New South Wales Law Reform Commission – Review of the *Anti-Discrimination Act 1977* (NSW)

26 September 2025

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practise in NSW. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

If you would like any further information regarding this submission, please contact the Association's Director, Policy and Law Reform

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A. Introduction

1. The New South Wales Bar **Association** thanks the New South Wales Law Reform **Commission** for the opportunity to provide a submission in response to its first **Consultation Paper** on the **Review** of the *Anti-Discrimination Act 1977* (NSW) (**ADA**).

2. The Association has had a long history of involvement in law reform and policy development in relation to anti-discrimination legislation and is pleased to participate in this important and significant Review. The Association first engaged with this Review by providing a **preliminary submission** dated 18 October 2023 to the Commission regarding the Terms of Reference.

3. The ADA remains a key statute for the protection of the right to equality and freedom from discrimination in NSW. However, as one of the earliest pieces of anti-discrimination legislation in Australia,[1] it has fallen behind evolving understandings of diversity and equality over the course of almost 50 years since its inception. This review is an opportunity to bring the ADA into conformity with contemporary community standards. Of course, the scale of the task should not be underestimated.

4. Several broad principles have guided the Association in its response to the consultation questions. Firstly, the ADA must reflect Australia's obligations under international legal instruments to which it is a party. It is a well-established principle of international law that human rights are interrelated, interdependent and indivisible. Where competing human right are in conflict an appropriate balance must be found. The mechanism used for determining the balance is that of proportionality. A State must only interfere with a person's rights if it is proportionate to the legitimate aim pursued. [2]

5. It has been said that:

> A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate where this is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.[3]

6. In the context of the ADA, a central instrument with regard to the equality of all persons before the law, is the International Covenant on Civil and Political Rights (**ICCPR**).[4] Article 2(1) of the ICCPR provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without

[1] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1999 (NSW)* (Report No 92, 1999) [3.45].
[2] *Handyside v the United Kingdom* no. 5493/72, 7 December 1976, paras 48 and 49.
[3] Harris, O'Boyle and Warwick, *Law of the European Convention on Human Rights* (Oxford University Press, 3rd ed, 2014). Certain 'permissible limitations' have been set on freedom of expression, for example: See *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/HRC/23/40 (17 April 2013) [28], [29].
[4] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(2).

distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[5]

7. Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[6]

8. Secondly, the approaches taken by other jurisdictions in analogous legislation is a relevant factor to be taken into account. In this respect, it is generally preferable for there to be consistency of legislation both within a jurisdiction and between Australian jurisdictions if that is possible. However, the Association does not advocate for the amending of legislation to reflect that in other jurisdictions simply for the sake consistency. If the comparable legislation is shown to be wanting, it would generally be appropriate for the New South Wales legislation to depart from it.

9. These principles have informed the Association's responses to the consultation questions. In summary, the Association submits that:

    a) the test for direct and indirect discrimination should be replaced with the "unfavourable treatment" and "detriment"/"disadvantage" tests respectively, consistent with equivalent legislation in other jurisdictions (dealt with in Part 3 titled "Tests for discrimination");

    b) the range of protected attributes under the ADA should be expanded, to provide greater support for vulnerable persons (dealt with in Part 4 titled "Discrimination: Protected attributes");

    c) identification of new protected attributes should have regard to the protections for equality and from non-discrimination found in the ICCPR, the International Convention on Economic, Social and Cultural Rights (**ICESCR**), the International Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), and the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) (dealt with in Part 5 titled "Discrimination: Potential new protected attributes**"**);

    d) the ADA's application to "areas of public life" should be reformed to apply to all areas of public life, consistent with Australia's international human rights obligations (dealt with in Part 6 titled "Discrimination: Areas of public life")

    e) there should be significant reforms to the exceptions for discrimination by religious bodies, discrimination in sport, discrimination by charitable bodies (dealt with in Part 7 titled "Wider Exceptions**"**);

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[5] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1).

[6] *International Convention on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

f) extensive amendments should be made to the ADA's vilification provisions, including greater harmonisation with section 93Z of the ***Crimes Act** 1900* (NSW) (dealt with in Part 8 titled "Civil protections against vilification");

g) the ADA's protections against harassment should be strengthened, following the recommendations of the Australian Human Rights Commission's (**AHRC**) 2020 Report, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (**Respect@Work Report**) where applicable (dealt with in Part 9 titled "Harassment");

h) the ADA should be amended to strengthen protections against victimisation, and to update provisions relating to vicarious liability (dealt with in Part 10 titled "Other unlawful acts and liability"); and

i) the objective of the ADA should be substantive equality, and accordingly, the ADA's approach to reasonable adjustments, special measures and positive duties should be reformed. In particular, the Association strongly supports the introduction of a positive duty to prevent unlawful conduct (dealt with under Part 11 titled "A positive duty to prevent or eliminate unlawful conduct").

10. These statements of policy are explored in further detail in the submission below.

11. This submission does not address each of the questions posed by the Consultation Paper. Rather, it responds to key questions which the Association has been able to consider in the time available. The absence of a response to any question does not signify support or the lack thereof.

B. Substantive Submissions

3 – Tests for discrimination

Question 3.1: Could the test for direct discrimination be improved or simplified? If so, how?

12. The Association submits that the test for direct discrimination could be improved by replacing the comparator test with an unfavourable treatment test, consistent with the tests applied in the Australian Capital Territory[7] (**ACT**) and Victoria[8].

13. The comparator test requires a complainant to prove that they were, or would have been, treated "less favourably" (in the sense of being undesirable, disadvantageous or unfairly) compared to another person without the protected attribute.

14. Key problems or inadequacies of the comparator test have been identified in cases, the literature and prior reviews.[9] For example, although comparisons will sometimes be relevant,[10] many instances of discrimination do not lend themselves to an appropriate comparator. The Consultation Paper provides an apt example (at [3.17]), illustrating the difficulty of identifying a suitable comparator against whom to judge a case of possible discrimination against a pregnant woman.

15. Furthermore, the comparator test can operate harshly to the detriment of complainants who should, arguably, have legal recourse. In *Purvis v New South Wales (Department of Education)* (2003) 217 CLR 92 (***Purvis***), the High Court considered whether a school had unlawfully discriminated against a student with a brain injury by suspending and expelling him for behaviour caused by his disability. The majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) rejected the claim, holding that the correct comparator was a student without a disability who engaged in the same conduct. Since both would receive equal treatment, no discrimination was found. Kirby J, in dissent, argued forcefully that equality may require differential treatment to accommodate disadvantage, and that a rigid comparator model is antithetical to

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[7] See *Discrimination Act 1991* (ACT) s 8(2).

[8] See *Equal Opportunity Act 2010* (Vic) s 8(1).

[9] See, e.g., *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 [19] (Mahoney J); *Commissioner of Police v Mohamed* [2009] NSWCA 432 [25]-[26] (Basten JA, highlighting difficulties of comparator test in that it relies on hypothetical / abstract comparisons, artificial ones that are not truly equivalent, distracting from actual harm); *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd* (No 3) [2012] FCA 697 (Katzmann J, noting the real difficulty in identifying a comparator); *Baird v Queensland* (2006) 156 FCR 451 [63] (Allsop J, explaining that the effectiveness of s 9(1) of the *Racial Discrimination Act 1975* (Cth) should not be denied because there is no directly comparable situation); See also, e.g., Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111; Belinda Smith, 'From Wardley to Purvis – How far has Australian anti-discrimination law come in 30 years' (2008) 21 *Australian Journal of Labour Law* 3; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [3.51]; Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti–Discrimination Laws* (Discussion Paper, September 2011) 10; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 279.

[10] *Kaplan v State of Victoria (No 8)* [2023] FCA 1092 [48], [70], [379], [608], [666] reiterates that while a comparator is not required under the RDA, comparative analysis may still serve as a useful evidentiary tool.

substantive equality. He wrote (at [225]) that "the law must respond to the reality of the disability, not to a fiction."

16. As contended in the Association's preliminary submission, the focus of the law should always be on 'substantive equality'.[11] Yet, a comparator test requires a focus on a respondent's process, reasoning and treatment of other persons, rather than on, properly, the impact of the discriminatory conduct on a victim. The comparator test is technical and often difficult to formulate, and is often open to legal confusion, deflection and obfuscation.[12]

17. The Association submits that an 'unfavourable treatment' approach, as adopted in the ACT and Victorian regimes, ought be adopted in NSW. This approach has the advantage of simplicity and flexibility, since it can accommodate a comparative analysis where relevant, but does not mandate this approach.[13] Although the equivalent provisions in both the ACT and Victoria are preferable to the comparator test,[14] the ACT approach is to be preferred, because it caters for intersectional discrimination and facilitates greater access to justice. Section 8(2) of the *Discrimination Act 1991* (ACT) (the **ACT Act**) provides:

> [A] person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.

18. The Association submits that this language might be further improved by adopting language akin to the Canadian *Human Rights Act 1985* (the **Canadian Act**) – "one or more prohibited grounds… or on the effect of a combination of prohibited grounds."[15]

Question 3.2: Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

19. The Association acknowledges the existence of concerns with the comparative disproportionate impact test (**CDI** test), and supports replacing it with a 'detriment' test, such as those adopted in the ACT, Victoria and Tasmania, as well as under Federal statutes.[16]

20. The CDI test requires a complainant to prove that the condition or requirement they are unable to comply with is one with which a substantially higher proportion of the population without their protected attribute is able to comply.[17] This approach has been criticised by recent reviews of anti-discrimination legislation in

[11] NSW Bar Association, Preliminary Submission No PAD86 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (18 October 2023) [20].
[12] NSW Bar Association, Preliminary Submission No PAD86 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (18 October 2023) [21].
[13] *Kuyken v Chief Commissioner of Police* [2015] VSC 204 [89].
[14] See Victorian context, e.g., 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, 483–4.
[15] *Canadian Human Rights Act* 1985 (CAN) s 3.1. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Consultation Paper, May 2025) [3.99].
[16] See, e.g., *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth).
[17] See, e.g., *Anti-Discrimination Act 1977* (NSW) s 24(1)(b).

Western Australia and Queensland.[18] The key problem is that complainants can face "overwhelming difficulties" in meeting the CDI test.[19] The test imposes a high evidentiary burden,[20] often requiring complicated statistical evidence that can be a subject of dispute between parties.[21] Identifying the appropriate pools of people as a point of comparison is not a simple process and has been the subject of considerable judicial elaboration.[22] This is of particular concern in light of the high number of self-represented complainants in this area, who may not be able to understand what is required to discharge the CDI test.[23] The unnecessary complexity of the CDI test would continue to present difficulties even if the onus of proof for this element were to be shifted to respondents.

21. An alternative is a 'detriment' or 'disadvantage' test, which has been adopted in other Australian jurisdictions in two forms:

    a) In states such as Victoria, Tasmania and in certain Commonwealth legislation, the test requires the complainant to prove that the condition or requirement has, or is likely to have, the effect of disadvantaging persons with a protected attribute.[24]

    b) The ACT adopts a slightly different approach, where the effect need only disadvantage the particular person because they have one or more protected attributes.[25]

22. Adopting a detriment test would rectify the evidentiary challenges that complainants currently face in respect of the CDI test.[26] The Association considers that the ACT model is preferable because it recognises that not everyone with a protected attribute will have the same experience or the same required adjustments to meet their needs.[27] This test assesses whether a condition or requirement disadvantages a person possessing the protected attribute or attributes, and whether it is reasonable – reducing the need for complex comparisons.

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[18] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 58; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 101.

[19] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 2010) 48.

[20] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 58.

[21] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 2010) 48. See, e.g., *Amery v New South Wales* [2001] NSWADT 37.

[22] See, e.g., *Australian Iron & Steel v Banovic* (1989) 168 CLR 165, 177–81.

[23] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 40.

[24] See, e.g., *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Sex Discrimination Act 1984* (Cth) s 5(2).

[25] *Anti-Discrimination Act 1991* (ACT) s 8(3). See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 101. Following this review, Queensland recently passed legislation to adopt an approach similar to the ACT, however, the relevant section has not yet proclaimed into force: *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B.

[26] The ACT Law Reform Advisory Council's review of the *Discrimination Act 1001* (ACT), which uses a detriment test, did not find any such difficulties with proof: ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015).

[27] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 100.

Question 3.3: 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?

23. The Association submits that this part of the indirect discrimination test is redundant and should be removed.

24. Concerns have been raised that the requirement for a complainant to demonstrate that they do not or cannot comply with a condition or requirement[28] might defeat a complaint where the condition or requirement has, in fact, been complied with (notwithstanding significant cost or effort on the part of the complainant). However, these concerns seem to have been addressed by the decision in *Hurst v Queensland* (2006) 151 FCR 562 [134]. In that case, the Federal Court of Australia found that 'it is sufficient … that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can "cope" with the requirement or condition'.[29] This interpretation has also been applied in NSW.[30]

25. Therefore, it is no longer clear what purpose is served by this portion of the test. Noting that none of the states that adopt a detriment test as recommended above impose a compliance requirement,[31] the Association recommends its removal.

Question 3.4(1): Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?

26. The Association supports the retention of the reasonableness standard. As the Consultation Paper outlines, to prove indirect discrimination under the ADA, a complainant must show that the requirement in question is "not reasonable having regard to the circumstances of the case".[32] Potential improvements to the relevant provisions relating to the reasonableness standard are discussed in the Association's response to question 3.4(2) below.

27. The Association does not support the Consultation Paper's proposed alternative of a proportionality test,[33] given inter alia overwhelming difficulties of evidence created by proportionality in the context of the CDI test.[34]

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[28] See, e.g., *Anti-Discrimination Act 1977* (NSW) s 38B(1)(b).
[29] *Hurst v Queensland* (2006) 151 FCR 562 [134].
[30] See, e.g., *Walsh v Amobee ANZ* [2022] NSWCATAD 257 [31].
[31] *Discrimination Act 1991* (ACT) s 8(3); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Equal Opportunity Act 2010* (Vic) s 9(1). However, it is accepted that some Commonwealth legislation incorporates both a detriment test and a compliance requirement: see, e.g., *Disability Discrimination Act 1992* (Cth) s 6.
[32] *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).
[33] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Consultation Paper, May 2025) [3.62].
[34] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 2010) 48; see also Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 103.

Question 3.4(2): Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

28. In the interests of clarity, the Association recommends that the ADA introduce a non-exhaustive list of factors to guide decision making with respect to the reasonableness standard, similar to those factors introduced in the *Sex Discrimination Act 1984* (Cth)[35] (**SDA**) and in several other states and territories. Additionally, the onus of proof should be reversed, as the requirement for complainants to prove unreasonableness has been a key concern, particularly where evidence of reasonableness is in the possession of the respondent.[36]

29. In Victoria, the ACT and Queensland, anti-discrimination legislation includes non-exhaustive lists of factors to be taken into account in determining reasonableness.[37] This approach is helpful to guide fact finders,[38] and is likely to assist complainants in understanding the applicable legal test. As noted in the Discussion Paper (at [3.61]) the Victorian model in particular has, for good reason, received support in Western Australia and by the Commission previously. The factors specified in the Victorian framework[39] are sensibly broad and, further, cover issues of proportionality.

Question 3.5: Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?

30. The Association submits that the prohibition on indirect discrimination should extend to characteristics that people with protected attributes either generally have or are presumed to have if a detriment test is to be adopted. However, if the CDI test is retained, the prohibition on indirect discrimination should not extend to such attributes.

31. Under the ADA, direct discrimination on grounds of an attribute is defined to include discrimination on grounds of a characteristic that appertains generally to people with that attribute or a characteristic that is generally imputed to people with that characteristic.[40] This extended definition, however, does not extend to indirect discrimination. None of the jurisdictions that use a CDI test use this extended definition for indirect discrimination,[41] while all states and territories that use a detriment test do.[42]

32. The Association considers that this extended definition is not compatible with a CDI test. The identification of the necessary pools of people to compare with each other is difficult enough in the case of identifiable attributes like sex or race and would become very difficult when dealing instead with 'characteristics', particularly imputed characteristics. Thus, if the CDI test is to be retained, the Association

[35] *Sex Discrimination Act 1984* (Cth) s 7B(2).
[36] Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12(1) *University of Tasmania Law Review* 88, 99.
[37] *Equal Opportunity Act 2010* (Vic) s 9(3); *Discrimination Act 1991* (ACT) s 8(5); *Discrimination Act 1991* (Qld) s 11(2).
[38] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (*WA*)* (Final Report, May 2022) 59.
[39] See *Equal Opportunity Act 2010* (Vic) s 9(3).
[40] See, e.g., *Anti-Discrimination Act 1977* (NSW) s 39(1A).
[41] See, e.g., *Anti-Discrimination Act 1977* (NSW) s 39(1A); *Equal Opportunity Act 1984* (WA) s 8; *Equal Opportunity Act 1984* (SA) s 29.
[42] *Equal Opportunity Act 2010* (Vic) s 7(2); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Anti-Discrimination Act 1991* (Qld) s 7(2).

would recommend against extending the definition of indirect discrimination. However, if a detriment test is to be adopted, the definition should be extended.

Question 3.6(1): Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?

33. The Association supports the adoption of a shared burden model similar to that which has recently been adopted in Queensland.[43] Under that test, modelled on section 136 of the *Equality Act 2010* (UK),[44] once the complainant has established a prima facie case of unlawful discrimination, the onus shifts to the respondent to prove on the balance of probabilities that they did not unlawfully discriminate against the complainant. This is consistent with the approach in the United Kingdom,[45] European Union,[46] and Canada.[47]

34. As discussed above, complainants face substantial challenges in satisfying the tests for discrimination. Arguably, the burden of proof, combined with the nature of the evidence that is required to satisfy the test, acts as a barrier to access to justice. The rationale for adopting a shared burden model is to cast upon the respondent the onus of proving that which lies within the scope of their knowledge (and outside that of the complainant).

Question 3.6(2): Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

35. Similarly, the Association supports shifting the onus of proof for the reasonableness test to the respondent in relation to indirect discrimination. This is consistent with the approach adopted in Victoria, Queensland and the ACT,[48] and has been recommended extensively.[49]

36. The issues that arise from placing the onus on the complainant to establish unreasonableness in the case of indirect discrimination are similar to those which arise in relation to direct discrimination. Given that the requisite information and knowledge is, generally, in the unique possession of the respondent, complainants without access to sufficient information regarding the respondents' decision-making will need to rely on circumstantial evidence. Courts are typically reluctant to draw inferences of discrimination from such evidence.[50] Shifting the onus of proof for the reasonableness test to the party that is best placed to adduce the relevant evidence would address these concerns.

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[43] *Anti-Discrimination Act 1991* (Qld) s 204. Support for this approach is noted in the Consultation Paper at [3.81].
[44] Explanatory Notes, Respect at Work and Other Matters Amendment Bill 2024 (Qld) 13.
[45] *Equality Act 2010* (UK) s 136.
[46] *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, 31.
[47] *Ontario Human Rights Commission v Simpson-Sears Limited* [1985] 2 SCR 536, 28.
[48] *Equal Opportunity Act 2010* (Vic) s 9(2); *Anti-Discrimination Act 1991* (Qld) s 204; *Discrimination Act 1991* (ACT) s 70. This is also true for some Commonwealth legislation: see, e.g., *Sex Discrimination Act 1984* (Cth) ss 7B, 7C.
[49] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 2010) 52; Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12(1) *University of Tasmania Law Review* 88, 99.
[50] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 583.

37. Additionally, shifting the onus to the respondent may create an incentive to settle matters out of court. A survey of lawyers in Victoria revealed that, while the impact of shifting the onus to prove unreasonableness in cases of indirect discrimination was regarded as muted, the fact that the onus should be on the respondent was generally accepted and could be helpful as a tactic in procuring settlements.[51]

Question 3.7:

(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?

38. The Association submits that the distinction between direct and indirect discrimination should be retained. While the distinction has been criticised for being conceptually difficult to understand,[52] and some Commonwealth legislation does not recognise it,[53] it has an important educative function[54] and the concepts are quite distinct, which becomes clear when one engages in the proof process. Many other common law jurisdictions recognise the distinction.[55]

39. It is submitted that the concepts should also be explicitly defined within the ADA, as is done in most other Australian jurisdictions.[56] One alternative would be to describe indirect discrimination as 'substantive discrimination' reflecting the true nature of such discrimination and distinguishing it from direct or 'facial' discrimination.

40. Further, it should also be clarified that the two categories are not mutually exclusive, as has been the judicial interpretation of the ADA up until now.[57] This interpretation has been opposed in reviews of anti-discrimination legislation in Western Australia, Queensland and the ACT.[58] There is no reason for these categories to be deemed mutually exclusive when the two categories can occur concurrently.

Question 3.8(1): Should the ADA protect against intersectional discrimination? Why or why not? (2) If so, how should this be achieved?

41. The Association supports amending the ADA to expressly protect against intersectional discrimination.

42. In the course of their practices, the Association's members encounter cases in which individuals experience discrimination based on more than one, or a combination of, protected attributes. The current legal

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[51] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010 (Vic)*' (2021) 44(2) *Melbourne University Law Review* 459, 486–7.
[52] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 29.
[53] *Australian Human Rights Commission Act 1986* (Cth) s 3(1); *RDA* s 7(1).
[54] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 29.
[55] See, e.g., *Equality Act 2010* (UK) ss 13, 19; *Human Rights Act 1993* (NZ) s 65.
[56] *Equal Opportunity Act 2010* (Vic) pt 2; *Anti-Discrimination Act 1991* (Qld) ch 2 pt 3; *Discrimination Act 1991* (ACT) s 8; *Anti-Discrimination Act 1998* (Tas) pt 4 div 1; *Sex Discrimination Act 1984* (Cth) ss 5, 7B.
[57] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 171 (Brennan J), 184 (Dawson J).
[58] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 50; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 88; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 29.

framework does not adequately recognise or protect complainants in such circumstances. The Association submits that amending the ADA to reflect more accurately the many ways discrimination can occur would address a significant gap in protection and better align with the lived reality of individuals' experiences.[59] It would also capture cases where the intersectional attributes may, taken alone, not have led to the impugned discriminatory conduct.

43. The ACT[60] and Canadian models provide examples of how this might be achieved. Of these two models, the Association submits that NSW model its approach on that of the Canadian Act, which specifies that "a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds",[61] therefore encompassing both multiple grounds (additive multiple discrimination) and discrimination on the combined effects of multiple grounds (intersectional discrimination).

44. However, the Canadian experience suggests that lawyers, courts and tribunals may require some time to become accustomed to intersectional analysis of discrimination claims.[62] Despite having allowed such claims to be brought since 1998, as of 2020, Canada's Supreme Court had not adjudicated a claim of discrimination on the combined effects of multiple grounds.[63] Further, there will inevitably be some additional complexity when proving a claim based on the combined effects of multiple grounds,[64] for instance, in connection with identifying an appropriate comparator (if, contrary to the Association's recommendation above, that test is retained).[65] The Association considers that such consequences are a necessary 'cost' in implementing an overall positive change.

Question 3.9: Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

45. The Association submits that the tests for discrimination should capture intended future discrimination. Most other jurisdictions in Australia already do so in respect of both direct and indirect discrimination.[66]

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[59] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *University of New South Wales Law Journal* 773, 791; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 106.
[60] *Discrimination Act 1991* (ACT) s 8(2)-(3).
[61] *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.1.
[62] Grace Ajele and Jena McGill, 'Intersectionality in Law and Legal Contexts' (Publication, Women's Legal Education & Action Fund, 2020) 48.
[63] Grace Ajele and Jena McGill, 'Intersectionality in Law and Legal Contexts' (Publication, Women's Legal Education & Action Fund, 2020 45.
[64] Grace Ajele and Jena McGill, 'Intersectionality in Law and Legal Contexts' (Publication, Women's Legal Education & Action Fund, 2020 45; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 63.
[65] See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 106.
[66] *Equal Opportunity Act 2010* (Vic) ss 8(1), 9(1); *Discrimination Act 1991* (ACT) ss 8(2), (3); *Anti-Discrimination Act 1991* (Qld) ss 10(1), 11(1); *Anti-Discrimination Act 1992* (NT) s 20(2) (though this Act does not deal with indirect discrimination); *Disability Discrimination Act 1992* (Cth) ss 5, 6.

46. The fact that the *ADA* does not *currently* capture intended future discrimination might be a consequence of it being one of the earliest pieces of anti-discrimination legislation in Australia,[67] bearing in mind that other anti-discrimination legislation in Australia that continues not to recognise future discrimination dates to the mid-1980s or earlier.[68]

47. The Association recommends ultimately, in line with other Australian jurisdictions, that the ADA's various direct discrimination provisions should be modified to insert appropriate language such as to read 'treats, or proposes to treat, the aggrieved person …' and the indirect discrimination provisions to read 'requires, or proposes to require, the aggrieved person…'.[69]

4 – Discrimination: protected attributes

48. The ADA prohibits discrimination on a more limited range of attributes than anti-discrimination legislation in other Australian jurisdictions. This is due, in large part, to a failure by subsequent NSW Governments to appropriately review and update the ADA in response to societal change. As a result, the language in the ADA has become outdated and, more concerningly, many sections of the community who are vulnerable to discrimination and other unlawful behaviour do not have adequate legal protection under NSW anti-discrimination law.

49. In this section of the submission, the Association argues for reform to expand the range of protected attributes under the ADA, to provide greater support for these vulnerable persons. The Association notes that, when developing recommendations about potentially expanding the list of protected attributes under the ADA, the Commission should review the available evidence and empirical data about groups that have been the subject of discrimination, harassment and vilification to ensure vulnerable groups are sufficiently captured.

Question 4.1(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "age"?

50. Children are an inherently vulnerable class of persons due to their dependency and relative immaturity. However, in recent months, criminal law reforms across Australia (including in NSW) have targeted children with the consequence that, in certain contexts, children are treated in a way that is harsher and more onerous than the treatment of adults in the same circumstances.

51. For example, section 22C of the *Bail Act 2013* (NSW), which took effect in April 2024, provides:

    (1) A bail authority must not grant bail to a relevant young person for a relevant offence alleged to have been committed while the young person is on bail for another relevant offence unless the bail authority has a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions.

[67] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1999 (NSW)* (Report No 92, 1999) [3.45].
[68] See, e.g., *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA). Cf *Anti-Discrimination Act 1998* (Tas).
[69] The proposed wording echoes the language of the *Equal Opportunity Act 2010* (Vic) ss 8(1), 9(1).

52. The test of a "high degree of confidence" is a standard previously unknown to the criminal law, and one which has attracted judicial critique for the way in which it treats a child's freedom less favourably compared with that of an adult.[70]

53. Predictably, the number of young people in NSW prisons is increasing. As at June 2025, the number of children in custody had increased by 34% compared with two years' prior. Nearly three quarters of those in youth detention were being held on remand. This punitive approach has a disproportionate impact on children who are already marginalised and vulnerable; 60% of those in youth detention are First Nations people, despite only accounting for 8% of NSW's youth population.[71]

54. The current review of the operation of *doli incapax* in NSW for children under 14 presents a risk that children's rights in the criminal justice context will be further eroded.

55. The Convention on the Rights of the Child (**CRC**) provides in article 1:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

56. In recognition of the unique vulnerabilities of children, and in order to uphold Australia's international human rights obligations, the Association submits that the Commission should consider an amendment to the ADA to provide explicitly that children are protected under the attribute of "age". While the ADA does not constrain Parliament's power to pass legislation, and section 54 provides a defence in respect of anything done by a person that is necessary to comply with a requirement of any other Act, subordinate legislation or any court order, the Association considers that strengthening the protection of children under the ADA may assist in a number of ways.

57. Firstly, it would articulate norms and basic principles which could be used to bolster arguments about the appropriateness of legislative reforms that may be inconsistent with the ADA's underlying principles. Secondly, the ADA might serve as a tool to regulate the discriminatory exercise of executive power against young people, as a class which falls outside a specific power conferred by statute.

58. The Association acknowledges that the proposed amendment would require consideration as to how it should be framed (including relevant exceptions) and would welcome the opportunity to engage further with the Commission in relation to these questions.

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[70] See, e.g., *R v RB* [2024] NSWSC 471 at [62] where Lonergan J observed that reforms to the *Bail Act 2013* (NSW) "… highlight a lack of coherence between the bail court's obligations to comply with ss 4 and 6 of the Children (Criminal Proceedings) Act and the requirements of s 22C, which treats a relevantly charged child's freedom in a less favourable way than an adult's freedom in exactly the same circumstances: See s 14 of the *Age Discrimination Act 2004* (Cth) "Concept of age discrimination"".

[71] NSW Bureau of Crime Statistics and Research, 'NSW youth detention numbers up 34% since 2023' (Media Release, 14 August 2025).

Question 4.2:

(1) What changes, if any, should be made to the way 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?

59. The Association considers that the definition of "responsibilities as a carer" under section 49S of the ADA should be amended to protect a broader and more contemporary understanding of carers, which better reflects "the diversity of cultures and relationships in our community"[72], including amongst First Nations communities.

60. Adopting a broader understanding of carer status is particularly important in supporting the disproportionate number of women who have care responsibilities. The 2024 Carers NSW Carer Survey found that 37.4% of respondents were balancing caring responsibilities with paid work and 88.5% of these identified as female.[73]

61. The Commission should consider the language of "parental status or status as a carer" from section 6(i) of the *Equal Opportunity Act 2010* (Vic) (the **Victorian Act**). Importantly, the term "parental status" is defined to mean "the status of being a parent or not being a parent" at section 4 of the Victorian Act. "Carer" is also broadly defined at section 4 of the Victorian statute, as a person who "is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis". The Association supports this broader approach.

62. Amendments to the ADA are also required to capture other relationships of care. The Commission should consider the language of "parent, family, carer or kinship responsibilities" at section 7(1)(l) of the ACT Act. As the Consultation Paper notes, this will help to ensure that a broader range of familial, care and kinship responsibilities are protected, including for First Nations communities.

Question 4.3(1): What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "disability"?

63. Section 4(1) of the ADA defines "disability" to include:

    (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

[72] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Consultation Paper, May 2025) [4.19].
[73] Carers NSW Australia, '2024 National Carer Survey: Summary Report' (Report, Carers NSW Australia, 2024) 61.

(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.

64. The definition extends to disabilities that are "present, past, future, or imputed". Section 49A confirms this inclusive temporal scope. Section 49B(2) further provides that discrimination includes treating a person unfavourably based on characteristics that appertain to or are imputed to a disability, such as the use of a guide dog or other aid. Section 49D protects associates of persons with disabilities. The definition was introduced by the *Anti-Discrimination (Amendment) Act 1994* (NSW), aligning NSW law with the then recently enacted *Disability Discrimination Act 1992* (Cth) (**DDA**).

65. The Association recommends section 4 of the ADA be amended to insert key operative definitions necessary for doctrinal coherence and the effective operation of proposed substantive provisions regarding disability discrimination. In particular, the ADA presently lacks definitions of the following terms:

a) **"reasonable adjustment"**, as defined in section 4 of the DDA to mean a modification or accommodation that does not impose unjustifiable hardship;

b) **"assistance animal"**, as defined in section 9 of the DDA to include accredited or trained animals which assist a person to alleviate the effect of a disability; and

c) **"disability aid"**, as defined in section 9 of the DDA to include equipment or devices that mitigate the effects of a person's disability.

66. These definitions are essential if the ADA is to include discrete forms of disability discrimination analogous to the Federal regime, including:

a) a distinct form of unlawful discrimination constituted by the failure to make reasonable adjustments for a person with disability (see DDA sections 5(2) and 6(2)); and

b) express provisions protecting persons who require an assistance animal or disability aid where the unfavourable treatment arises from the presence or use of that aid or animal (see DDA section 8).

67. The absence of the terms listed at subparagraph 47(b) and (c) in the ADA creates ambiguity in the interpretation and application of existing provisions such as section 49B(2), which refers to characteristics that "appertain to or are imputed to a disability." The ADA also fails to provide any express protection for persons discriminated against because of their use of assistance animals or disability aids. The DDA remedies this by deeming such conduct discriminatory under section 8, even where the less favourable treatment is directed not at the person per se but at the animal or aid upon which they rely. Further, in 2008, Australia ratified the CRPD. Article 1 states that persons with disabilities include those:

> who have long-term physical, mental, intellectual or sensory impairments **which in interaction with various barriers** may hinder their full and effective participation in society on an equal basis with others. (**emphasis** added)

68. The CRPD's jurisprudence, including *General Comment No. 6* (2018), interprets article 1 to require State Parties to adopt a social model of disability, and to embed this model in domestic law. *General Comment No. 6* (2018) provides that:

> Individual or medical models of disability prevent the application of the equality principle to persons with disabilities. Under the medical model of disability, persons with disabilities are not recognized as rights holders but are instead "reduced" to their impairments. Under these models, discriminatory or differential treatment against and the exclusion of persons with disabilities is seen as the norm and is legitimized by a medically driven incapacity approach to disability. [74]

69. The ADA currently employs a medical or impairment-based model. It does not expressly recognise that disability results from interaction with environmental and attitudinal barriers. It also lacks any objects clause or interpretive provision directing courts to read the ADA consistently with the CRPD. To ensure compliance with Australia's obligations under the CRPD and promote consistency with modern discrimination jurisprudence, it is submitted that the definition of "disability" in section 4 should be amended to adopt a hybrid model which recognises that while disability may arise from individual impairments, its legal relevance arises from the interaction of such impairments with external barriers to equal participation. A recommended formulation, consistent with article 1 of the CRPD, would define disability as including:

> a physical, mental, intellectual, cognitive, neurological, sensory or psychosocial impairment which, in interaction with barriers, may hinder a person's full and effective participation in society on an equal basis with others.

70. This formulation has already been adopted in principle by the Commonwealth Parliament through amendments to the *National Disability Insurance Scheme Act 2013* (Cth), and has been endorsed by the AHRC and numerous law reform bodies as the most appropriate contemporary approach to legislative recognition of disability.[75]

71. The ADA may further benefit from the insertion of an objects clause explicitly providing that one of the purposes of the ADA is to give effect to Australia's obligations under the CRPD. Such a provision would align the ADA with the DDA, which mandates in section 3 that the statute be interpreted consistently with Australia's international human rights commitments. As the Full Federal Court recognised in *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; (2017) 349 ALR 191, international instruments such as the CRPD have no independent domestic legal force unless incorporated, expressly or by necessary implication, into statute. Absent such incorporation, courts are precluded from adopting the CRPD as a controlling interpretive framework. Accordingly, the inclusion of an interpretive purpose clause referencing the CRPD would constitute a foundational structural reform, ensuring that the ADA is construed in accordance with the social model of disability and with Australia's obligations under international law, as

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[74] Committee on the Rights of Persons with Disabilities, *General Comment No 6: General Comment on Equality and Non-Discrimination (article 5),* 19th sess, UN Doc CRPD/C/GC/6 (26 Aprill 2018) [8].

[75] Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (Report, February 2014) 17–18; see also David Tune AO PSM, *Review of the National Disability Insurance Scheme Act 2013: Removing Red Tape and Implementing the NDIS Participant Service Guarantee* (Report, December 2019) [2.6].

required by the interpretive presumption articulated in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

Question 4.3(2): Should a new attribute be created to protect against genetic information discrimination? Should this be added to the existing definition of disability?

72. The ADA does not currently include genetic status or predisposition as an express ground of unlawful discrimination. While section 49A extends the definition of disability to include future and imputed disabilities, the provision lacks the clarity and specificity of its federal counterpart. Section 4(1)(f) of the DDA explicitly provides that a "disability" includes one that "may exist in the future (including because of a genetic predisposition to that disability)." The omission of analogous language in the ADA is doctrinally significant and risks excluding individuals who are subject to adverse treatment based solely on predictive health information derived from genetic data.

73. The use of genetic information in employment, insurance, education and healthcare has proliferated in recent decades due to advances in genomic testing. Discrimination on the basis of such information could occur in anticipation of the development of a disability, even where no present impairment exists. In the absence of clear statutory protection, such conduct may fall outside the scope of current prohibitions under the ADA. It is submitted that this creates a lacuna in the legislative framework and undermines the principles of equal treatment and human dignity that the ADA is intended to uphold.

74. Federal law has recognised these concerns by the inclusion of genetic predispositions within the DDA followed recommendations by the Australian Law Reform Commission (**ALRC**) and the Australian Health Ethics Committee in their joint report titled, *Essentially Yours: The Protection of Human Genetic Information in Australia*, which identified the need for legislative protection of individuals against discrimination based on genetic risk.[76] The Commonwealth Parliament responded by amending the DDA to incorporate this form of prospective disability within the protected attribute. NSW has enacted no equivalent amendment, and the ADA remains silent on the issue.

75. Two approaches are available. The first is to amend the definition of "disability" in section 4 of the ADA to include, expressly, a disability that may exist in the future by reason of a genetic predisposition. This would harmonise the ADA with the DDA and preserve the internal coherence of the ADA's disability provisions. It would ensure that individuals with genetic indicators of future impairment are afforded the same protections as those with current, past or imputed disabilities, consistent with section 49A of the ADA. It is submitted that this approach is analytically sound and consistent with the underlying logic of disability discrimination law, which recognises that stigma and social exclusion often precede the onset of an actual impairment.

76. The second is to create a discrete protected attribute of "genetic status" or "genetic information," akin to the approach taken in certain Canadian provinces.[77] This would permit the development of a tailored regulatory regime with appropriate exceptions and would avoid conceptual strain on the disability category.

[76] Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC Report 96, May 2003) vol 1 ch 9.
[77] See, e.g., *Genetic Non-Discrimination Act*, SC 2017, c 3; *Ontario Human Rights Code*, RSO 1990, c H.19.

However, the creation of a new attribute may introduce complexity and duplication, given the existing overlap between genetic information and anticipated disability.

77. On balance, the Association submits that the preferable course is to amend the definition of "disability" to incorporate genetic predisposition expressly. This approach is doctrinally coherent, aligning with federal law, and is sufficient to address the primary regulatory concern – namely, discrimination based on predictive genetic health information. It would also be consistent with article 5(2) of the CRPD which prohibits discrimination "on the basis of disability" and has been interpreted to include future or presumed disabilities that serve as proxies for social exclusion.

78. The Association therefore submits that section 4 of the Act should be amended to provide that "disability includes a disability that may exist in the future, including because of a genetic predisposition," and that corresponding amendments be made to section 49A to reflect this clarification. Such reform would close an identified legislative gap, ensure consistency with Commonwealth law, and strengthen the Act's capacity to address discriminatory practices arising from the misuse of emerging genetic technologies.

Question 4.3(3): What changes, if any, should be made to the public health exception?

79. Section 49P of the ADA provides that it is not unlawful to discriminate against a person with a disability if the discrimination is "reasonably necessary to protect public health." This exception is broadly framed, lacks a statutory definition of "public health," and is not subject to an express requirement of proportionality, necessity, or evidence-based justification. As currently enacted, the provision creates a broad discretion for discriminatory treatment without clear legislative safeguards, or any alignment with Australia's obligations under the CRPD.

80. The public health exception was introduced by the *Anti-Discrimination (Amendment) Act 1994* (NSW) as part of the original insertion of Part 4A. At the time, it was intended to ensure that anti-discrimination protections would not preclude public health interventions required in response to infectious disease, quarantine or similar emergencies. However, the exception has not been substantively revised in the three decades since its enactment, notwithstanding developments in international human rights law, statutory interpretation and public health regulation.

81. By contrast, the DDA contains a narrower and more structured exception in section 48. That section provides that a discriminatory act is lawful if it is "*r*easonably necessary to protect public health or the health of any person." Importantly, Federal jurisprudence has imposed meaningful judicial scrutiny on such claims. In *Moxon v Department of Health and Community Services (NT)* [1994] HREOCA 9, the Commission emphasised that the burden of proving necessity lies with the respondent, and that the exception must be interpreted strictly, consistent with the principle of legality and section 15AA of the *Acts Interpretation Act 1901* (Cth). The exception is not a general licence for unfettered discrimination in the name of public health.

82. In 1999, the NSW Law Reform Commission reviewed this provision and recommended that it be narrowed and refined. Specifically, Report 92 on the *Review of the Anti-Discrimination Act 1977(NSW)* (the **Commission's 1999 Report**) proposed that the exception apply only in tightly defined circumstances, namely where: (i) the disability in question involves a disease that is transmissible in the circumstances of the relevant activity; (ii) the discriminatory act is based on credible medical or expert opinion that it is necessary (and it is reasonable to rely on that opinion in those circumstances); and (iii) the act of

discrimination is proportionate to the risk involved. In essence, this would codify a three-limb test: *actual transmissible risk, evidence-based necessity* and *proportionality*.

83. Those 1999 recommendations were not implemented in the ADA. The current section 49P remains a relatively broad exemption, and similar provisions in other jurisdictions, likewise, do not enumerate specific criteria. The rationale for the recommended changes remains compelling and the Association submits they be implemented.

Question 4.4: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "homosexuality"?

84. As the Consultation Paper outlines, the ADA currently prohibits discrimination and vilification on the basis of "homosexuality",[78] which is defined at section 4 as a "male or female homosexual".

85. The Association noted in its preliminary submission that the term "homosexual" is limited and does not adequately protect persons of other sexualities, including people who are bisexual, pansexual, asexual or heterosexual. This is a significant deficiency in the operation of the ADA.

86. More flexible terminology should be introduced to protect against discrimination and vilification on the basis of sexuality or sexual orientation. In the Association's view, this approach is preferable to adopting more 'precise' definitions of, for example, bisexuality or asexuality. The Association shares the view of the Law Reform Commission of Western Australia, which concluded that an expansive definition allows for greater "recognition of the diversity of sexual orientations that exist in our community".[79]

87. As the Association's preliminary submission noted, potential approaches include the attribute of "sexual orientation", as is used in the Victorian Act (section 6(p)), and "sexuality", as is the protected attribute under the ACT Act (section 7(1)(w)). The Commission should consider the approach recommended by Equality Australia, in its preliminary submission dated 30 August 2023. Equality Australia's submission recommends adopting a definition of "sexual orientation", which includes elements from both Victoria and ACT's anti-discrimination laws, to ensure that this attribute does not inadvertently exclude protection for those who have limited or no romantic or sexual attraction to other people (as may be the case in Victoria's anti-discrimination laws), while also ensuring that the definition is inclusive of a broad range of sexualities (as is the case for the definition used in the ACT).

88. Close consultation with organisations like Equality Australia and ACON is critical to ensure any recommended changes to the attribute of "homosexuality" are appropriately constructed to protect LGBTQIA+ members of our community.

[78] *Anti-Discrimination Act 1977 (NSW)* ss 49ZF, 49ZG.
[79] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final report, May 2022) 117.

Question 4.5: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "marital or domestic status"?

89. As stated in its preliminary submission, the Association recommends that the Commission consider replacing the term "marital status" with a more inclusive alternative, as the current term does not adequately reflect contemporary relationships or language.

90. The Association supports the view at paragraph [4.80] of the Consultation Paper that "relationship status" would be an appropriate, more inclusive and modern term to use in the ADA, reflecting the terminology used by other states in this area.[80]

Question 4.6:

(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?

91. Under section 4(1) of the ADA, the definition of "race" includes colour, nationality, descent and ethnic, ethno-religious or national origin. While this is a broad and non-exhaustive definition, the Consultation Paper identifies several areas that are either not covered or only indirectly covered. These are considered in turn below.

Caste discrimination

92. As outlined in the AHRC's National Anti-Racism Framework Scoping Report, caste-based discrimination is described as an "intersectional system of discrimination" with "wide-ranging and severe impacts".[81] Submissions to the AHRC argued that caste should be explicitly recognised as a protected category within anti-discrimination legislation and policy.

93. In 2024, Queensland passed amendments to include "descent, ancestry or caste" within the definition of "race" under the *Anti-Discrimination Act 1991* (Qld) (the **Queensland Act**),[82] however this amendment is yet to commence.

94. The Association supports expanding the definition of "race" to explicitly include caste and considers the wording "descent, ancestry or caste" to be appropriate.

Immigrant status

95. The ADA does not expressly protect against discrimination on the basis of immigrant status. However, as noted in the Consultation Paper, the definition of "race" includes the related concept of "nationality",

[80] *Discrimination Act 1991* (ACT) s 7(1)(s); *Anti-Discrimination Act 1991* (Qld) s 7(b); *Anti-Discrimination Act 1992* (NT) s 19(1)(e).
[81] Australian Human Rights Commission, *National Anti-Racism Framework Scoping Report 2022* (Report, December 2022) 72.
[82] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52, amending *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of 'race') (not yet commenced).

interpreted as citizenship, and "national origin", which refers to a person's birthplace, the nation or nations their parents are connected to, and where their parents have made their home.

96. One option is to expand the definition of "race" to include immigration or migration status. This would align with the approaches in Tasmania and the Northern Territory, which otherwise have non-exhaustive definitions of race similar to that in NSW. The *Anti-Discrimination Act 1998* (Tas) (the **Tasmanian Act**) includes the "status of being, or having been, an immigrant"[83] and the *Anti-Discrimination Act 1992* (NT) (the **NT Act**) includes "that a person is or has been an immigrant".[84] Queensland has passed amendments to follow this approach by including "immigration or migration status" in the definition of race,[85] although the commencement date for this change remains uncertain.

97. Another option is to recognise immigration or migrant status as a standalone protected attribute, as is the case in the ACT.[86]

98. On a broad reading of the existing non-exhaustive definition of race, immigration or migration status may be covered by the ADA.[87] However, for the avoidance of doubt, this should be made explicit by adding immigration or migration status to the definition of race. The Association considers that it is unnecessary to create a separate, standalone protected attribute of immigration status if it is already included within the definition of race.

Language

99. As the Consultation Paper notes, language is in some cases indirectly included as a "characteristic" of race. However, the Northen Territory recognises "language" as a separate protected attribute.[88] The Association supports expanding the definition of "race" to expressly include language.

Recognising Aboriginal and Torres Strait Islander peoples

100. The Association supports the Commission consulting with First Nations communities and peoples to understand First Nations perspectives about being specifically recognised under the ADA's definition of "race". The Association is of the view that, subject to the views of First Nations people, this could serve as an important statement of community standards and explicitly affirm First Nations peoples' right to be free from racial discrimination.

[83] *Anti-Discrimination Act 1998* (Tas) s 3.
[84] *Anti-Discrimination Act 1992* (NT) s 4.
[85] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52, amending *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of 'race') (not yet commenced).
[86] *Discrimination Act 1991* (ACT) s 7(1)(i).
[87] See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 296–297.
[88] *Anti-Discrimination Act 1992* (NT) s 19(1)(ab).

Question 4.7(1): What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "sex"?

101. Ensuring adequate protection from sex or gender discrimination is critical for the effective operation of the ADA. The Association's response to question 4.8 below discusses how the attribute of "transgender grounds" should be amended to ensure broader protections, including for non-binary persons.

102. As discussed in the Consultation Paper, the relevant protected attribute under the ADA is "sex", rather than "gender". While the Association acknowledges the reasons why stakeholders may advocate for adopting the language of "gender" in this context, the Association notes that there may be risks in amending or replacing this protected attribute, given the significant body of jurisprudence about "sex discrimination", the benefits of broad consistency with other Australian jurisdictions and the importance of avoiding any potential uncertainty that may arise from including "sex" and "gender" as separate attributes.

103. However, the Association agrees with submissions that have advocated for the ADA to move away from binary conceptions of sex and gender. Using language, which recognises that sex and gender are not limited to male and female, is more inclusive and ensures that the ADA is consistent with NSW and Australian laws that recognise broader conceptions of gender and sex.[89]

Question 4.7(2): Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?

104. Consistent with the recommendations of the Commission's 1999 review of the ADA, and consistent with the approach in many other Australian jurisdictions, the Association agrees that pregnancy and breastfeeding should be introduced as standalone protected attributes.[90] In the Association's view, this will improve clarity of and understanding about the operation of the ADA.

Question 4.8: What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "transgender grounds"?

105. As outlined in the Consultation Paper, the ADA prohibits discrimination and vilification on "transgender grounds".[91] This attribute is defined as someone:[92]

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".

[89] *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11; *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW).
[90] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) recommendation 31, [5.40], [5.42].
[91] *Anti-Discrimination Act 1977* (NSW) s 38B.
[92] *Anti-Discrimination Act 1977 (NSW)* s 38A.

106. It includes someone who is "thought of as a transgender person, whether the person is, or was, in fact a transgender person.

107. The Association repeats the observations in its preliminary submission that the terminology of "transgender grounds" is limited in its coverage and not reflective of contemporary language. It assumes that a person identifies as male or female and does not contemplate broader conceptions of gender identity, including individuals who identify as non-binary.

108. The Association recommends that the language of the ADA be updated to provide broader protections, in line with the approach in other Australian jurisdictions and under NSW's criminal law. Currently, only NSW and WA anti-discrimination law do not include "gender identity" as a protected attribute.[93]

109. In addition, the Association notes the current incongruency between the ADA and section 93Z(1)(d) of the *Crimes Act*, which makes it a criminal offence to, by public act, threaten or incite violence towards another person or group of persons on the basis of "gender identity". This means that conduct against, for example, a non-binary person, that rises to the criminal standards under section 93Z, may attract a criminal penalty. However, the non-binary person who was the victim of that conduct may not have access to a civil remedy for discrimination or vilification under the ADA. If a non-binary person was the subject of discriminatory or vilifying conduct that fell below the criminal standards under section 93Z, they may have no recourse under NSW civil or criminal law.

110. To ensure broader protections under the ADA, the Association recommends that the attribute of "transgender grounds" be replaced with "gender identity". The ADA should adopt a broad definition of "gender identity" which includes the attributes identified in the definition of that term in section 4(1) of the Victorian Act, which provides:

> **gender identity** means a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.

Question 4.9(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?

111. The ADA currently protects against discrimination based on someone's past or future disability, or their past or future carer's responsibilities.[94] However, this type of protection does not apply to other protected attributes.

112. Where reasonable and appropriate to do so, the Association is of the view that the ADA should protect people against discrimination based on an attribute they have had in the past or may have in the future. There is a myriad of circumstances where a previous or future attribute might be the subject of discriminatory behaviour. For example, a person may be subjected to discrimination in relation to a

[93] *Sex Discrimination Act 1984* (Cth) s 5B; *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-Discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 15; *Discrimination Act 1992* (NT).
[94] *Anti-Discrimination Act 1977* (NSW) ss 49A(c), 49A(d), 49S(2).

previous homosexual relationship, even if that person no longer identifies as LGBTQIA+.[95] Similarly, a person who is in the process of applying for citizenship may be the subject of race discrimination, even if they are not yet a citizen of that country.

Question 4.9(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?

113. As outlined at paragraph [4.119] of the Consultation Paper, the ADA generally protects individuals against direct discrimination based on a protected attribute that they, or that their relative or associate has, excluding the protected attribute of carer's responsibilities.[96] The ADA does not provide this type of protection against indirect discrimination for any of the protected attributes.

114. The Association supports the addition of a specific protected attribute to protect relatives and associates of a person with a protected attribute in line with protections provided in other Australian jurisdictions.[97]

5 – Discrimination: potential new protected attributes

115. An ongoing deficiency of the ADA is it has failed to protect significant portions of the community who are particularly vulnerable or susceptible to unlawful conduct. This can, in large part, be attributed to the ADA having a more limited range of protected attributes compared with anti-discrimination legislation in all other Australian jurisdictions. The recommended reforms in this section of the Association's submission will help to address this deficiency.

Question 5.1: What principles should guide decisions about what, if any, new attributes should be added to the ADA?

116. The Association recommends that the following principles should guide decision-making as to what new attributes should be protected by the ADA:

a) the overarching principle of ensuring that NSW complies with Australia's obligations under international law;

b) that the law be updated to reflect the understanding of discrimination that has grown since the inception of the ADA; and

c) that the attributes protected against discrimination be expanded to bring the ADA into line with protections offered in other Australian jurisdictions.

117. In response to paragraphs [5.6] – [5.26] of the Consultation Paper, the Association notes that the ADA – as the foundational statute for the protection of the right to equality and freedom in NSW – should aim to be as comprehensive and as accessible as possible. In line with the position of the Association expressed in its preliminary submission, the Association reiterates that the ADA should be simplified to better

[95] It is noted that the ADA already protects anyone who is thought to be a homosexual person. See *Anti-Discrimination Act 1977* (NSW) ss 49ZF, 49ZG, 4(1) definition of "homosexual".
[96] *Anti-Discrimination Act 1977* (NSW) ss 7(1), 24(1), 38B(1)(a)–(b), 49B(1), 49ZG(1), 49ZYA(1).
[97] *Equal Opportunity Act 2010* (Vic) s 6; *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16; *Anti-Discrimination Act 1991* (Qld) s 7.

promote the equal enjoyment of rights. As such, the ADA should operate as a foundational piece of legislation to offer protection from discrimination. Amendments to the ADA should set coherence with other state regimes and the Commonwealth anti-discrimination law as a 'floor' for discrimination law purposes.

Question 5.2:

(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?

118. Presently, the ADA prohibits discrimination of a more limited range of attributes than anti-discrimination legislation in other Australian jurisdictions.

119. In formulating protected attributes, consideration should be given to the protections for equality and from non-discrimination found in the ICCPR, the ICESCR, the CEDAW, the UNDRIP, and the CRPD.

120. Turning to specific proposals for the creation of new protected attributes, the Association:

a) welcomes the Commission's proposal that "irrelevant criminal record" be added as a protected attribute under the ADA to bring it in line with the protections offered in other jurisdictions including the ACT, Tasmania and the Northern Territory;[98]

b) welcomes the protection of those with expunged convictions for homosexuality offences by way of recognising "expunged homosexual conviction" as a distinct attribute, following the example set in Victoria;[99]

c) favours the protection of people subjected to domestic and family violence under a protected attribute to provide the same protections in NSW as recognised in other jurisdictions;[100]

d) favours the inclusion of "irrelevant medical record" as a protected attribute to provide the same protections in NSW as recognised in Northern Territory and Tasmania;[101]

[98] *Anti-Discrimination Act 1992* (NT) s 19(q); *Discrimination Act 1991* (ACT) s 7(1)(k); *Anti-Discrimination Act 1998* (Tas) s 16(q).
[99] *Equal Opportunity Act 2010* (Vic) s 6(pa), s 6(pb).
[100] *Equal Opportunity Act 1984* (SA) s 85T(8); *Discrimination Act 1991* (ACT) s 7(1)(x); *Anti-Discrimination Act 1992* (NT) s 19(1)(jb).
[101] *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(1)(p).

e) favours the inclusion of protection against discrimination based on industrial activity to provide the same protections in NSW enjoyed in other jurisdictions[102] including the involvement in trade union activity[103] or trade union or employer association activity.[104]

f) favours the inclusion of protection against discrimination based on "physical features or appearance" and suggests that the definitions provided by the Victorian and ACT Acts should be adopted,[105] which provide sufficient articulation of the protected attribute;

g) favours a protected attribute that addresses religious discrimination in line with international human rights law and the protections offered by other Australian states and territories.[106] Such an addition would ideally simplify the complex exceptions under the ADA that indirectly protects freedom of religion (as to which see the answers to questions 7.1 – 7.3 below). The Association notes that there are a number of legal and practical limitations to protecting religious freedom under the ADA. These include that private conciliation is the preferred mechanism to resolve alleged civil vilification laws in Australia,[107] that only members of the targeted group have standing to lodge a complaint,[108] that representative complaints by organisations are only available where there is 'sufficient interest' to have standing,[109] but that private litigation of a public wrong places a significant burden on victims, especially when damages can be minimal and costs great. The Association also favours the addition of the broader attribute of freedom of thought, conscience and religion following the approach in the UK;[110]

h) favours the recognition of the rights of the distinct cultural heritage and spiritual practices of First Nations peoples through the insertion of protection of "First Nations spiritual belief or activity", consistent with protections in the Northern Territory.[111] The Association also considers that exceptions to the protection must be carefully considered and developed in close consultation with First Nations people and communities;[112]

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[102] *Anti-Discrimination Act 1991* (Qld) s 7(k).
[103] *Equal Opportunity Act 2010* (Vic) s 6(f); *Anti-Discrimination Act 1998* (Tas) s 16(l); *Discrimination Act 1991* (ACT) s 7(1)(j).
[104] *Anti-Discrimination Act 1992* (NT) s 19(1)(k).
[105] *Discrimination Act 1991* (ACT) dictionary definition of "physical features"; *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'physical features').
[106] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2); *Equal Opportunity Act 2010* (Vic) s 6(n); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o); *Anti-Discrimination Act 1992* (NT) s 19(1)(m); *Discrimination Act 1991* (ACT) s 7(1)(t); *Equal Opportunity Act 1984* (WA) s 53.
[107] Katharine Gelber and Luke McNamara, 'Anti Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 505.
[108] *Anti-Discrimination Act 1977* (NSW) s 88.
[109] *Anti-Discrimination Act 1977* (NSW) s 87A (1)(c).
[110] *Equality Act 2010* (UK) s 10(2).
[111] *Anti-Discrimination Act 1992* (NT) s 4(4).
[112] Note, as well, the Association's discussion in response to question 4.6 above.

i) supports the inclusion of the protected attribute of "a person who has an innate variation of primary or secondary sex characteristics that differs from the norms for female or male bodies",[113] however notes that intersex persons may also be protected through the proposal outlined at subparagraph (f) above;

j) supports the protections for and adoption of the broader term: a protection for "lawful sexual activity" following the examples from Tasmania and Victoria;[114]

k) supports the prohibition of discrimination based on "profession, trade, occupation or calling", noting its wider application of protection beyond sex workers;

l) supports the protection from discrimination based on "accommodation status" as provided for the in the ACT and Northern Territory;[115]

m) supports the protection from discrimination based on "employment status" as provided for in the ACT and Northern Territory;[116] and

n) broadly supports the protection from discrimination based on "social origin or status", noting the complexities surrounding defining this term.

121. In reference to paragraph [120(c)] (relating to victims of domestic and family violence), the Association further recommends that the Commission consider extending the ADA's protection to victims of sexual violence more generally. The Association notes that such an amendment was recommended by Full Stop Australia in its preliminary submission to the Commission.

122. However, the Association acknowledges that there are a number of questions raised by this suggested amendment which require careful consideration by the Commission, including:

a) how this protected attribute would operate in practice. This includes consideration of appropriate privacy protections for the impacted parties, what 'proof' of sexual violence may be required by the ADA and the duration for which the protection should be available after an instance of sexual violence;

b) any potential risk of causing additional trauma for victim-survivors, and how this could be appropriately mitigated; and

c) whether anti-discrimination law is the most appropriate mechanism for addressing challenges faced by victims of sexual violence.

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[113] Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), First Print, sch 1 [13].
[114] *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'sexual activity'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'lawful sexual activity').
[115] *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'accommodation status'), s 19(1)(ea); *Discrimination Act 1991* (ACT) s 7(1)(a), dictionary (definition of 'accommodation status').
[116] *Discrimination Act 1991* (ACT) dictionary definition of "employment status"; *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'employment status').

123. The Association acknowledges that these questions may also be relevant to the consideration of introducing a protected attribute on the basis of a person's status as a victim of domestic and family violence. However, there is a more significant body of evidence that the Commission can draw upon in determining the appropriate framework and parameters for including domestic and family violence as a protected attribute under the ADA.[117]

Question 5.3: Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

124. In many respects, an open-ended list, that would allow the ADA to better promote the equal enjoyment of rights and continue to reflect evolving community standards, is an attractive proposal. This approach is consistent with international human rights law that prohibits discrimination against undefined "other status."[118]

125. However, the Association is not persuaded that this is a practical or prudent approach to reforming the ADA. The Queensland Humans Rights Commission provides a compelling list of reasons why an open-ended list of attributes should not be adopted into Queensland's anti-discrimination statute:

- "Uncertainty about whether discrimination is lawful or not is a genuine risk if there is a general 'or other status' element to the list of attributes. Ensuring that duty-bearers understand the scope of their responsibilities assists compliance.

- The business community has expressed concerns about the complexity of complying with both federal and state discrimination and industrial laws, each with different coverage. If the laws become ambiguous and hard to apply, the level of compliance decreases.

- The Commission and the Act has a role in educating duty-holders and the community about anti-discrimination laws – a degree of certainty about what those rights and responsibilities [are] needed for the law to be effective.

- Such an open-ended provision could infringe on the fundamental legislative principle which requires that legislation is unambiguous and drafted in a sufficiently clear and precise way.

- Tribunals and courts may be reticent to take on what may amount to a law-making function."[119]

126. The Association shares the concerns of the Queensland Human Rights Commission. Importing this degree of uncertainty into the ADA is inadvisable. While attempts to create greater flexibility in support of

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[117] *Equal Opportunity Act 1984* (SA) s 85T(8); *Discrimination Act 1991* (ACT) s 7(1)(x); *Anti-Discrimination Act 1992* (NT) s 19(1)(jb); [117] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) 121 – 124; Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 329 – 333; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) Recommendation 14.2.

[118] *International Convention on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1); *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976*)* art 2(2).

[119] Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 311.

victims of unlawful conduct may be well-intentioned, reforms of this kind may lead to unworkable provisions that cannot readily be upheld, enforced or understood by impacted parties, and may encourage protracted and ultimately unhelpful litigation that is beyond the typical remit of courts and tribunals. For these reasons, the Association recommends against introducing an open-ended list of attributes into the ADA.

6 – Discrimination: Areas of public life

127. As noted throughout this submission, the Association shares the view expressed in the Consultation Paper "that the ADA has not kept pace with societal changes". This is reflected in the ADA's limited conception of "public life", which has meant that many at-risk persons in our community are not sufficiently protected.

128. This section of the Association's submission argues that the ADA's conception of "work", "education" and "goods and services" should be amended and broadened to more effectively cover these areas of public life and, more significantly, that the ADA should apply "in any area of public life". The Association is of the view that this will not only extend protections for potentially at-risk persons and ensure consistency with Australia's international human rights obligations but also simplify the operation of the ADA for impacted parties.

Question 6.1(1): Should the definition of employment include voluntary workers? Why or why not?

129. In the Association's view, the ADA's definition of employment should include coverage for volunteers. There is no clear justification for excluding volunteers from protection under the ADA, as was the Commission's conclusion when it reviewed the ADA in 1999.[120] Ongoing exclusion of volunteers from protection under the ADA will mean that NSW continues to be out-of-step with more appropriate and more expansive anti-discrimination laws across Australia.[121]

Question 6.1(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?

130. A broader approach to discrimination at work, which aligns with the approach to harassment under the SDA, would appropriately simplify the operation of the ADA and ensure greater coverage for those who experience discrimination in work contexts. When discussing the adequacy of protections against sexual harassment under the ADA, the Association's preliminary submission argued that greater alignment with the SDA will improve the operation of the ADA.

131. As the Consultation Paper outlines at Table 6.1, there is significant complexity under the ADA about which workers are protected from discrimination in different workplace contexts and relationships. This complexity may lead to unnecessary and resource-intensive disputes and litigation about whether or not

[120] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) recommendation 9, [4.42].

[121] *Discrimination Act 1991* (ACT) dictionary (definition of 'employment'); *Anti-Discrimination Act 1991* (Qld) sch 1 definition of "work"; *Equal Opportunity Act 1984* (SA) s 5 (definition of 'employee'); *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'work').

certain workers are covered by the ADA, including for gig economy workers, as is identified in the Consultation Paper.

132. The SDA provides a simpler model, which focuses on the more critical question of whether or not the conduct in question was unlawful. As the Consultation Paper outlines, the SDA, in this context, is unconcerned with the nature of the relationship between the complainant and the respondent. Instead, the SDA makes it unlawful to sexually harass any other person "in connection with" the complainant or respondent's status at work.[122] Adopting this approach would ensure that a broader range of discriminatory behaviour in the work context is captured under the ADA, including discriminatory behaviour by customers or visitors to a workplace.

133. According to the AHRC's Respect@Work Report, the phrase "in connection with" has been interpreted expansively by the courts, and has captured "sexual harassment of an employee by another employee while off-duty in staff accommodation quarters, at accommodation attended by employees while attending a work-related conference, and sexual assault that occurred in a home, after a work event".[123] In a contemporary context – where the boundaries between work-life and private-life have become harder to define (particularly as 'working from home' arrangements have become commonplace) and the nature of workplace relationships is in flux (as in the example of gig economy workers) – a broader and more flexible approach, like the way the SDA approaches harassment, is appropriate.

134. The Association acknowledges the Commission's comments about how this reform will potentially lead to "more people [being found] responsible for discrimination". The Association would welcome further opportunities to consult with the Commission about what limits, if any, are required to avoid potential overreach or overlap with other forms of unlawful conduct.

Question 6.3(1): What changes, if any, should be made to the definition and coverage of the protected area of "education"?

135. As outlined in the Consultation Paper, it is unlawful for an "educational authority" to discriminate against students and people applying to be students on all protected attributes with the exception of carers' responsibilities.[124]

136. The Association is of the view that a broader conception of "educational authority" is appropriate, which goes beyond the ADA's current formulation of a person or body administering a school, college, university or other institution at which education or training is provided.[125] The approach under the DDA and recommended by the Law Reform Commission of Western Australia is more appropriate, as it extends to organisations which have the purpose to develop or accredit curricula.[126]

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[122] *Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).

[123] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2022) 486.

[124] *Anti-Discrimination Act 1977* (NSW) ss 17, 31A, 46A, 49L, 49ZYL, 49ZO.

[125] *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'educational authority').

[126] *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'educational authority'); Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, May 2022) recommendation 57.

Question 6.4: What changes, if any, should be made to the definition and coverage of the protected area of "the provision of goods and services"?

137. The Association supports amending the ADA to prohibit discrimination in the manner, or way, goods and services are provided and in connection with the supply of goods and services. This amendment is appropriate to uphold the rights of persons with protected attributes and is consistent with equivalent protections in other state, territory and Commonwealth legislation.[127]

138. The Association supports the addition of "access to premises" as a separate, protected area under the ADA, noting that this is particularly relevant to people living with a disability. This amendment should reflect the conduct captured by section 23 of the DDA.[128]

Question 6.11(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? (2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?

139. In principle, the Association is of the view that discrimination should be prohibited in all protected areas for all protected attributes, including for discrimination based on carer's responsibilities, unless a relevant exception applies. This is consistent with the ADA's stated aim of promoting "equality of opportunity between all persons" and would assist in simplifying a piece of legislation that has become increasingly challenging to navigate. Such an approach is also broadly consistent with the approach taken in the ACT, Queensland, NT and Tasmania.

140. The analysis of the Law Reform Commission of Western Australia, which supported this view, is instructive:

> The Commission is of the view that, historically, discrimination on the basis of many protected attributes occurs in all the areas of public life identified by the Act, and in further areas of public life that the Commission recommends be included in the Act. Consistency in coverage for all protected attributes, in all areas of public life, aligns with the object of the Act in promoting recognition and acceptance within the community of equality for all. The Commission notes that such an approach may also serve to enhance community understanding of anti-discrimination practices by promoting consistency of approach.[129]

141. The Law Reform Commission of Western Australia therefore recommended that "subject to any exceptions, all the attributes protected by the Act should be protected in relation to all the areas of public life covered by the Act".[130]

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[127] *Anti-Discrimination Act 1991* (Qld) s 46; *Equal Opportunity Act 2010 (Vic)* s 44(1)(c); *Anti-Discrimination Act 1992 (NT)* s 41; *Age Discrimination Act 2004* (Cth) s 28(c); *Disability Discrimination Act 1992* (Cth) s 24(c); *Discrimination Act 1991* (ACT) s 20(c); *Equal Opportunity Act 1984* (WA) s 66K(c); *Sex Discrimination Act 1984* (Cth) s 22(c).
[128] *Disability Discrimination Act* 1992 (Cth) s 23.
[129] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 126.
[130] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) recommendation 56.

142. The Association acknowledges that there may be countervailing reasons that mean, in some cases, this approach is not entirely feasible. However, if and where this can be achieved, the Commission should consider a recommendation in similar terms to that of the Law Reform Commission of Western Australia.

Question 6.12(1): Should the ADA apply generally "in any area of public life"? Why or why not?

143. At present, the ADA only prohibits discrimination in specified areas of public life, with each area addressed in a separate section relating to the protected attribute. This structure has produced significant duplication and confusion. More importantly, the specified areas of public life are finite, leaving some aspects of public life unprotected. The restrictive nature of the ADA's approach to protected areas has also given rise to considerable contest about the metes and bounds of the definitions of the relevant areas of public life such as goods and services and employment.

144. The Association supports broadening the scope of the ADA to apply to all areas of public life, rather than retaining the current structure and updating the protected areas. The RDA provides an appropriate model to achieve this aim, whereby discrimination is expressly prohibited in various areas of public life[131] without limiting the general prohibition against racial discrimination "in the political, economic, social, cultural or any other field of public life."[132]

145. This broad coverage of areas of public life would be consistent with Australia's international human rights obligations, including the protections for equality and from discrimination found in the International Convention on Economic, Social and Cultural Rights, the Convention on the Rights of the Child (**CRC**), and the International Convention on the Elimination of all forms of Racial Discrimination (**ICERD**), CEDAW, CRPD, UNDRIP, and ICCPR.

7 – Wider Exceptions

Context for religious bodies - Australia's international law obligation

146. The primary source for the right to freedom of religion and belief is provided by article 18 of the ICCPR which provides:[133]

> 1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

[131] *Racial Discrimination Act 1975* (Cth) ss 11-15.
[132] *Racial Discrimination Act 1975* (Cth) s 9(1).
[133] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

147. In the operation of article 18, a distinction has been drawn between having a religious belief and its manifestation, the first being an absolute right.[134] The manifestation of religion or belief includes worship, teaching of those beliefs and observance of religious rituals and is not absolute "as such activities can interfere with the rights of others, or even pose a danger to society".[135]

148. Article 27 of the ICCPR, which has a relatively high degree of crossover with article 18, extends the freedom of religion and belief to minority ethnic, religious and linguistic groups.

149. Article 13 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) complements article 18(4) of the ICCPR by providing a similar protection in relation to freedom of religion protections to education.[136]

150. The primary protections given in article 18 of the ICCPR also apply to children: article 13 CRC[137]. Article 30 of the CRC extends the protections given to minority groups in article 27 of the ICCPR to the children of minority groups.

151. The right to freedom of religion and belief in employment is protected by article 5(d) of the International Labour Organisation Convention concerning Termination of Employment at the Initiative of the Employer where religion cannot be a valid reason for termination.[138]

Religious Schools

152. Article 24 of the ICCPR extends freedom from discrimination on the grounds of religion or belief to children.[139]

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[134] *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd & Ors* [2014] VSCA 75 [190] (Maxwell P) ('*Christian Youth Camps*').

[135] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 1st ed, 2013) 567 [17.15].

[136] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 13.

[137] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 13.

[138] International Labour Organization (ILO), *Termination of Employment Convention*, ILO Convention 158 (23 November 1975) (No. 158) art 5.

[139] See also *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 2; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5;

153. The United Nations Human Rights Committee has commented:

> The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians. [140]

154. It has been held that the State may be obliged to tolerate separate schools if that is necessary to respect the religious and philosophical convictions of parents.[141] This does not go so far as to establish an exception to discrimination for religious schools for acting in accordance with their own faith.

Conflict between rights

155. As discussed in the introduction of this submission, it is a well-established principle of international law that human rights are interrelated, interdependent and indivisible. Where competing human right are in conflict an appropriate balance must be found. The mechanism used for determining the balance is that of proportionality, which is a well-established principle of international law. A State must only interfere with a person's rights if it is proportionate to the legitimate aim pursued.[142]

156. In the context of European human rights law, it has been said that:

> A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process. [143]

157. Article 18(3) of the ICCPR specifically refers to limiting the freedom of religion and belief to protect the "fundamental rights and freedoms of others". The limitation is that which applies to many other human rights and is governed by the principle of proportionality.

ILO, *Convention concerning Discrimination in respect of Employment and Occupation*, ILO Convention 111 (25 June 1958) art 1.

[140] Human Rights Committee, *General Comment No 22: article 18 (Freedom of Thought, Conscience or Religion),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [6].

[141] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 Eur Court HR 711.

[142] *Handyside v the United Kingdom* (European Court of Human Rights, Application No 5493/72 (7 December 1976) [48] – [49].

[143] Harris, O'Boyle and Warwick, *Law of the European Convention on Human Rights* (Oxford University Press, 3rd ed, 2014). Certain 'permissible limitations' have been set on freedom of expression, see, e.g., *Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc A/HRC/23/40 (17 April 2013) [28] – [29].

Towards a principled approach to exceptions to anti-discrimination laws

158. This area of discrimination law remains highly contested as was evidenced by the former federal Government's religious discrimination bills. The Consultation Paper reveals that contestations remain around certain aspects of religious related employment and particularly in the area of education. The approach favoured by the Association is one which identifies the relevant principles and then uses those principles to resolve the contested areas rather than hoping to achieve some reconciliation or middle ground between the various positions.

159. Based in part on international human rights law, the Association proposes that the following principles guide resolution of difficult issues:

a) That freedom from discrimination in all its forms is to be protected by the ADA;

b) That the freedom is only to be subject to reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including the freedom, the importance of the purpose of the limitation, the nature and extent of the limitation the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve;[144]

c) The freedom of religion and belief, including its exercise, should be protected by way of exceptions which fall within subparagraph (b) above;

d) That religion and belief be appropriately defined and delimited taking into account the numerous and divergent religious beliefs of the people of NSW;

e) That recognition be given to the fact that persons who have a protected attribute (sex, transgender, race, marital status, disability, age, HIV/AIDS status etc.) do access the services provided by religious organisations daily and are entitled to do so on a non-discriminatory basis;

f) That religious discrimination ought only be permitted where it directly conforms to the doctrines, tenets or beliefs of that religion and does not include the imprecise notion of the 'susceptibilities' of those of that religion (which is not known to international human rights law);

g) That any such discrimination ought only be permitted where the act would offend the doctrines, tenets or beliefs of the members of the religion in a significant way; and

h) That there be a distinction between those propagating or required to propagate a religion (religious leaders, religious teachers) and those receiving that religion (parishioners, students, clients) with exceptions not permitted for the latter.

[144] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

Question 7.1(a): Should the ADA provide exceptions for the training and appointment of religious orders?

160. Exceptions aside, a religious body (to use a neutral term) may be governed by the anti-discrimination provisions in the ADA on the basis that it is a qualifying body or providing a service in connection with the areas of public life covered by the ADA.

161. The exceptions from the ADA proposed in this question for the "training and appointment of members of religious orders" reflects a simplification and amalgamation of the exceptions currently in subsections 56(a) and (b) of the ADA. Subsections 56 (a) and (b) provide:

> Nothing in this Act affects –
>
> > (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
> >
> > (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order…

162. Under international law, Australia is required to implement into domestic law its obligations under the ICCPR and other applicable Conventions.[145]

163. As discussed above, the ICCPR – to which Australia is a party – recognises, inter alia, the following fundamental rights and freedoms applicable to religious bodies:

a) The freedom to manifest religion or belief in worship, observance, practice and teaching (article, 18(1), ICCPR).

b) The freedom of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions (article, 18(4), ICCPR).

164. The Association recognises that the "training and appointment of members of religious orders" is intimately connected with the freedom to manifest religion or belief in worship, observance, practice and teaching. Although this is not an absolute right,[146] the balancing of competing human rights clearly supports an appropriately worded exception for the "training and appointment of members of religious orders".

165. On this basis, the Association supports inclusion in the ADA of an appropriately worded exception relating to the training and appointment of members of a religious order.

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[145] *International Convention on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976*)* art 2(2).

[146] *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd & Ors* [2014] VSCA 75 [190] (Maxwell P); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 1st ed, 2013) 567 [17.15].

Broadening wording of exception to include other faiths

166. The exception proposed in question 7.1(a) is phrased more broadly than the existing exceptions in subsections 56(a) and (b), which appear to have been drafted primarily by reference to the Christian faith. There is no definition of "members of religious orders", "religious order" (or "religious body") in the ADA.

167. In most other jurisdictions, the way in which the primary exception from the anti-discrimination provisions for the training and appointment of members of religious orders is described is either identical or very similar to that in subsections 56(a) and (b) (see Victoria,[147] South Australia,[148] Queensland,[149] Western Australia,[150], ACT,[151] Northern Territory,[152] Tasmania).[153]

168. Notwithstanding the relatively homogenous nature of the wording between states and territories, in the Commission's 1999 Report, it was recommended that section 56 of the ADA be amended to use terminology "appropriate to the religious personnel of other faiths".[154]

169. In the Association's view, the more neutral language used in question 7.1(1)(a) – being an exception for "training and appointment of members of religious orders" – better reflects the diversity of descriptions of religious leaders across religions.[155] The Association supports an amendment of the ADA to incorporate terminology appropriate to the religious personnel of other faiths.

Application of exemption to sexual harassment and vilification

170. As discussed in answer to question 7.3 below, in the Association's view the exemptions in section 56 of the ADA should not extend to preclude operation of the prohibitions against sexual harassment and vilification.

Application of exemption to sex, marital or domestic status, carer responsibilities and homosexuality

171. The next issue is whether there should be exceptions for the "training and appointment of members of religious orders" from the prohibitions against discrimination on the basis of sex (Part 3, ADA), marital or domestic status (Part 4 ADA), responsibilities as a carer (Part 4B, ADA) and homosexuality (Part 4C, ADA).

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[147] *Equal Opportunity Act 2010* (Vic) ss 82(1)(a)-(b).
[148] *Equal Opportunity Act 1984* (SA) ss 50(1)(a)-(b). See also s 85ZM.
[149] *Anti-Discrimination Act 1991* (Qld) s 109.
[150] *Equal Opportunity Act 1984* (WA) ss 72(a)-(b).
[151] *Discrimination Act 1991* (ACT) ss 32(1)(a)-(b).
[152] *Equal Opportunity Act 1992* (NT) s 51.
[153] *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'priest'), s 52. The introductory wording to s 52 provides "a person may discriminate against another person **on the ground of religious belief or affiliation or religious activit***y* in relation to…" (**emphasis** added)
[154] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW) (*Report No. 92, November 1999) [6.70].
[155] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Consultation Paper, May 2025) [7.17], [7.18].

172. In Queensland the exception for religious bodies in this context is to the whole of the relevant Act.[156] The situation is similar in Western Australia,[157] Tasmania[158] and the ACT.[159]

173. However, some jurisdictions include exceptions to their anti-discrimination regimes for sexual harassment and vilification (to the extent that those Acts cover this). For example, in Victoria the prohibitions against sexual harassment are outside the scope of the exceptions for religious bodies,[160] and in the ACT the prohibitions against sexual harassment and vilification are outside the scope of the exceptions for religious bodies.[161]

174. Similarly, in South Australia the prohibitions against sexual harassment are outside the scope of the exceptions for religious bodies.[162]

175. South Australia also has customised exemptions specifically covering this area. Assuming that in this context the religious order is a "qualifying body",[163] the South Australian Act provides an express exemption for training and appointment of members of a religious order from the prohibitions against discrimination on the basis of sex, sexual orientation and gender identity.[164]

176. Assuming the religious order is properly characterised as providing "services" in this context,[165] there is an express exemption for discrimination on the ground of marital or domestic partner status in relation to the ordination, training or appointment of priests, ministers of religion or members of a religious order.[166]

177. The human rights that need to be balanced in this context include the rights of all persons to be equal before the law (article 26, ICCPR). Article 26 of the ICCPR goes on to say:

> In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, **sex,** language, **religion**, political or other opinion, national or social origin, property, birth or **other status**.[167] (**emphasis** added)

178. Sex is expressly included as a protected attribute. The phrase "other status" encompasses homosexuality and domestic status, and is broad enough in its terms to extend to responsibilities as a carer.

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[156] *Anti-Discrimination Act 1991* (Qld) s 109.
[157] *Equal Opportunity Act 1984* (WA) s 72.
[158] *Anti-Discrimination Act 1998* (Tas) ss 17, 19, 52.
[159] *Discrimination Act 1991* (ACT) s 51.
[160] *Equal Opportunity Act 2010 (*Vic) s 82, pt 6.
[161] *Equal Opportunity Act 2010 (*Vic), s 32 and pts 5, 7.
[162] *Equal Opportunity Act 1984* (SA) ss 50, 87.
[163] *Equal Opportunity Act 1984* (SA) s 36.
[164] *Equal Opportunity Act 1984* (SA) s 50.
[165] *Equal Opportunity Act 1984* (SA) s 85ZG.
[166] *Equal Opportunity Act 1984* (SA) s 85ZM. The reference to "the ordination or appointment of priests" etc. indicates that this is intended to be characterised as a service to which s 85ZG applies.
[167] *International Convention on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976*)* art 26.

179. These rights and freedoms are to be balanced against everyone's "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching" (article 18(1), ICCPR).

180. In the Association's view, the "training and appointment of members of religious orders" is intimately connected with the right to manifest religion or belief in worship, observance, practice and teaching. Many religions have doctrines that directly concern the matters under consideration. For example, in Catholic doctrine only men are permitted to be ordained as priests, and priests are not permitted to marry and must remain celibate. Furthermore, a Catholic priest dedicates his life to the Church so that time consuming responsibilities as a carer for persons such as a family member are generally inconsistent with his role.

181. In the Association's view, the balance of competing human rights supports inclusion of an exception for the "training and appointment of members of religious orders" in relation to the prohibitions against discrimination on the basis of the attributes of sex, marital or domestic status, responsibilities as a carer and homosexuality.

Application of exemption to disability and age

182. The next issue is whether there should be exceptions for the "training and appointment of members of religious orders" from the prohibitions against discrimination on the basis of disability (Part 4A, ADA) or age (Part 4G, ADA).

183. As discussed above, religious bodies in South Australia are not exempted from compliance with prohibitions against discrimination on the grounds of disability or age (or race) unless they fall within the general exceptions provided in the legislation for those attributes.

184. If the same approach were taken in the ADA, religious bodies would still be able to invoke the general exceptions available in relation to each attribute. For example, the prohibitions against discrimination by qualifying bodies[168] on the grounds of disability[169] and age[170] include general exceptions or carve outs from the definition of discrimination in those areas to exclude from the scope of the prohibition, people who would be unable to carry out the inherent requirements of the occupation.

185. In the context of training and appointment of members of religious orders, if it were permissible to exclude an applicant who would be unable to carry out the inherent requirements of the occupation due to age or disability, this ought to alleviate difficulties that may otherwise arise. For example, the existing exception could be applied to exclude an applicant for priesthood who is not able, by virtue of age or disability, to give sermons, conduct religious rights such as baptisms, marriages and funerals and generally minister to his congregation.

[168] Being an authority or body which is empowered to confer, renew or extend an authorisation or a qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation: *Anti-Discrimination Act 1977* (NSW) s 49J.
[169] *Anti-Discrimination Act 1977* (NSW) s 49J(2).
[170] *Anti-Discrimination Act 1977* (NSW) s 49ZYY.

186. The same competing rights and freedoms as those discussed above are relevant in this context. The phrase "other status" in article 26 of the ICCPR encompasses a person's age and disability.

187. Any exceptions from the ADA for religious orders ought to be consistent with article 18(3) of the ICCPR and the Siracusa Principles. Relevantly, they must:

a) be necessary to protect fundamental rights and freedoms;

b) respond to a pressing public or social need;

c) pursue a legitimate aim and be proportionate; and

d) be an application of the least restrictive means required for achievement of a legitimate purpose.

188. In the Association's view, in balancing competing human rights it is necessary and proportionate to exclude disability and age related anti-discrimination provisions from the scope of the exception in section 56 relating to the "training and appointment of members of religious orders". However, as discussed above, it should be permissible to exclude an applicant who would be unable to carry out the inherent requirements of the occupation due to age or disability.

Application of exemption to race

189. The question whether there should be an exception for the "training and appointment of members of religious orders" from the prohibitions against discrimination on the basis of race (Part 2, ADA) raises different considerations, primarily due to the definition of "race" in the ADA and how it has been interpreted.

190. As discussed above, the ADA defines "race" to "include colour, nationality, descent and ethnic, ethno-religious or national origin" (section 4). In the case law it has frequently been accepted that Jewish people fall within the description of ethnic origin or ethno-religious origin.[171] Sikh people have also been found to constitute an ethnic group.[172] Furthermore, there is conflicting case law as to whether Muslim people, and Middle Eastern Muslim people, fall within the scope of the term ethnic or ethno-religious origin.[173]

191. Consequently, if the exception to the attribute of race in section 56 were removed (without amending the definition), a religious order may be obligated to train and appoint members of a different religion from their own.

[171] See, e.g., *Miller v Wertheim* [2002] FCAFC 156, [14]; *Jones v Scully* [2002] 120 FCR 243, 272, [113], *King-Ansell v Police* [1979] 2 NZLR 531.
[172] *Mandla v Dowell Lee* [1983] 2 AC 548.
[173] *Haider v Combined District Radio Cabs Pty Ltd t/as Central Coast Taxis* [2008] NSWADT 123, [50]; *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131, [18]; see also the review of the case law in *Ekermawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29.

192. In addition, in contrast to the provisions in the ADA relating to discrimination on the basis of disability[174] and age[175], in relation to racial discrimination, there is no general exception or carve out for people unable to carry out the inherent requirements of the occupation.

193. As discussed above in the context of age and disability, religious bodies in South Australia are not exempted from compliance with prohibitions against discrimination on the grounds of race, unless they fall within the specific exceptions for this attribute.[176] It is not immediately apparent that any of these specific exceptions would apply in this factual context. However, "race" is more narrowly defined in the South Australian legislation to mean "the nationality (current, past or proposed), country of origin, colour or ancestry of the person" (section 5 of the South Australian legislation). Notably, there is no reference to ethnic or ethno-religious origins.

194. In this context the freedom to manifest religion or belief in worship, observance, practice and teaching (article 18(1), ICCPR) needs to be balanced against Australia's obligations under international law to eliminate racial discrimination.

195. The ICCPR contains provisions seeking the elimination of racial discrimination in all its forms.[177] In particular, article 26 provides that all persons are entitled to equal protection of the law which will prohibit discrimination on grounds including race, national or social origin, birth and other status.

196. In addition, the ICERD seeks to eliminate all forms of racial discrimination. For example, article 2(1) of the ICERD provides (inter alia) that States party "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms". To this end, it goes on to say (article 2(1)(c)):

> Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists

197. In response, the Commonwealth enacted the RDA. The RDA makes unlawful discrimination based on race, colour, descent or national or ethnic origin in particular areas of public life including in the provision of services (section 13).[178] There is no exemption in the RDA for religious organisations.

198. In the Association's view, balancing competing human rights, it is necessary and proportionate to narrow the scope of the exception in section 56 for the "training and appointment of members of religious orders" so as only to permit religious discrimination. By way of illustration, an Australian Christian could be excluded from training to be an Imam but an American Muslim could not be.

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[174] *Anti-Discrimination Act 1977 (*NSW) s 49J(2).

[175] *Anti-Discrimination Act 1977* (NSW) s 49ZYY.

[176] See generally *Anti-Discrimination Act 1977* (NSW) s 50 (applies only to Part 3), pt 4 (prohibitions against discrimination on ground of race), s 58 (discrimination by qualifying bodies), s 65.

[177] See, e.g., *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) arts 2(1), 4 and 26.

[178] See also *Racial Discrimination Act 1975* (Cth) ss 10–12, 14–15, 18C. The *RDA* expressly provides that "it is not intended… to exclude or limit the operation of a law of a State or Territory that furthers the objects of the [ICERD]": s 6A(1). However, this does not apply to laws that do not further the objects of the ICERD: s 10(1).

Question 7.1(1)(b): Should the ADA provide exceptions for "the appointment of any other person in any capacity by a body established to propagate religion"?

Question 7.1(2): If so, what should these exceptions cover and when should they apply?

199. Section 56(c) of the ADA provides:

> Nothing in this Act affects: …
>
> > (c) the appointment of any other person in any capacity by a body established to propagate religion…

200. The primary difficulty with section 56(c) is its breadth. This wide-reaching exception cannot be justified by the right to manifest religion or belief in worship, observance, practice and teaching. It extends to any appointment by a religious body to any position regardless of whether that appointment has any relationship with religious observance or practice.

201. For example, in the context of a religious education institution, section 56(c) may permit discrimination on religious grounds to exclude from employment the cleaner, the tuck-shop operator, the mathematics teacher, or the sports coach on the ground of their religion when their employment has nothing to do with religion or only limited association.

202. Similarly, it would permit discrimination on religious grounds to exclude LGBTQIA+ staff, regardless of whether their employment is related to the practice or propagation of religion.

203. In principle, while it is legitimate to allow such discrimination in roles where it is relevant to the propagation and observance of religion, such as in the position of principal or school chaplain, discrimination should not be permitted in relation to appointments in any capacity.

204. Justice Michael Kirby (as he then was) expressed a similar concern in the context of the 1999 enquiry relating to the ADA where he submitted as follows:[179]

> It is obviously wholly acceptable to most Australians that churches and religious communities should be entitled to discriminate on religious grounds where religion is relevant, e.g. in the choice of their personnel, the establishment of colleges and the provision of instruction to their members. But it is equally obvious that discrimination on religious grounds should not be tolerated where the conduct impugned is irrelevant to the practice or propagation of a religion ... it scarcely seems justifiable to confine staff in the college kitchen to members of the religion, unless they are obliged to observe religious rituals in the preparation of food.

205. The Association respectfully agrees with that submission.

206. In the context of the appointment by a religious body of any person in any capacity, the competing rights include:

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[179] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW) (*Report No 92, November 1999) [6.68].

a) The freedom to manifest religion or belief in worship, observance, practice and teaching (article 18(1), ICCPR).

b) The freedom of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions (article 18(4), ICCPR).

c) The right to freedom of religion and belief in employment which is protected by article 5(d) of the International Labour Organisation Convention concerning Termination of Employment at the Initiative of the Employer where religion cannot be a valid reason for termination.

207. Section 56(c) in its current form, and any amendment strictly reflecting the proposed wording in this question, do not reflect a necessary and proportionate balance of these competing rights and freedoms.

208. As to what wording should be employed to reflect an appropriate balance between competing human rights, it is instructive to consider the way in which other Australian jurisdictions have dealt with this issue.

Other jurisdictions – section 56(c) exception confined to religious observance or practice

209. The anti-discrimination regimes in Victoria, [180] Queensland[181] and the Northern Territory[182] confine their exceptions that are analogous to section 56(c) of the ADA to "the selection or appointment of people **to perform functions in relation to, or otherwise participate in, any religious observance or practice**" (**emphasis** added). In the ACT[183] and Western Australia[184] the equivalent provisions are very similar. In Tasmania, the provision is more confined. It refers to "the selection or appointment of a person to participate in any religious observance or practice".[185]

210. For consistency it would be preferable for the wording of section 56(c) to be amended to reflect the wording used in most Australian states, namely to provide an exception for "the selection or appointment of people *to perform functions in relation to, or otherwise participate in, any religious observance or practice*". This wording reflects a necessary and appropriate balancing of human rights when considered together with the additional provisions proposed below.

Scope of term "body established to propagate religion"

211. The proposed exception in this question refers to the appointment of any other person in any capacity "by a body established to propagate religion".

212. If the provision is amended to reflect the wording used in most other Australian jurisdictions, the term "by a body established to propagate religion", or an equivalent term such as "religious body", could readily

[180] *Equal Opportunity Act 2010* (Vic) s 82(1)(c). See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [6.66].
[181] *Anti-Discrimination Act 1991* (Qld) s 109(c).
[182] *Anti-Discrimination Act 1992* (NT) s 51(c).
[183] *Anti-Discrimination Act 1991* (ACT) s 32(1)(c). It refers to "the selection or appointment of people to exercise functions for, or in relation to, any religious observance or practice by the body".
[184] *Equal Opportunity Act 1984* (WA) s 72(c). It refers to "the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in any religious observance or practice."
[185] *Anti-Discrimination Act 1998* (Tas) s 52(c).

be incorporated by amending section 56(c) to refer to "the selection or appointment of people *by a body established to propagate religion* to perform functions in relation to, or otherwise participate in, any religious observance or practice".

213. There is no proposed definition of "body established to propagate religion", and there is no equivalent definition in the ADA in its current form. For clarity the term *"body established to propagate religion"* or *"religious body"* (if that term is ultimately used) ought to be defined in the legislation.

214. Care should be taken to ensure that the definition is not too broad. The Association has expressed concern about the breadth of proposed definitions of "religious body" in the context of proposed religious discrimination legislation in the past. For example, difficulties may arise if the relevant term extends to organisations conducting commercial activities. In addition, schools and other educational entities which have been established by a religious order to teach children should be excluded from the definitions of 'religious body' or 'body established to propagate religion' as institutions primarily established for the provision of education should be considered separately under the relevant exceptions in relation to education.

Scope of the Exception – sexual harassment and vilification

215. As discussed in answer to question 7.3 below, in the Association's view the prohibitions against sexual harassment or vilification ought not be subject to a section 56 exemption as there appears to be no principled reason for the exemption.

Scope of the Exception – attributes

216. The ADA prohibits discrimination against workers in a number of areas of public life.

217. In relation to the attributes of age and disability, in the Association's view it is inappropriate for a religious body to be exempted from the general prohibitions against discrimination in the ADA (as discussed in answer to question 7.1(1)(a)).

218. Although the definition of "race" may give rise to difficulties in some circumstances, these can be resolved by appropriate amendment to the exemption (as discussed in answer to question 7.1(1)(a)). In the Association's view it is inappropriate for a religious body to be exempted from the general prohibitions against discrimination on the basis of race in the ADA.

219. In relation to sex, homosexuality, marital or domestic status and responsibilities as a carer, special considerations arise in the context of training and appointment of members of a religious order that do not apply in other contexts (as discussed in answer to question 7.1(1)(a)).

220. Different considerations arise in the context of staff members with protected attributes who are not required to perform functions in relation to, or otherwise participate in, any religious observance or practice. In general terms, in the Association's view there is no principled basis for discrimination against staff or prospective staff by a religious institution on the basis of these attributes unless the attribute itself makes the person inherently unsuitable for the position.

Other jurisdictions – additional provisions relating to staff

221. Other jurisdictions have included additional provisions in their anti-discrimination regimes on the question of the extent to which religious organisations should be excepted from the anti-discrimination provisions in relation to their appointment and treatment of staff.

222. For example, in Victoria, where "religious belief or activity" is a protected attribute,[186] there are specific provisions governing employment by a religious body (section 82A), provision of government funded services by a religious body (section 82B), the establishment or administration of a religious educational institution (section 83) and employment of staff by a religious educational institution (section 83A).

223. In relation to employment of staff by a religious educational institution, section 83A of the Victorian Act provides as follows in connection with the protected attribute of religious belief or activity:

> (1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a relevant educational entity in the course of establishing, directing, controlling or administering an educational institution if—
>
> > (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is **an inherent requirement of the position**; and
> >
> > (b) the other person cannot meet that inherent requirement **because of their religious belief or activity**; and
> >
> > (c) the discrimination is **reasonable and proportionate** in the circumstances.
>
> (2) The nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).
>
> (3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).
>
> (**emphasis** added)

224. There is an analogous provision for religious bodies that are not religious educational institutions in section 82A of the Victorian Act.

225. Tasmania also prohibits discrimination on the basis of "religious belief or affiliation" (section 16(o), Tasmanian Act) which is defined in a similar manner to the Victorian definition. In the context of religious educational institutions, the Tasmanian legislation permits a person to discriminate on the grounds of religious belief or affiliation in relation to employment "if the discrimination is **in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs,**

[186] *Equal Opportunity Act 2010* (Vic) s 6(n). See also s 4: "Religious belief or activity" is defined to mean holding or not holding a lawful religious belief or view, and engaging in, not engaging in or refusing to engage in a lawful religious activity.

teachings, principles or practices" (**emphasis** added).[187] In other contexts the legislation permits a person to discriminate on the grounds of religious belief or affiliation "in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a **genuine occupational qualification or requirement**" (**emphasis** added).[188]

226. Western Australia prohibits discrimination on the basis of "religious or political conviction" (sections53-66, *Equal Opportunity Act 1984* (WA) (the **WA Act**)). Their legislation also includes additional provisions relevant to religious bodies,[189] which do not go as far as Victoria in the achievement of balance. For example, in relation to employment of staff of a religious education institution, in section 73(1) of the WA Act the touchstone is whether the discrimination is "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed."

227. In the ACT, there is an exception from a number of prohibitions against discrimination on the ground of religious conviction in relation to employment or work in a religious educational institution or hospital if the duties of the employment or work would involve "**the participation by the employee or worker in the teaching or practice of the relevant religion**" (section 44, ACT Act).

228. In the Association's view, balancing the freedoms and rights discussed above, it is necessary and proportionate to include in the ADA additional provisions specifically regulating discrimination against employees by religious organisations.

229. In principle, the Association is of the view that in relation to selection, appointment and promotion, religious educational institutions should be able to give preference to staff based on the staff member's religious belief or activity, where this is justified because:

a) participation of the person in the teaching, observance, or practice of the religion is a genuine and inherent requirement of the role (for example, for a principal or chaplain); and

b) the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and

c) the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.

230. In principle, the Association is of the view that the nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role.

231. The Victorian provisions generally reflect these principles and reflect a necessary and proportionate balance of competing human rights. In the Association's view, in relation to selection, appointment and promotion of staff, a religious educational institution ought to be required to comply with all the

[187] *Anti-Discrimination Act 1998* (Tas) s 51(2).
[188] *Anti-Discrimination Act 1998* (Tas) s 51(1).
[189] See also *Equal Opportunity Act 1984* (WA) ss 73(1) (employment of staff of religious education institutions), 73(2) (appointment of contract workers for religious education institutions), 73(3) (provision of education and training by religious education institutions).

prohibitions in the ADA unless the particular attribute makes the person inherently unsuitable to selection, appointment or promotion (consistent with the Victorian legislation).

Question 7.2: 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?

232. This question raises the appropriateness of the exception in section 56(d) which provides that nothing in this Act affects –

> (d) any other act or practice of a body established to propagate religion that conforms to the doctrine of that religion or is necessary to avoid injury to the religious susceptibilities of the adherent of that religion.

233. Section 56(d) in its present form is unduly and unnecessarily broad. It may allow, for example, a religious educational institution to discriminate against students based on attributes such as sexual orientation, gender identity or relationship status on the basis that this is "necessary to avoid injury to the religious susceptibilities of the adherent of that religion".

234. At a Commonwealth level there are provisions analogous to section 56(d) in the SDA[190] and the *Fair Work Act* 2009 (Cth) (**FWA**).[191] This is also the case in Victoria,[192] South Australia,[193] Queensland,[194] Western Australia,[195] and Tasmania.[196] In the Northern Territory there is no directly analogous provision.[197] The ACT has a similarly worded provision, but it excludes from its operation the enrolment and treatment of students, and employment of staff, at an educational institution and the employment of a person at an educational institution.[198] These topics are dealt with in customised provisions that are not analogous to section 56.[199]

235. For the reasons discussed below, in principle, the Association supports inclusion in the ADA of an appropriately worded exception for other acts or practices of a religious body, provided additional provisions are included in the ADA governing its application by religious educational authorities which reflect an appropriate balance of competing human rights.

<u>*Broad or narrow exception*</u>

236. There are numerous issues with the wording of section 56(d) which ought to be addressed.

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[190] *Sex Discrimination Act 1984* (Cth) s 38(3).
[191] *Fair Work Act 2009* (Cth) s 351(2).
[192] *Equal Opportunity Act 2010* (Vic) s 82.
[193] *Equal Opportunity Act 1984* (SA) s 50(1)(c).
[194] *Anti-Discrimination Act 1991* (Qld) s 109(1)(d). But see *Anti-Discrimination Act 1991* (Qld) ss 109(1)(d), 109(2): the exemption does not apply in the worked-related area, in the education area or in relation to accommodation for religious purposes.
[195] *Equal Opportunity Act 1984* (WA) ss 72(d), 73(3). See also *Equal Opportunity Act 1984* (WA) s 74(3).
[196] *Anti-Discrimination Act 1998* (Tas) s 52(d).
[197] But see *Anti-Discrimination Act 1992 (*NT) s 51.
[198] *Discrimination Act 1991* (ACT) s 32(2), dictionary (definition of 'educational institution').
[199] See, e.g., *Discrimination Act 1991* (ACT) ss 18, 46.

237. In general terms there are two broad structures for legislative exceptions to anti-discrimination regimes which are almost invariably applied. We have defined them below to be the "narrow exception" and the "broad exception".

238. Section 56(d) of the ADA is an example of the broad exception.

239. A question arises as to whether, balancing competing human rights, it is more appropriate for section 56(d) to be rephrased to reflect the usual modified narrow exception similar to that commonly found in anti-discrimination legislation in Australia.

"Broad exception"

240. The exclusion from the anti-discrimination provisions in sections 56 of the ADA,82(2) and 83(2) of the Victorian Act, 50(c) of the *Equal Opportunity Act 1984* (SA) (the **SA Act**), 72(d) of the WA Act, 35 of the *Age Discrimination Act* 2004 (Cth) and 37 of the SDA,[200] are all examples of the broad exception.

241. These provisions provide that the relevant part of the ADA does not affect an act or practice of a body [established for religious purposes[201] or established to propagate religion[202]] that (broad exception):

a) conforms to the [doctrines,[203] / doctrines, tenets or beliefs,[204] / doctrines, tenets, or teachings[205]] of that religion; or

b) is necessary to avoid injury to the religious [susceptibilities[206] / sensitivities[207]] of adherents of that religion.

242. These exceptions are broad as they apply when either subparagraph (a) or (b) above is satisfied.

"Narrow exception"

243. A narrow exception to anti-discrimination regimes is applied in sections 109(1)(d) of the Queensland Act,[208] 52(d) of the Tasmanian Act,[209] 32(1)(d) and (g) of the ACT Act,[210] 38 of the SDA, 351 of the

[200] Cf. *Sex Discrimination Act 1984* (Cth) s 38.
[201] *Sex Discrimination Act 1984* (Cth) s 37(d); *Age Discrimination Act 2004* (Cth) s 35.
[202] *Anti-Discrimination Act 1977* (NSW) s 56(d).
[203] *Anti-Discrimination Act 1977* (NSW) s 56(d) only refers to "doctrines", and not to "tenets, beliefs or teachings".
[204] *Sex Discrimination Act 1984* (Cth) s 37 and *Age Discrimination Act 2004* (Cth) s 35 refer to "doctrines, tenets or beliefs".
[205] The "phrase doctrines, tenets, beliefs or teachings" is used in the *Fair Work Act 2009* (Cth) s 351(1) and the *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination').
[206] *Sex Discrimination Act 1984* (Cth) s 37; *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination'); *Anti-Discrimination Act 1977* (NSW) s 56.
[207] *Age Discrimination Act 2004* (Cth) s 35; *Equal Opportunity Act 2010* (Vic) ss 82(2), 83(2).
[208] But see *Anti-Discrimination Act 1991* (Qld) ss 109(1)(d), 1092(d): the exemption does not apply in the worked-related area, in the education area or in relation to accommodation for religious purposes. Also note that there is no reference to good faith in this provision.
[209] Note that there is no reference to good faith in this provision.
[210] Note, the exemptions do not apply to employment of a person at an "educational institution" or to admission, treatment or continued enrolment of a student at an educational institution. "Educational institution" is defined

FWA, and the definition of discrimination in 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

244. In general, these provisions limit the exception to the anti-discrimination provisions in those Acts to an action that is:

a) taken by an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed;

b) in good faith;[211] and

c) in order to avoid injury to the religious [susceptibilities or sensitivities] of adherents of that religion or that creed.

245. In the Association's view if a provision in a form analogous to section 56(d) is to be retained, it would be preferable to replace it with the narrow exception, which better reflects an appropriate balance of competing human rights.

246. However, the Association sees no principled reason for adoption of the third element to the narrow exception above – religious susceptibility or sensitivity. This is an area which is necessarily beyond the 'doctrines, tenets, beliefs or teachings of a particular religion or creed' and is imprecise. It embraces a category of opinion which is not based on religion and is not a belief. One may readily acknowledge that in many cases people who are members or adherents of a religion also have 'socially conservative' opinions. This is the category of opinion which may amount to religious susceptibility or sensitivity but for which there is no principled view, from a human rights law perspective, to permit discrimination which is prohibited by human rights law. That is, the protection of religious 'susceptibility or sensitivity' is a disproportionate limit upon the right of those who are members of a protected attribute to be free from discrimination. The religious beliefs of such persons are adequately protected by the exception which values and respects the doctrines, tenets, beliefs or teachings of a particular religion or creed.

247. Accordingly, the Association recommends the adoption of a modified narrow exception (**modified narrow exception**).

Meaning of "conforms to doctrines"

248. The precise meaning of the phrase "conforms to the doctrine of that religion" in section 56(d) is yet to be determined. Amendments to this provision ought to be made to clarify its meaning.

249. The leading case in NSW is *OV & OW v Members of the Board of the Wesley Mission Council* 79 NSWLR 606; [2010] NSWCA 155 (***OV & OW v Wesley Mission***). In that case a claim was made by a same sex couple that the Wesley Mission had unlawfully discriminated against them by refusing to permit them to foster a child. The couple relied on the provisions in the ADA prohibiting discrimination against

to mean a school, college or university: *Discrimination Act 1991* (ACT) dictionary (definition of 'educational institution'). Note also that there is no reference to good faith in this provision.

[211] Not all provisions include this requirement.

same sex couples and homosexuality. The Wesley Mission relied on the broad exception in section 56(d) arguing that fostering a child to a same sex couple did not conform to the doctrines of its religion.

250. Ultimately the matter was referred back to the Equal Opportunity Division for further consideration. However, in the course of the Court of Appeal proceeding a question was raised,[212] but not decided, whether for an act to "conform to" the doctrines of a religion it must be an act involved in the propagation of the religion. Basten JA and Handley AJA said that there might be a question, not relevant in that case, as to whether section 56(d) applies to conduct undertaken by a religious body in managing an investment property which includes residential lettings (at [62]).[213]

251. In *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd & Ors* [2014] VSCA 75 (***Christian Youth Camps***) this issue was more extensively considered in the context of section 75(2) of the *Equal Opportunity Act* 1995 (Vic) (now repealed) which was analogous to section 56(d). It provided: "Nothing in Part 3 applies to anything done by a body established for religious purposes that— (a) conforms with the doctrines of the religion…".

252. In that case, Maxwell P (with whom Neave JA substantially agreed) stated that "[t]he phrase 'anything done by a body established for religious purposes' must be taken … to mean any act or omission by the body in the course of its pursuit of the religious purposes for which it was established" (at [263]). Applying this principle, Maxwell P found that the activity of the Christian Brethren in conducting a secular accommodation business did not have an intrinsic religious character, and the conduct in refusing access to camping accommodation by a same sex youth group was outside the scope of section 75(2) (see at [268]-[269]).

253. These cases highlight the necessity for the meaning of section 56(d) to be clearly articulated and free from ambiguity. *OV & OW v Wesley Mission* leaves open the possibility of section 56(d) being interpreted so that the phrase "conforms to" the doctrines of a religion could include an act not in the course of its pursuit of the religious purposes for which the religious body was established. For example, it may allow a religious body to refuse to lease a residential property to people in a same sex domestic relationship on the basis that this conforms to a doctrine of the religion.

254. An exception that operates in this manner is not necessary or proportionate and does not reflect an appropriate balance of competing human rights.

255. The Association submits that section 56(d) ought to be defined to clarify that the meaning of the phrase "any other act or practice of a body established to propagate religion that conforms to the doctrine of that religion" means any act or omission by the religious body in the course of its pursuit of the religious purposes for which it was established.

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[212] *OV & OW v Members of the Board of the Wesley Mission Council* 79 NSWLR 606; [2010] NSWCA 155, [14], [16] (Allsop P), [61] – [62] (Basten JA and Handley AJA).

[213] Cf. *OV & OW v Members of the Board of the Wesley Mission Council* 79 NSWLR 606; [2010] NSWCA 155, (Allsop P said that he did "not immediately accept that proposition" and that he wished to point out that "there appears to be no textual foundation for the argument and it would appear to produce a curious construction of the first limb of s 56(d)" at [14]).

Meaning of "religious body"

256. Question 7.2 asks whether the ADA should provide an exception for other acts or practices of "religious bodies". There is no definition of "religious body" or any related term in the ADA. In the Association's view an appropriately worded definition of "religious body" (or whichever term is ultimately chosen) ought to be included in the amended ADA.

257. In Victoria, "religious body" is defined as follows:[214]

> For the purposes of this Part, "religious body" means –
>
> (a) a body established for a religious purpose; or
>
> (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

258. However, in the Association's view, it is not an appropriate balance of competing human rights to exempt religious bodies from the anti-discrimination provisions in the ADA in circumstances where they are not engaging in activities directly related to religious observance or practice.

259. Consequently, in principle, the Association does not support the inclusion of a definition of "religious body" that extends the protection to discriminate on religious grounds to organisations which have religious or charitable purposes but which are not strictly engaged in conducting religious practices (such as services, weddings, funerals, baptisms etc.). For example, clothes and second-hand goods charities (such as those run by St Vincent de Paul), health bodies, advocacy organisations, youth support organisations and aged care services (such as meals on wheels) could be included in a broad definition of the term "religious body".

Application of exemption to sexual harassment and vilification

260. As discussed in answer to question 7.3 below, in the Association's view the exemptions in section 56 of the ADA should not extend to preclude operation of the prohibitions against sexual harassment or vilification.

Application of exemption to religious educational institutions

261. As stated above, in principle, the Association supports inclusion in the ADA of an appropriately worded exception for other acts or practices of a religious body, provided additional provisions are included in the ADA governing its application by religious educational authorities which reflect an appropriate balance of competing human rights.

262. The exception the subject of question 7.2 is very broad. Even with the changes recommended above it may allow, for example, a religious educational institution to discriminate against students based on attributes such as sexual orientation, gender identity or relationship status on the basis that this is "necessary

[214] *Equal Opportunity Act 2010* (Vic) s 81.

to avoid injury to the religious susceptibilities of the adherent of that religion". It may also allow a religious educational institution to discriminate against students based on their religious beliefs or activities.

263. Although there are specific provisions in the ADA prohibiting discrimination by an "educational authority" in the following circumstances, they do not apply to a "private educational authority", which is defined to include a religious educational institution (section 4):

a) discrimination on the ground of race (section 17)

b) discrimination on the ground of sex (section 31A)

c) discrimination on transgender grounds (section 38K)

d) discrimination on the ground of disability (section 49L)

e) discrimination on the ground of marital or domestic status (section 46A)

f) discrimination on the ground of homosexuality (section 49ZO)

g) discrimination on the ground of age (section 49ZYL).

264. In the Association's view there is no reason why the provisions relating to race, age and disability ought not apply equally to religious educational institutions. The other attributes are discussed below.

Other jurisdictions – additional provisions protecting students at religious institutions

265. A number of Australian jurisdictions have included additional provisions in their anti-discrimination regimes which relate specifically to students at religious educational institutions.

266. The most comprehensive provisions providing additional protection to students at religious institutions are in South Australia. In addition to a provision analogous to section 56(d) of the ADA,[215] South Australia has provisions protecting students and prospective students from discrimination by educational authorities (including religious educational authorities) on the grounds of **sex, sexual orientation, gender identity and intersex status**,[216] and also on the basis of **marital or domestic partnership status, identity of spouse or domestic partner, pregnancy, caring responsibilities, religious appearance or dress or being, or having been, subjected to domestic abuse**.[217]

267. In relation to prospective students, section 37(1) of the SA Act provides that it is unlawful for an educational body to discriminate against a person on grounds of **sex, sexual orientation, gender identity or intersex status** by refusing or failing to accept an application for admission as a student, or in the terms on which it offers to admit the person as a student.[218]

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[215] *Equal Opportunity Act 1984* (SA) s 50(1)(c).
[216] *Equal Opportunity Act 1984* (SA) s 37.
[217] *Equal Opportunity Act 1984* (SA) s 85ZE.
[218] But see *Equal Opportunity Act 1984* (SA) s 37(3): there is an exception for discrimination on the ground of sex in respect of same sex schools, colleges, universities and boarding facilities.

268. In relation to existing students, section 37(2) provides that it is unlawful for an educational authority to discriminate on these grounds:

a) in the terms or conditions on which the religious institution provides the student with training or education; or

b) by denying or limiting access to a benefit provided by the authority; or

c) by expelling the student; or

d) by subjecting the student to other detriment.

269. The provision does not apply to "discrimination on the ground of sex" in respect of same sex schools and the provision of boarding facilities for students of one sex (section 37(3)).

270. In relation to discrimination by an educational authority on grounds of **marital or domestic partnership status, identity of spouse or domestic partner, pregnancy, caring responsibilities, religious appearance or dress or being, or having been, subjected to domestic abuse**, section 85ZE(1) and (2) of the SA Act reflect sections 37(1) and (2) above. It does not include an exception for same sex schooling or accommodation. But, it includes exceptions where the student or potential student appears or dresses in a manner required by, or symbolic of, a different religion;[219] or is a pregnant woman and she would not be able to adequately perform an activity without endangering herself or the unborn child;[220] or if, by reason of the person's appearance or dress, in general terms the person would not be able to perform an activity without endangering anyone.[221]

271. In the ACT in relation to prospective students, section 18(1) of the ACT Act provides that it is unlawful for an educational authority[222] to discriminate against a person by failing to accept the person's application for admission as a student; or in the terms or conditions on which it is prepared to admit the person as a student.

272. In relation to enrolled students, section 18(2) of the ACT Act provides that it is unlawful for an educational authority to discriminate against a student by denying the student access, or limiting the student's access, to any benefit provided by the authority; or by expelling the student; or by subjecting the student to any other detriment.

273. However, section 46 of the ACT Act provides an exception from section 18(1) for a religious educational institution conducted "**solely for students having a religious conviction other than that of the applicant**" (**emphasis** added). This exception will only apply if the educational institution has published a readily accessible policy relating to student matters.

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[219] *Equal Opportunity Act 1984* (SA) s 85ZE(5).
[220] *Equal Opportunity Act 1984* (SA) s 85ZE(3)(a).
[221] *Equal Opportunity Act 1984* (SA) s 85ZE(4)(a).
[222] See generally *Discrimination Act 1991* (ACT) dictionary (definitions of 'educational authority' and 'educational institution').

274. In Tasmania, there is a specific exception from the anti-discrimination regime relating to admission of students at religious institutions.[223] It includes a positive right of a religious institution to discriminate in relation to admission of a student on the grounds of religious belief or affiliation or religious activity including by reference to **the religious belief or affiliation, or religious activity, of the prospective student, their parents or grandparents**, if the educational institution's policy for the admission of students demonstrates this criteria for admission (**emphasis** added).[224] This provision does not apply to an enrolled student.[225]

275. In Victoria and Western Australia[226] there are no additional provisions relating to discrimination against current or prospective students at religious institutions.

276. At the Commonwealth level section 351(1) of the FWA prohibits an employer from taking adverse action against an employee on the following grounds unless, inter alia, an exception analogous to section 56(d) applies: because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

277. In this context, the competing rights that need to be balanced include:

a) the freedom to manifest religion or belief in worship, observance, practice and teaching (article, 18(1), ICCPR);

b) the freedom of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions (article, 18(4), ICCPR);

c) the rights of the child to freedom of religion under the CRC; and

d) (in the context of employment) the right to freedom of religion and belief in employment which is protected by article 5(d) of the *International Labour Organisation Convention concerning Termination of Employment at the Initiative of the Employer* where religion cannot be a valid reason for termination.

278. The balancing of competing human rights requires exceptions to the anti-discrimination provisions to be proportionate and go only as far as is necessary. In the Association's view, standing alone neither the current exception in section 56(d), or the proposed exception in question 7.2, satisfy these requirements.

279. In principle, the Association is of the view that the South Australian legislation reflects a necessary and appropriate balancing of competing human rights in relation to protected attributes in this context. Those provisions protect students and prospective students from discrimination by educational authorities

[223] *Anti-Discrimination Act 1998* (Tas) s 51A.
[224] *Anti-Discrimination Act 1998* (Tas) s 51A(4).
[225] *Anti-Discrimination Act 1998* (Tas) s 51A(1), (2).
[226] See generally *Equal Opportunity Act 1984* (WA) s 74(3): nothing in the Act renders it unlawful for a person to discriminate against another in connection with the provision of education or training by a religious educational institution if this is done "in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of person who are not adherents of that religion or creed".

(including religious educational authorities) on the ground of sex, sexual orientation, gender identity and intersex status,[227] and also on the basis of marital or domestic partnership status, identity of spouse or domestic partner, pregnancy, caring responsibilities, religious appearance or dress or being, or having been, subjected to domestic abuse.[228]

280. The Association supports the inclusion of provisions analogous to section 37 and 85ZE of the SA Act in the ADA.

281. In Tasmania and the ACT, a religious educational institution is entitled to refuse an application for enrolment from a child with a different religious belief or affiliation, or in the case of Tasmania, in circumstances where the parent or grandparent has a different belief or affiliation. This raises a difficult question of the balance between the competing rights.

282. For example, clause 56(d) "may be used to exclude a child from attending a Jewish school solely because the child is not Jewish in circumstances where the child's mother is Anglican and the father is Jewish and notwithstanding that the child has an appreciation of both religions. In these circumstances, the child has a fundamental right to be treated free from discrimination on the basis of their religious beliefs or lack thereof, and the father has a right to educate his child in accordance with his beliefs. The exclusion of such a child from a religious school may not reflect an acceptable or proportionate balance between competing rights."[229] Such exclusions fly in the face of the reality of religious school education in NSW where the common experience is that the student cohort is drawn from multiple ethnicities, cultures and religions. Such students have, for example, a right to maintain their religion even where their parents have chosen to place them in a convenient school of another religion.

283. In principle, the Association is of the view that the South Australian legislation applicable in this context reflects a necessary and appropriate balancing of competing human rights in relation to protected attributes. The Association supports the inclusion of provisions analogous to section 37 and 85ZE of the SA Act in the ADA.[230]

Question 7.3: Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?

284. The Association does not support the continued application of the general exemptions for religious bodies found in section 56 of the ADA in respect of all forms of unlawful conduct under the ADA. An overarching difficulty with section 56 of the ADA in its current form is that it provides an exception to the whole of the ADA for religious bodies in the circumstances described.

285. It is a well-established principle that human rights listed within conventions, charters and bills of rights are to be seen as universal, interdependent, indivisible and equal. Consequently, no one human right can be said to achieve paramountcy over all the others. Religious freedoms do not, therefore, stand alone as an

[227] *Equal Opportunity Act 1984* (SA) s 37.
[228] *Equal Opportunity Act 1984* (SA) s 85ZE.
[229] Law Council of Australia, Submission to the Attorney-General's Department, *Religious Freedom Bills* (3 October 2019) [204].
[230] Save for where the student or potential student appears or dresses in a manner required by, or symbolic of, a different religion: *Equal Opportunity Act 1984* (SA) s 85ZE(5).

exceptional or uniquely protected area of public and private life. While guaranteed under international human rights treaties and under bills of rights in comparator common law jurisdictions, the right to observe one's faith must be set alongside, and balanced against, all of the other rights considered fundamental in a democratic society.

286. Exceptions to the ADA relating to the manifestation of religious beliefs ought to reflect a balancing of competing human rights and go only as far as is necessary to achieve that end. The current blanket exception in section 56 from the anti-discrimination provisions in the ADA does not reflect a balancing of competing human rights.

Sexual harassment and vilification

287. In particular, in the Association's view, there is no justification by reference to balancing of human rights or otherwise for religious bodies to be exempted from compliance with the prohibitions in the ADA against sexual harassment or vilification.

288. The Commission came to this conclusion in its enquiry into the ADA in 1999. Relevantly, it said:[231]

> While this section guarantees the right of religious groups to practise their beliefs, and to that extent should be retained, this protection should not be something which religious groups are allowed to hide behind in cases where harassment or vilification of a particular group occurs, and it should be narrowed to reflect this principle. Religion should not be able to be used as an excuse for unlawful conduct. In the words of Chief Justice Mason and Justice Brennan of the High Court:
>
> > The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. Religious conviction is not a solvent of legal obligation.[232]

289. The approach taken in other Australian jurisdictions is divided, but the majority apply prohibitions against sexual harassment and vilification to religious bodies.

290. In Victoria, the ACT, South Australia and Queensland there are legislative exemptions from their prohibitions against discrimination for religious bodies in similar circumstances to those in section 56,[233] but not in relation to sexual harassment[234] and vilification.[235] Consequently, religious bodies are subject to those prohibitions. In Tasmania although sexual harassment and vilification are not explicitly excluded, the wording of the relevant provision is likely to have the same effect.[236]

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[231] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1999 (NSW)* (Report No 92, 1999) [6.71].
[232] *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120, 135-136.
[233] *Equal Opportunity Act 2010* (Vic) ss 81-83; *Discrimination Act 1991* (ACT) s 32; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Anti-Discrimination Act 1991* (Qld) s 109.
[234] *Equal Opportunity Act 2010* (Vic) pt 6; *Discrimination Act 1991* (ACT) pt 5; *Equal Opportunity Act 1984* (SA) s 87; *Anti-Discrimination Act 1991* (Qld) ss 118-120, 124A.
[235] *Racial and Religious Tolerance Act 2001* (Vic); *Discrimination Act 1991* (ACT) pt 7; *Racial Vilification Act* 1996 (SA).
[236] *Anti-Discrimination Act 1998* (Tas) s 52.

291. By contrast the exemptions in Western Australia and the Northern Territory for religious bodies[237] are expressed to be to the whole of the Act with the consequence that they extend to sexual harassment.[238] At a Commonwealth level, the SDA prohibits sexual harassment against students at an educational institution,[239] but this is subject to the exception in sections 37 and 38 relating to religious bodies and religious educational institutions.

292. Consequently, removal of the exemption for religious bodies from the prohibitions against sexual harassment and vilification is consistent with the position in the majority of Australian jurisdictions.

293. In the Association's view, there is no justification by reference to balancing of human rights or otherwise for religious bodies to be exempted from compliance with prohibitions against any form of sexual harassment or vilification.

294. In relation to attributes that should be protected, please refer to the responses to questions 7.1 and 7.2 above.

Question 7.5:

(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?

295. In principle, in the Association's view, the employment exceptions afforded to private educational authorities should not be as broad as those recommended for religious educational authorities (see the answer to question 7.1 above).

296. The exceptions provided to religious institutions in relation to employment reflect a balancing of internationally recognised freedoms and rights.

297. Private educational authorities are not the subject of these rights and freedoms. Consequently exceptions drafted to protect religious educational institutions will not generally be appropriate for private educational institutions having regard to applicable competing human rights.

298. Otherwise, the Association makes no submissions in relation to this question.

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[237] *Equal Opportunity Act 1984* (WA) ss 72, 73; *Anti-Discrimination Act 1992* (NT) s 51.
[238] *Equal Opportunity Act 1984* (WA) ss 24-26 (there are no specific anti-vilification provisions in the WA Act); *Anti-Discrimination Act 1992* (NT) ss 22-23.
[239] *Sex Discrimination Act 1984* (Cth) s 28F.

Question 7.6:

(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?

299. The Associations repeats its answer to question 7.5. Otherwise, the Association makes no submissions in relation to this question.

Question 7.7: Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?

300. Sporting activities usually involve the provision of "services" which are generally covered under the ADA in the context of each protected attribute.[240]

301. Sporting activities may also be conducted by "registered clubs" where the definition[241] is satisfied. The provision of club membership and benefits by a registered club is generally covered under the ADA in the context of each protected attribute.[242]

302. However, if a sporting organisation is a voluntary "body" under the ADA, and not a "registered club", it may be exempt from the key anti-discrimination provisions (section 57, ADA). Relevantly section 57(2) provides:

> Nothing in this Act affects:
>
> (a) any rule or practice of a body which restricts admission to membership of that body, or
>
> (b) the provision of benefits, facilities or services to members of that body.

303. There are also general exemptions from the anti-discrimination provisions in the ADA for registered charities in certain defined circumstances, which may conceivably be applicable (section 55, ADA).

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[240] See, e.g., *Anti-Discrimination Act 1977* (NSW) ss 38M, 49ZP.

[241] See generally *Anti-Discrimination Act 1977* (NSW) s 4: "Registered club" is defined to have the same meaning as in the *Registered Clubs Act 1976* (NSW) which, in turn, defines it to mean a club with a "club licence". A "club licence" is defined to be a licence issued under the *Liquor Act 2007* (NSW).

[242] See, e.g., *Anti-Discrimination Act 1977* (NSW) ss 38O, 49ZR.

Discrimination in sport - transgender persons

304. Part 3A of the ADA specifically prohibits discrimination against transgender people in a number of areas of public life.

305. For example, it is unlawful for a registered club to discriminate against current or prospective members on transgender grounds by, inter alia, denying them access to any benefit provided by a club or subjecting them to any other detriment (section 38O, ADA).

306. In the context of provision of services, section 38M renders it unlawful for a person who provides services to discriminate against another person on transgender grounds by:

a) refusing to provide the person with those services; or

b) in the terms on which the other person is provided with those services.

307. The description of what constitutes discrimination on transgender grounds is in section 38B. In general terms this includes where a perpetrator:

a) on the ground of a person (or their a relative or associate) being transgender, treats the transgender person less favourably in the same circumstances than they would treat someone who they did not think was transgender (section 38B(1)(a));

b) requires a transgender person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender comply, being a requirement which is not reasonable and with which the transgender person does not or is not able to comply (section 38B(1)(b)); or

c) in relation to a "recognised transgender person" (section 38B(1)(c)):

i treats them as being of the person's former sex; or

ii requires them to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition 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.

308. The definition of "transgender person" in section 38A of the ADA provides as follows:

A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a recognised transgender 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,

(d) 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.

309. "Recognised transgender person" is defined to mean a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (**BDMR Act**) or under the corresponding provisions of a law of another Australian jurisdiction (section 4). There are strict conditions in the BDMR Act governing circumstances in which a person is able to alter their registered sex.

310. However, these anti-discrimination provisions protecting transgender people are subject to an express exception in the context of sporting activities.

311. Section 38P of the ADA provides:

(1) Nothing in [Part 3A] renders unlawful the exclusion of a transgender person from participation in **any sporting activity** for members of the sex with which the transgender person identifies.

(2) Subsection (1) does not apply—

(a) to the coaching of persons engaged in any sporting activity, or

(b) to the administration of any sporting activity, or

(c) to any sporting activity prescribed by the regulations for the purposes of this section.

(**emphasis** added)

312. There is no Regulation excluding any sporting activity from the scope of the exemption in section 38P(1).

Procedure for exemption from ADA – granted by President

313. There is a procedure for the President of the Anti-Discrimination Board to grant an exemption from the ADA in whole or in part in relation to (section 126):

(a) a person or class of persons, or

(b) an activity or class of activity, or

(c) any other matter or circumstances specified in the order.

314. In exercising discretion under section 126 in relation to a proposed exemption, the President is required to consider, without limitation, the following matters (Reg 6, *Anti-Discrimination Regulation* 2019 (NSW)):

(a) whether the proposed exemption is appropriate or reasonable,

(b) whether the proposed exemption is necessary,

(c) whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought,

(d) whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption,

(e) the public, business, social or other community impact of the granting of the proposed exemption,

(f) any conditions or limitations to be contained in the proposed exemption.

Discrimination in sport on transgender grounds – Sex Discrimination Act 1984 (Cth)

315. In general, it is preferable for legislation covering the same subject matter to be consistent across Australian jurisdictions as far as practicable.

316. At the Commonwealth level, the SDA has an anti-discrimination regime applicable in specified areas of public life including in the context of the provision of services (section 22) and clubs (section 25).[243] Like the ADA, there is an exemption for voluntary bodies (section 39). The SDA also includes an exemption relating to sport (section 42).

317. Section 42(1) of the SDA provides:

Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

318. The exception does not apply to coaching, umpiring, refereeing, or the administration of sporting activities, and nor does it apply to children under 12 (section 42(2)).

319. Gender identity is defined to mean (section 4, SDA):

the gender - related identity, appearance or mannerisms or other gender - related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

Discrimination in sport on transgender grounds – other jurisdictions

320. Many other jurisdictions in Australia have exceptions from their anti-discrimination regimes relating to sporting activities that expressly relate to transgender people.

321. In Victoria there are provisions analogous to the SDA relating to participation in a "competitive sporting activity" by transgender people (section 72(1), Victorian Act). The exception is limited to people

[243] See generally *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'club').

12 years and over (section 72(3), Victorian Act), and the definition of "competitive sporting activity" includes limitations analogous to section 42(2) of the SDA relating to coaching, umpiring, refereeing, or the administration of sporting activities (section 70, Victorian Act). The definition also expressly excludes "the non-competitive practice of a sport" (section 70(d), Victorian Act). "Gender identity" is defined in a similar manner to the way it is defined in the SDA (section 4(1), Victorian Act).

322. In Queensland the exception from the relevant anti-discrimination prohibitions on grounds of gender identity is analogous to the SDA, including the limitations (section 111, Queensland Act)).

323. By contrast, in South Australia,[244] Tasmania,[245] the ACT[246] and the Northern Territory[247] "gender identity" is identified as a protected attribute, but there are no express exceptions applicable to a transgender person in relation to sporting activities.

324. There are no equivalent provisions in the WA Act relating expressly to transgender persons.

Balance of competing human rights

325. All Australians should have the opportunity to be involved in sport and physical activity, regardless of their sex or gender identity. It is important that sporting bodies, from local clubs through to national sporting organisations, ensure that as far as possible every person is treated with respect and dignity and protected from discrimination. This necessarily involves a balancing of competing human rights.

326. The Olympic Charter declares in its fundamental principles: "The practice of sport is a human right" and "Every individual must have access to the practice of sport, without discrimination of any kind in respect of internationally recognised human rights within the remit of the Olympic Movement."

327. Similarly, in 2019, in the context of considering the "Elimination of discrimination against women and girls in sport" the UN Human Rights Council passed a resolution (**2019 UNHRC Resolution**):[248]

[244] See, e.g., *Equal Opportunity Act 1984* (SA) s 35: gender identity is a protected attribute in relation to associations. An association administered in accordance with the precepts of a particular religion is exempted from compliance with section 35 (s 35(2)(b)). See also *Equal Opportunity Act 1984* (SA) s 48: The general exception relating to competitive sporting activity allows discrimination on the basis of sex but not gender identity.

[245] In Tasmania, "gender identity" is identified as a protected attribute and there is no express exception in relation to sporting activities: *Anti-Discrimination Act 1998* (Tas) s 16(ea). "Gender identity is defined in a different manner to the *SDA* but is broadly analogous: *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'gender identity').

[246] In the ACT "gender identity" is a protected attribute and there is no express exception in relation to sporting activities: *Discrimination Act 1991* (ACT) ss 7(1), 23A. "Gender identity" is defined in a similar manner to the definition in the *SDA*: *Discrimination Act 1991* (ACT) dictionary (definition of 'gender identity').

[247] In the NT, gender identity" is a protected attribute and the exception relating to sporting activity does not expressly refer to persons with a gender identity: *Anti-Discrimination Act 1992* (NT) ss 19(1)(ba), 56. The definition of that term reflects the Victorian definition: *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'gender identity'); *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'gender identity').

[248] UN Human Rights Council, *Elimination of discrimination against women and girls in sport*, A/HRC/RES/40/4 (21 March 2019), 2.

… recognizing also the potential value of sport as a universal language that contributes to educating people on the values of respect, dignity, diversity, equality, tolerance and fairness and as a means to combat all forms of discrimination and to promote social inclusion for all.

328. Section 38P of the ADA provides an exception to the anti-discrimination protections in the ADA with the potential to affect the rights of transgender people to participate in sport. Under international law, exceptions to anti-discrimination regimes ought to:

a) be necessary to protect fundamental rights and freedoms;

b) respond to a pressing public or social need;

c) pursue a legitimate aim and be proportionate; and

d) be an application of the least restrictive means required for achievement of a legitimate purpose.

329. In relation to the necessity to protect fundamental rights and freedoms in the context of transgender people participating in sports, there are a number of competing human rights.

330. A right that is often referred to in this context in support of cisgender female athletes, is the right to fair competition and safety. This right arises from the right to equality[249] and bodily integrity[250] under the ICCPR.

331. Transgender people also have the right to equality and non-discrimination under the ICCPR. Article 26 provides:

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**. (**emphasis** added)

332. There is case law deciding that "gender identity" comes within the term "other status" in article 26.[251]

333. Furthermore, in the context of considering women in sport, the UNHRC has expressed concern that regulations, rules and practices that require women and girl athletes with differences of sex development, androgen sensitivity and levels of testosterone to medically reduce their blood testosterone levels may contravene international human rights norms and standards, including:

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[249] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

[250] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7. See also *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 8 – 11.

[251] See, e.g., *Tickle v Giggle for Girls Pty Ltd* (No 2) [2024] FCA 960, [4] (Bromwich J). See also *Tickle v Giggle for Girls Pty Ltd* (No 2) [2024] FCA 960, [4] – [5]: Bromwich J was not satisfied that the kind of gender identity discrimination alleged by Ms Tickle under section 22 of the *SDA* would be supported as an enactment of the *Convention for the Elimination of All Forms of Discrimination* Against Women (1979), but he did not decide this question).

the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right to work and to the enjoyment of just and favourable conditions of work, the right to privacy, the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment, and full respect for the dignity, bodily integrity and bodily autonomy of the person;[252]

334. This consideration applies equally to transgender athletes.

335. The 2019 UNHRC Resolution called upon States:

> to ensure that sporting associations and bodies implement policies and practices in accordance with international human rights norms and standards, and refrain from developing and enforcing policies and practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women's events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy;[253]

336. In relation to the competing right to fair competition and the safety of athletes, there is a concern that some transgender people have superior strength, stamina and physique which provides them with an unfair advantage over cisgender females in some sports.

337. Although it is likely that this will be the case in some sports (for example boxing, weight-lifting, sprinting and swimming), this is not necessarily the case in relation to all sports.

338. On one view, section 38P provides a necessary and proportionate balance of competing human rights as it simply *enables* the exclusion of a transgender athlete from participation in a sporting activity. It does not prescribe that all transgender athletes ought to be excluded in any or all circumstances. However, neither does it provide any guidance as to the factors to be taken into account by the relevant decision maker.

339. By contrast, section 42 of the SDA provides that it is not unlawful to discriminate on the ground of gender identity by excluding persons from participation in any competitive sporting activity where "strength, stamina, or physique of competitors is relevant". On a plain reading of these words, it is unclear whether the only basis upon which transgender athletes may be excluded is strength, stamina or physique, or whether they may also be excluded on the basis of other biological or physical attributes not found in cisgender females.

340. Both provisions essentially leave it to the governing body for the relevant sport to make decisions about the circumstances in which transgender athletes may be excluded from participation in a sporting activity.

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[252] UN Human Rights Council, *Elimination of discrimination against women and girls in sport*, A/HRC/RES/40/4 (21 March 2019), 2.

[253] UN Human Rights Council, *Elimination of discrimination against women and girls in sport*, A/HRC/RES/40/4 (21 March 2019), 2.

341. In the context of participation in sport which is not at the elite level, the AHRC publication entitled "Guidelines for inclusion of transgender and gender diverse people in sport" (June 2019) recommends that sporting clubs develop policies which focus on non-discrimination and inclusion.

342. Slightly different considerations apply where sport is at the elite level, or where some transgender people may have an unfair advantage over cisgender females in particular sports due to factors such as superior strength, stamina or physique.

343. Guidelines have been issued by the Australian Sports Commission (**ASC**) relating to transgender and gender diverse inclusion in sport at the elite level (**ASC Elite Athlete Guidelines**).[254] Whilst those guidelines generally seek to promote inclusion of transgender athletes in sporting activities, they recognise that some sports may require hormone (testosterone) suppression of trans athletes in the female category. In this respect, they say "an NSO [National Sporting Organisation] may determine that hormone suppression (and the demonstration thereof over a prescribed period) is a HP [high performance] eligibility requirement for trans athletes in the female category".[255]

344. The ASC Elite Athlete Guidelines go on to provide:

> As a general guideline the AIS recommends that, where a sport requires hormone (testosterone) suppression of trans athletes in the female category as part of its eligibility rules, an appropriate range is < 2.5 nmol/L for 24 months prior to competition, medically supervised and with ongoing monitoring.
>
> - This guideline may vary based upon the unique physiological requirements of a sport. For example, sports that are not explosive, power-based, or aerobic may consider that the appropriate range for their sport exceeds AIS recommended guidelines. In such circumstances, reasoning should be set out clearly for all. …
>
> Current scientific understanding is that the overwhelming majority (=95%) of individuals undergoing hormone-suppression therapy will record a testosterone (T) level below 1.7 nmol/L; readings above 2 are rare. In many instances, hormone suppression results in undetectable levels of testosterone. [256]

345. Whilst they may be necessary in some sports, eligibility requirements for transgender athletes that may require hormone suppression should not be lightly adopted.

346. An enormous amount of scientific data is likely to be relevant in determining whether restrictions are appropriate in each sport, and at each level of competition.

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[254] Australian Sports Commission, 'Transgender and gender-diverse inclusion guidelines for HP sport', *AIS* , May 2023 <https://www.ausport.gov.au/ais/position_statements/content/transgender-gender-diverse-inclusion-guidelines-for-hp-sport>.

[255] Australian Sports Commission, 'Transgender and gender-diverse inclusion guidelines for HP sport', *AIS* , May 2023 <https://www.ausport.gov.au/ais/position_statements/content/transgender-gender-diverse-inclusion-guidelines-for-hp-sport>.

[256] Australian Sports Commission, 'Transgender and gender-diverse inclusion guidelines for HP sport', *AIS* , May 2023 <https://www.ausport.gov.au/ais/position_statements/content/transgender-gender-diverse-inclusion-guidelines-for-hp-sport>.

347. Any restrictions on the rights of transgender athletes to compete must be necessary and proportionate having regard to competing human rights. In general, participation in sport by all Australians should be encouraged.

348. In the Association's opinion, at this stage the governing bodies for each sport, in consultation with scientists, are likely to be in the best position to make these complex policy judgments. It is beyond the role of legislation to be as prescriptive as may be necessary in relation to when a transgender person is precluded from participating in a sporting activity.

349. If governing bodies for each sport are unable or unwilling to craft appropriate guidelines, or if such guidelines prove not to reflect an appropriate balancing of competing human rights, it may be open to the legislature to prescribe a sporting activity under section 38P(2)(c) of the ADA. Alternatively, an exemption may be granted by the President of the Anti-Discrimination Board under section 126 of the ADA.

350. In the Association's view, an exception analogous to section 42 of the SDA reflects a necessary and proportionate balance of competing human rights. That provision is enabling only – it does not require sporting bodies to exclude transgender athletes where strength, stamina or physique are relevant. However, it does provide a signpost for matters to be taken into account by decision makers in relation to each sport. It should be made clear in the ADA amendment that the express references to strength, stamina and physique do not preclude other biological or physical attributes being taken into account.

351. With these caveats, the Association supports an amendment to section 58P of the ADA to reflect section 42 of the SDA.

Discrimination in sport – nationality, place of birth, period of residency

352. The ADA includes a prohibition on discrimination on the grounds race in certain areas of public life, including in the provisions of services (Part 2, ADA; section19). However, there is an exception to this in Part 2 of the ADA relating to participation in a sporting activity. Section 22 provides as follows:

> Nothing in this Part applies to or in respect of anything done on the grounds of a person's nationality or place of birth or length of time for which the person has been resident in a particular place or area—
>
> (a) in selecting one or more persons to represent a place or an area in any sport or game, or
>
> (b) in pursuance of the rules of any competition in so far as they relate to eligibility to compete in any sport or game.

353. International law requires the balancing of competing human rights. This requires exceptions to anti-discrimination regimes to go only as far as is necessary taking into account those competing rights.

354. Australia has obligations under international law to eliminate racial discrimination under both the ICCPR[257] and the ICERD. Article 2(1) of the ICERD provides that State parties "condemn racial

[257] See *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1),4, 26.

discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms". To this end it goes on to say (article 2(1)(c)):

> Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists

355. Balanced against this is the right to fair competition between athletes which arises from the right to equality as recognised in the ICCPR.[258]

356. Section 22(a) of the ADA is of very broad application. It permits, without limitation, discrimination against people on the basis of nationality, place of birth and period of residence. In principle, the Association is of the view that this provision does not reflect an appropriate balance of competing human rights other than where representative teams are selected.

357. In the Associations view, section 22 of the ADA ought to be amended to reflect an appropriate balance of competing human rights taking into account selection of national sporting teams.

Discrimination in sport – sexual harassment

358. The ADA prohibits a person engaged in a sporting activity from sexually harassing another person engaged in that activity (section 22I).

359. The Association supports retention of this provision.

Discrimination in sport - sex

360. The ADA includes a prohibition on discrimination on the grounds of sex in certain areas of public life, including in the provisions of services (Part 3, ADA; section 33). There is an exception which permits "exclusion of persons of the one sex from participation in any sporting activity" (section 38).

361. The Association supports retention of this provision.

Discrimination in sport - disability

362. The ADA includes a prohibition on discrimination on the grounds of disability in certain areas of public life, including in the provision of services (Part 4A, ADA; section 49M). However, there is an exception for participation in a sporting activity if, amongst other things, the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity or the persons who participate are selected on the basis of their skills and abilities.

363. The Association makes no submissions in relation to this exception.

[258] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

Discrimination in sport - age

364. The ADA includes a prohibition on discrimination on the grounds of age in certain areas of public life, including in the provision of services (Part 4G, ADA; section 49ZYN). However, there is a general exception for discrimination on the basis of age in a sporting activity (section 49ZYW), although the exception does not apply to coaching, or administration of a sporting activity, or to any sporting activity prescribed by regulations (section 49ZYW(2))

365. In principle, the Association supports retention of this exception on the basis that it reflects a necessary and proportionate balance of competing human rights.

Context for vilification – Australia's international law obligations

366. The ICCPR specifically recognises the rights to freedom of expression. Relevantly, articles 19(2) and (3) of the ICCPR provide:

> (2) Everyone shall have the **right to freedom of expression**; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. **It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
>
> (a) **For respect of the rights or reputations of others**;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.
>
> (**emphasis** added)

367. Article 20 of the ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

368. The ICERD also seeks to eradicate racial vilification. Relevantly, article 4 of the ICERD provides:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.

Vilification in sport – transgender people

369. In New South Wales transgender vilification is unlawful under section 38S of the ADA. Specifically, it is unlawful for a person, by a public act, to incite hatred, serious contempt for, or severe ridicule of, inter alia, transgender people (section 38S(1)). There are exceptions from this prohibition for (section 38S(2)):

(a) a fair report of a public act, or

(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege in proceedings for defamation, or

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

370. The term "public act" is defined to include (section 38R):

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, or

(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, or

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of—

(i) a person on the ground that the person is a transgender person, or

(ii) a group of persons on the ground that the members of the group are transgender persons.

371. In terms of criminal liability, section 93Z of the *Crimes Act* provides that a person who by public act, intentionally or recklessly threatens or incites violence towards another person on grounds of (inter alia) the gender identity of the other person is guilty of an offence. "Gender identity" is defined in section 93Z(5) to mean "the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth".

372. In Queensland there are provisions analogous to the ADA prohibiting gender identity vilification (section 124A, Queensland Act).[259]

373. In the ACT there is a similar provision (section 67A, ACT Act).[260] It is subject to exceptions analogous to those in section 38S(2) of the ADA (section 67A(2)). A note in the ACT Act under section 67A(1) provides broad examples of the meaning of "other than in private". The *Criminal Code* 2002 (Act) renders serious vilification an offence under section 750.

374. Tasmania's provision is similar but not as prescriptive (section 19(e), Tasmanian Act).[261]

375. The other jurisdictions do not expressly prohibit vilification of transgender athletes in sport.

376. The human rights that need to be balanced in these circumstances include:

a) the right to freedom of expression (Universal Declaration of Human Rights, article 19);

b) the rights of all people (including transgender people) to be treated fairly and without discrimination (ICCPR, article 26);

c) the rights of people of all races to be treated fairly and without discrimination (ICCPR, article 26).

377. In principle, the prohibition against vilification of transgender people in section 38S of the ADA reflects a proportionate, necessary and appropriate balancing of human rights. In addition, it is consistent with the analogous provisions in Queensland, the ACT and Tasmania. In principle, the Association supports its retention.

Vilification in sport – Racial

378. In New South Wales racial vilification is unlawful under section 20C of the ADA. Specifically, it is unlawful for a person, by a public act, to incite hatred, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race of the person or members of the group (section 20C(1)). There are exceptions from this prohibition for fair report, communications that would be protected by the defence of absolute privilege, and a public act done reasonably and in good faith for identified purposes including for academic, artistic, scientific or research purposes (section 20C(2)). This provision reflects the anti-vilification provision relating to transgender persons.

[259] Formerly there was a provision prohibiting vilification against transgender people in section131A, but it has been repealed: Anti-Discrimination Act (Qld) s 131A, as repealed by *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) s 7.

[260] It extends to inciting hatred toward, **revulsion of**, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, **other than in private (emphasis** added).

[261] It provides that "[a] person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of the gender identity or intersex variations of sex characteristics of the person or any member of the group".

379. There is an exception from the operation of section 20C in the context of sport, namely section 22, but it does not appear to operate in the context of racial vilification (other than nationality or place of birth). This exception is discussed above in the context of racial discrimination in sport.

380. In principle the prohibition against racial vilification in section 20C of the ADA reflects a proportionate, necessary and appropriate balancing of human rights and the Association supports its retention.

Vilification in sport - Religious

381. In New South Wales religious vilification is unlawful under section 49ZE of the ADA. In general terms, it is unlawful for a person, by a public act, to incite hatred, serious contempt for, or severe ridicule of a person or group of persons on the ground of having or not having a religious belief or affiliation, and engaging in and not engaging in a religious activity (section 49ZE(1)). There are exceptions from this prohibition for fair report, communications that would be protected by the defence of absolute privilege, and a public act done reasonably and in good faith for identified purposes including for academic, artistic, scientific or research purposes (section 49ZE(2)). This provision reflects the other anti-vilification provision considered above.

382. In principle the prohibition against religious vilification in section 49ZE of the ADA reflects a proportionate, necessary and appropriate balancing of human rights and the Association supports its retention.

Question 7.8: Should the ADA provide exceptions relating to charitable benefits? If so, what should they cover and when should they apply?

383. Section 55(1) of the ADA provides an exception from the whole of the Act for charities in certain defined circumstances. It provides:

> (1) Nothing in this Act affects—
>
> (a) a provision of a deed, will or other instrument, whether made before or after the day appointed and notified under section 2(2), that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in this Act, or
>
> (b) an act which is done in order to give effect to such a provision.

384. In the Association's view, this exception ought not apply to the prohibitions against harassment and vilification in the ADA (see generally the Association's answer to question 7.3 above). Otherwise, a circumstance may conceivably arise in the context of section 55(1)(b) where such protection is necessary and appropriate.

Question 7.9: Should the ADA provide an exception for voluntary bodies? If so, what should it cover and when should it apply?

385. Section 57 of the ADA provides a complete exception from the whole of the Act for certain voluntary bodies as defined in section 57(1) (**body**) in relation to (section 57(2)):

a) any rule or practice of a body which restricts admission to membership of that body, or

b) the provision of benefits, facilities or services to members of that body.

386. Balancing competing human freedoms and rights generally, it is difficult to see how such a broad exception could be necessary or appropriate.

387. For example, sporting activities may be organised by a voluntary body. This would ordinarily constitute a service within the meaning of section 57(2). Balancing competing freedoms and rights, it is neither necessary nor proportionate for participants in such sporting activities to be excluded from the protections against discrimination in the ADA. Participants in sport arranged by such bodies should be entitled to the benefit of prohibitions against sexual harassment or vilification, and the provisions governing racial and religious discrimination.

388. In principle, the Association does not support retention of the exception applicable to voluntary bodies in its present form.

8 – Civil protections against vilification

389. As outlined in the Consultation Paper, the ADA plays an important role in protecting diverse communities from hate speech and denigration, and in promoting inclusion and social cohesion. According to Professor Katherine Gelber and Professor Luke McNamara, anti-vilification laws should serve these two overlapping purposes:

> Anti-vilification laws are intended to provide a remedy for the individuals directly targeted by vilifying conduct, as well as discourage further harassment and violence that can result from allowing such conduct to circulate publicly. This approach acknowledges that there are, broadly speaking, two forms of harm from vilifying behaviour. Firstly, causal harm encompasses the distinct harms experienced by targets of the conduct, such as public ridicule. Second, consequential harm considers the flow-on effects of the conduct upon the broader community, such as societal marginalisation of the targeted group.[262]

390. The Association's submission to the Commission on 10 May 2024 – in respect of its review into the effectiveness of section 93Z of the *Crimes Act* in addressing serious racial and religious vilification in NSW – notes the importance of NSW's civil and criminal laws, along with education and public awareness campaigns, in achieving these dual purposes and in upholding Australia's obligations under international law. It also notes that there are limitations in addressing vilification under the ADA, namely:

a) Public condemnation: Confidential conciliation is the preferred mechanism to resolve alleged breaches of civil vilification laws. Unless specified in a settlement agreement, conciliation provides

[262] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into anti-vilification protections* (Report, March 2021) 39 [3.2].

no public condemnation of vilification, and does not facilitate wider educative and deterrent impacts. For First Nations people in particular, individual complaints mechanisms have led to "exhaustion, resignation, fear of retaliation and disillusionment".[263]

b) Standing and costs: Only members of the targeted group have standing to lodge a complaint.[264] Representative complaints by organisations are only available where there is a "sufficient interest" to have standing.[265] Private litigation of a public wrong places a significant burden on victims, particularly when damages can be minimal and costs can be great.

391. The Commission may wish to consider these limitations when developing recommendations in relation to the ADA's vilification provisions.

Question 8.1(1): What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?

392. As the Association argued in its preliminary submission to the Commission, dated 18 October 2023, there are inconsistencies between the protected attributes under the ADA's vilification provisions, compared with the relevant provisions in the *Crimes Act*, which should be harmonised.

393. Section 93Z(1) of the *Crimes Act* makes it an offence for "A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons" on the grounds of, amongst other categories:

(c) the sexual orientation of the other person or one or more of the members of the group,

(d) the gender identity of the other person or one or more of the members of the group

(e) that the other person is, or one or more of the members of the group are, of intersex status.

394. In contrast, the relevant vilification provisions of the ADA make it unlawful to publicly incite hatred, serious contempt or severe ridicule towards a person or group, on the ground the person or members of the group based on a range of protected attributes, including "homosexuality"[266] or "transgender grounds"[267]. This difference in terminology has created a perverse situation whereby the vilification of bisexuals, non-binary and intersex people may be a criminal offence, but those same victims have no access to a civil remedy under the ADA. Bisexual, non-binary and intersex people who are the subject of vilification, which falls below the criminal thresholds in section 93Z of the *Crimes Act*, may have no recourse under either the criminal or civil law.

395. As outlined in the Association's preliminary submission, this demonstrates the need to harmonise the ADA's vilification provisions with section 93Z of the *Crimes Act*. The more contemporary and expansive attributes under section 93Z are preferable to those used in the ADA to ensure groups who are vulnerable

[263] Fiona Allison, 'A Limited Right to Equality: Evaluation the Effectiveness of Racial Discrimination Law for Indigenous Australians Through an Access to Justice Len' (2013-2014) 17(2) *Australian Indigenous Law Review* 3, 12.
[264] *Anti-Discrimination Act 1977* (NSW) s 88.
[265] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(c).
[266] *Anti-Discrimination Act 1977* (NSW) s 49ZT.
[267] *Anti-Discrimination Act 1977* (NSW) s 38S.

to vilification are not left without an appropriate civil remedy, particularly those amongst the LGBTQIA+ community. As discussed earlier in this submission, this could be addressed by replacing the protected attributes of "homosexuality" and "transgender grounds" with a broader description such as "sexual orientation", "sexuality" or "gender identity".

396. Section 93Z(2) of the *Crimes Act* states that:

> In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons…were correct or incorrect at the time that the offence is alleged to have been committed.

There is no equivalent provision in the ADA.

397. The Commission may wish to consider whether the vilification provisions of the ADA should be expanded to capture circumstances where the person engaging in the conduct was incorrect about a protected attribute of the other person or group, or whether the other person or group had a particular protected attribute. As noted in the Consultation Paper, both the Victorian and Queensland Parliaments have recently passed similar amendments to this effect.[268] Such provisions may be particularly useful in deterring these forms of unacceptable behaviour, regardless of whether the victim of the vilification has the relevant attributes.

(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?

398. The Association supports expanding the ADA to protect against vilification based on a wider range of attributes. The Association's preliminary submission argued that any expansion should be based on empirical research about which identified communities and groups are most impacted and most at-risk of vilification.

399. While this submission does not intend to provide a list of additional attributes which should be covered, the Association notes that a number of recent inquiries have called for vilification provisions to be extended to people with disability. Although these inquiries were either national in their focus (in the case of the **Royal Commission** into Violence, Abuse, Neglect and Exploitation of People with Disability) or related to other states and territories, it is reasonable to assume that the experiences of vilification by people with disability in Victoria or Western Australia may also mirror the experiences of people with disability in NSW:

a) A 2021 report of the Victorian Legislative Assembly's Legal and Social Issues Committee recommended that the Victorian Government extend its anti-vilification laws to include people with disability.[269]

[268] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21.

[269] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into anti-vilification protections* (Report, March 2021) 51.

b) In 2022, the Law Reform Commission of Western Australia recommended legislative reforms to prohibit vilification on the grounds of disability.[270]

c) The Royal Commission recommended legislative amendments to make vilification on the grounds of disability unlawful.[271]

400. It is also noted that the ACT and Tasmania expressly prohibit vilification on the basis of disability, and the Victorian Parliament has recently passed similar reforms.[272]

Question 8.2:

(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?

401. As the Consultation Paper outlines, the ADA's current test for determining vilification is an "incitement-based" test. According to the ADA, vilification occurs when a person, by public act, incites hatred towards, serious contempt for, or severe ridicule of a person or group because they have a protected attribute.[273]

402. As the Association noted in its preliminary submission, the ADA imposes a higher standard than the test under section 18C(1) of the RDA, which states that:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.

403. The approach adopted in the RDA is a type of "harm-based test". It facilitates a regulatory response to the constitutive harms of vilification, whereas the ADA's test does not respond to constitutive harms, but only certain consequential harms. It is for this reason that the Association has formed the view that a harm-based test, for some protected attributes, is more appropriate to support and protect victims of vilification.

404. As the Association argued in its preliminary submission, the Commission should consider the approach taken in the Tasmanian Act). In Tasmania, a harm-based test, which is largely identical to the RDA, applies to a broad list of attributes, while an incitement-based test is applied for a more limited, prescribed list of attributes.[274]

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[270] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984*, (Project 111 Final Report, May 2022) 229–30 [Recommendation 115].
[271] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report: Executive Summary, Our vision for an inclusive Australia and Recommendations* (Final Report, September 2023) 193-208 [Recommendation 4.30].
[272] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9.
[273] *Anti-Discrimination Act 1977* (NSW) ss 20C, 38S, 49ZXB, 49ZE, 49ZT.
[274] *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19.

405. If the Commission is of the view that a two-tiered approach should be implemented in NSW – whereby a harm-based test and an incitement-based test be applied in different circumstances – then there should be clear justifications for why the harm-based test should apply to certain attributes and why the incitement-based test should apply to other attributes.

Question 8.3: What changes, if any, should be made to the definition of "public act" in the test for vilification in the ADA?

406. For the purposes of racial vilification under the ADA, "public act" is defined as:

> (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
>
> (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
>
> (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.[275]

407. As discussed in the Association's response to question 8.1, where it is appropriate, greater consistency between the ADA and section 93Z of the *Crimes Act* is desirable. For this reason, it may be useful for the ADA to clarify that a "public act" can include:

> (a) communicating through social media and other electronic means,
>
> (b) graffiti, and
>
> (c) acts that occur on private land.[276]

408. Along with providing greater consistency with section 93Z of the *Crimes Act*, this amendment would ensure the ADA's definition of public act better reflects contemporary forms of conduct and communication, as well as addressing any perception (whether or not that perception is accurate) that a broader range of acts may be captured by the criminal provisions, when compared with the ADA.[277]

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[275] *Anti-Discrimination Act 1977* (NSW) s 20B. The Association notes that there are broadly identical definitions of "public act" at ss 38R, 49ZS and 49ZXA, except that those definitions relate to "transgender vilification", "homosexual vilification" and "HIV/AIDS vilification".

[276] *Crimes Act 1900* (NSW) s 93Z(5).

[277] Noting the discussion at [8.118] of the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Consultation Paper, May 2025).

Question 8.4: What changes, if any, should be made to the exceptions to the vilification protections in the ADA?

409. The Consultation Paper outlines the exceptions that apply specifically to vilification under the ADA.[278] The ADA's vilification prohibitions do not apply to:

(a) a fair report of a public act of vilification,

(b) the communication, distribution or dissemination of any matter that would be subject to a defence of absolute privilege in defamation proceedings, and

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.[279]

410. The exceptions to vilification outlined at (a) and (b) above are appropriate.

411. Similarly, the Association supports the exceptions at (c) above. However – in the case of vilification based on the grounds of transgender, homosexuality, HIV/AIDS and/or religious belief (or non-belief), affiliation or activity – the public interest exception also includes "religious discussion or instruction purposes".[280] In the Association's view, a blanket exception for religious discussion or instruction purposes is not appropriate.

412. In developing and reforming anti-discrimination laws, legislators are often required to balance certain freedoms and rights that come into conflict. These conflicts are inevitable and are contemplated by international human rights instruments, for which Australia is a signatory. For example:

a) Article 18 of the ICCPR states that "everyone shall have the right to freedom of thought, conscience and religion." However, freedom of religion "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

b) Article 19 of the ICCPR states that freedom of expression "carries with it special duties and responsibilities". Where necessary and where provided by law, this right will be "subject to certain restrictions" in order to respect the rights and reputation of others, and to preserve the public order.

413. In undertaking this balancing exercise, it is the Association's view that it should not be permissible for a person to incite hatred towards, severe contempt for, or severe ridicule of a person or group of persons on the basis of sexuality, gender identity, HIV/AIDS status or religion in the context of religious discussion or instruction. The Association shares the view expressed by the Law Reform Commission of Western Australia in its *Review of the Equal Opportunity Act 1984* (WA) that "individuals can hold, and even strongly express, religious views without engaging in such [vilifying] conduct".[281] Enabling a person to vilify another

[278] Note that broader exceptions, discussed at [8.123] of the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Consultation Paper, May 2025) are discussed previously in this submission.
[279] *Anti-Discrimination Act 1977* (NSW) s 20C(2).
[280] See *Anti-Discrimination Act 1977* (NSW) ss 38S(2)(c), 49ZT(2)(c), 49ZXB(2)(c), 49ZE(2)(c).
[281] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), (Project 111 Final Report, May 2022) 231.

person on certain grounds, with some degree of impunity, as long it is in the context of religious discussion or instruction, unjustifiably abrogates their right to be free from incitement to discrimination, hostility or violence.[282]

414. For these reasons, the public interest exception should not include any reference to religious discussion or instruction. This is consistent with the public interest exception that applies to racial vilification under the ADA[283], as well as the approach in the ACT, Northern Territory and the RDA.[284] Further consequential amendments across the ADA will be required to ensure that acts done for religious purposes are not exempt from vilification protections.[285]

415. This submission discusses religious exceptions more generally in response to question 7.

Question 8.5: What changes, if any, should be made to the protection against religious vilification in the ADA?

416. The Association supported the NSW Government's 2023 reforms to make it unlawful to vilify a person or group of persons on the ground of religious belief or affiliation or religious activity.[286] It addressed a long-standing omission in NSW's civil vilification protections.

417. The Consultation Paper raises a number of potential concerns relating to the religious vilification protections that, if amended, may improve its operation, effectiveness and appropriateness.

418. Firstly, to promote consistency across civil and criminal vilification offences, it may be useful to define "religious belief or affiliation"[287] in the ADA, in line with the definition used in section 93Z of the *Crimes Act* – that being "holding or not holding a religious belief or view".[288] This may help to address any potential ambiguity in the language of the civil vilification offence, as is discussed in the Consultation Paper.

419. However, the Association would suggest caution in any potential amendment to the language of "engage, or do not engage, in religious activity" at section 49ZE(1)(b)(ii) of the ADA, despite this language not appearing in section 93Z of the *Crimes Act*. In the Association's view, religious activities or practices – such as the manner in which a person of faith may engage in prayer or worship – rather than their belief or view, could foreseeably be the subject of acts of vilification, which should be protected by the ADA. If this phrase is considered unclear by the Commission, an appropriate definition could be considered.

420. Further, the religious vilification provision of the ADA has only been in operation for a short period of time. It would be preferable for the NSW Government to monitor and assess the operation of the ADA's

[282] Article 20(2) of the ICCPR states that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."
[283] *Anti-Discrimination Act 1977* (NSW) s 20C(2)(c).
[284] *Racial Discrimination Act 1975* (Cth) s 18D; *Discrimination Act 1991* (ACT) s 67A(2); *Anti-Discrimination Act 1992* (NT) s 20B. See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21, inserting *Anti-Discrimination Act 1991* (Qld) s 124D(2)(c) (not yet commenced).
[285] See *Anti-Discrimination Act 1977* (NSW) ss 56(d), 59A.
[286] Anti-Discrimination Amendment (Religious Vilification) Bill 2023.
[287] *Anti-Discrimination Act 1977* (NSW) s 49ZE(1)(i).
[288] *Crimes Act 1900* (NSW) s 93Z(5).

religious vilification provisions for a longer period of time, in consultation with Anti-Discrimination NSW, before attempting any significant structural amendments.

421. Secondly, the Association acknowledges the concerns raised in the Consultation Paper that the ADA's vilification provisions may inadvertently protect organisations, and not just individuals, because a "person" includes "an individual, a corporation and a body corporate or public" under NSW law.[289] If the ADA were to be interpreted this way, this would be inconsistent with the overriding purpose of Australian anti-discrimination laws – which is to protect individual, rather than collective, organisational or institutional, rights.

422. The Commission's suggestion, drawn from submissions by the Justice and Equity Centre (formerly the Public Interest Advocacy Centre) and the NSW Council for Civil Liberties, of using the language of "natural persons" rather than "persons" has some merit.[290] To ensure consistency across the ADA, it would be preferable for any such amendment to be considered at section 4, under "Definitions", rather than confining this change in language to the religious vilification provisions.

9 – Harassment

Question 9.1:

(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?

423. As outlined in the Consultation Paper (at [9.9] – [9.16]), the ADA and the SDA both define "sexual harassment" as engaging in unwelcome conduct of a sexual nature in relation to another person.[291] However, there are several key differences between the two acts. In the interests of consistency, the Association supports the alignment of the ADA's definition of sexual harassment with the SDA.

424. Firstly, the Association submits that the threshold of the "reasonable person" standard in the ADA be lowered to encompass the "possibility" that the person harassed would be offended, humiliated or intimidated. At present, the definition in section 22A will only be satisfied if a reasonable person would have anticipated that the conduct would *actually* have that effect. The proposed amendment would appropriately address the situation contemplated by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 Report on the effectiveness of the SDA, in which "a person realises that

[289] *Interpretation Act 1987* (NSW) sch 4 (definition of 'person').
[290] See the discussion at [8.155]–[8.158] of the Consultation Paper.
[291] *Anti-Discrimination Act 1977* (NSW) s 22A; *Sex Discrimination Act 1984* (Cth) s 28A

it is possible the other person will be humiliated by that conduct but thinks the odds are against it and decides to run the risk".[292]

425. Secondly, the Association considers that it would be appropriate for the ADA to specify a non-exhaustive list of circumstances that a court is to have regard to in assessing whether a reasonable person would anticipate the possibility the recipient of the conduct would be offended, humiliated or intimidated. The circumstances to be considered by a court should be consistent with those listed in section 28A(1A) of the SDA, namely:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

(c) any disability of the person harassed;

(d) any other relevant circumstance.

426. As observed by the AHRC in the Respect@Work Report:[293]

> The inclusion…of a non-exhaustive indicative list of circumstances to take into account when a court makes this assessment is intended to ensure that all relevant circumstances are considered when applying the objective element to the context in which the conduct in question occurred… These circumstances may help to explain why an individual victim felt that the conduct was unwelcome and inappropriate.

427. Thirdly, the Association supports defining *"conduct of a sexual nature"* as has been done in the SDA, to clarify that this includes "making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing".[294] This definition has been interpreted broadly by courts, encompassing physical, verbal and written conduct.[295]

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[292] 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) [11.36].

[293] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 455-456.

[294] *Sex Discrimination Act 1984* (Cth) s 28A(2).

[295] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 454.

Question 9.2(1): Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?

428. At present, the ADA does not explicitly outlaw harassment on the basis of sex unless that harassment is sexual in nature. A complainant who is subjected to behaviours that are sexist, rather than sexual, would be required to pursue their claim under the SDA.

429. Section 28AA of the SDA prohibits harassment on the ground of sex where:

(a) a person engages in unwelcome conduct of a demeaning nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

430. This provision was inserted into the SDA in response to the AHRC's Respect@Work Report. The AHRC noted that an allegation of harassment on the grounds of sex, which does not amount to 'conduct of a sexual nature', may nevertheless constitute sex discrimination. However, the AHRC considered that this aspect of the law is not well understood. To provide clarity and certainty to the law, which ultimately supports access to justice, the AHRC recommended that sex-based harassment be expressly prohibited under the SDA.[296]

431. For these reasons, the Association supports expressly prohibiting harassment on the grounds of sex under the ADA. In addition to improving community awareness, introducing a provision to address behaviour that is more sexist than sexual reflects the lived experience of victims of harassment, who often experience workplace sexual harassment in conjunction with other sex-based harassment and discrimination because of broader inequality in the workplace.[297] The prohibition of harassment on the ground of sex under the ADA would allow complainants to pursue claims encompassing a range of behaviours entirely under the ADA, using provisions that appropriately reflect the nature of the alleged conduct.

432. In the interests of simplicity and reducing inconsistency between different jurisdictions, the Association is broadly supportive of amending the ADA in line with section 28AA of the SDA. However, it is not recommended that the ADA adopt the requirement that the conduct be of a "demeaning nature" to constitute harassment on the ground of sex. As the Consultation Paper notes, neither the tests for sexual harassment nor sex discrimination include a requirement that the conduct is demeaning. In the Association's view, this additional requirement is unnecessary and, if included, may limit the effectiveness of any new protection from harassment on the ground of sex under the ADA.

[296] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 458, recommendation 16.
[297] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 264.

Question 9.2(2): Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?

433. The Association supports an amendment to the ADA to prohibit workplace environments that are hostile on the ground of sex, consistent with section 28M of the SDA.

434. Section 28M was inserted into the SDA in order to implement the recommendation of the Respect@Work Report that the Act be amended to introduce an express prohibition on creating or facilitating an intimidating, hostile or offensive workplace environment on the basis of sex.[298] The AHRC observed:[299]

> In certain circumstances, sexual harassment may occur where a work environment or culture is sexually charged or hostile, even if the conduct is not directed at a particular person.
>
> In a sexually hostile workplace, one sex is made to feel uncomfortable or excluded by the workplace environment. Factors that point to a sexually hostile workplace may include the display of obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes.
>
> Conduct that creates an intimidating, hostile, humiliating or offensive environment for a person may also be captured through the existing sex discrimination provisions in the SDA, constituting discrimination on the ground of sex.

435. The AHRC recommended expressly prohibiting work environments that are hostile on the ground of sex to "provide clarity and certainty to the law and assist in setting clear boundaries in the workplace for what is and is not acceptable".[300]

436. The Association suggests that the Commission consider introducing an equivalent prohibition into the ADA. This will serve the symbolic purpose of denouncing such conduct as unacceptable, as well as the practical purpose of offering an avenue for complaint in circumstances where the hostility is pervasive, but without a clear target.

Question 9.3: 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?

437. The Association supports aligning the ADA with the SDA's approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking. This prohibition is appropriately broad, offering more consistent protection than the ADA, which fails, in certain contexts, to protect persons in a position of authority from being sexually harassed by their subordinates.

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[298] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) recommendation 16(c).
[299] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 458-459.
[300] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 460.

438. All workers – regardless of their role – have a right to be free from sexual harassment in the workplace. The International Labour Organisation's Convention (No 190) Concerning the Elimination of Violence and Harassment in the World of Work:[301]

> protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, **and individuals exercising the authority, duties or responsibilities of an employer**. (**emphasis** added)

439. In the Respect@Work Report, the AHRC expressed the view "that every worker, whether paid, unpaid or self-employed, should have access to legal protections from workplace sexual harassment, no matter who sexually harasses them in the course of their work, as well as access to adequate remedies."[302]

440. While a person's lack of authority in relation to their harasser may be considered a factor which aggravates the wrongfulness of the conduct, workplace sexual harassment is never acceptable, regardless of the dynamics of the relationship in which it takes place. This should be reflected in the ADA by prohibiting sexual harassment whenever it occurs in connection with someone's status as a worker or person conducting a business or undertaking.

Question 9.5:

(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?

441. The Association supports consideration of an amendment to the ADA to extend the prohibition against sexual harassment to any area of life, whether public or private.

442. In its recent report: *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, the ALRC recommended that the SDA's prohibition of sexual harassment be expanded to all areas of life.[303] The SDA, like the ADA, only prohibits sexual harassment when it occurs in prescribed areas of activity, which are said to reflect public life. Areas in which sexual harassment is prohibited under both acts include employment and the workplace, employment agencies, educational institutions, the provision of goods, services and

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[301] *International Labour Organization Convention Concerning the Elimination of Violence and Harassment in the World of Work (No. 190)*, adopted 21 June 2019 (entered into force 25 June 2021) art 2.
[302] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 469.
[303] See recommendation 49 of the Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, (Report 143, January 2025) [14.79]–[14.112].

facilities, accommodation, and clubs. However, the ALRC found that the restriction to these areas is not supported by a clear policy basis:[304]

> The objects of the Sex Discrimination Act suggest that a common feature of the listed areas of activity may be that they are somehow 'public' in nature. However, most of the areas of activity have been described as 'quasi-public', and can be difficult to characterise as wholly public. Moreover, there are many areas of public activity that are not included in the list, for example sexual harassment by a stranger in the street. In any event, characterising any particular area of activity as either 'public' or 'private' has become increasingly difficult, and less meaningful, especially as distinctions are blurred by private economies and online interactions.

443. Furthermore, extending the scope of the prohibition on sexual harassment to the private sphere is consistent with international human rights obligations. Article 2 of CEDAW requires state parties to 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. The CEDAW Committee has urged state parties to implement measures to eradicate 'all forms of gender-based violence, whether by public or private act'.[305] The Committee has also observed that women have historically been confined to the private sphere, which has been treated as inferior to the public sphere and regulated accordingly.[306]

444. The Queensland Act prohibits sexual harassment in both public and private life. The Northern Territory also recently introduced an amendment to include a prohibition on sexual harassment in all areas of life.[307] As noted in the Consultation Paper, the Queensland Human Rights Commission's 2022 review of its anti-discrimination legislation found that the current definition of sexual harassment is "effective and operates well".[308] However, it is worth noting that the broader scope of the prohibition against sexual harassment has a modest impact in practice; between 2017 and 2024, only about 6% of sexual harassment complaints handled by the Queensland Human Rights Commission related to 'private' areas of life.[309] Therefore, an equivalent amendment to the ADA would be unlikely to result in a dramatic increase in complaints.

445. For the above reasons, the Association is in favour of increasing the scope of the ADA's protection against sexual harassment to all areas of life. This amendment would be more consistent with Australia's international obligations, remove arbitrary distinctions and reduce complexity in the law.

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[304] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, January 2025) 455.

[305] See *Report of the Committee on the Elimination of Discrimination against Women*, 11th sess, UN Doc A/47/38 (24 June 1992) 4 [24].

[306] See General Recommendation 23 on 'Women in public life' of the *Report of the Committee on the Elimination of Discrimination against Women*, 16th sess and 17th sess, UN Doc A/52/38/Rev.1 (1997) 62–63 [8]–[11].

[307] *Anti-Discrimination Act 1992* (NT) s 22.

[308] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 134.

[309] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, January 2025) 460.

Question 9.6: 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?

446. The Association agrees with the Commission's 1999 recommendation that this anomalous exception should be repealed.[310]

447. While there may be a policy argument in favour of preserving an exception to discrimination for private households (so as to preserve a person's right to choose with whom they live), it is more difficult to justify the ADA's failure to prohibit sexual harassment when it occurs in the course of providing, or offering to provide, accommodation in a private household.[311]

448. People in boarding arrangements are often young, female, international students, or have limited housing options, making them highly vulnerable and in particular need of protection. Removing the barrier to protection from sexual harassment is consistent with Australia's international obligations to eliminate discrimination against women in CEDAW.[312]

449. If the private accommodation exception in section 22G is not repealed, the Association suggests that it should be narrowed to be made consistent with the scope of the exception to discrimination in respect of private households.[313] That is to say that the sexual harassment exception should only apply in private households where the accommodation is for six people or lower and the person providing the accommodation or their near relative, lives there.

Question 9.7: If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

450. The Association is not in a position to offer a settled view on whether or not attribute-based harassment should be introduced into the ADA. On the one hand, no one in the community should be the victim of offensive, intimidating and humiliating treatment on the basis of a protected attribute. However, the Association is not necessarily persuaded that prohibiting attribute-based harassment will lead to safer communities or an improved legislative scheme.

451. If the Commission is minded to recommend such a reform to the ADA, it should consider the following matters:

a) Significant overlap between different prohibitions and offences should be avoided, as much as possible. As the Consultation Paper outlines, much of the conduct contemplated under such an amendment may already be prohibited under unlawful discrimination, vilification, intimidation or workplace bullying. This may create unnecessary duplication, complexity and confusion, particularly for complainants[314], without necessarily capturing a broader range of conduct that is not already covered, and which should otherwise be unlawful. As the Queensland Human Rights Commission explains, "this could result in a complainant arguing three contraventions for the

[310] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.49], rec 91.
[311] *Anti-Discrimination Act 1977* (NSW) s 22G.
[312] See *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) arts 2, 3.
[313] *Anti-Discrimination Act 1977* (NSW) s 20(3), s 34(3), s 38N(3), s 49N(3), s 48(3), s 49ZQ(3), s 49ZYO(3)(a)–(b).
[314] But also, for relevant areas of public life (e.g. workplaces and education) and for courts in interpreting such a provision.

same conduct: sex discrimination, sex-based harassment and sexual harassment".[315] This is more challenging for the complainant, the respondent and, in the case of NSW, ADNSW, and yet does not necessarily lead to better outcomes. The Commission should carefully consider the scope and boundaries of any recommendation for a new prohibition.

b) As the Consultation Paper notes, "prohibiting harassment based on some attributes and not others…may suggest that harassing behaviour is sometimes acceptable".[316] It may also suggest a hierarchy of protected attributes, which is inconsistent with the approach recommended by the Association in this submission. However, there may be some protected attributes where it would be more clearly inappropriate to introduce a new prohibition of this kind. An appropriate balance would need to be struck by the Commission. It should avoid creating a hierarchy of protected attributes, but if all protected attributes were not recommended to be captured by a new prohibition, the Commission should provide clear justifications for why only some attributes should be covered.

c) The Association notes that in Tasmania, which has the broadest prohibition of this kind in the country, there have been a large number of complaints about conduct that offends, humiliates, intimidates, insults or ridicules.[317] It may be useful for the Commission to consult Equal Opportunity Tasmania to gain a greater understanding about the nature of these complaints, the outcomes of these complaints and any issues of duplication or overlap, as discussed at (a) above. This may support the Commission in developing a rationale and evidence base for why harassment should be prohibited in respect of some attributes and not others.

10 – Other unlawful acts and liability

Question 10.1(1): Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?

452. Section 50 of the ADA makes it unlawful for a person to subject another person to any detriment in any circumstances on the ground that they have:

a) brought proceedings under the ADA;

b) given evidence or information in connection with proceedings under the ADA,

c) alleged someone has committed an act which would amount to a contravention of the ADA; or

d) otherwise done anything under or by reference to the ADA.

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[315] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 136.
[316] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Consultation Paper, May 2025) [9.92].
[317] See Equal Opportunity Tasmania, *Annual Report 2023-24* (Report, 30 September 2024) 11 <https://www.antidiscrimination.tas.gov.au/__data/assets/pdf_file/0011/791759/EOT-OADC-Annual-Report-2023-24-FINAL-accessible.pdf>.

453. Section 50 also makes it unlawful to victimise a person who intends to do any of these things, or who is suspected of having done or intending to do any of them.

454. However, in contradiction to most other Australian anti-victimisation laws,[318] the ADA does not make clear whether it is unlawful to threaten victimisation.

455. The Association considers that a threat to subject a person to a detriment is tantamount to victimisation and ought to be explicitly prohibited by the ADA. Furthermore, it is appropriate to align the ADA with equivalent prohibitions under the SDA, which defines an act of victimisation as one where a person "subjects, or threatens to subject", the other person to any detriment.[319]

(2) 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?

456. With respect to acts that are committed for more than one reason, the Association supports extending the operation of section 4A of the ADA, such that a person who subjects another person to a detriment for two or more reasons, one of which amounts to victimisation (whether or not that is the dominant or substantial reason) will be taken to be victimisation.

457. Alternatively, consideration could be given to including a subsection in section 50 similar to section 360 of the FWA, which provides that, "For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason."

Question 10.3: What, if any, concerns or issues are raised by the ADA's approach to the various forms of liability?

458. The Association suggests that the definition of liability under section 106 of the SDA should replace the definition under section 53 of the ADA. Although the provisions are similar, it is desirable to avoid the potential for divergent interpretations by aligning the sections with one another.

459. The Association also notes that the ADA is unclear as to whether more than one entity can be held to be vicariously liable for the same conduct. This issue can arise, for example, when the conduct occurs while employees are seconded to another entity, or when employees hold more than one position (which is prevalent in certain industries such as higher education) and it is difficult to identify in connection to which position the conduct occurred.

460. Case law on this issue is sparse, but there is authority for the proposition that only one entity can be vicariously liable for the conduct.[320]

461. For this reason, the Association also supports amending section 53 of the ADA to make explicit that more than one entity can be held to be vicariously liable for the same conduct.

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[318] See, e.g., *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).
[319] *Sex Discrimination Act 1984* (Cth) s 47A(2).
[320] *Laugher v Pointer* (1826) 5 B & C 547, 558; 108 ER 204, 208; *Esso Petroleum Co Ltd v Hall Ruseel & Co Ltd* [1989] 1 AC 643, 686 as cited in the decision of the Court of Appeal in *Day v Ocean Beach Hotel Shellharbour Pty Ltd and Anor* [2013] NSWCA 250.

Question 10.4: 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?

462. In order for employers and principals to avoid vicarious liability for the acts of an agent or employee, they must either prove that they took all reasonable steps to prevent the agent or employee from breaching the ADA (the "reasonable steps" defence), or that they did not authorise the agent or employee to do the act which breached the ADA (the "unauthorised acts" defence).

463. The "reasonable steps" defence is a relatively narrow one. The employer or principal must establish that they took *all* reasonable steps in the circumstances (as opposed to merely *some* reasonable steps).[321]

464. Whereas the "reasonable steps" defence to vicarious liability can be found in all Australian discrimination laws, the ADA is the only anti-discrimination legislation to include a defence in relation to unauthorised acts. Originally, this was the only defence contained in section 53. However, as noted in the Consultation Paper (at [10.32]), the "reasonable steps" defence was added in 1997 to align with the SDA.

465. The Association considers that the "reasonable steps" exception is sufficient and is consistent with other Australian anti-discrimination legislation. Accordingly, the Association supports the Commission's 1999 recommendation that the "unauthorised act" exception be removed. As the Commission observed, an employer should only be relieved from liability for the discriminatory conduct of their employees if they meet the test in section 53(3) that they "took all reasonable steps" to prevent the discrimination.[322]

Question 10.5: Does the use of AI challenge the ADA's approach to liability? If so, how could the ADA be amended to address this?

466. The Association supports the amendments to the ADA (identified at [10.39]), which would provide that decisions made by a computer program used by an individual or body corporate would be attributed to that individual or body corporate.

467. The use of Artificial Intelligence (**AI**) presents challenges for the ADA's approach to liability:

a) in situations where bias might arise; and

b) by way of the resourcing that would be required to hold makers of both non-government and government decisions deploying AI accountable.[323]

468. As AI learns from human behaviour, it is prone to reproduce human failings. Relevantly, AI presents particular risks to vulnerable people, including but not limited to:

a) algorithmic bias and discrimination, which occurs when automated systems contribute to unjustified differential treatment based on, for example, race, colour, descent or national or ethnic origin, sexual orientation, gender identity, disability or any other classification protected by law;

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[321] *Van Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2)* [2020] 273 FCR 189 [60].
[322] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [6.139], [7.210], rec 100.
[323] Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 53–83.

b) automation bias, which describes people's tendency to "disregard or not search for contradictory information in light of a computer-generated solution that is accepted as correct". This tendency can be exacerbated in time-critical domains;[324] and

c) misinformation and disinformation.

469. The key legal issue for consideration in respect of AI is liability of workplaces and government and non-government entities for discrimination.

470. AI is presently employed for decision-making in a range of contexts including public and private decisions. Although it is likely that neither the applicant nor the employer would be aware, certain AI implemented criteria have the potential to have discriminatory impact. For example, factors such as length of time working, or unbroken work history are likely to discriminatorily affect women and those with caring responsibilities. Decisions made on such bases by a human being are currently likely to be prima facie unlawful, and barriers should not be placed in front of a complainant seeking to challenge the same decision when made by AI.

471. From a principled point of view, the use of AI should not be a barrier to a claim of discrimination if it can be established that there is a discriminatory outcome. Similarly, the type of workplace that has engaged AI in a decision-making process (i.e. whether it is a government or non-government entity), should not be a barrier to a claim of discrimination.

472. The Association submits that individuals, partnerships, corporations, associations or government agencies that have engaged AI in decision making should be liable for any discrimination arising out of the use of AI, as provided for under the existing framework of the ADA. Accordingly, where a respondent in litigated proceedings has relied on AI technology and the AI technology has contributed to a discriminatory outcome,[325] the respondent should not be able to deny liability on the basis that AI technology was used unless they can establish that reasonable steps were taken to avoid discrimination by the AI.

473. The Association further maintains that a respondent against whom discrimination is alleged due to use of AI should be permitted to cross-claim against the provider of the AI technology.

474. Discriminatory decisions made or influenced by AI may be brought within the scope of the ADA by defining AI as a good or service such that providers of AI technology are captured by the relevant provisions.[326]

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[324] Mary Cummings, 'Automation Bias in Intelligent Time Critical Decision Support Systems' (Conference Paper, American Institute of Aeronautics and Astronautics 1st Intelligent Systems Technical Conference, 20–22 September 2004, Chicago, Illinois).

[325] A major challenge for both a complainant alleging discrimination and a respondent to any claim would be discovering the role of AI and establishing whether that is the source of the discrimination. This has been the subject of comprehensive inquiry informing existing and ongoing efforts in capacity building, policy and practice: Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021). Such measures are a necessary priority. In the meantime, the courts may be best placed to determine whether the existing legislation is adequate to prevent discrimination.

[326] *Anti-Discrimination Act 1977* (NSW) ss 19, 33, 38M, 47, 49M, 49ZP, 49ZYN.

475. The Association supports any amendments to the ADA in relation to use of AI in decision making being subject to review to allow monitoring and adjustments for a developing legal and regulatory environment, and ongoing technological advancements.

11 – Promoting substantive equality

Question 11.1:

(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?

476. A statutory duty to provide reasonable adjustments is necessary to give effect to the principle of substantive equality. Without a positive duty, the ADA risks entrenching formal equality that fails to dismantle structural disadvantage. Article 2 of the CRPD defines discrimination to include the denial of reasonable accommodation. As a ratifying State, Australia is obligated to ensure domestic legislation provides for reasonable adjustments for persons with disability.[327] Section 20(1) of the Victorian Act imposes a similar obligation in employment. Other jurisdictions, including the UK (*Equality Act 2010* (UK), sections 20–21), provide for a distinct and enforceable reasonable adjustment duty.

477. The Association considers that the current reliance on indirect discrimination under the ADA is legally insufficient and unduly complex. Consider, for example, the High Court's decision in *Purvis*, discussed above. In that case, the absence of a duty to provide adjustments meant that the question of whether the school could have made reasonable accommodations was not considered by the Court. The outcome in *Purvis* highlights the lacuna in NSW law, where formal equality is preserved at the expense of fair outcomes.

478. Further, in *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128, the Full Court of the Federal Court of Australia interpreted the amended DDA provisions on reasonable adjustments. The Court held that failure to provide reasonable adjustments must still be causally linked to the relevant protected attribute to constitute unlawful discrimination".[328] Insofar as the amendments were intended to obligate a respondent to make reasonable adjustments, the amendments failed.

479. In *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, the Full Court of the Federal Court reinforced that anti-discrimination statutes are remedial in nature and must be interpreted broadly.

480. It must also be acknowledged, however, that the imposition of a positive duty would represent a significant doctrinal and procedural shift from existing discrimination law. Presently, a failure or refusal to make adjustments is typically assessed by reference to when such a refusal occurred, as a question of fact. In *Watts v Australian Postal Corporation* [2014] FCA 370; (2014) 222 FCR 220 at [28]–[34], Katzmann J

[327] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.
[328] *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128 [32]–[44].

emphasised that the timing of a refusal or failure is crucial, and that a respondent's position can evolve over time.[329]

481. The development of a positive duty will require clarity on threshold conditions for its activation—specifically, a statutory awareness criterion. That is, the duty should only arise where the duty-holder knows or ought reasonably to have known of the need for adjustment. A further consideration is whether such a duty would be privately enforceable, and if so, when a cause of action would crystallise.

482. The United Kingdom (**UK**) House of Lords in *Archibald v Fife Council* [2004] UKHL 32 confirmed the breadth of a reasonable adjustment duty. The House of Lords held that a reasonable adjustment included transferring the claimant to a vacant post without competition. Lord Rodger stated at [55] that the duty to adjust goes beyond merely ensuring equal treatment and requires "*the taking of positive steps*."[330] Such decisions demonstrate that a properly formulated duty of reasonable adjustment operates as a substantive right, not a derivative of general anti-discrimination principles.

483. The obligation to provide adjustments should not depend on a formal request from the affected person. Rather, it should arise when the duty-holder knows or ought reasonably to know of the need. As the UK Court of Appeal held in *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 (CA) (***Tarbuck***), and reaffirmed in *Project Management Institute v Latif* [2007] EWCA Civ 36 (***Latif***), the duty may arise in the absence of an express request, provided the employer is aware (or ought reasonably to be aware) of the need.[331]

484. This approach avoids placing the full burden on the affected person, who may not know what accommodations are possible or may fear reprisal. It also ensures that the protective purpose of the law is not thwarted by procedural technicalities.

485. Importantly, the duty to adjust need not be confined strictly to disability, although disability is the paradigm case. Other protected attributes that may warrant adjustments should be included. The Commission's review of the ADA recommended extending a reasonable accommodation obligation not only to disability but also to attributes like pregnancy, breastfeeding and carer's responsibilities (at least in the employment context).[332] These are situations where accommodating a person's circumstances – for example, adjusting duties or hours for a pregnant worker, or providing flexible scheduling for an employee with family caregiving responsibilities – is often essential to prevent indirect discrimination.

486. Accordingly, the Association submits that the ADA should be amended to impose a standalone statutory duty to make reasonable adjustments, in relation to disability, pregnancy, breastfeeding and caring responsibilities. These reforms are necessary to bring the ADA into conformity with international human rights standards, domestic best practices and the requirements of substantive equality.

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[329] *Watts v Australian Postal Corporation* [2014] FCA 370; (2014) 222 FCR 220.

[330] *Archibald v Fife Council* [2004] UKHL 32.

[331] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 2.

[332] See *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 (CA); *Project Management Institute v Latif* [2007] EWCA Civ 36.

Question 11.2(1): Should the ADA generally allow for special measures? Why or why not?

487. The Association supports the introduction of a general exception to allow "special measures" to counteract the disadvantage experienced by underprivileged groups and further their advancement towards the equal enjoyment of human rights and fundamental freedoms.

488. As acknowledged in the Consultation Paper (at [11.35]), the ADA does not contain a general exception for special measures. Instead, it provides for limited "special needs" exceptions and processes for duty holders to seek exemptions or certifications to permit acts which would otherwise contravene the ADA.

489. The "special needs" exceptions apply to anything done to afford certain persons access to facilities, services or opportunities to meet the special needs or to promote equal or improved access to facilities, services and opportunities. However, these exceptions only apply in respect of the protected attributes of race[333] and age.[334] There are no equivalent special needs provisions to promote the rights of people with other attributes.

490. An exemption under section 126 of the ADA may be granted by the President of Anti-Discrimination NSW (**ADNSW**) upon application for activities that facilitate access to jobs, programs, services or facilities for people with protected attributes.[335] An exemption may be subject to conditions,[336] and remains in force for the period specified in the order, which cannot be more than 10 years.[337]

491. Alternatively, a certification under section 126A may be granted by the NSW Attorney General in respect of programs or activities that have the purpose or primary purpose of promoting access to facilities, services or opportunities to meet special needs or the promotion of equal or improved access for members of a group affected by any form of unlawful discrimination.[338] This relates to all grounds of unlawful discrimination except race and age (as these are separately provided for by the general "special needs" exceptions). A certification remains in force for the period specified in the certification, or otherwise, until it is withdrawn.[339]

492. The Association is of the view that the ADA's reliance on exemptions and certifications to permit affirmative action in respect of most protected attributes is unduly onerous, both for duty holders and for ADNSW. Additionally, this approach frames special measures as an "exception" to the application of the ADA's provisions whereas the better view, as acknowledged by the Consultation Paper (at [11.51]), is that special measures are integral to the goal of achieving substantive equality. The Queensland Human Rights Commission observed in its 2022 review of Queensland's Anti-Discrimination Act 1991 observed:

> Cases decided under the special measures provision in the Racial Discrimination Act 1975 (Cth) have determined that special measures are not, properly considered, exceptions to discrimination, but rather 'integral to its meaning'.

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[333] *Anti-Discrimination Act 1977* (NSW) s 21.
[334] *Anti-Discrimination Act 1977* (NSW) s 49ZYR.
[335] *Anti-Discrimination Act 1977* (NSW) s 126.
[336] *Anti-Discrimination Act 1977* (NSW) s 126(2).
[337] *Anti-Discrimination Act 1977* (NSW) s 126(3).
[338] *Anti-Discrimination Act 1977* (NSW) s 126A.
[339] *Anti-Discrimination Act 1977* (NSW) s 126A(4).

> The Australian Capital Territory Law Reform Advisory Council in 2015 recommended that special measures should not be seen as exceptions to discriminatory conduct, but rather as positive measures to promote equality.
>
> ...
>
> Associate Professor Dominique Allen commented that framing welfare and equal opportunity measures as exceptions does not fit with the purpose of the law to 'redress historic inequality'. She noted that the law must be 'positive and proactive' in order to*: …encourage employers and goods and service providers to comply from the outset, rather than once a person has experienced discrimination, and to identify policies and practices that contribute to inequality.*
>
> Affirmative measures are a key mechanism by which organisations can work towards eliminating discrimination to the greatest extent possible. This approach to affirmative measures may also support the transition to a positive duty approach generally. [340]

(2) If so, what criteria for a special measure should the ADA apply?

493. The Association is of the view that the criteria for a special measure under the ADA must reflect the criteria identified in international human rights law.[341] This could be achieved by adopting criteria enacted in the Victorian Act, namely that the special measure is:

a) undertaken in good faith for achieving substantive equality

b) reasonably likely to achieve this purpose

c) a proportionate means of achieving this purpose, and

d) justified because members of the group have a particular need for assistance. [342]

(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?

494. The Association considers that there is merit in retaining exemptions under section 126 of the ADA, even if a general special measures provision is introduced. This is consistent with the approach in Victoria,[343] the Northern Territory,[344] and in the SDA.[345] The availability of exemptions will allow flexibility to permit

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[340] Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991*, (Report, July 2022) 112-113.

[341] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 5(4); *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).

[342] *Equal Opportunity Act 2010* (Vic) s 12.

[343] *Equal Opportunity Act 2010* (Vic) s 89.

[344] *Anti-Discrimination Act 1992* (NT) s 59.

[345] *Sex Discrimination Act 1984* (Cth) s 44.

certain measures in appropriate circumstances which may otherwise fall outside the scope of the special measures provision.

495. However, the Association notes that there is already considerable overlap in the scope and availability of section 126 exemptions and section 126A certifications. If a general exception for special measures is introduced, the latter will be rendered redundant. As observed by the Commission in its 1999 Report:[346]

> [Section 126A] does not provide any additional power to that contained in section 126... The overlap caused by the existence of the two sections, together with the limited scope of section 126A, suggests that the latter section should be repealed, even where there was no specific provision for special measures.

Question 11.3(1): Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

496. The Association's preliminary submission argued that the Commission should consider amendments to the ADA to introduce a positive duty on employers and persons conducting a business or undertaking to eliminate, as far as possible, unlawful conduct.

497. Introducing a positive duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct would constitute a critical structural change to the ADA. The current scheme is in many ways 'reactionary' – in that it relies primarily on complaints and complainants – and places undue pressure on the victims of unlawful conduct to come forward, in order to effect meaningful workplace cultural and behavioural change. This proposed reform would appropriately shift some of that burden – requiring employers, leaders and organisations to take proactive steps to create safer and more respectful workplaces, in which unlawful conduct is prevented before it occurs, or otherwise minimised as much as possible.

498. As the Consultation Paper notes, a number of reviews have made similar arguments in favour of the introduction of positive duties to prevent unlawful conduct.[347] The AHRC's 2023 report, *Free and Equal: Revitalising Australia's Commitment to Human Rights*, provides a compelling case for the need for this structural change in the context of Commonwealth anti-discrimination laws:

> The current model of federal discrimination laws is heavily dependent on individuals bringing forward complaints of discriminatory treatment as the only available method for enforcing the law. We know that many people who have been discriminated against and treated unlawfully will never take such action.
>
> To do so, requires a person to be prepared to relive an incident or pattern of behaviour that may have been deeply hurtful or traumatic for them. It requires them to have enough knowledge of the law, and/or of how to get legal assistance, even to know that their treatment may be unlawful. It involves a

[346] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [6.139], [6.140].

[347] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 2023) vol 4, rec 4.27; Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 82–83, 92, 95; Australian Human Rights Commission, *The National Anti-Racism Framework: A Roadmap to Eliminating Racism in Australia* (2024) rec 10; Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report 143, 2025) rec 53.

significant investment of time and often, money. It also requires them to exercise bravery and, in some instances, to risk experiencing further adverse consequences from stepping forward.

Those most likely to experience discrimination on a regular basis may be less likely to bring individual actions. They are often the least resourced and least supported in our community to do so, and the cumulative impact of their exposure to such treatment on a regular basis may leave them the most disempowered in the community…

…Ensuring that there are remedies for those subject to discrimination is fundamental. It is a key component to meeting obligations to respect, protect and fulfil the right to non-discrimination.

Complaints mechanisms are, therefore, of critical importance, but such mechanisms should not be the first or only mechanism for addressing discrimination, because they are focused on redress rather than prevention.

Positive duties are an emerging feature of discrimination laws in Australia and overseas, reflecting a shift to a preventative focus that is proactive in dealing with discrimination and avoiding harm.

499. The Law Council of Australia's 2019 submission to the National Inquiry into Sexual Harassment in Australian Workplaces, which included contributions from this Association, rejected the suggestion that introducing a positive duty to prevent and eliminate sexual harassment would be too onerous for duty holders. The submission argued that:

> The positive duties suggested here would not significantly increase the burden of the existing responsibilities or proactive duties already faced by employers, agents and other duty holders, but would strengthen them in regard to sexual harassment and provide duty holders with clarification as to best practice.[348]

500. This argument is even more persuasive in 2025. Employers and relevant duty holders have a range of positive obligations, including:

a) proactive duties under occupational health and safety laws,[349]

b) to protect themselves from vicarious liability, a responsibility to take "all reasonable steps" to prevent certain unlawful behaviours by employees or agents,[350] and

c) following the implementation of recommendations of the AHRC's *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report*,[351] a legal obligation to take

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[348] Law Council of Australia, Submission no 249 to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) [167] <https://lawcouncil.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf>.

[349] *Work Health and Safety Act 2011* (NSW) ss 17, 19; *Work Health and Safety Regulation 2017* (NSW) cl 34–35, cl 37–38.

[350] *Sex Discrimination Act 1984* (Cth) s 106(2).

[351] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2022) recs 17, 18.

proactive steps to prevent sexual harassment and related unlawful behaviours from occurring in the workplace, or in connection to work.[352]

501. In the Association's view, a positive duty to prevent unlawful conduct under the ADA would complement and strengthen these existing responsibilities. It is noted that some organisations, when implementing their new obligations in response to the Commonwealth Government's "Respect at Work" reforms, have taken an expansive approach, in which duty holders are required to prevent a broad range of conduct, beyond sexual harassment and related unlawful behaviours.

502. For example, under the *Defence Respect@Work Framework*, relevant leaders and personnel at the Department of Defence and the Australian Defence Force have a responsibility to prevent a broad range of unacceptable behaviour – including harassment, workplace bullying and discrimination.[353] This example provides guidance as to how a new positive duty under the ADA, if appropriately constructed, could co-exist with and build on existing organisational obligations.

503. Further, introducing a positive duty to prevent or eliminate unlawful conduct will ensure that NSW does not continue to fall behind other states and territories, which have already introduced and implemented positive duties since as early as 2010,[354] and ensures that NSW upholds its obligations under international law.[355]

Question 11.3(2)(a): What should duty holders be required to do to comply with the duty?

504. Consistent with the approach of anti-discrimination laws in other Australian jurisdictions, the Association is of the view that duty holders should be required to take "reasonable and proportionate" measures to prevent or eliminate, as far as possible, unlawful conduct.[356] The benefit of this approach, as outlined in the Consultation Paper, is that it allows for an individualised assessment of what might be reasonable and proportionate in the context of a particular organisation or duty holder. Requirements for a large multinational organisation would often be different, appropriately so, than for a sole practitioner.

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[352] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth); *Sex Discrimination Act 1984* (Cth) s 47C(1)–(4).

[353] See Department of Defence (Cth), 'A message from the Secretary of the Department of Defence and the Chief of the Defence Force' (End of year message, 1 February 2024) <https://www.defence.gov.au/about/staff-resources/staff-announcements/respect-work>; See also Australian Human Rights Commission, *Defence Respect@Work Framework* (June 2023) provided by the Department of Defence in response to a Notice to Produce issued by the Royal Commission into Defence and Veteran Suicide, available here <https://defenceveteransuicide.royalcommission.gov.au/system/files/exhibit/Exhibit%2090-06.034%20-%20DEF.1356.0001.0796%20-%20Attachment%20A%20-%20Defence%20Respect%20at%20Work%20Framework.pdf>.

[354] *Equal Opportunity Act 2010* (Vic) s 15; *Anti-Discrimination Act 1992* (NT) s 18B; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1998* (Tas) s 104.

[355] See, e.g., *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 2, which requires state parties 'to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms'.

[356] See *Sex Discrimination Act 1984* (Cth) s 47C(1); *Equal Opportunity Act 2010* (Vic) s 15.

505. The Association recommends that the ADA should include a list of factors that must be considered when determining whether a measure is reasonable and proportionate, consistent with the approaches in the Victorian Act and the SDA.[357] That list of factors should include:

a) the size of the person's business or operations,

b) the nature and circumstances of the person's business or operations,

c) the person's resources,

d) the person's business and operational priorities,

e) the practicability and the cost of the measures, and

f) any other relevant matters.

506. The AHRC recommended "all other relevant factors and circumstances" be included as a mandatory consideration (which was additional to the factors requiring consideration under the Victorian Act), to enable consideration of any "systemic issues within that industry or workplace".[358]

Question 11.3(2)(b): What types of unlawful conduct should the duty cover?

507. In the Association's view, the positive duty should apply to all forms of unlawful conduct prohibited under the ADA – that being discrimination, harassment, vilification, victimisation and any other forms of unlawful conduct that might ultimately be recommended by the Commission's review. There does not appear to be any compelling justification for there being a positive duty to prevent or eliminate some forms of unlawful conduct, but not other forms of unlawful conduct. This was the position adopted by significant reviews undertaken in Queensland and Western Australia.[359]

Question 11.3(2)(c): Who should the duty holders be?

508. For consistency, and for ease of implementation, there is a strong rationale that the duty holders under the ADA should be the same cohort who have an existing positive duty under the SDA. Currently, that is limited to employers or 'a person conducting a business or undertaking' (**PCBU**).[360] A PCBU includes sole traders, not-for-profit organisations that engage and pay staff, government departments and companies.[361]

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[357] *Equal Opportunity Act 2010* (Vic) s 15(3); *Sex Discrimination Act 1984* (Cth) s 47C(6).

[358] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 479.

[359] Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 230; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 241.

[360] *Sex Discrimination Act 1984* (Cth) s 47C(1).

[361] *Sex Discrimination Act 1984* (Cth) s 4; *Work Health and Safety Act 2011* (Cth) s 5.

509. Employers and PCBUs, as defined under the SDA, have been provided with extensive guidance to support them in taking necessary steps to meet their new obligations under the SDA.[362] A further extension of their duties, such that they be required to prevent or eliminate a broader range of unlawful behaviors, while not without its challenges, could build on the work these organisations have already undertaken in response to the reforms to the SDA. The example of Defence institutions, as described above, is illustrative of how, in the context of a large organisation, policies, practices and processes might potentially be constructed to capture a broader range of unlawful behaviour.

510. However, in principle there are also compelling reasons for introducing a positive duty for all duty holders under anti-discrimination law. This would include all organisations, beyond just the workplace, with relevant responsibilities under the ADA – including providers of accommodation, education and goods and services.

511. The AHRC argued for this more expansive approach, stating that "a broader positive duty incorporating all discrimination laws is essential if Australia is to achieve the goal of the elimination of discrimination".[363] According to the AHRC, this approach "would set out a clear expectation that all these responsible organisations will always act in a non-discriminatory manner and pre-emptively consider and address risks of discrimination."[364]

512. The Commission may wish to consider the feasibility of a broader approach in consultation with relevant industries. If minded to recommend a more expansive approach, the Commission should consider how the NSW Government and Anti-Discrimination NSW might be able to assist relevant organisations in building appropriate knowledge and capacity, such that they are able to meet these expanded obligations.

Question 11.3(2)(d): What attributes and areas should the duty apply to?

513. The Association is of the view that the positive duty should apply to all protected attributes. This is consistent with the approach taken in most Australian jurisdictions that have introduced an equivalent positive duty.[365] The analysis of the Queensland Human Rights Commission is particularly instructive on this issue:

> Covering all attributes would prevent forming a 'hierarchy' of attributes, simplify the law, and reduce confusion about the application of the duty…Ensuring all attributes are subject to the same protection

[362] See, e.g., the Australian Human Rights Commission, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (August 2023) <https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf>.
[363] Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 82.
[364] Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 83.
[365] *Equal Opportunity Act 2010* (Vic) s 15(2); *Anti-Discrimination Act 1992* (NT) s 18B(2); *Discrimination Act 1991* (ACT) s 75(2); *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25; Anti-Discrimination Act 1991 (Qld) s 131I (uncommenced).

would better reflect the intersectional nature of discrimination, an aspect of discrimination that is difficult to adequately protect.[366]

514. Similarly, the Association is of the view that the positive duty should apply to all areas of public life in which discrimination or other unlawful conduct is prohibited. This is consistent with the approach recommended by the AHRC, Queensland Human Rights Commission and Law Reform Commission of Western Australia.[367]

C. Conclusion

515. Thank you in advance for considering this correspondence. If you wish to discuss it, or if the Association may be of further assistance, please do not hesitate to contact Sean Robertson, Director, Policy and Law Reform

[366] Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 228.

[367] Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023) 82–83, 95; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) rec 15.2; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) rec 125.