Justice and Equity Centre

Submission to NSW Law Reform Commission Review of Anti-Discrimination Act 1977: First Consultation Paper

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Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au

About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions.We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQA+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

Contact

Emma Bastable
The Justice and Equity Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6514
E: ebastable@jec.org.au

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Introduction

The Justice and Equity Centre welcomes this comprehensive review of the *Anti-Discrimination Act 1977* (NSW) ('ADA'). The ADA is long overdue for modernisation, having long since become the 'laggard' amongst Australia's anti-discrimination laws and no longer fit for purpose.[1]

In answering the questions set out in the first Consultation Paper, we have applied the following principles:

- Protections under the ADA should be broad, reflecting the beneficial purpose of the Act, namely to help people in NSW live free from discrimination.
- Exceptions for acts of discrimination that would otherwise be prohibited should be necessary and proportionate to achieving a legitimate purpose.
- The law should be clear and easy to understand and apply: this includes by reflecting the lived reality of discrimination, vilification, victimisation and harassment in all its forms. The people of NSW deserve a law that is best practice – the aim should be not just to bring the ADA up to a minimum standard already enjoyed in other Australian jurisdictions, but to restore NSW to its position as a leader in protecting the rights of people to live free from discrimination. While we recognise the value of consistency across jurisdictions, there is also a role for innovation to promote the progressive realisation of human rights.

While we recognise the nature of a review of the ADA necessarily involves engaging closely with its existing terms, we urge the Commission to use this opportunity to avoid the complexity and idiosyncrasy of the current ADA which significantly undermines its effectiveness.

2. Tests for discrimination

Question 3.1: Direct discrimination

The test for direct discrimination should be improved and simplified.

The current test is unclear, outdated, and relies heavily on a problematic hypothetical comparator, which is open to misapplication to the detriment of people experiencing mistreatment. This undermines the effectiveness of the protections offered by the ADA.

We propose the more modern and simplified approach contained in the *Discrimination Act 1991* (ACT) which 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'.[2]

Taking this approach r*emoves the need for a comparator, focusing instead on whether someone is treated unfavourably because of a protected attribute*. This model would make the law more

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1 See Public Interest Advocacy Centre 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act' (2021) https://jec.org.au/resources/leader-to-laggard-the-case-for-modernising-the-nsw-antidiscrimination-act/.

2 *Discrimination Act 1991* (ACT), s 8(1).

accessible, inclusive, and reflective of how discrimination is experienced in reality – especially where multiple protected attributes are involved.

The ADA should also make clear that the motive and intention of a respondent is not relevant. We support an amendment based on the Victorian *Equal Opportunity Act* which explicitly provides that in determining whether a person directly discriminates it is irrelevant whether the person is aware of the discrimination or considers the treatment to be unfavourable,[3] as is a person's motive.[4]

Question 3.2: The comparative disproportionate impact test

The comparative disproportionate impact test for indirect discrimination is overly complex and outdated, and should be replaced.

The test currently requires demonstrating that a substantially higher proportion of people without the protected attribute can comply with a condition, and that the condition is unreasonable in the circumstances.[5] This imposes a burdensome evidentiary requirement and may require hypothetical comparisons that are difficult to prove and often unclear in practice.

The better approach is that under the *Discrimination Act 1991* (ACT), which modernises and simplifies the test. Under this model, indirect discrimination occurs where a person imposes a condition or requirement that has, or is likely to have, the effect of disadvantaging someone because they have a protected attribute.[6]

This focuses the inquiry on the real-world impact of the condition or requirement.

Question 3.3: Indirect discrimination and inability to comply

The 'not able to comply' element of the test for indirect discrimination should also be removed to simplify the law, reduce evidentiary barriers, and ensure the test reflects real-world disadvantages experienced by affected groups.

Requiring a complainant to demonstrate they are not able to comply with a requirement or condition places an additional burden on complainants and detracts from what should be the central issue: whether the condition disadvantages people with a protected attribute.

The approach in the *Discrimination Act 1991* (ACT) offers a clearer and fairer standard by focusing on whether the condition has, or is likely to have, the effect of disadvantaging someone because of one or more protected attributes.[7] This shift better captures the impact of indirect discrimination and aligns with contemporary understandings of equality and structural barriers.

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3 *Equal Opportunity Act 2010* (Vic) s 8(2)(a).
4 *Equal Opportunity Act 2010* (Vic) s 10.
5 *Anti-Discrimination Act 1977* (NSW) s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b).
6 *Discrimination Act 1991* (ACT) s 8(3)–(4).
7 *Discrimination Act 1991* (ACT) s 8(3)–(5), see also *Equal Opportunity Act 2010* (Vic) s 9.

Question 3.4: Indirect discrimination and the reasonableness standard

We support replacing the test of reasonableness with one of proportionality for the reasons given by the Australian Human Rights Commission – namely that it would support 'more rigour and specificity' than the more general and deferential reasonableness test.

We suggest that concerns around the application and understanding of a 'legitimate and proportionate' test could be addressed by listing factors relevant to determining legitimacy and proportionality of a condition, requirement or practice. This may include the extent of the disadvantage created, the costs of remedying that disadvantage and the availability of less restrictive means of achieving any legitimate aim that is the basis for the condition, requirement or practice.

In the alternative, if the test of reasonableness is to be retained, the ADA should provide guidance as to relevant factors to be considered, including considerations of proportionality, similar to the Victorian approach.[8] This would provide greater clarity and consistency, helping both complainants and respondents understand how the law is likely to be applied.

Question 3.5: Indirect discrimination based on a characteristic

The prohibition on indirect discrimination should be extended to characteristics that people with protected attributes either generally have or are assumed to have.

This would better reflect how discrimination often operates in practice. People are frequently disadvantaged not just because of a protected attribute itself, but because of traits or circumstances commonly associated with that attribute, or stereotypes and assumptions about people with the attribute.

We support the approach taken in under the *Discrimination Act 1991* (ACT), which includes characteristics and presumed characteristics in the definition of protected attributes, thereby extending the prohibition on indirect discrimination.[9]

Question 3.6: The burden of proof

The ADA should require complainants and respondents to prove certain aspects of both the direct and indirect discrimination tests, in line with a shifting burden of proof model.

For direct discrimination, once a complainant has established that they were treated unfavourably and that they possess a protected attribute or attributes, the burden should shift to the respondent to demonstrate that the treatment was not because of that attribute or attributes. This would address a significant barrier in the current framework, which requires complainants to prove the reason for the treatment – something that is often difficult or impossible to assess, particularly where the discrimination may be due to the respondent's unconscious bias.[10]

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8 *Equal Opportunity Act 2010* (Vic) s 9(3).

9 *Discrimination Act 1991* (ACT) s 7(2)(a)–(b).

10 See, eg, *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', 301–302, rec 4.23.

For indirect discrimination, once a complainant shows that a condition or requirement has, or is likely to have, the effect of disadvantaging people with a protected attribute or attributes, the burden should shift to the respondent to prove that the requirement is legitimate and proportionate (or reasonable) in the circumstances. This reflects respondent's often greater capacity and resources to explain and justify the purpose of the policy or practice, and any efforts made to mitigate its impact.[11]

Reforming the burden of proof in this way would help address the imbalance of power and resources between complainants and respondents, improve access to justice, and bring the ADA in line with best practice models, such as those recently enacted in Queensland, the Exposure Draft of the *Human Rights and Anti-Discrimination* ('**HRAD'**) *Bill 2012* (Cth) and the adverse action protections of the *Fair Work Act 2009* (Cth).[12]

Question 3.7: Direct and indirect discrimination

The relationship between different types of discrimination should be recognised in a way that reflects the complexity of how discrimination occurs in practice. As the consultation paper recognises, discrimination is not always easily categorised as either direct or indirect. The current binary approach is outdated and often leads to complexity and confusion.

A modernised approach should acknowledge overlap and allow for flexibility in how claims are framed and determined, to avoid unjust technical barriers for complainants.

We recognise that one way to resolve this issue is through a unified definition of discrimination as exists, for example, in Canada. On balance, however, we prefer the approach of retaining the concepts of 'direct' and 'indirect' discrimination which are familiar in Australian law after many decades of use and serve an educative function.[13]

We support the approach taken in the *Discrimination Act 1991* (ACT)[14] which recognises discrimination may be direct, indirect, or both.

Question 3.8: Intersectional discrimination

The ADA should protect against intersectional discrimination. Real-world experiences of discrimination often do not arise from a single attribute in isolation, but from the unique ways in which multiple attributes – such as race, sex, sexuality, gender identity, disability, or age – interact to create compounded forms of disadvantage. The current framework, which requires

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11 See, eg, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) rec 6; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) rec 97.

12 Exposure Draft, *Human Rights and Anti-Discrimination Bill 2012* (Cth) s 124; *Anti-Discrimination Act 1991* (Qld) s 204; *Fair Work Act 2009* (Cth) s 361.

13 We note this is the approach recommended by the Australian Human Rights Commission in its Position Paper on national discrimination law reform, Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 230.

14 *Discrimination Act 1991* (ACT) s 8(1).

complainants to select a specific protected attribute, fails to account for this complexity and can exclude valid claims simply because they do not fit neatly within legal categories.[15]

To ensure intersectional discrimination is meaningfully addressed, the ADA should adopt a more flexible and inclusive approach that allows for complaints based on multiple, overlapping attributes. This could be achieved by using the approach from the passed but not yet commenced *Respect at Work and Other Matters Amendment Act 2024* (Qld), which provides that 'discrimination on the basis of an attribute of a person who has 2 or more attributes includes discrimination in relation to (a) any of the attributes; or (b) 2 or more of the attributes; or (c) the combined effect of 2 or more of the attributes.'[16]

This approach would help to ensure intersectional discrimination is effectively prohibited under the ADA.

Question 3.9: Intended future discrimination

The tests for discrimination within the ADA should capture intended future discrimination. Limiting legal protection to harm that has already occurred limits opportunities to prevent acts of discrimination and leaves individuals exposed until after the damage is done.

Including future or intended discrimination would allow individuals to act proactively, rather than reactively, and would better align the ADA with its protective purpose. This could be achieved by amending the definition of discrimination to cover conduct that is proposed or is likely to occur. The ACT, Victoria, the Northern Territory, and Queensland already take this approach, recognising discrimination when a person 'proposes to treat' another unfavourably.[17]

3. Discrimination: Protected attributes

The following suggestions for the definition of protected attributes, including where they might be redefined, are based on the assumption that the comparator test is removed from the test for discrimination. Should the comparator test be retained, in several cases this framing will need to be reconsidered, most notably disability, sexual orientation and gender identity.

Question 4.1: Age discrimination

We do not suggest any changes to the expression or definition of the protected attribute of 'age' or to the age-related exceptions in the ADA.

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15 See, eg, Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) [4.1.3]; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 50.

16 *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7A, inserting *Anti-Discrimination Act 1991* (Qld) s 8(2) (uncommenced).

17 *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1); see also *Age Discrimination Act 2004* (Cth) s 14.

Question 4.2: Discrimination based on carer's responsibilities

The ADA should be updated to expand and clarify the way it defines the protected attribute of 'responsibilities as a carer'.

The current framing is too narrow and may not adequately reflect the diverse forms of caring and family structures that exist today, particularly for First Nations communities where kinship responsibilities extend beyond Anglocentric models of caregiving. The definition should explicitly include family, carer, and kinship responsibilities, with recognition of culturally specific practices such as First Nations kinship relationships.[18]

In addition, the ADA should separately protect against discrimination based on a person's status of being, or not being, a parent. People can face disadvantage or stereotyping both because they have children and because they do not. Ensuring the definition is broad enough to capture this status-based discrimination would close existing gaps in protection, better align the ADA with the realities of modern social and family life, and recognise best practice from other jurisdictions.[19]

Question 4.3: Disability discrimination

The language used to define 'disability'

The definition of disability in the ADA reflects a medical model of disability, including by using deficit-based language. It is outdated and should be updated to reflect contemporary understandings of disability. The definition should be reframed to better align with community expectations, human rights principles, and international obligations such as the UN Convention on the Rights of Persons with Disabilities ('**CRPD**').

As the Disability Royal Commission observed, the CRPD 'reflects the fundamental shift from a medical model of disability (defining people by their impairments) to a social model and human rights model (treating people with disability as rights holders)'.[20] With the CRPD providing 'the most contemporary and holistic application of human rights and fundamental freedoms to people with disability',[21] and Australia, through various mechanisms seeking to give effect to it,[22] the model of disability in the CRPD should be adopted as much as possible in all policy and law reform.

One challenge in developing a definition of discrimination based on the social model of disability is avoiding potential circularity. The social model recognises various barriers (eg attitudinal, environmental, communication and social) to full and effective participation in society, while

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18 See, eg, *Discrimination Act 1991* (ACT) s 7(l); ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT),* Final Report (2015) 73, rec 11.

19 *Equal Opportunity Act 2010* (Vic) s 4 definition of 'parental status', s 6(i); *Anti-Discrimination Act 1998* (Tas) s 3 definition of 'parental status', s 16(i); *Anti-Discrimination Act 1991* (Qld) s 7(d), sch 1 definition of 'parental status'.

20 *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', 44.

21 Rosemary Kayess and Therese Sands, 'Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation' (Research Report, September 2020) 2.

22 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 3(1); *Disability Services and Inclusion Act 2023* (Cth) s 3(a) and *Disability Inclusion Act 2014* (NSW) s 3(e).

discrimination laws target actions that create or perpetuate those barriers. There is a circularity in prohibiting actions causing disadvantage because of disability if disability is itself defined by reference to such disadvantage.

Accordingly, we recommend:

- removing stigmatising, negative or deficit-based language ie 'malfunction', 'malformation' and 'disfigurement';
- including express clarification that people with psychosocial disability and who are neurodiverse are included;
- being guided by Disability Representative Organisations ('**DROs'**) and the disability community as to the precise definition of disability; and
- implementing other changes to the ADA to reflect the social and human rights model, including through positive/proactive duties, as flagged in the Consultation Paper.

Recognising the rights of people with assistance animals

The ADA treats the use of an assistance dog as a 'characteristic' that is generally held by people with disability relating to vision, hearing or mobility, and discrimination based on this characteristic is a form of disability discrimination. This gives considerably less protection to people using assistance animals than the DDA – by comparison, the DDA protects the rights of a person with any assistance animal (not just dogs) and protects assistance animals for a person with any type of disability (not just vision, hearing or mobility).[23]

The ADA should be updated to reflect the lived experiences of many people with disability who use other types of animals, or who require assistance animals for other types of disability, such as psychosocial or neurological conditions.

Through our casework, we are aware of significant barriers faced by people with assistance animals, which deny them access to public spaces and services. Many barriers stem from inconsistencies in the current regulation of assistance animals.[24] There may also be ignorance about the rights of people using assistance animals, for example, in rideshare services.

We therefore suggest that the ADA adopts a definition of 'assistance animal' that aligns with the DDA's broader and more inclusive definition and extends the prohibition on disability discrimination to people using assistance animals.[25]

Discrimination based on genetic information

In relation to genetic information, we believe a separate protected attribute should be introduced. While there may be some overlap with disability discrimination, genetic information discrimination raises distinct concerns, including potential impacts on people who are currently asymptomatic or

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23 *Disability Discrimination Act 1992* (Cth) ss 8 and 9(2).

24 See, Justice and Equity Centre, *Submission to Department of Social Services: Consultation on National Principles for the Regulation of Assistance Animals* (30 May 2025) <https://jec.org.au/wp-content/uploads/2025/06/25.05.30-Submission-on-National-Principles-for-the-regulation-of-Assistance-Animals.pdf>.

25 See, eg, *Disability Discrimination Act 1992* (Cth) s 8; *Discrimination Act 1991* (ACT) s 5AA(1).

who may never develop a condition. A standalone attribute would provide clearer and stronger protection, including for people who are intersex, or at risk of future disability, and ensure the ADA keeps pace with advances in medical technology and genetic screening.[26]

The public health exception

Finally, the public health exception should be reviewed to ensure it is proportionate and evidence-based. While it is important to retain the ability to manage legitimate public health risks, the exception should not be drafted so broadly that it enables discriminatory restrictions on people with disability, particularly where less restrictive alternatives are available. The exception should be clearly limited to ensure it is not used to justify denial of services without rigorous justification.

Question 4.4: Discrimination based on homosexuality

The ADA should replace the outdated protected attribute of 'homosexuality' with the more inclusive and contemporary term 'sexual orientation.'

The current definition at section 4(1) of the ADA that 'homosexual means a male or female homosexual' is not only archaic but also excludes bisexual, pansexual, asexual and heterosexual people, leaving them without protection under this attribute. NSW is the only jurisdiction in Australia that still uses this limited framing, which is now out of step with both national and international standards.

Adopting 'sexual orientation' as the protected attribute would align the ADA with other jurisdictions such as Victoria, the NT, Queensland, Western Australia (as proposed by recent law reform commission reviews), the ACT, Tasmania and the *Sex Discrimination Act 1984* (Cth) ('**SDA'**).[27] The definition should be sufficiently broad to ensure it covers heterosexual, homosexual, bisexual, pansexual and asexual orientations. It should also not be exhaustive given language and identity in this space continues to evolve over time.

Question 4.5: Discrimination based on marital or domestic status

The ADA should update the protected attribute 'marital or domestic status' to 'relationship status'. This change would better reflect contemporary society, ensuring the law is inclusive of all types of relationships, including those that may not fit neatly into traditional categories.

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26 See, eg, *Discrimination Act 1991* (ACT) s 7(1)(h); *Disability Discrimination Act 1992* (Cth) s 4 definition of 'disability'. See also ACT Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT),* Final Report, (2015) 60.

27 *Equal Opportunity Act 2010* (Vic) s 4 definition of 'sexual orientation'; *Anti-Discrimination Act 1992* (NT) s 4 definition of 'sexual orientation'; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(2), s 52(2), amending *Anti-Discrimination Act 1991* (Qld) s 7(n), sch 1 definition of 'sexual orientation' (uncommenced); Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 54; D*iscrimination Act 1991* (ACT) dictionary definition of 'sexuality'; *Anti-Discrimination Act 1998* (Tas) s 3 definition of 'sexual orientation', s 16; *Sex Discrimination Act 1984* (Cth) s 4 definition of 'sexual orientation'. See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 23.1.

'Relationship status' is more neutral and adaptable and aligns with terminology used in other jurisdictions.[28] It also avoids assumptions tied to dated norms about marriage or cohabitation and better recognises diverse personal circumstances, as well as those who choose not to be in a relationship.

Question 4.6: Racial discrimination

The ADA should update the way it expresses and defines the protected attribute of 'race' to explicitly include Aboriginal and Torres Strait Islander peoples, subject to thorough consultation with Aboriginal and Torres Strait Islander people.

While existing protections already apply to First Nations peoples under the current definition of race in NSW and the *Racial Discrimination Act 1975* (Cth),[29] explicitly naming First Nations people would recognise the significant extent to which Aboriginal and Torres Strait Islander people have been discriminated against, be a powerful affirmation of their right to be free from discrimination and reflect contemporary standards of recognition and respect. It would also align with recommendations from other jurisdictions, such as the WA Law Reform Commission.[30]

We also support:

- the express inclusion of prohibitions on language-based discrimination, including to address concerns about how some complaints of racial discrimination which involve language have failed historically;[31]
- following the (not yet commenced) Queensland approach of adding caste discrimination to the definition of race;
- the introduction of immigration status as a new, stand-alone protected attribute.

Discrimination based on visa status, temporary residency, or lack of citizenship can lead to significant disadvantage, particularly for migrant workers, refugees, and international students. Adding this attribute would close an existing gap in the legislation and ensure stronger protections for vulnerable groups who often face compounding forms of racial and status-based discrimination.[32]

Question 4.7: Sex discrimination

The ADA should retain the protected attribute of sex but update its approach to reflect contemporary usage and understanding, operating alongside the updated protected attribute of gender identity (discussed below).

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28 *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).

29 *Eatock v Bolt* [2011] FCA 1103, 197 FCR 261 [314].

30 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) 108.

31 Catherine Zhou and William Ruan, 'Unearthing Language Rights Protections in the Racial Discrimination Act 1975 (Cth)' (2024) 46(3) *Sydney Law Review* 293.

32 See, eg, *Discrimination Act 1991* (ACT) s 7. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) 84, rec 31.

In protecting against sex discrimination, the ADA should avoid binary language in recognition that not all people identify as male or female.

In addition, the ADA should prohibit discrimination based on pregnancy and breastfeeding as separate, stand-alone protected attributes, rather than subsuming them under sex discrimination. This acknowledges that people of all gender identities, including trans men and non-binary people, may become pregnant and breastfeed, and deserve protection from discrimination. Separating out pregnancy and breastfeeding would enhance legal clarity, ensure stronger and more inclusive protection, and align the ADA with best practice across other jurisdictions.[33]

Taking this approach means:

- It is unnecessary to use or define the terms 'man' and 'woman';
- While we have recommended above that 'comparator' approaches to be discrimination should not be used, any comparison should refer to people of 'different sex' rather than 'opposite sex'.

Question 4.8: Discrimination on transgender grounds

The ADA should replace the protected attribute of 'transgender grounds' with 'gender identity', accompanied by a modern and inclusive definition. The current framing, focused on binary transitions between 'opposite' sexes, is outdated and fails to protect non-binary, gender fluid, and other gender-diverse individuals.

This can be addressed by adopting a definition of gender identity that reflects the lived realities of all gender-diverse people and aligns with human rights principles. This is found in the definition in the *Anti-Discrimination Act 1991* (Qld).[34] The Queensland approach avoids medicalised framing, and should be preferred over the narrower definition in the SDA and *Crimes Act 1900* (NSW).[35]

Importantly, the Queensland definition explicitly includes gender expression (by covering 'other expressions of the person's gender, including name, dress, speech and behaviour') which ensures people are protected from discrimination not only based on their internal identity but also on how others perceive or react to their gender expression. This will assist in ensuring that many real-world examples of anti-trans discrimination are captured, and therefore actionable.

Finally, any references to gender or sex elsewhere in the ADA should be reviewed and revised to remove binary language and reflect an inclusive, respectful understanding of gender diversity.

Question 4.9: Extending existing protections

The ADA should protect people against discrimination based on any protected attribute they have had in the past or may have in the future. Discrimination often occurs not only because of

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33 *Sex Discrimination Act 1984* (Cth) s 7, s 7AA; *Discrimination Act 1991* (ACT) s 7(1)(o), s 7(d); *Equal Opportunity Act 2010* (Vic) s 6(b), s 6(l); *Anti-Discrimination Act 1991* (Qld) s 7(c), s 7(e); *Equal Opportunity Act 1984* (WA) s 10, s 10A; *Anti-Discrimination Act 1998* (Tas) s 16(g), 16(h); *Anti-Discrimination Act 1992* (NT) s 19(f), s 19 (h); *Equal Opportunity Act 1984* (SA) s 85T(4), s 85T(5), s 87B(1).

34 *Anti-Discrimination Act 1991* (Qld) sch 1 definition of 'gender identity'.

35 *Crimes Act 1900* (NSW) s 93Z; *Sex Discrimination Act 1984* (Cth) s 4.

someone's current status but due to perceptions or assumptions about their past or future – such as a history of disability, previous gender identity, or potential future health status. Including past and future attributes within the scope of the ADA would ensure more comprehensive protection and reflect the real-world experiences of people who face discrimination due to stigma or assumptions, rather than only current characteristics.[36]

The ADA should also include protection against discrimination based on being a relative or associate of someone with a protected attribute. People are often discriminated against because of their close relationships, for example, being the parent of a child with a disability, or a partner of someone of a particular race or religion. Extending the law to cover associates ensures that anti-discrimination protections are meaningful and capable of addressing discrimination that occurs by association, not just direct personal attributes. This would also bring the ADA in line with best practice standards and approaches adopted in other jurisdictions.[37]

4. Discrimination: Potential new protected attributes

Question 5.1: Guiding principles

We generally support the QHRC criteria for including new attributes, set out in Table 5.1 of the Consultation Paper, with the possible exception of the criteria of existing protection ('Are they already protected by other legislation eg employment legislation?').

Particularly as we aim to better recognise the impact of intersectional discrimination and respect the complexity of people's identities, we see value in providing comprehensive protection in the ADA for discriminatory treatment – rather than requiring people to seek protection from more than one source for different attributes.

This position also reflects the complementary approach to Australian discrimination laws operating at a state/territory and federal level. We support people in NSW having access to a local remedy for breaches of their human rights and the ability to have disputes resolved in a more informal tribunal as opposed to a court.

We also see this review as an opportunity for NSW to re-establish itself as a national leader in anti-discrimination law by looking to best-practice protections adopted in other jurisdictions as minimum standards for protection.

Question 5.2: Potential new attributes

As noted above, these proposed new attributes are framed on the assumption that the comparator test is removed. If the comparator test remains a part of the test for discrimination, a number of the definitions of these attributes may need to be drafted differently.

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36 See, eg, *Discrimination Act 1991* (ACT) s 7(2); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Anti-Discrimination Act 1992* (NT) s 20(2). See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) rec 14.

37 *Discrimination Act 1991* (ACT) s 7(2); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Anti-Discrimination Act 1992* (NT) s 20(2).

Irrelevant criminal record

Irrelevant criminal record should be included as a protected attribute, as individuals with past convictions that are not relevant to their current circumstances often face significant and unjustified barriers to employment, housing, and participation in other areas of public life. Including this attribute would promote rehabilitation and reduce recidivism.

We support the definition of irrelevant criminal record found in the ACT *Discrimination Act* which covers a range of scenarios that may face a person charged with a criminal offence.

By specifying that the protected ground is *irrelevant* criminal record, the exceptions noted in the Consultation Paper at [5.35] are arguably unnecessary. We recognise, however, that some clarity around specific circumstances in which criminal record will be considered relevant may be appropriate, particularly when dealing with a new protected attribute. Any such exceptions should be carefully defined and limited – for example by linking any discrimination with the inherent requirements of employment or a specific concern about the safety of children.

In terms of expunged homosexual convictions, we support the approach adopted in Victoria and Queensland, where this is a stand-alone protected attribute. This recognises that these convictions should never have happened and are substantively different to other types of convictions.

Domestic and family violence

Domestic and family violence also warrants inclusion as a stand-alone attribute. Many people who experience such violence are subject to discrimination in work, education, and service settings due to misunderstandings, stigma, or the impacts of coercive control. Recognising this as a protected attribute would ensure greater support for survivors and reduce secondary victimisation.

We also provide in-principle support for including sexual violence within this protection. While precise definitions will need to be developed, they could be anchored in existing definitions such as the one used by the Australian Bureau of Statistics in their Personal Safety Survey.[38]

Health status and irrelevant medical record

We support the inclusion of health status (or a related term, such as medical condition, subject to the views of relevant community organisations such as ACON and the HIV/AIDS Legal Centre) as a new protected attribute. People living with HIV, blood-borne viruses, and/or sexually transmissible infections can be subject to significant discrimination and may not consider themselves to have a disability. The definition should also be wide enough to protect people who experience episodic mental health issues, who also may not be covered clearly by existing attributes.

Likewise, irrelevant medical history, including past illnesses that have no bearing on current abilities, can be unfairly used to exclude individuals, and therefore should also be added. This

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[38] Australian Bureau of Statistics, *Sexual Violence 2021–22* (2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>.

new attribute should be informed by existing law in Tasmania, the NT and Queensland, as well as the public health and disability sectors and should ensure protections while allowing for reasonable, safety-related exceptions.[39]

Industrial activity and political belief or activity

Industrial activity is another attribute we support in line with the approach of other jurisdictions, as well as under the *Fair Work Act 2009* (Cth).[40] Inclusion within the ADA would help ensure consistent protections across different settings, including education, services, and accommodation, where federal protections may not reach. The definition should cover lawful union membership, participation in industrial action, and refusal to participate, with exceptions for unlawful or violent conduct.

We also support the introduction of political belief or activity as a protected attribute, to uphold the international human right of freedom of conscience. This should be based on the approach in Victoria, including the definition (covering holding or not holding a lawful political belief or view, and engaging in, not engaging in or refusing to engage in a lawful political activity),[41] as well as relevant exceptions for political employment[42] and local government.[43]

Physical features or appearance

We support adding physical features as a protected attribute, consistent with the approach in Victoria.[44] This would provide a strong normative statement that extends disability discrimination protection to cover discrimination based on height, weight, size or other bodily characteristics.

We recognise it would be appropriate to also provide for narrowly crafted exceptions, for example, to apply where physical features are a genuine occupational requirement (for example in the case of modelling of dramatic performance) or where required for the protection of health, safety or property (for example in the case of minimum height requirements for safely riding on a ride at an amusement park).[45]

Religious belief or activity

The JEC has consistently called for the ADA to be amended to include religious belief as a protected attribute. This would align NSW with the majority of other Australian jurisdictions[46] and reflect a long-recognised human right. Such protection is important for people of all religions, as

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39 *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(1)(p); *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7(3), s 52(2), inserting *Anti-Discrimination Act 1991* (Qld) s 7(pf), sch 1 definition of 'irrelevant medical record' (uncommenced).

40 *Fair Work Act 2009* (Cth) s 346.

41 *Equal Opportunity Act 2010* (Vic), s 4(1).

42 *Equal Opportunity Act 2010* (Vic), s 27.

43 *Equal Opportunity Act 2010* (Vic), s 74.

44 *Equal Opportunity Act 2010* (Vic) s 4, definition of 'physical features', s 6(j)..

45 *Equal Opportunity Act 2010* (Vic) ss 26(4), 86(1).

46 *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.

well as those who do not hold religious beliefs, and would promote inclusion, dignity, and equality in public life.

However, the inclusion of religious belief must be done carefully and within a conventional anti-discrimination framework, on the same footing as existing protected attributes such as race, sex, and disability: a 'shield' against discrimination rather than as a 'sword' of 'religious freedom' permitting discrimination against others.

Recent legislative attempts at both state and federal levels have misapplied this protection by giving broad exemptions or privileges to religious individuals and organisations, while undermining the rights of others, especially women, LGBTQ people, people with disability, and those of minority faiths. Any reform must avoid these pitfalls and ensure that protecting religious belief does not come at the cost of the dignity, inclusion and safety of others.

The attribute should be expressly defined in the legislation to provide clarity and certainty. A suitable definition could be drawn from section 93ZA of the *Crimes Act 1900* (NSW) which provides 'religious belief or affiliation means holding or not holding a religious belief or view.' This should be supplemented by the protection of religious activity, with the limitation that it be restricted to only cover lawful religious activity as an important safeguard.

The protection against religious discrimination and vilification should apply only to natural persons, while explicitly excluding bodies corporate (a potential issue for faith-based organisations that does not arise for other protected attributes).

We support the retention of ethno-religious origin as part of the existing definition of the protected attribute of race to ensure the broadest protection of people of faith.

In terms of exceptions, only narrow and clearly-defined exemptions should be permitted, for example, where religious organisations are engaging in religious observance or worship. This issue is discussed in more detail below in response to Chapter 7.

Sex characteristics

The ADA should be amended to include 'sex characteristics' as a protected attribute.

The current exclusion of people with innate variations of sex characteristics (sometimes described as intersex) leaves a significant gap in the law. NSW and Western Australia are the only jurisdictions that fail to provide such protection, which means that people with innate variations of sex characteristics remain vulnerable to discrimination in education, employment, healthcare, and other areas of public life.[47] Including this attribute would bring NSW into line with

[47] *Equal Opportunity Act* (2010) (Vic) s 6(oa); *Discrimination Act 1991* (ACT) s 7(v); *Sex Discrimination Act 1984* (Cth) s 5C; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16(eb); *Anti-Discrimination Act 1992* (NT) s 19(ca); *Anti-Discrimination Act 1991* (Qld) s 7(o).

best practice and with reforms already enacted in jurisdictions like the ACT, Victoria, Tasmania, the NT and Queensland.[48]

Rather than adopting the now-outdated terminology of 'intersex status' – as used in the SDA – the ADA should reflect the current consensus of intersex-led organisations such as InterAction for Health and Human Rights and include sex characteristics as the protected attribute. A suitable definition can be drawn from the *Anti-Discrimination Act 1991* (Qld), which describes sex characteristics as including a person's physical features relating to sex, including genitalia, chromosomes, hormones, and reproductive organs, whether congenital or acquired.[49]

Crucially, the adoption of this definition should only be done if accompanied by a shift away from the comparator test in the ADA, and towards an 'unfavourable treatment' test to ensure protection and make the law more accessible and practical for affected individuals. This approach ensures inclusive and accurate coverage of all people with variations of sex characteristics.

Sex work and lawful sexual activity

Sex work should be added as a new protected attribute under the ADA to ensure explicit and robust protection against discrimination, vilification, and sexual harassment for sex workers. This change would fill a significant gap in the current anti-discrimination framework.

In line with the views of sex worker advocates including SWOP NSW and the Inner City Legal Centre, we would not support the protection of sex workers via a new attribute of 'lawful sexual activity' or 'trade or occupation'. These existing terms have proven inadequate, especially in light of decisions like the Queensland Court of Appeal in *Dovedeen Pty Ltd v GK* (2013) QCA 116, which found a person could be discriminated against based on conduct related to sex work, even if their status as a lawful sex worker was technically protected. By naming sex work directly as a protected attribute, the ADA would better reflect and respond to the realities faced by sex workers, sending a strong signal that their rights, safety, and dignity matter. While protections for trade, occupation or profession may also be considered, these should not be a substitute for a distinct and specifically defined attribute for sex work.

The definition of sex work should be inclusive and comprehensive. It should encompass both contact and non-contact services. The definition should also reflect the informal and diverse nature of sex work, which can be occasional and/or opportunistic.

Homelessness or accommodation status

The JEC recommends the addition of accommodation status as a protected attribute under the ADA, with a particular focus on protecting people experiencing homelessness.

Homelessness is both a symptom and driver of entrenched disadvantage, and individuals experiencing it are frequently subjected to discrimination when applying for housing, employment,

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48 *Discrimination Act 1991* (ACT) s 7(v) dictionary definition of 'sex characteristics'; *Equal Opportunity Act* (2010) (Vic) s 4(1) definition of 'sex characteristics'; *Anti-Discrimination Act 1998* (Tas) s 3 definition of 'sex characteristics'; *Anti-Discrimination Act 1992* (NT) s 4(1) definition of 'sex characteristics'; *Anti-Discrimination Act 1991* (Qld) sch 1 definition of 'sex characteristics'.

49 *Anti-Discrimination Act 1991* (Qld) sch 1 definition of 'sex characteristics'.

and accessing essential services, often because they lack a fixed address, have identification barriers, or list transitional accommodation.[50] These issues are compounded by stigma based on appearance or assumptions linked to homelessness. Such discrimination significantly affects health outcomes and entrenches social and economic exclusion.[51] As the 2008 Department of Justice *Victorian Equal Opportunity Review* noted, protecting people experiencing homelessness 'reinforces the dignity and worth' of individuals and helps remove barriers to full social participation.[52]

We support a definition drawing on elements of both section 4 of the *Anti-Discrimination Act 1992* (NT), and the general definition in the *Discrimination Act 1991* (ACT), such that:

> Accommodation status includes being:
>
> (a) a tenant, boarder, lodger or licensee; or
>
> (b) homeless; or
>
> (c) a person in receipt of, or waiting to receive, housing assistance under the *Housing Act 2001* (NSW);
>
> (d) a resident of any of the following:
>
> (i) an aged care facility;
>
> (ii) disability accommodation;
>
> (iii) supported care accommodation.

This combined approach ensures coverage across formal, informal, and supported housing circumstances. No attribute-specific exceptions are required, but privacy protections for complainants should be considered.

This attribute should also be protected under anti-vilification provisions, reflecting the high levels of stigma and hostility often directed at people who are, or are perceived to be, homeless.[53]

We note that under the ACT legislation, discrimination on the basis of accommodation status is allowed if it is reasonable having regard to any relevant factors.[54] Such an exception is

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50 Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (Law and Justice Foundation of New South Wales, 2005), xvii, 18; Tamara Walsh, *Homelessness and the Law* (The Federation Press, 2011), 168; Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (Report, July 2008), 10.

51 Philip Lynch, 'Homelessness, Poverty and Discrimination: Improving Public Health by Realising Human Rights' (2005) 10(1) *Deakin Law Review* 233.

52 State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (Final Report, June 2008), [5.103].

53 Rowland Atkinson and Keith Jacobs, *Public Housing in Australia: Stigma, Home and Opportunity*, Housing and Community Research Unit Paper No 01 (University of Tasmania, School of Sociology), 10; Sarah L Canham, Rachel Weldrick, Margaret Erisman, Anna McNamara, Jeffrey Rose, Elizabeth Siantz, Tallie Casucci and Mary M McFarland, 'A Scoping Review of the Experiences and Outcomes of Stigma and Discrimination Towards Persons Experiencing Homelessness' (2024) *Health & Social Care in the Community* 2024.

54 *Discrimination Act 1991* (ACT) s 26(2).

unnecessarily broad and risks undermining the effectiveness of the protection. For example, allowing a landlord to assess rental history might appear reasonable, but could be used to deny accommodation to someone based on a history of transitional or supported housing: the kind of discrimination this reform is intended to prevent. Given that private rental processes are already a frequent source of discrimination, we recommend that if any specific exception is introduced, it is narrowly drafted.

Employment status

The JEC supports the inclusion of employment status as a protected attribute under the ADA, given the increasing prevalence of insecure work arrangements and the discrimination experienced by people outside traditional full-time employment. Individuals in casual or part-time work, on temporary contracts, seeking employment, or receiving social security benefits often face differential treatment, particularly when accessing rental housing or applying for services. For example, applicants receiving income support are frequently overlooked in private rental markets, which directly contributes to housing instability and exclusion.

We recommend adopting a definition consistent with the approach taken in the ACT and NT, which includes being employed on a part-time, casual or temporary basis; undertaking shift or contract work; being unemployed; or receiving a pension, social security benefit, or compensation. We acknowledge that it may be appropriate to include an exception where employment status is relevant to meeting the inherent requirements of a role, particularly in relation to an applicant's availability for work.

However, such an exception should be narrowly framed. For example, being unemployed or receiving a benefit should not, in itself, be grounds for exclusion from employment if the individual can perform the job. Allowing broad exceptions would risk undermining the protection intended by introducing this attribute. Exceptions should be limited to the applicant's ability to fulfil job requirements, rather than status-related assumptions.

Social origin or status

The JEC has no position on whether social origin or status should be added as a protected attribute. Further research and consultation would be necessary to determine whether this attribute would provide meaningful protection beyond that offered by other characteristics, such as race, employment status, or homelessness. Definitions would need to be carefully constructed to avoid confusion or redundancy, and to ensure enforceability.

Question 5.3: An open-ended list

The JEC does not support an open-ended list of attributes in the ADA at this time. We recognise that this approach would ensure the law can evolve to address emerging forms of discrimination, particularly in a rapidly changing social and technological environment. However, such a model would represent a significant change from the status quo, not just in NSW but across Australian anti-discrimination law more broadly. We would prioritise the other more clearly defined and urgent reforms identified in this submission above this approach.

5. Discrimination: Areas of public life

Question 6.1: Discrimination at work – coverage

The definition of employment in the ADA should be expanded to reflect the diversity of contemporary work arrangements. This includes extending protections to voluntary workers, gig economy workers, and other non-traditional and emerging forms of labour that fall outside narrow legal definitions of employment.

Volunteers

Volunteers contribute significantly across numerous sectors and are often subject to the same power imbalances, difficult workplace dynamics, and risks of discrimination as paid employees. Excluding them from protection creates a serious gap in the law that leaves many individuals vulnerable**,** particularly in sectors such as health, aged care, disability, and community services, where volunteering is common. Including voluntary workers would bring the ADA in line with community expectations and ensure equitable treatment across all forms of work relationships.

Gig economy workers

Equally, gig economy workers must be brought within the ADA's scope. The gig economy represents a major shift in the structure of work, characterised by task-based, on-demand jobs mediated through digital platforms. These workers are frequently classified as independent contractors, which may place them outside the reach of many workplace protections, including those against discrimination and harassment. However, this classification does not eliminate the power imbalances they face**,** particularly the lack of control over working conditions, lack of recourse for unfair treatment, and vulnerability to algorithmic decision-making bias.

Harassment

The ADA should adopt a broader approach to regulating discrimination in the context of work, similar to the model in the SDA. The SDA recognises that harassment can occur outside strict employer-employee relationships, capturing a wider range of harmful conduct involving contractors, clients, co-workers, and third parties.[55] Adopting a similar framing in the ADA with respect to discrimination would ensure that all individuals performing work receive protection.

Local government

Finally, the ADA should protect local government members from age discrimination while performing their official duties. As elected representatives, they are engaged in a form of public service work and should be entitled to the same fundamental protections against discrimination as other workers. Excluding them implies that age is a legitimate basis for excluding individuals from civic leadership, which is inconsistent with democratic principles and could discourage participation in public life**,** particularly by older or younger people.

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55 *Sex Discrimination Act 1984* (Cth) s 28B(5)–(6).

Question 6.2: Discrimination in work – exceptions

A number of changes should be made to improve consistency, fairness, and clarity in relation to exceptions to discrimination in work.

Employment for private household purposes

The exception for private households should be narrowed, drawing on models in other jurisdictions that limit this exception to roles involving close personal relationships or intimate care.[56]

Employment by small businesses and discrimination by small partnerships

The small business exception, which allows employers with five or fewer staff to discriminate on various grounds, should be removed entirely.[57] It is no longer justified in a modern employment context and creates double standards between workers based solely on the size of their employer. The small partnerships exception should also be abolished for similar reasons.[58]

Persons addicted to prohibited drugs: disability discrimination

The current provision allowing discrimination against people addicted to drugs should be removed, with any issues relating to a person's ability to perform their role dealt with in the context of an inherent requirements test, rather than based on stigma or assumptions. The introduction of an inherent requirements exception should be linked with a duty to make adjustments, similar to the model in the ACT, to ensure people with disabilities, dependencies, or chronic health conditions are assessed fairly and can participate in work as appropriate.[59]

The 'inherent requirements' and 'unjustifiable hardships' exceptions

We note the concerns expressed about the inherent requirements exception by the Disability Royal Commission, and support its recommendation for the inclusion of two additional factors in determining whether a person with disability is able to meet the role's inherent requirements, namely the nature and extent of any adjustments made, and the extent of consultation with the person with disability. As in the ACT, this change should be introduced alongside a positive duty to make adjustments (discussed at Question 11.1 below), as well as a requirement that discrimination must be reasonable, proportionate and justifiable in the circumstances for the inherent requirements exception to apply.

Exceptions based on 'genuine occupational qualifications'

We also support the ACT's approach to genuine occupational qualifications exceptions, providing that discrimination is not unlawful if it is a genuine occupational qualification that the position is filled by a person with a particular protected attribute and the discrimination is reasonable,

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56 See, eg, NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) rec 9, [4.90]–[4.92]; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 278.

57 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) rec 14, [4.99].

58 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) rec 15, [4.102].

59 *Discrimination Act 1991* (ACT) s 74, s 33C.

proportionate and justifiable. As in the ACT, this could apply across all protected attributes, and include examples of where such a genuine occupational requirement may exist.

Discrimination against young people

In terms of discrimination against young people, we share concerns that the breadth of the ability to pay young workers lower wages is too broad. We support its replacement with an exception which only applies where a young worker is being offered a lower wage in accordance with an industrial award or agreement, as is the case in SA, WA and the ACT.

Discrimination in favour of married couples

With respect to the exception for discrimination where a job is one of two to be held by a married couple, we recognise there may be a role for an exception of this type in particular circumstances. However, if such an exception is to be retained, it should be amended to also protect people in de facto relationships. It would be inconsistent with the protection otherwise afforded against discrimination on the basis of marital status.

Employment outside NSW

We also support removing the exception relating to employment outside NSW and agree that any issues that may arise would be more appropriately dealt with by way of application for an exemption.

Question 6.3: Discrimination in education

Issues relating to coverage

The definition and coverage of the protected area of 'education' under the ADA should be broadened to align more closely with the approach taken in the DDA. This would involve extending coverage to include not only formal education institutions, such as schools, TAFEs and universities, but also other education providers, including private training organisations and informal or community-based learning settings.[60]

Exceptions – single-sex educational institutions

We support retaining an exception for single-sex educational institutions. However, we support clarification that it does not permit discrimination against transgender or gender-diverse students. Any provision must be consistent with the right of all students, regardless of gender identity, to have equal access to educational opportunities. The exception should be reviewed to guarantee the inclusion of trans students in line with their affirmed gender. Nor should it permit the expulsion of already-enrolled students who affirm a different gender identity at any point in their education, to ensure continuity of their education.

Disability discrimination exceptions

The exceptions that permit discrimination by educational authorities on the basis of disability should be removed. Allowing education providers to discriminate against students with disability

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60 *Disability Discrimination Act 1992* (Cth) s 4(1) definition of 'education provider'.

undermines the fundamental rights of those students and is inconsistent with the objectives of both the ADA and the DDA. Removing these outdated exceptions would help build inclusive education environments and better reflect Australia's commitments under the CRPD. Instead, obligations to make adjustments, and to consider the inherent requirements of participation, should guide how institutions support students with disability.

Age discrimination exceptions

We recognise that it may be appropriate in some cases for educational institutions to take age into account – for example, where programs are designed for particular developmental stages – but any exception should be narrowly tailored and clearly justified to prevent misuse. Further consultation may be required to assess whether existing exceptions strike the right balance.

Question 6.4: The provision of goods and services – coverage

The manner in which goods and services are provided

The definition and coverage of the protected area of 'the provision of goods and services' should be updated to explicitly include not only the availability of goods and services, but also the manner in which they are provided.

Discrimination can occur not just in the outright denial of goods or services, but also in the way they are delivered – for example, through differential treatment, delays, or hostility. Including the manner of provision would clarify that such conduct is also unlawful and bring NSW law into line with best practice in other jurisdictions.[61]

The receipt of goods and services

We share concerns about the introduction of prohibitions on discrimination by people in receipt of goods, services or facilities who discriminate in the way they receive those goods, services or facilities. While this may offer some protection for employees or contractors who are mistreated by customers, we are concerned about the potential consequences for consumer boycotts, which can perform an important role in democracy.

Access to premises

Finally, the ADA should explicitly include access to premises as a form of discrimination. If people cannot enter or navigate premises where goods or services are offered due to disability, age, or other protected attributes, this should be clearly recognised as a form of unlawful discrimination. We support adding 'access to premises' as a separate protected area in line with the DDA and Victoria, rather than incorporating it into the definition of goods and services.[62] Contrary to the previous view of the NSWLRC, we suggest this would be less confusing than treating access to premises as a service and it is preferable to align the NSW approach with the established approach under the DDA.

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61 *Anti-Discrimination Act 1991* (Qld) s 46; *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).

62 *Disability Discrimination Act 1992* (Cth) s 23; *Equal Opportunity Act 2010* (Vic) s 57(2) definition of 'premises'.

Question 6.5: Superannuation services and insurance exceptions

We support explicitly recognising superannuation and insurance as areas covered by the ADA to avoid any uncertainty. We suggest this would be best done as a separate area of public life with specific exceptions and consumer data rights applying, as is the approach taken in the ACT and other jurisdictions.

In terms of insurance and superannuation related exceptions, we support the approach adopted in the ACT, which includes requiring that the discrimination must be based on actuarial or statistical data (or where this is unavailable, other relevant documents); that it is reasonable for the provider to rely on the data or other documents; and that the discrimination is reasonable, proportionate and justifiable in the circumstances.[63] This also includes the ability of a requirement for the insurance or superannuation provider to either give the consumer a copy of the data or other documents, or a meaningful explanation of the data or other documents in writing; or make the data or other documents available for inspection.[64]

Drawing on our previous work in this area, and as an additional transparency measure, we also recommend that insurers be required to report annually on the number of times they have declined insurance or offered insurance on non-standard terms on the ground of disability.[65]

In relation to superannuation, the specific exception for transgender people currently found in section 38Q of the ADA should be repealed. This provision permits superannuation providers to treat a transgender person as being of the 'opposite [sic] sex' to which they identify, reinforcing outdated and discriminatory assumptions. Removal of this exception is essential to ensure consistency with broader reforms recognising gender identity, and to uphold the principle that all individuals should be treated equally in financial and retirement-related services.

Question 6.6: The provision of goods and services – exceptions

The combination of a broadly framed special measures provision (discussed below), and a retained exemption process, should be sufficient to address most relevant situations, thus removing the need to keep this range of specific exceptions.

Question 6.7: Discrimination in accommodation – coverage

The definition of 'accommodation' in the ADA should be expanded to explicitly include all forms of housing, including caravans, mobile homes, boarding houses, and other non-traditional or informal living arrangements. This would provide better protection for low-income and vulnerable populations.

We also support the introduction of a right for people with disability to make reasonable alterations to their accommodation, similar to provisions in Victoria, Queensland, and the NT.[66] This would better support the rights of people with disability to live safely and independently.

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63 *Discrimination Act 1991* (ACT) s 28(2).
64 *Discrimination Act 1991* (ACT) s 28(3).
65 Justice and Equity Centre, *Mental Health Discrimination in Insurance* (Report, October 2021), rec 9.
66 *Equal Opportunity Act 2010* (Vic) s 55(1); *Anti-Discrimination Act 1991* (Qld) s 84; *Anti-Discrimination Act 1992* (NT) s 39. See also *Disability Discrimination Act 1992* (Cth) s 25(2)(d).

While unjustifiable hardship could still operate as a safeguard for accommodation providers, an express right would help ensure appropriate adjustments are not unreasonably refused.

We also support strengthening protections related to assistance animals, including by ensuring the ADA explicitly covers animals other than dogs where appropriately trained and accredited.[67] This is particularly important for people with psychosocial disability, epilepsy, and other conditions for which assistance animals provide critical support. Ensuring these animals can be accommodated is essential to upholding equal access for people with disability.

Question 6.8: Discrimination in accommodation – exceptions

The exception for private household accommodation should be narrowed to better balance privacy with the right to be free from discrimination. We support limiting the exception to situations where three or fewer people are accommodated in a genuinely private household context, similar to models adopted in other jurisdictions.[68] This would help ensure that the exception is not overly broad or misused by those offering quasi-commercial arrangements.

The current exception allowing for age-based discrimination in accommodation should be removed, provided the ADA is amended to include an effective special measures provision. This would allow for lawful and justified forms of targeted accommodation, such as seniors' villages or youth refuges, without permitting blanket age discrimination. This approach would better protect individuals from unjustified exclusion while still allowing for programs that support the needs of specific age groups.

We support retaining an exception to the prohibition of disability discrimination for charitable and non-profit organisations providing accommodation to people with particular disabilities.

Question 6.9: Discrimination by registered clubs – coverage

The definition and coverage of the protected area of 'registered clubs' should be expanded to more clearly and comprehensively prohibit discrimination by clubs and associations.

Currently, the ADA's focus on 'registered clubs' is too narrow and fails to capture the broad range of clubs, societies, and associations that operate in NSW and have a significant impact on people's access to social, cultural, and professional participation. Reform should ensure that all clubs, societies and associations that provide benefits, services, or opportunities to members or the public are covered by anti-discrimination protections.

This broader coverage should include incorporated and unincorporated associations, especially where they control access to public events, opportunities, or resources. Discrimination should be prohibited not just in the process of admitting or expelling members, but also in the way services or opportunities are provided to members and guests. This approach would align the ADA with best-practice models in other jurisdictions and reflect the importance of ensuring equality in all

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67 See, eg, *Equal Opportunity Act 2010* (Vic) s 54(1)–(2).

68 *Sex Discrimination Act 1984* (Cth) s 23(3)(a)(ii); *Age Discrimination Act 2004* (Cth) s 29(3)(b); *Disability Discrimination Act 1992* (Cth) s 25(3)(a)(ii); *Equal Opportunity Act 2010* (Vic) s 59(1)(b); *Equal Opportunity Act 1984* (WA) s 21(3)(a)(ii).

areas of public life.[69] The approach taken in the Commonwealth *Disability Discrimination Act 1991* serves as an appropriate model.

Question 6.10: Discrimination by registered clubs – exceptions

The exceptions for registered clubs in relation to sex, race, age, and disability discrimination should be narrowed and reframed to ensure they do not permit unjustified exclusion or harm to people.

Rather than maintaining broad exceptions that authorise discrimination, the ADA should provide positively-framed provisions that enable clubs to provide a legitimate benefit to particular groups.

We support the ACT approach, under which clubs are allowed to discriminate against someone with a protected attribute, but only if the club is established to benefit people who share a protected attribute, and the discrimination is reasonable, proportionate and justifiable.[70]

The current express ability of clubs to discriminate based on sex or disability should be removed from the ADA. There is no justification for allowing blanket or unchecked discrimination on these grounds in contemporary settings, and any departure from equality must be narrowly tailored, time-limited, and clearly aimed at addressing disadvantage or ensuring equal opportunity. For instance, a club should not be able to exclude members with disability or deny them equal access to facilities, services, or leadership roles.

Question 6.11: Discrimination based on carer's responsibilities

Discrimination based on carer's responsibilities should be prohibited in all protected areas of public life.

Carer's responsibilities can impact a person's access to employment, education, housing, services, and participation in public life more broadly. Limiting protection to only specific areas creates unnecessary gaps and leaves carers vulnerable to discrimination. Extending protection across all areas ensures consistency, reflects the lived experience of disadvantage faced by carers, and aligns with contemporary standards of equality and inclusion.

In general, discrimination should be prohibited in all protected areas for all protected attributes.[71] Allowing for different levels of protection for different attributes or areas risks creating a hierarchy of rights. It creates uncertainty, diminishes the clear normative statement that broad protection delivers and thereby undermines the effectiveness of the overall anti-discrimination framework. A better approach recognises that discrimination occurs in a wide range of contexts and that all protected groups deserve equal protection. Where justified, narrowly defined exceptions can still be included, but the starting point should be comprehensive and equal protection across the board.

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69 *Disability Discrimination Act 1992* (Cth) s 4(1) definition of 'club'. See also Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act* 1991 (2022) 358–359, rec 35.

70 See, eg, *Discrimination Act 1991* (ACT) s 31.

71 See, eg, *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1991* (Qld) s 7; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16.

Question 6.12: Additional areas of public life

We support the ADA having a broader application to all areas of public life. Limiting coverage to specific, enumerated areas results in patchy protection and undermines the ADA's ability to provide comprehensive redress against discrimination.

One option would involve a general provision that applies to all areas of public life, unless expressly excluded for compelling policy reasons, thus ensuring broader and more consistent protection. This could then be supported by the retention of a non-exhaustive list of areas which are explicitly covered (as is the approach in the *Racial Discrimination Act 1975* (Cth), and which can be supplemented by new areas that may warrant specific recognition in the future.

Recognising, however, the concerns that have been raised about this broader approach by numerous previous inquiries, we suggest the coverage of the ADA is broadened by providing explicit coverage in the range of areas identified in the consultation paper.

First, the ADA should include discrimination in the disposal of interests in land, currently a gap in the legislation despite its significance to housing access and economic participation.

Second, there should be explicit coverage of discrimination in the administration of state laws and programs. Public authorities and government services play a central role in people's lives and the ADA should create a clear obligation and expectation that government agencies – such as NSW Police and the Department of Communities and Justice – will not discriminate.

Third, the ADA should follow the ACT and Queensland approach in covering requests for information, which can be used as a discriminatory gatekeeping tool.[72]

Fourth, in terms of sporting and other forms of competition, we support the ACT approach, which covers both formally-organised (but not informal) sporting activities,[73] as well as other formally-organised competitions such as singing competitions.[74]

Finally, strata committees and similar bodies should be covered, given their increasing influence over housing access and community participation.

6. Wider exceptions

Question 7.1: Religious personnel exceptions

The ADA should retain exceptions for the training and appointment of members of religious orders (s 56(a)) and ministers of religion (s 56(b)), as these activities are closely connected to religious worship and practice.

However, the broader exception in s 56(c), which permits discrimination in the appointment of *any person* by religious bodies, is overly expansive and out of step with community expectations. This

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72 *Discrimination Act 1991* (ACT) s 23; *Anti-Discrimination Act 1991* (Qld) s 124(1), s 124(3).
73 *Discrimination Act 1991* (ACT) s 23A.
74 *Discrimination Act 1991* (ACT), s 23B.

provision should be replaced with more narrowly tailored exceptions, in line with the recommendations from the 2023 ALRC report *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*,[75] or those modelled on s 82A of the *Equal Opportunity Act 2010* (Vic). The latter approach allows religious organisations to make employment decisions based on religious belief *only where* the belief is an inherent requirement of the role and the discrimination is reasonable and proportionate. This would appropriately balance religious freedom with protection from discrimination across a range of sectors, including schools and faith-based service providers.

As such, the exception for employment by religious bodies should only apply where: (a) religious belief is an inherent requirement of the position; (b) the applicant or employee does not meet that requirement; and (c) the resulting discrimination is reasonable and proportionate.

Importantly, exceptions must not permit discrimination based on other attributes such as sexual orientation, gender identity, relationship status, or disability. This model, as demonstrated by Victoria's s 82A, provides a fair and legally robust framework that protects both religious freedom and equality rights. We do not support requiring written discrimination policies as a safeguard, as evidence shows such policies may entrench harm rather than protect against it.[76]

Question 7.2: Other acts and practices of religious bodies

The ADA should not retain the broad and vague exception in s 56(d) of the ADA, which permits any act or practice that conforms with religious doctrine or is deemed necessary to avoid offending religious sensibilities.

This provision creates an unjustifiably wide licence to discriminate across all protected attributes and is inconsistent with community standards, especially in the delivery of publicly funded services such as education, healthcare, housing, disability and welfare.[77]

If some form of the exception in s 56(d) is retained, it should be limited to acts that are related to core religious observances (such as worship practices), and any exceptions for service provision should only allow preferential treatment of people from that faith where it is necessary, reasonable, and proportionate to do so. Importantly, it should expressly prohibit discrimination on the basis of other attributes, including relationship status, sexual orientation, gender identity and disability.

Should a general special measures provision be introduced (as we recommend at Question 11.2 below), religious organisations would be able to take advantage of that provision on the same basis as other groups.

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75 Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) recs 1, 7B.

76 Alice Taylor and Liam Elphick, 'Religious Schools: A Transparent Right to Discriminate?' (2023) 32(3) *Griffith Law Review* 286.

77 Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) rec 1, [4.165]–[4.166].

Question 7.3: Exceptions for other forms of unlawful conduct

Religious organisations should not be exempt from prohibitions on harassment, victimisation and vilification.[78]

Allowing religious exceptions to apply beyond limited forms of discrimination necessary for religious worship and practice could permit harmful conduct, including hate speech, under the guise of religious belief. The right to manifest religion is not absolute and may be subject to legal limitations necessary to protect the fundamental rights and freedoms of others. Vilification or harassment in the name of religion should not receive legal protection.

The ADA should be amended to clarify that religious exceptions apply only in relation to discrimination provisions, and not to other unlawful conduct, consistent with human rights standards and contemporary community expectations.

Question 7.4: Exceptions for providers of adoption services

The ADA should not permit discrimination by providers of adoption services.

Decisions about adoption should be guided solely by the best interests of the child and assessed on a case-by-case basis, rather than allowing blanket discriminatory practices.[79] The existing exception in section 59A of the ADA, which permits religious adoption agencies to discriminate, should be repealed. Such discrimination is not justified in contemporary Australia and undermines both equality principles and the integrity of the adoption process.

Where faith-based organisations choose to provide public (and publicly-funded) services such as adoption services, they should be required to comply with the same laws as other providers.

Question 7.5: Private educational authorities' employment exceptions

The ADA should not retain the current broad exceptions for private educational authorities, whether religious or non-religious, in employment or education.

These exceptions are a gross anachronism, out of step with community values. They permit a wide range of discrimination, particularly against LGBTQ+ individuals, people with disabilities, and others with protected attributes in all private schools and educational institutions.

In employment, if any exception is to be retained, it should be limited to religious educational authorities and based solely on religious belief. This approach seeks to strike an appropriate balance between respecting the liberty of parents to ensure the religious and moral education of their children[80] and protecting the right to non-discrimination for those seeking employment in the large religious education sector.

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78 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999) [6.71]. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) [4.5.4.4.3], rec 77.

79 See, eg, *Adoption Act 2000* (NSW) s 8(2).

80 *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March (1976) art 18(4).

As outlined in our earlier answer to question 7.1, alternative approaches include those in line with the recommendations from the 2023 ALRC report *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*,[81] or those modelled on s 82A of the *Equal Opportunity Act 2010* (Vic).

In the former, discrimination is only permitted on the basis of religious belief and only at the point of hiring, where it involves:

- Giving preference, in good faith, to a person of the same religion
- Where giving preference is reasonably necessary to build a community of faith, and
- Where it is proportionate to the aim of building or maintain a community of faith, including in light of any disadvantage or harm that may be caused to any person or persons not preferred.[82]

In the case of the latter, discrimination is only be permitted where religious belief is an inherent requirement of the role, and where the discrimination is necessary, reasonable, and proportionate.

Importantly, in both options, exceptions do not apply to other attributes, including sexual orientation, gender identity, relationship status and disability. These attributes should be fully protected in all educational settings, consistent with anti-discrimination protections in other jurisdictions. It is not a feature of the right to freedom of religion that religious educational institutions are generally exempt from laws that seek to protect the rights of others. As noted above, the right to manifest religion is not absolute and may be subject to lawful limitations necessary to protect the rights and freedoms of others.

Question 7.6: Discrimination against students and prospective students

The ADA should also not allow private educational authorities, religious or otherwise, to discriminate against students on the basis of protected attributes such as sexual orientation, gender identity, relationship status or disability.

The human rights of children should be paramount in this context and not compromised on the basis of vague notions such as ‘ethos and values’.

If an exception is retained for religious schools to uphold the liberty of parents to provide religious education, it should be narrowly confined to religious belief, and only apply in relation to prospective students.

Once a student is enrolled, they should be fully protected from discrimination regardless of their religious belief, as well as sexual orientation, gender identity, disability or other status. This is

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81 Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, Report 142 (2023) recs 1, 7B.

82 Ibid, recommendation 7.

essential to ensure children can safely explore and express their beliefs and identities as they grow, without fear of expulsion or mistreatment.

Discrimination on the basis of disability should be explicitly ruled out in this context as out of line with community expectations.

We also reject the idea that requiring schools to publish written policies justifying discriminatory practices acts as a meaningful safeguard. As highlighted by Elphick and others, such policies only formalise discrimination and can increase harm to already marginalised students and staff.[83]

The ADA's current provisions represent the most extreme and outdated educational exceptions in the country, allowing blanket discrimination without justification. In contrast, jurisdictions such as Victoria, the ACT, Queensland, the NT and Tasmania protect LGBTQ+ students in religious schools,[84] while still allowing some limited religious preference at enrolment.[85]

Reform of the ADA in this area is overdue, to provide consistency with human rights principles, to bring NSW into line with other states and territories, and above all to protect the dignity and human rights of all students.

Question 7.7: Exceptions relating to sport

The ADA should allow only very limited exceptions to prohibitions on discrimination in sport, and these exceptions should only apply when necessary to uphold fairness, safety, or competitive integrity.

Such exceptions must be clear and narrowly defined, and grounded in evidence. The guiding principle should be to support participation and inclusion to the greatest extent possible, with the law promoting the broadest possible access to sport for all individuals, including transgender people, people with disabilities, and older Australians. Exceptions should apply exclusively to competitive sporting activities and not extend to recreational, social, or school sports, where the emphasis is on participation and community engagement.

Regarding transgender participants, any exceptions should not apply to children under 12, should be restricted to elite or high-level competitions, and must be subject to a test of reasonableness and proportionality that considers individual circumstances and relevant evidence.

Discrimination against referees, umpires, coaches, and support staff should never be permitted.

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83 Alice Taylor and Liam Elphick, 'Religious Schools: A Transparent Right to Discriminate?' (2023) 32(3) *Griffith Law Review* 286.

84 *Equal Opportunity Act 2010* (Vic) s 39(a); *Anti-Discrimination Act 1998* (Tas) s 51A(1), s 51A(4); *Discrimination Act 1991* (ACT) s 46(1)–(2); *Equal Opportunity Act 1984* (SA) s 85ZE(5); *Anti-Discrimination Act 1991* (Qld) s 41(a); *Anti-Discrimination Act 1992* (NT) ss 19, 29.

85 *Anti-Discrimination Act 1998* (Tas) s 51A(2); *Discrimination Act 1991* (ACT) s 46(1); *Anti-Discrimination Act 1991* (Qld) s 41.

Exceptions related to disability and age discrimination in sport should also be carefully crafted so as not to cause unnecessary exclusion. Sections 41, 57, and 57M of the *Discrimination Act 1991* (ACT) serve as instructive examples of these exceptions.

The current exceptions for discrimination or vilification in sport based on nationality, place of birth of length of residence should be abolished. Any legitimate distinctions based on nationality, place of birth or length of residence can be accommodated as part of an exemption targeting actions that seek to target disadvantage or preserve minority culture, or the subject of an exemption.

Question 7.8: The charitable benefits exception

We support the retention of the charitable benefits exception, in line with the recommended approach of the WA Law Reform Commission.[86] Under this model, the exception is limited to circumstances where the conferring of charitable benefits based on one or more protected attributes is consistent with the stated purpose of the relevant charity, and reasonable and proportionate to the public benefit that the charity is trying to achieve. This appropriately balances the ability to provide benefits targeted to particular groups with the need to avoid unreasonable discrimination on the basis of other protected attributes.

Question 7.9: Voluntary bodies exception

We recommend the exception for voluntary bodies is significantly narrowed. While we recognise that voluntary bodies can play a positive role in supporting a diverse and pluralistic society, there is a danger that a broad exemption will exclude people from settings where people commonly access essential social, cultural, and community opportunities. It is vital that the ADA upholds protections in these areas to ensure equal participation and access for all, regardless of protected attributes.

The exception should be strictly limited to acts that are directly connected to the genuine purpose of the organisation and only apply where conformity with the group's core mission or identity is essential. In such cases, the exception should be subject to a reasonable and proportionate test, such as that found in section 32 of the *Discrimination Act 1991* (ACT).

The exception should apply only to discrimination and not to harassment, vilification or victimisation.

Question 7.10: Aged care accommodation providers exception

The ADA should not provide a specific exception for aged care accommodation providers.

All individuals, regardless of gender identity, sexual orientation, disability, or other protected attributes, deserve equal access to aged care services and accommodation without the risk of discrimination.

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[86] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) rec 70, rec 71.

Aged care settings are places where people are especially vulnerable and reliant on the care and support of others. Maintaining an exception for providers in this sector risks entrenching harmful practices and denying people dignity and respect at a critical stage of life.

Question 7.11: The statutory authorities exception

The ADA should include a limited exception for acts done in compliance with court or tribunal orders. This exception should be based on the recommendation of the ACT Law Reform Advisory Council, which only applies to 'an act done under an order of a court or tribunal which is mandatory and specific about conduct that must be performed in the absence of a non-discriminatory alternative'.[87]

We agree with both the ACT Law Reform Advisory Council[88] and the WA Law Reform Commission[89] in their view that a broader exception, covering acts done in compliance with the written laws of a jurisdiction, is no longer necessary or appropriate.

7. Civil protections against vilification

Question 8.1: Protected attributes

The ADA's vilification protections should be modernised to better reflect contemporary community standards, including reforms to those protected attributes already covered, as well as the addition of new attributes.

Currently, the ADA prohibits civil vilification on five grounds – race, homosexuality, transgender status, HIV/AIDS status and religious belief or affiliation or religious activity.[90] This is both insufficient, and inconsistent with the broader protections under section 93Z of the *Crimes Act 1900* (NSW), which covers race, sexual orientation, gender identity, intersex status, HIV/AIDS status, and religious belief or affiliation.[91]

In line with our answers to earlier questions, we support the following changes to the protected attributes covered by civil vilification provisions under the ADA:

- Replacing homosexuality with sexual orientation
- Replacing transgender with gender identity, and
- Replacing the terminology of HIV/AIDS infected with person living with HIV/AIDS.

These attributes are more inclusive, ensuring larger sections of the community are protected against vilification, as well as reflecting usage by the relevant communities.

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87 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT),* Final Report (2015) rec 19.1.
88 Ibid.
89 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) 158.
90 *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZXB, s 49ZE, s 49ZT. See *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW).
91 *Crimes Act 1900* (NSW) s 93Z(4).

Protections against religious vilification should also be made consistent with s 93Z of the *Crimes Act*, which covers 'religious belief or affiliation', defined as 'holding or not holding a religious belief or view.' This definition is important to avoid ambiguity in the term 'affiliation'.

It should also be made clear that these protections apply only to natural persons, not organisations – a point considered further below.

The ADA should also extend civil vilification protections to at least three new protected attributes. This includes sex characteristics (to ensure intersex people are protected against vilification);[92] sex (to ensure women are protected); and disability. The inclusion of disability is consistent with the recommendations of the Disability Royal Commission.[93]

This would bring NSW's vilification protections into line with recently-introduced reforms in Victoria.[94] And, similarly to Victoria, we support provisions clarifying that vilification prohibitions also protect people who have a personal association (whether as a relative of otherwise) with someone with these attributes, and that 'it does not matter whether the contravention is claimed to have been in respect of one protected attribute or more than one attribute.'

Question 8.2: The test for vilification

We support the adoption of the recently-passed Victorian approach to the test for vilification, which includes both a harm-based test, and a separate incitement-based test.

The harm-based test makes it unlawful to engage in conduct because of a protected attribute of another person or group of persons, that would in all the circumstances, be reasonably likely to be considered by a reasonable person with the protected attribute to be hateful of seriously contemptuous of, or reviling or severely ridiculing, the other person or group of persons.[95]

While the incitement-based test covers conduct that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute of that other person or group of persons.[96]

This bifurcated approach will ensure that civil vilification provisions apply to a wide variety of real-world examples of hate-speech.

Other strengths of the Victorian approach, compared to the existing ADA test, is that it covers acts that are likely to incite, that the conduct may consist of a single occasion or a number of occasions over time, and that the conduct may occur in or outside the state. We also support the proposal to prohibit acts that threaten vilification.

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92 This would use the same definition discussed earlier at Question 5.2, and should be accompanied by amendments to s 93Z of the *Crimes Act 1900* (NSW) to also replace intersex status with sex characteristics.

93 *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', rec 4.30.

94 As passed in the *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2024* (Vic).

95 *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2024* (Vic), s9.

96 Ibid.

Question 8.3: The definition of 'public act'

We support retaining the ADA's existing approach to the scope of public act, supplemented by amendments to:

- Expressly include communicating through social media and other electronic means, and graffiti, in line with the approach in s 93Z of the *Crimes Act 1900* (NSW), and
- Clarifying that conduct may be public even if it occurs on private property or land, or at a place that is not open to the general public, as recently passed in Victoria.[97]

We also support the Victorian approach to tattoos, providing that a display on a person's body by means of tattooing or other body modification is not considered public conduct.[98]

Question 8.4: Exceptions

The general exceptions to vilification protections in the ADA appear to be functioning effectively. They provide a necessary safeguard for legitimate public discourse while maintaining appropriate limits on harmful conduct.[99]

As the Consultation Paper recognises, the public interest exceptions for some forms of vilification currently also refer to certain religious purposes. It is unnecessary to provide for a specific exemption for the expression of religious views and agree with the observation of the Law Reform Commission of Western Australia that people can hold, and even strongly express, religious views without engaging in vilification.[100]

Question 8.5: Religious vilification

As discussed in response to question 8.1, we recommend that the protection against religious vilification in the ADA be aligned with the definition used in section 93Z of the *Crimes Act 1900* (NSW), which defines religious belief or affiliation as 'holding or not holding a religious belief or view.'

Without such definition, the term 'affiliation' is otherwise excessively vague and broad and risks the provision being used to stifle criticism of religious institutions by allowing claims to be brought by people associated with such bodies.

Should 'religious activity' remain part of the provision, we maintain that this should be limited to 'lawful' religious activity. The current drafting of section 49ZE may otherwise enable individuals or organisations engaging in harmful or unlawful practices – such as conversion therapy – to bring complaints when criticised. Making this explicit in the legislation would be preferable to relying on the judicial definition of 'religion'.

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97 Ibid.
98 Ibid.
99 *Anti-Discrimination Act 1977* (NSW) s 20C(2), s 38S(2), s 49ZE(2), s 49ZT(2), s 49ZXB(2).
100 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 231.

The ADA should not allow for institutions to bring claims in their own right. As the Consultation Paper recognises, this generally does not arise, as even where organisations are corporate 'persons', they cannot be said to have a protected attribute such as race, disability sex etc. It may, however, arise in the context of religious organisations.

Allowing claims by religious organisations is inappropriate both in principle and practice. Human rights protections should apply only to natural persons, and allowing powerful, well-funded religious organisations to initiate complaints could suppress legitimate public criticism and debate, including of harmful or unethical conduct.

8. Harassment

Question 9.1: The definition of sexual harassment

The ADA provisions relating to sexual harassment should be updated and modernised to ensure effective protection.

The reasonable person test should be expanded to include the possibility of offence, intimidation, or humiliation, consistent with the SDA.[101]

This aligns with the Respect@Work recommendations and recognises the power imbalances and subtle behaviours that can contribute to hostile or unsafe environments.[102] The current threshold may be too high to capture certain behaviours that, while not guaranteed to cause harm, still carry a serious risk of doing so and are inappropriate in professional or public contexts.[103] A possibility-based threshold would encourage earlier intervention and help shift focus from intent to impact.

The ADA should require express consideration of individual attributes (such as age, gender and disability) and the nature of the relationship between the parties (for example, power imbalance or dependency). These contextual factors are essential to understanding how conduct is likely to be experienced. A one-size-fits-all 'reasonable person' test can obscure how vulnerable people may be differently impacted by the same behaviour. Expressly including these considerations would modernise the test and aid responsivity to real-world dynamics, particularly in workplaces and institutions.[104]

Providing an inclusive definition of 'conduct of a sexual nature' consistent with the SDA[105] would also be beneficial. While the term might seem self-explanatory, ambiguity can lead to inconsistent application and deter people from reporting misconduct. A definition would assist courts, employers, and the public in understanding the scope of the law.

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101 See, eg, *Sex Discrimination Act 1984* (Cth) s 28A(1)(b), s 28AA(1)(b), s 28M(2)(c).

102 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) recs 16–20.

103 *Anti-Discrimination Act 1977* (NSW) s 22A.

104 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 359. See also *Sex Discrimination Act 1984* (Cth) s 28A(1A).

105 *Sex Discrimination Act 1984* (Cth) s 28A(2).

Question 9.2: Other sex-based conduct

Harassment on the ground of sex should be expressly prohibited by the ADA. This would address a gap in the current legislative framework, ensuring that inappropriate conduct based on sex, such as derogatory remarks, exclusionary behaviour, or repeated undermining that falls short of sexual harassment, is still captured. Including sex-based harassment would bring NSW in line with other jurisdictions and implement key recommendations from the Respect@Work report, offering better protection particularly for women, gender-diverse people, and others.[106] Noting the concerns that have been raised in relation to the requirement that behaviour be 'demeaning', we recommend that this be removed from the definition of 'harassment on the ground of sex'.

The ADA should also prohibit workplace environments that are hostile on the ground of sex. Hostile work environments, where sexist comments, behaviours, or cultures persist even without specific targets, contribute significantly to discrimination and exclusion. Recognising this form of harm in the legislation would reflect lived experiences, promote safer and more inclusive workplaces, and help prevent harm before it escalates into direct harassment or discrimination.[107]

Question 9.3: Sexual harassment in the workplace

We support the ADA following the SDA's approach of prohibiting sexual harassment in connection with someone's status as a worker or a person conducting a business or undertaking.[108]

This would significantly improve coverage by extending protections to more workplace participants, including volunteers, interns, apprentices, and contractors, and better reflect the diversity of modern working arrangements.

Question 9.4: Workplace-related laws regulating sexual harassment

We have limited experience with other workplace-related laws and defer to the views of other organisations such as the Women's Service Legal NSW on whether workplace-related sexual harassment laws and the ADA are currently working well together in practice, particularly regarding the definitions of sexual harassment.

In principle there may be value in pursuing greater consistency between these legal frameworks to reduce confusion and improve access to justice. However, consistency should not come at the expense of adopting best practice reforms. If one framework, such as that within the SDA, offers stronger or more contemporary protections, including clearer definitions or broader coverage, then aligning the ADA with that model would be preferable. The priority should be ensuring the most effective legal protections are in place, even if that means some divergence from existing structures.

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106 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) rec 16. See also *Sex Discrimination Act 1984* (Cth) s 28AA.

107 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 451–71. See also *Sex Discrimination Act 1984* (Cth) s 28M(1).

108 *Sex Discrimination Act 1984* (Cth) s 28B(3)–(8).

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

We are broadly in favour of extending sexual harassment protections to cover all areas of public life. This approach would help ensure comprehensive and consistent protection for individuals and align the ADA with modern community expectations and legislative best practice, such as the approach taken in the recently enacted *Anti-Discrimination Act 1991* (Qld).[109] Expanding coverage in this way would also help close existing gaps where people may currently experience sexual harassment without access to a clear legal remedy.

However, we note concerns with the idea of extending regulation of sexual harassment in all areas of life. While protections against sexual harassment must be robust, care should be taken to avoid overreach into genuinely private domains where enforcement may be impractical or inappropriate.

Accordingly, we support a focus on public life and areas covered by discrimination protections – as recommended by the Law Reform Commission of Western Australia – while remaining cautious about proposals that would seek to regulate conduct universally, including in wholly private contexts.

In any event, we strongly support changes to ensure that sexual harassment is prohibited in clubs. We see no compelling basis for maintaining this exclusion.

Question 9.6: The private accommodation exception

Sexual harassment should be prohibited in private accommodation. The current exception in the ADA creates a significant gap in protection, particularly affecting vulnerable individuals such as renters, boarders, and domestic workers who may live in another person's home.[110]

Accordingly, this exception should not be included in a new ADA. If a limited exception is retained, it should be narrowly drawn and clearly justified,[111] with careful safeguards to ensure it does not permit or enable harassment, exploitation, or abuse. The default position, however, should be that all people, regardless of their living arrangements, are entitled to protection.

Question 9.7: Attribute-based harassment

We support expanding the ADA to prohibit attribute-based harassment across a broader range of attributes and areas of public life. Harassment can occur on the basis of many personal characteristics beyond sex – as illustrated, for example, by the Disability Royal Commission – and the law should recognise and respond to this reality to provide more comprehensive protection.

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109 *Anti-Discrimination Act 1991* (Qld) s 118. See also *Anti-Discrimination Act 1992* (NT) s 22.

110 *Anti-Discrimination Act 1977* (NSW) s 22G(2).

111 The *Sex Discrimination Act 1984* (Cth), for example, limits the exception to situations where the private accommodation is provided by a near relative.

We suggest the Northern Territory provides the best framework, with harassment on the basis of all attributes prohibited in all areas in which discrimination is also prohibited.[112] This provides a simple, clear and consistent model.

9. Other unlawful acts and liability

Question 10.1: Victimisation

The prohibition of victimisation in the ADA should be expanded to expressly include situations where a person threatens to victimise someone.[113] Threats alone can have a significant chilling effect on individuals' willingness to assert their rights or participate in complaints processes, and the law should recognise this as a form of harm in itself.[114]

Additionally, the ADA should clarify that victimisation is unlawful even if it occurs for two or more reasons. This would ensure that where victimisation is partly motivated by a prohibited reason, such as a person's involvement in discrimination proceedings, it remains unlawful, even if other motivations are also present. This could be achieved by amending the ADA to state that a mixed motive does not prevent a finding of victimisation, ensuring consistency with modern anti-discrimination jurisprudence and enhancing protection for complainants.[115]

Question 10.2: Advertisements

We support adopting the Queensland and Victorian approach to advertisements, which provides a defence where a person took reasonable steps to ensure that the advertisement was not in breach of anti-discrimination laws.[116] This strikes an appropriate balance between promoting accountability in public communications and recognising situations where individuals or organisations have genuinely attempted to comply with the law.

This is preferrable to the current approach in the ADA, with a general defence based solely on a person's reasonable belief that publication was lawful, without any requirement to have taken steps to verify this. This undermines the effectiveness of the advertising provisions. A reasonableness defence should be linked to demonstrable efforts to comply, rather than subjective belief alone.[117]

Question 10.3: The forms of liability

A key concern with the current approach to liability under the ADA is that it does not clearly or effectively account for modern forms of work, particularly within the gig economy.

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112 *Anti-Discrimination Act 1992* (NT) s 20(1)(b).

113 See, eg, *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).

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

115 See, eg, *Anti-Discrimination Act 1977* (NSW) s 4A.

116 *Anti-Discrimination Act 1991* (Qld) s 127(2)–(3); *Equal Opportunity Act 2010* (Vic) s 183.

117 See, eg, *Anti-Discrimination Act 1991* (Qld) s 127(2)–(3); *Equal Opportunity Act 2010* (Vic) s 183.

The traditional categories of direct, vicarious, joint and several, and accessorial liability are grounded in conventional employer–employee or principal–agent relationships. However, many people performing work today, such as rideshare drivers, food delivery workers, and digital platform contractors do so under arrangements that potentially fall outside these traditional classifications. This leaves a significant gap in protections, where gig workers may experience discrimination or harassment but have limited recourse due to their ambiguous or contested legal status.

To address this, the ADA should be updated to clarify and expand the scope of liability, particularly to ensure that duty holders, including digital platforms and other non-traditional entities, can be held responsible for discrimination and harassment occurring within their systems or operations. The law should better reflect the reality of contemporary work by drawing on broader definitions, such as those used in the ACT, Queensland, South Australia and the NT which encompass a wider range of work relationships beyond formal employment.[118]

Further, accessorial liability could be strengthened and better utilised to capture those in positions of control or influence, including platform operators, who knowingly allow unlawful conduct to occur. Clearer guidance and expanded liability provisions would ensure more effective enforcement and protection for all workers, regardless of their employment status.

Question 10.4: The exceptions for liability

The 'unauthorised acts' exception to vicarious liability should be removed from the ADA.[119] The existing 'reasonable steps' defence is sufficient to protect organisations that have genuinely taken appropriate action to prevent discrimination or harassment.

Relying solely on a 'reasonable steps' exception better aligns with best practice by focusing on the proactive responsibilities of employers and principals, rather than allowing them to escape liability simply because the conduct was not explicitly authorised.

Question 10.5: Liability and artificial intelligence

The increasing use of AI does challenge the ADA's current approach to liability, particularly where discriminatory outcomes arise from automated systems without direct human intervention. To address this, the ADA should be amended to ensure that liability for discriminatory conduct extends to individuals or organisations that design, deploy, or rely on AI systems, especially where those systems produce outcomes that would otherwise constitute unlawful discrimination.

The law should make it clear that the use of AI does not absolve duty holders from responsibility. Liability should be attributed to those who control or benefit from the AI system, and the 'reasonable steps' defence should require proactive auditing and mitigation of discrimination risks in AI design and implementation. This would help future-proof the ADA and reinforce the principle that technological tools cannot be used to bypass human rights.

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118 See, eg, *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'.

119 *Anti-Discrimination Act 1977* (NSW) s 53(1), s 53(3).

10. Promoting substantive equality

Question 11.1: Adjustments

We support the introduction of a positive duty to provide adjustments.

This should apply, at a minimum, to the protected attribute of disability and with respect to all areas of public life, in line with key recommendations of the Disability Royal Commission.[120]

From a terminology perspective, we agree with the Disability Royal Commission's view that 'an adjustment has nothing to do with whether an adjustment is reasonable, or if a request for an adjustment is reasonable or if a respondent's response to the request is reasonable.'[121] This is consistent with the Committee on the Rights of Persons with Disabilities ('**CRPD Committee**') stance that 'reasonableness' should not act as a distinct qualifier or modifier to the duty.'[122] To remove any misconception, the term 'adjustments', rather than 'reasonable adjustments', should be adopted in the ADA.[123]

We also support the extension of this positive duty to the other attributes identified by the Law Reform Commission of Western Australia, namely family responsibilities or carer obligations, pregnancy and breastfeeding, and especially in the context of employment.

We also support the extension of this positive duty to anyone with a protected attribute as required, or where the person has a special need because of an attribute – as is the case in the ACT and NT, respectively.[124] However, we believe that the highest and most urgent priority should be placed on the introduction of a duty to provide adjustments for people with disability, especially given the failures of anti-discrimination laws, including the ADA, on this issue over many years.

This positive duty should be a separate or stand-alone duty, rather than forming part of the broader tests for discrimination.

The existing reliance on direct/indirect discrimination provisions and a defence of unjustifiable hardship fails to address structural barriers faced by people with disability in areas such as employment, education, and access to goods and services. The reasonable adjustment provisions in the DDA and its judicial interpretation serve as a cautionary tale, which as the Disability Royal Commission observes, has failed to realise its 'apparent purpose'.[125]

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

121 *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', 307 and recommendation 4.25.

122 Committee on the Rights of Persons with Disabilities, *General Comment No. 6: Equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 7[25].

123 Noting the defence of unjustifiable hardship may be available to a duty-holder.

124 S 74, *Discrimination Act 1991* (ACT); s 24(1) *Anti-Discrimination Act* 1992 (NT).

125 *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', 306.

A distinct duty would make the obligation clearer, more proactive, and easier to enforce, reducing the onus on individuals to first prove discrimination. The *Equal Opportunity Act 2010* (Vic) provides a helpful model in this regard and has been considered one of the strengths of that Act.[126]

Requiring a person to request an adjustment as a precondition, risks undermining the purpose of the obligation, especially where individuals may not feel safe or empowered to ask, or where the need is obvious. Consistent with the views of the CRPD Committee, an adjustment must be provided from the moment a person requires access to non-accessible situations and is not limited to the person asking for the adjustment.[127] To practically discharge the duty, duty-holders should be expected to identify and implement adjustments proactively, wherever the need is either known or reasonably foreseeable.

Concerns about the introduction of a new, proactive duty, can be managed through staged introduction, with the duty applying initially to public officeholders, government agencies, and large businesses, before gradually extending coverage to other duty holders over time. Duty holders should be required to take reasonable and proportionate steps, having regard to their size, resources, nature of operations, and the context in which they operate. These steps could include conducting risk assessments, implementing policies, providing training, and responding effectively to complaints.

In terms of the test which should be used to determine the scope of this duty, and any limits, we once again see the existing approach in the Victorian *Equal Opportunity Act* as providing a helpful model. This includes both the principle that whether the adjustment is reasonable depends on the context in which the duty applies (such as employment), and also the non-exhaustive list of factors that must be considered in determining whether an adjustment is reasonable.

Question 11.2: Special measures

We support a general special measures provision, covering all protected attributes.

These measures are essential to proactively address structural and historical disadvantage and to promote substantive equality, particularly for groups such as First Nations people. Special measures are consistent with Australia's international human rights obligations, including under the International Convention on the Elimination of All Forms of Racial Discrimination ('**ICERD'**) and the Convention on the Elimination of All Forms of Discrimination Against Women ('**CEDAW'**).[128] They serve an important role in moving beyond formal equality to undo the effects of entrenched discrimination.

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126 *Equal Opportunity Act 2010* (Vic) s 20, s 22A, s 33, s 40, s 45; Queensland Human Rights Commission, 'Building belonging: Review of Queensland's *Anti-Discrimination Act 1991*' (July 2022) 119

127 Committee on the Rights of Persons with Disabilities, *General Comment No. 6: Equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 6-7.

128 *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 1(4).

In terms of the criteria that should apply, the Victorian approach provides a sound model. This includes that the action be undertaken in good faith for achieving substantive equality, be reasonably likely to achieve this purpose, be a proportionate means of achieving this purpose, and be justified because members of the group have a particular need for assistance.[129] We are also wary of imposing too many criteria, as this may add to complexity and lead to low utilisation of these provisions, and therefore limited benefits to historically marginalised groups.

Even if a general special measures provision is introduced, we nevertheless support the retention of an exemptions process as a flexible and necessary safeguard. This is particularly important where actions may fall outside the scope of a defined special measure but are nonetheless justifiable.

However, we agree in principle that the current certification process should be abolished.[130] It adds unnecessary complexity, has limited practical utility (as demonstrated by the very low numbers of applications), and could be misused. Removing certification would not preclude organisations from lawfully taking special measures, or seeking exemptions as appropriate.

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

We support the inclusion of a positive duty in the ADA to take reasonable and proportionate measures to prevent or eliminate unlawful conduct.

This introduction of this duty would shift the burden away from individuals who experience discrimination, harassment or vilification, and instead encourage proactive prevention by those in a position to effect change.[131] This approach aligns with reforms recently made to the SDA following the Respect@Work report and with the recommendations of the Disability Royal Commission[132], as well as reforms by a growing number of other Australian jurisdictions.

We support the Victorian approach to this duty, which requires duty holders to take reasonable and proportionate measures, while what those measures look like depends on factors such as the size, nature and circumstances of the duty holder's business or organisation, their resources, their business and operational priorities, as well as the practicability and cost of the measures. These steps could include conducting risk assessments, implementing policies, providing training, and responding effectively to complaints.

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129 *Equal Opportunity Act 2010* (Vic) s 12. See also ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT),* Final Report (2015) rec 20.1; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 4.1.

130 *Anti-Discrimination Act 1977* (NSW) s 126.

131 See, eg, *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; *Sex Discrimination Act 1984* (Cth) s 47C. See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).

132 *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', rec 4.27; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 480. See also 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.

In terms of implementation, as for a positive duty to make adjustments, we are open to a staged approach, where this duty initially applies to public officeholders, government agencies, and large businesses, before gradually extending coverage to other duty holders over time.

The duty should apply across all forms of unlawful conduct covered by the ADA, including discrimination, harassment, vilification, and victimisation, and should apply across all protected attributes and areas of public life. Ensuring that the duty is broad in scope but flexible in application would maximise its impact while allowing for proportionality in compliance.[133]

Finally, we support in-principle the introduction of an additional, proactive duty to promote equality on public sector bodies only, similar to the Victorian approach to promoting gender equality, the broad-based UK equality duty and in line with the recommendations of the Disability Royal Commission. This could operate alongside, and supplement, the broader duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct.

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133 See, eg, *Equal Opportunity Act 2010* (Vic) s 15(1)–(2); *Anti-Discrimination Act 1992* (NT) s 18B(1)–(2); *Discrimination Act 1991* (ACT) s 75(1)–(2). See also *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25, inserting *Anti-Discrimination Act 1991* (Qld) s 131I (uncommenced).