Submission to the NSWLRC Review of the *Anti-Discrimination Act 1977* (NSW)

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Introduction

We are legal academics working in the field of sexual harassment law. We are both members of the Australian Discrimination Law Experts Group. We make this submission in our private capacities and this submission does not reflect the views of ADLEG.

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Part 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?

The 'reasonable person' test in the *ADA* should be expanded to include the 'possibility' of offence, intimidation or humiliation.

The harder test that is currently set in the ADA by the requirement that the harasser 'anticipate' that the other person *would* be offended, humiliated or intimidated risks excluding conduct that should be captured within the definition of 'sexual harassment' to achieve both the objects of the legislation and the broader policy goals of eliminating sexual harassment from the workplace and other areas of public life.

Amending t**he definition of 'sexual harassment' in the *ADA* to reflect the scope of the SDA, would consequently expand the coverage of the IRC (consistently with the coverage of the Fair Work Commission).** Whereas, retaining the current definition of 'sexual harassment' in the *ADA* would create inconsistency between the jurisdictions of the Fair Work Commission and the Industrial Relations Commission in relation to the scope of conduct that could be the subject of a stop sexual harassment or other dispute resolution application. Workers within the NSW industrial relations framework would not have the same rights as workers within the Federal system because they would need to prove that the harasser would have 'anticipated' the person *would be* offended, humiliated or intimidated, rather than proving only the 'possibility'.

We further note that the definition of 'sexual harassment' in the *ADA* is now referenced in the new Chapter 3A of the *Industrial Relations Act 1996* (s. 144L, awaiting proclamation) governing the Industrial Relations Commission's new jurisdiction with respect to sexual harassment.

Although not directly asked about the terms, we have ongoing **concerns about the continuing use of the terms "offence, intimidation or humiliation" as unduly emphasising the emotional impact of the prohibited behaviour on the person harassed**. Where a person does not have those particular responses, they should still not be subjected to sexually harassing behaviour. This aspect of the test for unlawfulness may be used against the complainant, for example, in TN v BF & Anor [2015] FCCA 1497, the complainant TN's phone recording of her employer masturbating in front of employees was referenced as evidence that she was not humiliated, since she had stayed to make the recording (O'Connell, K. (2019). Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders. *Laws*, *8*(4), 34).

We submit that the Inquiry should consider including an additional term or terms to 'offence, intimidation or humiliation' to update the test, and to include situations where interference to properly carry out one's work/participate in public life on an equal basis with others is the result of the harassment. Options for additional terms that more broadly capture the grounding of the harassment prohibition in equality, rather than in the emotional response of the aggrieved person, include:

- Including a term such as 'interference with the capacity to work/access public life on an equal basis with others' alongside 'offence, intimidation or humiliation'.
- Including a term such as 'undermined' alongside 'offence, intimidation or humiliation'. We note that the language of 'degraded or undermined' is used to describe workplace psychosocial hazards in the Safe Work Australia Managing Psychosocial Risks Code of Practice (June 2022, p. 19).

(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?

The ADA should expressly require consideration of an individual's attributes, or the relationship between the parties, in determining whether a person would be reasonably anticipated to be offended, humiliated or intimidated by the conduct. We note that these factors have already been included for consideration in the new Chapter 3A of the *Industrial Relations Act 1996* (NSW).

Guidance should be provided to a court or tribunal to indicate that the reason for considering these factors is to identify characteristics in the target of the conduct, or in the relationship between the complainant and respondent, that <u>indicate any further relevant disadvantage of the complainant</u>.

Intersectional sexual harassment is an entrenched and abiding problem that needs addressing. The ADA should be amended to include in the definition of unlawful sexual harassment a requirement that a court or tribunal consider factors such as sex, youth, disability, sexual orientation, gender identity, and any relationship of power disparity between the parties.This would be substantially the same as section 28A(1A) of the SDA, but *require* consideration by the decision-maker rather than merely permitting it. This allows intersectional sexual harassment to be explicitly addressed, and provides a basis for a court

or tribunal, deciding on a harassment case, to include factors that might exacerbate the seriousness and impact of the conduct due to further vulnerability of the target of the harassment.

Recent research (Madeleine Causland, 'A sword and a shield': How intersectionality in federal sexual harassment matters is approached by decision-makers and legal practitioners' (2025) 38(1) *Australian Journal of Labour Law* 1-28) demonstrates that the relevant provision in the SDA is beneficial for recognising intersectional factors and contextualising the harassment in some case law. However, without guidance, it is also being used in legal practice to the detriment of complainants, confirming earlier work by O'Connell (2017).

Ideally, therefore, guidance should be provided to indicate that the reason for considering these factors is to identify factors of vulnerability in the target of the conduct that might affect the assessment of whether the 'a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.'

(3) Does the ADA need to define "conduct of a sexual nature"? Why or why not?

We submit that the ADA does not need to define "conduct of a sexual nature".

It is well established in the case law that the phrase 'conduct of a sexual nature' is broadly interpreted by the judiciary. This approach has been reiterated and applied most recently by Justice Bromwich in *Magar v Khan* [2025] FCA 874.

Including a definition of 'conduct of a sexual nature' in the ADA could potentially narrow the range of conduct that will fall within the definition, and risks undermining the broad approach taken by the judiciary.

If guidance materials are produced to support future law reform, that material should make clear that 'conduct of a sexual nature' is to be construed broadly and contextually. That is, as indicated by case law, conduct that may not on the face of it appear sexual (for example, flicking elastic bands (*Shiels v James* [2000] FMCA 2, [72]) or declarations of love *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81) can be so because of the context in which it occurs.

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?

Yes, harassment on the ground of sex and a prohibition on hostile workplace environments should be expressly prohibited in the *ADA*.

The inclusion of a prohibition of 'harassment based on sex' is of substantial importance as not all harassment is sexual in nature. Much of it is simply sexist or misogynistic. The need to link harassment specifically to behaviours that are sufficiently "sexual" has always limited the scope and effectiveness of the prohibition on sexual harassment in the *ADA*. As the NSWLRC notes, this has now been corrected in the *SDA*.

We also support a prohibition on hostile workplace environments. Current sexual harassment provisions focus on individual-to-individual actions, and yet in many workplaces harm is created through collective actions that create a generally toxic and harmful environment.

Amending the legislation to explicitly cover harassment on the grounds of sex and to prohibit work environments that are hostile on the grounds of sex will reduce confusion by making it clear that these are forms of unlawful conduct. We are of the view that the other options suggested by the NSWLRC, such as amending the definition of indirect discrimination or better education and information, are unlikely to be effective. The former relies on judicial interpretation of a concept that has traditionally been narrowly interpreted by the judiciary, and the latter has been shown to be ineffective as a means of eliminating sex discrimination and harassment on the grounds of sex.

Complaints made to the Australian Human Rights Commission using the new protections also reveal their importance to complainants. Since the 2021-22 financial year, when the protection against sex-based harassment commenced, and 2022-23, when the protection against hostile work environment commenced, the number of complaints to the Australian Human Rights Commission on these grounds has been significant. On the ground of sex-based harassment there were 26 complaints in 2021-22, 69 in 2022-23 and 135 in 2023-24. On the grounds of hostile work environment there were 10 in 2022-23 and 95 in 2023-24. The number of complaints on the ground of sex discrimination has declined, possibly in response to the creation of these additional grounds. We are of the view that these complaint statistics reveal:

1. The extent of the problem presented by sex-based harassment and the creation of a hostile work environment.
2. The importance of clarity within the legislation that sex-based harassment and subjecting a worker to a hostile work environment are forms of unlawful conduct, without the need to rely on the interpretation of other definitions.
3. The capacity of complainants to navigate these new grounds within the legislative framework and the complaint process.

The Australian Discrimination Law Experts' Group (ADLEG) has previously submitted that the drafting of the federal "hostile environment" provision was unsatisfactory, as it replicated an individual form of action rather than created an environmental harm for which individuals could be held responsible. We therefore suggest that any provision drafted take into account the following point:

"The requirement in [the then proposed section 28M(2) of the SDA] that an individual (the first person) subjects another individual (the second person) directly to harmful conduct replicates ordinary unlawful harassment. In this form, the provisions will fail to achieve

the benefit of adding a hostile environment action, which is to cover a situation where a person's unlawful behaviour lies in contributing to the creation of a hostile environment. Another person who is harmed by that environment can then bring an action against the persons who created the environment. This is a crucial distinction. It avoids the common situation where individuals' acts are difficult to connect directly to a specific individual, but they create a hostile environment, and another person is impacted by that environment. To give an example, a person who institutes a workplace competition rating women on attractiveness may be responsible to women impacted by that system even if they have never personally rated them." (ADLEG, Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022)

In this submission ADLEG further notes that the federal SDA creates three different sets of "circumstances" to be taken into account: for sexual harassment, harassment on the grounds of sex and hostile work environment. Ideally, the circumstances for the latter two would be the same as for sexual harassment, to give more certainty to duty-holders and rights-bearers, and we point that out for any potential future drafting of new provisions.

(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?

If our recommendations regarding the definitions of 'sexual harassment', 'sex-based harassment' and 'hostile workplace environment' are implemented by the NSWLRC, between them these definitions will effectively prohibit conduct that should be prohibited to meet the goals of the legislation. No other options or models would be required.

Question 9.3: Sexual harassment in the workplace

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 recommend that the ADA adopt the definitions of 'worker' and 'PCBU' from work health and safety legislation, because these definitions are the simplest and the most expansive, and are increasingly in use across workplace legislation. The current approach of the ADA, which lists different types of workers and their status, is unnecessary and does not reflect the reality of workplace sexual harassment. The nature and extent of sexual harassment, and the harms it causes, are well documented and not limited to specific types of work relationships. Research by the AHRC has also revealed that although relationships of power, authority and control are risk factors for workplace sexual harassment, it is also very common amongst peers, and occurs in circumstances where the perpetrator is of a more junior rank than the victim-survivor.

We note that the terms 'PCBU' and 'worker' have been included in some areas of the *SDA* but not others, which continues to rely on the terms 'employer' and 'employee'. This creates confusion. For this reason, we do not recommend that the ADA adopt the approach taken in

the SDA, but that the ADA should take a uniform approach to the use of 'PCBU' and 'worker'.

This approach will foster consistency across Federal and New South Wales law, removing the possibility that the legislation will apply differently to different categories of workplace participant across different jurisdictions.

The NSWLRC has included discussion in this section regarding the possibility of expanding the prohibition on sexual harassment to other and potentially all areas of public life. We have addressed this discussion at Question 9.5 below.

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?

As we note above at 9.1, the current differences between the definition of sexual harassment in the *ADA* and the *SDA* has consequential effects for the scope of conduct that is captured by the *Fair Work Act 2009* (Cth) and the recent amendments to the *Industrial Relations Act 1996* (NSW).

The narrower definition of sexual harassment in the *ADA* means that the scope of conduct captured by the jurisdiction of the Industrial Relations Commission will be narrower than that of the Fair Work Commission in circumstances where the legislation was intended to offer the same protections to workers under the NSW industrial relations system.

Within work health and safety regulation, the SafeWork NSW Code of Practice on Sexual and Gender Based Harassment includes the *ADA* definition that requires the higher bar of anticipation that the conduct would make the harassed person feel offended, humiliated or intimidated, but erroneously links this definition to the *SDA* rather than the *ADA* (p. 5). This mistake is repeated in the Safe Work Australia model Code of Practice on Sexual and Gender-Based Harassment. Although this does not limit the scope of the legislative duty itself, it is problematic that the Code of Practice, which is intended to guide PCBUs, contains advice that incorrectly limits the definition of sexual harassment.

On this basis, we are of the view that the definitions of sexual harassment between the workplace-related sexual harassment laws and the *ADA* are not currently working well together. We recommend that the definition of sexual harassment in the *ADA* reflect the scope of conduct captured by the *SDA*. This will bring consistency to the scope of conduct that will be caught by the equality and workplace relations jurisdictions, and hopefully also bring that consistency to the work health and safety regulation as well.

(2) Should the ADA and workplace-related sexual harassment laws be more aligned?

We submit that the primary focus of the NSWLRC in the context of this Review should be on the quality and robustness of the legislation within the equality jurisdiction.

The *Respect@Work* package of reforms introduced a number of anomalies and inconsistencies between the equality and workplace legislation. We submit that as part of this Inquiry, the NSWLRC should seek to address and avoid those anomalies in recommendations for changes to equality and workplace legislation. We note that the *Respect@Work* package of reforms will be reviewed in the next eighteen months. **New South Wales is therefore well placed to lead the way with more robust equality legislation that can positively influence the Federal jurisdiction.**

We set out below inconsistencies between the equality and workplace jurisdictions introduced by *Respect@Work* reforms, together with recommendations as to how these issues should be resolved in NSW.

- Different terminology is used to describe employers/PCBUs and employees/workers across different legislation. We submit that the terms 'PCBU' and 'worker' are the simplest and most expansive and should be adopted across both jurisdictions.

- The *Fair Work Act 2009* (Cth) now includes protections in relation to sexual harassment, but does not include protections in relation to sex-based harassment or a workplace environment that is hostile on the grounds of sex. These protections are located only in the *SDA*. In many cases, complainants will seek to bring a complaint in relation to multiple forms of unlawful conduct, and the limitation only to sexual harassment in the *FWA* arguably limits the usefulness of this jurisdiction. This limitation on the workplace jurisdiction to only be able to deal with sexual harassment is repeated in the newly legislated Chapter 3A of the *Industrial Relations Act 1996* (NSW). This is understandable given that its definitions are currently tied to the ADA, which does not yet include sex-based harassment or a hostile workplace environment. **We are of the view that the Inquiry should recommend the inclusion of protections from sex-based harassment and a workplace hostile on the grounds of sex within both the ADA and the IRA to foster consistency and provide greater choice for complainants.**

Although the intention behind the *Respect@Work* reforms was to simplify the law, they have in some respects made it more complex. This is because there are now greater remedial options for victim-survivors of harassment. Providing victim-survivors with greater choice is a positive move, where victim-survivors are supported to navigate those choices. We support greater alignment with workplace sexual harassment laws where they work in conjunction with equality legislation to empower victim-survivors.

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?

(1) The ADA should not continue to limit the areas of life where sexual harassment is unlawful.

We support the removal of an 'areas' restriction in the Act. Unless there is a reason to restrict coverage, we consider that beneficial human rights legislation should provide as much protection as possible from discriminatory acts including harassment.

We support the removal of an 'areas' restriction for the following reasons:

- Sexual harassment is socially pervasive and takes place in areas of life not clearly covered by the Act, such as social media platforms. It is difficult to imagine any reason why sexual harassment would be acceptable in any area of public life.
- Sexual harassment provisions should not be limited by placing unnecessary hurdles to bringing complaints. Where areas of sexual harassment are demarcated, the lines of demarcation can themselves become an unnecessary source of legal and regulatory attention. Removing area restrictions provides clarity and prevents resources being wasted on seeking legal determinations on the demarcations of areas of activity over time.
- The expanded coverage in other Australian state jurisdictions demonstrates that removal of area restrictions is possible and practical. The removal of areas restrictions in other jurisdictions, along with the equivalent recommendations for change in the other most recent law reform inquiries, demonstrates that this is the direction that sexual harassment law reform is taking. A change to the ADA would be consistent with the overall direction of sexual harassment law reform.

In addition, we support the conclusion of the ALRC in its recent consideration of this issue:

"Prohibiting sexual harassment in more contexts would be more consistent with Australia's international obligations. It would provide greater access to justice and facilitate more just outcomes for people experiencing sexual violence. It would reduce the extent of arbitrary distinctions between sexual harassment that is prohibited, and sexual harassment that is lawful simply because of the context in which it occurs. It would reduce the complexity of disputes to the extent it would no longer be necessary to demonstrate that the sexual harassment occurred in a relevant context." ALRC, Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence (ALRC Report 143), para 14.107.

We recommend that the ADA be amended to remove restrictions of areas of activity on sexual harassment.

(2) Sexual harassment should be unlawful in any area of life, public or private.

As the NSWLRC points out, the ALRC has recently and comprehensively considered the arguments for and against universal coverage of the federal sexual harassment provisions. It has recommended the expansion of the prohibition on sexual harassment to all aspects of public life and for active consideration of expanding the federal SDA so that the prohibitions on sexual harassment apply universally. In addition, Queensland has universal coverage of

sexual harassment in any area of life, and the ALRC report (cited above) covers instances demonstrating the effective application of these provisions in cases concerning private life.

This Review of the *ADA* provides an opportunity for NSW to take the lead in expanding prohibitions on sexual harassment to all areas of public life.

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An additional note on coverage of school students:

We note particularly that the prohibition on sexual harassment in the context of education is very limited, and applies only to sexual harassment between staff members and students, and between students aged over 16 years and other students. Students are not protected from harassment by other students under the age of 16 in educational contexts.

We note that addressing sexual harassment in educational contexts has not been expanded in the *SDA* because recent inquiries have focused on the workplace rather than educational contexts. This NSWLRC Review therefore provides an opportunity to investigate and expand protections from sexual harassment in educational contexts, including schools.

Children and young people under the age of 16 are currently only afforded legal protection from sexual harassment by staff and students over the age of 16 in educational institutions under the SDA and ADA; there is no protection in these Acts from sexual harassment by students under the age of 16 years.

Within schools, sexual harassment is often framed and responded to as a form of bullying rather than a form of gender-based violence. This framing means that drivers and enablers of sexual harassment are not identified and addressed at either an individual or systemic level, and responses to victims are inadequate. Children who experience sexual harassment at school tend to respond to it in the same way as vulnerable workers within the workplace: they put up with it, or they move to a different school, with no consequences for the perpetrator and no systemic change to address the problem. Children become acculturated to experiencing, and perpetrating, sexual harassment at school before they even enter the workplace.

Amending the ADA to extend protections from sexual harassment in schools would send a clear message that sexual harassment is different to bullying, that it requires a different response, and that this behaviour is unlawful in all education institutions.

Accordingly, we recommend:

- That the NSWLRC expand consultation to specifically consider how to amend the ADA to extend protections from sexual harassment in schools.
- That the NSWLRC consider the following options for reform of the ADA:
    - Creation of a positive duty on educational providers to take reasonable and proportionate measures to eliminate sexual harassment, sex-based harassment and hostile educational environments from educational contexts, that would be actionable by students against educational providers.

- Creating a new definition of unlawful conduct based on subjecting a person to an educational environment that is hostile on the ground of sex.
- Expanding the current prohibition on sexual harassment to include sex-based harassment, mirroring workplace prohibitions.

Question 9.6: The private accommodation exception

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 are of the view that sexual harassment should be prohibited everywhere. However, we recommend that the private accommodation exception should be retained, but amended to be the same as the private accommodation exception that applies to discrimination. This would ensure that the exception is limited to circumstances where the person is living in the household and the accommodation is provided for no more than 6 people. We favour this approach for consistency across the Act.

Question 9.7: Attribute-based harassment

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

A prohibition against harassment should apply to all protected attributes and areas of activity covered by the Act.

We recommend that the ADA be amended to give express protection against harassment and similar forms of conduct in respect of all protected attributes and all areas of activity.

Although harassment and other forms of demeaning conduct may be considered a form of 'less favourable treatment' and caught by prohibitions on discrimination in specific areas, explicitly prohibiting such conduct provides greater clarity to the community in terms of understanding what is encompassed within the prohibitions and obligations.

We recommend that the prohibition on attribute-based harassment move beyond the "offended, humiliated or intimidated" test for sexual harassment in s22A to include conduct that diminishes a person's capacity to participate in public life on an equal basis with others.

As set out above for sexual harassment, we recommend that the definition of attribute-based harassment includes conduct that 'degrades' and 'undermines' a person on the basis of an attribute or otherwise moves beyond the feelings-based test for sexual harassment which has long been criticised (Thornton, Margaret. "Sexual Harassment Losing Sight of Sex Discrimination'(2002)." *Melbourne University Law Review* 26: 422). We recommend that the prohibition be grounded in the concepts of degradation and undermining conduct, or similar terms that **reflect the legislative object of equality, rather than unduly relying on the emotional response of the person being harassed**. As we point out at 9.1 above, where a

person does not have particular responses to harassment that include ‘offence’ or ‘intimidation’, they should not be subjected to sexually harassing behaviour. The same principle applies in relation to attribute-based harassment. The emphasis should be on the impact of the conduct on the harassed person’s capacity to participate equally, not on their emotional response to the harassment.

We note that this approach differs to the approach currently taken to defining attribute-based harassment in the Northern Territory and Tasmania. In the *Anti-Discrimination Act 1992* (NT), harassment on the basis of an attribute is encompassed within the definition of discrimination in s.20(1), and is unlawful in areas covered by Part 4 of the Act. The term ‘harassment’ is undefined in the NT Act or for the purposes of s.20(1). Section 20A of the NT Act also prohibits acts that are ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ where the act is because of an attribute of the person or group of people, and the act is not done in private. We note that the Anti-Discrimination Amendment Bill 2025 currently before the NT Legislative Assembly does not propose to alter the protection from attribute-based harassment, but does propose to alter the provisions with respect to offensive behaviour.

In the *Anti-Discrimination Act 1998* (Tas), s.17(1) prohibits ‘any conduct which offends, humiliates, intimidates, insults or ridicules another person’ on the basis of a range of attributes ‘in circumstances in which a reasonable person, having regarding to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed’. Section 17(1) effectively draws on the elements of offensive conduct from the NT definition of offensive conduct, together with ridicule, within the definition of harassment rather than offensive conduct.

Concerns have been raised in both the Northern Territory and Tasmania regarding the potential impact of such provisions on freedoms of speech, particularly in relation to the inclusion of the terms ‘offend’ and ‘insult’. These concerns tend to overlook the fact that these provisions provide an objective test for the conduct grounded in reasonableness.

We submit that a definition of attribute-based harassment that emphasises the legislative goal of equality rather than the emotional response of the harassed person, coupled with an element of reasonableness, balances the need to protect vulnerable people from harassment while preserving freedoms of speech.