WOMEN'S
LEGAL SERVICE NSW

Submission on Consultation Paper - Review of the Anti-Discrimination Act 1977 (NSW)

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About Women's Legal Service NSW

Women's Legal Service NSW ('WLS NSW') advocates for an end to gender-based violence and for gender equity in Australia. As a state-wide specialist women's legal service, we assist women across NSW by providing legal advice and representation from our trauma informed, holistic legal practice across a range of practice areas including family law, domestic/family and sexual violence, compensation and victims support for victims of crime, discrimination, employment and sexual harassment.

We prioritise women who are experiencing deep and persistent disadvantage. Our specialist programs include:

- First Nations Women's Legal Program, led by First Nations staff and supported by a First Nations Women's Consultation Network,
- Women's Rights, and
- Working Women's Centre.

All three programs focus on responding to legal issues faced by women with a particular focus on responding to gender-based violence and addressing women's safety, economic security and intersecting discrimination.

We use our experience gained from working with over one hundred thousand women and our feminist analysis of social issues and the law to determine where we can make the most impactful and positive change. We advocate for systemic change through policy and law reform, strategic litigation and providing education and training to the legal profession, the community services sector and other key stakeholders.

Acknowledgements

We acknowledge the Traditional Custodians of the lands on which we work across NSW and on which we live. We pay deep respects to Elders past and present. Is, was and always will be Aboriginal land.

We acknowledge the many women who have experienced gender-based violence with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

Contributors

The following people contributed to the research and/or drafting of this submission: Philippa Davis, Sharmilla Bargon, Emily Gray, Rebecca Koelmeyer, Emily Jol, Leigh Gordon and Sarah Croskery-Hewitt.

Use of language

Gendered language

Throughout this submission we refer to the experience of women and girls. This reference is inclusive of all people who have experienced oppression as women, including cisgender, transgender, non-binary and gender diverse people. We also acknowledge the need to address the high rates of sexual, domestic and family violence and abuse perpetrated against LGBTIQ+ people more broadly and the same gendered drivers of such violence.

Abbreviations

Anti-Discrimination Act 1977 (NSW)	the Act
Convention on the Elimination of All Forms of Discrimination Against Women	CEDAW
Convention on the Rights of the Child	CRC
Convention on the Rights of Persons with Disabilities	CRPD
Disability Discrimination Act 1992 (Cth)	DDA
Equal Opportunity Act 2010 (Vic)	VEO Act
Family and domestic violence	FDV
Fair Work Act 2009 (Cth)	FWA
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
Person conducting a business or undertaking	PCBU

Sex Discrimination Act 1984 (Cth)	SDA
Anti-Discrimination Act 1991 (Qld)	QAD Act
United Nations Declaration on the Rights of Indigenous Peoples	UNDRIP

Opening comments

We thank the NSW Law Reform Commission for the opportunity to comment on the first consultation paper of the review of the Anti-Discrimination Act 1977 (NSW) ('the Act') regarding unlawful conduct.

We welcome this review as a vital and overdue opportunity to modernise and strengthen anti-discrimination protections in NSW.

This review takes place in a broader national context marked by a lack of progress or agenda on human rights reform at the federal level. While the recently announced review of the Disability Discrimination Act 1992 (Cth) ('DDA') is welcomed, the Federal Government has not meaningfully responded to the recommendations of the Inquiry into Australia's Human Rights Framework. At the same time, reforms to Queensland's Anti-Discrimination Act 1991 ('QAD Act') remain stalled, and the Northern Territory is actively winding back protections.

In this landscape, consistency of anti-discrimination laws across jurisdictions, particularly alignment with federal legislation, is a valuable goal. However, NSW must not be constrained by the limitations of the federal framework. This review is a critical opportunity for NSW to take a leadership role and deliver best practice legislation that is meaningful, future-proof and inclusive.

It is widely recognised that the Act must be updated to include more comprehensive protections so that individuals and communities are fully protected under the law. However, the Act must do more than respond to harm. The current neutrality of the Act does not adequately recognise or account for the disproportionate impacts of discrimination on women and those experiencing deep systemic disadvantage. Our submission is guided by an intersectional feminist framework that recognises the harmful social constructs and systemic inequalities that underpin discrimination and harassment.

We submit that reforms to the Act must be guided by the following principles:

- Modelled on the equality and non-discrimination provisions of international human rights instruments to which Australia is a signatory, including the *International Covenant on Civil and Political Rights* ('ICCPR'), the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'), the *Convention on the Rights of the Child* ('CRC'), the *Convention on the Rights of Persons with Disabilities* ('CRPD') and the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP');

- Accessible, ensuring that all people can easily understand, navigate and use the protections provided;

- Inclusive and comprehensive so that individuals and communities who experience discrimination are fully protected under the law;

- Responsive to intersectional discrimination by recognising and facilitating claims of intersectional discrimination;

- Equipped with mechanisms to proactively identify and address systemic discrimination, rather than relying solely on individuals to initiate complaints;

- Explicit in stating that the achievement of substantive equality is a core object of the Act;

- Aligned, where possible, with federal anti-discrimination protections to promote consistency, while also going beyond federal standards where necessary to ensure NSW leads with a best practice approach; and

- Future-proofed to remain relevant and responsive to emerging forms of discrimination and evolving understandings of equality and human rights.

We reiterate our strong belief that a modernised Act must be accompanied by a NSW Human Rights Act to fully protect and promote human rights.

Recommendations

Recommendation 1

We recommend that the *Anti-Discrimination Act 1977* (NSW) ('the Act') be repealed and replaced with a new anti-discrimination law that is modern, inclusive and accessible, and based on best practice from other jurisdictions.

Recommendation 2

We recommend that the Act include an objects clause to explicitly state that the purpose of the Act is, among other things, to eliminate discrimination and promote and facilitate the achievement of substantive equality for all people.

Recommendation 3

We recommend that the definition of 'direct discrimination' be amended to remove the requirement for a comparator and replaced with an unfavourable treatment or detriment test.

Recommendation 4

We recommend that the test for indirect discrimination be amended to require only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected.

Recommendation 5

We recommend the reasonableness standard be retained in the test for indirect discrimination. The Act should include a comprehensive list of factors to be considered in determining reasonableness, modelled on the Victorian Equal Opportunity Act 2010 ('VEO Act').

Recommendation 6

We recommend the prohibition on indirect discrimination extend to characteristics that people with protected attributes either have or are assumed to have.

Recommendation 7

We recommend the adoption of a shifting burden of proof, modelled on the *Equality Act 2010* (UK) and Queensland's *Anti-Discrimination Act 1991* ('QAD Act').

Recommendation 8
We recommend the adoption of a unified, inclusive and simplified definition of 'discrimination' that makes clear that direct and indirect discrimination can occur concurrently and are not mutually exclusive.

Recommendation 9
We recommend that the Act explicitly prohibit discrimination arising from the effect of the intersection of two or more protected attributes.

Recommendation 10
We recommend that the test for discrimination be extended to prohibit intended future discrimination.

Recommendation 11
We recommend the Act update and expand the attribute of 'responsibilities as a carer' to include all persons who provide care and assistance to someone in need of care, excluding those who do so on a commercial basis. The Act should explicitly state that this includes kinship responsibilities.

Recommendation 12
Subject to further consultation with disability advocacy organisations and people with disabilities, we recommend a definition of 'disability' in the Act that aligns substantially with the *Disability Discrimination Act 1992* (Cth) ('DDA'), but with the removal of the offensive and outdated language of 'disfigurement', 'malformation', 'malfunction' and 'disturbed'.

Recommendation 13
We recommend that the ground of 'homosexuality' be replaced with protection from discrimination on the basis of sexual orientation.

Recommendation 14
We recommend that the ground of 'marital or domestic status' be replaced with protection from discrimination on the basis of relationship status.

Recommendation 15
We recommend that protections against caste discrimination be included and suggest, for consistency with federal legislation, that this could be achieved under the attribute of 'social origin'.

Recommendation 16
We recommend that references to people of the 'opposite sex' in the test for sex discrimination be replaced with people of a 'different sex'.

Recommendation 17
We recommend that breastfeeding and pregnancy (including potential pregnancy) be included as standalone protected attributes in the Act, separate to sex discrimination.

Recommendation 18
We recommend that discrimination on transgender grounds be removed and replaced with 'gender identity' and 'sex characteristics' as separate attributes.

Recommendation 19
We recommend that the Act protect people against discrimination based on any protected attribute they have had in the past or may have in the future.

Recommendation 20
We recommend that discrimination based on being a relative or associate of someone with any other protected attribute be included as a separate attribute.

Recommendation 21
We recommend that being subjected to gender-based violence, such as family, domestic or sexual violence, is included as a protected attribute.

Recommendation 22
We recommend the inclusion of irrelevant criminal record as a protected attribute.

Recommendation 23
We recommend the inclusion of social origin as a protected attribute.

Recommendation 24
We recommend that sex work be recognised as a protected attribute.

Recommendation 25
We recommend that immigration status be recognised as a protected attribute.

Recommendation 26
We recommend that religious belief or activity be recognised as a protected attribute.

Recommendation 27
We recommend that the Act include a statutory requirement for regular reviews to assess its effectiveness in light of changing social norms and to consider whether new attributes should be added or existing ones amended.

Recommendation 28
We recommend that the definition of 'employment' is expanded to include volunteers.

Recommendation 29
We recommend that the Act adopt a broader, more comprehensive approach to discrimination in work.

Recommendation 30
We recommend removing the following exceptions to discrimination in work: discrimination by private educational authorities, discrimination by small businesses and small partnerships, discrimination against people addicted to prohibited drugs and discrimination against private household employees.

Recommendation 31
We recommend the definition of 'educational authority' be expanded, and that the exemptions afforded to private educational authorities to discriminate in employment and education alike on the grounds of sex, marital status, disability, homosexuality and transgender status be removed.

Recommendation 32
We recommend prohibiting discrimination in the manner or way in which goods or services are provided, and expanding coverage of goods and services to ensure that service provision includes that provided by NSW Government agencies.

Recommendation 33
We recommend narrowing current exceptions in insurance and superannuation, in particular exceptions based on sex, disability and marital status, and exceptions that allow the misgendering of transgender individuals.

Recommendation 34
We recommend removing the broad exceptions that allow religious bodies to discriminate in the provision of goods and services to the public.

Recommendation 35
We support expanding the definition of 'accommodation' to ensure it reflects the range of accommodation now used in NSW, and the removal of the religious bodies exception for the provision of accommodation to members of the public.

Recommendation 36
We recommend that the definition of 'registered clubs' be expanded, and that the exception in relation to sex be removed.

Recommendation 37
We recommend that discrimination based on family/carer's responsibilities be prohibited in all areas of public life.

Recommendation 38
We recommend broadening the Act to cover discrimination in all areas of public life.

Recommendation 39
We recommend that exceptions should be allowed for members of religious orders only in relation to the appointment of ministers of religion and where it is directly related to religious observance.

Recommendation 40
We recommend that in relation to the acts or practices of religious bodies, discrimination should be limited to that based on religious belief or activity.

Recommendation 41
We recommend that exceptions for religious bodies are not expanded to cover other forms of unlawful conduct under the Act.

Recommendation 42
We recommend removing the remaining exception for providers of adoption services.

Recommendation 43
We recommend removing the private educational authority employment exceptions.

Recommendation 44
We recommend removing exceptions for private educational authorities in education.

Recommendation 45
We recommend significantly narrowing the exception allowing discrimination in sport against transgender people.

Recommendation 46
We recommend removing exemptions that allow faith-based service providers/charities to discriminate on any ground other than religious belief or activity.

Recommendation 47
We support the repeal of the voluntary bodies and aged care accommodation providers exceptions.

Recommendation 48
We recommend, in relation to vilification, changing 'homosexuality' to 'sexual orientation', 'recognised transgender person' to 'trans or gender diverse person' and 'HIV/AIDS infected' to 'person living with HIV/AIDS'.

Recommendation 49
We recommend that the Act extend protections from vilification to all groups with protected attributes.

Recommendation 50
We recommend the adoption of a harm-based test for vilification.

Recommendation 51
We recommend that the threshold for the incitement-based test is lowered to a public act that 'is likely to incite' serious hatred, contempt or ridicule.

Recommendation 52
We recommend replacing the current definition of 'public act' with the definition in s 93Z of the *Crimes Act 1900* (NSW).

Recommendation 53
We recommend the removal of the permanent religious exemptions to vilification. Instead, we support the inclusion of religious belief and activity as a protected attribute.

Recommendation 54
We recommend clarifying that religious vilification protections are applicable only to 'natural persons' or 'individuals'.

Recommendation 55
We recommend that the protections against sexual harassment under the Act be aligned, as far as possible, with the *Sex Discrimination Act 1984* (Cth) ('SDA').

Recommendation 56
We recommend the inclusion of 'harassment on the basis of sex' and 'subjection to a hostile workplace on the basis of sex' as unlawful acts to bring the Act in line with the protections included in the SDA.

Recommendation 57
We recommend that the Act adopt the SDA's approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking.

Recommendation 58
We recommend greater alignment between the Act and sexual harassment laws.

Recommendation 59
We recommend that the Act include a general prohibition on sexual harassment in all aspects of public life.

Recommendation 60
We recommend that the private accommodation exception for sexual harassment be repealed.

Recommendation 61
We recommend that the protections relating to a hostile workplace on the ground of sex and harassment on the basis of sex should extend to all protected attributes.

Recommendation 62
We support the prohibition of both actual and threatened victimisation under the Act, and the introduction of provisions that ensure that victimisation is unlawful even if done for two or more reasons.

Recommendation 63
We recommend a standalone duty to provide adjustments for people with a protected attribute under the Act, in particular, for victim-survivors of gender-based violence and people with disability.

Recommendation 64
We recommend that the Act contain a special measures provision.

Recommendation 65
We recommend the introduction of a NSW-based positive duty to prevent or eliminate unlawful conduct.

Comprehensive reform

1. Comprehensive reform of the Act is essential to adequately protect human rights in NSW. The Act is outdated, complex and difficult to navigate, making it difficult for individuals to understand and assert their rights, and for organisations to ensure compliance.

2. The Act contains inherent structural deficiencies that have been compounded by decades of piecemeal amendments. This sees each attribute included in its own Part, with its own definitions, prohibitions for each area of public life and exceptions. In some instances, understanding a single legal principle requires searching through multiple parts of the Act. For example, the definition of 'disability' in relation to disability discrimination is not confined to a single provision, but rather spread across the Definitions in Part 1, and Part 4 of the Act which deals with disability discrimination.

3. This structure is strikingly out of step with Commonwealth and other State and Territory anti-discrimination laws, which start by listing the protected attributes, the prohibitions in each area of public life, and then a single list of exceptions. This structure ensures consistency in judicial interpretation and accessibility, which assists in understanding and navigation of law.

4. Substantively, the Act contains serious limitations including outdated and exclusionary language, overly complex legal tests for discrimination, a narrow scope of protections and outdated exceptions that are unjustifiably broad. These issues go to the very core of the Act and cannot be rectified through further incremental reform.

5. We must take this opportunity to meet community expectations and protect the human rights of all people in NSW by enacting a modern, inclusive and accessible law. Strong foundations are required so that the new law will be equipped to adapt to future challenges.

Recommendation 1

We recommend that the *Anti-Discrimination Act 1977* (NSW) be repealed and replaced with a new anti-discrimination law that is modern, inclusive and accessible, and based on best practice from other jurisdictions.

Objects of the Act

6. Unlike other jurisdictions, [1] the Act does not include an objects clause. An objects clause plays an important role in clarifying the purpose and foundational principles that underpin the Act. It provides guidance to both the community and the judiciary in interpreting and applying the legislation in a way that is consistent with its intended objectives.

7. We recommend that the Act include an objects clause that states, at a minimum, that the objects of the Act are:

- to reflect the equality and non-discrimination provisions of the human rights instruments that Australia is a signatory to, including the ICCPR, ICESCR, CEDAW, CRC, CRPD and UNDRIP;

- to eliminate discrimination as far as possible by providing comprehensive protections against unlawful discrimination, including intersectional forms of discrimination;

- to promote and facilitate the achievement of substantive equality for all people, as far as reasonably practicable, by recognising that:

    - discrimination can cause social and economic disadvantage and that access opportunities are not equitably distributed throughout society;

    - equal application of a rule to different groups can have unequal results or outcomes; and

    - the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodations and the taking of special measures;

- to recognise and address the unique and compounded forms of harm that result from intersectional discrimination; and

- to promote and facilitate the elimination of systemic discrimination.

Recommendation 2:

We recommend that the Act include an objects clause to explicitly state that the purpose of the Act is, among other things, to eliminate discrimination and promote and facilitate the achievement of substantive equality for all people.

Tests of discrimination

Question 3.1: Direct Discrimination

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

8. The current test for direct discrimination is arbitrary, overly technical and confusing, and undermines the intent of the Act. Reform is essential regardless of whether a unified definition of 'discrimination' as recommended above is adopted.

9. Applying the comparator test requires identifying a person in materially the same circumstances as the person alleging discrimination. This diverts judicial attention from the central question of whether a person was treated unfavourably because of a protected attribute or attributes. It shifts the focus to a highly artificial exercise in identifying a hypothetical comparator rather than focussing on the effect of the conduct. As a result, cases may be lost based on artificial and technical debates about what the material circumstances were, or not pursued at all, with such individuals deterred by a legal test that is at odds with their lived experience.

10. As discussed below at Question 3.8, this exercise poses a particular problem for intersectional claims because of uncertainty around selecting an appropriate comparator. Relying on a single comparator to prove discrimination for each protected attribute is fundamentally at odds with the nature of intersectional discrimination and is likely to undermine the success of these claims.

11. The comparator requirement should be replaced by an 'unfavourable treatment' or 'detriment' test. The test should ask whether the person was treated unfavourably because the person has *one or more protected attributes*, without requiring a hypothetical comparator. This approach is easier to apply and better recognises the nuanced ways discrimination can manifest.

12. This would bring NSW in line with best practice in other Australian and international jurisdictions, including Victoria and the ACT, by adopting a modern, simplified definition of 'direct discrimination'.

Recommendation 3:

We recommend that the definition of 'direct discrimination' be amended to remove the requirement for a comparator and replaced with an unfavourable treatment or detriment test.

Question 3.2: The comparative disproportionate impact test

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

13. We support simplifying the test for indirect discrimination by removing the requirement to assess the disproportionate impact of a requirement or condition by reference to a comparator group. The statistical analysis required to show a disproportionate impact is unnecessarily technical and places an undue evidentiary burden on complainants. This exercise becomes even more complex where there are multiple grounds of discrimination involved.

14. As is the position in several Australian jurisdictions, the question should be whether a requirement or condition disadvantages a person with a protected attribute. [2] This approach better reflects the realities of discrimination and enhances access to justice, whilst maintaining fairness and balance by still requiring the applicant to establish the link between the disadvantage and the protected attribute or attributes.

Question 3.3: Indirect discrimination and inability to comply

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

15. We support removing the 'not able to comply' limb from the indirect discrimination test to ensure alignment with a substantive equality approach and consistency with modern formulations of the test in international and Australian jurisdictions.

16. This requirement is overly restrictive and does not reflect the lived experience of discrimination. Discrimination may exist even if some individuals within a group could technically comply, but doing so causes serious disadvantage. For example, whilst a woman returning from parental leave may theoretically be able to comply with a requirement to work full-time by arranging childcare, caring for her children is intrinsic to the attribute of family responsibilities. Requiring proof of absolute non-compliance undermines the purpose of indirect discrimination protections.

17. The focus should be on whether the condition or practice has a disadvantaging impact, not on whether all individuals within a group are theoretically able to comply. Jurisdictions with this approach include the ACT, Tasmania, Victoria, and the *Age Discrimination Act 2004* (Cth) and SDA at the federal level.

18. Gaze and Smith note that this requirement has "not generally posed a problem for complainants because it has been interpreted practically rather than theoretically". [3] In *Hurst v Queensland*, [4] the Full Federal Court held that:

> *"... it is sufficient to satisfy that component of s6(c) [of the Disability Discrimination Act 1992 (Cth)] that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespectively or whether that person can cope with the requirement or condition."*

19. This approach has been followed by the NSW Civil and Administrative Tribunal in applying the similar requirement under the Act. [5] We believe that the Act should not impose a requirement that is more stringent at face value than is supported by case law. To do so is likely to cause confusion for members of the community who are unfamiliar with such case law, and would be out of step with community expectations.

Recommendation 4:

We recommend that the test for indirect discrimination be amended to require only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected.

Question 3.4: Indirect discrimination and the reasonableness standard

Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it? Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

20. We support the retention of a reasonableness standard in the test for indirect discrimination, provided it is more clearly defined to minimise uncertainty and promote consistent application.

21. Retaining the reasonableness standard ensures alignment with the approach taken at the federal level and in most State and Territory jurisdictions. While alternative formulations such as a 'legitimate and proportionate' test may assist judicial interpretation, we believe any potential benefits are outweighed by the risk of confusion for duty holders resulting from introducing a new standard.

22. Concerns about the clarity and predictability of the reasonableness standard can be appropriately mitigated by including a comprehensive list of factors to be considered in determining reasonableness, including a factor referring to proportionality. We consider the list of factors in s 9 of the VEO Act to be a useful reference point.

Recommendation 5:

We recommend the reasonableness standard be retained in the test for indirect discrimination. The Act should include a comprehensive list of factors to be considered in determining reasonableness, modelled on the *Victorian Equal Opportunity Act* 2010.

Question 3.5: Indirect discrimination based on characteristics

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

23. We support extending the prohibition on indirect discrimination to cover characteristics that people with protected attributes generally have or are assumed to have. This approach more accurately reflects how discrimination often occurs – not solely on the basis of the attribute itself, but through stereotypes and assumptions associated with that attribute.

24. As noted above, we reiterate our concerns about the artificial distinction between direct and indirect discrimination. In line with this, there is no principled reason why protection against discrimination based on characteristics should be confined to direct discrimination. A consistent approach should apply to ensure comprehensive protection.

Recommendation 6:

We recommend the prohibition on indirect discrimination extend to characteristics that people with protected attributes either have or are assumed to have.

Question 3.6: Proving discrimination

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

25. The current approach where the burden of proof rests entirely with the complainant is unduly onerous and inconsistent with the objectives of anti-discrimination laws and the approaches of comparable overseas jurisdictions. [6]

26. In practice, discrimination is rarely overt. Complainants must prove the internal motivations behind a respondent's behaviour which is inherently difficult to do, particularly where the discrimination is the result of bias and prejudice. These difficulties are compounded in cases of intersectional discrimination. The result is

that the complainant must rely on circumstantial evidence with the court asked to make an inference, something which we know the court is reluctant to do. [7]

27. We support the adoption of a shifting burden of proof, modelled on the *Equality Act 2010* (UK) and the QAD Act. Under these models, once a complainant establishes a prima facie case that the unlawful discrimination occurred, the burden shifts to the respondent to demonstrate that the reason for the action was not discriminatory. We support the position of the Australian Human Rights Commission that this shifting burden "sets the appropriate threshold, rather than s 361 of the Fair Work Act". [8]

28. With respect to indirect discrimination, once a complainant has established the discriminatory impact of a condition, requirement or practice, the evidentiary burden of proving that the discriminatory condition was reasonable should shift to the respondent. This is consistent with the approach under the *Age Discrimination Act 2004* (Cth), the DDA and the SDA.

29. We note the comments from the Parliamentary Joint Committee on Human Rights that "it is a well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case has been made". [9]

Recommendation 7:
We recommend the adoption of a shifting burden of proof, modelled on the *Equality Act 2010* (UK) and Queensland's *Anti-Discrimination Act 1991*.

Question 3.7: Direct and indirect discrimination

How should the relationship between different types of discrimination be recognised? Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

30. The current distinction between direct and indirect discrimination creates unnecessary complexity and confusion. Complainants are often forced to plead both direct and indirect discrimination claims in the alternative and prepare evidence to satisfy both. This creates additional complexity and leads to technical disputes, rather than focussing on the substantive discrimination issue. Treating them as mutually exclusive is arbitrary and distracts from the core issue of whether discrimination occurred, and creates a technical barrier that undermines access to justice. This artificial divide is particularly pronounced in cases of intersectional discrimination. [10]

31. We support a unified, inclusive and simplified definition of discrimination that applies to all attributes. This definition would make it clear that direct and indirect discrimination can occur concurrently and are not mutually exclusive. At a minimum, we support the approach adopted in the *Discrimination Act 1991* (ACT).

32. This is not a radical proposal. This approach would enhance the accessibility of the Act for the community, support compliance and more accurately reflect individual experiences of discrimination. Importantly, however, it retains the established concepts of direct and indirect discrimination, thereby ensuring consistency with existing case law.

33. We also point to the test proposed by the Australian Discrimination Law Expert Group, [11] which we consider builds on and strengthens the approach taken in the ACT. This test makes clear that it is not necessary that the prescribed reason be the sole or dominant ground, and the respondent's intention or awareness of the purpose or effect of the discrimination is irrelevant. Including language similar to existing s 4A of the *Discrimination Act 1991* (ACT) within the definition of 'discrimination' itself would further support the accessibility of the Act.

Case study

Ayesha* cannot attend her team's 8am daily meeting because of her family responsibilities. This would likely meet a current definition of indirect discrimination given women continue to be more likely to have primary caregiving responsibilities. It is artificial to ignore that Ayesha is also experiencing direct discrimination because her inability to meet the requirement arises because of her family responsibilities, or a characteristic appertaining to her sex.

**Not her real name*

Recommendation 8:

We recommend the adoption of a unified, inclusive and simplified definition of 'discrimination' that makes clear that direct and indirect discrimination can occur concurrently and are not mutually exclusive.

Question 3.8: Intersectional discrimination

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

34. The Act must explicitly recognise and address the unique and compounded forms of harm that arise from intersectional discrimination. [12]

35. Whilst a provision similar to ss 8(2)–(3) of the *Discrimination Act 1991* (ACT) test may provide protection in cases of multiple discrimination, that is, unfavourable treatment based on two or more separate protected attributes, it falls short of addressing intersectional discrimination.

36. We recommend that the Act explicitly prohibit discrimination arising from the effect of the intersection of two or more protected attributes. While we recommend drafting of the provision should be modelled on s 3.1 of the Canadian *Human Rights Act*, RSC 1985, c H-6 – "For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds" – we recommend that the definition use the words 'on the basis of the intersection of two or more attributes' rather than the term 'combination' to ensure it accurately reflects the concept of intersectionality.

Case study

Elle* is a lesbian woman with a decade of corporate experience. She works for a large finance company, where she has worked for close to half of her career. Elle has applied for promotions to the management level on several occasions throughout her employment, but has been denied a promotion every time. Elle has noticed that she has been passed over repeatedly by gay men and heterosexual women with less experience and fewer qualifications. Her boss has made several comments to Elle about "not wanting to alienate investors", and about how the company needs "committed" managers who will "go above and beyond" to make investors feel comfortable. Elle's experience of discrimination is an intersectional experience of discrimination on the basis of both her sexual orientation and her gender, rather than on the two grounds separately.

**Not her real name*

37. A further essential reform is the removal of the comparator requirement for direct discrimination claims. This requirement is particularly unsuitable for intersectional claims, where identifying a suitable comparator may be impossible or conceptually flawed (see Question 3.1). To prove discrimination under the Act, the complainant often must show that they were treated less favourably than a person in the same or similar circumstances but without the protected attribute (the comparator). So, a woman alleging sex discrimination must compare herself to a man in similar circumstances. For intersectional discrimination, say, where you have a First Nations woman alleging discrimination, should the comparator be a white man, a First Nations man, or a white woman? None of those comparators highlight the intersecting effect or disadvantage of being both First Nations and female.

38. We also reiterate our recommendation to include explicit reference to intersectionality in the Act's objects clause, to aid both the community and the judiciary in interpreting and applying the legislation in a way that is consistent with how discrimination is experienced in practice.

Recommendation 9:

We recommend that the Act explicitly prohibit discrimination arising from the effect of the intersection of two or more protected attributes.

Question 3.9: Intended future discrimination

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

39. Capturing intended future discrimination is essential to ensuring the Act is effective in addressing both the realities and risks of discrimination towards women (and other groups or individuals with protected attributes) in NSW.

40. The current failure of the Act to address intended future discrimination overlooks the significant harm such conduct can cause, even before any discriminatory act takes place. Public statements or planned practices may deter individuals from seeking employment or accessing essential services, and contribute to a broader culture of exclusion and inequality.

41. We recommend that the test for discrimination be extended to include when a duty holder 'proposes to' treat someone unfavourably, or to impose a requirement, condition or practice which would have the effect of treating someone unfavourably. This would ensure the Act captures both direct and indirect forms of intended future discrimination.

Case study

A common example of intended future sex discrimination arises in recruitment. For instance, an employer may decline to hire a young woman on the assumption that she will soon start a family and require parental leave or flexible working arrangements upon return from leave. Although the discriminatory impact is framed as occurring in the future, the decision to deny employment is made now, based on stereotypes linked to her sex. This illustrates how intended future sex discrimination operates in practice, disadvantaging women not because of their present circumstances, but because of assumptions about what their future roles or capacities will be.

Case study

A disability advocacy group attempted to challenge the design of a new public library before construction began, arguing that the planned lack of accessible features would indirectly discriminate against people with disabilities. A complaint based on future indirect discrimination cannot be made under the current Act. After the library was opened, the group lodged their complaint with Anti-Discrimination NSW. The council strongly defended the complaint by citing unjustifiable hardship, arguing that retrofitting the building would be prohibitively expensive. Had the complaint been allowed at the planning stage, these accessibility issues could have been addressed. This case demonstrates that the Act's failure to prohibited future discrimination can undermine the success of an indirect discrimination claim.

Recommendation 10:

We recommend that the test for discrimination be extended to prohibit intended future discrimination.

42. Characteristics or attributes such as pregnancy, potential pregnancy, breastfeeding and family responsibilities, or being accompanied by an assistant or an assistance animal, would be likely as a matter of law to be covered by an appropriately broadly drafted characteristics extension. However, specific recognition of these particular characteristics plays an important role in making the application of the legislation clear, and should be maintained together with a general characteristics extension.

Question 4.2: Discrimination based on carer's responsibilities

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "responsibilities as a carer"? Should the ADA separately protect against discrimination based on someone's status of being, or not being, a parent?

43. The narrow way that this attribute is expressed means it fails to adequately recognise the diversity of caring responsibilities and family structures in the community, instead reflecting a Western-centric, heteronormative notion of family life.

44. This attribute should be updated and expanded to include all persons who provide care and assistance to someone in need of care, excluding those who do so on a commercial basis. Drawing on the approach in the ACT, we support redefining the attribute itself as 'parent, family or kinship status or responsibilities'. Explicitly labelling the attribute in this way has a strong signalling effect and reinforces its inclusive scope to the community. If this wording is not adopted, the definition of 'carer' must, at a minimum, be revised to reflect this broader scope. We strongly emphasise the importance of explicitly stating that the provision includes kinship responsibilities.

45. For clarity, the Act should explicitly note that discrimination based on parental status includes the status of not being a parent.

Case study

We represented Tahlia*, a First Nations woman working full-time in a retail store. She regularly cared for her sister's three young children as part of her kinship responsibilities, but did not have any formal legal guardianship. On one occasion, our client requested leave at short notice to care for the children when their mother was hospitalised. Her employer denied the leave and subsequently dismissed her for being 'an unreliable employee'. Our client was unable to make

a claim of discrimination under the Act on the basis of her responsibilities as a carer because it does not expressly recognise and protect kinship caring responsibilities and nor is she considered immediate family. This situation demonstrates the gap in the Act that exists for those undertaking caring roles in accordance with extended kindship and family obligations.

**Not her real name*

Recommendation 11:
We recommend the Act update and expand the attribute of 'responsibilities as a carer' to include all persons who provide care and assistance to someone in need of care, excluding those who do so on a commercial basis. The Act should explicitly state that this includes kinship responsibilities.

Question 4.3: Disability discrimination

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "disability"? Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability? What changes, if any, should be made to the public health exception?

46. A human rights model of disability must inform and underpin the Act. This model recognises that all people have an inherent right to dignity and worth as individuals, with an understanding of intersectionality at the forefront.

47. The definition provided in the Act aligns closely with the DDA, consistent with the approach taken in other State and Territory jurisdictions. The definition of disability under the DDA [13] reflects a medical model of disability, using deficit-based language to position disability as a problem, deficit or abnormality that requires medical attention to 'cure'. The language of 'disfigurement', 'malformation', 'malfunction' and 'disturbed' is particularly problematic, and reinforces the biases and prejudices driving disability discrimination and harassment.

48. Whilst consistency of laws is important, this should not come at the expense of best practice. We urge the NSW Government to show leadership by setting a higher benchmark in disability law.

49. Accordingly, we support a broad and inclusive definition of 'disability' that aligns substantially with the DDA, but with the removal of the offensive and outdated language of 'disfigurement', 'malformation', 'malfunction' and 'disturbed'. The definition must specify that a disability includes 'behaviour that is a symptom or manifestation of the disability'. We emphasise that further consultation is required

with disability advocacy organisations and people with disabilities on the appropriateness of this definition.

50. We acknowledge that the medical model will continue to have a role in defining disability in anti-discrimination law. However, it is essential that the Act also integrate the human rights model to describe how discrimination takes place and how it should be prevented and addressed. Our recommendations regarding the inclusion of an objects clause, the duty to provide reasonable adjustments and the introduction of a NSW-based positive duty will ensure that the Act is firmly underpinned by a human rights approach to disability.

51. Our support for a broad definition of 'disability' means we do not consider that introducing a new attribute to protect against genetic information discrimination is required. Instead, consistent with the approach in other Australian jurisdictions, the definition of 'disability' should specify that a disability that may exist in the future, including because of a 'genetic predisposition to the disability'.

52. Currently, the definition of 'disability' is split across the Definitions in Part 1, and Part 4 of the Act. To improve clarity and accessibility, and consistent with our recommendation to repeal and replace the Act, the full definition should be consolidated within the Definitions section.

Recommendation 12:

Subject to further consultation with disability advocacy organisations and people with disabilities, we recommend a definition of 'disability' in the Act that aligns substantially with the *Disability Discrimination Act 1992* (Cth), but with the removal of the offensive and outdated language of 'disfigurement', 'malformation', 'malfunction' and 'disturbed'.

Question 4.4: Discrimination based on homosexuality

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

53. The Act is currently failing to adequately protect the rights of LGBTIQ+ people.

54. The use of the terms 'homosexuality' and 'homosexual person' are antiquated terms no longer used by the vast majority of people under the LGBTIQ+ umbrella.

55. Discrimination on the ground of sexual orientation can occur because someone is lesbian, gay, bisexual or queer, or because of the gender of the person's current, past or intended sexual and/or romantic partners.

56. The ground of 'homosexuality' should be replaced with protection from discrimination on the basis of sexual orientation. This term is consistent with Australia's obligations under international law and with anti-discrimination laws in comparable jurisdictions.

57. The grounds of 'homosexuality' and 'transgender status' should be changed in tandem and respectively to sexual orientation, gender identity and sex characteristics.

Recommendation 13:

We recommend that the ground of 'homosexuality' be replaced with protection from discrimination on the basis of sexual orientation.

Question 4.5: Discrimination based on marital or domestic status

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

58. We recommend that the ground of 'marital or domestic status' be replaced with protection from discrimination on the basis of relationship status.

59. 'Relationship status' is a more inclusive and contemporary term that better reflects and protects the diversity of modern relationships. In contrast, 'marital status' creates an unnecessary legal distinction and reinforces a perceived hierarchy among different types of relationships. Similarly, the term 'domestic status' is outdated and lacks clarity.

Recommendation 14:

We recommend that the ground of 'marital or domestic status' be replaced with protection from discrimination on the basis of relationship status.

Question 4.6: Racial discrimination

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "race"? Are any new attributes required to address potential gaps in the ADA's protections against racial discrimination?

60. Australia's National Anti-Racism Framework, developed by the Australian Human Rights Commission, recognises caste-based discrimination as a form of intersectional racial discrimination [14] and recommends that the Australian Government "investigate options for legal protections against caste discrimination". [15] Social, cultural and economic factors underpinning casteism contribute to the

increased prevalence of violence against lower caste women, even after migration to Australia. [16]

61. We point to the significant work on this issue by the Coalition Against Caste Discrimination, [17] and by the Federation of Ethnic Communities' Councils of Australia in its report on national community consultations for an Anti-Racism Framework, [18] commissioned by the Australian Human Rights Commission.

62. We support prohibiting discrimination based on caste under the Act. Whilst this could be achieved by expressly including it within the definition of 'race', we consider there to be significant benefits in recognising it as part of a new protected attribute of 'social origin'.

63. The term 'social origin' is derived from the International Labour Organization's 1958 *Discrimination (Employment and Occupation) Convention* to prohibit discrimination on the basis of caste, class or social-occupational category.

64. There are currently limited protections for social origin discrimination in federal legislation.

65. The inclusion of social origin in the *Australian Human Rights Commission Act 1986* (Cth) in relation to employment and occupation means complaints of social origin discrimination can be made to the Australian Human Rights Commission. However, such discrimination is not unlawful in the same way as discrimination covered under the four federal anti-discrimination statutes. As a result, if conciliation fails, there is no judicial pathway for enforcement.

66. The general protection provisions of the *Fair Work Act 2009* (Cth) ('FWA') prohibit discrimination on the basis of 'social origin'. However, this protection is limited to conduct which would be unlawful under any anti-discrimination law in force in the place where it occurs, meaning employees in NSW cannot use these provisions. [19]

67. Prohibiting caste-based discrimination under the attribute of 'social origin' would promote consistency with federal legislation and enliven protections under existing laws. The need for protections on the basis of class or social economic background or status is discussed below in Question 5.2.

Recommendation 15:

We recommend that protections against caste discrimination be included and suggest, for consistency with federal legislation, that this could be achieved under the attribute of 'social origin'.

Question 4.7: Sex discrimination

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

68. Given that sex discrimination is firmly grounded in Australian law, and to align with the SDA, we believe it is appropriate to retain the term 'sex' in this context.

69. However, consistent with the SDA, we support replacing references to people of the 'opposite sex' with people of a 'different sex'. This would align with our recommendation below that 'gender identity' and 'sex characteristics' be included as protected attributes.

Recommendation 16:

We recommend that references to people of the 'opposite sex' in the test for sex discrimination be replaced with people of a 'different sex'.

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

70. Breastfeeding and pregnancy should be included as standalone protected attributes in the Act, separate to sex discrimination. 'Pregnancy' must be defined to include potential pregnancy. This will clarify and reinforce these protections by sending a clearer message to the community and duty holders about the unacceptability of discrimination on these grounds. This will also result in greater harmonisation with the SDA and State and Territory jurisdictions.

Recommendation 17:

We recommend that breastfeeding and pregnancy (including potential pregnancy) being included as standalone protected attributes in the Act, separate to sex discrimination.

Question 4.8: Discrimination on transgender grounds

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

71. The terminology in the Act perpetuates a binary concept of gender that is harmful, exclusionary and contrary to community standards. In doing so, the Act fails to protect people with non-binary identities and people with innate variations of sex characteristics from discrimination.

72. We recommend that this attribute be removed from the Act and replaced with 'gender identity'. With NSW and WA now the only jurisdictions yet to include gender identity as a protected attribute, reform is significantly overdue. The introduction of this attribute must be supported by an inclusive definition, developed through

further consultation, particularly as its application will depend heavily on whether the comparator requirement is retained.

73. We also recommend the introduction of a separate attribute for 'sex characteristics'. Whilst the attribute of protecting intersex people from discrimination is defined varies across jurisdictions, including being referred to as 'intersex status', 'sex characteristics' and 'variations of sex characteristics', we suggest adoption of the term 'sex characteristics', in line with the position of Australia's peak intersex human rights organisation, Intersex Australia. [20]

Recommendation 18:

We recommend that discrimination on transgender grounds be removed and replaced with 'gender identity' and 'sex characteristics' as separate attributes.

Question 4.9: Extending existing protections

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

74. We recommend that protection from discrimination extend to situations where a person previously had, or may in the future have, a protected attribute. This approach is already reflected in the current protections relating to disability and carer's responsibilities and should be applied consistently across all attributes.

75. Consistent with anti-discrimination laws in Victoria, the ACT, Northern Territory, Tasmania and Queensland, we recommend that being an associate of a person with a protected attribute be recognised as a distinct protected attribute. This will ensure that being an associate of someone with a protected attribute is protected from both direct and indirect discrimination.

Recommendation 19:

We recommend that the Act protect people against discrimination based on any protected attribute they have had in the past or may have in the future.

Recommendation 20:

We recommend that discrimination based on being a relative or associate of someone with any other protected attribute be included as a separate attribute.

Discrimination: potential new protected attributes

Question 5.1: Guiding principles

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

76. We recommend that decisions about whether to include new protected attributes in the Act should be guided by the following principles, building on the approach of the Queensland Human Rights Commission. [21]

a. Is there a gap in protection?

i. Is there sufficient information to show that people with a particular characteristic need the protection of the Act?

ii. Is the characteristic already protected under an existing attribute?

iii. Is the attribute protected under other legislation? Would its inclusion in the Act enhance or activate these existing protections?

iv. Would the inclusion of the attribute support greater alignment with best practice anti-discrimination laws in other jurisdictions and with international human rights instruments to which Australia is a party?

b. Is the proposed attribute of a comparable nature to those already covered by the Act?

i. Does the group experience persistent prejudice, structural or historical disadvantage or marginalisation that is comparable in nature or impact to the experiences of groups already protected by the Act?

ii. Does the proposed attribute intersect with existing attributes in ways that contribute to intersectional forms of disadvantage?

iii. Does the group experience discrimination that cannot be reasonably and objectively justified?

77. Expanding the list of protected attributes in the Act will only be meaningful if those who experience discrimination are able to effectively enforce their rights. The current complaints-based system poses significant and well-recognised barriers to justice for complainants. We understand that these access to justice issues will be explored in the NSW Law Reform Commission's second Consultation Paper and we look forward to providing our comments.

Question 5.2: Potential new attributes

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

Gender-based violence

78. We recommend the inclusion of being subjected to gender-based violence as a protected attribute. The coverage of this ground should extend to all areas of public life, including employment, education, accommodation and the provision of goods and services.

79. The CEDAW Committee's General Recommendation No 19 identifies gender-based violence as a form of discrimination against women. [22] CEDAW places obligations on State parties to legislate to prohibit, and so eliminate, discrimination against women. [23] Including the status of being a victim-survivor of gender-based violence in the Act is therefore consistent with Australia's human rights obligations.

80. The need to recognise family and domestic violence ('FDV') as a protected attribute has been raised previously by the Australian Human Rights Commission, [24] the Australia Law Reform Commission [25] and the Senate Legal and Constitutional Affairs Committee. [26] We note that the ACT, Northern Territory and South Australia already prohibit discrimination on the basis of FDV. [27] We have long advocated for the inclusion of this protected attribute.

81. It is vital that experiences of sexual violence, which may occur outside of intimate and family relationships, are also recognised. Sexual assault, sexual harassment and image-based abuse, for example, are often perpetrated by acquaintances who are not in an intimate or family relationship with the victim-survivor. We suggest that the protected attribute should therefore be 'gender-based violence'. This could be supplemented with a non-exhaustive list of examples of relevant violence, for example: 'gender-based violence, such as family, domestic or sexual violence'.

82. As noted in CEDAW General Recommendation No 35 on gender-based violence, the term 'gender-based violence' is a:

> *"more precise term that makes explicit the gendered causes and impacts of the violence. The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors."* [28]

83. The National Plan to End Violence Against Women and Children acknowledges that:

> *"While people of all genders can experience gender-based violence, the term is most often used to describe violence against women and girls, because most gender-based violence is perpetrated by heterosexual, cisgender men against women, because they are women. … Violence experienced by LGBTIQA+ people, particularly by those who are gender diverse such as Brotherboy and Sistergirl communities, is also gender-based violence and shares some of the drivers of violence against women."* [29]

84. We understand gender-based violence to be inclusive of all people impacted by patriarchal and gendered power structures, including non-binary people.

85. The current Act offers very limited protection for victim-survivors of gender-based violence. Complainants are forced to rely on attributes such as sex or disability to make a complaint, arguing that being subjected to domestic violence is a characteristic that generally appertains to women, or by demonstrating that they have a disability arising from the trauma of violence, such as a mental illness. This indirect legal pathway is complex, burdensome and excludes those who cannot directly link their experience to an existing attribute. A standalone protected attribute would close this gap and ensure clear, direct, consistent protection for people subjected to gender-based violence.

86. In 2023, 'subjection to family and domestic violence' was introduced as a protected attribute under the general protections provisions of the FWA. [30] However, an exception limits this protection where the conduct is not unlawful under any anti-discrimination law in force in the relevant jurisdiction. [31] As neither the Act nor federal discrimination law currently prohibit discrimination on this basis, women in NSW are unable to utilise the FWA to make a complaint about certain forms of adverse action in employment based on being subjected to FDV.

87. Victim-survivors who are subjected to gender-based violence can experience discrimination in areas of public life such as employment, education and housing, compounding the harm they have experienced. For example, a woman fleeing domestic violence may lose work or have their employment terminated after taking time off work to attend court, secure new housing or meet with support services.

Case study

Rebecca* lived in a rental house with her boyfriend who subjected her to FDV. Rebecca's name was the only name on the lease. She secured an ADVO against her boyfriend, and terminated her lease early using the domestic violence termination provisions in the *Residential Tenancies Act 2010* (NSW). Rebecca was subsequently rejected when she applied to lease a new rental property on the basis that she had terminated a previous lease using those provisions.

**Not her real name*

88. In our casework experience, victim-survivors of gender-based violence often face significant and compounding disadvantage with many seeking assistance with family law, employment and tenancy issues. This disadvantage is further intensified when their experience of violence intersects with other attributes such as gender identity, disability or race. Introducing a stand-alone ground for discrimination based on subjection to gender-based violence, alongside provisions explicitly prohibiting intersectional discrimination (see section 3.8), would provide a clearer and more effective legal framework to address these complex and intersecting forms of discrimination.

89. Including the status of being a victim-survivor of gender-based violence as a protected attribute would play an important role in educating and raising awareness within the wider community about gender-based violence, and, we hope, foster more empathetic approaches to people who are, or who have experienced it. It would also serve an important normative function, acknowledging that the harm experienced by victim-survivors can be exacerbated by negative or prejudicial attitudes and inflexible policies.

Case study

Karina* a single mother with experience of FDV, was employed by a large institution in their Human Resources department, and was looking to make a career there. She applied for a promotion and was surprised when she was unsuccessful as she had an excellent work record and had completed an MBA in Human Resources. The role was given to someone junior to her who had to undergo significant training in order to be able to do the role. Karina requested a follow-up meeting during which comments were made about her FDV background, making her unsuitable for the pressures of the position she applied for. She made several attempts to engage her manager in informal conversations about not making assumptions about her FDV impacting her ability to do the work, but she was told that she was "too fragile" to handle a more demanding position. She was passed over for promotion three times, and eventually left the employer.

**Not her real name*

Case study

Min's* former partner perpetrated violence against her which included stalking her outside her workplace and repeatedly calling the office demanding to speak to her. Her manager expressed concern that she was "putting the workplace at risk" and "disrupting team operations". An ADVO was later made to protect our client which prevented her former partner from contacting her and approaching her workplace. Shortly after our client informed her manager about the ADVO,

she was dismissed on the basis that she had "too many personal problems" and that she "wasn't a good fit".

**Not her real name*

Recommendation 21:

We recommend that being subjected to gender-based violence, such as family, domestic or sexual violence, is included as a protected attribute.

Irrelevant criminal record

90. We recommend the inclusion of irrelevant criminal record as a protected attribute.

91. We provide civil and family law legal services to women in prison through the Legal Education and Advice in Prison ('LEAP') for Women program, a service we have provided for more than 15 years alongside Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre.

92. The high number of women in custody who have been subjected to child sexual abuse, sexual assault and family violence indicates that the factors leading to a woman offending and ending up with a criminal record can be complex. This issue particularly affects Aboriginal and Torres Strait Islander people, who are overrepresented in the criminal justice system. [32]

93. Discrimination on the basis of an irrelevant criminal record can prevent people from obtaining and maintaining employment and housing. It also undermines progress to achieving Targets 7 and 8 of the National Agreement on Closing the Gap, which seek to improve employment outcomes for Aboriginal and Torres Strait Islander adults and youth. Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would go some way to achieving these targets.

94. Victim-survivors of FDV are particularly likely to face discrimination on the basis of an irrelevant criminal record. The misidentification of victim-survivors of FDV as the primary aggressor is a pervasive issue, often resulting in charges and/or family violence orders being made against them. [33] Misidentification disproportionately impacts upon First Nations victim-survivors, with a Queensland review of FDV-related deaths finding that "nearly all" First Nations victims had been identified as perpetrators by police prior to their death. [34]

95. Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would be balanced by the existing inherent

requirements defence, which would permit employers to discriminate against employees and potential employees where their criminal record prevents them from being able to fulfil the inherent requirements of the role.

Recommendation 22:

We recommend the inclusion of irrelevant criminal record as a protected attribute.

Social origin

96. We recommend that social origin be recognised as a protected attribute.

97. Women who experience gender-based violence often also experience homelessness. 42% of clients accessing Specialist Homelessness Services in Australia have experienced FDV, and 60% of women who have separated in circumstances of FDV report experiencing housing stress. [35] We also note that poverty is gendered. In Australia, households with a female main earner have a poverty rate almost twice as high as those with a male main earner. [36]

98. The broad framing of 'social origin' would protect people from discrimination because of their status as (or previously being) homeless, unemployed or a recipient of social security payments (and as discussed above at Question 4.6, caste-based discrimination).

99. Discrimination and disadvantage linked to social origin are a driving force behind many of our clients' experiences of systemic inequality. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and healthcare as others, the denial of or unequal access to public places, as well as unequal treatment at work. [37] Individuals and groups must not be exposed to discriminatory treatment on account of belonging to a certain economic or social group or strata within society.

Recommendation 23:

We recommend the inclusion of social origin as a protected attribute.

Sex work and sex workers

100. Sex Workers Outreach Project notes that sex workers in NSW "regularly experience discrimination in relation to education, provision of goods and services, professional qualification/membership, employment, housing, banking and vilification". [38]

101. We support the inclusion of sex work and sex workers as a protected attribute.

Recommendation 24:

We recommend that sex work be recognised as a protected attribute.

Immigration status

102. We support the inclusion of immigration status as a standalone protected attribute.

103. While the current racial discrimination provisions offer some protection on the basis of a person's nationality, this does not adequately protect against the systemic disadvantage experienced by individuals because of their immigration or visa status. Consistent with the approach taken in the ACT, immigration status should be treated as a distinct attribute to ensure comprehensive protection. Immigration status should be defined to include 'being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth)'. [39]

104. In our casework, we assist clients from migrant and refugee backgrounds who are subjected to discrimination based on their visa or immigration status. This includes being inappropriately questioned about their visa status and unjustly denied housing or employment, even when their visa permits them to work or rent. We have seen employers use visa conditions against their staff to insist on the 'repayment' of 'loans' and silence complaints of sexual harassment. Many employees from migrant and refugee backgrounds are also subjected to exploitative working conditions, harassment and underpayment, based on the assumption that their temporary visa status will deter them from asserting their rights.

105. Discrimination often arises from the intersection of immigration status with other attributes. Women from culturally and linguistically diverse backgrounds who hold temporary visas are at increased risk of stigma, marginalisation and exploitation. Their experiences of discrimination are compounded by the intersection of multiple attributes, including immigration status, gender and cultural background. Recognising immigration or visa status as a protected attribute, alongside intersectional discrimination, is critical to ensure meaningful protection from discrimination and access to justice for these marginalised groups.

Case study

Zahra*, a woman from a migrant background, was employed in a small business while living in Australia on a temporary work visa. The business owner, an older man, also provided her accommodation on the premise. Our client was forced to return all of her wages to the owner in cash after each payment. The owner also subjected her to repeated sexual harassment and sexual violence,

using her temporary visa status as leverage, threatening to withdraw his sponsorship of her visa if she refused his sexual demands. Years later, after obtaining permanent residency, he abruptly dismissed her from her employment. Whilst she had recourse under unfair dismissal laws, she was not recognised under anti-discrimination legislation as having been treated less favourably because of her immigration status.

**Not her real name*

Recommendation 25:

We recommend that immigration status be recognised as a protected attribute.

Religious belief or activity

106. We recommend that religious belief or activity (including having no religious belief or refusing to engage in religious activity) be added as an express protected attribute.

107. This is particularly important to ensure that people of minority faiths, such as Islam and Judaism, cannot be discriminated against because of their membership of, identification with or participation in the practices related to that religion.

108. Adding this ground is also critical if exceptions for private educational authorities (as discussed below in Question 7.5) are to be narrowed. We advocate for the removal of all exceptions other than for discrimination based on religious belief or activity, and further that this exception must only apply in very limited circumstances.

Recommendation 26:

We recommend that religious belief or activity be recognised as a protected attribute.

Question 5.3: An open-ended list

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

109. The significant number of recommended new protected attributes outlined above highlights the extent to which the Act has fallen behind contemporary community standards and the protections in Commonwealth and other State and Territory anti-discrimination laws.

110. Importantly though, we do not support the inclusion of an open-ended attribute such as 'other status' that would enable the courts to extend protections to

additional groups. Certainty about rights and responsibilities is important for both the community and duty holders. Whilst the court has a critical role in interpreting existing attributes, which may have the effect of expanding their application, we believe the power to add new protected attributes or amend existing ones should remain with the legislature. This ensures that any expansion of protections occurs within a transparent framework, is subject to appropriate scrutiny and remains focussed on addressing systemic disadvantage rather than reinforcing privilege.

111. While we strongly agree with the premise of needing to ensure the Act is 'future-proof', we believe there are more appropriate ways to achieve this.

112. We recommend that the Act include a statutory requirement for ongoing and regular reviews, in consultation with stakeholders, to assess its effectiveness and relevance in light of changing social norms and to consider whether new attributes should be added or existing ones amended. We suggest Anti-Discrimination NSW, with appropriate resourcing, is best placed to undertake this exercise and report to the NSW Attorney-General. This would enable timely recommendations for legislative reform without having to wait until the next comprehensive review of the Act.

Recommendation 27:

We recommend that the Act include a statutory requirement for regular reviews to assess its effectiveness in light of changing social norms and to consider whether new attributes should be added or existing ones amended.

Areas of public life

Question 6.1: Discrimination at work — coverage

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

113. The definition of 'employment' should include voluntary workers, work experience placements, vocational placements and apprenticeships, as is the case under the QAD Act. [40] There should also be provisions to protect gig workers from discrimination at work.

114. Vast numbers of organisations, including charities, hospitals, emergency services and sporting clubs rely on volunteers. Volunteers are excluded from protections under the Act even though they often perform duties akin to those of employees and may face discrimination or sexual harassment while doing so.

115. Furthermore, the number of organisations and workforce sectors relying on gig work continues to increase. As of August 2024, the Australian Bureau of Statistics counted 1.1 million independent contractors nationwide (of which gig workers are a part), representing 7.5% of all employed persons. [41]

116. The existence of compensation and/or a formal employment relationship should not be a precondition for protection from being subjected to discrimination at work. Excluding volunteers, those on work experience or vocational placements, apprenticeships and gig workers from discrimination protections exacerbates unequal power structures in the workplace, and has the effect of further marginalising already marginalised populations such as, for example, women, First Nations people, migrants, older volunteers and young people engaging in internships. Volunteers often have less bargaining power than employees, making them especially at risk for exploitation, discrimination and harassment in the absence of legal remedies.

Recommendation 28:

We recommend that the definition of 'employment' is expanded to include volunteers.

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

117. Under the Act, protection is structured around defined 'areas of public life' (such as employment, education, goods and services). In relation to work, the Act distinguishes between 'employment', 'partnerships', 'industrial organisations' and

so on. By contrast, the SDA takes a broader approach: its prohibitions on sexual harassment (and harassment on the ground of sex) are not confined to narrow workplace categories. Instead, they apply to any person in connection with work, including prospective employees, partners, members of industrial organisations, contractors, interns, volunteers, commission agents, self-employed people and workplace participants.

118. Including a broader definition in the Act (akin to the SDA model) would ensure that all people in workplaces or engaged in work are covered. The rise of gig work, labour hire, casualisation and volunteering makes it particularly urgent to expand coverage. A broader approach would acknowledge that harmful conduct (harassment, discrimination, victimisation) can take place in any work setting, regardless of the contractual label.

119. Having a single, overarching protection would provide greater clarity for both workers (including volunteers) and employers than the current patchwork of categories. It would also have the likely benefit of reducing litigation over threshold questions (for example, *is this person technically an 'employee'*?). In addition, aligning the Act with the SDA would promote consistency across jurisdictions, making compliance easier for national employers and reducing confusion for workplace participants.

Recommendation 29:

We recommend that the Act adopts a broader, more comprehensive approach to discrimination in work.

Question 6.2: Discrimination in work — exceptions

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

120. We support removing the following exceptions that currently allow discrimination at work:

- Discrimination by private educational authorities on the grounds of 'homosexuality', 'transgender status', 'sex', 'marital status' and 'disability' (this is explored more in Part 7 on wider exceptions);
- Discrimination by small businesses on the grounds of 'homosexuality', 'transgender status', 'sex', 'marital status' and 'disability';
- Discrimination by small partnerships on all grounds;
- Disability discrimination against people addicted to prohibited drugs; and

- Discrimination against private household employees on all grounds.

121. We further recommend removing the exception which permits discrimination in relation to private household employees. The Act currently allows an employer to discriminate in a private home (for example, against a cleaner, nanny or live-in carer) in ways that would be unlawful in other workplace settings, leaving a largely female, migrant and precarious workforce with weaker protections, and at greater risk of exploitation, discrimination and marginalisation and its associated harms. This exception is antiquated and reflects a public/private divide that no longer reflects the realities of modern work – that domestic work is work. Finally, we also recommend removing the exception for persons addicted to prohibited drugs because this could present additional barriers to accessing treatment, rehabilitation and support.

Recommendation 30:

We recommend removing the following exceptions to discrimination in work: discrimination by private educational authorities, discrimination by small businesses and small partnerships, discrimination against people addicted to prohibited drugs and discrimination against private household employees.

Question 6.3: Discrimination in education

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

122. We support an expanded definition of 'educational authority' to ensure that it encompasses 'private educational authorities' along with organisations whose purpose is to develop or accredit curricula. The latter reflects the definition under the DDA. [42]

123. As discussed further in Part 7 regarding wider exceptions, we recommend the wholesale removal of the exceptions that allow private educational authorities to discriminate on the grounds of sex, marital status, disability, homosexuality and transgender status. These exceptions cause real and substantial harm to staff and students and their families, create a culture of fear at schools, are out of step with community attitudes and run counter to the established norms of international human rights law.

Recommendation 31:

We recommend the definition of 'educational authority' be expanded, and that the exemptions afforded to private educational authorities to discriminate in employment and education alike on the grounds of sex, marital status, disability, homosexuality and transgender status be removed.

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

124. Exceptions that allow single-sex schools to discriminate against a particular sex need to be amended such that they cannot exclude transgender or non-binary students who primarily identify with the sex that the school is catered for.

Question 6.4: The provision of goods and services — coverage

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

125. We support an expanded definition and scope of the 'provision of goods and services' under the Act. At present, this term only renders unlawful discrimination in the refusal of service or in offering the service on worse terms. This fails to account for discrimination during service or the manner in which services are provided.

126. In addition, we recommend expanding the coverage of the goods and services provisions to ensure that services provided by NSW Government agencies are covered to include, for example, discrimination in policing, in the exercise of public power or in the administration of State laws and programs. This is particularly important for some of our client cohort, including First Nations women, who have little recourse when they are the subject of discriminatory policing.

Recommendation 32:

We recommend prohibiting discrimination in the manner or way in which goods or services are provided, and expanding coverage of goods and services to ensure that service provision includes that provided by NSW Government agencies.

Question 6.5: Superannuation services and insurance exceptions

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

127. We support changes to remove (or at least limit) the current discrimination exceptions in insurance and superannuation. In particular, we are concerned about exceptions based on sex, disability and marital status, and exceptions that allow the misgendering of transgender individuals. We support a model in which:

- exceptions on the above grounds are removed;
- if any exceptions are to remain, they must be based on actuarial or statistical data, and be reasonable, proportionate and justifiable in the circumstances;

- a non-exhaustive list of factors is provided to guide whether it is reasonable to rely on the actuarial or statistical data; and

- exceptions should be amended such that superannuation funds and insurance providers must treat/categorise transgender individuals as their current/preferred gender identity, rather than automatically reverting to their sex assigned at birth.

Recommendation 33:

We recommend narrowing current exceptions in insurance and superannuation, in particular exceptions based on sex, disability and marital status, and exceptions that allow the misgendering of transgender individuals.

Question 6.6: The provision of goods and services — exceptions

What changes, if any, should be made to the exceptions to sex, age and disability discrimination in relation to the provision of goods and services?

128. We recommend that the broad s 56 religious bodies exception cannot be used to discriminate on the basis of sex, age or disability in the provision of goods and services to the public. Any carve-outs should be narrow and limited to genuinely religious or ritual functions only.

Recommendation 34:

We recommend removing the broad exceptions that allow religious bodies to discriminate in the provision of goods and services to the public.

Question 6.7: Discrimination in accommodation — coverage

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

129. We support expanding the definition of 'accommodation' to ensure it reflects and provides protection across the range of accommodation now used in NSW, especially by migrant and student populations, and various types of temporary accommodation used by people at risk of becoming homeless.

Question 6.8: Discrimination in accommodation — exceptions

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

130. We recommend the removal of the religious bodies exception for the provision of accommodation, in particular where the accommodation is open to the public. In the alternative, if any exception were to remain, it should be confined to religious ministry accommodation (or similar), and require an inherent requirements and reasonable and proportionate test. Exceptions must not facilitate discrimination for people accessing housing or refuges.

Recommendation 35:

We support expanding the definition of 'accommodation' to ensure it reflects the range of accommodation now used in NSW, and the removal of the religious bodies exception for the provision of accommodation to members of the public.

Question 6.9: Discrimination by registered clubs — coverage

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

131. We support the expansion of the definition of 'registered clubs' to include cultural, social, political and sporting associations above a specified size, regardless of whether or not they have a liquor licence. This aligns with the definition under the DDA.

Question 6.10: Discrimination by registered clubs — exceptions

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

132. We recommend that the exception in relation to sex be removed, and that any exemptions should be applied for on a case-by-case basis with Anti-Discrimination NSW. In relation to exceptions regarding the other grounds, we defer to other organisations with greater expertise and/or relevant client cohorts.

Recommendation 36:

We recommend that the definition of 'registered clubs' be expanded, and that the exception in relation to sex be removed.

Question 6.11: Discrimination based on carer's responsibilities

Should discrimination based on carer's responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why? In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not? on to sex, race, age and disability discrimination?

133. We recommend that discrimination based on family/carer's responsibilities be prohibited in all areas of public life. As it stands, protections only cover carers who experience discrimination in employment, leaving carers exposed in, for example, housing, education, goods and services, and registered clubs. That gap disproportionately impacts women (who we know bear the brunt of the bulk of caring responsibilities), hurts parents, kinship carers and people engaged in cultural caregiving, and people supporting elders or disabled family members, and is out of step with other jurisdictions (for example, the ACT and Northern Territory protect "parent, family, carer or kinship responsibilities" more broadly). [43]

134. Expanding coverage would prevent real-world harms such as being refused a rental because of single parent caring responsibilities, and would align NSW with contemporary caring realities and national consistency.

Recommendation 37:

We recommend that discrimination based on family/carer's responsibilities be prohibited in all areas of public life.

Question 6.12: Additional areas of public life

Should the ADA apply generally "in any area of public life"? Why or why not? Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

135. As it stands, the Act only prohibits discrimination in specified, delineated areas of public life. This has resulted in confusion and complexity regarding who and what is covered, and in significant gaps in protection.

136. We strongly recommend broadening the Act to cover discrimination in all areas of public life. This will have the triple benefit of simplifying discrimination law, increasing accessibility to justice through greater clarity, and sending a clear message that discrimination, wherever it occurs in the public sphere, is unacceptable and unlawful.

Recommendation 38:

We recommend broadening the Act to cover discrimination in all areas of public life.

Wider Exceptions

137. The wider exceptions contained in the Act pose a real and current threat to equality, non-discrimination and the full enjoyment and exercise of human rights in NSW. The exemptions have a particularly deleterious, direct and disproportionate impact on already marginalised groups, such as women, pregnant women, LGBTIQ+ people, people who are divorced and people with disabilities. These exceptions allow unbridled discriminatory treatment of, for example, gay, lesbian or transgender students, and pregnant, unmarried teachers. They also foster a culture of silence, exclusion, alienation, ridicule, hatred and fear. These exceptions are not only out of step with community attitudes, but are outliers in Australian discrimination law, and in breach of well-established international law and jurisprudence.

Question 7.1: Religious personnel exceptions

Should the ADA provide exceptions for: (a) the training and appointment of members of religious orders, and (b) "the appointment of any other person in any capacity by a body established to propagate religion"? If so, what should these exceptions cover and when should they apply?

138. Exceptions should be allowed for members of religious orders only in relation to the appointment of ministers of religion and where is it directly related to religious observance. We support restricting the exemptions (as per the ACT model) to the selection or appointment of people to perform duties or functions in relation to religious observance or practice (which would not cover religious schools or religious bodies/organisations with a primarily charitable or commercial purpose).

139. If exceptions here are based on 'inherent requirement' or 'genuine occupational requirement', the definitions of both of these terms need to be significantly narrowed to prevent discrimination based on broad interpretations of religious belief. Any changes need to ensure that 'inherent requirements', 'genuine occupational qualifications' and similar exemptions cannot be used by religious bodies as an alternative pathway to discriminate based on gender, LGBTIQ+ status or relationship status.

140. The exception relating to the 'appointment of any other person in any capacity' is too broad, and has been interpreted to capture appointees to charities etc, and to roles that have no religious character whatsoever. This exception should be removed.

141. Our recommendations here strike an appropriate balance of supporting religious autonomy over religious observance and practice with protecting the rights of women, LGBTIQ+ people and other marginalised groups.

Recommendation 39:

We recommend that exceptions should be allowed for members of religious orders only in relation to the appointment of ministers of religion and where it is directly related to religious observance.

Question 7.2: Other acts and practices of religious bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

142. In relation to other acts or practices of religious bodies, discrimination should be limited to that based on religious belief, with no other protected attributes falling under the exemption.

143. Furthermore, any discrimination based on religious belief must be reasonable and proportionate in the circumstances.

Recommendation 40:

We recommend that in relation to the acts or practices of religious bodies, discrimination should be limited to that based on religious belief or activity.

Question 7.3: Exceptions for other forms of unlawful conduct

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

144. Any exceptions for religious bodies should be limited to the realm of discrimination. Exceptions that would allow a religious body to harass, vilify or victimise are not consistent with the doctrine of proportionality under international human rights law. [44] Such allowances could not be considered necessary to avoid offending the sensibilities of any particular religion.

Recommendation 41:

We recommend that exceptions for religious bodies are not expanded to cover other forms of unlawful conduct under the Act.

Question 7.4: Exceptions for providers of adoption services

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

145. We recommend removing the exception in its entirety. Several adoption charities continue to discriminate based on sexual orientation or marital status in their adoption eligibility requirements, meaning same-sex and unmarried couples and single women have fewer agencies willing to assess their eligibility for adoption, and limiting the options available to relinquishing parents. For these reasons, we suggest repealing s 59A from the Act entirely and not introducing a similar provision in any future NSW anti-discrimination law.

146. We know that decades of studies and multiple systematic reviews show children raised or adopted by same-sex parents do as well on psychological, social and educational outcomes as peers with different-sex parents; family processes (warmth, stability, low conflict) predict wellbeing rather than the sexual orientation of parents. [45]

147. The best interests of the child principle requires individualised, rights-based assessment rather than stereotypes about family form. Decisions must focus on the child's holistic development and concrete circumstances. [46]

Recommendation 42:

We recommend removing the remaining exception for providers of adoption services.

Question 7.5: Private educational authorities employment exceptions

Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities? If you think the Act should provide exceptions in this area: (a) what attributes should the exceptions apply to, and (b) what requirements, if any, should duty holders meet before an exception applies?

148. The private educational authorities exceptions allowed in the current Act are the widest in Australia. We recommend significantly narrowing these exceptions so that they are fit for purpose, rather than facilitating unbridled discrimination against future and current employees of schools based on sex, homosexuality, transgender status, marital or domestic status or disability.

149. Currently, LGBTIQ+ teachers and other school employees, as well as staff who are heterosexual but pregnant and unmarried, or even divorced, can be denied employment on the above grounds, or disciplined, or have their employment terminated should their pregnancy status, marital status and/or LGBTIQ+ status be disclosed or discovered.

150. This creates an environment in many religious schools of fear, shame, institutional stigma and secrecy, and makes staff who do not fit the mould of the

traditional Judeo-Christian nuclear family have to keep quiet about or actively hide who they are. The threat of being 'outed' risks not just marginalisation, exclusion and victimisation and its consequent harm, but also jeopardises job safety and economic security.

151. Any exceptions in this category should be limited only to 'religious educational authorities' rather than applying to the much broader class of 'private educational authorities.'

152. Further, any narrowed exceptions should be limited to discrimination in employment based on religious belief. To implement this recommendation, protections against discrimination based on religious belief and activity (including having no religious belief or refusing to engage in religious activities) would have to be introduced.

153. Finally, any discrimination in relation to religious belief should only be permitted where:

- conformity with the doctrines of the religion is an inherent requirement of the position;
- the person cannot meet the inherent requirement because of their religious belief or activity; and
- the discrimination is reasonable and proportionate based on the circumstances. [47]

154. Current exceptions that allow private educational authorities to discriminate based on sex, homosexuality, transgender status, marital or domestic status or disability are out of step with community attitudes, are outliers in Australian discrimination law and run counter to established principles of international human rights jurisprudence. [48]

155. We support limiting the ability of religious educational institutions to discriminate against staff based on their religious beliefs or activities, except where the required religious beliefs or activities are relevant to the role in question and the discrimination is reasonable and proportionate in the circumstances.

Recommendation 43:
We recommend removing the private educational authority employment exceptions.

Question 7.6: Discrimination against students and prospective students

Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities? If you think it is necessary for the ADA to provide exceptions in this area: (a) what attributes should the exceptions apply to, (b) should they apply to prospective students, existing students, or both, and (c) what requirements, if any, should duty holders meet before an exception applies?

156. We recommend the removal of all exemptions that allow religious educational institutions to discriminate against LGBTIQ+ students.

157. Currently, all private educational authorities, not just those that are religious, are lawfully permitted to discriminate against LGBTIQ+ students. These exemptions apply unconditionally, meaning that educational institutions are permitted to discriminate without showing any justification for their conduct. In practice, this means:

- lesbian, gay, bisexual or transgender students can be denied entry to any private educational authority because of their homosexuality or transgender status; and

- lesbian, gay, bisexual or transgender students can be expelled or denied opportunities. This could include being refused school captainship or a place on the Student Representative Council, or being expelled if a student were to come out as a lesbian, or to be 'found out' to be one.

158. This creates an environment in which LGBTIQ+ students are either explicitly or implicitly told to keep quiet about or actively hide who they are. This, in turn, creates shame about LGBTIQ+ identities and conduct, and fuels ridicule, hatred and exclusion.

159. The current provisions create institutional stigma and foster both external and internal homophobia and transphobia. They create conditions in which harassment, bullying and victimisation based on excluded attributes are allowed to thrive. Studies have shown that LGBTIQ+ youth in hostile legal or policy climates are more likely to be victimised and at risk of suicide. [49] Discriminatory laws and the flow-on policies at schools also create an environment where LGBTIQ+ young people are not able to access safe and appropriate psychological or pastoral care within school settings. Where young people may already face rejection from parents or family members, to have this rejection and exclusion mirrored at school is doubly harmful.

160. In Australia and internationally, suicide rates and attempts for LGBTIQ+ youth are markedly higher than that of the general population. In the 2021 Writing Themselves In report, data showed that 41% of LGBTIQ+ young people had attempted suicide. Crucially, the data also showed that legal and policy

discrimination, especially in education and health, was cited as a key source of stress and marginalisation. [50]

161. These exceptions are blatantly discriminatory, increase suicidality risk and are in breach of Australia's international human rights obligations. [51]

162. We recommend the removal of all exemptions that allow religious educational institutions to discriminate against LGBTIQ+ students. We support the amendment of the Act to clarify that exemptions which allow single-sex schools to exclude students based on their sex do not allow discrimination against transgender students.

163. In relation to other acts or practices of religious bodies, discrimination should be limited to that based on religious belief, with no other protected attributes falling under the exemption.

164. Furthermore, exemptions for discrimination based on religious belief must be directly connected to an inherent requirement of the role and reasonable and proportionate in the circumstances.

Recommendation 44:
We recommend removing exceptions for private educational authorities in education.

Question 7.7: Exceptions relating to sport

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

165. We recommend narrowing the exception allowing discrimination in sport against transgender people, such that it is:

- only permitted to the extent that the strength, stamina or physique of competitors is relevant and reasonable and proportionate in all the circumstances;
- limited to competitive, as opposed to social or recreational, sporting activities;
- not to be applied in relation to children under 12 years old;
- not applicable to umpiring or refereeing; and
- reasonable and proportionate in the circumstances.

Recommendation 45:

We recommend significantly narrowing the exception allowing discrimination in sport against transgender people.

Question 7.8: The charities exception

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

166. We recommend amending the Act to remove exemptions that allow faith-based service providers/charities to discriminate on any ground other than adherence to a particular religion.

167. Discrimination based on religious belief or activity by faith-based service providers whenever they provide goods, services, facilities or accommodation to the general public should be prohibited other than when it:

- is reasonable and proportionate to meet the genuine needs of members of religious communities;
- forms part of religious observance or practice; or
- is connected to a site of religious significance, such as a place of worship.

168. If religious charities are to retain the ability to discriminate, then any provision of benefits must be a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

Recommendation 46:

We recommend removing exemptions that allow faith-based service providers/charities to discriminate on any ground other than religious belief or activity.

Question 7.9: Voluntary bodies exception

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

169. We support the repeal of this exception.

Recommendation 47:

We support the repeal of the voluntary bodies and aged care accommodation providers exceptions.

Vilification

Question 8.1: Protected attributes

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

170. Under the Act, protected attributes from civil vilification are currently limited to race, religious affiliation, homosexuality, transgender grounds and HIV/AIDS status. [52]

171. As discussed in our responses to Chapter 4, the current definitions of certain protected attributes are outdated, and are not inclusive enough to adequately protect all persons within those groups. We recommend the following changes be made to the way the Act expresses and defines the attributes currently protected against vilification:

Homosexuality

172. The Act's definition of 'homosexuality' is restricted to a 'male or female homosexual'. [53] This definition is restrictive, does not provide inclusive and adequate protection for LGBTIQ+ people who may have other diverse sexual orientations and uses outdated language.

173. For the reasons in our response above to Question 4.4, we also recommend that 'on the grounds of homosexuality' be replaced with protection from vilification on the basis of 'sexual orientation'.

Transgender grounds

174. To be eligible to bring a vilification claim on transgender grounds, the complainant must fit within the Act's definition of a 'recognised transgender person', subject to compliance with a series of requirements under the Births, Deaths and Marriages Registration Act 1995 (NSW). [54]

175. To be recognised as a transgender person for the purpose of legal proceedings, a complainant must submit an application that is accompanied by a statutory declaration and a statement of support by an adult who has known the complainant for at least 12 months. [55]

176. This process is onerous and not necessarily accessible to all transgender people, and may exclude those who may be newly transitioning, who may not have a supportive adult or who may not have the means to apply for legal recognition.

177. We recommend replacing the current definition of a 'recognised transgender person' with a 'trans or gender diverse' person, as is the preferred terminology recommended by ACON. [56]

Race

178. As discussed in our response above to Question 4.6, caste discrimination is an intersectional form of racial discrimination that contributes to violence against lower caste women. [57]

179. We recommend that protections against caste vilification be included under the Act. We also suggest the inclusion of 'social origin' under the protected attribute of race, to promote consistency with federal legislation and ensure protection against intersectional forms of racial discrimination.

HIV/AIDS

180. The NSW HIV/AIDS Strategy 2021–2025 uses the language of 'person living with HIV/AIDS' rather than 'HIV/AIDS infected'. We recommend replacing 'HIV/AIDS infected' with 'person living with HIV/AIDS' in the Act to align with this preferred terminology. [58]

Recommendation 48:

We recommend, in relation to vilification, changing 'homosexuality' to 'sexual orientation', 'recognised transgender person' to 'trans or gender diverse person' and 'HIV/AIDS infected' to 'person living with HIV/AIDS'.

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

181. The Act provides protection from vilification based on attributes of race, homosexuality, transgender grounds, HIV/AIDS status and religious belief, affiliation and activity. [59] This list is narrow and inconsistent with attributes protected from discrimination under the Act, and criminal anti-vilification legislation in NSW. Groups who are at risk of experiencing discrimination based on a protected attribute may also be at risk of experiencing vilification. As such, we support widening the range of attributes protected under the Act.

182. In NSW, criminal vilification laws protect groups distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion. [60] Federal and Victorian law both also protect these groups from vilification, with the addition of 'sex characteristics' and 'personal association' as protected attributes under Victorian civil law. [61] This list of attributes more accurately represents the groups at risk of harm and defines them more appropriately.

183. We recommend that civil vilification be extended to include all attributes protected against discrimination, noting particular importance for protection of the following attributes:

Vilification on the ground of sex

184. Sex-based vilification is prevalent across public life, including in person and online, and often accompanies violence committed against women. [62] Despite its commonality and the harm it causes, vilification on the ground of sex is not currently addressed by NSW anti-vilification legislation. [63]

185. It has been argued that "by failing to address gendered hate speech, Australian law permits the marginalisation of women and girls and actively exacerbates their vulnerability to exclusion and gender-based harm". [64]

186. As such, we support the inclusion of 'sex' as a protected attribute from civil vilification in NSW. As discussed in our response above to Question 4.7, we recommend that references to people of the 'opposite sex' be replaced with people of a 'different sex' in its definition for the purposes of inclusivity and alignment with federal legislation.

Vilification on the ground of gender identity

187. We also support the inclusion of 'gender identity' as a separate protected attribute against civil vilification.

188. As discussed in our response above to Question 4.7, we recommend a progressive and inclusive definition of 'gender identity'. We consider the Victorian definition of 'gender identity' under the VEO Act to be appropriate and encourage a similar definition within the Act. [65]

Vilification on the ground of disability

189. Advocacy groups have long called for the inclusion of disability as a protected attribute from vilification. [66] People with disability experience violence and abuse in public areas of life, and the impact of vilification can be 'devastating'. [67] In recognition of this harm, we strongly support the inclusion of 'disability' as a protected attribute against civil vilification in NSW.

190. Regarding definitions, we refer to our response above to Question 4.3, wherein we suggest a definition of 'disability' that aligns substantially with the DDA, but with the removal of the offensive and outdated language of 'disfigurement', 'malformation', 'malfunction' and 'disturbed'.

Recommendation 49:

We recommend that the Act extends protections from vilification to all groups with protected attributes.

Question 8.2: The test for vilification

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

191. The current test for vilification under the Act focuses on whether the public act incites, or is capable of inciting, emotions in others, rather than the actual harm caused by that action. As outlined by Kingsford Legal Centre, the threshold for incitement is so high that vilification provisions have not been accessible or effectively utilised. [68]

192. To more effectively safeguard groups with protected attributes and reflect changing social norms, harms-based tests have been implemented in federal and Victorian anti-discrimination legislation. For example, the *Racial Discrimination Act 1975* (Cth) features a harm-based test, whereby a person can make a complaint to the Australian Human Rights Commission where an act performed in public is 'reasonably likely' to offend, insult, humiliate or intimidate a person or another group of people. [69]

193. Victorian anti-discrimination legislation already uses both tests, requiring an objective approach in determining whether a reasonable person with the protected attribute would find the act to be hateful, seriously contemptuous of or severely ridiculing of a person or group with that attribute.

194. We welcome the inclusion of a supplementary harm-based test to align with other anti-discrimination legislation and increase protection for individuals with protected attributes.

Recommendation 50:
We recommend the adoption of a harm-based test for vilification.

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

195. The current threshold for civil vilification is high and therefore very difficult to establish. This is due to the difficulty of proving incitement, the requirement that the public act invokes 'serious' hatred, contempt or ridicule, [70] and the need to establish the reaction of a third party to an action, rather than the harm caused by the action itself. [71]

196. For example, in *Burns v Cunningham*, a claim for vilification on the grounds of homosexuality arising from public statements that included 'gays need "rehab"', and 'gays and lesbians are "unfortunates" and should undergo "psychiatric rehabilitation"' was not made out as the public statements did not reach the threshold of inciting 'serious' hatred, contempt or ridicule. [72] This judgment also

relied on commentary from *Veloskey v Karagiannakis* that states that the sensitivity of historically oppressed minority groups is "irrelevant" in the consideration of a public act. [73]

197. In recognition of this high bar, both the ACT and Victorian jurisdictions have revised the incitement-based test and lowered the threshold. [74] The Commonwealth law also adopts a lower harm threshold, questioning whether the conduct is "likely to offend, insult, humiliate of intimidate members of a targeted group". [75]

198. We recommend NSW also lowers the threshold for the incitement-based test from a public act that actually incites, to one that 'is likely to incite' serious hatred, contempt or ridicule.

Recommendation 51:
We recommend that the threshold for the incitement-based test is lowered to a public act that 'is likely to incite' serious hatred, contempt or ridicule.

Question 8.3: The definition of 'public act'

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

199. We recommend repealing the current definition of public act and replacing it with the definition in the NSW Crimes Act.

200. The current provisions are inadequate and fail to afford protection from vilification in all areas of public life. While the definition of 'public act' under the Act has been broadly interpreted, it is not sufficiently broad, having been found not to extend to protect from vilification in a range of settings, including public transport, schools and universities. [76]

201. We also note the rise of online forums and social media as a platform to vilify and perpetuate hate speech against individuals with protected attributes. Almost one in four individuals within target groups, including Aboriginal and Torres Strait Islander people, sexually diverse people, and people with disability, have been personally subjected to online hate. [77]

202. The eSafety Commissioner reports that 23% of women experience gendered - hate online. [78] Adults with diverse sexualities were more than twice as likely as heterosexual adults to personally experience online hate. [79]

203. A 'public act' under the Act has been found to cover certain online activity, although, the full extent to which is not explicit. For example, case law outlines the circumstances in which a Facebook post will be considered a public act, [80] but as

as we know, has not extensively considered the parameters of this on other more recently developed platforms.

204. The definition of 'public act' under s 93Z of the *Crimes Act 1900* (NSW) casts a wider net and has been recommended as appropriate to define the contexts within which vilification will be unlawful. [81] We welcome the adoption of the s 93Z definition of 'public act' to harmonise the definitions under civil and criminal laws.

205. We also encourage the inclusion of a non-exhaustive list of examples, such as school and workplace, under the definition of 'public space' to ensure clarity of protection in those spaces even though they are not strictly public. For example, Victorian legislation provides examples of places where public conduct can occur, to avoid doubt in the interpretation. [82] Adopting a similar section in NSW legislation would be helpful.

Recommendation 52:

We recommend replacing the current definition of 'public act' with the definition in s 93Z of the *Crimes Act 1900* (NSW).

Question 8.4: Exemptions

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

206. As stated above, we oppose vilification exemptions on religious grounds. We recommend the removal of permanent religious exceptions to vilification and, rather, recommend religious belief and activity be considered a protected attribute.

207. The Act provides exemptions to vilification for public acts, done reasonably and in good faith, for 'religious instruction' [83] and 'religious discussion'. [84] We are concerned that exemptions to vilification on these grounds may compromise the rights of other vulnerable individuals the Act seeks to protect, such as LGBTIQ+ communities.

208. We recommend removing permanent exemptions for religious organisations, and rather, include religion as a protected attribute.

209. We also support the view of the Law Reform Commission of Western Australia in their conclusion that prohibitions on vilification do not unduly prevent individuals from expressing religious views and opinions.

Recommendation 53:

We recommend the removal of the permanent religious exemptions to vilification. Instead, we support the inclusion of religious belief and activity as a protected attribute.

Question 8.5: Religious vilification

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

210. All people have a right to live free from vilification on the basis of religious belief, affiliation and activity. As such, we support the ongoing protection of religion as a protected attribute from civil vilification.

211. As laid out in the Consultation Paper, the provision that renders religious vilification unlawful can be interpreted broadly, and could be construed to protect religious organisations, as well as groups and individuals.

212. To prevent vilification claims from religious organisations, it may be appropriate to clarify that these protections apply only to 'natural persons'.

Recommendation 54:

We recommend clarifying that religious vilification protections are applicable only to 'natural persons' or 'individuals'.

Sexual Harassment

Question 9.1: The definition of sexual harassment

Should the reasonable person test be expanded to include the "possibility" of offence, intimidation or humiliation? Why or why not?

Should the ADA expressly require consideration of an individual's attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?

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

213. The current protections against sexual harassment under the Act are inadequate. We recommend that these protections be aligned with the SDA. [85]

214. Consistent with this objective, we recommend that the reasonable person test be expanded to include the "'possibility'" of offence, intimidation or humiliation. The Act should also expressly provide for the matters to be considered in determining whether a reasonable person would anticipate the possibility of offence, insult or humiliation. This would ensure that decision-makers are required to take into account the ways in which individuals may experience intersectional forms of harassment.

215. Although judicial authority supports a broad interpretation of 'conduct of a sexual nature',' we suggest that in the interests of consistency and clarity, the Act adopt the definition contained in s 28A(2) of the SDA.

Recommendation 55:

We recommend that the protections against sexual harassment under the Act be aligned, as far as possible, with the *Sex Discrimination Act 1984* (Cth) ('SDA').

Question 9.2: Other sex-based conduct

Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?

Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?

Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?

216. We recommend that the Act expressly include ‘harassment on the basis of sex’ and ‘subjection to a hostile workplace on the basis of sex’ as unlawful conduct. This would align the Act with the protections included in the SDA and close a significant gap in the existing legislative framework.

217. Although the definition of ‘sexual harassment’ in the Act is quite broad in that ‘conduct of a sexual nature’ includes verbal, non-verbal and physical conduct, there are grey areas where it is not clear that the conduct has a ‘sexual’ element. One of the key problematic areas is where the behaviour is sexist rather than sexual in nature. The inclusion of harassment on the ground of sex would address behaviour that degrades women. Similarly, research has shown that sexual harassment is more likely to occur in workplaces that are sexually charged or hostile. It is important to include provisions to address toxic workplace cultures and provisions that can target conduct which is not specifically directed at any individual.

218. Our clients often report that the workplaces where they have been subjected to physical acts of sexual harassment have also been workplaces where they have been subjected or exposed to conduct such as sexist jokes, derogatory and demeaning comments, pornographic material and general misogyny. This causes significant harm to individuals, but also has the effect of excluding women and people of diverse backgrounds. This environment has the dual effect of making our clients feel that if they were to make a complaint, they would not be supported or believed, while also creating an environment where employees feel unsafe at work and perpetrators are emboldened through perception that their inappropriate conduct is acceptable and recognised as regular workplace conduct.

219. The introduction of an express prohibition for sex-based harassment and subjection to a hostile workplace on the basis of sex would go a long way to changing workplace culture and the prevention of sexual harassment in the workplace. It would build upon the progress made at the federal level (with the introduction of a positive duty) and send a clear signal to employers and employees that conduct which creates, enables or upholds a hostile work environment or excludes people on the basis of their sex is unacceptable and unlawful.

220. The SDA requires sex-based harassment to be ‘demeaning in nature’. We believe this sets an unnecessarily high bar for complainants and risks undermining the purpose of the provision. We recommend that the Act adopt a more appropriate standard that more closely reflects the reality of the harm. The Act should provide that it is sufficient to show that a person was exposed to conduct because of their sex, or characteristics pertaining to their sex, which an objective reasonable observer believes would have offended, humiliated or intimidated the person harassed.

Recommendation 56:

We recommend the inclusion of 'harassment on the basis of sex' and 'subjection to a hostile workplace on the basis of sex' as unlawful acts to bring the Act in line with the protections included in the SDA.

Question 9.3: Sexual harassment in the workplace

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

221. The Act's approach to prohibiting sexual harassment in the workplace is confusing and unduly restrictive. In contrast, the SDA provides broader and clearer protections by prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking ('PCBU').

222. We recommend that the Act adopt the SDA's approach. This would ensure that a wider range of workers, including all volunteers and unpaid workers, are covered by the prohibition on sexual harassment. All types of workers would be treated equally, regardless of where the harassment occurred or their status as a worker. In addition, sexual harassment perpetrated by any person -– not just an employer or coworker – would be prohibited, provided it occurred in connection with someone's status as a worker or PCBU.

Case study

Samantha* is employed as a casual cleaner by a small business. One of the contracts held by the business is to provide cleaning services in a nursing home. Samantha, her colleague Rachel* and the cleaning business owner were cleaning the room of a patient when he pulled his penis out and started to masturbate. When Samantha and Rachel complained to the business owner about being subjected to the patient's conduct, he told them, "Just ignore it. Keep working. The patient is harmless." The following day when they complained again, the business owner stopped giving each of them shifts.

**Not their real names*

223. In our experience, many people are subjected to harassment by third parties. In scenarios such as the one described above, despite the incident clearly occurring in the course of Samantha and Rachel's employment, there are no clear protections under the current Act. The patient is not considered a workplace participant, and it is likely that the provision of 'goods and services was directed to the nursing home, not the individual resident.

224. To bring workers in such circumstances within the scope of the existing protections, it is often necessary to argue that the business owner, who for these purposes, was also a co-worker, sexually harassed them by requiring them to continue working in the presence of the resident's behaviour. The business may then be held vicariously liable for the business owner's conduct, including the subsequent victimisation. This workaround is legally complex and unsatisfactory. Prohibiting sexual harassment in connection with someone's status as a worker or PCBU and extending protections to cover sexual harassment in all areas of public life would address these gaps.

Recommendation 57:

We recommend that the Act adopt the SDA's approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking.

Question 9.4: Workplace-related laws regulating sexual harassment

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

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

225. Currently, three primary legal frameworks regulate sexual harassment: the Act, the SDA and the FWA. Of these, the Act provides the most limited and outdated protections. In our experience, complainants frequently approach us after lodging a complaint under the Act with Anti-Discrimination NSW, only to discover they are precluded from pursuing their matter in a more appropriate forum, such as the Australian Human Rights Commission, where the SDA may offer broader protections.

226. Greater alignment between the Act and other workplace sexual harassment laws is essential to ensure individuals do not fall through jurisdictional gaps or suffer disadvantage due to early, uninformed procedural decisions.

227. However, legal alignment alone is not sufficient. The current complaints-based system places a disproportionate burden on individuals, particularly women in insecure work, those subjected to gender-based violence, and others experiencing structural disadvantage.

Recommendation 58:

We recommend greater alignment between the Act and sexual harassment laws.

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

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

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

228. The endemic nature of sexual harassment in the community means that it is essential that sexual harassment laws protect all individuals, regardless of the type of workplace, the nature of their employment or volunteer status, their relationship to the harasser, or the circumstances in which the harassment occurs.

229. The Act should include a general prohibition on sexual harassment in all aspects of public life, as recommended by the Australian Law Reform Commission. [86] This would enhance the Act's effectiveness, simplify its operation, and send a clear message to the community that sexual harassment is unacceptable in all circumstances.

Recommendation 59:

We recommend that the Act include a general prohibition on sexual harassment in all aspects of public life.

Question 9.6: The private accommodation exception

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

230. We support the 1999 recommendation of the NSW Law Reform Commission to repeal the private accommodation exception for sexual harassment. Individuals residing in private accommodation, such as boarders in a boarding house and women living and working in a private residence, should be afforded the same protections from sexual harassment.

Recommendation 60:

We recommend that the private accommodation exception for sexual harassment be repealed.

Question 9.7: Attribute-based harassment

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

231. We recommend that the protections relating to a hostile workplace on the ground of sex and harassment on the basis of sex should extend to all protected attributes.

232. It is imperative that discrimination law recognises the complexity and intersectionality of sex harassment and discrimination. Toxic workplace cultures and low-level bullying and harassment can be as harmful as unfavourable treatment by an employer. A worker may have the same substantive opportunities as their co-workers (so, no formal discrimination by the employer) but the interactions between the workers – the culture in the workplace – makes the environment toxic for the individual.

Recommendation 61:

We recommend that the protections relating to a hostile workplace on the ground of sex and harassment on the basis of sex should extend to all protected attributes.

Other unlawful acts and liability

Question 10.1: Victimisation

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

233. We support the express prohibition of both actual and threatened victimisation under the Act. This will bring NSW legislation into step with other State and federal anti-victimisation laws. [87]

234. To establish victimisation, a complainant must prove they have been subject to a detriment by the respondent. There is a legal gap in instances where that detriment is threatened to prevent a complainant raising a concern or taking an action under the Act.

235. Prohibiting victimisation, both actual and threatened, will also reduce the burden on the complainant who has experienced harm or injury and more comprehensively prohibit actions that undermine the purpose of the Act. [88]

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

236. Including a provision that prohibits victimisation, even when done for two or more reasons, will better reflect the intersectional and compounding harms experienced by certain groups of people protected under the Act. The SDA provides an example of this, stating that an action may still be found unlawful even if it was taken for two or more reasons. [89] A similar provision may be appropriate for the purpose of including this protection in the Act.

Recommendation 62:

We support the prohibition of both actual and threatened victimisation under the Act, and the introduction of provisions that ensure that victimisation is unlawful even if done for two or more reasons.

Promoting Substantive Equality

Question 11.1: Adjustments

Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to?

Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach?

237. We welcome implementation of equitable provisions in the Act that work to achieve substantive equality.

238. We support the imposition of a separate, stand-alone duty to provide adjustments to people with a protected attribute under the Act. This positive duty should extend to all duty holders, and not just employers.

239. In particular, we support a positive duty to provide adjustments for attributes including:

People with disability

240. As laid out in the Consultation Paper, there is no current clear obligation for duty holders to provide reasonable adjustments for a person with a disability under the Act.

241. According to the Productivity Commission, disability discrimination cannot be "adequately addressed in the absence of a duty to make reasonable adjustments". [90]

242. The Disability Royal Commission recommended the implementation of a positive, stand-alone duty to make adjustments for all duty holders. [91] The Commission recommended that subject to unjustifiable hardship on the person asked to make the adjustment, it should be unlawful to refuse an adjustment requested by a person or group of people with disability. [92]

243. Implementing a positive duty to make adjustments for people with disability in NSW would comply with recommendations from the Disability Royal Commission and ensure people with disability in NSW have equitable enjoyment of their rights.

Victim-survivors of gender-based violence

244. Although not currently recognised as a protected attribute under the Act, we have long advocated for discrimination protections for victim-survivors of gender-based violence, including eligibility for adjustments.

245. As discussed in our response above to Question 5.2, victim- survivors of gender-based violence can experience discrimination in all areas of public life.

246. The 'education gap' is one example that illustrates the need for victim- survivors of gender-based violence to be eligible for adjustments under the Act. Experiences of violence, even if only during a portion of a tertiary study period, have a negative impact on women's education. [93] Women who have not been subjected to domestic violence are 8% more likely to obtain a tertiary qualification. [94] Sabotaging behaviours by perpetrators, such as stalking, destroying homework, forced pregnancy and disrupting childcare, are common and associated with reduced attendance and dropping out of university. [95]

247. We welcome the inclusion of a provision in the Act that requires all duty holders, including education providers, to make reasonable adjustments for survivors of gender-based violence.

Recommendation 63:
We recommend a stand-alone duty to provide adjustments for people with a protected attribute under the Act, in particular, for victim-survivors of gender-based violence and people with disability.

Question 11.2: Special measures

Should the ADA generally allow for special measures? Why or why not?

248. We support the inclusion of a general special measures provision with a view to supporting specific groups to enjoy freedoms equally with others, thereby promoting substantive equality.

249. In allowing for this, we welcome the shift in language from 'special needs' to 'special measures'. The term 'special needs' is generally regarded as offensive, [96] and places the onus on the individual rather than enshrining an obligation of equitable action and provisions.

If so, what criteria for a special measure should the ADA apply?

250. Any inclusion of criteria for special measures should be aligned with international human rights law. As outlined in the Consultation Paper, Victorian legislation provides a model that has been endorsed by Queensland Human Rights Commission and the ACT Law Reform Advisory Council. This model allows the implementation of a special measure where the measure will promote or achieve substantive equality for a group with a protected attribute. In our view, this model appropriately defines the requirements of a lawful special measure, namely that it is proportionate, made in good faith, reasonable and justified. [97] We recommend a similar provision is included in the Act to ensure consistency across jurisdictions.

251. Further, meaningful consultation with the specific groups these special measures will apply to is an essential element in the establishment of these provisions. This is particularly important for any affirmative actions or special

measures taken in regard to Aboriginal and Torres Strait Islander communities. In , *Maloney v The Queen*, Chief Justice French stated that prior consultation with a community affected by a special measure is a matter of common sense, that "is likely to be essential to the practical implementation of that measure". [98] However, prior consultation was not found to be a requirement under the *Racial Discrimination Act*.

252. We join human rights groups in calling for consultation with communities prior to the implementation of special measures provisions under the Act. [99]

Recommendation 64:
We recommend that the Act contain a special measures provision.

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

Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not? If so:

(a) what should duty holders be required to do to comply with the duty,
(b) what types of unlawful conduct should the duty cover,
(c) who should the duty holders be, and
(d) what attributes and areas should the duty apply to?

253. We believe the Act must include positive obligations to eliminate harassment, discrimination and vilification in all areas of public life.

254. The need for a positive duty is exemplified by the inadequacy of the current requirement for employers to 'take all reasonable steps' to prevent sexual harassment in the workplace. This current obligation is reactive and has been shown to be ineffective in addressing the prevalence of sexual harassment.

255. We note positive obligations have been introduced into the SDA and we support the introduction of similar obligations in NSW which are not limited to the employment context, but rather, expanded to other protected attributes.

256. To ensure positive obligations are as effective as possible, it is imperative the body enforcing positive duties is properly resourced, empowered and has the necessary skills to undertake this important work.

Recommendation 65:
We recommend the introduction of a NSW-based positive duty to prevent or eliminate unlawful conduct.

Endnotes

[1] See, e.g. *Sex Discrimination Act 1984* (Cth) s 3; *Discrimination Act 1991* (ACT) s 4.

[2] See, e.g. *Sex Discrimination Act 1984* (Cth) s 5; *Discrimination Act 1991* (ACT) s 8.

[3] Beth Gaze and Belinda Smith, Equality and Discrimination Law in Australia: An Introduction (Cambridge University Press, 2017) 122.

[4] *Hurst v Queensland* (2006) 151 FCR 562 at [134].

[5] See, eg, *Walsh v Amobee ANZ Pty Ltd* [2022] NSWCATAD 257 at [32].

[6] Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) at [50].

[7] See Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579.

[8] Australian Human Rights Commission, *Free & Equal: A Reform Agenda for Federal Discrimination Laws* (Issues Paper, 2021) 210.

[9] Parliamentary Joint Committee on Human Rights, Submission No 595 to Senate Legal and Constitutional Affairs Committee, *Preliminary Views on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, 5.

[10] See, eg, Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019).

[11] Australian Discrimination Law Experts Group, *Submission No 97 to the Queensland Human Rights Commission, Submission of the Australian Discrimination Law Experts Group to the Queensland Human Rights Commission Review of Queensland's Anti-Discrimination Act* (1 March 2022).

[12] Mary Eaton, 'Patently Confused: Complex Inequality and Canada v. Mossop' (1994) 1(2) *Review of Constitutional Studies* 203, 229.

[13] We note that the DDA is currently under review.

[14] Australian Human Rights Commission, *National Anti-Racism Framework Scoping Report* (Report, December 2022)

[15] Australian Human Rights Commission, *The National Anti-Racism Framework: A Roadmap to Eliminating Racism in Australia* (Report, November 2024).

[16] Ibid.

[17] Coalition Against Caste Discrimination, Preliminary Submission No 28 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (29 September 2023).

[18] Federation of Ethnic Communities' Councils of Australia, *An Anti-Racism Framework: Experiences and Perspectives of Multicultural Australia* (Report, 2024).

[19] *Fair Work Act 2009* (Cth) s 351(2).

[20] Intersex Human Rights Australia, Preliminary Submission No 2 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (February 2022).

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

[22] United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19: Violence Against Women* (1992) 1 [1].

[23] Convention on the *Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 14 (entered into force 3 September 1981) arts 1 and 2.

[24] Australian Human Rights Commission, *Domestic and Family Violence: A Workplace Issue*, A Discrimination Issue (Factsheet, 2012).

[25] Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (Report No 117, November 2011) 406–411, Recommendation 16-8.

[26] Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) 87, [7.28].

[27] *Equal Opportunity Act 1984* (SA) s 85T(8); *Discrimination Act 1991* (ACT) s 7(1)(x); *Anti-Discrimination Act 1992* (NT) s 19(1)(jb).

[28] United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19* (2017) 4 [9].

[29] Commonwealth of Australia (Department of Social Services), *National Plan to End Violence Against Women and Children 2022–2032: Ending Gender-Based Violence in One Generation* (Report, 2022) 36.

[30] *Fair Work Act 2009* (Cth) s 351(1).

[31] Ibid s 351(2).

[32] See NSW Bureau of Crime Statistics and Research, *NSW Closing the Gap Quarterly Update March 2025* (Report, July 2025).

[33] See, eg, Australia's National Research Organisation for Women's Safety, *Accurately Identifying the "Person Most in Need of Protection" in Domestic and Family Violence Law* (Research Report, November 2020); inTouch Multicultural Centre Against Family Violence, *The Causes and Consequences of Misidentification on Women from Migrant and Refugee Communities Experiencing Family Violence* (Position Paper, February 2022).

[34] Australia's National Research Organisation for Women's Safety, Accurately Identifying the "Person Most in Need of Protection" in Domestic and Family Violence Law (Research Report, November 2020) 14.

[35] Australia's National Research Organisation for Women's Safety, *Domestic and family violence, housing insecurity and homelessness: Research synthesis* (ANROWS Insights, July 2019).

[36] Australian Council of Social Service and UNSW Sydney, *Research and Insights into Poverty & Inequality in Australia: Rate of poverty by gender (% of men and women)*, accessible at: < https://povertyandinequality.acoss.org.au/data/poverty/rate-of-poverty-by-gender-of-men-and-women/>.

[37] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* (2 July 2009) 11.

[38] Sex Workers Outreach Project, Submission No 121 to Queensland Human Rights Commission, *Review of the Queensland Anti-Discrimination Act 1991* (4 March 2022) 2.

[39] See *Discrimination Act 1991* (ACT) Dictionary – definition of 'immigration status'.

[40] *Anti-Discrimination Act 1991* (Qld) sch 1.

[41] Australian Bureau of Statistics, 'Working Arrangements' (Webpage, August 2024) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/latest-release?utm_source=chatgpt.com>.

[42] *Disability Discrimination Act 1992* (Cth) s 4(1) – definition of 'education provider'.

[43] This was echoed in our preliminary submission to the review, and is in line with the recommendations of Carers NSW in their preliminary submission: Women's Legal Service NSW, Preliminary Submission No 55 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (29 September 2023); Carers NSW, Preliminary Submission No 71 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (4 October 2023).

[44] See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 16 December 1966) art 18(3); United Nations Human Rights Committee, *General Comment No 22: Freedom of Thought, Conscience or Religion* (27 September 1993).

[45] Cornell University, 'What Does the Scholarly Research Say About the Well-Being of Children with Gay or Lesbian Parents?', *What We Know: The Public Policy Research Portal* (Online Literature Review, 2015) <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/>.

[46] United Nations Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (29 May 2013).

[47] Note that this approach aligns with the Victorian position in s 83A(1) of the VEO Act.

[48] The exceptions for private educational authorities in relation to employment are in breach of the rights to non-discrimination and equality under Articles 2 and 26 of the *International Covenant on Civil and Political Rights*, and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*; the right to work and to just and favourable conditions of work under Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights*; and the responsibility of states to eliminate discrimination against women in employment under Article 11 of the *Convention on the Elimination of All Forms of Discrimination Against Women*.

[49] Cornell University, 'What Does the Scholarly Research Say about the Effects of Discrimination on the Health of LGBT People', *What We Know: The Public Policy Research Portal* (Online Literature Review, 2019 <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-scholarly-research-say-about-the-effects-of-discrimination-on-the-health-of-lgbt-people/>.

[50] Adam O Hill et al, *Writing Themselves In 4: The Health and Wellbeing of LGBTQA+ Young People in Australia* (National Report Monograph Series No 124, February 2021).

[51] The exceptions for private educational authorities in relation to students are in breach of the rights to non-discrimination and equality under Articles 2 and 26 of the *International Covenant on Civil and Political Rights*, Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*, and Article 2 of the *Convention on the Rights of the Child*; the right to education under Article 13 of the *International Covenant on Economic, Social and Cultural Rights*, and Articles 28 and 29 of the *Convention on the Rights of the Child*; the best interests of the child under Art 3 of the *Convention on the Rights of the Child*; and Principle 16 of the Yogyakarta Principles.

[52] *Anti-Discrimination Act 1977* (NSW) ss 20C, 38S, 49ZXB, 49ZE and 49ZT.

[53] Ibid s 3.

[54] Ibid s 4.

[55] *Births, Deaths and Marriages Registration Act 1997* (NSW) Part 5A, s 32B.

[56] Zahra Stardust et al, *Effective and Meaningful Inclusion of Trans and Gender Diverse People in HIV Prevention* (Discussion Paper, December 2017) 3.

[57] Australian Human Rights Commission, *The National Anti-Racism Framework: A Roadmap to Eliminating Racism in Australia* (Report, November 2024).

[58] NSW Government (NSW Ministry of Health), *NSW HIV Strategy 2021–2025* (Report, 19 February 2021).

[59] *Anti-Discrimination Act 1977* (NSW) ss 20C, 38S, 49ZXB, 49ZE and 49ZT.

[60] *Crimes Act 1900* (NSW) s 93Z(1).

[61] *Criminal Code Act 1995* (Cth) ss 80.2A and 80.2B; *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Act 2025* (Vic) s 9.

[62] Anjalee de Silva, 'Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law' (2020) 43(3) *Melbourne University Law Review* 987.

[63] Tanya D'Souza et al, 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' (2018) 41(3) *University of New South Wales Law Journal* 940.

[64] Ibid 940.

[65] *Equal Opportunity Act 2010* (Vic) s 4.

[66] Queensland Advocacy Incorporated, Submission No 75 to the Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes* (30 July 2021) 3.

[67] Ibid.

[68] Kingsford Legal Centre, Preliminary Submission No 35 to NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (29 September 2023).

[69] *Racial Discrimination Act 1975* (Cth) s 18C.

[70] Victorian Aboriginal Legal Service and Victoria Legal Aid, Submission No 50 to the Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2020).

[71] Victorian Equal Opportunity & Human Rights Commission, 'Submission No 51 to the Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (31 January 2020) 50.

[72] *Burns v Cunningham* [2011] NSWADT 240.

[73] Ibid.

[74] Victorian Aboriginal Legal Service and Victoria Legal Aid, Submission No 50 to the Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2020).

[75] Katherine Gelber and Luke McNamara, 'Anti-Vilification Law and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 498.

[76] Ibid 502.

[77] eSafety Commissioner, *Fighting the Tide: Encounters with Online Hate Among Targeted Groups* (Report, 2025) 19.

[78] eSafety Commissioner, 'Encounters with Online Hate' (Webpage) <https://www.esafety.gov.au/research/encounters-with-online-hate>.

[79] eSafety Commissioner, *Fighting the Tide: Encounters with Online Hate Among Targeted Groups* (Report, 2025) 19.

[80] *Burns v Smith* [2019] NSWCATAD 56 at [34]–[35].

[81] Victorian Equal Opportunity & Human Rights Commission, Submission No 51 to the Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (31 January 2020) 77.

[82] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 102C.

[83] *Anti-Discrimination Act 1977* (NSW) s 49ZT (2).

[84] Ibid s 38S.

[85] *Sex Discrimination Act 1984* (Cth) ss 28A(1)(b), 28AA(1)(b) and 28M(2)(c).

[86] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Report No 143, 11 February 2025) Recommendation 48.

[87] *Sex Discrimination Act 1984* (Cth) s 47A(2); *Equal Opportunity Act 1984* (WA) s 67(1); *Anti-Discrimination Act 1991* (Qld) s 130(1); *Equal Opportunity Act 2010* (Vic) s 104(1).

[88] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW) (Report No 92, 1999) Recommendation 98, [7.154].

[89] *Sex Discrimination Act 1984* (Cth) s 8.

[90] Productivity Commission, *Review of the Disability Discrimination Act 1992* (Final Inquiry Report No 30, vol 1, April 2004) 193.

[91] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Our Vision for an Inclusive Australia and Recommendations (Final Report Executive Summary, 29 September 2023) 64.

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