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**ANTI-DISCRIMINATION ACT 1977 (NSW) LAW REFORM**

**SUBMISSION IN RESPONSE TO CONSULTATION PAPER 24 (UNLAWFUL  
CONDUCT)**

**I INTRODUCTION**

- 1 I am a current solicitor in New South Wales, and a former sex worker. I forward this submission as an independent contributor. My submission is informed by my independent legal research, reviewing the submissions forwarded by other contributors, reviewing the perspectives included in the NSWLRC consultation paper on ‘unlawful conduct’ for this review, and my own experience.
- 2 My submission is broadly focused on: (1) Improving the tests for direct and indirect discrimination; (2) Extending the list of protected attributes; (3) Improving protections from all unlawful conduct for all workers; (4) Limiting the exemptions from liability for religious institutions; (5) Improving the test for vilification; (6) Narrowing the protections for religious vilification; and (7) Improving victimisation protections.
- 3 I would like to take the opportunity to express my gratitude to everyone who is contributing to the process of considering and improving critical protections for sex workers and other vulnerable groups in NSW through reforms of the *Anti Discrimination Act 1977* (NSW) (**ADA**). These reforms are long overdue and have been hard fought for. If properly executed, they have the potential to significantly positively influence the life trajectories, outcomes, and social opportunities of many people in our State.

## II RESPONSES TO SELECTED CONSULTATION PAPER QUESTIONS

### *Chapter 3: Tests for Discrimination*

#### **Direct Discrimination**

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

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

4 The test for direct discrimination could be improved by: (1) Replacing the comparator test with an unfavourable treatment test; (2) Eliminating the limb of the test focused on the intention of the alleged discriminator; and (3) Shifting the burden of proof to the Respondent to demonstrate that there was a lawful reason for the unfavourable treatment of a person with one or more protected attributes.

#### *Enacting the “unfavourable treatment” test*

5 The comparator test is outdated and ineffective. It often involves consideration of the treatment of an artificial hypothetical, shifting the focus away from the negative impact of the discrimination on the Applicant. In some cases, there is difficulty in identifying an appropriate comparator.<sup>1</sup>

6 These deficiencies can contribute to unusual technical legal arguments which can undermine the confidence of vulnerable groups in the adequacy and fairness of legal protections. This is because the technical legal arguments are disconnected from the lived experiences of marginalised groups.

7 An “unfavourable treatment” test addresses these deficiencies. It focuses on the effect or consequence of alleged discrimination, which is reflective of how discrimination is experienced by people with protected attribute/s. If enacted with the wording “*because the person has one or more protected attributes*” the test will have the advantage of capturing intersectional discrimination,<sup>2</sup> protecting those most at risk of compounded

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<sup>1</sup> *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, 116 IR 186 [121]–[122]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 [58].

<sup>2</sup> Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.1.2]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 95.

discrimination. The test is simple, facilitating access to justice, including for those people who may not be legally trained or who cannot afford legal representation.

*The intention of discriminator is irrelevant*

- 8 The intention of the discriminator should not be regarded as a relevant component of the test for discrimination.
- 9 This is because excusing inadvertent discrimination is at odds with the long-term objectives of anti-discrimination protections, which seek to promote insight and inclusivity for all members of our society.
- 10 Including intention as a component of the test also diminishes accessibility, as applicants may not have the resources to obtain evidence of the reason for why they were treated less favourably.
- 11 The *ADA* should expressly provide that “*it is not relevant whether the respondent was aware of the discrimination or if they considered the treatment to be unfavourable*”<sup>3</sup> and “*it may still be discrimination if the respondent acted out of unconscious bias, but did not intend to discriminate.*”<sup>4</sup> This would provide greater clarity in the law, promote insight about the importance of the impact of ones actions on others, and deter defences of harmful behaviour focused on the lack of intention or insight of the Respondent. Such an approach is in line with contemporary standards of expected behaviour.

*Burden on the Respondent to prove discrimination not for an unlawful reason*

- 12 Once the Applicant establishes that they have a protected attribute and they were subjected to unfavourable treatment, it is reasonable to shift the burden of proof to the Respondent to establish that the unfavourable treatment was not for a prohibited reason.
- 13 Shifting the burden of proof in this way encourages Respondent’s to internally address and logically convey their reasons for the unfavourable treatment. Where a Respondent fails to do so, a discrimination complaint should succeed. Applicants sometimes do not have the resources to establish causation between their protected attribute/s and the unfavourable treatment that they experienced. An additional hurdle is presented when

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<sup>3</sup> *Equal Opportunity Act 2010* (Vic) s 8(2)(a), s 10.

<sup>4</sup> *Austin Health v Tsikos* [2023] VSCA 82, 324 IR 1 [71], [84] – [85].

the alleged discrimination occurred due to unconscious bias, which, according to this submission, should be unlawful. The shift of the burden serves to address deep rooted discriminatory social attitudes and promote access to justice.

14 This approach is in place in other jurisdictions,<sup>5</sup> and has been recommended in reviews.<sup>6</sup>

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### **Recommendation 1**

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

It is recommended the *ADA* replace the comparator test with an “unfavourable treatment” test, which seeks to test if the unfavourable treatment occurred, or was proposed to occur, “because the person has one or more protected attributes”

### **Recommendation 2**

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

It is recommended the *ADA* read that it is not relevant whether the Respondent was aware of the discrimination or if they considered the treatment to be unfavourable. It may still be discrimination if the respondent acted out of unconscious bias, but did not intend to discriminate.

### **Recommendation 3**

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

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<sup>5</sup> *Anti-Discrimination Act 1991* (Qld) s 204; *Fair Work Act 2009* (Cth) s 361; *Equality Act 2010* (UK) s 13(1), s 136.

<sup>6</sup> Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) [3.4]; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 97; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, “Realising the Human Rights of People with Disability”, 302, rec 4.23.

It is recommended the *ADA* shift the burden of proof onto the Respondent to establish that the proven unfavourable treatment was not for a prohibited reason.

## **Indirect Discrimination**

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

*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?*

*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?*

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

*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?*

15 The test for indirect discrimination could be improved by: (1) Replacing the comparator test with a “disadvantageous outcome” test; (2) Disregarding the “not able to comply” component of the test; (3) Providing guidance on the factors which will inform the determination of whether a requirement, condition, or practice is reasonable or proportionate in all the circumstances; (4) Shifting the burden of proof to the Respondent to establish that a requirement, condition, or practice was reasonable or proportionate; (5) Extending the prohibition on discrimination on the basis of characteristics to indirect discrimination; and (6) Including the word “stereotypical” in the section/s of the *ADA* prohibiting direct and indirect discrimination on the basis of characteristics.

### *Enacting the “disadvantageous outcome” test*

16 Like the current test for direct discrimination, the current test for indirect discrimination is ineffective due to the difficulty in identifying a comparator group. If a comparator group is identified, an Applicant will need access to statistical data which can be

difficult to gather or obtain. Even if the data is gathered or obtained, the data can be complex and difficult to translate. Statistical evidence is permeable to distortion, particularly where comparator groups are small, or where the Respondent is legally trained or well-resourced enough to advance purported analytical arguments which misconstrue the data unfairly. All of these issues limit access to justice for Applicants with limited resources or limited legal or mathematical knowledge.<sup>7</sup>

17 A disadvantageous outcome test could remedy these issues. Under this model, indirect discrimination will be made out where a discriminator is found to have “*imposed a condition or requirement that has, or is likely to have, the effect of disadvantaging someone because they have one or more protected attributes.*” Like the unfavourable treatment test for direct discrimination, the disadvantageous outcome test focuses on the lived experience of the person who has experienced the discrimination. The test is simpler, facilitating access to justice, including for those people who may not be legally trained, who cannot afford legal representation, or who do not have the resources to adequately respond to complex or misconstrued statistical analysis arguments.

18 A form of this test is in place in the ACT.<sup>8</sup> Reviews of discrimination laws in WA and QLD have also recommended the replacement of the disproportionate impact test with the disadvantageous outcome test.<sup>9</sup>

*Removing the “not able to comply” limb of the test*

19 The “not able to comply” component of the test risks decision makers finding that a person could have theoretically complied with the discriminatory requirement, however risky or detrimental the outcome, and therefore, the claim of discrimination is not made out.<sup>10</sup> Finding that a claim is not made out in circumstances where compliance, however

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<sup>7</sup> Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review, Final Report* (2008) [5.28], rec 42; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.2.1]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98.

<sup>8</sup> *Discrimination Act 1991* (ACT) s 8(3)–(4).

<sup>9</sup> Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 101; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 9, [4.1.2.1].

<sup>10</sup> Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98.

burdensome, was available to an Applicant undermines the spirit of discrimination protections which serve to promote active inclusion of all members of our community.

- 20 The inclusion of this component of the test is obsolete,<sup>11</sup> particularly if the “disadvantageous outcome” test replaces the comparator “disproportionate impact” test. It imposes an additional and unnecessary hurdle on Applicants. The component is not part of the test for indirect discrimination in the ACT, Victoria, Tasmania, and some federal discrimination laws.<sup>12</sup>

*The reasonableness standard and the burden of proof*

- 21 Irrespective of whether the test uses the term “reasonable” or “proportionate,” the *ADA* should provide guidance on the factors which will inform the determination of whether a requirement, condition, or practice is reasonable or proportionate in all the circumstances.
- 22 Section 9 of the *Equal Opportunity Act 2010* (VIC)<sup>13</sup> appears to take a sensible approach, listing the nature and extent of the disadvantage experienced by the applicant as a result of the imposed requirement, the proportionality of the requirement comparative to the result sought by the person imposing the requirement, the cost of any alternatives and the financial circumstances of the person imposing the requirement, and the availability of reasonable adjustments as the criteria relevant to determining reasonableness.
- 23 The list is exhaustive, and it is recommended the future NSW list identically be exhaustive to provide predictability as to what will inform decisions assessing reasonableness.
- 24 The burden should be placed on the Respondent to establish that a requirement is proportionate or reasonable. Once an Applicant has established the existence of their protected attribute/s, and the disadvantageous outcome in an applicable setting, it is just

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<sup>11</sup> Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.1.2.3], rec 11; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 98; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 296, 339.

<sup>12</sup> *Discrimination Act 1991* (ACT) s 8(3)–(4); *Equal Opportunity Act 2010* (Vic) s 9(1); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B. But see *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B, amending *Anti-Discrimination Act 1991* (Qld) s 10 (uncommenced).

<sup>13</sup> *Equal Opportunity Act 2010* (Vic) s 9(3).

to place the onus on the Respondent to establish using a set list of criteria the reasonableness or proportionality of the conditions they have imposed.

- 25 Such an approach encourages Respondents to internally address and logically convey their reasons for imposing a particular condition that has had a disadvantageous outcome. Where a Respondent fails to communicate lawful reasons, a discrimination complaint should succeed.

*Enacting indirect discrimination protections on the basis of characteristics, and ensuring discrimination on the basis of stereotypical characteristics is unlawful*

- 26 There appears to be no logical reason for discrimination based on actual, assumed or stereotypical characteristics to be unlawful only when that discrimination is direct. The protection should extend to indirect discrimination so that the *ADA* is uniform and principled.

- 27 It is recommended the wording of the legislation protecting Applicants from both direct and indirect discrimination on the basis of characteristics, use the wording “*actual, assumed or stereotypical characteristics.*” This is because some negative stereotypical assumptions that lead to discrimination against people with protected attributes are not, or should not, fairly be termed to be “assumed characteristics.” Applicants may understandably be apprehensive to advance such an argument, even if it could lead to a successful outcome in their case because doing so would perpetuate the assumptions.

- 28 One example is discrimination against a former sex worker in the hiring process on the basis of a harmful stereotypical assumption that sex workers are associated with the underworld. In fact, many sex workers actively screen and refuse to provide their services to people who they suspect may be affiliated with criminal activity. Some sex workers are never approached by people in the criminal world because they work at an establishment that refuses entry to people affiliated with criminal activity, or because the establishment simply does not attract such a crowd. Forcing a sex worker Applicant to argue that affiliation with the underworld is an “assumed characteristic” associated with sex workers is offensive, harmful and contrary to the sex worker communities collective interests.

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#### **Recommendation 4**

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

It is recommended the *ADA* focus the test for indirect discrimination on whether a requirement or condition disadvantages a person with a protected attribute.

#### **Recommendation 5**

*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?*

It is recommended the *ADA* disregard the “inability to comply” component of the test for indirect discrimination

#### **Recommendation 6**

*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?*

It is recommended the *ADA* provide an exhaustive list of criteria which will inform determination of whether an imposed requirement, condition, or practice is reasonable or proportionate in all the circumstances.

#### **Recommendation 7**

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

It is recommended the *ADA* shift the burden on to the Respondent to a claim of discrimination to establish that an imposed condition or requirement is reasonable or proportionate.

#### **Recommendation 8**

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*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?*

It is recommended the *ADA* protect Applicants from both direct and indirect discrimination on the basis of “*actual, assumed or stereotypical characteristics.*”

## **Overarching Issues**

*Question 3.7 (1) and (2): How should the relationship between different types of discrimination be recognised? Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?*

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

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

29 The *ADA* could be improved by: (1) Softening but not eliminating the distinction between direct and indirect discrimination; (2) Protecting people from intersectional discrimination; and (3) Allowing complaints to be filed for intended future discrimination.

### *Softening but not eliminating the distinction between direct and indirect discrimination*

30 It can be difficult to distinguish between direct and indirect discrimination in certain cases.<sup>14</sup> The wording of the *ADA* should acknowledge that there is some overlap at times. It is recommended the *ADA* eliminate the strict distinction between direct and indirect discrimination.

31 It is not recommended that reference to direct or indirect discrimination be eliminated entirely through the adoption of a single definition at this stage. This is because the concepts of direct and indirect discrimination are well established in discrimination laws across all Australia States and Territories, and at a Federal level. Removing reference to these concepts could in some cases convolute precisely how a claimant

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<sup>14</sup> *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 176–177.

alleges the *ADA* has been breached and could mean well established case law becomes difficult to apply to specific factual scenarios.

- 32 The wording contained in the *Discrimination Act 1991* (ACT) appears to sufficiently address the issue. That wording is “discrimination occurs when a person discriminates either directly or indirectly, *or both*, against someone else.”<sup>15</sup>

*Protecting people from intersectional discrimination*

- 33 It is recommended the *ADA* protect against intersectional discrimination. Many people who are most at risk of discrimination possess more than one protected attribute and experience compounded disadvantage.

- 34 There are multiple options available to protect people from intersectional discrimination and the compounded harm that flows. In essence, the wording of the *ADA* should reference discrimination being unlawful if it is based on “*one or more protected attribute, or one or more characteristics associated with one or more protected attributes, or the combined effect of one or more protected attributes, or characteristics associated with one or more protected attributes.*”

- 35 Reference should also be made to the immateriality of the attribute or characteristic being the “dominant reason” for the discrimination. It should be sufficient to sustain a complaint where the Applicant establishes that one of the reasons for the discrimination was the protected attribute/s or characteristic/s associated with a protected attribute/s.

*Outlawing future discrimination*

- 36 It is recommended the *ADA* outlaw intended future discrimination. Protecting against future discrimination allows an Applicant to make a complaint to prevent discrimination that they are aware is intended. There is no principled reason to hinder a complaint from being made until the Applicant has experienced actual disadvantage. Doing so means that an Applicant may only make a complaint when they have less access to resources and are experiencing actual instability in their circumstances.

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<sup>15</sup> *Discrimination Act 1991* (ACT) s 8(1).

- 37 For example, where an employer appears to have newly gained knowledge of someone’s protected attribute, the Applicant should not be limited to making a complaint only when they are actually terminated from work because of that protected attribute. The option to make a complaint should be available when the Applicant is aware of an intention to terminate or consideration on the part of their employer to terminate the Applicant.
- 38 This reform will address one of the greatest barriers to seeking justice for some of our states most marginalised groups, being the availability of monetary resources to seek legal advice and representation.
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### **Recommendation 9**

*Question 3.7 (1) and (2): How should the relationship between different types of discrimination be recognised? Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?*

It is recommended the *ADA* eliminate the strict distinction between direct and indirect discrimination but retain these terms, and state discrimination occurs when a person “discriminates either directly or indirectly, *or both*, against someone else.”

### **Recommendation 10**

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

It is recommended the *ADA* protect against intersectional discrimination by outlawing direct and indirect discrimination based on “*one or more protected attribute, or one or more characteristics associated with one or more protected attributes, or the combined effect of one or more protected attributes, or characteristics associated with one or more protected attributes.*”

### **Recommendation 11**

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

It is recommended the *ADA* tests for discrimination outlaw intended future discrimination.

#### *Chapter 4: Protected Attributes*

##### **Extending Existing Protections**

*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?*

*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?*

39 The *ADA* could be improved by: (1) Outlawing discrimination on the basis of a persons past or future protected attributes of associated characteristics; and (2) Protecting relatives and associates of people with protected attributes from discrimination.

##### *Outlawing discrimination based on past or future attributes and characteristics*

40 People with protected attributes face discrimination not only based on the attribute/s or associated characteristics that they presently possess but also based on the stigma associated with the knowledge, perceptions or stereotypical assumptions about their past or future. The *ADA* should protect people from discrimination based on attributes or characteristics that a person may have had or assumed to have had in the past, or may have or assumed to have in the future. This would reflect the reality of the way in which discrimination manifests.

##### *Protecting relatives and associates from discrimination*

41 Relatives and associates of people with protected attributes should be protected from discrimination. Amongst other purposes, these protections would serve the important purpose of combating stigma experienced by people within their social circle.

42 Social stigma has insidious consequences. People with protected attributes sometimes struggle to seek assistance after experiencing harm, due to fear of the repercussions for

their family or friends if information about their status as a person with a protected attribute becomes common knowledge.

- 43 For example, in the context of sex workers, sex workers may opt not to report criminal conduct experienced at work out of fear that information about their chosen occupation may spread disadvantaging their partners, parents, children, and friends. Stigmatisation of relatives and associates of sex workers also contributes to the social isolation and ostracization of sex workers impacting our wellbeing and quality of life. Protecting relatives and associates from stigma would facilitate reports to Police about sexual violence.

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### **Recommendation 12**

*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?*

It is recommended the *ADA* make unlawful direct and indirect discrimination based on a protected attribute someone has had in the past, or one they currently have or are presumed to have.

### **Recommendation 13**

*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*

It is recommended the *ADA* include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute

## *Chapter 5: Potential New Protected Attributes*

### **Some Options for New protected Attributes**

*Questions 5.2: Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why? How should each of the new attributes*

*that you have identified above be defined and expressed? If any of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?*

44 The ADA could be improved by adding the following as protected attributes: (1) “sex worker” or a person engaging in “sex work activity”; (2) participation or affiliation with industrial activity, trade union activity, or peer support activity (3) person subjected to or alleging gender based violence; (4) irrelevant criminal record (5) health status or irrelevant medical record; (6) homelessness or accommodation status; (7) employment status (8) social status or origin. At this stage, the *ADA* should not employ a non exhaustive list of protected attributes.

*Sex work activity” and “sex worker”*

45 The addition of a protected attribute expressed in the terms “sex work activity and sex worker” is recommended.

46 “Sex worker” should be defined as “adults who provide, for payment or reward, a service that involve participating in sexual activity with another person or the use or display of their body for the sexual arousal or gratification of another person.”

47 “Sex work activity” should be defined as “the engagement in the provision, for payment or reward, of a service that involves participating in sexual activity with another person or the use or display of their body for the sexual arousal or gratification of another person.”

48 The reasons for the recommended definitions and expressions are as follows.

49 *First*, the proposed definition does not confine the protection to those who engage in “lawful” sex work activity. The exclusion of the term “lawful” removes from statutory interpretation questions about whether an exchange can be regarded as strictly lawful, which in turn provides protection for the most marginalised sex workers. This includes people who, for example, have exchanged sexual services for drugs, or those who were so unfortunate that they entered the sex work industry as children. It would also fail to protect those sex workers who reman criminalised under the *Summary Offences Act*, even though these laws are largely obsolete and unused.

50 If these vulnerable members of our community are not protected from discrimination, we risk inhibiting their ability to re-enter the conventional employment sector, or being able to access stable housing. This in turn forces people to continue engaging in sex work and confines them to operating on the outskirts of mainstream society indefinitely. The exclusion of the term “lawful” further recognises that sex work often occurs opportunistically, as well as by employed and independent sex workers.

51 *Secondly*, the proposed definitions include both the carrying out of an activity as well as someone’s status as a current or former sex worker. Focusing on sex work as an activity is important. In the case of *Doveteen*, when the Queensland definition of sex work was focused on only someone’s status as a sex worker rather than that fact that they did, currently do, or were going to engage in sex work activity, the Queensland Court of Appeal held that a sex worker had not been discriminated against because she had been a sex worker. Rather the discrimination occurred because the discriminator reasonably believed the accommodation was going to be used for sex work activity. The NSW definition should not leave room for such an interpretation by the Tribunals. Doing so inhibits the intended critical protections to be offered to sex workers through these reforms.

52 *Thirdly*, the definition expressly and unambiguously states “sex work”. This is important so that the express mention of sex work in the protected attributes list drives cultural change.

53 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services. There should be no exceptions.

*Participation or affiliation with industrial activity, trade union activity, or peer support activity*

54 A protected attribute expressed as “participation or affiliation with industrial activity, trade union activity, or peer support activity” is recommended.

55 It is important to include informal peer support activity in the wording of the protected attribute. For example, in some industries, although there is no official union or industrial activity, there may be informal peer support networks or organisations. For

example, in the sex work industry, there are peer support organisations such as the Sex Workers Outreach Project (SWOP NSW) that disseminate information about health and safety and otherwise advocate for sex worker protections when opportunities arise.

56 These organisations have staff that are experienced in providing information and strategies that can be of significant value to sex workers including migrant sex workers. For example, a sex worker peer support organisation can be useful to discuss strategies on how to safely refuse service, for example, if a client is refusing to use protection; information on how and where to obtain birth control in Australia; known sex worker friendly sexual health testing clinics, where to report violence experienced at work; referrals to legal centres to discuss possible wage theft and unfair penalties by the sex work business owners.

57 These organisations are not unions. However, sometimes, when a sex worker is known to be affiliated with such an organisation, discloses that they have attended a workshop, or discussed a concern, they may be de-rostered at work by sex worker business owners. This most often happens at sex work business where majority of sex workers are migrants or from a non-English speaking background, but can happen at premises where majority of the workers are Australian born or speak English as a first language.

58 The information provided by sex worker peer support networks is essential for our health, wellbeing, and safety and for the wellbeing of the general public. People should be protected from discrimination on the basis of their affiliation with or participation in peer support activities and organisations.

59 The coverage of this ground realistically needs to apply only to employment.

*Person subjected to or alleging gender-based violence*

60 A protected attribute expressed as “person subjected to or alleging gender-based violence” is recommend.

61 This reform is critical for many people, including many women, who experience discrimination at work when they report gender-based violence experienced at work or in their personal life. In the context of sex work, sex workers may be de rostered if they report or raise a concern about sexual violence or inappropriate conduct by a client of

a sex work business. This is particularly so if the client spends a significant amount of money at the business.

62 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services. There should be no exceptions.

#### *Irrelevant criminal record*

63 The addition of a protected attribute expressed as “irrelevant criminal record” is recommended.

64 People who commit criminal offences do so for complex reasons. Human factors such as necessity arising out of poverty, exposure to violence as a young person, or being a direct victim of violence themselves sometimes contribute to an offender’s commission of an offence. Sometimes people are charged incorrectly, for example, when victims of domestic violence and misidentified as the primary perpetrator of violence.

65 Many people who come into contact with the criminal justice system are committed to rehabilitation, and many often successfully rehabilitate.

66 Discrimination on the basis of someone’s irrelevant criminal record can prevent people from obtaining conventional forms of employment and hinder their efforts to rehabilitate. Discrimination on the basis of an irrelevant criminal record carries the risk of people who would otherwise successfully rehabilitate self identifying as deviants, leading to an increase in deviance or criminal behaviour, known as “labelling theory”.

67 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services.

68 An exception would need to be drafted to this protected attribute, to ensure employers and others could discriminate when the criminal record prevents a person from being able to fulfil the requirements of a role, meeting a key obligation, or posing an unacceptable risk. This exception is already reflected by the use of the term “*irrelevant*” but an express exception should be included in the *ADA*.

#### *Health status or irrelevant medical record*

69 The addition of a protected attribute expressed as “health status or irrelevant medical record” is recommended.

70 People living with HIV, BBV or other infections which attract stigma and which have no bearing on current abilities should be protected from discrimination.

71 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services.

72 An exception to ensure protection for reasonable safety related concerns should exist.

#### Homelessness or accommodation status

73 The addition of a protected attribute in the term “homelessness or accommodation status” is recommended.

74 People experiencing homeless or unstable housing face significant discrimination when seeking to secure housing and employment, which in turn further perpetuates homelessness and entrenches instability.

75 “Accommodation status” should be broadly defined.

76 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services.

77 An exception to allow discrimination when reasonably necessary should be included. However, care should be taken to ensure the exception is not too broad so as to undermine the protection.

#### Employment status

78 The addition of a protected attribute in the term “employment status” is recommended.

79 This is to protect people from discrimination on the basis of engagement in gig economy work, part time work, contract work, remote work, temporary work, unemployment, or receipt of social security benefits. People with non traditional work arrangements often face barriers to securing housing or other services, leading to instability and exception from full social participation.

- 80 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services.
- 81 An exception would need to be drafted, but it will need to be focused on the employment status directly impacting on the persons ability to fulfill particular key obligations so as not to undermine the protection offered.

*Social origin or status*

- 82 The addition of a protected attribute in the term “social origin or status” is recommended.
- 83 The coverage of this ground should apply to all areas of public life, including employment, education, accommodation and the provision of goods and services.

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**Recommendations 14 - 21**

*Questions 5.2: Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why? How should each of the new attributes that you have identified above be defined and expressed? If any of new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?*

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**Recommendation 14**

The addition of a protected attribute expressed in the term “sex work activity and sex worker” is recommended, extending to all areas of public life with no exceptions.

**Recommendation 15**

The addition of a protected attribute in the term “participation or affiliation with industrial activity, trade union activity, or peer support activity” is recommended, extending to the area of work, with no exceptions.

**Recommendation 16**

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The addition of a protected attribute expressed in the term “person subjected to or alleging gender-based violence” is recommended, extending to all areas of public life, with no exceptions.

### **Recommendation 17**

The addition of a protected attribute in the term “irrelevant criminal record” is recommended, extending to all areas of public life, with an exception allowing employers and others to discriminate when the criminal record prevents a person from being able to fulfil the requirements of a role, fulfilling a key obligation, or posing an unacceptable risk.

### **Recommendation 18**

The addition of a protected attribute in the term “health status or irrelevant medical record” is recommended, extending to all areas of public life, with an exception to ensure protection for reasonable safety related concerns.

### **Recommendation 19**

The addition of a protected attribute in the term “homelessness or accommodation status” is recommended, extending to all areas of public life, with a narrow exception to allow discrimination when reasonably necessary.

### **Recommendation 20**

The addition of a protected attribute in the term “employment status” is recommended. Extending to all areas of public life, with a narrow exception allowing discrimination if the employment status directly impacting on the person’s ability to fulfill particular key obligations.

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## Recommendation 21

The addition of a protected attribute in the term “social origin or status” is recommended, extending to all areas of public life

### *Chapter 6: Areas of Public Life*

#### **Issues Relating to Coverage**

*Questions 6.1 (1) and (2): Should the definition of employment include voluntary workers? Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment?*

84 The ADA could be improved by: (1) Ensuing voluntary workers are protected from discrimination by including them in the definition of “employment”; (2) Shifting the focus away from the relationship between the Applicant and Respondent when determining claims of discrimination.

#### *Protecting volunteer workers from discrimination at work*

85 Volunteers and interns are an important part of the workforce, contributing meaningfully to many workplaces. Volunteers and interns are often young people, and unpaid roles serve as an opportunity to enter a sector. Allowing discrimination to perpetrate at this early stage allows for social inequality to perpetuate into the long term futures of people with protected attributes. For example, if a young person with a protected attribute is discriminated against when applying for a volunteer role, that person will have greater difficulty entering the sector, and accumulating relevant work experience to secure paid employment.

86 There is no principled reason to exclude volunteer workers and interns from protection from discrimination. All workers are entitled to equal opportunity and inclusion at work, irrespective of whether they are paid.

#### *Shifting the focus away from the relationship between the Applicant and Respondent and precise place of work in all ADA complaints alleging a breach at work*

- 87 Determinations of complaints alleging a breach of the *ADA* at work should not be focused on the particulars of the relationship between the Applicant and the Respondent or on the precise place where harassment occurred. This should be the case for all allegations of discrimination, harassment, and vilification at work.
- 88 The focus on the particulars of the relationship and the place of work is outdated due to the advancement of technology. Focusing on these issues is not reflective of an understanding of the widespread nature of how technology is utilised for communication between a wide range of workers with varying work arrangements, who often interact using their own mobile devices, on social media and in social settings. These issues are immaterial to the evaluation of the conduct and its effect on the Applicant.
- 89 Where a personal mobile or computer device is used for communication between two people who know each other through work, and that communication contains evidence of discrimination, harassment or vilification of an Applicant at work, the focus should not be on the relationship between the Applicant and Respondent.
- 90 Similarly, the Applicant should not be required to demonstrate the online or electronic space was a “place of work.” Often this will not be a difficult hurdle to overcome, for example, where the online space also contains discussion about work, or where there was no work device provided by the employer so that it can be assumed that all work related communication occurred through personal devices. However, the hurdle is unnecessary and outdated. Shifting the focus away from this issue is particularly important to adequately protect interns and volunteers, who may be required to use a personal device, phone or email address for the short period of time that they are working for an employer.
- 91 Wording identical to that of *Sex Discrimination Act 1984* (Cth) which prohibits harassment “by any person if it is in connection with either the complainant’s or respondent’s status at work”<sup>16</sup> appears sensible. The clause should state “harassment, vilification, and discrimination by any person if it is in connection with either the complainant’s or respondent’s status at work.”

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<sup>16</sup>*Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).

- 92 Discrimination should also be made out when a customer, patient or visitor to a business discriminates against staff.
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### **Recommendation 22**

*Questions 6.1 (1): Should the definition of employment include voluntary workers?*

It is recommended volunteers and interns are protected from discrimination by including them in the definition of “employment” in the ADA

### **Recommendation 23**

*Questions 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?*

It is recommended the ADA shift the focus away from the relationship between the Applicant and Respondent when determining claims of discrimination, and all other allegations of a breach of the ADA at work, like the way the Sex Discrimination Act 1984 (Cth) approaches sexual harassment.

## *Chapter 7: Wider Exceptions*

### **Other Acts or Practices of Religious Bodies**

*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?*

- 93 The ADA could be improved by limiting the exceptions to liability for religious institutions.

#### *Limiting the exceptions to liability for religious institutions*

- 94 The exceptions to liability available to religious institutions in the ADA should be available only in response to claims of discrimination, and the exemptions should not be available for discrimination against all protected attributes.

- 95 It is never acceptable to harass, vilify, or victimise because of their protected attribute/s or connected characteristics. This conduct cannot be justified under international

human rights law.<sup>17</sup> Freedom of religion or belief should never be used to justify ends that are inconsistent with any human rights instruments.<sup>18</sup>

96 Prohibitions on harassment, vilification and victimisation do not unduly prevent individuals from expressing their religious views and opinions. Individuals can internally believe and even strongly express their religious views without their expression amounting to breaches of the *ADA*.<sup>19</sup>

97 While freedom of religion and internal belief should usually be legally protected, as a peripheral point, these beliefs should always be open to respectful debate so that problematic or inconsistent beliefs can be respectfully challenged before they result in radicalisation or spill into actions that express undue judgement of others or result in harm to others. Allowing internal beliefs to manifest in such a way where it limits another society members right to equal participation in society or otherwise results in harm, exemption, ridicule or the perpetuation of contempt of others, should never be endorsed by the State.

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### **Recommendation 24**

*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?*

The exceptions to liability available to religious institutions in the *ADA* should be available only in response to claims of discrimination, and the exemptions should not be available for discrimination against all protected attributes.

### *Chapter 8: Civil Protections Against Vilification*

#### **The Protected Attributes: Civil Vilification**

*Question 8.1(1) and (2): What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification? (2) Should the ADA protect*

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<sup>17</sup> OHCHR and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (2023) 53.

<sup>18</sup> A Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief: Gender-Based Violence and Discrimination in the Name of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) [60].

<sup>19</sup> Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 231.

*against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?*

- 98 The *ADA* could be improved by extending vilification protections to cover all protected attributes, including all new protected attributes; (2) Expressly stating that it irrelevant whether the person engaging in the conduct was incorrect about a protected attribute or associated characteristic; (3) Protecting against vilification based on having an association, real or perceived, with a targeted group; and (4) Prohibiting vilification based on more than one attribute.
- 99 The vilification (and harassment) protections in the *ADA* should be consistent with discrimination protections and include all the new protected attributes recommended above.
- 100 It should be irrelevant whether the person engaging in the conduct was incorrect about a protected attribute or associated characteristic of the other person or group, or whether the other person or group had a particular protected attribute.<sup>20</sup>
- 101 The *ADA* should protect against vilification based on having an association, real or perceived, with a targeted group.
- 102 The *ADA* should prohibit vilification based on more than one attribute. Prohibiting vilification that occurs because of more than one attribute might recognise that people with multiple protected attributes can experience vilification in unique and intersectional ways and experience compounded harm and exclusion.
- 103 Although not the focus of the consultation paper, if it can be passed during these reforms, vilification for of sex workers should be outlawed criminally under s 93Z(1) of the *Crimes Act 1900* (NSW).

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## **Recommendations 25 – 28**

*Question 8.1(1) and (2): What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification? (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?*

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<sup>20</sup> *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102F (uncommenced).

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### **Recommendation 25**

The vilification (and harassment) protections in the *ADA* should extend to all the protected attributes in the *ADA*, including the new protected attributes recommended above.

### **Recommendation 26**

It should be irrelevant whether the person engaging in the conduct was incorrect about a protected attribute or associated characteristic of the other person or group, or whether the other person or group had a particular protected attribute

### **Recommendation 27**

Vilification based on having an association, real or perceived, with a targeted group should be unlawful under the *ADA*.

### **Recommendation 28**

The *ADA* should prohibit vilification based on more than one attribute.

### **Recommendation 29**

Vilification for of sex workers should be outlawed criminally under s 93Z(1) of the *Crimes Act 1900* (NSW).

### **The Test for Vilification**

*Question 8.2 (1) and (2): Should NSW adopt a “harm-based” test for civil vilification? If so, should this replace or supplement the existing “incitement-based” test? What, if any, other changes should be made to the incitement-based test for civil vilification?*

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

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

*Adopting a harm based test for civil vilification, and other changes to the test*

- 104 The ADA could be improved by: (1) Adopting a harm based test to replace the incitement based test for vilification; (2) providing that the protected attribute/s or associated characteristics need not be the dominant or substantial reason for the conduct; (3) Providing that the motive for engaging in any such conduct is irrelevant to the determination of the complaint; (4) broadening the definition of “public act.” (5) limiting the exemptions to liability for vilification.
- 105 NSW should adopt a harm-based test for vilification to replace the incitement-based test.
- 106 This is because the harm-based test better reflect how people with protected attributes understand and experience vilification.<sup>21</sup> The test should provide that the protected attribute/s or associated characteristics need not be the dominant or substantial reason for the conduct,<sup>22</sup> and provide that the motive for engaging in any such conduct is irrelevant to the determination of the complaint.<sup>23</sup>

*Expanding the definition of “public act”*

- 107 The definition of “public act” should include communicating through social media and other electronic means, graffiti, and acts that occur on private land. This would facilitate further alignment between the civil and criminal vilification regimes in NSW.<sup>24</sup> It would address the situation that the definition in the criminal legislation is expressed in wider terms than in the civil legislation.

*Exemptions from liability for vilification complaints*

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<sup>21</sup> Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 9, 119.

<sup>22</sup> *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102D(3) (uncommenced).

<sup>23</sup> *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102E(3) (uncommenced).

<sup>24</sup> *Crimes Act 1900* (NSW) s 93Z(5).

- 108 The exception to vilification to allow for fair reporting of an act of vilification should continue to apply to allow the media to report freely, provided the reporting is fair and factual.<sup>25</sup>
- 109 The absolute privilege exception should be removed. It is unclear why a person should be permitted to express their opinion in a manner which amounts to civil vilification during proceedings of a parliamentary body, during court or tribunal proceedings or to a Police officer. Strong views can be expressed in all of these domains respectfully, supported by evidence of a particular claim, without amounting to vilification.
- 110 It is unclear why any respectful debate would require inciting serious contempt. While the public interest exemption from liability for vilification should remain, it should be narrowed appropriately.
- 111 The *ADA* should not contain any exemption to liability from vilification for religious purposes. The vilification protections in the ACT, the NT, and the *Racial Discrimination Act* do not provide exceptions for religious purposes.<sup>26</sup>
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### **Recommendation 26 – 28**

*Question 8.2 (1) and (2): Should NSW adopt a “harm-based” test for civil vilification? If so, should this replace or supplement the existing “incitement-based” test? What, if any, other changes should be made to the incitement-based test for civil vilification?*

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### **Recommendation 26**

The ADA should adopt a harm based test for vilification to replace the incitement based test.

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### **Recommendation 27**

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<sup>25</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [7.132]–[7.133].

<sup>26</sup> *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) (uncommenced).

The *ADA* should provide that the protected attribute/s or associated characteristics need not be the dominant or substantial reason for the conduct

### **Recommendation 28**

The *ADA* should provide that the motive for engaging in any such conduct is irrelevant to the determination of the complaint.

### **Recommendation 29**

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

The definition of “public act” should include communicating through social media and other electronic means, graffiti, and acts that occur on private land.

### **Recommendation 30**

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

The *ADA* should limit the exemptions from liability for vilification.

## **Religious Vilification Protections**

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

112 The *ADA* in its current form goes beyond protecting against vilification based on “lawful” and specific religious belief or affiliation.<sup>27</sup> The *ADA* could also be used to silence criticism of those beliefs and views themselves.<sup>28</sup>

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<sup>27</sup> Public Interest Advocacy Centre, *Submission SV10*, 3; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 8; Legal Aid NSW, *Preliminary Submission PAD87*, 30.

<sup>28</sup> NSW Council for Civil Liberties, *Preliminary Submission PAD21* [71]; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 8.

113 The *ADA* should adopt the definition of religious belief and affiliation in s 93Z of the *Crimes Act* to address this issue.<sup>29</sup> The *ADA* should expressly state that the protections are not intended to “protect religion or religious beliefs themselves, and they are not intended to be used to silence criticism or debate,”<sup>30</sup> so as to ensure vilification complaints made by religious organisations against individuals are not used to silence public debate and undermine democratic engagement and institutional accountability.<sup>31</sup> the *ADA* should expressly state the protection against religious vilification only applies to “natural persons”.<sup>32</sup>

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### **Recommendations 31 - 33**

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

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#### **Recommendation 31**

The *ADA* should adopt the definition of “religious belief and affiliation?” in s 93Z of the *Crimes Act 1900 (NSW)*.

#### **Recommendation 32**

The *ADA* should expressly state that the protections are not intended to “protect religion or religious beliefs themselves, and they are not intended to be used to silence criticism or debate,”<sup>33</sup> so as to ensure vilification complaints made by religious organisations against individuals are not used to silence public debate and undermine democratic engagement and institutional accountability.

#### **Recommendation 33**

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<sup>29</sup> Public Interest Advocacy Centre, *Submission SV10*, 4; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 11.

<sup>30</sup> NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 28 June 2023, 4.

<sup>31</sup> NSW Council for Civil Liberties, *Preliminary Submission PAD21* [74].

<sup>32</sup> Public Interest Advocacy Centre, *Submission SV10*, 13–14; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [74]–[75].

<sup>33</sup> NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 28 June 2023, 4.

The ADA should expressly state the protection against religious vilification only applies to “natural persons.”

## Chapter 9: Harassment

*Question 9.1 (1), (2), and (3): Should the reasonable person test be expanded to include the “possibility” of offence, intimidation or humiliation? Why or why not? 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? Does the ADA need to define “conduct of a sexual nature”? Why or why not?*

*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?*

*Question 9.7: If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?*

### Improving the test for sexual harassment

- 114 The test for harassment should be expanded to include conduct which raises the “possibility” of offence, intimidation or humiliation. The current test allows a person to “run the risk” of causing offence, humiliation or intimidation.<sup>34</sup>
- 115 The test should expressly allow for consideration of an individual’s attributes, or the relationship between the parties, and any other relevant circumstance in determining whether a reasonable person would anticipate the possibility of offence, humiliation, or intimidation as a result of the conduct.<sup>35</sup> This is because inequalities that arise from an individual’s characteristics can influence their risk of sexual harassment, and how they experience and respond to it.<sup>36</sup>

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<sup>34</sup> Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) [11.36], rec 15.

<sup>35</sup> *Sex Discrimination Act 1984* (Cth) s 28A(1A).

<sup>36</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 359.

116 There is no need to define the term “conduct of a sexual nature”. The NSW Court of Appeal has found that it is a broad term, and it should not be interpreted in a limited way.<sup>37</sup> Defining the term could have the effect of narrowing the current interpretation.

*Shifting the focus away from the terms “workplace participant” and “workplace”*

117 The definition of “workplace participant”<sup>38</sup> in the *ADA* is broad, however the component of the test addressing the relationship between the parties could be refocused to better reflect the many types of relationships and work arrangements in the modern workforce. The definition could also be broadened to expressly cover more types of workers.

118 The *ADA* defines “workplace” as a place where “workplace participants” work or attend “in connection” with being workplace participants.<sup>39</sup> While the *ADA* has found to outlaw harassment at accommodation provided by an employer, modes of transportation to attend work events and places where there are social gatherings of work colleagues,<sup>40</sup> there are still limitations. For example, due to the advancement of technology, and the countless avenues of communication available to a person both during work hours and outside of work hours sexual harassment can occur online. Sexual harassment should be expressly unlawful even if a worker uses a personal device to sexually harass another worker. Similarly, sexual harassment at social gatherings or one on one meetings outside of work between workers should be unlawful.

119 To remedy these limitations the *ADA* could adopt the *Sex Discrimination Act* approach, prohibiting sexual harassment in connection with a person’s status as a “worker” or “person conducting a business or undertaking”.<sup>41</sup> This would mean more types of workers would be covered by the prohibition on sexual harassment, all types of workers would be treated the same, with no differences in requirement for where the sexual harassment took place, and sexual harassment done by any person, not just an employer

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<sup>37</sup> *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [97].

<sup>38</sup> *Anti-Discrimination Act 1977* (NSW) s 22B(6).

<sup>39</sup> *Anti-Discrimination Act 1977* (NSW) s 22B(9) definition of “workplace”.

<sup>40</sup> *Ewin v Vergara (No 3)* [2013] FCA 1311; *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130, 144 FCR 402. These cases discuss the definition of “workplace” in the *Sex Discrimination Act*, which was the same as the *ADA* definition at the time.

<sup>41</sup> *Sex Discrimination Act 1984* (Cth) s 28B(3)–(8).

or co-worker, would be prohibited, if done in connection with someone’s status as either a worker or a person conducting a business or undertaking.

*Attribute based harassment*

120 The *ADA* should prohibit harassment of people based on all protected attributes. The protection should be offered in all areas of public life. Attribute-based harassment is prohibited elsewhere, including in Tasmania, the NT, WA and in some federal discrimination laws.<sup>42</sup> Expressly prohibiting attribute-based harassment may better reflect the reality of people’s experiences of harassment.<sup>43</sup>

121 There should not be a need to establish a disadvantage to make out a harassment claim.

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**Recommendation 34 – 36**

*Question 9.1 (1), (2), and (3): Should the reasonable person test be expanded to include the “possibility” of offence, intimidation or humiliation? Why or why not? 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? Does the ADA need to define “conduct of a sexual nature”? Why or why not?*

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**Recommendation 34**

The test for harassment should be expanded to include conduct which raises the “possibility” of offence, intimidation or humiliation.

**Recommendation 35**

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<sup>42</sup> *Anti-Discrimination Act 1998* (Tas) s 17(1); *Anti-Discrimination Act 1992* (NT) s 20(1)(b); *Racial Discrimination Act 1975* (Cth) s 18C; *Disability Discrimination Act 1992* (Cth) s 35, s 37, s 39; *Equal Opportunity Act 1984* (WA) s 49A(3), s 49B(2), s 49C(2).

<sup>43</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 463.

The test should expressly allow for 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.

### **Recommendation 36**

There is no need to define the term “conduct of a sexual nature.”

### **Recommendation 37**

*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?*

The ADA should prohibit sexual harassment in connection with someone’s status as a worker or person conducting a business undertaking to cover more types of workers, shift the focus of the test away from the nature of the relationship and remove the focus of the test from where the harassment occurred.

### **Recommendation 38**

*Question 9.7: If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?*

The ADA should prohibit harassment of people based on all protected attributes.

## *Chapter 10: Other Unlawful Acts and Liability*

### **Victimisation**

*Question 10.1(1) and (2): Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not? 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?*

- 122 The prohibition on victimisation should expressly extend to situations where a person threatens to victimise someone. Similar to discrimination, requiring someone alleging victimisation to prove that a detriment has already occurred perpetuates disadvantage. Most other Australian anti-victimisation laws expressly cover threats to victimise someone.<sup>44</sup> The NSW Law Reform Commission (NSWLRC) has in the past recommended that the *ADA* expressly cover a situation where the respondent threatens to victimise someone.<sup>45</sup>
- 123 The *ADA* should expressly state victimisation is unlawful even if it was done for two or more reasons with one of the reasons related to the *ADA*, including taking action or alleging a breach of the *ADA*. The *ADA* related reason need not be the dominant reason for the victimisation.

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### Recommendations 39 - 40

*Question 10.1(1) and (2): Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not? 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?*

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### Recommendation 39

The prohibition on victimisation should expressly extend to situations where a person threatens to victimise someone

### Recommendation 40

The *ADA* should expressly state victimisation is unlawful even if it was done for two or more reasons with one of the reasons related to the *ADA*, including taking action or alleging a breach of the *ADA*.

Yours sincerely,

Hana Seraphim

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<sup>44</sup> *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).

<sup>45</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 98, [7.154].