22 August 2025

Proper Officer
Law Reform Commission
NSW Department of Communities and Justice
Email only: nsw-lrc@justice.nsw.gov.au

Dear Officer,

Submission on the Anti-Discrimination Act 1977 (NSW) Review 2025

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission on the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (the **ADA**). We consent to this submission being published.

About Kingsford Legal Centre

KLC is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney and across NSW. We have been providing specialist discrimination law advice and representation to people since 1981. Our purpose encompasses advocating for social justice and human rights and empowering our community. KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education to its law students.

We specialise in discrimination law and run a state-wide Sexual Harassment & Discrimination Legal Service and the Employment Rights Legal Service (**ERLS**) (in collaboration with Inner City Legal Centre and Redfern Legal Centre).

In 2024 / 2025 our service helped 238 clients experiencing discrimination, providing legal advice and representing clients in their discrimination claims. We provide advice and representation in all discrimination jurisdictions, including Anti-Discrimination NSW, the NSW Civil and Administrative Tribunal, Fair Work Commission, Australian Human Rights Commission (**AHRC**), Federal Court of Australia and Federal Circuit and Family Court of Australia.

We also have long-held policy expertise in the area of discrimination law and human rights. We have undertaken significant international human rights work co-ordinating civil society engagement around Australia's international human rights compliance. We also conduct extensive community legal education to our community around discrimination law and human rights with a current particular focus on sexual harassment and young people.

We draw on all this experience in commenting on the Review.

Introduction

We welcome the opportunity to comment on the NSW Law Reform Commission's Review of the ADA. This is an important and overdue opportunity to reform the law, to make it more effective for the people of NSW and to ensure it reflects human rights

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standards and community values. We have made our recommendations with some guiding principles. These include:

- securing alignment with international human rights principles;
- ensuring the law is accessible and removes unnecessary complexity – the law should not be written for lawyers but for the wider, diverse NSW community;
- addressing significant gaps in the law;
- ensuring that the law reflects modern community standards and provides meaningful human right protection into the future;
- ensuring that exceptions are limited and in line with human rights principles;
- recognising the important way in which discrimination law signals norms and expectations about the enjoyment of rights in a peaceful and free society; and
- ensuring that the law explicitly states that the purpose of the ADA is to ensure substantive equality.

Our submission draws on KLC's experience advising people across NSW in relation to their rights under anti-discrimination and sexual harassment law. We have included anonymised case studies to illustrate some our concerns with the current ADA and potential avenues for reform. Names and some identifying details have been changed for confidentiality, indicated with an asterisk (*).

Modernising the ADA will go a long way toward preventing discrimination and achieving substantive equality in NSW, but in order to fully realise human rights further reform is urgently needed. To this end, KLC reiterates our calls for a Human Rights Act for NSW.

People in NSW should be able to live free from discrimination. NSW has fallen well behind other jurisdictions and our outdated laws offer inconsistent and inadequate protection. Now is our opportunity to lead the way, drawing on best practice from across the country.

Objects clause

A robust objects clause, grounded in human rights principles, will help ensure that the new ADA is interpreted in a manner that fulfils the Act's purpose of preventing discrimination and promoting substantive equality. The objects clauses from the *Equal Opportunity Act 2010* (Vic)[1] and the objects and interpretation clauses from the *Discrimination Act 1991* (ACT)[2] could be possible models. The ADA should include objectives to "eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible",[3] eliminate systemic causes of discrimination,[4] and "promote and facilitate the progressive realisation of equality, as far as reasonably practicable".[5] In the absence of a Human Rights Act in NSW, the objects clause should specify that the ADA should be interpreted in line with international human rights law.

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[1] *Equal Opportunity Act 2010* (Vic) s 3.
[2] *Discrimination Act 1991* s 4, 4A.
[3] *Equal Opportunity Act 2010* (Vic) s 3(a).
[4] *Equal Opportunity Act 2010* (Vic) s 3(c).
[5] *Equal Opportunity Act 2010* (Vic) s 3(d); *Discrimination Act 1991* (ACT) s 4(d).

Recommendation 1: The ADA should include an objects clause that promotes substantive equality and is grounded in human rights principles.

Test for direct discrimination

Question 3.1: Direct discrimination

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

The comparator test

This review is an important opportunity to abandon the comparator test in the law. This test has created unnecessary complexity and unfairness and has limited the effectiveness of discrimination laws. Modern discrimination law tests should not be based on a comparator.

The comparator test should be abandoned in favour of a test of 'unfavourable treatment'. The need to demonstrate 'less favourable'[6] treatment via a real or hypothetical comparator introduces unnecessary technicality and a lack of clarity into discrimination claims. This results in uncertainty and often, injustice, for our clients as well as confusion for duty holders as to the relevant test.

Case study: Mark* was employed as a junior accountant. He had ADHD and mental health conditions, which he managed with medication. Mark was facing disciplinary proceedings at work because his boss said he was frequently unfocussed and often late. Mark asked for simple workplace accommodations to help him focus. He also requested to start work later because his medication made him drowsy in the morning. Mark's boss refused and continued to treat the issue as a disciplinary matter.

We advised Mark about his options for making a discrimination claim. We advised Mark there was a risk that a court would see the comparator as a person without a disability who was also unfocussed and frequently late. This would have seriously weakened Mark's case.

Mark chose to settle his matter for a modest amount of money rather than risk the time, money and reputational damage associated with pursuing a discrimination claim.

As shown by Mark's example, the identification of the comparator is a crucial factor in the likelihood of success for a discrimination claim. The identification of a comparator is particularly challenging for direct discrimination based on the characteristics of an attribute. The issue of the comparator – whether real or hypothetical – is subject to large amounts of conjecture when we give advice, and adds to the uncertainty of matters that proceed to hearing. This detracts from the substance of the conduct and creates further legal hurdles and additional cost in running matters. The lack of clarity around the characteristics of the comparator does not provide the certainty required for the law to be effective for respondents or applicants. This reduces the efficacy of the law.

Each year, our service advises clients on hundreds of potential instances of discrimination, including about the evidence a client would need to bring, and the likely merits of their case. For clients who go on to self-represent, the legal technicality of the

[6] See e.g. *Anti-Discrimination Act 1977* (NSW) s 7(1).

comparator test is difficult to navigate. Complainants must satisfy the comparator test *in addition to* bearing the onus of proving that the unfavourable treatment was, on the balance of probabilities, linked to a protected attribute. This is an unnecessary hurdle in an already very technical jurisdiction.

KLC supports the adoption of an 'unfavourable treatment' test, as currently applied in Victoria and the ACT,[7] and as was recommended by the Queensland Human Rights Commission in their review of the *Anti-Discrimination Act 1991* (Qld).[8] This test would reduce the emphasis on a comparator and reduce the complexity of discrimination law. This would better allow applicants to bring direct evidence within their knowledge of the 'unfavourable treatment' and would result in better use of the time at Anti-Discrimination NSW (**ADNSW**) processes and the NSW Civil and Administrative Tribunal (**NCAT**) to argue the substance of the claims.

An 'unfavourable treatment' test would also facilitate claims based on intersectional discrimination (discussed in relation to Question 3.8).

Causation

Current case law suggests that while it might not be necessary to show discriminatory motive to prove direct discrimination, the mental state required to discriminate in Australian law is not settled.[9] Current NSW legislation also makes it clear that if an act is done for two or more reasons, it is sufficient if one of the reasons is discriminatory, and that reason does not need to be the dominant or substantial reason for doing the act.[10] However, the current ADA does not specify whether a person can unconsciously discriminate against another person.[11]

As raised in the Consultation Paper, people are often not fully aware of the reasons that that they make decisions, and unconscious bias can infect the decision-making process.[12] The impact of this type of decision-making can be just as detrimental as 'conscious' decisions. We also believe that it will be increasingly important to capture decisions 'made' by algorithms in contemporary anti-discrimination law. Automated CV screening and housing related "RentTech" platforms[13] are areas of particular concern, as they will inevitably play a greater role in people's access to fundamental human rights, such as accommodation, employment and education.

Our view is that there would be considerable benefit in the ADA expressly stating that direct discrimination does not require any particular motive, similar to the provisions in

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[7] *Equal Opportunity Act 2010* (Vic) s 8(1); *Discrimination Act 1991* (ACT) s 8(2); Queensland Human Rights Commission*, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 95.
[8] Queensland Human Rights Commission*, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 95.
[9] Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 109.
[10] *Anti-Discrimination Act 1977* (NSW) s 4A.
[11] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 26.
[12] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 26 citing Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.2.8].
[13] Choice, *At What Cost? The Price Renters Pay to Use RentTech* (Report, April 2023).

the *Equal Opportunity Act 2010* (Vic)[14] and the *Anti-Discrimination Act 1998* (Tas).[15] The drafting of the provision should address both unconscious basis and 'acts' by artificial intelligence systems. This would be an essential part of 'future proofing' the Act.

Recommendation 2: The ADA should define direct discrimination as 'unfavourable treatment', modelled on the *Equal Opportunity Act 2010* (Vic) and *Discrimination Act 1991* (ACT).

Recommendation 31: The ADA should clarify that discrimination does not require a discriminatory motive and should draft amendments so as to capture unconscious bias and discrimination by artificial intelligence systems.

Test for indirect discrimination

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?

The indirect discrimination test is largely misunderstood in the community, and unnecessarily technically complex. Similar to the comparator test in direct discrimination, the comparative disproportionate impact test in indirect discrimination has made the law highly ineffective by imposing evidentiary requirements that most complainants are unable to meet. It often relies on statistics that are in the control of the respondent, or do not exist. Given the preponderance of indirect discrimination, it is important that the law reflects a workable test that focuses on the real issue, which is addressing systemic discrimination.

The comparative disproportionate impact test should be replaced with a disadvantage test, in line with Victorian and ACT anti-discrimination legislation and the *Age Discrimination Act 2002* (Cth) and *Sex Discrimination Act 1984* (Cth).[16]

Case study: Marianne* came to KLC after facing discrimination in a recruitment process. Marianne asked for adjustments to be made to the recruitment process to accommodate her needs as a person living with autism. The employer refused.

There were significant difficulties fitting Marianne's situation under the current definitions of direct and indirect discrimination. For example, Marianne was required to complete an online test which was timed, but due to the impact of her disability on her processing speed there was no way she could complete the test. There were two issues in determining whether indirect discrimination had occurred under the law – firstly, should the "persons who do not have that disability" be defined as non-autistic people or as people who did not have Marianne's specific processing speed challenges? Secondly, how could Marianne find out if a "substantially higher proportion" of people in that group could complete the test?

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[14] *Equal Opportunity Act 2010* (Vic) s 10.
[15] *Anti-Discrimination Act 1998* (Tas) s 14(3).
[16] *Equal Opportunity Act 2010* (Vic) s 9(1); *Discrimination Act 1991* (ACT) s 8(3); *Age Discrimination Act 2004* (Cth) s 15(1); *Sex Discrimination Act 1984* (Cth) s 7B, as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 29.

The specific drafting of the test should be based on the ACT model of a "disadvantaging the other **person**"[17] (emphasis added) as compared to the Victorian approach of "disadvantaging **persons** with an attribute".[18] As discussed in the Queensland Human Rights Commission's *Building Belonging* report,[19] requiring proof that the class of persons with the attribute was affected, as compared to the individual, can be problematic for attributes like disability where people with the same condition can be differently affected by a requirement.

Adopting the ACT approach addresses the core issue of discrimination law (that the person is treated unfairly because of an attribute, like disability) and avoids unintentionally reintroducing statistical analysis of attribute groups.

Recommendation 42: The comparative disproportionate impact test should be replaced with a disadvantage test modelled on s 8 of the *Discrimination Act 1991* (ACT).

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?

The 'not able to comply' element of the indirect discrimination test should be removed. For many of our clients, while it might be technically possible to comply, the condition imposed is often unrealistically burdensome or so onerous that it cannot be considered a real and viable option for the complainant.

For example, a person with caring responsibilities might be directed to work from a different worksite that is further from the employee's childcare and/or home. Technically the worker might be able to comply with a direction to work at the other worksite, but it would require them to change childcare centres (where their children are already settled), which may not always be logistically or financially possible.

Case study: Louisa* worked in sales for a large furniture retailer. While she initially worked in-store, during COVID her role shifted to being online-only. She continued in an online role for three years and then went on parental leave. While Louisa was on parental leave, her work instituted mandatory days in the office. When Louisa returned to work, she asked to continue to work online so that she could be available to pick her baby up if needed – her office was far from her home. Louisa's work refused to exempt her from the mandatory in-office policy.

Case study: Flora* worked at a small family-run florist. She was required to stand when working at the retail store. When Flora became pregnant, it became very uncomfortable for Flora to stand for long periods of time, so she asked to be able to sit to perform some of her duties. This request was denied by her boss. As standing was not strictly speaking a medical risk to her or her developing baby, she was technically able to comply with the requirement, even though it caused her extreme discomfort.

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[17] *Discrimination Act 1991* (ACT) s 8(3).
[18] *Equal Opportunity Act 2010* (Vic) s 8(1)(a).
[19] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 100.

While courts and tribunals have not tended to interpret the phrase 'not able to comply' literally,[20] the phrase has operated practically to unnecessarily increase the evidentiary burden on clients like Louisa and Flora. We think a better focus in these cases is the impact of the requirement on the person with the protected attribute, and whether it disadvantages them. The focus on compliance moves away from the real purpose of the Act, which is to remove systemic barriers to full participation in areas of public life.

KLC recommends the removal of the 'not able to comply' element in favour of the 'unfavourable treatment' approach in ACT and Victorian legislation. Differential ability to comply would still be addressed as part of a reasonableness (or proportionality) standard – see below.

Recommendation 53: The ADA should be changed to remove the 'inability to comply' element from the test for indirect discrimination.

Question 3.4: Indirect discrimination and the reasonableness standard

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

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

The reasonableness component of the test for indirect discrimination should be replaced with a 'legitimate and proportionate' test. To be lawful under this test, a requirement or condition that had the effect of disadvantaging a person with a protected attribute would need to be a proportionate means of achieving a legitimate aim. This mirrors the approach of European and UK lawmakers,[21] and was recommended by the AHRC in its report *Free and Equal: A Reform Agenda for Federal Discrimination Laws*.[22]

In our opinion, a legitimate and proportionate test would more clearly guide the Tribunal's reasoning towards weighing the (legitimate) benefit sought by the duty holder and the burden on the applicant. In the alternative, a non-exhaustive list of factors to be considered in determining 'reasonableness' would help to clarify the reasonableness test. We consider the Victorian legislation to be a suitable model.[23] Notably, the list of factors includes "whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice".[24]

Recommendation 6a: The 'reasonableness' element of indirect discrimination should be replaced with a 'legitimate and proportionate' test.

Recommendation 6b: In the alternative, the test for indirect discrimination should include a non-exhaustive list of factors to be considered when determining 'reasonableness', based on s 9(3) of the *Equal Opportunity Act 2010* (Vic).

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[20] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 98.
[21] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 296.
[22] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 297.
[23] *Equal Opportunity Act 2010* (Vic) s 9(3).
[24] *Equal Opportunity Act 2010* (Vic) s 9(3)(b).

Question 3.5: Indirect discrimination based on a characteristic

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

The prohibition on indirect discrimination should extend to characteristics that people with protected attributes either generally have or are assumed to have. This would be in line with several other states and territories.[25]

To the extent that duty holders might be concerned that this would unfairly increase the burden placed on them, we believe this can be addressed by the reasonableness (or proportionality) requirements in the test for indirect discrimination.

KLC would support the inclusion of a provision such as the ACT's s 7(2), which defines protected attribute to include "a characteristic that people with the attribute generally have" or "a characteristic that people with the attribute are generally presumed to have" (amongst other inclusions).[26]

Recommendation 7: The prohibition on indirect discrimination should extend to characteristics that people with protected attributes either generally have or are assumed to have.

Burden

Question 3.6: Proving discrimination

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

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

Discrimination law places a significant evidentiary burden on applicants. It is also a general characteristic of discrimination law that individual applicants bring matters against better resourced respondents. In our experience many matters do not proceed simply because an applicant does not hold or have access to the requisite evidence to discharge their burden of proof. For example, in employment matters, employers are usually the only party to know why a candidate didn't get the job. A shifting burden of proof is an appropriate response to address the structural disadvantage faced by claimants in discrimination claims. In our view a shifting burden would also increase the efficacy of pre-filing complaints and then conciliations at ADNSW as it would prompt respondents to be open and transparent around their decision-making. This would allow applicants to better understand the purported reasons for the conduct and assess the merits of the case. In our experience, many matters that may have merit do not proceed beyond the person seeking legal advice from us because they do not hold the information necessary to establish their case. This is not in the public interest as it potentially allows discriminatory practices to flourish unchecked.

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[25] *Discrimination Act 1991* (ACT) s 7(2); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8 as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 33.
[26] *Discrimination Act 1991* (ACT) s 7(2)(a),(b).

Case study: Mark* is Aboriginal and lives in regional NSW. He was banned from a local pub, ostensibly for breaches of the behaviour and dress code. He disagrees with these reasons. He knows of several other friends and relatives, all of whom are also Aboriginal, who also received bans for minor infractions. When Mark complains of racial discrimination, the club says they also banned lots of white people. Mark doesn't believe this is true but has no way of proving this.

Case study: Lara* went on parental leave for a year. As she was about to return to work, she received notice that she was made redundant. Lara thinks this is because her work didn't want her back when she had caring responsibilities, and that they were worried she would take a second period of parental leave if she had a second child. Lara's work told her that they had been talking about restructuring the business for months. As Lara was on leave, she has no way of knowing whether this is true.

Case study: Peter* is Aboriginal and was visiting Sydney. He wanted to book a hotel for a night. When he walked into the lobby, the receptionist was immediately hostile. The receptionist told Peter that they didn't have any rooms left. Peter left the hotel but, suspecting that the receptionist was lying, got a friend to call up the hotel and ask for a room. There was a room available which was offered to her. Without this quick thinking he would have found it difficult to prove his case.

As shown by Mark and Lara's cases, the evidence to connect a person's treatment with their attribute is often held entirely by the duty holder. Peter's case was a rare example where an applicant was able to catch the respondent out – but many people are not able to do this in the immediate aftermath of being discriminated against and the law should better protect people in these circumstances.

Where the burden of proof lies has only increased in importance in the context of algorithmic discrimination by AI systems. In many cases, it will be very difficult for applicants (and many respondents) to determine the actual basis on which an apparently discriminatory decision was made. A shifting burden of proof would be fairer for applicants and encourage duty holders to responsibly use technology and be more transparent about their decision making

KLC supports a burden shifting approach similar to section 361 of the *Fair Work Act 2009* (Cth). This approach was supported by the Disability Royal Commission (in the context of disability discrimination).[27] The applicant would need to show that they had an attribute and were treated unfavourably. The burden would then shift to the respondent to show that the unfavourable treatment was not because of their attribute.

In the alternative, KLC supports a burden-shifting model similar to the UK's *Equality Act 2010*. This approach has been adopted in Queensland and was recommended by the AHRC.[28]

For indirect discrimination, once an applicant has demonstrated that a condition has the effect of disadvantaging person with an attribute, the burden should shift to the respondent to show that the condition was reasonable (or legitimate and proportionate).

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[27] Disability Royal Commission, *Final Report* (Report, Chapter 4, September 2023) 302.
[28] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 210.

Recommendation 8a4: The ADA should contain a shifting burden of proof for direct discrimination, similar to section 361 of the *Fair Work Act 2009* (Cth).

Recommendation 8b: In the alternative, the ADA should adopt a burden-sharing model for direct discrimination similar to the UK *Equality Act 2010*.

Recommendation 9: For indirect discrimination, once an applicant has shown that a condition disadvantages a person with an attribute, the burden should shift to the respondent to show that the condition was reasonable (or legitimate and proportionate).

Question 3.7: Direct and indirect discrimination

(1) How should the relationship between different types of discrimination be recognised?

(2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

The current division between direct and indirect discrimination (and segregation for racial discrimination[29]) under the ADA creates an artificial distinction between forms of discrimination. Whether discrimination is direct or indirect is often a matter of how the facts are characterised and is particularly challenging for applicants given much of the evidence about the factual context is held by the respondent. For example, a child with a learning disability might be banned from attending an excursion because of behaviours associated with their disability (direct discrimination). The school might also have blanket rules that only students with good behavioural records can attend excursions, which is more difficult for children with some kinds of learning disabilities to comply with (indirect discrimination). However, the current drafting might suggest that direct and indirect discrimination are mutually exclusive concepts, confusing applicants and duty holders.

An approach to addressing this complexity and overlap between the two tests could be to adopt a unified test for discrimination. International jurisdictions in the USA, Canada, South Africa and New Zealand do this.[30] The Northern Territory has also adopted a unified discrimination test. [31]

We prefer the ACT's approach[32] of defining discrimination to include direct discrimination, indirect discrimination or both. This approach clarifies that direct and indirect discrimination might arise from the same facts, but still refers explicitly to the concepts of direct and indirect discrimination. Explicitly referring to the types of discrimination is consistent with most Australian jurisdictions.[33] It also has an important educative function, particularly for self-represented respondents who might not be familiar with the concept of indirect discrimination. We note, for example, that that the

[29] *Anti-Discrimination Act 1977* (NSW) s 7.
[30] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 86.
[31] *Anti-Discrimination Act 1992* (NT) s 20.
[32] *Discrimination Act 1991* (ACT) s 8(1).
[33] See e.g. *Equal Opportunity Act 2010* s 7(1)(a).

Australian Parliament amended the *Racial Discrimination Act 1975* (Cth) in 1990[34] to clarify that indirect racial discrimination was also prohibited and to prevent "covert discriminatory practices".[35]

A further issue in defining direct and indirect discrimination is whether segregation should be explicitly included in the definition of discrimination. The current definition of racial discrimination specifies that segregation is a form of discrimination.[36] It is likely that racial segregation would be captured by a definition prohibiting direct discrimination, indirect discrimination (or both direct and indirect discrimination) and there is case law to support this.[37] However, we recommend that the Commission consult directly with organisations representing Aboriginal and Torres Strait Islander Peoples and Culturally and Racially Marginalised groups on this specific issue.

Question 3.8: Intersectional discrimination

(1) Should the ADA protect against intersectional discrimination? Why or why not?

(2) If so, how should this be achieved?

KLC and community legal centres have a long-held position that discrimination law should recognise the distinct experience of intersectional discrimination. This is a major impediment for many marginalised groups being able to assert their rights under the current law.

The ADA should protect against intersectional discrimination. Many of our clients experience compounding, complex discrimination on the basis of multiple attributes or at the intersection of attributes. For example, some clients have been discriminated against (and sexually harassed) on the basis of both their sex and race. We have also had older women clients who have been discriminated against at work in ways that were distinct from the experiences of their younger female colleagues or older male co-workers.

NSW anti-discrimination law should be amended to protect people from discrimination on the basis of a combination of attributes. The ACT and Canada provide possible models for this. We prefer the Canadian approach, which protects against discrimination on the basis of one or more protected attributes ("prohibited grounds") or "on the effect of the combination of prohibited grounds."[38] As discussed by the Queensland Human Rights Commission,[39] the ACT approach, which prohibits discrimination on the basis of "1 or more protected attributes"[40] in our view does not adequately protect against discrimination that occurs only at the *intersection* of two (or more) attributes, which is distinct from discrimination on more than one attribute.

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[34] *Law and Justice Amendment Act 1990.*
[35] Hansard, Law and Justice Amendment Bill (12 November 1990, Daryl Melham).
[36] *Anti-Discrimination Act 1977* (NSW) s 7(1)(b).
[37] *NC v Queensland Corrective Services Commission* [1997] QADT 22, cited by Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 107.
[38] *Canadian Human Rights Act*, RSC 1985 c H-6 pt I, 3.1.
[39] Queensland Human Rights Commission*, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 109.
[40] *Discrimination Act 1991* (ACT) s 8 (2) and (3).

Recommendation 105: The ADA should prohibit discrimination on the basis of one or more protected attributes, or on the basis of the effect of a combination of 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?

The ADA should prevent intended future discrimination. Currently our clients cannot use the ADA to prevent discrimination, which undermines the purpose of anti-discrimination law to increase substantive equality.

We support amending the definition of direct and indirect discrimination to include circumstances where a duty holder "proposes to treat" someone in a discriminatory manner. This is in line with many other jurisdictions.[41]

Recommendation 116: The ADA should prevent intended future discrimination where a duty holder 'proposes to treat' a person in a discriminatory manner.

Existing attributes

The structure of the ADA should be modernised to provide for a list of attributes at the start of the Act, rather than separating out each attribute in a separate section. This is the approach in, for example, ACT and Victorian anti-discrimination legislation.[42]

Recommendation 127: The ADA should be restructured to have a list of protected attributes rather than separate sections for each attribute.

KLC draws on our experience providing discrimination law advice to a broad range of client groups to make recommendations about protected attributes. Where relevant, we recommend that the Commission consult with specialist organisations.

Question 4.1: Age discrimination

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

(2) What changes, if any, should be made to the age-related exceptions?

We have not observed any issues with the way that the ADA expresses and defines the protected attribute of age in our practice.

See below for discussion of age-related exceptions.

Question 4.2: Discrimination based on carer's responsibilities

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[41] *Discrimination Act 1991* (ACT) s 8(3); *Equal Opportunity Act 2010* (Vic) s 9(1*); Anti-Discrimination Act 1991* (Qld) s 11(1); *Age Discrimination Act 2004* (Cth) s 15(1) as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 40.

[42] *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 2010* (Vic) s 6.

(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "responsibilities as a carer"?

The ADA currently prohibits discrimination against people with caring responsibilities, defined through a relatively narrow list of relationships.[43] This currently excludes people with caring responsibilities that fall outside of this list, including some Aboriginal and Torres Strait Islander people. This is an area where discrimination protections should be significantly enhanced to better protect the people who undertake important caring responsibilities in our community.

Case study: Joyce* is an Aboriginal woman in her early 30s who works in regional NSW. Joyce has caring responsibilities for her adult niece, Lucy, who lives with serious disabilities. Although Lucy lives with Joyce and is heavily dependent on her, Joyce is not formally recognised as Lucy's guardian. Joyce was sacked from her work, partially on the basis of some time she had to take off to care for her niece. Joyce did not have any protection as a carer under the ADA.

Case study: Kelly* is an Aboriginal woman living in Sydney with cultural connections to northern NSW. Her workplace has strict policies about taking leave without giving several weeks' notice. Kelly has caring responsibilities for several people in her community and can't always give the required notice. While some of the people she cares for fall within the ADA's definitions of caring responsibilities, others do not.

As shown by Joyce and Kelly's cases, the ADA doesn't sufficiently protect the range of caring responsibilities held by people in the community, including people from Aboriginal and Torres Strait Islander communities. We note the more expansive definitions of carer responsibilities in Victoria,[44] the ACT,[45] and the Northern Territory.[46] The NSWLRC should consult with Aboriginal and Torres Strait Islander organisations, representatives for Culturally and Racially Marginalised groups, women's organisations, and disability advocacy groups to determine the appropriate definition.

Recommendation 13: The ADA should expand the definition of 'caring responsibilities'.

Question 4.3: Disability discrimination

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

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

Definition of 'disability'

It is important to have an expansive definition of 'disability' in the ADA to ensure that all people with disabilities are protected from discrimination. The Queensland Human

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[43] *Anti-Discrimination Act 1999* (NSW) s 49S.
[44] *Equal Opportunity Act 2010* (Vic) s 4: "carer means a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis".
[45] *Discrimination Act 1991* (ACT) s 7(1)(l); Dictionary definition of 'carer'.
[46] *Anti-Discrimination Act 1992* (NT) s 4: "whether or not the person is a parent or has responsibility to care for a family member or near relative or through kinship or otherwise".

Rights Commission recommended modernising terms in the *Disability Discrimination Act 1992* (Cth) (also contained the ADA), such as 'malfunction', 'malformation' and 'disfigurement'.[47] We would support the removal of stigmatising language from the ADA (in consultation with disability groups), with a particular focus on ensuring that broad coverage for people with disabilities is maintained.

Some concerns with the definition of 'disability' might best be addressed by the creation of new attributes. An attribute of 'medical condition' (or 'medical record') might be more appropriate for people living with HIV or neurodiverse people, who might not identify as having a disability. An attribute for 'physical features' might better protect people with extensive facial scarring or facial differences. An attribute for 'genetic information' would offer a clearer pathway for people who face discrimination because of genetic testing results (e.g. in the context of insurance).

The *Disability Discrimination Act 1992* (Cth) is currently being reviewed.[48] There is significant merit in harmonising the definitions between the ADA and the *Disability Discrimination Act 1992* (Cth), to provide clarity and reduce complexities for people living with disabilities, their carers and for duty holders.

Assistance animals

Unlike the *Disability Discrimination Act 1992* (Cth),[49] the ADA does not currently clearly protect assistance animals that are not dogs, or assistance animals that assist people with disabilities that are not related to vision, hearing or mobility.[50] This is a serious gap in protection, particularly for people who need assistance animals for a psychosocial disability.

Case study: Toby* came to us for advice. Toby is currently homeless and relies on the use of his assistance dog Pavel* to manage his psychosocial disability. Despite Pavel having completed training through a specialist organisation, Toby was refused accommodation because 'pets' were not allowed. The accommodation service refused to recognise Pavel as an assistance animal. We advised Toby that he could make a discrimination claim under the *Disability Discrimination Act 1992* (Cth), but could not make a complaint under the ADA. Toby would need to wait 9-12 months for a conciliation at the AHRC, instead of the currently faster process at ADNSW.[51]

The ADA should be amended to ensure that it covers assistance animals that are not dogs, and for animals that assist with psychosocial disabilities. Generally, harmonisation between Commonwealth and state laws would help users of assistance animals and duty holders understand their rights and obligations under anti-

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[47] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 271
[48] Commonwealth Attorney-General's Department, *Review of the Disability Discrimination Act 1992* (Website, 2025) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australias-anti-discrimination-law/review-disability-discrimination-act>.
[49] *Disability Discrimination Act 1992* s 54A.
[50] *Anti-Discrimination Act 1977* (NSW) s 49B(3).
[51] A version of this case study originally appeared in Kingsford Legal Centre, *Submission in Response to the Consultation Paper on the National Principles for the Regulation of Assistance Animals* (Submission, 2025) 3.

discrimination law. We also strongly recommend that the ADA's definition of assistance animals should make it clear that assistance animals in the process of being trained are also covered.

Recommendation 14: The ADA should modernise the definition of 'disability' in line with recommendations from the disability sector.

Recommendation 15: The ADA should provide broader protection for assistance animals, including animals other than dogs and for disabilities that are not related to vision, hearing, or mobility. Assistance animals in the process of being trained should also be captured by this definition.

Recommendation 16: The ADA should include an attribute for 'genetic information'.

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"?

The ADA should protect against discrimination on the basis of sexuality, gender identity and expression, and sex or gender attributes, based on the *Yogyakarta Principles*.

The protected attribute of 'homosexuality' should be replaced with an attribute of 'sexuality' or 'sexual orientation'. Currently, the ADA only narrowly protects discrimination on the basis of 'homosexuality' and is defined to mean 'male or female homosexual'.[52] This is clearly not acceptable. The definition as it currently stands would not protect against discrimination against, for example, bisexual, asexual or pansexual people. The definition also unnecessarily references biological sex.

We support Equality Australia's recommendations in relation to the protected attribute of 'sexuality' or 'sexual orientation'. The attribute should be expanded in line with the *Yogyakarta Principles'* definition of 'sexual orientation',[53] and also include protections for asexual people.

Recommendation 17: The ADA should include an attribute of 'sexuality' or 'sexual orientation' instead of an attribute for 'homosexuality'.

Question 4.5: Discrimination based on marital and domestic status

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

We support updating the protected attribute of 'marital and domestic status' to include 'relationship status.' 'Relationship status' is a more contemporary expression and would be in line with other state-based anti-discrimination legislation.[54] Framing the attribute

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[52] *Anti-Discrimination Act 1977* (NSW) Part 4C, s 4.
[53] *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) Preamble.
[54] *Discrimination Act 1991* (ACT) s 7(1)(s); *Anti-Discrimination Act 1991* (Qld) s 7(b); *Anti-Discrimination Act 1992* (NT) s 19(1)(e), as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 56.

as 'marital or relationship status' would be consistent with the *Sex Discrimination Act 1984* (Cth).[55]

Recommendation 18: The language of the ADA should be updated to protect a person's 'relationship status' or 'marital or relationship status'.

Question 4.6: Racial discrimination (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of 'race'? (2) Are any new attributes required to address potential gaps in the ADA's protections against racial discrimination?

There are serious gaps in protection for several attributes which are currently indirectly protected by the attribute of race. These include:

- Religious belief or activity; and
- Visa, immigration, or migration status; and
- Language.

Religious belief or activity

We discuss the need for a new protected attribute for 'religious belief or activity' in response to Question 5.2 "Potential new attributes".

Visa, immigration, or migration status

We support the introduction of a new protected attribute for visa status (or immigration or migration status). We note the potential complexity of introducing immigration status as a protected attribute given many laws make distinctions on the basis of visa status. Following the approach recommended by the Queensland Human Rights Commission,[56] discrimination should be permitted when an act is done in direct compliance with a law of the state or Commonwealth.

Recommendation 19: The ADA should contain a new attribute for 'visa status', 'immigration status' or 'migration status'.

Language

Language (including signed language) should be a separate protected attribute, as is currently the case in the Northern Territory.[57] 'Language' is recognised as a potential characteristic on which discrimination can be based in international instruments.[58]

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[55] *Sex Discrimination Act 1984* (Cth) s 6.
[56] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 304.
[57] *Anti-Discrimination Act 1992* (NT) s 19 (ab).
[58] United Nations General Assembly, International Covenant on Civil and Political Rights, res 2200A (XXI) (16 December 1966), art 2; United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, res 2106 (XX) Preamble; United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, Res 2200A (XXI) art 2.2.

Recommendation 20: The ADA should contain a new attribute for language (including signed language).

Question 4.7: Sex discrimination

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

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

We note Equality Australia's position that a single attribute of either 'sex' or 'gender' would be appropriate.[59] The *Sex Discrimination Act 1984* as well as most state and territory-based anti-discrimination legislation protect 'sex'.[60] 'Sex' should be defined to include "social roles, expectations and stereotypes related to gender"[61] and should not be limited to physical sex characteristics. Binary language like references to 'opposite sex' should be removed throughout the Act.[62]

Pregnancy and breastfeeding should be protected as their own attributes. This is clearer and consistent with other jurisdictions, including the *Sex Discrimination Act 1984* (Cth).[63]

Recommendation 21: The ADA should contain new attributes for pregnancy and breastfeeding.

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'?

As discussed above in relation to Question 4.4, the ADA should protect against discrimination on the basis of sexuality, gender identity and expression, and sex or gender attributes, based on the *Yogyakarta Principles.* The current attribute does not currently protect transgender people from discrimination, or prevent discrimination based on gender expression.[64]

Case study*:* Robin* is non-binary and experienced discrimination at work based on their gender identity. We had to advise Robin that they could not make a complaint to ADNSW because the ADA only covers people who are transgender – not people who are non-binary.

Replacing the attribute of 'transgender grounds' with an attribute for 'gender identity' will better protect non-binary people like Robin.

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[59] Equality Australia, *Explainer – Fix Broken Discrimination Laws in NSW* (Paper, June 2025) 2
[60] *Sex Discrimination Act 1984* s 5; *Discrimination Act 1991* (ACT) s 7(u), *Anti-Discrimination Act 1993* (NT) s 19(b), *Equal Opportunity Act 2010* (Vic) s 6(o); *Equal Opportunity Act 1984* (WA) s 8; *Anti-Discrimination Act 1991* (Qld) s 19, cf *Anti-Discrimination Act 1998* (Tas) s 16(e) "gender".
[61] Equality Australia, *An Equality Act for Queensland: Submission to the Queensland Human Rights Commission's Review of Queensland's Anti-Discrimination Act* (Submission, March 2022) 7.
[62] Equality Australia, *Explainer – Fix Broken Discrimination Laws in NSW* (Paper, June 2025) 2.
[63] *Sex Discrimination Act 1984* ss 7 and 7AA.
[64] For further discussion see Equality Australia, *Explainer – Fix Broken Discrimination Laws in NSW* (Paper, June 2025) 2.

Recommendation 22: The ADA should include an attribute of 'gender identity' instead of an attribute for 'transgender grounds'.

Question 4.9: Extending existing protections

(1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?

(2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

The ADA should protect against discrimination based on protected attributes that a person has had in the past or may have in the future. Section 20 of the *Anti-Discrimination Act 1992* (NT) provides a good model for coverage of past attributes.

The ADA should also protect against discrimination based on being a relative or associate of someone with a protected attribute. We support following other jurisdictions[65] by adding being a relative or associate of a person with a protected attribute as a protected attribute itself.

Recommendation 23: The ADA should protect against discrimination based on past attributes and attributes a person might have in the future.

Recommendation 24: The ADA should contain a new attribute for being a relative or associate of a person with a protected attribute.

Proposed new attributes

Question 5.2: Potential new attributes

(1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, what should be added and why?

(2) How should each of the new attributes that you have identified above be defined and expressed?

(3) If any new attributes were to be added to the ADA, would any new attribute-specific exceptions be required?

We make the following suggestions of areas where we have seen a clear need for a specific protected attribute, however, this list is non-exhaustive. We are sure many specialist organisations may make suggestions beyond this list based on the experiences of their clients.

Irrelevant criminal record

Discrimination on the basis of an irrelevant criminal record should be unlawful. In our experience advising clients across NSW on discrimination law, many businesses and employers are quick to discriminate against people with any kind of criminal history,

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[65] *Equal Opportunity Act 2010* (Vic) s 6; *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16; *Anti-Discrimination Act 1991* (Qld) s 7. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, 2022) rec 50, as cited by NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 63-64.

without any consideration of its relevance to the situation. Too frequently, discrimination on the basis of an irrelevant criminal record is also a cover for, or occurs alongside, other types of discrimination (like racial discrimination and discrimination against people experiencing mental ill health). The prevalence of criminal law checks across employment pre-screening means that people with any criminal record are often excluded without any consideration as to the relevance of that record. People in this position face high rates of discrimination with little legal redress. This has larger societal impacts and entrenches economic and societal disadvantage. A more balanced approach which focusses on 'relevance' would not unnecessarily exclude people from roles. Once again this type of discrimination is largely invisible and keeps some people in long term unemployment without due cause.

Case study: Mike* lives with a mental health condition. Several years ago, Mike stole a small number of items from a convenience shop. The charges were dismissed on mental health grounds. However, Mike's photograph was distributed to other shops in the area and Mike was permanently banned from his closest convenience shop. Mike (who also has physical disabilities) now cannot access his closest shop and feels humiliated by the ban. The shop refused to reverse the ban despite the alleged offending occurring many years ago. While it might have been possible for Mike to make a complaint based on disability discrimination, it would have been a difficult case to argue[66] and the client was reluctant to disclose any more information about their mental health to the shop owner.

Case study: Louisa* was being investigated at her new job after a security clearance process revealed she'd been charged with common assault. The assault occurred as part of a mental health episode and no conviction was recorded. Louisa didn't disclose the incident as a criminal conviction because she wasn't convicted of the offence and didn't think it was relevant to her work. KLC helped Louisa successfully reapply for security clearance and discuss the issue with her employer. Louisa was concerned that, even though she had successfully obtained security clearance, the assault charges would be held against her.

Discrimination on the basis of an irrelevant criminal record is increasingly widespread but hidden. It prevents clients like Louisa from getting and keeping jobs, and clients like Mike from accessing businesses and services. NSW should follow the lead of jurisdictions like the ACT, Tasmania, and the Northern Territory in protecting clients against discrimination for an irrelevant criminal record.

Adding 'irrelevant criminal record' as a protected attribute also gives legal force to Australia's agreements under international law. Australia has ratified the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO111).[67] Currently the AHRC can conciliate disputes about discrimination on the basis of an irrelevant criminal record, but as applicants cannot proceed to a Federal Court determination there is a lack of an effective remedy in the federal sphere.

The ADA should protect against discrimination against an irrelevant criminal record on a similar basis to the Northern Territory or Tasmania, which include records relating to

[66] See our submission sections on the tests for direct and indirect discrimination.
[67] Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012).

arrest, interrogation or criminal proceedings.[68] Irrelevant criminal records should include cases where a charge has been withdrawn,[69] where a conviction is spent,[70] or where a person has been convicted but "the circumstances ... are not directly relevant to the situation in which the discrimination arises."[71] Extinguished convictions for homosexuality offences[72] should be included in the definition (or protected as a separate attribute)

We note exceptions in the Northern Territory[73] and Tasmania[74] that allow discrimination on the basis of an irrelevant criminal record for work with vulnerable people or children. We consider that these concerns can be addressed by:

- Considering the relevance of a conviction – a person should only be discriminated against on the basis of a *relevant* conviction.
- In the case of employment, considering genuine occupational requirements alongside requirements for Working with Children checks, National Disability Insurance Scheme Worker Checks or other security clearances.

Recommendation 25: The ADA should include a new attribute for 'irrelevant criminal record'.

Domestic and family violence

Case study: Laura* experienced serious domestic violence perpetrated by her husband. The police applied for a full non-contact Apprehended Domestic Violence Order (ADVO). Laura worked at the same workplace as her ex-husband but Laura stopped getting shifts after the ADVO proceedings started. Her ex-husband continued to work at their workplace.

Victim-survivors of domestic and family violence should be protected from discrimination. As shown by Laura's case, workers who have experienced domestic and family violence can face backlash from their employers, losing income at a time when they need it most. We are aware of instances where victim-survivors have lost work because an abusive partner has harassed or intimidated the victim-survivor at the victim's workplace.

Protection on the basis of being a victim of domestic and family violence would be consistent with the ACT, Northern Territory, South Australia, and the *Fair Work Act 2009*,[75] and the recommendations of the Western Australian Law Reform Commission and the Queensland Human Rights Commission.

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[68] *Anti-Discrimination Act 1992* (NT) s 4 'irrelevant criminal record' (b); *Anti-Discrimination Act 1998* (Tas) s 3 'irrelevant criminal record'.
[69] E.g. *Discrimination Act 1991* (ACT) Dictionary 'irrelevant criminal record' (a)(ii).
[70] E.g. *Discrimination Act 1991* (ACT) Dictionary 'irrelevant criminal record' (f).
[71] E.g. *Anti-Discrimination Act 1992* (NT) s 4 'irrelevant criminal record' (b)(ix).
[72] *Criminal Records Act 1991* (NSW), Part 4A Extinguishing convictions for historical homosexual offences.
[73] *Anti-Discrimination Act 1992* (NT) s 37(1).
[74] *Anti-Discrimination Act 1998* (Tas) s 50.
[75] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 72.

Recommendation 26: The ADA should include a new attribute to protect victim-survivors of domestic and family violence from discrimination.

Medical condition or record

Discrimination on the basis of irrelevant medical information is common, particularly in the context of employment. KLC has observed an increase in wide-ranging requests for medical histories for job applicants, including requesting information about past and current mental health conditions. Currently, job applicants can complain to the AHRC as part of its ILO 111 grounds.[76] People in the Northern Territory and Tasmania are also able to make discrimination claims on the basis of irrelevant medical record.[77]

Case study: Sadia* applied for a job in a warehouse. She had passed most parts of the application process, including a written application and an interview. She had discussed start dates with the employer and was told the company was looking to hire as soon as possible. Sadia was then asked to complete a medical assessment. Sadia disclosed a prior workplace injury (five years prior), which had since resolved. She did not need any adjustments for the previous injury. The company stopped contacting Sadia and then eventually withdrew the offer saying she couldn't safely perform the role.

Case study: Daniel* applied for a job at a not-for-profit organisation. He was told by the interviewer that they wanted to hire him on-the-spot but that he needed to complete some more checks. The company asked Daniel for a full medical history, including any physical or mental health diagnoses. Daniel disclosed that he had been diagnosed with schizoaffective disorder, which was currently well-managed. The company didn't proceed with Daniel's job offer despite telling him that he had been the preferred candidate.

Case study: Patricia* is 35 years old and applied for a job as a childcare worker. The interview went well and Patricia was asked to do a medical examination. Patricia was flagged as being at high risk of injury by a doctor because of medical conditions like Type 2 diabetes and a high BMI. The doctor also flagged a previous wrist injury as being of concern. Patricia "failed" the medical test and was not offered the job. Patricia was confused because she couldn't see the relevance of her medical history to not being able to do the job. She was particularly confused by the reference to the wrist injury because the "injury" was a netball injury from her teens and didn't cause her any current issues.

As shown by Sadia, Daniel and Patricia's cases, people currently face discrimination on the basis of medical records and prior workers compensation claims that have no bearing on their ability to perform their job. KLC is concerned by the practices of some employers in requesting invasive and irrelevant medical information from potential employees as a condition of employment. These types of decisions only serve to entrench economic disadvantage.

Some elements of these clients' claims could be protected as part of disability discrimination, including presumed future disability. However, a separately protected attribute of medical condition (or record) more clearly addresses the nature of the

[76] Australian Human Rights Commission Regulations 2019 (Cth) reg 6(a)(ii); *Australian Human Rights Commission Act 1986* (Cth) s 31(b).
[77] *Anti-Discrimination Act 1992* (NT) s 19(p); *Anti-Discrimination Act 1998* (Tas) s 16(r).

discrimination and is more user-friendly. For some characteristics, like a high BMI or lower-than-expected grip strength, bringing a claim on the basis of presumed future disability would also require the applicant to step through a chain of logic entirely within the mind of their employer (e.g. that the employer thought a high BMI made the applicant prone to future injury or illness).

We prefer the formulation of 'medical condition' (or 'medical record') rather than 'irrelevant medical record' because it is consistent with how we approach other attributes, such as 'disability'. Considerations of relevance are more appropriately dealt with as part of 'inherent requirements' or 'unjustifiable hardship'. Removing the word 'irrelevant' from the attribute itself also avoids confusing the scope of the applicant's burden of proof. If NSW adopted a shifting onus of proof (like s 361 of the *Fair Work Act 2009* (Cth)) and 'irrelevant' were included as part of the attribute, the applicant would bear the onus of establishing the irrelevancy of the condition to the role - information which would usually be held by the respondent.

KLC supports the introduction of a new protected attribute for medical condition or record, including a history of Workcover claims.

Recommendation 27: The ADA should include an attribute for 'medical condition' or 'medical record'.

Industrial activity or political belief or activity

KLC supports the inclusion of 'political belief or activity' as a protected attribute. This could be modelled on Victorian anti-discrimination legislation, which prohibits discrimination on the basis of "holding or not holding a lawful political belief or view"; or "engaging in, not engaging in or refusing to engage in a lawful political activity".[78]

Recommendation 28: The ADA should include a new attribute to protect against discrimination on the basis of political belief or activity.

Physical features or appearance

Some of our clients have reported discrimination on the basis of their physical features or appearance, sometimes in combination with other attributes.

Case study: Sara* came to KLC for employment law and discrimination law advice. She had recently started at a new job and her colleagues had repeatedly made comments about her weight and appearance, calling her 'ugly'. Sara could not take this treatment any longer, so she quit. Because Sara had already left her job, she did not have options for a 'stop bullying' order through employment law complaint mechanisms. She would not have had protections against discrimination (or harassment) on the basis of her appearance.

Case study: Gili* worked as a caretaker in a school. This involved a lot of manual labour and maintenance. Gili's boss repeatedly made comments about his weight. One day his boss told him: "You'd be much faster at your job if you just lost some weight" and gave him a book of low-calorie recipes. Gili declined the book and told his boss that he had no right to make comments about his private life. Gili's boss continued to make comments about joining a gym and getting weight-loss counselling, which Gili ignored. Gili

[78] *Equal Opportunity Act 2010* (Vic) s 4 'political belief or activity'.

eventually resigned from his job, as the comments were getting too much. Gili's discrimination case was difficult to run, as there was no protected attribute for "appearance", and Gili did not have any diagnosed underlying health conditions.

We support the inclusion of a protected attribute for physical features or appearance, particularly for weight, height and facial features (like prominent scarring).

Recommendation 29: The ADA should include a new attribute to protect against discrimination on the basis of physical features like weight, height and facial features.

Religious belief or activity

Discrimination on the basis of religious belief or activity (or lack thereof) should be prohibited. This is a gap in discrimination protection in NSW which means this type of discrimination is not unlawful. The current situation under the ADA has created limited protection for faiths which are considered ethno-religious in origin or religious practices that can be linked a person's national origin. The current law is not comprehensive and is unclear and overly technical.

Clear religious discrimination should be brought as a standalone form of discrimination instead of being framed as race discrimination. The current legislative framework is confusing and unfair. As noted by the Consultation Paper,[79] the circumstances in which the Tribunal will protect religious practices through a race discrimination complaint have not been consistent. This makes it difficult for applicants to understand their rights and to assert them to duty holders. The protections can also operate unfairly, with some faiths like Judaism and Sikhism recognised as ethno-religions, while other faiths have a less certain position[80] or do not fall within this category at all.[81] People who are discriminated against because they do not have a religion also lack protection. This is an obvious area where the Act requires reform to bring it into line with a multi-faith society that opposes religious discrimination.

Case study:[82] Jake* is a student at a Catholic high school. He believes he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not currently a protected attribute.

Case study:[83] Ali* is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that he would not be able to successfully make a discrimination complaint on the

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[79] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 63-64.79.
[80] See e.g. discussion in *Ekermawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 in relation to racial vilification.
[81] E.g. Christianity.
[82] Case study originally published in Kingsford Legal Centre, *Submission on the Exposure Draft of the Religious Discrimination Bill* (Submission, October 2019) 5.
[83] Case study originally published in Kingsford Legal Centre, *Submission on the Exposure Draft of the Religious Discrimination Bill* (Submission, October 2019) 5.

basis of religious discrimination. The lack of legal protections in NSW and at the federal level meant that Ali couldn't access an appropriate remedy. Some applicants may be able to frame this application as a race discrimination complaint. This is insufficient protection, as not all applicants would be able to make a race discrimination complaint for the same conduct.

KLC supports the introduction of a protected attribute for religious belief or activity. This would give greater clarity to clients like Ali and make a clearer statement against religious discrimination. The attribute should be defined to include a lack of religious belief or activity to protect clients like Jake. The *Equal Opportunity Act 2010* (Vic) is an appropriate model for the protected attribute and its definition.[84]

Recommendation 30: The ADA should include a new attribute to protect against discrimination on the basis of religious belief and expression.

Recommendation 31: The ADA should define religious belief or activity as "holding or not holding a lawful religious belief or view; or engaging in, not engaging in or refusing to engage in a lawful religious activity".

Sex characteristics

Discrimination against a person based on innate variations of sex characteristics should be prohibited.

Recommendation 32: The ADA should include a new attribute to protect against discrimination on the basis of sex characteristics.

Sex work, lawful sexual activity and occupation

We support amendments to anti-discrimination legislation to prohibit discrimination against sex workers.

Case study: Marie* was evicted from her tenancy and had to find a new place to live. The applications for new rental accommodation all asked her to disclose her employer. She was concerned about disclosing that she was a sex worker to accommodation services because she was worried they wouldn't offer her accommodation on this basis. We advised Marie that she was not protected by discrimination laws on the basis of her occupation.

Cases like Marie's show the current gap in anti-discrimination laws. The Scarlet Alliance reports that sex workers like Marie experience high rates of discrimination when accessing healthcare services, accommodation, financial services and insurance.[85] We support the inclusion of 'sex work' or 'sex worker' as a protected attribute.

Recommendation 33: The ADA should include a new attribute to protect against discrimination against sex workers.

Socioeconomic status

KLC supports the inclusion of a new protected attribute to address discrimination based on socioeconomic status. We have observed a particular problem with discrimination

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[84] *Equal Opportunity Act 2010* (Vic) s 6(n), s 4 'religious belief or activity'.
[85] Scarlet Alliance, *Anti-discrimination and vilification protections* (Website) <https://scarletalliance.org.au/anti-discrimination-and-vilification-protections/>.

based on homelessness, a person's residence in social housing, and social security status (like being in receipt of Centrelink payments).

Case study: Luke* moved into a social housing property in a new apartment building after a period of homelessness. Most other apartments in the complex are privately owned (and expensive). Luke has noticed that the security guard at his building treats him worse than other residents, turning away his visitors and making rude comments. The security guard commented negatively on Luke paying less rent than other residents and said that 'people like you' shouldn't be living here.

As shown by Luke's example, people living in social housing often face hostility on the basis of their accommodation status. Other clients have been discriminated against on the basis of current or prior homelessness. This can take the form of direct discrimination (like not being allowed into venues) or indirect discrimination (like being required to provide a permanent address or phone number before accessing services).

We support the inclusion of a protected attribute to prohibit discrimination on the basis of accommodation status. The NSW Government should also consider extending this protection to employment status or social security status.

Recommendation 34: The ADA should include new attributes to protect against discrimination on the basis of accommodation status and social security status.

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?

In our experience providing discrimination advice, this would not be helpful. Applicants and duty holders benefit from clarity in what kinds of conduct are prohibited. Instead, we would favour a process in which there are more regular reviews of the Act, or a greater role and resourcing of Anti-Discrimination NSW to monitor and suggest areas where the law should be expanded. No discrimination law should be 'set and forget' due to the way in which social norms and values evolve, as well as new types and methods of discrimination.

Areas of public life

Question 6.12: Additional areas of public life

(1) Should the ADA apply generally 'in any area of public life'? Why or why not?

(2) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

Discrimination law should offer the broadest possible protection and avoid gaps in coverage that are inconsistent with human rights principles. At the same time, discrimination law should be easy to understand and apply, and create clarity for rights and duty holders and the broader community. We recognise this can be a challenging balancing act within the law.

KLC believes that to conform with human rights principles and provide the greatest possible protection from discrimination, the ADA should apply to all areas of public life. To avoid unnecessary uncertainty, the ADA should also provide a non-exhaustive list of

areas where discrimination protections apply. This should include all areas currently covered by the ADA (subject to clarification discussed below) as well as:

- the disposal of interest in land; [86]
- the administration of state laws and programs;[87]
- organised sport;[88]
- local government;
- requests for information;[89] and
- owners' corporations.

Disposal of interest in land

KLC believes that NSW should follow the approach of Victoria, South Australia, Western Australia and Queensland by clarifying that the disposal of an interest in land is covered by the ADA. Allowing discrimination in the sale or transfer of property may have harmful consequences, including racial segregation, as observed by the NSWLRC.[90]

Strata schemes

This is an area requiring urgent reform. Approximately 1.5 million NSW residents live in strata schemes.[91] Despite this, there is a lack of clarity in the ADA about its coverage when discrimination happens in the context of strata accommodation. In most cases, owners and tenants need to characterise their complaints as relating to the provision of goods and services by their owners corporation, which inadequately characterises this relationship and can lead to it falling within a 'grey' area. KLC has had experience advising and representing clients in these situations, particularly in relation to disability discrimination complaints.

Case study: Norma owns her unit in a strata block that has a lift. There are four steps leading into the building foyer. Norma's health has deteriorated over the past five years; she now uses a wheelchair and can no longer climb the steps leading into the building foyer. There are no alternative ways to get in and out of the building, meaning that Norma has effectively become a prisoner in the home she has lived in for 20 years. Because the steps and foyer are common property, Norma has no control over getting modifications done, such as a simple ramp. Norma spent a whole year trying to negotiate a solution with her owners committee to no avail, even though her proposed, simple modifications would have benefitted everyone in the building. The committee argued that they were not under any obligations under the ADA or other discrimination laws to provide modifications to common areas. It was not until KLC became involved

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[86] As in Victoria, South Australia, Western Australia and Queensland: *Equal Opportunity Act 2010* (Vic) s 50; *Equal Opportunity Act 1984* (SA) ss 38, 60, 75, 85ZF; *Equal Opportunity Act 1984* (WA) ss 21A, 35AN, 35ZA, 47A, 66ZH; *Anti-Discrimination Act 1991* (Qld) s 77.
[87] As in the ACT, Queensland and under federal law: *Discrimination Act 1991* (ACT) ss 23C, 67; *Anti-Discrimination Act 1991* (Qld) s 101; *Sex Discrimination Act 1984* (Cth) s 26; *Disability Discrimination Act 1992* (Cth) s 29; *Age Discrimination Act 2004* (Cth) s 31.
[88] As in the ACT, Victoria and under federal law: *Discrimination Act 1991* (ACT) s 41; *Equal Opportunity Act 2010* (Vic) ss 70-71; *Disability Discrimination Act 1992* (Cth) s 28.
[89] As in *Anti-Discrimination Act 1991* (Qld) s 124(1); *Discrimination Act 1991* (ACT) s 23; *Anti-Discrimination Act 1992* (NT) s 26.
[90] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Areas of Public Life* (Consultation Paper, May 2025) 91-126, 122.
[91] UNSW City Futures Research Centre, *Australasian Strata Insights 2024- Report and Infographics* (Report, 2024).

and lodged a formal complaint for Norma that the owners corporation seriously considered her proposals- a process that in itself took over two years.

Some of our clients have reported receiving unclear and inconsistent information from ADNSW about whether or not they are able to bring a complaint against their owners corporation.

Case study: Michelle* is a tenant who complained to ADNSW about discrimination against her by the property manager and owners' corporation of the building she lived in. Michelle's complaint was rejected by ADNSW based on their view that the owner's corporation and property manager were providing services to owners in the building, including Michelle's landlord, but not to tenants like Michelle. KLC had to advise Michelle that this approach was open to ADNSW. If owners' corporations were covered by the ADA, Michelle may have been able to proceed with her discrimination complaint.

The administration of state laws and programs and local government

KLC agrees with the NSWLRC that governments should be required to comply with their own discrimination standards.[92] Government laws, policies and programs shape virtually all aspects of people's lives and protections from discrimination should be clear and consistent.

For example, KLC is concerned about the legal complexities facing people who experience discrimination by police and has had experience advising clients in these situations. The current approach of treating policing as a 'service' for the purposes of the ADA has led to uncertain and inconsistent coverage.

Case study: Pedro* was concerned about discriminatory treatment by police when he asked for assistance, while he was being interviewed, and when he later made a complaint at a police station. Whether or not the police were providing a service such that Pedro would be protected by the ADA varied depending on the stage of the process. The classification of certain police conduct as a service also depended on information held by police. For example, whether Pedro was being interviewed as a victim or as a potential suspect may have influenced whether the interview was covered by the ADA.

KLC believes that the inclusion of the administration of state laws and programs as a new area of public life is the simplest way of addressing this issue and ensuring that government agencies such as the police can be held accountable for discrimination.

Requests for information

KLC also supports a prohibition on requests for unnecessary information, based on the approach taken in Queensland.[93] This model makes it unlawful to request information on which discrimination might be based and shifts the onus to the person requesting the information to prove, on the balance of probabilities, that the information was reasonably required for a non-discriminatory purpose. KLC supports this approach because it appropriately reflects the imbalance in access to information which can prove an insurmountable barrier to complainants.

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[92] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Areas of Public Life* (Consultation Paper, May 2025) 91-126, 123.
[93] *Anti-Discrimination Act 1991* (Qld) s 124(1).

Sport

As discussed below, sport is an important part of Australian culture and can contribute to health and wellbeing. It is important that the ADA covers sport so that people can participate in sporting activities to the maximum extent possible without unnecessary discrimination.

If the ADA is not expanded to cover all areas of public life, it is especially important that these additional areas of public life are included and that existing areas of public life are refined, including any exceptions. We provide our recommendations for clarifying existing areas of public life and improving exceptions below.

Recommendation 35: The ADA should apply generally to any area of public life and include a non-exhaustive list of areas including all areas currently included in the ADA as well as the disposal of interest in land, the administration of state laws and programs, organised sport, local government, and strata schemes.

Recommendation 36: The ADA should cover unnecessary requests for information, based on the approach in the *Anti-Discrimination Act 1991* (Qld).

Discrimination in Work

Question 6.1: Discrimination at work – coverage

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

KLC supports the inclusion of unpaid workers within the definition of employment. Volunteers contribute significantly to our community and completing unpaid internships is a common part of higher education that can be an important stepping stone for people's careers.[94] Student interns are a particularly vulnerable cohort and should not be excluded from discrimination protections.

Volunteers are already protected as workers in Queensland, South Australia, the Northern Territory, and the ACT.[95] The *Sex Discrimination Act 1984* (Cth) was also recently amended to extend protections to many volunteers as part of the Respect@Work reforms.[96]

In our work, KLC has assisted clients who have experienced discrimination while volunteering.

Case study: Stephen* played an important role in his community as an emergency services volunteer. He was subjected to racist and homophobic comments by a paid employee of the organisation he was volunteering for. KLC had to advise Stephen that volunteers are not protected under the ADA.

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[94] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, December 2021) 252-253.
[95] *Anti-Discrimination Act 1991* (Qld) Schedule 1 (definition of 'work'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'employee'); *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'work'); *Discrimination Act 1991* (ACT) Dictionary (definition of 'employment').
[96] *Sex Discrimination Act 1984* (Cth) s 4 (definition of 'worker'); *Work Health and Safety Act 2011* (Cth) s 7 (definition of 'worker').

Recommendation 37: The ADA should be amended to include unpaid workers in the definition of employment.

Question 6.1: Discrimination at work – coverage

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

KLC does not support the broader approach to discrimination in work suggested in the NSWLRC consultation paper. The current approach, requiring a relationship of authority and/or control between the discriminator and the person being discriminated against, is consistent with all other Australian discrimination laws and has not created an unjustifiable gap in protection. The existence of a relationship of authority and/or control is relevant to whether discrimination has occurred and who should be held liable.

However, KLC is concerned that the restrictive approach to the coverage of employment relationships in the ADA leaves some workers without protection. For example, KLC sees clients who have experienced discrimination while working on secondment or for a labour hire agency at a particular worksite/placement organisation. Because that organisation is not their direct employer or contract principal, the ADA does not provide adequate coverage.

Case study: Samantha* worked as a fruit picker for a labour hire agency and was placed on a farm owned and run by John. Samantha worked on the farm with John but received her payslips from the labour hire agency. While working on the farm, Samantha was repeatedly sexually harassed by John. Because of Samantha's employment arrangement, John was not Samantha's contract principal or employer and so she could not make a complaint directly against him under the ADA.

Case study: Jacob* was employed with a labour hire agency to work as a truck driver for a construction company. Jacob was discriminated against by the construction company. Because Jacob's employer was the labour hire agency, Jacob would not have been able to bring a claim against the waste management company under the ADA.

KLC recommends that the ADA broadly defines the kinds of relationships of authority to which protections against discrimination in employment apply. The definition should be broad enough to capture employment-like relationships, such as where a person is employed by one organisation but works within another. The ADA could define these relationships by reference to the level of control or authority exercised.

Recommendation 38: **The ADA should prevent discrimination against workers in situations where a relationship of authority exists. The relevant relationship should be defined broadly and include an employer against an employee, an employer against an applicant, or a principal against a contract worker as well as other similar workplace relationships in which a level of control or authority is exercised.**

Question 6.11: Discrimination based on carer's responsibilities

(1) Should discrimination based on carer's responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why?

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

Discrimination protections should apply uniformly. All protected attributes should be protected in all areas of public life unless there is an exception. In general, exceptions should only apply where necessary to protect other human rights and should be framed as narrowly as possible to achieve that goal.

This approach is grounded in human rights principles and makes the discrimination framework more consistent and less complex.

Recommendation 39: **All protected attributes should be protected in all areas of public life unless an appropriately limited exception applies.**

Question 6.1: Discrimination at work – coverage

(3) Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not?

KLC supports extending age discrimination protections to local government members performing work in their official capacity.

There is no justification for excluding local government members from discrimination protections based on age.

Recommendation 40: Amend the ADA to protect local government officials from age discrimination while performing work in their official capacity.

Question 6.2: Discrimination at work – exceptions

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

Private households

The broad exception for 'employment for the purposes of a private household' should not be retained in its current form and should be limited. KLC understand that it may not be appropriate for discrimination law to apply to decisions about who a person wants to perform work in their own home, however any exception in this area must be narrowly framed.

Commonwealth law, Queensland and the ACT limit the exception for private households to the home where the employer lives,[97] while Victoria also allows discrimination in the home of the person receiving services if the discrimination is requested by or on behalf of that person.[98]

KLC favours the Victorian approach with the added requirement, as in the ACT, that the discrimination be reasonable, proportionate and justifiable in the circumstances.[99] If the

[97] *Sex Discrimination Act 1984* (Cth) s 14(3); *Anti-Discrimination Act 1991* (Qld) s 26; *Discrimination Act 1991* (ACT) s 24.
[98] *Equal Opportunity Act 2010* (Vic) s 24.
[99] *Discrimination Act 1991* (ACT) s 24

exception is not qualified in this way, it should be limited to the selection of employees and not extend to the treatment of employees once they are hired.[100]

Similarly to discrimination laws in Victoria and the ACT,[101] we believe a specific exception for discrimination in the care of children in their home may be justified where that discrimination is in good faith and reasonably necessary, for example, to protect the physical, psychological or emotional wellbeing of the children.[102]

Recommendation 41: **The ADA should retain a limited exception for employment in the home where the employer lives or in the home of the person receiving services where the discrimination has been requested by or on behalf of that person. The exception should only apply where the discrimination is reasonable, proportionate and justifiable in the circumstances.**

Recommendation 42: **The ADA could include a further exception for discrimination in the care of children in their home where the discrimination is in good faith and reasonably necessary, for example, to protect the physical, psychological or emotional wellbeing of the children.**

Small businesses

KLC does not support exceptions from the ADA for small businesses or small partnerships. Many people in Australia are employed by or seek employment from small businesses. There is no human rights-based justification for depriving these employees or prospective employees of protection from discrimination.

Case study: Amelia* came to KLC after she was sexually harassed at work as an independent contractor for a small organisation in the hospitality industry. Further inquiries revealed that this organisation was a small partnership. This meant that Amelia could not bring a claim under the ADA.

Recommendation 43: The ADA should not include exceptions to discrimination for small businesses or small partnerships.

Persons addicted to prohibited drugs

Allowing an exception to disability discrimination protections for people addicted to prohibited drugs is harmful and stigmatising. Any exceptions to discrimination on the ground of disability should focus on the person's capacity to perform their job not on the criminalisation of particular substances. KLC does not support an exception of this nature.

Recommendation 44: The ADA should not include exceptions to discrimination in employment for persons addicted to prohibited drugs.

Inherent requirements and unjustifiable hardships

KLC supports the inclusion of an exception allowing an employer to discriminate against another person on the basis of any attribute where that person is unable to carry out the inherent requirements of the position because of that protected attribute even with adjustments in place or where the adjustments required would cause the employer

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[100] *Equal Opportunity Act 2010* (Vic) s 24.
[101] *Equal Opportunity Act 2010* (Vic) s 25; *Discrimination Act 1991* (ACT) s 25.
[102] See *Equal Opportunity Act 2010* (Vic) s 25.

unjustifiable hardship. This exception should only apply if the discrimination is reasonable, proportionate and justifiable in the circumstances.[103]

The Disability Royal Commission made useful observations about the limitations of the inherent requirements exception.[104] KLC encourages the Commission to consult with disability rights advocates and other relevant stakeholders about how best to ensure that employers consult with employees or prospective employees about their capacity to meet inherent requirements and any necessary adjustments. One option is for the explanatory memorandum to include an explanation of what it looks like for an employer to properly consider and apply the inherent requirements exception. We have also recommended a positive duty to consult on adjustments which we discuss below.

Recommendation 45: The ADA should retain an inherent requirements exception which allows an employer to discriminate against a person based on a protected attribute where:

- **the person is unable to carry out the inherent requirements of the position because of that protected attribute even with adjustments in place or where the adjustments required would cause the employer unjustifiable hardship; and**
- **where the discrimination is reasonable, proportionate and justifiable in the circumstances.**

Genuine occupational qualifications

KLC favours the approach taken in the ACT of a single broad exception where:

- it is a genuine occupational qualification that a position be filled by a person with a particular protected attribute, and
- the discrimination is reasonable, proportionate and justifiable.[105]

We believe this approach is easier to navigate than an enumerated list and provides a higher level of protection. This approach is also better able to respond to changing employment contexts and social expectations.

KLC also supports a carve-out from this exception for religious conviction or belief.[106] This is because the genuine occupational qualification exception has been misused by some religious organisations to discriminate on the basis of sexual orientation or gender identity.[107]

Recommendation 46: The ADA should adopt a single broad exception for genuine occupational qualifications modelled on the ACT, including a carve out for religious conviction or belief.

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[103] *Discrimination Act 1991* (ACT) s 33C.
[104] See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Areas of Public Life* (Consultation Paper, May 2025) 91-126, 99.
[105] *Discrimination Act 1991* (ACT) s 33B(1)(a).
[106] *Discrimination Act 1991* (ACT) s 33B(2).
[107] Equality Australia, *Dismissed Denied Demeaned: A national report on LGBTQ+ discrimination in faith-based schools and organisations* (Report, 2024) https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

Young people

There is no human rights-based justification for allowing discrimination against people under 21 years old in employment. KLC does not support this exception.

Recommendation 47: The ADA should not include exceptions allowing discrimination against young people in employment.

Employment outside of NSW

The exception in the ADA allowing racial discrimination against people who do not normally live in NSW and are employed to use skills outside of NSW is not justifiable and should be removed.

Recommendation 48: The ADA should not include exceptions for discrimination on the ground of race in employment where the person is not normally resident in NSW and was engaged to be employed outside NSW.

Discrimination in Education

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

The ADA should extend the coverage of the protected area of 'education' to include organisations whose purpose is to develop or accredit curricula, in line with the *Disability Discrimination Act 1992* (Cth).[108]

Recommendation 49: The ADA should define 'educational authority' to include bodies whose purpose is to develop or accredit curricula.

Question 6.3: Discrimination in education
(2) 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?

Single-sex educational institutions

Exceptions for single-sex schools are reasonable and appropriate. The scope of this exception should be clarified and the outdated and inaccurate language of 'opposite sex' should be removed.

KLC supports a model similar to the proposed language in the draft Queensland Anti-Discrimination Bill 2024.[109] That is: an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex may refuse to admit as students persons who are not of the particular sex.

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[108] Disability Discrimination Act 1992 (Cth) s 4 (definition of 'educational provider').
[109] Draft Anti-Discrimination Bill 2024 (Qld) (28 February 2024).

The exception should also make it clear that a single-sex school should also accept transgender students where their gender identity is consistent with the sex the school is conducted for.

Recommendation 50: The ADA should provide an exception that allows an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex to refuse to admit as students persons who are not of the particular sex.

Recommendation 51: The ADA should clarify that the exception for single sex schools requires single sex schools to accept transgender students where their gender identity is consistent with the sex the school is conducted for.

Disability and age

KLC does not support an exception to allow for discrimination on the basis of disability in schools established for people who have or do not have a particular disability. KLC supports the view of the Disability Discrimination Commissioner that segregated schooling for people with disability leads to unacceptable outcomes like lifelong segregation.[110]

KLC supports an exception to allow an educational institution to select students for an educational program on the basis of an admission scheme that has a minimum qualifying age. This approach is in line with other Australian discrimination laws.[111] KLC cannot see a justification for allowing a maximum age for educational programs and so does not support an exception of this nature.

Recommendation 52: The ADA should not provide an exception for discrimination on the basis of disability in schools established for people who have or do not have a particular disability.

Recommendation 53: The ADA should provide an exception that allows an educational institution to select students for an educational program on the basis of an admission scheme that has a minimum qualifying age.

Discrimination in the provision of goods and services

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'?

The manner in which goods and services are provided

The definition and coverage of the protected area of 'goods and services' should be expanded to include the manner in which the goods and services are provided. The

[110] See Australian Human Rights Commission, *Disability Discrimination Commissioner urges Qld Govt to scrap plans to build more segregated schools* (Press release, 24 July 2025).
[111] See, e.g. *Equal Opportunity Act 1984* (WA) s 66ZD; *Discrimination Act 1991* (ACT) s 57E; *Equal Opportunity Act 1984* (SA) s 85H; *Age Discrimination Act 2004* (Cth) s 26.

current definition in the ADA is unnecessarily limited and is out of step with most other jurisdictions.[112]

Access to premises

KLC supports the expansion of the ADA's coverage to include access to premises. KLC believes this could be achieved most simply through the amendment of the definition of 'services' but we would also support the addition of 'access to premises' as a new area of public life.

The receipt of goods and services

KLC believes that applying discrimination law to the receipt of goods and services may unduly broaden the scope of the ADA. For example, it may be appropriate and legitimate that the ADA does not apply to decisions made by consumers about who they purchase goods and services from, especially where those services are personal in nature. If our recommendation to prohibit discrimination in all areas of public life is adopted, the NSWLRC should consider whether an exception should be provided for the receipt of goods and services.

Recommendation 54: The ADA should define 'goods and services' to include the manner in which goods and services are provided.

Recommendation 55: The ADA should define 'services' to prohibit discrimination relating to access to public premises.

Question 6.5: Superannuation services and insurance exceptions

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

Exceptions for insurance and superannuation providers should be carefully tailored and provide transparency to people accessing insurance or superannuation policies. The existing exception in the ADA has allowed insurance providers to assert that discrimination is based on actuarial or statistical data without providing access to that data. This makes it difficult for a person who believes they have been discriminated against to assess the strength of a potential claim.

Case study: When Graham* tried to take out an income protection insurance policy, the insurer asked him intrusive questions about his sex life during a phone call. Graham complained that the questions were badly framed, offensive and discriminatory toward gay men. The insurer claimed that these questions were based on actuarial or statistical data but would not provide this information to Graham.

KLC supports the inclusion of an exception based on the ACT model which allows discrimination in the provision of insurance or superannuation if the discrimination is based on actuarial or statistical data that it is reasonable for the insurance or superannuation provider to rely on and where the discrimination is reasonable,

[112] *Anti-Discrimination Act 1991* (Qld) s 46; *Anti-Discrimination Act 1992* (NT) s 41; *Age Discrimination Act 2004* (Cth) s 28(c); *Disability Discrimination Act 1992* (Cth) s 24(c); *Discrimination Act 1991* (ACT) s 20(c); *Equal Opportunity Act 1984* (WA) s 66K(c); *Sex Discrimination Act 1984* (Cth) s 22(c).

proportionate and justifiable in the circumstances.[113] Importantly, the ACT model also requires the insurance or superannuation provider to make the data, or a meaningful explanation of the data, available to a consumer upon request.

KLC believes it would be beneficial to clarify that discrimination in superannuation is unlawful under the ADA. KLC believes this could be achieved most simply through the amendment of the definition of 'services' but would also support the addition of 'superannuation' as a new area of public life.

Allowing superannuation funds to treat a transgender person as 'being of the opposite sex from the sex with which the transgender person identifies' may perpetuate harm and misgendering.[114] KLC believes this exception should be removed from the ADA.

Recommendation 56: The ADA should define 'services' to prohibit discrimination relating to access to superannuation.

Recommendation 57: The ADA should not include exceptions that allows superannuation providers to discriminate against transgender people.

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?

KLC does not believe that the exceptions in the ADA to allow discrimination in the provision of goods and services relating to sex and age are necessary. Where exceptions are sought to protect or advance the interests of a historically marginalised group, the 'special measures' exception discussed below is a more appropriate and consistent mechanism.

Recommendation 58: The ADA should not include exceptions relating to sex and age that allow discrimination in the provision of goods and services.

Accommodation

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'?

KLC believes that the current definition of accommodation is broad enough to cover all forms of accommodation, including caravans and motor homes. Nevertheless, KLC would support a clearer articulation of the kinds of accommodation that are covered by the ADA either through a non-exhaustive list (as in Victoria[115]) or through clarification in the second reading speech.

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[113] *Discrimination Act 1991* (ACT) s 28(2).
[114] See e.g. Equality Australia, *Now's our chance: Tell the Government to fix our broken discrimination laws* (Submission guide, 27 June 2025) https://equalityaustralia.org.au/resources/resource-fix-broken-discrimiantion-laws-in-nsw/.
[115] *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'accommodation').

Refusing to allow reasonable alterations or assistance animals may already be unlawful under the ADA, especially in light of recommended changes to the tests for discrimination and a positive duty to make adjustments. However, KLC would also support clarifying this position. KLC would support a clear prohibition on refusing to allow reasonable alterations in the same form as under Victorian law or the *Disability Discrimination Act 1992* (Cth).[116] Similarly to Victoria, KLC would also support a prohibition on refusing to accommodate a person with disability because they have an assistance animal, requiring the assistance animal to be kept elsewhere, or charging additional fees because of an assistance animal.

Recommendation 59: The ADA should clarify the kinds of accommodation that are covered through either a non-exhaustive list or in the second reading speech.

Recommendation 60: The ADA should make it unlawful not to allow reasonable alterations to accommodation to meet the needs of a person with a disability.

Recommendation 61: The ADA should make it unlawful to refuse to accommodate a person with a disability because they have an assistance animal, to require the assistance animal to be kept elsewhere or charging additional fees because of an assistance animal.

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?

KLC believes that the exceptions in the ADA to allow discrimination in the provision of accommodation based on age and by charitable bodies based on disability are unnecessary. As stated above, where exceptions are sought to protect or advance the interests of a historically marginalised group, the 'special measures' exception discussed below is a more appropriate and consistent approach.

Recommendation 62: The ADA should not include exceptions allowing discrimination based on age in the provision of accommodation.

Recommendation 63: The ADA should not include exceptions relating to the provision of accommodation to people with disabilities by charitable bodies.

Registered clubs

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'?

The ADA should not define clubs by reference to the *Registered Clubs Act 1976* (NSW), the *Liquor Act 2007* (NSW), or by reference to registration or the service of alcohol generally. Clubs play an important role in society and social inclusion and this approach unduly limits the scope of this protected area. Instead, the ADA should adopt the

[116] *Equal Opportunity Act 2010* (Vic) s 55(1); *Disability Discrimination Act 1992* (Cth) s 25(2)(d).

definition used in the *Disability Discrimination Act 1992* (Cth) that defines a club as 'an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association'.[117]

Recommendation 64: The ADA should define 'club' in the same manner as the *Disability Discrimination Act 1992* (Cth).

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?

KLC supports the approach taken in the ACT, allowing discrimination by clubs against a person with any protected attribute if the club is established to benefit people who share a protected attribute, the discrimination occurs because the person does not have that attribute and the discrimination is reasonable, proportionate and justifiable in the circumstances.[118] We believe this strikes the appropriate balance between protecting people from discrimination and allowing clubs to maintain spaces for people who share a particular identity.

Recommendation 65: The ADA should include an exception that allows clubs to discriminate on the basis of any protected attribute if:

- **the club is established to benefit people who share a protected attribute;**
- **the discrimination occurs because the person does not have that attribute;**
- **and the discrimination is reasonable, proportionate and justifiable in the circumstances.**

Wider exceptions

Religious bodies

KLC supports the submissions made by Equality Australia in relation to exceptions for religious bodies, educational institutions, adoption services and sport. These exceptions are often used to discriminate against LGBTIQ+ people rather than to create and maintain communities of faith.[119]

Question 7.1: Religious personnel exceptions

Should the ADA provide exceptions for:

(a) the training and appointment of members of religious orders?

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[117] *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'club')
[118] *Discrimination Act 1991* (ACT) s 31.
[119] Equality Australia, *Dismissed Denied Demeaned: A national report on LGBTQ+ discrimination in faith-based schools and organisations* (Report, 2024) https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

(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?

The training and appointment of members of religious orders?

While discrimination in the training and appointment of members of religious orders can be highly controversial within religious communities, the freedom of religious communities to choose and educate their own religious leaders or members of a religious order is consistent with international human rights law.[120] KLC adopts the submissions made by Equality Australia, and does not recommend any changes to subsections 56(a) and (b) relating to the training, education, ordination or appointment of priests, ministers or members of any religious order.

Recommendation 66: The ADA should retain exceptions allowing religious bodies to discriminate based on any attribute in the training, education, ordination and appointment of priests, ministers and members of a religious order.

Other appointments by religious bodies

The exception in subsection 56(c) allowing for discrimination in the appointment of any other person in any capacity by a body established to propagate religion is overly broad and has no equivalent in any Australian law. The exception as it currently exists provides inappropriate scope for a wide range of religious organisations to discriminate in employment even where that employment has no connection to religious practice, instruction or activity. KLC adopts the approach taken by Equality Australia that subsection 56(c) should be replaced by a more limited carve out for 'the selection or appointment of a person to perform functions in relation to, or otherwise participate in, any religious observance or practice' (in line with similar provisions in most other jurisdictions).[121]

Recommendation 67: The ADA should include an exception for discrimination on any attribute in 'the selection or appointment of a person to perform functions in relation to, or otherwise participate in, any religious observance or practice'.

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?

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?

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[120] UN Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought Conscience or Religion) 30 July 1993 CCPR/C/21/Rev.1/Add.4.
[121] *Sex Discrimination Act 1984* (Cth) s 37(1)(c); *Equal Opportunity Act 2010* (Vic) s 82(1)(c); *Anti-Discrimination Act 1998* (Tas) s 52(c); *Discrimination Act 1991* (ACT) s 32(1)(c); *Anti-Discrimination Act 1992* (NT) s 51(c); *Equal Opportunity Act 1984* (WA) s 72(c); *Anti-Discrimination Act 1991* (Qld) s 109(1)(c).

This exception, allowing discrimination that conforms with religious doctrine or is necessary to avoid injury to religious susceptibilities is vague and difficult to apply. It requires decision makers to understand and apply religious doctrine, including where there are different views within a religious community.[122]

The exception is also very broad and may apply to a wide range of organisations and areas of public life including the provision of goods and services or accommodation. There is also a risk that this provision could be used to evade narrower exemptions in the ADA for religious schools (discussed below) and employers (discussed above).[123]

Religious organisations provide a wide range of services to the public and any exceptions allowing discrimination against people accessing these services should be carefully limited, and easy to understand and apply. Members of the public receiving services should not be required to comply with the doctrines and beliefs of the organisation providing the services or avoid injuring religious susceptibilities.

To this end, drawing on the recommendations of the Queensland Human Rights Commission[124] and the exception in the ACT,[125] this exception should be limited to the attribute of religious belief or activity and apply only to conduct by religious organisations that conforms with the religious doctrines, tenets or beliefs of the religious body's religion and is reasonable and proportionate in all the circumstances. The ADA should make it clear that this exemption does not apply where other narrower exemptions exist in the ADA, such as in employment or education.

Recommendation 68: The ADA should include a general exception which allows a religious body to discriminate against a person on the basis of the person's religious belief or activity if the discrimination:

- **conforms to the doctrines, tenets or beliefs of the religious body's religion; and**
- **is reasonable and proportionate in the circumstances.**

This exception should apply generally except where another narrower exemption exists, for example employment by a religious educational institution.

Adoption Services

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?

An exception allowing faith-based organisations to discriminate in the provision of adoption services is inappropriate and out of step with community values and expectations. These exceptions do not exist under other Australian discrimination laws.

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[122] See e.g. *OV & OW v Wesley Mission* [2010] NSWCA 155 (6 July 2010)
[123] See Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142, 2024) 134-135.
[124] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 374-378.
[125] *Discrimination Act 1991* (ACT) s 32(d).

A recent report by Equality Australia found that adoption providers continue to openly and explicitly exclude same-sex couples from eligibility to adopt in NSW.[126] Just last year, Anglicare Australia refused to assess an Aboriginal aunt of an Aboriginal baby for long term care because she was in a same-sex relationship.[127] These exceptions could also be used to discriminate against people on other bases, for example people who are single or couples who are unmarried.

There is no justification for allowing these exceptions and KLC supports their removal.

Recommendation 69: The ADA should not include an exception for providers of adoption services.

Private educational authorities

Private and religious schools should not have broad exceptions from discrimination law. These exceptions are regressive and out of step with community expectations. One in three students and two in five staff are enrolled or employed in private schools in Australia and these exceptions have enabled religious schools in NSW to refuse to enrol students and fire teachers for being gay or trans.[128] These exceptions may also be used to discriminate against staff members who are divorced.[129]

KLC often advises clients who have experienced discrimination as students or staff of private schools. In these circumstances, KLC must advise clients that their options are limited and that they cannot make a complaint on any grounds under the ADA.

Case study: Grace* and her father came to KLC for advice about sex-based discrimination and victimisation at the private school Grace attended. KLC had to advise Grace that she could not make a complaint to ADNSW as private schools are exempt from discrimination law in NSW.

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?

(b) what requirements, if any, should duty holders meet before an exception applies?

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[126] Equality Australia, *Dismissed Denied Demeaned: A national report on LGBTQ+ discrimination in faith-based schools and organisations* (Report, 2024) https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[127] Guardian Australia, *Anglicare Sydney refused to assess Aboriginal baby's aunt as carer because she was in same-sex relationship, court hears* (6 February 2024) https://www.theguardian.com/australia-news/2024/feb/06/anglicare-court-case-aboriginal-baby-daisy-aunt-refused-same-sex-relationship.

[128] Equality Australia, *Dismissed Denied Demeaned: A national report on LGBTQ+ discrimination in faith-based schools and organisations* (Report, 2024) https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[129] Sydney Morning Herald, *Christian schools defend right to discipline divorced or gay staff* (21 December 2021) https://www.smh.com.au/politics/federal/christian-schools-defend-right-to-discipline-divorced-or-gay-staff-20211221-p59j6d.html.

KLC believes that it is appropriate that the ADA includes an exception for religious educational institutions to preference staff members of the same religion as that educational institution in the selection of staff.

KLC supports the model proposed by the Australian Law Reform Commission which allows a religious educational institution in the selection of staff for employment to give preference, in good faith, to a person of the same religion where the giving of such a preference is reasonably necessary to build or maintain a community of faith and is proportionate to that aim.[130]

It is important that this exception allows preferencing only based on a person's religion and not based on their religious belief or activity. This is because religious educational institutions have sometimes misused exceptions of this nature to discriminate against staff who share their religion but who hold different views in relation to the rights and dignity of others.

Case study: An Anglican school in Sydney fired a teacher after she came out as gay. The school argued that the teacher was not dismissed because of her sexual orientation but because of her belief that a person can be both Christian and gay.[131]

Recommendation 70: The ADA should not provide broad exceptions for private and religious educational authorities in employment.

Recommendation 71: The ADA should provide a new limited exception which allows a religious educational institution in the selection of staff for employment to give preference, in good faith, to a person of the same religion where the giving of such a preference is reasonably necessary to build or maintain a community of faith and is proportionate to that aim.

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?

(c) what requirements, if any, should duty holders meet before an exception applies?

KLC does not believe there should be any exceptions available to private and religious educational institutions to discriminate against students, beyond the exceptions for same-sex schools discussed above. Children and young people rarely have a say in which school they attend and there is no human rights-based justification for allowing

[130] Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142, 2024) recommendation 7.
[131] Sydney Morning Herald, *Teachers sacked for being gay warn religious discrimination bill will empower similar dismissals* (21 January 2022) https://www.theguardian.com/australia-news/2022/jan/21/teachers-sacked-for-being-gay-warn-religious-discrimination-bill-will-empower-similar-dismissals.

schools to discriminate against students or potential students. This is particularly important where one third of students in Australia attend private schools.[132]

Case study: Former student, James Elliott-Watson recently spoke out about his experience of discrimination while attending a religious school in NSW. After coming out as gay, James was told by his school that they would not allow him to be a prefect and he was forbidden from talking about his sexual orientation to his friends and classmates.[133]

KLC does not believe that a published policy by an educational institution provides any justification for allowing for discrimination against students.

Recommendation 72: The ADA should not provide exceptions that allow religious educational institutions to discriminate against students, other than the limited exception for same-sex schools.

Sport

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?

As stated above, KLC supports the addition of sport as an area of public life to make it clear that people are protected from discrimination while involved in sporting activities.

Participation in sport is important for health and wellbeing and is a significant part of Australian culture. Restrictions on participation are sometimes necessary but should only be allowed in competitive sporting activity and not in related activities such as coaching, administration, umpiring or refereeing. Exceptions should be narrow and intended to facilitate participation to the extent possible.

KLC supports limited exceptions that allow a person to restrict participation in competitive sporting activities on the basis of disability, age, sex and gender identity only. Following best practice in other jurisdictions, exceptions for sex and gender identity should only apply to people 12 years old and over[134] and where the strength, stamina and physique of competitors is relevant.[135]

Exceptions that allow discrimination in sport on the grounds of age, disability, sex and gender identity should be further qualified. Two possible approaches are either to

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[132] Equality Australia, *Dismissed Denied Demeaned: A national report on LGBTQ+ discrimination in faith-based schools and organisations* (Report, 2024) https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[133] Sydney Morning Herald, *Bradley's school years were the best of his life. For his twin, James, they were 'hell'* (25 March 2024) https://www.smh.com.au/politics/federal/bradley-s-school-years-were-the-best-of-his-life-for-his-twin-james-they-were-hell-20240319-p5fdjz.html.

[134] *Sex Discrimination Act 1984* (Cth) s 42; *Anti-Discrimination Act 1992* (NT) s 56(2), *Anti-Discrimination Act 1991* (Qld) s 111(2); *Anti-Discrimination Act 1998* (Tas) s 29; *Equal Opportunity Act 2010* (Vic) s 72(3).

[135] *Sex Discrimination Act 1984* (Cth) s 42; *Discrimination Act 1991* (ACT) s 41(a); *Equal Opportunity Act 2010* (Vic) s 72(1); *Anti-Discrimination Act 1992* (NT) s 56(1)(a); *Anti-Discrimination Act 1991* (Qld) s 111(1)(a); *Equal Opportunity Act 1984* (SA) s 48(a); *Equal Opportunity Act 1984* (WA) s 35(1).

require that the discrimination is reasonable, proportionate and justifiable in the circumstances as in the ACT,[136] or, in line with the Victorian law, to require that the restriction is reasonable having regard to the nature and purpose of the activity, the consequences of the restriction, and whether there are other opportunities for restricted people to participate in the activity.[137]

KLC does not support the exception in the ADA allowing vilification and discrimination based on race in relation to representation or competition in sports and games. If exceptions are required to preserve minority cultures this is best dealt with by special measures or the exception for clubs discussed above.

Recommendation 73: The ADA should provide exceptions to allow a person to restrict participation in competitive sporting activities on the basis of disability, age, sex and gender identity only. The exemption for sex and gender identity should only apply to people 12 years of age and over and where the strength, stamina and physique of competitors is relevant.

Voluntary bodies

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?

KLC supports the inclusion of a limited exception for voluntary bodies in the ADA. It is appropriate that small volunteer-run organisations are not unreasonably subject to the ADA in relation to the admission of members or the provision of services and facilities to their members.[138] Such an exception protects the rights to freedom of association, freedom of conscience and belief and privacy and is consistent with other jurisdictions.

For consistency and clarity, the definition of a voluntary body in the ADA should be harmonised with federal law, particularly the definition in the *Sex-Discrimination Act 1984* (Cth) which defines a voluntary body as an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include a club, a registered organisation, or an association that provides grants, loans, credit or finance to its members.[139]

Recommendation 74: The ADA should include a limited exception for voluntary bodies.

Recommendation 75: The ADA should define a voluntary body as an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include a club, a registered organisation, or an association that provides grants, loans, credit or finance to its members.

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[136] *Discrimination Act 1991* (ACT) s 41.
[137] *Equal Opportunity Act 2010* (Vic) s 72.
[138] See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 355.
[139] *Sex-Discrimination Act 1984* (Cth) s 4 (definition of 'voluntary body').

Aged care accommodation providers

Question 7.10: Aged care accommodation providers exception

Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

The ADA should not contain blanket exceptions for aged care accommodation providers on the basis of sex, marital or domestic status, race or any other protected attribute. Aged care providers who wish to accommodate the needs of particular groups should be dealt with under provisions relating to special measures, as discussed below.

Recommendation 76: The ADA should not include an exception for aged care accommodation providers.

Civil protections against vilification

Question 8.1: Protected attributes

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

Question 8.5: Religious vilification

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

The attributes currently protected from vilification should be defined as recommended above for the ADA generally. This will ensure that the ADA is internally consistent and broadly aligns with the definitions in section 93Z of the *Crimes Act 1900* (NSW).

As explained above, KLC supports the inclusion of a new attribute of religious belief or activity and supports the protection of people of faith from vilification. The ADA currently protects people from vilification based on religious belief, religious affiliation or religious activity but does not define these terms. This means that the attribute is potentially very broad and is inconsistent with other states and territories and the equivalent criminal provisions of the *Crimes Act 1900* (NSW).[140]

The potential breadth of the current prohibition on religious vilification under the ADA raises concerns about the coverage of organisations (as opposed to individuals) and unlawful religious activities. KLC supports the submissions made previously by the Justice Equity Centre on this point.[141]

As above, KLC recommends that religious belief or activity be included as a new attribute as defined in Victoria to mean "holding or not holding a lawful religious belief or view; or engaging in, not engaging in or refusing to engage in a lawful religious

[140] *Crimes Act 1900* (NSW) s 93Z.
[141] Justice Equity Centre (formerly Public Interest Advocacy Centre), *NSW Law Reform Commission Inquiry into Serious Racial and Religious Vilification* (Submission, April 2024) https://jec.org.au/wp-content/uploads/2024/04/24.04.19-PIAC-Submission-NSWLRC-93Z-Crimes-Act-Inquiry-1.pdf.

activity". This same attribute and definition should be applied in relation to vilification. KLC also recommends clarification in the ADA that these provisions only protect natural persons, although complaints must be able to be brought against both natural persons and corporations.

Recommendation 77: The ADA should be internally consistent and adopt the same definitions of protected attributes for discrimination and vilification, including defining religious belief or activity as 'holding or not holding a lawful religious belief or view; or engaging in, not engaging in or refusing to engage in a lawful religious activity'.

Recommendation 78: The ADA should clarify that religious vilification provisions only protect natural persons.

Question 8.1: Protected attributes

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

The extension of vilification protections in the ADA to other attributes must be carefully considered due to the potential restriction of other rights, including freedom of expression. In its recent review of hate crime laws, the Law Commission of England and Wales proposed criteria for the inclusion of additional attributes, including that there is a demonstrable need for protection.[142] While this review focused on criminal vilification, KLC believes it is appropriate to engage in a similar assessment when determining which attributes to protect from vilification under the ADA. This would help to ensure that vilification protections are tailored to address the real harm experienced by targeted groups.

At a minimum, KLC supports providing vilification protections to the attributes of disability, race, sexuality, sex, sex characteristics, gender identity, sex work, medical condition/record and religious belief or activity (if appropriately defined).

KLC also supports the extension of vilification protections to people who have an association or perceived association with a targeted group. This is necessary to protect friends, family members, carers or other people who may be connected to someone with a protected attribute.

Recommendation 79: The ADA should make vilification on the basis of a protected attribute unlawful where there is a demonstrable need for protection, including disability, race, sexuality, sex, sex characteristics, gender identity, sex work, medical condition/record and religious belief or activity.

Recommendation 80: The ADA should extend vilification protections to people who have an association or perceived association with a person or group with one or more protected attributes.

Question 8.2: The test for vilification

[142] England and Wales Law Commission, *Hate Crime Laws, Final Report No 402* (Report, 2021) [3.42], [3.45].

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

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

KLC supports a harm-based test for civil vilification under the ADA. We believe that this appropriately places the focus on how vilification is experienced by those who are targeted. A harm-based test is also clearer and reduces the evidentiary burden on a complainant.

KLC supports a formulation similar to the new test in Victoria or the proposed test in Queensland.[143] That is, a person must not, because of the protected attribute of a person or group of people, engage in a public act that a reasonable person with that protected attribute would in the circumstances consider hateful towards, seriously contemptuous of, reviling or seriously ridiculing the other person.

KLC supports the approach taken in the recent reforms to vilification in Victoria and proposed reforms in Queensland and recommends keeping an incitement-based test alongside a new harm-based test.[144]

KLC supports a formulation of the incitement-based test similar to the new test in Victoria or the proposed test in Queensland. That is, a person must not, by a public act, engage in conduct that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute.[145]

Although the test for incitement sets a high bar, we believe this is mitigated by the additional harm-based provision and the introduction of a prohibition on attribute-based harassment (discussed below).

KLC is also concerned that the terms 'serious ridicule' and 'serious contempt' are difficult to understand and apply. These terms provide significant discretion for decision-makers and have not operated effectively. Greater clarity could be provided through examples in a note or in the explanatory memorandum about the kind of conduct that would or would not amount to vilification under both the incitement- and harm-based tests.

Recommendation 81: The ADA should include a harm-based test for vilification alongside an incitement-based test based on the test in the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) and the proposed test in the *Respect at Work and Other Matters Amendment Act 2024* (Qld).

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[143] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 102D; *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed s 124C.
[144] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic); *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed.
[145] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 102E; *Respect at Work and Other Matters Amendment Act 2024* (Qld) proposed s 124CD.

Recommendation 82: The ADA should provide further clarification on the kinds of conduct that would constitute vilification under both the incitement- and harm-based tests either in a note or in the explanatory memorandum.

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?

The current definition of public act is limited and excludes a range of actions that occur in public or quasi-public spaces. KLC believes that a broader definition would be consistent with international human rights principles and provide greater coverage and effectiveness.

KLC recommends that the definition of public act be amended to include conduct that is within hearing (not just observation) of a public place or members of the public, even if the conduct was not intended to be made to the public.

Unlike the definition in the *Crimes Act 1900* (NSW),[146] the definition in the ADA does not explicitly cover the dissemination of materials through social media and online, which is the primary method of communication for many people in NSW and is a common platform for hate speech. Given the proliferation of vilification online, the ADA should explicitly cover the dissemination of materials through social media and other electronic methods.

Recommendation 83: The ADA should define 'public act' to include conduct that is within hearing (not just observation) of a public place or members of the public and the dissemination of materials through social media and online platforms.

Question 8.4: Exceptions

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

KLC does not believe that any changes are required to the exceptions to vilification protections in the ADA.

Recommendation 84: The ADA should retain the exceptions to vilification protections in their current form.

Sexual harassment

Question 9.1: The definition of sexual harassment

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

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

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

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

Possibility of offence

The reasonable person test should be expanded to include the 'possibility' of offence, intimidation or humiliation, in line with the *Sex Discrimination Act 1984* (Cth).[147] The current threshold in the ADA is too high, applying to circumstances where a reasonable person would have anticipated that someone 'would be' offended, humiliated or intimidated.[148]

The Respect@Work Report confirmed what many workers already understood too clearly – that sexual harassment is rife in Australia.[149] In a 2018 National Survey, one third of respondents reported experiencing sexual harassment in the five years, with nearly two in five women experiencing sexual harassment in the last five years.[150] In this context, it is appropriate for the law to encourage a person to turn their mind to whether there is the possibility that the person on the receiving of their behaviour be offended, humiliated or intimidated.

We believe this strikes the right balance between creating safe and respectful interpersonal interactions and not being overly prescriptive of people's behaviours. This approach would also facilitate a more nuanced consideration of the particular attributes of the person being harassed, which are relevant in determining whether they might be offended, humiliated or intimidated (see 9.1 question 2, below).

Consideration of a person's attributes

The ADA should 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. This should be modelled on s 28A(1A) of the *Sex Discrimination Act 1984* (Cth).

Currently, the ADA says that the reasonable person would have regard to "all the circumstances". In our experience providing legal advice to people who have experienced sexual harassment, this is too vague and non-specific to be of much use to applicants. We know that marginalised groups, including women, LGBTQI+ persons, culturally and racially marginalised women, women living with disability and young people experience higher rates of sexual harassment than the general population.

A non-exhaustive list of factors can help to clarify that consideration of all relevant circumstances must be undertaken when deciding whether conduct is unwelcome or inappropriate.[151] This approach gives valuable consideration to context, which is almost always highly relevant to cases of sexual harassment where communication and interpersonal dynamics are fluid, subjective and based on interpretations informed by each parties' own lived experience.

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147 *Sex Discrimination Act 1984* (Cth) s 28A.
148 *Anti-Discrimination Act 1977* (NSW) s 22A.
149 Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report: 2020).
150 Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report: 2020) 96.
151 Australian Human Rights Commission, *Federal Discrimination Law* (Australian Human Rights Commission 2016) 143.

Defining 'conduct of a sexual nature'

We do not believe the ADA needs to define 'conduct of a sexual nature'. Existing case law can help to inform our understanding of 'conduct of sexual nature' and has tended to interpret the phrase broadly. For example, the New South Wales Court of Appeal in *Vitality Works* (2021)[152] found that 'conduct of a sexual nature' can include "[i]nnuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod".[153]

As raised by the Discussion Paper,[154] defining the term could have the effect of narrowing the current interpretation.

Recommendation 85: The ADA should define 'sexual harassment' to include the 'possibility' of offence, intimidation or humiliation, and to consider a person's attributes, in line with the *Sex Discrimination Act 1984* (Cth).

Question 9.2: Other sex-based conduct

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

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

Harassment on the ground of sex

Harassment on the ground of sex should be prohibited by the ADA, in line with the *Sex Discrimination Act 1984* (Cth). In cases where sex-based comments or conduct might not necessarily be sexual in nature, it is difficult for a person being harassed to make a claim of sexual harassment. It might be demeaning conduct which can be equally as uncomfortable and potentially distressing.

Case study: Kylie* worked on a construction site. Her colleagues constantly made jokes about using tampons and about how she should be in the kitchen instead of on-site.

Case study: Tijen* works in a warehouse and is one of the few women working at her location. She came to us for advice about the conduct of several of her co-workers, as she did not know if she could take working there any longer. In her two years at that workplace, she endured comments such as: "You should be looking after my kids rather than coming to work drinks", "We need to find you a husband", "We need a woman here to keep us in line", and was constantly being expected to clean up after her male co-workers. The comments and conduct were constant, completely unacceptable, and continued even after Tijen spoke to her manager.

Hostile workplace environments

The ADA should prohibit hostile workplace environments in line with the *Sex Discrimination Act 1984* (Cth). There is a broad range of conduct that is similar to but properly characterised neither as sex discrimination nor as sexual harassment that

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[152] *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [97].
[153] *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [125].
[154] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Unlawful Conduct* (Consultation Paper, May 2025) 200.

makes it unsafe for certain people – mostly women and gender diverse people – to be in particular environments.

Often, sexist behaviour is not targeted at one person specifically but is part of the culture of the organisation or workplace. Sexist jokes may be routine practice, or it may be common for employees at work to make lewd comments about women walking past, who may not be colleagues or customers or otherwise have any connection to the workplace. A woman in that workplace, however, who overhears the comments or feels she has to in some way engage in them, may feel unsafe working in an environment where there are plainly hostile attitudes towards women. Another example of hostile workplace environment is a male-dominated environment where there are pornographic/sexualised images of women around the workplace.

Recommendation 86: The ADA should prohibit harassment on the ground of sex, in line with the *Sex Discrimination Act 1984* (Cth).

Recommendation 87: The ADA should prohibit hostile work environments, in line with the *Sex Discrimination Act 1984* (Cth).

Question 9.3: Sexual harassment in the workplace

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

We recommend that sexual harassment should be unlawful everywhere (see Question 9.5). However, at a minimum, the ADA should prohibit sexual harassment in connection with the wide range of employment and employment-like arrangements used in Australian workplaces.

Case study: Thao* came to Australia on a temporary visa and was sexually harassed while working in the agricultural industry. Thao's employer placed her on a farm in a regional area where she was sexually harassed by another person on the farm. Thao's employer was not interested in engaging with her about her complaint. As the person who harassed Thao was not an employee, she would need to demonstrate that the person was an agent of her employer before she could hold her employer liable for what happened to her. This is almost impossible to do in circumstances where a person who has experienced sexual harassment is not aware of the extent or nature of the relationship between their harasser and their employer.

The ADA should protect against sexual harassment perpetrated against workers in non-traditional work arrangements, including labour hire workers like Thao. To do this, NSW could follow Queensland and the Northern Territory and prohibit sexual harassment everywhere.[155]

Alternatively, increased worker protection could take the form of sections 28B and 28AB of the *Sex Discrimination Act 1984* (Cth). If NSW adopted the *Sex Discrimination Act 1984* (Cth) approach, it would mean that sexual harassment done by any person, not just an employer or co-worker, would be prohibited, if done in connection with someone's

[155] *Anti-Discrimination Act 1991* (Qld) s 118; *Anti-Discrimination Act 1992* (NT) s 22.

status as either a worker or a person conducting a business. This would include labour hire workers like Thao (see case study above).

Recommendation 88: The ADA should prohibit sexual harassment in any area of life, public or private, similar to the *Anti-Discrimination Act 1991* (Qld) and the *Anti-Discrimination Act 1992* (NT).

Recommendation 89: In the alternative, the ADA should adopt the approach in the *Sex Discrimination Act* (Cth) 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

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

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

The current inconsistencies between the ADA and other workplace-related sexual harassment laws are confusing and difficult to navigate. In its sexual harassment practice, KLC frequently advises clients with up to five different claim options. The amount of information to consider, including the process-related distinctions between each claim option, is significant. KLC frequently receives feedback from clients that they find the number of options to be overwhelming, and that there is too much information for them to assess in a single advice appointment. Because of the volume of information, clients will often ask for KLC to choose a claim option for them, rather than engaging in this decision themselves. If there are differences between the relevant laws that may affect the relative strength or weakness of each claim option for a client, this adds to the complexity of the decision-making process. This is particularly difficult for clients in the sexual harassment area who are suffering from trauma and other psychological symptoms.

Consistency is an important (though not determinative) factor to consider when re-designing NSW anti-discrimination law. Absent policy reasons to take a different approach, the ADA should be aligned with other workplace-related sexual harassment laws. Greater consistency across these jurisdictions will make the legal avenues in this area more accessible and empower clients to make informed decisions about which claim to pursue.

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

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

(2) Should sexual harassment be unlawful in other areas of life? For example:

(a) areas of life that are protected from discrimination

(b) all areas of public life, or

(c) any area of life, public or private?

KLC is in favour of the expansive approach adopted in Queensland and the Northern Territory which prohibits sexual harassment in all areas of life, public or private.[156] KLC's current practice in sexual harassment suggests that this issue is endemic in society and there is significant harm associated with this conduct regardless of where it occurs.

Case study: Jessica* leased a room in an established share house. One of the housemates, Mark, started making explicit sexual comments to Jessica. Jessica discussed the issue with her other housemates, but they didn't know what they could to make Mark stop. Jessica ended up moving out.

Cases like Jessica's show the current gaps in NSW sexual harassment laws. Mark was not providing accommodation to Jessica, and the accommodation was a private household.[157] If sexual harassment were prohibited in all areas of life, Jessica would have had had more options for bring a sexual harassment complaint against Mark.

KLC agrees with the comments in the consultation paper that such a change would simplify the law in this area, which is a key priority for vulnerable clients (for the reasons outlined above in 9.4). This change would also have symbolic significance and would convey that sexual harassment is unacceptable regardless of the context in which it occurs.

It is recognised that this approach may increase the volume of complaints submitted to ADNSW (although this has not occurred in Queensland according to the 'Building Belonging' Report). Accordingly, KLC would only support such a recommendation if there were adequate resources to action these complaints in a timely manner, noting that the current delays in actioning complaints made to the AHRC can substantially limit the effectiveness of this claim option.

If there is no appetite to prohibit sexual harassment everywhere, sexual harassment should be as a minimum prohibited in all areas of public life. This approach would ensure that sexual harassment that occurs in public settings that are not currently defined as an 'area of life' (for example, on the street) are captured by the law.

Recommendation 90: The ADA should prohibit sexual harassment in any area of life, public or private, like the *Anti-Discrimination Act 1991* (Qld) and *Anti-Discrimination Act 1992* (NT).

Question 9.6: Expanding the areas of life where sexual harassment is prohibited

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?

KLC supports the 1999 recommendation of the NSW Law Reform Commission to repeal the private accommodation exception for sexual harassment.[158]

As above, KLC's position is that sexual harassment should be unlawful in all areas of life, which would include private accommodation.

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[156] *Anti-Discrimination Act 1991* (Qld) s 118; *Anti-Discrimination Act 1992* (NT) s 22.
[157] *Anti-Discrimination Act 1977* (NSW) ss 22G.
[158] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report,1999) [7.49], rec 91.

Recommendation 91: The ADA should not include exceptions for sexual harassment in private accommodation.

Attribute-based harassment

Question 9.7: Attribute-based harassment

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

Attribute-based harassment is necessary to protect people against harmful conduct which cannot be characterised as discrimination. This includes, for example, repeated belittling comments made by colleagues in circumstances where it is difficult to link workers' behaviour to their employer (for discrimination) or where the conduct might not meet the high threshold for vilification.

Case study – sex-based harassment (as above): Kylie* worked on a construction site. Her colleagues constantly made jokes about using tampons and about how she should be in the kitchen instead of on-site.

Case study – race-based harassment: Neha* worked in retail. Her colleagues repeatedly mocked her about her race, which ultimately culminated in a physical assault framed as 'practical joke'.

Case study – disability-based harassment: Sam* has a physical disability and a learning disability. His coworkers regularly made fun of him, saying he was slow and calling him lazy when he asked for breaks. When Sam complained to human resources, nothing was done. When Sam came to KLC he had already resigned so he was unable to make a stop bullying claim. He couldn't make a complaint about vilification as the conduct was not public and there was no legal avenue for a harassment claim based on disability.

KLC supports the introduction of attribute-based harassment for attributes including race, disability, medical condition/record, sexuality, gender identity, sex, sex characteristics, religious belief and activity (if appropriately defined),[159] and sex work. Attribute-based harassment should be limited to defined areas of public life (i.e. employment, education, provision of accommodation, provision of goods and services, registered clubs, as well as new areas like the disposal of interests in land, the administration of state laws and programs, organised sport, local government, and owners corporations).

This change would address current gaps in discrimination laws. In our practice, we frequently advise clients who have been subject to conduct that would not meet the high threshold for vilification, noting that not all protected attributes are subject to vilification laws. For conduct that applies in employment, even if conduct may potentially be discriminatory, there is no ability to make a complaint against an individual respondent. Although an employer can be vicariously liable for discriminatory conduct by an employee, many of our clients do not wish to make a complaint against their employer, and there are also defences available where the employer was unaware of the conduct or took all reasonable steps to prevent it.

[159] See response to Question 5.2 'Religious belief or activity'.

We have considered the risk that attribute-based harassment, particularly if it has a lower threshold than vilification, could be used inappropriately or unduly restrict free speech. Limiting the harassment to established areas of public life goes some way to addressing this concern. This can be contrasted to vilification, which applies in public generally and can apply between strangers.

For some attributes, like political belief, freedom of expression considerations might justify excluding it from attribute-based harassment protections. Religious belief and activity (given the wide range of beliefs that this would encompass) would also need to be carefully defined.

Recommendation 92: The ADA should prohibit attribute-based harassment in defined areas of public life for attributes like race, disability, medical record/condition, sexuality, gender identity, sex, religious belief and activity, and sex work.

Victimisation

Question 10.1: Victimisation

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

We consider victimisation to be an important part of the ADA. KLC supports the clarification that threats to victimise someone are unlawful. Victimisation provisions are intended to allow people to exercise their rights under the ADA without fear of retribution or further detriment. Threats to victimise someone may have the same chilling effect on the exercise of rights and so should be explicitly covered by the ADA. This is the approach taken in most other jurisdictions, as well as other victimisation provisions in NSW.[160]

Recommendation 93: The ADA should expressly prohibit threats of victimisation.

Question 10.1: Victimisation

(2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

KLC supports clarification in the ADA that victimisation is unlawful where *one of the reasons* for the victimisation was that the person took action under the ADA. This aligns with how victimisation in the ADA has been interpreted[161] and makes the law clearer and more consistent.

Requiring that a person show that victimisation occurred solely, or primarily, because they took action under the ADA could allow duty holders to avoid liability even where it is established that victimisation has occurred and places an unjustifiable burden on complainants.

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[160] See e.g. *Industrial Relations Act 1996* (NSW) s 213(2)(e)).
[161] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Other unlawful acts and liability* (Consultation Paper, May 2025) 217.

Recommendation 94: The ADA should specify that if a person is victimised for two or more reasons, and one reason was because the person took action under the ADA, then the victimisation is taken to be unlawful.

Advertisements

Question 10.2: Advertisements

Should it be a defence to publishing an unlawful advertisement that the person reasonably believed publication was not unlawful? Why or why not?

A mistaken understanding or ignorance of the law should not be a defence against a discrimination complaint. KLC believes it is undesirable to allow an advertiser to avoid liability for publishing discriminatory material on this basis. We do not support this defence.

If the ADA retains a provision that makes it unlawful to cause discriminatory advertisements to be published, KLC believes that providing a defence where a person has taken reasonable precautions and exercised due diligence to prevent publication may be appropriate.[162]

Recommendation 95: The ADA should not include a defence to publishing an unlawful advertisement where the person reasonably believed the publication was not unlawful.

Liability

Question 10.3: The forms of liability

What, if any, concerns or issues are raised by the ADA's approach to the various forms of liability?

KLC believes that the various forms of liability in the ADA should remain in the Act. It is appropriate that, in certain situations, individuals and entities other than the person directly responsible for the unlawful discrimination should be held liable for the detriment caused to a complainant. The various forms of vicarious liability, joint liability and accessorial liability should remain in the Act to cover situations where the community reasonably expects duty holders and people/entities in a position to prevent discrimination to take action to do so.

Question 10.4: The exceptions for liability

Should the ADA continue to provide two exceptions to vicarious liability (that is, the 'reasonable steps' and 'unauthorised acts' exceptions)? Or is a single 'reasonable steps' exception sufficient?

Liability of principals and employers under the ADA is unnecessarily complicated by the doubling up of the 'unauthorised acts' and 'reasonable steps' exceptions. We recommend the removal of the 'unauthorised acts' exception. We also recommend re-drafting the exception to make it clear that the starting point is that both the

[162] See *Anti-Discrimination Act 1991* (Qld) s 127(2)-(3); *Equal Opportunity Act 2010* (Vic) s 183.

agent/employee and the employer/principal are liable for unlawful acts done in the course of or related to the course of employment or while acting as an agent.

Case study: Neha* worked in retail. Her colleagues repeatedly mocked her about her race, which ultimately culminated in a physical assault framed as 'practical joke'. Neha's colleagues and manager were aware of the conduct but did nothing to prevent it. When Neha made a complaint, her employer denied liability because the conduct was unauthorised.

Requiring a principal to take ***all*** reasonable steps to prevent the contravention is the more appropriate exception. It aligns with the positive duty recommended below and encourages employers to take proactive steps to prevent discrimination. KLC recommends retaining this exception but redrafting it so that it is made clear that taking 'all reasonable steps' is an on-going obligation for an employer/principal and also includes an obligation to exercise due diligence to avoid the conduct.

Recommendation 96: The ADA should not include an exception to the liability of principals/employers for unauthorised acts.

Recommendation 97: The ADA should retain an exception requiring a principal/employer to have taken 'all reasonable steps' to prevent the contravention in order to avoid liability.

Question 10.5: Liability and artificial intelligence

Does the use of AI challenge the ADA's approach to liability? If so, how could the ADA be amended to address this?

Unlawful discrimination by companies using AI is a huge and emerging area. AI is increasingly being used to screen job applications and pick between prospective tenants. We believe that duty holders who use AI should be held accountable for any discriminatory outcomes arising from using AI tools.

AI challenges the ADA's approach to liability in several ways. It is unclear whether a decision made solely by an AI system would satisfy the requirement of a 'person' for the purposes of anti-discrimination law.[163] Additionally, while there is supportive case law for the principle that a discriminatory motive is not required for discrimination,[164] the phrasing 'on the grounds of' might imply some kind of human reasoning process.[165] As a result, there is a risk that discriminatory decisions 'made' by AI might not be included.[166]

The ADA should hold duty holders liable for using tools that are discriminatory. This should extend to a duty for AI users to understand the technology to a sufficient degree to know whether technology is discriminatory. It should not be a defence that the duty holder did not know how the AI tool worked or was not aware that the tool operated in a discriminatory manner.

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[163] See e.g. *Anti-Discrimination Act 1977* s 7.
[164] Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 109.
[165] Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 108.
[166] See Recommendation in relation to 'Causation', above.

AI also poses evidentiary challenges for applicants. Because most applicants will not have access to the software used to discriminate against them, they will be at a disadvantage when trying to explain the discriminatory nature of their treatment. The ADA should empower ADNSW to compel AI companies to produce evidence in relation to potential discrimination by their AI tools. This power could either be invoked at the request of individual applicants, or as part of an own motion inquiry by ADNSW.

Ultimately, it is important for AI tools to be robustly regulated and for consumers to be able to bring claims directly against AI companies. Proactive regulation could be helpful --- we note the EU's approach to regulating 'high risk' AI technologies, like AI employment-screening tools.[167] Given the pace of change in AI technologies and the laws regulating them, the ADA should be reviewed within 5 years with a particular focus on its ability to respond to discrimination by AI systems.

Recommendation 98: The ADA should ensure that duty holders are liable for the use of discriminatory AI tools.

Recommendation 99: ADNSW should be empowered to compel AI companies to produce evidence in relation to whether AI tools operate in a discriminatory manner.

Recommendation 100: The new ADA should be reviewed within 5 years of its enactment.

Promoting substantive equality

Adjustments

Question 11.1: Adjustments

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

The ADA should be amended to impose a duty to provide adjustments within the areas of public life that are explicitly articulated. A duty to provide adjustments would put the onus on the person who operates in the area of public life to proactively ensure that they are not discriminating, and increase awareness, equality and participation.

The duty to provide adjustments should apply to all attributes in line with the approach in the Northern Territory and the ACT.[168] This would provide the greatest possible protection for people in NSW.

Recommendation 101: The ADA should impose a duty to provide adjustments that applies to all attributes in the areas of public life specifically identified.

Question 11.1: Adjustments

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

[167] *Artificial Intelligence Act*, Regulation (EU) 2024/1689, ss 2, 3; Annex III, 4.
[168] *Discrimination Act 1991* (ACT) s 74; *Anti-Discrimination Act 1992* (NT) s 24(1).

The duty to provide adjustments should be a separate duty as in Victoria or the ACT,[169] rather than being incorporated into the definition of discrimination. KLC favours this approach because it is consistent with Australia's international human rights obligations[170] and creates clarity for rights and duty holders. A separate duty also encourages proactive steps to prevent discrimination.

KLC believes that fitting the duty to make adjustments into the tests for discrimination creates additional complexity and provides a barrier for complainants who may be required to formulate the adjustment that has been sought and refused in order to prove discrimination.

Recommendation 102: The ADA should include a separate duty to provide adjustments.

Question 11.1: Adjustments

(3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

KLC has considered how a positive duty to provide adjustments might operate. We consider that requiring a duty holder to anticipate the particular needs of a person with a protected attribute may be unworkable. For example, this could lead to an employer making incorrect assumptions about the needs of a new employee to try to comply with the positive duty.

The ADA should instead require duty holders to consult or otherwise proactively provide avenues for rights bearers to discuss their needs and any required adjustments. This is because the purpose of this duty should be to shift the burden away from the person with the protected attribute and encourage proactive steps toward inclusion, accessibility and participation.

KLC understands that a proactive obligation to consult may not be appropriate in all circumstances. The NSW Law Reform Commission should carefully consider the areas of public life in which consultation should be proactive. Based on our experience working with clients who have experienced discrimination due to lack of adjustments, the areas of education and employment should be included as a minimum.

We make this recommendation against the backdrop of our other recommendations to improve the tests for discrimination, impose a positive duty to prevent unlawful conduct, and expand the areas of public life to which the ADA applies. Together, these changes mean that duty holders in other contexts may already have an obligation to make adjustments and failure to do so may be enforceable under other provisions of the ADA.

Recommendation 103: The ADA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

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[169] *Discrimination Act 1991* (ACT) s 74; Equal Opportunity Act 2010 (Vic) s 20, s 22A, s 33, s 40, s 45.
[170] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 308. *Convention on the Rights of Persons with Disabilities*, art 5.

Question 11.1: Adjustments

What test should be used to determine the scope of, including any limits to, the obligation to provide adjustments?

The duty to provide adjustments should apply to the extent that making the required adjustments does not cause unjustifiable hardship to the duty holder, as in the ACT.[171] We believe this is a more consistent and protective approach than an assessment of reasonableness as required in Victoria. It is also consistent with the interpretation of adjustments under the *Disability Discrimination Act 1992* (Cth).[172]

Recommendation 104: The ADA should provide that a duty holder is only required to provide an adjustment where making that adjustment would not cause unjustifiable hardship.

Special measures

Question 11.2: Special measures

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

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

If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

The ADA should generally allow for special measures. Special measures are important to address disadvantage faced by marginalised groups and contribute to the equal enjoyment of human rights and are clearly supported by international human rights law.

The criteria for special measures should be consistent with international human rights law. KLC supports the approach taken in Victoria which requires that a special measure is:

- undertaken in good faith for achieving substantive equality;
- reasonably likely to achieve this purpose;
- a proportionate means of achieving this purpose; and
- justified because members of the group have a particular need for assistance.[173]

This model has broad support and been in place for over a decade, providing a useful reference point for NSW of how special measures can be applied in practice.

There may be limited circumstances in which exemptions are required beyond the scope of special measures and existing exceptions. The Commission should consider whether it is appropriate that the ADA retain the ability for a duty holder to apply to ADNSW for an exemption in very limited circumstances.

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[171] *Discrimination Act 1991* (ACT) s 74.
[172] *Watts v Australian Postal Corporation* [2014] FCA 370, 222 FCR 220 [22].
[173] *Equal Opportunity Act 2010* (Vic) s 12.

KLC cannot see a need to retain the certification process alongside special measures and exemptions. The certification process should be removed from the ADA.

Recommendation 105: The ADA should allow for special measures that are undertaken in good faith for achieving substantive equality, reasonably likely to achieve this purpose, a proportionate means of achieving this purpose, and justified because members of the group have a particular need for assistance.

Recommendation 106: The ADA should not include a certification process.

Positive duty

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?

(d) What attributes and areas should the duty apply to?

The ADA should include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct, also known as a positive duty.

A positive duty shifts the emphasis away from individual complaints following unlawful conduct to requiring schools, businesses and other duty holders to prevent discrimination before it occurs. A positive duty already exists in Victoria, the Northern Territory, the ACT, and in the *Sex Discrimination Act 1984* (Cth).[174]

KLC supports the requirement that duty holders take reasonable and proportionate measures to eliminate unlawful conduct. As in other jurisdictions, it may be useful to guide the determination of what is reasonable and proportionate by providing a non-exhaustive list of considerations including the nature and size of the organisation, the resources of the organisation or person, and the practicability and cost of the steps. This approach allows consideration of the varying capacity that different organisations and individuals may have to prevent unlawful conduct.

The positive duty should extend to preventing discrimination, sexual harassment, attribute-based harassment, victimisation and vilification (where applicable) and should apply to all protected attributes. Subject to the limitations on areas of public life explained below, the duty should apply to anyone who has an obligation under the ADA not to engage in unlawful conduct.

Although KLC has recommended that the ADA be extended to cover all areas of public life, we recognise that for a positive duty to be practical and effective it is important to

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[174] *Equal Opportunity Act 2010* (Vic) s 15; *Anti-Discrimination Act 1992* (NT) s 18B; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1998* (Tas) s 104; *Sex Discrimination Act 1984* (Cth) s 47C.

provide clarity about when the duty applies. For this reason, KLC suggests limiting the positive duty to the areas of public life explicitly articulated in the ADA. This would create greater certainty for duty holders, rights bearers and ADNSW as the regulator.

KLC believes that this is the clearest, most consistent and rights-protective approach and would bring NSW in line with other states and territories that have introduced a positive duty. In KLC's experience, the current approach in the *Sex Discrimination Act 1984* (Cth) which imposes a positive duty only on employers and people conducting a business or undertaking and only in relation to sexual harassment is undesirable as it is inconsistent and creates a hierarchy of rights.

Case study: KLC advised Sarah* who had experienced sexual harassment at work in a small business. Sarah's employer claimed that it had complied with the positive obligation under the SDA by telling new employees to read a large volume of policies. No time was provided to read these policies and there was no follow up to check if the policies had been read. There was also no in-person training on sexual harassment.

It is important that the positive duty requires duty holders to take meaningful action beyond just having training or policy documents available, as in Sarah's case. The Commission should consider recommending that the explanatory memorandum and second reading speech provide suggestions for what the positive duty may require and examples of where a positive duty would not have been complied with.

KLC would also support a duty to promote equality that applies only to public authorities, as in the United Kingdom. This would increase the requirement to consider equality in public policy decisions.[175]

To be effective, it is important that ADNSW is given the appropriate powers and resources to monitor compliance with the positive duty and any duty to promote equality, and that civil penalties are available.

Recommendation 107: The ADA should include a positive duty that requires anyone with an obligation not to engage in unlawful conduct under the ADA to take reasonable and proportionate measures to eliminate unlawful conduct. The duty should apply to all attributes and in all areas of public life specifically identified in the ADA.

Recommendation 108: ADNSW should be given the necessary powers and resources to monitor and enforce the positive duty, including imposing civil penalties.

Recommendation 109: The ADA should include a separate and additional duty to promote equality that applies only to public authorities.

[175] *Equality Act 2010* (UK).

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,
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Appendix A: List of Recommendations

Recommendations

Recommendation 1: The ADA should include an objects clause that promotes substantive equality and is grounded in human rights principles.

Recommendation 2: The ADA should define direct discrimination as 'unfavourable treatment', modelled on the Equal Opportunity Act 2010 (Vic) and Discrimination Act 1991 (ACT).

Recommendation 3: The ADA should clarify that discrimination does not require a discriminatory motive and should draft amendments so as to capture unconscious bias and discrimination by artificial intelligence systems.

Recommendation 4: The comparative disproportionate impact test should replaced with a disadvantage test modelled on s 8 of the *Discrimination Act 1991* (ACT).

Recommendation 5: The ADA should be changed to remove the 'inability to comply' element from the test for indirect discrimination.

Recommendation 6a: The 'reasonableness' element of indirect discrimination should be replaced with 'legitimate and proportionate' test.

Recommendation 6b: In the alternative, the test for indirect discrimination should include a non-exhaustive list of factors to be considered when determining 'reasonableness', based on s 9(3) of the *Equal Opportunity Act 2010* (Vic).

Recommendation 7: The prohibition on indirect discrimination should extend to characteristics that people with protected attributes either generally have or are assumed to have.

Recommendation 8a: The ADA should contain a shifting burden of proof for direct discrimination, similar to section 361 of the Fair Work Act 2009 (Cth).

Recommendation 8b: In the alternative, the ADA should adopt a burden-sharing model for direct discrimination similar to the UK Equality Act 2010.

Recommendation 9: For indirect discrimination, once an applicant has shown that a condition disadvantages a person with an attribute, the burden should shift to the respondent to show that the condition was reasonable (or legitimate and proportionate).

Recommendation 10: The ADA should prohibit discrimination on the basis of one or more protected attributes, or on the basis of the effect of a combination of protected attributes.

Recommendation 11: The ADA should prevent intended future discrimination where a duty holder 'proposes to treat' a person in a discriminatory manner.

Recommendation 12: The ADA should be restructured to have a list of protected attributes rather than separate sections for each attribute.

Recommendation 13: The ADA should expand the definition of 'caring responsibilities'.

Recommendation 14: The ADA should modernise the definition of 'disability' in line with recommendations from the disability sector.

Recommendation 15: The ADA should provide broader protection for assistance animals, including animals other than dogs and for disabilities that are not related to vision, hearing, or mobility. Assistance animals in the process of being trained should also be captured by this definition.

Recommendation 16: The ADA should include an attribute for 'genetic information'.

Recommendation 17: The ADA should include an attribute of 'sexuality' or 'sexual orientation' instead of an attribute for 'homosexuality'.

Recommendation 18: The language of the ADA should be updated to protect a person's 'relationship status' or 'marital or relationship status'.

Recommendation 19: The ADA should contain a new attribute for 'visa status', 'immigration status' or 'migration status'.

Recommendation 20: The ADA should contain a new attribute for language (including signed language).

Recommendation 21: The ADA should contain new attributes for pregnancy and breastfeeding.

Recommendation 22: The ADA should include an attribute of 'gender identity' instead of an attribute for 'transgender grounds'.

Recommendation 23: The ADA should protect against discrimination based on past attributes and attributes a person might have in the future.

Recommendation 24: The ADA should contain a new attribute for being a relative or associate of a person with a protected attribute.

Recommendation 25: The ADA should include a new attribute for 'irrelevant criminal record'.

Recommendation 26: The ADA should include a new attribute to protect victim-survivors of domestic and family violence from discrimination.

Recommendation 27: The ADA should include an attribute for 'medical condition' or 'medical record'.

Recommendation 28: The ADA should include a new attribute to protect against discrimination on the basis of political belief or activity.

Recommendation 29: The ADA should include a new attribute to protect against discrimination on the basis of physical features like weight, height and facial features.

Recommendation 30: The ADA should include a new attribute to protect against discrimination on the basis of religious belief and expression.

Recommendation 31: The ADA should define religious belief or activity as 'holding or not holding a lawful religious belief or view; or engaging in, not engaging in or refusing to engage in a lawful religious activity'.

Recommendation 32: The ADA should include a new attribute to protect against discrimination on the basis of sex characteristics.

Recommendation 33: The ADA should include a new attribute to protect against discrimination against sex workers.

Recommendation 34: The ADA should include new attributes to protect against discrimination on the basis of accommodation status and social security status.

Recommendation 35: The ADA should apply generally to any area of public life and include a non-exhaustive list of areas including all areas currently included in the ADA as well as the disposal of interest in land, the administration of state laws and programs, organised sport, local government, and strata schemes.

Recommendation 36: The ADA should cover unnecessary requests for information, based on the approach in the Anti-Discrimination Act 1991 (Qld).

Recommendation 37: The ADA should be amended to include unpaid workers in the definition of employment.

Recommendation 38: The ADA should prevent discrimination against workers in situations where a relationship of authority exists. The relevant relationship should be defined broadly and include an employer against an employee, an employer against an applicant, or a principal against a contract worker as well as other similar workplace relationships in which a level of control or authority is exercised.

Recommendation 39: All protected attributes should be protected in all areas of public life unless an appropriately limited exception applies.

Recommendation 40: Amend the ADA to protect local government officials from age discrimination while performing work in their official capacity.

Recommendation 41: The ADA should retain a limited exception for employment in the home where the employer lives or in the home of the person receiving services where the discrimination has been requested by or on behalf of that person. The exception should only apply where the discrimination is reasonable, proportionate and justifiable in the circumstances.

Recommendation 42: The ADA could include a further exception for discrimination in the care of children in their home where the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.

Recommendation 43: The ADA should not include exceptions to discrimination for small businesses or small partnerships.

Recommendation 44: The ADA should not include exceptions to discrimination in employment for persons addicted to prohibited drugs.

Recommendation 45: The ADA should retain an inherent requirements exception which allows an employer to discriminate against a person based on a protected attribute where:

- the person is unable to carry out the inherent requirements of the position because of that protected attribute even with adjustments in place or where the adjustments required would cause the employer unjustifiable hardship; and
- where the discrimination is reasonable, proportionate and justifiable in the circumstances.

Recommendation 46: The ADA should adopt a single broad exception for genuine occupational qualifications modelled on the ACT, including a carve out for religious conviction or belief.

Recommendation 47: The ADA should not include exceptions allowing discrimination against young people in employment.

Recommendation 48: The ADA should not include exceptions for discrimination on the ground of race in employment where the person is not normally resident in NSW and was engaged to be employed outside NSW.

Recommendation 49: The ADA should define 'educational authority' to include bodies whose purpose is to develop or accredit curricula.

Recommendation 50: The ADA should provide an exception that allows an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex to refuse to admit as students persons who are not of the particular sex.

Recommendation 51: The ADA should clarify that the exception for single sex schools requires single sex schools to accept transgender students where their gender identity is consistent with the sex the school is conducted for.

Recommendation 52: The ADA should not provide an exception for discrimination on the basis of disability in schools established for people who have or do not have a particular disability.

Recommendation 53: The ADA should provide an exception that allows an educational institution to select students for an educational program on the basis of an admission scheme that has a minimum qualifying age.

Recommendation 54: The ADA should define 'goods and services' to include the manner in which goods and services are provided.

Recommendation 55: The ADA should define 'services' to prohibit discrimination relating to access to public premises.

Recommendation 56: The ADA should define 'services' to prohibit discrimination relating to access to superannuation.

Recommendation 57: The ADA should not include exceptions that allows superannuation providers to discriminate against transgender people.

Recommendation 58: The ADA should not include exceptions relating to sex and age that allow discrimination in the provision of goods and services.

Recommendation 59: The ADA should clarify the kinds of accommodation that are covered through either a non-exhaustive list or in the second reading speech.

Recommendation 60: The ADA should make it unlawful not to allow reasonable alterations to accommodation to meet the needs of a person with a disability.

Recommendation 61: The ADA should make it unlawful to refuse to accommodate a person with a disability because they have an assistance animal, to require the assistance animal to be kept elsewhere or charging additional fees because of an assistance animal.

Recommendation 62: The ADA should not include exceptions allowing discrimination based on age in the provision of accommodation.

Recommendation 63: The ADA should not include exceptions relating to the provision of accommodation to people with disabilities by charitable bodies.

Recommendation 64: The ADA should define 'club' in the same manner as the *Disability Discrimination Act 1992* (Cth).

Recommendation 65: The ADA should include an exception that allows clubs to discriminate on the basis of any protected attribute if:

the club is established to benefit people who share a protected attribute;
the discrimination occurs because the person does not have that attribute;
and the discrimination is reasonable, proportionate and justifiable in the circumstances.

Recommendation 66: The ADA should retain exceptions allowing religious bodies to discriminate based on any attribute in the training, education, ordination and appointment of priests, ministers and members of a religious order.

Recommendation 67: The ADA should include an exception for discrimination on any attribute in 'the selection or appointment of a person to perform functions in relation to, or otherwise participate in, any religious observance or practice'.

Recommendation 68: The ADA should include a general exception which allows a religious body to discriminate against a person on the basis of the person's religious belief or activity if the discrimination:

- conforms to the doctrines, tenets or beliefs of the religious body's religion; and
- is reasonable and proportionate in the circumstances.

This exception should apply generally except where another narrower exemption exists, for example employment by a religious educational institution.

Recommendation 69: The ADA should not include an exception for providers of adoption services.

Recommendation 70: The ADA should not provide broad exceptions for private and religious educational authorities in employment.

Recommendation 71: The ADA should provide a new limited exception which allows a religious educational institution in the selection of staff for employment to give preference, in good faith, to a person of the same religion where the giving of such a preference is reasonably necessary to build or maintain a community of faith and is proportionate to that aim.

Recommendation 72: The ADA should not provide exceptions that allow religious educational institutions to discriminate against students, other than the limited exception for same-sex schools.

Recommendation 73: The ADA should provide exceptions to allow a person to restrict participation in competitive sporting activities on the basis of disability, age, sex and gender identity only. The exemption for sex and gender identity should only apply to people 12 years of age and over and where the strength, stamina and physique of competitors is relevant.

Recommendation 74: The ADA should include a limited exception for voluntary bodies.

Recommendation 75: The ADA should define a voluntary body as an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include a club, a registered organisation, or an association that provides grants, loans, credit or finance to its members.

Recommendation 76: The ADA should not include an exception for aged care accommodation providers.

Recommendation 77: The ADA should be internally consistent and adopt the same definitions of protected attributes for discrimination and vilification, including defining religious belief or activity as 'holding or not holding a lawful religious belief or view; or engaging in, not engaging in or refusing to engage in a lawful religious activity'.

Recommendation 78: The ADA should clarify that religious vilification provisions only protect natural persons.

Recommendation 79: The ADA should make vilification on the basis of a protected attribute unlawful where there is a demonstrable need for protection, including disability, race, sexuality, sex, sex characteristics, gender identity, sex work, medical condition/record and religious belief or activity.

Recommendation 80: The ADA should extend vilification protections to people who have an association or perceived association with a person or group with one or more protected attributes.

Recommendation 81: The ADA should include a harm-based test for vilification alongside an incitement-based test based on the test in the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) and the proposed test in the *Respect at Work and Other Matters Amendment Act 2024* (Qld).

Recommendation 82: The ADA should provide further clarification on the kinds of conduct that would constitute vilification under both the incitement- and harm-based tests either in a note or in the explanatory memorandum.

Recommendation 83: The ADA should define 'public act' to include conduct that is within hearing (not just observation) of a public place or members of the public and the dissemination of materials through social media and online platforms.

Recommendation 84: The ADA should retain the exceptions to vilification protections in their current form.

Recommendation 85: The ADA should define 'sexual harassment' to include the 'possibility' of offence, intimidation or humiliation, and to consider a person's attributes, in line with the *Sex Discrimination Act 1984* (Cth).

Recommendation 86: The ADA should prohibit harassment on the ground of sex, in line with the *Sex Discrimination Act 1984* (Cth).

Recommendation 87: The ADA should prohibit hostile work environments, in line with the *Sex Discrimination Act 1984* (Cth).

Recommendation 88: The ADA should prohibit sexual harassment in any area of life, public or private, similar to the *Anti-Discrimination Act 1991* (Qld) and the *Anti-Discrimination Act 1992* (NT).

Recommendation 89: In the alternative, the ADA should adopt the approach in the *Sex Discrimination Act 1984* (Cth) of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking.

Recommendation 90: The ADA should prohibit sexual harassment in any area of life, public or private, like the *Anti-Discrimination Act 1991* (Qld) and Anti-Discrimination Act 1992 (NT).

Recommendation 91: The ADA should not include exceptions for sexual harassment in private accommodation.

Recommendation 92: The ADA should prohibit attribute-based harassment in defined areas of public life for attributes like race, disability, medical record/condition, sexuality, gender identity, sex, religious belief and activity, and sex work.

Recommendation 93: The ADA should expressly prohibit threats of victimisation.

Recommendation 94: The ADA should specify that if a person is victimised for two or more reasons, and one reason was because the person took action under the ADA, then the victimisation is taken to be unlawful.

Recommendation 95: The ADA should not include a defence to publishing an unlawful advertisement where the person reasonably believed the publication was not unlawful.

Recommendation 96: The ADA should not include an exception to the liability of principals/employers for unauthorised acts.

Recommendation 97: The ADA should retain an exception requiring a principal/employer to have taken 'all reasonable steps' to prevent the contravention in order to avoid liability.

Recommendation 98: The ADA should ensure that duty holders are liable for the use of discriminatory AI tools.

Recommendation 99: ADNSW should be empowered to compel AI companies to produce evidence in relation to whether AI tools operate in a discriminatory manner.

Recommendation 100: The new ADA should be reviewed within 5 years of its enactment.

Recommendation 101: The ADA should impose a duty to provide adjustments that applies to all attributes in the areas of public life specifically identified.

Recommendation 102: The ADA should include a separate duty to provide adjustments.

Recommendation 103: The ADA should require duty holders to consult on or provide avenues to discuss a person's needs and adjustments, at least in the areas of education and employment.

Recommendation 104: The ADA should provide that a duty holder is only required to provide an adjustment where making that adjustment would not cause unjustifiable hardship.

Recommendation 105: The ADA should allow for special measures that are undertaken in good faith for achieving substantive equality, reasonably likely to achieve this purpose, a proportionate means of achieving this purpose, and justified because members of the group have a particular need for assistance.

Recommendation 106: The ADA should not include a certification process.

Recommendation 107: The ADA should include a positive duty that requires anyone with an obligation not to engage in unlawful conduct under the ADA to take reasonable and proportionate measures to eliminate unlawful conduct. The duty should apply to all attributes and in all areas of public life specifically identified in the ADA.

Recommendation 108: ADNSW should be given the necessary powers and resources to monitor and enforce the positive duty, including imposing civil penalties.

Recommendation 109: The ADA should include a separate and additional duty to promote equality that applies only to public authorities.