes consistency.

Question 6.12: Additional areas of public life

1. **Should the ADA apply generally "in any area of public life"? Why or why not?**

In our view, serious consideration should be given to legislating for the ADA to apply generally to any area of public life. This may make the legislative scheme more understandable to the public, and better respond to developments in the digital environment, which continue to expand the meaning of 'public life'. Practically, we suggest including a non-exhaustive list of public areas in the ADA, which includes the public areas discussed in our responses in this Chapter, but not limited to them, to account for new areas of 'public life' that may arise in the digital environment.

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

We consider that the following areas of public life should be included in a non-exhaustive list, subject to relevant exceptions:

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[104] *Anti-Discrimination Act 1977* (NSW) s 49V.
[105] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, 10 December 2021) 256.

- Employment and employment-related areas;
- Education;
- Goods and Services;
- Disposal of land;
- Accommodation;
- Club membership and affairs;
- Administration of state laws and programs;
- Local government.

The above areas are included in most jurisdictions. Another area which warrants consideration is requests for information in the context where the information is requested or required in connection with, or for the purposes of, an act that is itself discriminatory. We note that this ground is protected in the DDA (s 30), the Age Discrimination Act (s 32), and the SDA (s 27). Further, it appears in the Queensland and NT regimes, but is drawn more broadly to prohibit asking another person, either orally or in writing, to supply information on which unlawful discrimination might be based.[106]

Strata committees and owners corporations

In our view, it is not appropriate to extend the operation of the ADA to apply to the decisions of strata committees and owners corporations which, we suggest, cannot be properly characterised as an area of 'public life'. The common areas in a strata scheme are shared areas amongst the residents, but they remain private, not public, areas.

In our view, the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) is the appropriate legislation to balance and govern the competing individual rights of persons who live in strata title properties.[107] We also note the existing expertise of the NSW Civil and Administrative Tribunal (**NCAT)** in dealing with disputes under the SSMA.

It is appropriate to consider the application of the relevant provisions of the SSMA to a situation where a person with a disability requires an alteration to common property such as a ramp, or a device to open a door automatically, as referred to in paragraph 6.193 of the Consultation Paper. Most relevantly, the reforms referred to in footnote 190 of the Consultation Paper, the lowering of the threshold for passing an accessibility infrastructure special resolution to less than 50% of the votes cast are against it, commenced on 1 July 2025. We support this important change, together with new s 132C of the SSMA, which sets out the matters that the owners corporation must consider before approving an accessibility infrastructure resolution:

> Before approving an accessibility infrastructure resolution, the owners corporation must consider the following—
>
> (a) the cost and financing of the accessibility infrastructure and works including expected running and maintenance costs,
> (b) who will own, install and maintain the accessibility infrastructure,

[106] *Anti-Discrimination Act 1991* (Qld) s 124(1); *Anti-Discrimination Act 1992* (NT) s 26.
[107] Similarly, the *Community Land Management Act 2021* (NSW) is the appropriate legislation to balance and govern the competing individual rights of persons who live in community title properties.

(c) the extent to which the use of the accessibility infrastructure will be available to all or some of the lots in the strata scheme,
(d) the extent to which not installing the accessibility infrastructure will cause or be likely to cause detriment to be suffered by—
the person requesting the installation of the accessibility infrastructure, or
a person on behalf of whom the installation of the accessibility infrastructure is requested,
(e) whether the building can support the type of infrastructure required to provide access,
(f) other matters prescribed by the regulations.

This provision, particularly s 132C(d) brings into focus the needs of a person seeking to install accessibility infrastructure. We suggest that the SSMA already provides a satisfactory framework in relation to the installation of accessibility infrastructure, and it is not necessary to extend the operation of the ADA as is being considered.

We suggest that given the existing framework under the SSMA in relation to accessibility infrastructure, consideration could be given to an amendment to the SSMA that broadly incorporates the substance of ss 56(1)-(2) of the *Equal Opportunity Act 2010* (Vic) as referred to in paragraph 6.194 of the Consultation Paper. If that option was pursued, we suggest other relevant conditions that must be satisfied should include some of the matters referred to in s 132C, such as payment of maintenance and running costs by the person making the common property alterations, and that the building can support the type of infrastructure.

CHAPTER 7: WIDER EXCEPTIONS

The Law Society appreciates that the discussion on wider exceptions in the ADA is often controversial, particularly as those exceptions relate to religious bodies and institutions. We have consistently advocated that the most desirable way to balance the right to religious freedom with other human rights, including the right to non-discrimination, is through dedicated human rights legislation both in NSW and federally.

We note that statutory charters or bills of rights are used in other jurisdictions to ensure freedom of religion. This is the approach followed, for example, in the *New Zealand Bill of Rights Act 1990*[108], the Canadian *Charter of Rights and Freedoms*[109] as well as in Victoria[110] and Queensland.[111] Each of these instruments includes provision for a proportionality approach to its application, which allows the right to freedom of religion to be balanced with other rights.

As a broad membership organisation, the Law Society is aware that there will be differences in opinion across our membership on how the wider exceptions should be framed. The responses below are underpinned by the principle of the rule of law, and, in our view, in considering these wider exceptions, the focus should be on the purposes of the ADA, namely, to render discriminatory conduct unlawful, and to promote equality of opportunity between all persons.

The views below reflect discussions in our Human Rights, Public Law, and Employment Law Committees.

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?**

Consistent with the principles outlined above, we consider that the exceptions relating to religion should not extend to the whole ADA and should be confined to the prohibition against discrimination, and to the extent reasonable and proportionate, to the legitimate protection of religious freedoms and consistent with human rights laws.

We consider that it is appropriate to allow an exception for religious bodies to discriminate in the selection, ordination or appointment of persons to perform functions in relation to a religion.

The exception as it relates to the appointment of 'any other person in any capacity by a body established to propagate religion' is very broad and may capture roles across a range of organisations that do not have a religious character e.g., an IT worker at a religious-based charity. In the interests of ensuring that

[108] *New Zealand Bill of Rights Act 1990* (NZ) ss 13, 15.
[109] *Canada Act 1982* (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms') art 2(a).
[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.
[111] *Human Rights Act 2019* (Qld) s 20.

discrimination by religious bodies is appropriately limited in scope, we suggest that the test recommended by the Queensland Human Rights Commission be applied, namely that religious organisations should only be able to discriminate based on religious belief or activity in relation to work if:

- It was reasonable and proportionate in the circumstances, and
- Participation in the teaching, observance or practice of a particular religion was a genuine occupational requirement.[112]

A test of this nature has been adopted in Victoria, in s 82A of the *Equal Opportunity Act 2010* (Vic).

We suggest that 'genuine occupational requirement' be defined narrowly to ensure that the exception does not indirectly allow for discrimination against other groups, for example based on gender, LGBTQIA+ status, or relationship status.

Question 7.2: Other acts and practices of religious bodies

1. **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?**

The exception at s 56(d) provides that nothing in the ADA applies to the acts or practices of any body established to propagate religion that either:

- conform to the doctrine of that religion; or
- are necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

This exception is very broad, particularly as only one of the two conditions set out needs to be satisfied.

As is recognised in the Consultation Paper, religious bodies such as charities, foster care services and health and aged care services perform many essential public services.[113] As such, we suggest that it is appropriate to narrow the general exception so that religious bodies are allowed to discriminate in relation to other acts or practices on the basis of religious belief or activity only i.e., not on the basis of any other protected attribute. Even where discrimination is based on religious belief or activity, the discriminatory act or practice should be required to be reasonable and proportionate in the circumstances.

If the exception is not significantly narrowed as described above for all areas, we consider that there is merit in including specific requirements around the provision of public services, noting that in Victoria, religious bodies may only discriminate in the provision of government-funded goods or services based on religious belief or activity where the discriminatory conduct is:

- reasonable and proportionate in the circumstances, and
- conforms with the doctrines and beliefs of the religion or is necessary to avoid injury to the religious sensitivities of followers of the religion.[114]

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[112] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) rec 39.1–39.2.
[113] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 138 [7.48].
[114] *Equal Opportunity Act 2010* (Vic) ss 82(2), 82B.

Question 7.3: Exceptions for other forms of unlawful conduct

1. **Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?**

In our view, exceptions for religious bodies should be limited to discriminatory conduct and should not extend to harassment, victimisation and vilification. We consider exceptions that allow a religious body to engage in otherwise unlawful conduct of this kind are inconsistent with the doctrine of proportionality under international human rights law. Further, we suggest that religious bodies can operate according to their convictions, doctrines, tenets and beliefs without engaging in conduct of this kind, which is widely recognised as harmful and incompatible with a harmonious and cohesive society.

Question 7.4: Exceptions for providers of adoption services

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

We suggest that s 59A should be repealed. Our members have reported that some adoption providers discriminate based on sexual orientation and/or marital status in their adoption eligibility requirements. We note the decision of the Children's Court of NSW in *Re Daisy Logan* [2023] NSWChC 16, in which a faith-based not-for-profit organisation contracted by the NSW Government, was found to have refused to assess the Aboriginal aunt of an Aboriginal baby as a long-term carer because she was in a same-sex relationship and instead sought to have the baby adopted to a non-Aboriginal couple.[115] We do not consider it appropriate to curtail the number and type of families for adoptive children based on protected attributes such as the adopted parents' sexuality, gender identity or relationship status.

Question 7.5: Private educational authorities employment exceptions

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

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

A 'private educational authority' includes any school, college, university or other institution at which education or training is provided, which is not public.[116] The exceptions therefore cover a wide range of educational bodies, many of whom receive government funding.

On balance, we support removing exceptions for religious educational authorities to discriminate in employment based on any protected attribute other than religious belief. The current law allows discrimination

[115] *Re Daisy Logan* [2023] NSWChC 16 [15], [28]-[38].
[116] *Anti-Discrimination Act 1977* (NSW) s 4(1) definition of 'private educational authority'.

based on sex, disability, transgender grounds, homosexuality, or marital and domestic status, and, in our view, is not sufficiently inclusive for a diverse society such as NSW.

Where religious educational authorities are able to discriminate based on religious belief, we suggest additional safeguards.

One option is to adopt the safeguards in Victoria, which allow for discrimination in employment where:

- conformity with the doctrines of the religion is an inherent requirement of the position
- the person cannot meet the inherent requirement because of their religious belief or activity, and
- the discrimination is reasonable and proportionate based on the circumstances.[117]

We suggest that the safeguards would not unduly impede religious schools from providing an education in line with their religious values and convictions, considering discrimination would be allowed, for example, in selecting a religion teacher or similar staff member with religious duties (e.g. leading prayer). We do note, however, that there may be a subjective element to determining what constitutes an 'inherent requirement of the position'. An example may be a school who wishes for references to religious doctrines and texts to be integrated through their teaching methodologies.

Another option is the safeguards proposed proposed by the Australian Law Reform Commission (**ALRC**) in 2023, which recommended that in relation to the selection of staff for employment at a religious educational institution, it is not contrary to the anti-discrimination provisions in the FWA to give preference, in good faith, to a person of the same religion, where the giving of such preference:[118]

- is reasonably necessary to build or maintain a community of faith;
- is proportionate to the aim of building or maintaining a community of faith, including in light of any disadvantage or harm that may be caused to any person or persons not preferred; and
- does not amount to conduct that is unlawful under the *Sex Discrimination Act 1984* (Cth).

Question 7.6: Discrimination against students and prospective students

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

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

We consider that it is inappropriate for private educational institutions, including religious institutions to access exceptions to discrimination in relation to students and prospective students. We agree with the views of the ALRC that discrimination against students and prospective students can cause harm to students, who are

[117] *Equal Opportunity Act 2010* (Vic) s 83A(1).
[118] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) Recommendation 7B.

young and may be vulnerable because of their protected attribute.[119] Refusing admission or expelling students on the basis of a protected attribute such as LGBTQIA+ status is inconsistent with international human rights obligations.[120]

Question 7.7: Exceptions relating to sport

1. **Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?**

We consider that only very limited exceptions should be permitted relating to sport, where necessary, to uphold fairness, safety, or competitive integrity. Sections 41, 57, and 57M of the *Discrimination Act 1991* (ACT) serve as instructive examples of how exceptions for discrimination in sport can be narrowly crafted in line with these principles.

The exception in the ADA allowing discrimination in sport against transgender people is broader than comparable laws, including under Commonwealth laws.[121] We suggest amending s 38P with a narrower exemption that:

- prohibits discrimination against children under 12 years old
- limits the exemption to competitive sporting activities, rather than any sporting activity
- ensures the exemption does not apply to umpiring or refereeing
- adds a requirement that any exclusion only be permitted to the extent that the strength, stamina or physique of competitors is relevant and reasonable and proportionate in all the circumstances of the case.

The reason for adding the proportionality requirement is to bring the exemption in line with international human rights law, and would also be consistent with the principles set out in the Australian Sports Commission's Transgender & Gender Diverse Inclusion Guidelines for High Performance Sport.[122]

Question 7.8: The charities exception

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

In relation to the exception which currently applies to a charitable benefit under s 55, we consider that if charities are to retain the ability to discriminate when conferring charitable benefits, the provision of benefits must be a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic. This aligns with the approach adopted in the UK.[123]

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[119] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report 142, December 2023) Recommendation 1.
[120] See, for example, Article 6(2) of the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[121] *Sex Discrimination Act 1984* (Cth) s 42.
[122] Australian Sports Commission, *Transgender & Gender-Diverse Inclusion Guidelines for HP Sport* (Guidelines, May 2023).
[123] *Equality Act 2010* (UK) s 193(2).

Further, consistent with our comments above and in the interests of clarity, the exception should not be framed as extending to the whole ADA.

Question 7.9: Voluntary bodies exception

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

We agree with the recommendation by the NSWLRC in 1999 that this exception be repealed on the basis that the 'ADA (should) specifically prohibit discrimination in relation to membership and access to benefits by all incorporated associations with membership open to the public or a section of the public'.[124]

Question 7.10: Aged care accommodation providers exception

1. **Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?**

We agree with the recommendation by the NSWLRC in 1999 that this exception be repealed on the basis that people should not be arbitrarily excluded from accommodation by aged care accommodation providers based on a protected attribute.[125] We agree that if a provider of accommodation wishes to discriminate (e.g., to run an aged care home in community language or to accommodate measures to address genuine safety concerns), it would be appropriate for them to apply for an exemption. Alternatively, the ADA could include a special measures provision generally, or in relation to age, allowing appropriate tailoring of facilities.

Question 7.11: The statutory authorities exception

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

We consider it unlikely that an order of a court or NCAT would require unlawful conduct under the ADA. If this exception is to be retained, the approach recommended by the ACT Law Reform Advisory Council seems appropriate, namely that the exception for court and tribunal orders should be limited to an act done under an order of a court or tribunal, which was mandatory and specific about conduct that must be performed in the absence of a non-discriminatory alternative.[126]

[124] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) rec 27, rec 47, [6.88].
[125] Ibid [6.89]–[6.96].
[126] *Discrimination Act* 1991 (ACT) s 30(1); ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 18 March 2015) rec 19.1.

CHAPTER 8: CIVIL PROTECTIONS AGAINST VILIFICATION

Question 8.1: Protected attributes

1. **What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?**

2. **Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?**

The Law Society considers that vilification protections under the ADA should be strengthened to ensure that vulnerable individuals and communities are properly protected from hateful speech and conduct. As set out in the Consultation Paper, NSW currently prohibits civil vilification in relation to the following grounds: race (s 20C); transgender status (s 38S), homosexuality (s 49ZT) and HIV/AIDS status (s 49ZXB). The *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) also introduced a prohibition on religious vilification (Part 4BA of the ADA), which commenced on 11 November 2023.

Section 93Z of the Crimes Act also deals with vilification by making it unlawful to, by a public act, intentionally or recklessly threaten or incite violence towards another person or a group of persons on any of the following grounds: race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.[127]

The civil provisions contained in the ADA are narrower in scope than the criminal provisions in the Crimes Act. At the very least, we consider that those attributes protected under criminal law should be covered by the civil vilification provisions in the ADA. The difficulties with bringing an anti-vilification case under the criminal law are well recognised, not least because of the appropriately higher burden of proof. If the Government does enact legislation with contemporary terminology (as discussed elsewhere in this submission), it should be made consistent across the civil and criminal vilification laws.

We suggest that consideration be given to extending civil vilification laws to all attributes covered by discrimination protections, with the definitions in line with what we suggested above for discrimination in our responses to Chapter 4. This would provide cohesion between the discrimination and vilification schemes, and would reflect recent trends in other state and territory jurisdictions to strengthen vilification provisions across a range of protected attributes. For example, we note that protections against vilification in Victoria have recently been extended to cover disability, gender identity, sex, sex characteristics, sexual orientation, and personal association with a person who has a protected attribute.[128]

[127] *Crimes Act 1900* (NSW) s 93Z.
[128] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102B (not yet commenced).

Question 8.2: The test for vilification

1. **Should NSW adopt a "harm-based" test for civil vilification? If so, should this replace or supplement the existing "incitement-based" test?**

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

In a previous submission to the NSWLRC, the Law Society did not support the introduction of a harm-based test into the NSW criminal vilification offence (s 93Z).[129] We agree with the conclusions reached by the NSWLRC that such a test is insufficiently certain for the purposes of the criminal law[130].

For the purposes of the civil regime, however, we consider that it may be appropriate to enact a harms-based test in addition to a separate incitement-based test, provided that the harm-based test is accompanied by adequate safeguards to protect freedom of speech in line with the exceptions provided for in s 18D of the RDA. We support the approach in Victoria, whereby the harms-based test should include an objective assessment of the conduct from the perspective of a reasonable person with that same attribute.[131]

We also consider it appropriate to lower the threshold in the ADA's incitement-based test to prohibit public conduct that is 'likely to' incite hatred, serious contempt for, revulsion or severe ridicule of another person or group based on a protected attribute. We agree that this standard would reduce the burden on complainants and reflect the way in which this protection is interpreted by the courts.[132]

Question 8.3: The definition of "public act"

1. **What changes, if any, should be made to the definition of "public act" in the test for vilification in the ADA?**

As noted in the Consultation Paper, the current definition of 'public act' under s 20B of the ADA has been interpreted broadly to cover communication that is 'capable of being seen or heard, without undue intrusion by a non-participant', and has been held to cover certain online activity.[133] However, we are concerned that the definition does not capture acts that occur in places where a member of the public is not entitled to be present. For example, in *Riley v NSW Department of Education*, an act at a school muster meeting was held not to be a public act for the purposes of the ADA.[134]

To remedy the above situation, we suggest that the definition of 'public act' under the ADA be harmonised with the definition in s 93Z of the Crimes Act which is currently expressed in wider terms than the civil definition. For example, it clarifies that a public act can include acts that occur on private land. It would be

[129] Law Society of NSW, Submission to the NSWLRC, *Serious racial and religious vilification*, 27 June 2024.
[130] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 181 [8.85].
[131] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010 (Vic)* s 102D(1)(b) (not yet commenced).
[132] Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 8, rec 9, 112–119.
[133] *Z v University of A (No 7)* [2004] NSWADT 81 [100].
[134] *Riley v NSW Department of Education* [2019] NSWCATAD 223 [118].

useful for the ADA to provide examples of places where conduct may be considered a public act even if it happens somewhere the public do not ordinarily access, for example, a workplace.

Question 8.4: Exceptions

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

We support the expansion of vilification exceptions in the ADA in line with those provided for under the Victorian legislation. These include conduct or discussion that is engaged in, reasonable and in good faith, for:

- the performance, exhibition or distribution of artistic work
- making or publishing a fair and accurate report of any event or matter of public interest.[135]

We do not support the introduction of a 'fair comment' exception based on genuine belief as is available in the NT and under the RDA.[136] We consider such an exception to be drawn too broadly, and could exempt abusive and offensive conduct, for the only reason that the person making them believes them to be true.

We consider that it is unnecessary to exempt acts done for religious purposes from vilification protections. We agree with the Law Reform Commission of Western Australia that individuals are able to express their views without these amounting to civil vilification.[137] We note that there are no exemptions for acts done for religious purposes in the ACT, the NT and under the RDA.

Question 8.5: Religious vilification

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

As noted above, the Law Society considers that civil vilification laws should be extended to all attributes covered by discrimination protections. We recommend that religious belief is included as a protected attribute for the purposes of preventing discrimination and therefore suggest that it should remain in the ADA for the purposes of preventing vilification. As previously raised in relation to discrimination, it would be appropriate that the protection be clarified so that it only applies to 'natural persons'.

[135] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010 (Vic)* ss 102G(1)(a), 102G(1)(c) (not yet commenced).
[136] *Racial Discrimination Act 1975* (Cth) s 18D(c)(ii); *Anti-Discrimination Act 1992* (NT) s 20B(c)(ii).
[137] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 231.

CHAPTER 9: HARASSMENT

Question 9.1: The definition of sexual harassment

1. **Should the reasonable person test be expanded to include the "possibility" of offence, intimidation or humiliation? Why or why not?**
2. **Should the ADA expressly require consideration of an individual's attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?**
3. **Does the ADA need to define "conduct of a sexual nature"? Why or why not?**

The Law Society suggests that the protections against sexual harassment in NSW should be aligned, as far as possible, with the SDA.[138] We therefore agree that the reasonable person test should be expanded to include the "possibility" of offence, intimidation or humiliation.

In the interests of alignment, we also consider it appropriate that the ADA reflects the SDA in providing for the matters to be considered in determining whether a reasonable person would anticipate the possibility of offence, insult or humiliation. These include the individual's attributes, the relationship between the parties and any other relevant circumstance.[139] Such an approach is helpful, as the decision-maker will turn their mind to a complainant's individual circumstances and the way in which these might impact upon their experience of sexual harassment.[140]

While it may not be necessary to define "conduct of a sexual nature" given judicial authority that the term should be interpreted broadly, we suggest it is in the interests of alignment that the ADA reflects the definition in s 28A(2) of the SDA.

Question 9.2: Other sex-based conduct

1. **Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?**
2. **Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?**
3. **Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?**

The Law Society supports a prohibition on harassment on the ground of sex (or sex-based harassment (see s 28AA of the SDA)) as well as subjecting another person to a workplace environment that is hostile on the ground of sex (see s 28M). This is in the interests of aligning the ADA with the SDA, and we agree with the additional benefits set out in the Consultation Paper, particularly the way in which a prohibition on workplace

[138] *Sex Discrimination Act 1984* (Cth) ss 28A(1)(b), 28AA(1)(b), 28M(2)(c).
[139] *Sex Discrimination Act 1984* (Cth) s 28A(1A).
[140] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 359.

environments which are hostile on the ground of sex can be used to bring workplaces with an underlying culture of inappropriate behaviour to account.[141]

While it is possible that introducing these additional prohibitions may make it harder for a complainant to decide which law best applies to their experience, considering there may be overlap in conduct which constitutes sex discrimination, sex-based harassment and sexual harassment, we do not consider this detrimental, as a complainant would be at liberty to plead the different grounds.
We consider that if harassment on the ground of sex and subjecting another person to a workplace environment that is hostile on the ground of sex are prohibited, there will not be major gaps between sex discrimination and sexual harassment.

Question 9.3: Sexual harassment in the workplace

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

We agree that the ADA should adopt the approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking. It is appropriate that more types of workers are covered by the prohibition on sexual harassment; that there be no difference in requirement for where the sexual harassment takes place; and that sexual harassment done by any person, not just an employer or co-worker is prohibited.
While adopting the SDA approach is desirable to address workplace sexual harassment, serious consideration should be given to a prohibition in all areas of public activity, as recommended by the ALRC.[142]

Question 9.4: Workplace-related laws regulating sexual harassment

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

2. **Should the ADA and workplace-related sexual harassment laws be more aligned?**

At the current time, there are three main regimes which regulate sexual harassment (SDA, the ADA and the FWA). Persons that experience a workplace injury as a result of harassment may also have recourse to compensation payments and other support under personal injury laws.

We support a practical way for people in NSW to access remedies under the legislation. In the experience of our members, many complainants who have not had the benefit of legal advice, may file a complaint in multiple jurisdictions (e.g., NSW and Commonwealth) and only subsequently discover that they are disentitled

[141] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 201 [9.31].
[142] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, 11 February 2025) rec 48.

to progress with their complaint in the AHRC. Due to the more limited protections under the ADA, this often leads to a complainant being unable to address their grievance in a timely and practical manner.

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

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

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

We support expanding the prohibition on sexual harassment to all areas of public life. We understand that this approach is operating satisfactorily in Queensland[143] and has also been endorsed by the ALRC in its recent review of justice responses to sexual violence.[144]

Question 9.6: The private accommodation exception

1. **Should sexual harassment be prohibited in private accommodation? Why or why not? If an exception for private accommodation is required, how wide should it be**

We agree with the NSWLRC recommendation in 1999 to repeal the private accommodation exception for sexual harassment.[145] As a matter of principle, a person living in private accommodation, for example a boarder in a boarding house, should not be subjected to sexual harassment.

Question 9.7: Attribute-based harassment

2. **If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?**

We support an approach where the same attributes are protected from discrimination and harassment e.g., if the ADA protects against discrimination on the basis of disability, it should also protect against harassment on the basis of disability. We suggest that would promote consistency within the legislative scheme, and assist in community understanding. This is the approach adopted in the NT[146] and, with some exceptions, Tasmania.[147]

[143] *Anti-Discrimination Act 1991* (Qld) s 118; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 130.
[144] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, 11 February 2025) rec 48.
[145] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [7.49], rec 91.
[146] *Anti-Discrimination Act 1992* (NT) s 20(1)(b).
[147] *Anti-Discrimination Act 1998* (Tas) ss 16(l)–(s), 17(1).

CHAPTER 10: OTHER UNLAWFUL ACTS AND LIABILITY

Question 10.1: Victimisation

3. Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?

We support expressly extending the prohibition of victimisation to situations where a person threatens to victimise someone, consistent with most other Australian anti-victimisation laws,[148] and the NSWLRC's recommendation in 1999.[149]

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

We suggest that the test for victimisation in the ADA should be aligned with s 26(2) of the AHRC Act and s 94 of the SDA. We suggest that the description of conduct that may give rise to victimisation should be broad and may be inferred from the circumstances.

Question 10.2: Advertisements

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

Section 51 of the ADA provides that it is unlawful to publish, or cause to be published, an advertisement that indicates an intention to do something that is unlawful under the ADA. There are only a few cases where this provision has been judicially considered, and we are not aware of case law on the defence at s 51(4).[150] However, we suggest that the defences to unlawful advertising in Queensland and Victoria may be more appropriate as they require the person responsible for the advertisement to exercise reasonable precautions and due diligence to prevent publication.[151] By contrast, in NSW, it is sufficient for the person to believe on reasonable grounds that publication does not constitute an offence.

Question 10.3: The forms of liability

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

As set out in the Consultation Paper, the ADA provides several avenues by which a duty holder may be liable for unlawful conduct under the ADA, for example, direct or personal liability, vicarious liability, joint and several liability, and accessorial liability. Our members have suggested that this combination of provisions is appropriate, noting that the accessorial liability provisions may be more difficult to plead than the vicarious

[148] *Sex Discrimination Act 1984* (Cth) s 47A(2); *Anti-Discrimination Act 1991* (Qld) s 130(1); *Equal Opportunity Act 2010* (Vic) s 104(1); *Equal Opportunity Act 1984* (WA) s 67(1).
[149] NSW Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW), Report 92 (1999) rec 98, [7.154].
[150] For recent judicial consideration of the section, please see: *Whippy v The University of Sydney* [2023] NSWSC 1607.
[151] *Anti-Discrimination Act 1991* (Qld) s 127(2)-(3); *Equal Opportunity Act 2010* (Vic) s 183.

liability provisions, given that the former require evidence that a person caused, instructed, induced, aided or permitted another person to act unlawfully.

Question 10.4: The exceptions for liability

1. **Should the ADA continue to provide two exceptions to vicarious liability (that is, the "reasonable steps" and "unauthorised acts" exceptions)? Or is a single "reasonable steps" exception sufficient?**

In our view, the reasonable steps exception for liability is sufficient to provide a mechanism for employers and other duty holders to avoid liability in appropriate circumstances. The 'unauthorised acts' exception should be removed.

The fact that a duty holder must demonstrate that all reasonable steps were taken to prevent the unlawful act has a preventative focus. Further, the 'reasonable steps' exception occurs across Commonwealth discrimination laws, and it is therefore in the interests of consistency that this remains in the ADA.

The fact that NSW also has an 'unauthorised acts' exception is out of keeping with other Australian jurisdictions and, we suggest, may create unnecessary confusion. A more streamlined approach to the defences available to duty holders is preferable in the interests of clarity.

Question 10.5: Liability and artificial intelligence

1. **Does the use of AI challenge the ADA's approach to liability? If so, how could the ADA be amended to address this?**

Given the increasing use of AI in decision-making that impacts individuals, we suggest that it is appropriate that express provision be given in the ADA to ensure that decisions made by AI (or some other similar computer program) used by an individual or body corporate are attributed to their user i.e., by the corporation or individual relying on the system to make a decision. This will hopefully encourage duty holders to use AI systems which are inclusive and non-discriminatory and ensure that individuals subject to discriminatory decisions made by AI are not barred from making a complaint.

It is important that the onus is on the individual/body corporate user to make out any defence that all reasonable steps were taken to prevent the unlawful conduct. This is because only the duty holder will be aware of their actions in relation to the implementation and/or use of an AI system.

CHAPTER 11: Promoting substantive equality

1. **Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?**
2. **Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?**
3. **Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?**
4. **What test should be used to determine the scope of, including any limits to, the obligation to provide adjustments?**

While the ADA does not currently impose a duty to provide adjustments, we suggest that this would be desirable, particularly a duty in relation to people with disability. One option is to follow the mechanism for reasonable adjustments in the DDA, where the definitions of direct and indirect discrimination impose a requirement for reasonable adjustments. However, as noted in the Consultation Paper, this approach is limited by the fact that 'consideration of adjustments only arises in the areas where discrimination is unlawful and through the definition of "discrimination"'.[152] Further, the case of *Sklavos v Australian College of Dermatologist* required the person with disability to show that the failure to provide a reasonable adjustment which leads to a disadvantage was because of the person's disability.[153] This has been criticised as rendering the reasonable adjustments under the DDA as unenforceable.[154] We note that as the DDA is also under review, it would be helpful to achieve alignment, where possible, between the two schemes.

We suggest that in the interests of encouraging a proactive approach to inclusion and to promote substantive equality for persons with disabilities, it would be preferable therefore for the ADA to contain a separate duty as occurs in the Victorian Act.[155] This would be in line with obligations arising under the *Convention on the Rights of Persons with Disabilities*, which requires the reasonable accommodation of people with a disability to fully enjoy their human rights.[156]

In most cases, it would seem appropriate that a person with a protected attribute should request an adjustment, before the obligation to provide one is triggered. For example, an employer may not be apprised of the need to make an appropriately tailored adjustment if the employee has not in the first instance communicated this need (e.g., flexible working hours during a period of mental illness). However, there may be some cases of persons with intellectual disabilities, for example, who are unable to communicate their

[152] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025) 226 [11.16].
[153] *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 [23]–[53].
[154] Public Interest and Advocacy Centre (now Justice and Equity Centre), 'PIAC working with disability advocates to fix 'reasonable adjustments' (Article, 13 November 2019) <https://jec.org.au/civil-rights/discrimination/piac-working-with-disability-advocates-to-fix-reasonable-adjustments/>.
[155] *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.
[156] *Convention on the Rights of Persons with Disabilities*, opened for signature 12 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

need to access certain reasonable adjustments. Therefore, we suggest in such cases, that the ADA provide a mechanism through which such adjustments can be requested e.g., through a carer, family member or friend.

It would be appropriate to set out a non-exhaustive list of factors to be considered in determining whether an adjustment is reasonable as occurs in the Victorian Act.[157]

Question 11.2: Special measures

1. **Should the ADA generally allow for special measures? Why or why not?**
2. **If so, what criteria for a special measure should the ADA apply?**
3. **If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?**

The Law Society considers it appropriate for the ADA to be amended to provide for special measures so that certain groups can exercise and enjoy human rights and fundamental freedoms equally with others. As discussed in the Consultation Paper, in many circumstances this could avoid the administrative inconvenience of having to apply for exemptions.[158]
We are supportive of aligning the criteria for special measures with international standards, and support the approach outlined in s 12 of the Victorian Act, where a person can take a special measure for the purpose of promoting or achieving substantive equality for members of a group with a protected attribute.[159] However, we suggest that it is important for special measures to be implemented in consultation with affected people and communities, particularly Aboriginal and Torres Strait Islander peoples. In our view, this is particularly important, given that community consultation has been held not to be a requirement for the introduction of special measures under the RDA.[160]

We consider that it is appropriate to retain mechanisms to apply for exemptions or certifications, given there may be limited circumstances where an exemption is required that falls outside the scope of a special measure. The Consultation Paper, for example, cites the example of an exemption awarded to a company in order to comply with US export policies, which could not be characterised as being for the purpose of furthering substantive equality.[161]

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[157] *Equal Opportunity Act 2010* (Vic) s 20(3).
[158] NSW Law Reform Commission, *Review of then Anti-Discrimination Act 1977 (NSW): Unlawful Conduct* (Consultation Paper, May 2025).
[159] *Equal Opportunity Act 2010* (Vic) s 12.
[160] *Maloney v The Queen* (2013) 252 CLR 168.
[161] Anti-Discrimination NSW, 'Current Exemptions' (Web Page, 20 August 2025) <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/current-exemptions.html>.

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?**

The introduction of a positive duty to eliminate discrimination, harassment and victimisation would assist in making the anti-discrimination regime in NSW less reactive. Rather than focusing solely on individual complainants, positive obligations on duty holders would help to ensure prevention of discrimination in the first place. A focus on systemic discrimination could assist more people than a solely complaints-based regime, as businesses would be required to account for their cultures and organisational practices.

The *Equal Opportunity Act 2010* (Vic) provides one example of the way in which a positive duty could be drafted. Under s 15, a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. Section 15(6)(a)-(e) sets out mandatory factors to consider in determining whether a measure is reasonable or proportionate, for example the size of the person's business or operations and the practicability and cost of the measures. We note, however, that some commentators have pointed to the fact that while s 15 has a symbolic and educative function, there is 'no individual cause of action if the duty is breached' and the Victorian Equal Opportunity and Human Rights Commission is limited to investigating a breach, rather than taking action against a non-compliant duty bearer.[162] Therefore, it has been suggested that the positive duty would have a greater impact if it was reframed as an enforceable obligation.[163]

Most recently, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) modified the SDA, including by the introduction of a positive duty for employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, and victimisation in relation to those grounds. This amendment reflects Recommendation 17 of the Respect@Work Report.[164]

As concerns the scope and coverage of a duty in NSW, we suggest as a matter of principle that it should cover all conduct prohibited by the ADA, and apply to all persons with obligations under the ADA. Limiting the scope, for example, to unlawful sex discrimination and harassment only, would risk creating a 'hierarchy' of

[162] Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2), *Melbourne University Law Review* 459, 495.
[163] Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2), *Melbourne University Law Review* 459, 498.
[164] The possibility of a positive duty is also being considered in the current review of the DDA by the Commonwealth Attorney General's Department.

protected attributes and undermine the principle of equal and effective prevention.[165]. A duty in respect of all discriminatory conduct may be perceived as a significant regulatory burden, particularly by small and medium sized businesses. It would therefore be useful for the NSWLRC to examine the way in which this is managed in other jurisdictions, for example through the approach taken in s 15(6) of the *Equal Opportunity Act 2010* (Vic), which is limited to the taking of reasonable and proportionate measures.

It would be necessary to guide businesses in a practical way to meet their obligations, for example through guidance directed to businesses of different sizes and operational priorities. Examples are the Guidance issued by the Australian Human Rights Commission in relation to the positive duty under the SDA, or the resources of the Victorian Equal Opportunity & Human Rights Commission.[166]

[165] *Anti-Discrimination Act 1991* (Qld) s 118; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 228.
[166] Australian Human Rights Commission, 'The Positive Duty in the Sex Discrimination Act' (Web Page) <https://humanrights.gov.au/our-work/sex-discrimination/positive-duty-sex-discrimination-act>; Victorian Equal Opportunity & Human Rights Commission, 'Positive duty' (Web Page) <https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>.