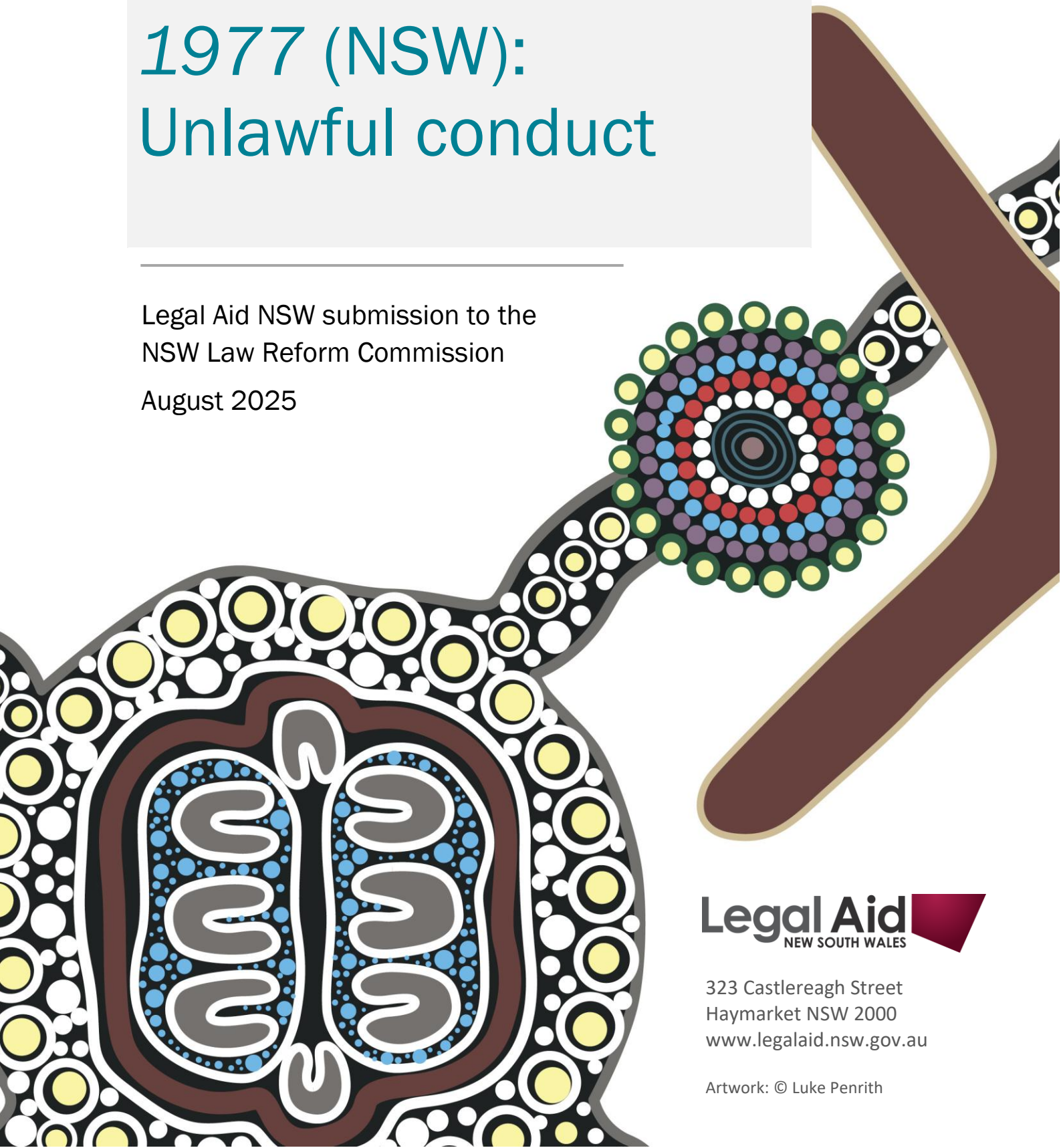


# Review of the *Anti-Discrimination Act 1977* (NSW): Unlawful conduct

Legal Aid NSW submission to the  
NSW Law Reform Commission

August 2025



**Legal Aid**  
NEW SOUTH WALES

323 Castlereagh Street  
Haymarket NSW 2000  
[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women’s Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children’s Courts, and in some Local Courts alongside the Apprehended

Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children’s Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.



## 2. Executive summary

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Law Reform Commission's (NSWLRC) review of the *Anti-Discrimination Act 1977* (NSW) (ADA), in response to its first consultation paper on unlawful conduct.

Legal Aid NSW provides advice and representation in discrimination and harassment matters to clients throughout NSW via our specialist employment law and human rights teams, as well as lawyers in most regional offices.

Our lawyers contribute to inquiries and law reform submissions relating to discrimination and employment law. Legal Aid NSW also publishes self-help education resources for those experiencing discrimination and harassment, such as the [Discrimination Toolkit: Your Guide to Making a Discrimination Complaint](#). Our specialist employment lawyers provide regular community legal education on discrimination law to groups including new migrants, people with a disability, young people, Aboriginal and Torres Strait Islander people and people of culturally and linguistically diverse (CALD) backgrounds.

The ADA and the NSW discrimination jurisdiction it creates is an important option for many of our clients who perceive it as more accessible and less intimidating than the federal discrimination jurisdiction and the possibility of pursuing a claim in the Federal Court.

We consider that there is considerable scope to improve and refresh the ADA to reflect contemporary best practice, better respond to discrimination, and promote equality in NSW.

This review is an opportunity to address many of the long-standing gaps in discrimination law coverage and NSW. We look forward to contributing to the second consultation paper.

We respond to the first consultation paper questions below. This submission draws on and expands on our preliminary submission to the NSWLRC of October 2023.

## Recommendations

### *Recommendation 1*

The ADA should be replaced with a new Act, with a simplified structure and broader protections against discrimination.

### *Recommendation 2*

- The new ADA should include a single overarching definition of discrimination that applies to all protected attributes.
- The comparator test in the ADA should be replaced with a detriment test.

### *Recommendation 3*

The “not able to comply” part of the indirect discrimination test in the ADA should be removed.

### *Recommendation 4*

The new ADA should not require complainants to establish that they are “not able to comply” with a discriminatory requirement imposed by the respondent as part of the indirect discrimination test.

### *Recommendation 5*

The reasonableness standard in the test for indirect discrimination in the ADA should be amended as follows:

- The onus should be on the respondent to show that the condition they imposed on the complainant was reasonable.
- The provision should include a non-exhaustive list of factors that must be considered to determine reasonableness, including the cultural implications.
- When assessing reasonableness, the Australian Human Rights Commission should consider drawing on the perspectives of Aboriginal and Torres Strait Islander community leaders or Elders.

### *Recommendation 6*

In indirect discrimination matters, once an applicant has established that they have been subjected to unfavourable treatment and possess a protected attribute, the onus should rest on the respondent to prove on the balance of probabilities that the reason for the treatment was not the protected attribute.

### *Recommendation 7*

The new ADA should include an express statement that a person may experience conduct amounting to both direct and indirect discrimination.

### Recommendation 8

The new ADA should protect against intersectional discrimination by:

- allowing complainants to raise multiple protected attributes in a single complaint, and
- expressly recognising that conduct can amount to discrimination in relation to multiple and overlapping protected attributes.

### Recommendation 9

The new ADA should include a protected attribute of “parent, family, carer or kinship responsibilities”.

### Recommendation 10

- The definition of “disability” in the new ADA should align with the definition of “disability” in the *Disability Discrimination Act 1992* (Cth).
- The new ADA should include protections for persons who have an assistance animal that assists in relation to any disability.
- The new ADA should protect against genetic information discrimination.
- The public health exception in section 49P of the ADA should only capture discrimination that is reasonable, proportionate and justifiable in the circumstances.

### Recommendation 11

The new ADA should replace the term “homosexuality” with the term “sexual orientation” and adopt the definition used in the *Sex Discrimination Act 1984* (Cth).

### Recommendation 12

The new ADA should include an objects clause to establish that the ADA is remedial legislation with a beneficial purpose.

### Recommendation 13

The following protected attributes should be added to the new ADA:

- religion
- irrelevant criminal record
- experience of domestic and family violence
- social origin, and
- profession, trade or occupation.

### Recommendation 14

The new ADA should retain an exhaustive list of protected attributes, rather than an open-ended list of protected attributes.

#### **Recommendation 15**

The definition of employment in section 4 of the ADA should include voluntary workers.

#### **Recommendation 16**

The new ADA should not include exceptions to prohibitions against discrimination for small businesses.

#### **Recommendation 17**

- The definition of educational authority in section 4 of the ADA should be expanded to include:
  - early childhood education and care settings, and
  - online learning.
- The disability exceptions in section 49L of the ADA should be replaced with a requirement for educational authorities to provide adjustments.

#### **Recommendation 18**

The definition of accommodation in section 4 of the ADA should be expanded to cover other forms of accommodation, including supported housing for people with disabilities.

#### **Recommendation 19**

The definition of club in section 4 of the ADA should be aligned with the definition of club used in section 4 of the *Disability Discrimination Act 1992* (Cth).

#### **Recommendation 20**

The new ADA should extend prohibitions on discrimination for all protected attributes to all protected areas of public life.

#### **Recommendation 21**

- The new ADA should include additional protected areas of life, including:
  - State laws and State programs
  - sporting activities
- The new ADA should expressly prohibit discrimination on digital platforms and online services.

#### **Recommendation 22**

- In the new ADA, the exceptions for religious bodies to the prohibitions on discrimination should be limited to instances where religion is an inherent requirement of the role.
- The new ADA should not permit religious bodies to discriminate on the basis of religion in connection with the provision of government funded services.

#### Recommendation 23

The new ADA should not contain broad exceptions for private educational authorities in employment and education.

#### Recommendation 24

- The new ADA should replace the definition of vilification in the ADA with the broader definition used in section 18C of the *Racial Discrimination Act 1975* (Cth).
- The new ADA should include a prohibition against disability vilification.

#### Recommendation 25

The new ADA should replace the incitement-based test with a harm-based test for vilification.

#### Recommendation 26

The prohibition of sexual harassment in Part 2A of the ADA should be aligned with the prohibition of sexual harassment in Part II, Division 3 of the *Sex Discrimination Act 1984* (Cth).

#### Recommendation 27

The new ADA should expressly prohibit sex-based harassment and creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

#### Recommendation 28

The new ADA should prohibit sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking.

#### Recommendation 29

The new ADA should prohibit harassment on the basis of each individual protected attribute and prohibit harassment on the basis of a combination of protected attributes.

#### Recommendation 30

- The new ADA should include a standalone obligation to provide adjustments for people with a disability unless the making of the adjustment would impose an unjustifiable hardship on the person.

- The new ADA should introduce similar obligations in relation to pregnancy, breastfeeding and carer responsibilities.
- The NSWLRC should give consideration to the issues raised by the Federal Court decision of *Sklavos* in any proposal to reform the duty to provide adjustments in the ADA.

### **Recommendation 31**

The new ADA should include a positive duty on all individuals and organisations that currently have obligations under discrimination laws to take positive measures to eliminate discrimination.

## 3. Tests for discrimination

### The structure of the ADA

The current ADA is outdated in structure and substance. Legal Aid NSW recommends introducing a new anti-discrimination Act in NSW with a simplified structure, and broader and clearer protections against discrimination for people with protected attributes.

In this submission we use the term “the new ADA” to refer to a new Act that would replace the current ADA.

### Recommendation 1

The ADA should be replaced with a new Act, with a simplified structure and broader protections against discrimination.

### Question 3.1: Direct discrimination

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

One test for discrimination applying to all protected attributes

Currently there is no overarching definition of discrimination in the ADA. Instead, direct and indirect discrimination on each prohibited ground is set out progressively through the Act.

Legal Aid NSW prefers the approach taken in the Victorian, ACT and Queensland legislation, where one definition of discrimination applies to all protected attributes.

### Removing the comparator test

Legal Aid NSW supports a detriment test in place of a comparator test in the definition of discrimination. The detriment test approach is based on the simpler premise that discrimination occurs where a person is treated unfavourably on the ground of one or more protected attributes, and is the approach taken in Victoria<sup>1</sup> and the ACT.<sup>2</sup>

This would overcome the difficulty and complexity created by the comparator test currently used in the ADA, which establishes discrimination by comparing the treatment of the complainant to the treatment of others who lack their protected attribute.<sup>3</sup> This

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<sup>1</sup> *Equal Opportunity Act 2010* (Vic) ss 8-9.

<sup>2</sup> *Discrimination Act 1991* (ACT) s 8.

<sup>3</sup> *Anti-Discrimination Act 1977* (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA.

requires a comparison between the treatment of a person because of a prohibited attribute, and treatment that is or would be afforded to a real or hypothetical person – the ‘comparator’, in the same or similar circumstances.

While there sometimes is an actual comparator, in many instances the comparator is entirely hypothetical.

Constructing a hypothetical comparator can be a difficult process that moves the focus away from the impact on the affected person and requires courts and tribunals to:

engage in the artificial exercise of deciding how the respondent would have treated a hypothetical person without the complainant’s relevant attribute had such a person been in the same circumstances.<sup>4</sup>

Discrimination because of cumulative or intersectional disadvantage is also difficult to establish where a comparative approach is required. The detriment test approach makes it easier for individuals to bring overlapping complaints and is also more compatible with intersectional theory which recognises the compounding, rather than ‘additive’, effect of characteristics.

The Disability Royal Commission also recommended removing the comparator test in favour of a detriment test and proposed the following definition of direct discrimination:

(1) For the purposes of this Act, a person (the **alleged discriminator**) directly discriminates against another person (the **aggrieved person**), if the person treats, or proposes to treat, the aggrieved person unfavourably on the ground of the aggrieved person’s disability.

(1A) For the purposes of subsection (1), an alleged discriminator who has treated, or proposes to treat, the aggrieved person unfavourably bears the burden of proving that the treatment or proposed treatment was not on the ground of the aggrieved person’s disability.<sup>5</sup>

### Systemic inequality and structural racism

The comparator test fails to reflect the lived reality of our Aboriginal and Torres Strait Islander clients, particularly those in custody, whose experiences are shaped by intersecting forms of disadvantage. In such settings, it is often impossible to identify a suitable comparator, as systemic inequality is the norm, not the exception. Requiring a

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<sup>4</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 95.

<sup>5</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, Recommendation 4.23.

comparator in such settings disconnects the law from lived experience.

The test also overlooks the role of structural racism, where discriminatory outcomes may be embedded in institutional policies and practices. In these contexts, comparison is not only artificial—it obscures the very mechanisms through which discrimination operates.

### Recommendation 2

- The new Act should include a single overarching definition of discrimination that applies to all protected attributes.
- The comparator test in the ADA should be replaced with a detriment test.

### Question 3.2: The comparative disproportionate impact test

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

Legal Aid NSW supports replacing the comparative disproportionate impact test with a disadvantage test.<sup>6</sup>

For example, under subsection 8(3) of the *Discrimination Act 1991* (ACT):

a person **indirectly** discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, **the effect of disadvantaging the other person** because the other person has 1 or more protected attributes. [emphasis added]

Like the comparator test discussed above, the comparative disproportionate impact test is an artificial exercise, which fails to recognise the complexity of intersectional disadvantage. It is also needlessly complicated, particularly for unrepresented complainants.

### Recommendation 3

The “not able to comply” part of the indirect discrimination test in the ADA should be removed.

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<sup>6</sup> Such as the test used in the *Discrimination Act 1991* (ACT) s 8.

### 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?

Legal Aid NSW supports removing the “not able to comply” part of the indirect discrimination test, which requires a complainant to show that they cannot comply with a requirement or condition imposed by the duty-holder.<sup>7</sup>

In our experience, there are circumstances where the issue is not that the complainant is entirely unable to comply, but that compliance would carry disproportionate burdens or consequences that are not experienced by others—for example, due to cultural or religious beliefs, or trauma-related impacts. The current framing of “unable to comply” risks excluding these nuanced experiences of disadvantage.

#### Recommendation 4

The new ADA should not require complainants to establish that they are “not able to comply” with a discriminatory requirement imposed by the respondent as part of the indirect discrimination test.

### Question 3.4: Indirect discrimination and the reasonableness standard

- (1) Should the reasonableness standard be part of the test for indirect 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?

Legal Aid NSW supports shifting the onus from the complainant to the respondent to prove that the condition imposed by the respondent meets the reasonableness test.

We also support including a non-exhaustive list of factors that must be considered in determining reasonableness, as used in the Victorian Act.<sup>8</sup> In addition to the factors set out in the Victorian Act, this list of factors should also require consideration of the cultural implications resulting from the imposition of a condition.

One approach could involve Anti-Discrimination NSW drawing on the perspectives of Aboriginal and Torres Strait Islander community leaders or Elders to inform whether a requirement is reasonable in context. This would help ensure that assessments of reasonableness take into account the differences between dominant cultural norms and

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<sup>7</sup> *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).

<sup>8</sup> *Equal Opportunity Act 2010* (Vic) s 9(3).

Aboriginal and Torres Strait Islander values, practices, and lived experiences and are not limited to mainstream assumptions.

#### Recommendation 5

The reasonableness standard in the test for indirect discrimination in the ADA should be amended as follows:

- The onus should be on the respondent to show that the condition they imposed on the complainant was reasonable.
- The provision should include a non-exhaustive list of factors that must be considered to determine reasonableness, including the cultural implications.
- When assessing reasonableness, the Australian Human Rights Commission should consider drawing on the perspectives of Aboriginal and Torres Strait Islander community leaders or Elders.

#### Question 3.6: Proving indirect 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?

In our view, the current burden of proof in the ADA is too onerous for complainants who are required to establish that a respondent has treated them less favourably on the basis of a protected attribute. In our experience, it is difficult and rare for applicants to have access to direct evidence of the reasons for the respondent's actions. We agree with Associate Professor Simon Rice's comments to the 2008 review of the *Sex Discrimination Act 1984* (Cth) (SDA):

A complainant must... prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as a fact, on the balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables

a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.<sup>9</sup>

We submit that a better approach would be one similar to the onus provisions in the general protections provision of the *Fair Work Act 2009* (Cth) (**Fair Work Act**).<sup>10</sup> Once an applicant has established that they have been subjected to unfavourable treatment and possess a protected attribute, the onus should rest on the respondent to prove on the balance of probabilities that the reason for the treatment was not the protected attribute.

This aligns with the Disability Royal Commission's recommendation 4.23.<sup>11</sup>

### Recommendation 6

In indirect discrimination matters, once an applicant has established that they have been subjected to unfavourable treatment and possess a protected attribute, the onus should rest on the respondent to prove on the balance of probabilities that the reason for the treatment was not the protected attribute.

## Question 3.7: Direct and indirect discrimination

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

The ADA currently requires complainants to frame their experience of discrimination as either direct or indirect discrimination. In practice, discrimination complaints will often argue both indirect and direct discrimination.

Legal Aid NSW supports an express statement in the ADA that direct and indirect discrimination are not mutually exclusive, and a person may experience conduct amounting to both.

For example, section 8(1) of the *Discrimination Act 1991* (ACT) provides that “discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else.” This is recognised in a similar way in section 7 of the Victorian legislation.<sup>12</sup>

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<sup>9</sup> The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (December 2008) [6.47].

<sup>10</sup> *Fair Work Act 2009* (Cth) s 361.

<sup>11</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023) vol 4, 302.

<sup>12</sup> *Equal Opportunity Act 2010* (Vic) s 7.

### Recommendation 7

The new ADA should include an express statement that a person may experience conduct amounting to both direct and indirect discrimination.

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

Legal Aid NSW is open to exploring whether the ADA should retain the distinction between direct and indirect discrimination.

On the one hand, we acknowledge that these concepts help clarify the legal forms discrimination can take and are supported by a substantial body of case law.

On the other hand, we recognise that this distinction does not always reflect the lived experience of discrimination, particularly where systemic or intersectional factors are involved. We are interested in exploring alternative models that better reflect the realities of discrimination and improve access to justice.

### 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?

##### *Recognising intersectionality*

Legal Aid NSW strongly supports protecting against intersectional discrimination.

Many of Legal Aid NSW's clients experience more than one category of disadvantage and discrimination. Intersectionality recognises that this does not merely add one form of discrimination to another, but that different forms of discrimination can arise at the intersections of traditional grounds of discrimination.

Legal Aid NSW considers that the definition of discrimination in the ADA should be amended to ensure that multiple and overlapping grounds of discrimination are recognised, and to expressly acknowledge that complaints involving a number of protected attributes can be made in one complaint.

### Recommendation 8

The new ADA should protect against intersectional discrimination by:

- allowing complainants to raise multiple protected attributes in a single complaint, and
- expressly recognising that conduct can amount to discrimination in relation to multiple and overlapping 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?

Legal Aid NSW supports tests for discrimination that capture intended future discrimination for the reasons set out in the discussion paper.

## 4. Discrimination: protected attributes

### Question 4.2: Discrimination based on carer's responsibilities

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “responsibilities as a carer”?
- (2) Should the ADA separately protect against discrimination based on someone’s status of being, or not being, a parent?

Legal Aid NSW supports adopting the attribute of “parent, family, carer or kinship responsibilities” as considered in the discussion paper and used in the ACT.<sup>13</sup>

In our experience, the lack of protection from discrimination because of “kinship responsibilities” can severely disadvantage Aboriginal and Torres Strait Islander people. We are also concerned that the current definition of carer may work to exclude informal carers, such as siblings or grandparents, who often provide substantial care, as illustrated by Hua’s story.

#### Hua’s story<sup>14</sup> – discrimination against informal carer

Hua is a young adult who has moved out of the family home. Her sister, Mei, has Down Syndrome and needs extra support. Hua’s parents are Mei’s primary carers; they are from a CALD background and do not speak English. When Mei has medical appointments and meetings, Hua attends to support Mei and speak to her care team.

Hua’s employer does not allow Hua to take leave to attend appointments with Mei because she is not Mei’s primary carer.

#### Recommendation 9

The new ADA should include a protected attribute of “parent, family, carer or kinship 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”?

Legal Aid NSW considers that the definition of disability under the ADA should be harmonised with the definition in the *Disability Discrimination Act 1992* (Cth) (DDA),

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<sup>13</sup> *Discrimination Act 1991* (ACT) s 7(1)(l).

<sup>14</sup> All case studies in this submission have been de-identified.

which expressly recognises that disability includes behaviour that is a symptom or manifestation of the disability.<sup>15</sup>

Legal Aid NSW recognises that some organisations have recommended replacing the current definition of disability in the ADA, which is based on a medical model of disability, with a definition based on the social model of disability. We would be open to exploring such an amendment, but in our view, it is critical to ensure that any new definition of disability does not inadvertently make it more difficult for complainants to establish that they have a disability. In our experience, our clients have not had difficulty establishing that they have a disability under the current definitions of disability in the ADA and DDA.

We also recognise that some of the language used in both the ADA and DDA to describe disability is problematic and outdated.<sup>16</sup> We would be supportive of the ADA implementing more inclusive language, provided that any changes do not inadvertently narrow the definition of disability or make it less accessible to complainants. We recommend working closely with the disability community on reforms to this definition.

### Assistance animals

Currently, the ADA only provides protection to people with assistance animals if the assistance animal is a dog that assists the person in respect of vision, hearing or mobility.<sup>17</sup> Legal Aid NSW recommends extending these protections to persons who have an assistance animal that assists in relation to any disability.

#### Gus's story – discrimination against a veteran with an assistance dog

Gus is a veteran who lives with post-traumatic stress disorder (PTSD) from his time served in the military. He experiences hypervigilance, a fear of being ambushed, and flashbacks to the incident that led to his condition. Due to these symptoms, whenever Gus is seated, he prefers to sit with his back to the wall where he can see the entrance and an exit.

Gus has an assistance dog who is trained to recognise when Gus is experiencing signs of stress. His assistance dog can jolt him back to a more stable state.

Gus is regularly refused entry to cafes and asked to sit outside, due to the presence of his assistance dog. However, due to his PTSD symptoms, Gus does not feel safe sitting at an outdoor table.

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<sup>15</sup> *Disability Discrimination Act 1992* (Cth) s 4.

<sup>16</sup> This includes the terms "disorder", "malfunction", "malformation", "disfigurement" and "disturbed behaviour".

<sup>17</sup> *Anti-Discrimination Act 1977* (NSW) s 49B(3).

Legal Aid NSW brought a complaint to Anti-Discrimination NSW on Gus's behalf, however the complaint was unsuccessful.

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

Legal Aid NSW supports protecting against genetic information discrimination, whether through a new attribute or through the definition of disability.

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

Legal Aid NSW is concerned that the existing public health exception could be used to justify indirect or systemic discrimination against people with infectious diseases.

For duty-holders to rely on the public health exception, we recommend including a requirement "that the discrimination is reasonable, proportionate and justifiable in the circumstances."<sup>18</sup>

**Recommendation 10**

- The definition of "disability" in the new ADA should align with the definition of "disability" in the *Disability Discrimination Act 1992* (Cth).
- The new ADA should include protections for persons who have an assistance animal that assists in relation to any disability.
- The new ADA should protect against genetic information discrimination.
- The public health exception in section 49P of the ADA should only capture discrimination that is reasonable, proportionate and justifiable in the circumstances.

**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 protection from discrimination on the basis of homosexuality in the ADA is narrower than the protection under the SDA and requires reform. We support the ADA adopting the term "sexual orientation"<sup>19</sup> and the definition used in the SDA.

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<sup>18</sup> This language is based on exceptions contained in the *Discrimination Act 1991* e.g. ss 24(b), 28(c).

<sup>19</sup> *Sex Discrimination Act 1984* (Cth) s 5A.

## Recommendation 11

The new ADA should replace the term “homosexuality” with the term “sexual orientation” and adopt the definition used in the *Sex Discrimination Act 1984* (Cth).

### Question 4.5: Discrimination based on marital or domestic status

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

Legal Aid NSW supports replacing this attribute with a new attribute of “relationship status” to capture a broader range of relationships. We also support protecting against discrimination on the basis of “lawful sexual activity.”

### 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”?

We support the ADA adopting a protected attribute of ‘intersex status’ in the form used in the SDA.

### 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”?

We support the ADA adopting a protected attribute of “gender identity” in the form used in the SDA.

### 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?

Legal Aid NSW supports this reform option for the reasons set out in the discussion paper.

(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?

Legal Aid NSW supports extending protections to relatives and associates of persons with protected attributes.

## 5. Discrimination: Potential new protected attributes

### Question 5.1: Guiding principles

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

Legal Aid NSW supports including a clause in the ADA which sets out the objects of the Act to make it clear that the ADA is remedial legislation with a beneficial purpose. An example of such a clause is section 3 of the DDA.<sup>20</sup>

In defining the objects of the ADA and the guiding principles for reform, we support drawing on Australia's international obligations to eliminate discrimination and to protect historically disadvantaged groups.

A further consideration for reform is the inconsistencies between protections against discrimination at the NSW state and federal levels. We support aligning the protections across these laws.

### Recommendation 12

The new ADA should include an objects clause to establish that the ADA is remedial legislation with a beneficial purpose.

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<sup>20</sup> Section 3 of the DDA states: The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
  - (i) work, accommodation, education, access to premises, clubs and sport; and
  - (ii) the provision of goods, facilities, services and land; and
  - (iii) existing laws; and
  - (iv) the administration of Commonwealth laws and programs; and
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

## Question 5.2: Potential new attributes

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

### Religion

Clients seek advice from Legal Aid NSW regarding religious discrimination, primarily in employment. However, currently in NSW and federally, protection from religious discrimination is inadequate. All other state and territory discrimination laws, except South Australia,<sup>21</sup> contain a prohibition against discrimination on the ground of religious belief.<sup>22</sup>

Legal Aid NSW supports in-principle legal protection from religious discrimination in the ADA. Religion is not, of itself, currently a ground of unlawful discrimination federally or under the ADA, however the definition of race in the ADA includes ethno-religious or national origin. The extent of 'ethno-religious origin' and the groups it protects remains unclear. While it has been accepted that Jewish people have "ethno-religious origins",<sup>23</sup> it is not clear the extent to which this protection applies to other groups such as Muslims<sup>24</sup> and Sikhs.

### Criminal record

Many clients seek assistance from Legal Aid NSW regarding discrimination in employment because of an irrelevant criminal record. We consider that existing protections from discrimination because of an irrelevant criminal record in employment

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<sup>21</sup> Under Part 5B of the *Equal Opportunity Act 1984* (SA) it is unlawful to treat a person unfavourably in their work or their education because they wear dress or adornments that are required by or symbolic of their religion.

<sup>22</sup> *Discrimination Act 1991* (ACT) s 7(1)(u); *Anti-Discrimination Act* (NT) s 19(1)(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o) and (p); *Equal Opportunity Act 2010* (Vic) s 6(n); *Equal Opportunity Act 1984* (WA) s 53.

<sup>23</sup> *Ekmaw v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 [51]; *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 [47]; *Droga v Birch* [2017] NSWCATAD 22 [35].

<sup>23</sup> *Anti-Discrimination Act 1977* (NSW) s 56.

<sup>24</sup> In *Ekmaw v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 the NSW Civil and Administrative Tribunal found that the evidence presented in that matter did not support a finding that Muslims living in Australia are a 'race' by reason of a common ethnic or ethno-religious origin. However, NCAT noted that the result might have been different had there been different or additional, objective evidence.

under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**),<sup>25</sup> spent convictions,<sup>26</sup> and privacy legislation<sup>27</sup> are inadequate to address this problem.

This issue affects some of the most marginalised people in society and can be a major impediment to a person's ability to participate in the workforce, support themselves and their families, and reintegrate into the community after release from prison or the youth justice system.

This issue can affect entire communities which are subject to over policing, characterised by frequent, unnecessary interactions with police, that then escalate and lead to charges or convictions. It especially affects Aboriginal and Torres Strait Islander people, both adults and youth, who are overrepresented in the criminal justice system.<sup>28</sup>

A conviction can impact on a person's ability to gain employment for decades, and without the opportunity to explain the circumstances of the charge or conviction to potential employers, it often contributes to a cycle of poverty and disadvantage. We note that this is particularly significant for roles which require a National Police Check such as support workers in aged care facilities. These consequences may not be known or considered at the time the person decides whether to plead guilty to offences.

Young people with a juvenile criminal record are not immune from discrimination based on an irrelevant criminal record. It is a common misconception that a person's criminal record is 'wiped' when they turn 18. In NSW, convictions and non-convictions for offences committed when a person is under 18 may still be disclosed on a criminal history check until they are spent. This can have significant consequences on a young person's opportunity for rehabilitation and reintegration.<sup>29</sup>

Discrimination on the basis of an irrelevant criminal record is counterproductive to achieving targets 7 and 8 of the *National Agreement on Closing the Gap*, which seek to increase the proportion of Aboriginal and Torres Strait Islander adults and youth in employment. Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would go some way to achieving these targets.

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<sup>25</sup> Irrelevant criminal record is defined as discrimination under the AHRC Act, however it is not a ground of unlawful discrimination. The Australian Human Rights Commission (**AHRC**) can investigate complaints of discrimination in employment on the basis of irrelevant criminal record and, where appropriate, try to resolve them by conciliation. If the AHRC is satisfied that discrimination has occurred, it can report to the Minister. However, there is no enforceable remedy and an applicant cannot go to court because of discrimination on the basis of irrelevant criminal record.

<sup>26</sup> *Criminal Records Act 1992* (NSW).

<sup>27</sup> *Privacy and Personal Information Protection Act 1998* (NSW).

<sup>28</sup> See NSW Bureau of Crime Statistics and Research, *Aboriginal over-representation in the NSW Criminal Justice System quarterly update June 2023* (Report, September 2023).

<sup>29</sup> Legislative Assembly of New South Wales Law and Safety Committee, *The Adequacy of Youth Diversion Programs in New South Wales* (Report, September 2018), 36-37.

Presently employees do not have to be given any opportunity to explain the circumstances of the offence, nor are the employers required to consider whether it is relevant.

Legal Aid NSW considers that this issue should be addressed by introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment under the ADA, and reforming the law regarding children's criminal records and spent convictions.

Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would be balanced by the existing inherent requirements defence, which would permit employers to discriminate against employees and potential employees where their criminal record prevents them from being able to fulfil the inherent requirements of the role.

Irrelevant criminal record is a protected attribute in ACT<sup>30</sup> and Tasmania.<sup>31</sup> The WA Law Reform Commission recently recommended that a new protected attribute of irrelevant criminal record be included in the WA Act, with criminal record defined broadly to include a record relating to arrest, a criminal investigation or criminal proceedings.<sup>32</sup>

### Experience of domestic and family violence

Legal Aid NSW supports experience of family and domestic violence being added as a protected attribute in the ADA.

In our casework experience, victims and survivors of domestic and family violence experience prejudice and exclusion in many areas of public life, which compounds the harm they have experienced. For example, discrimination can occur in employment through employers declining requests to take time off to attend court proceedings or relocate housing or schools. Discrimination in the housing context can include refusing to offer someone a tenancy because they have terminated a previous tenancy under domestic violence provisions of the *Residential Tenancies Act 2010* (NSW).<sup>33</sup>

Employment, and the financial independence that it can provide, as well as access to alternative accommodation, are key enablers of escaping violent relationships.

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<sup>30</sup> *Discrimination Act 1991* (ACT) s7(1)(k).

<sup>31</sup> *Anti-Discrimination Act 1998* (Tas) s 16(q).

<sup>32</sup> Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA) (Final Report, August 2022) recommendation 34 and 35, 91.

<sup>33</sup> *Residential Tenancies Act 2010* (NSW) ss 105A and 105I.

We consider that existing laws are inadequate to address both direct and indirect discrimination experienced by victims and survivors of domestic and family violence. While the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**Fair Work Act**) provide some protections for victims and survivors of domestic and family violence, we consider that certain gaps remain. For example, under the Fair Work Act employees are entitled to 10 days of unpaid domestic and family violence leave per year.<sup>34</sup> Employees who have completed at least 12 months of service with their employer, or who are long term casuals, and who have experienced violence from a member of their family, may also request flexible working arrangements.<sup>35</sup> However, in our casework experience, many victims of domestic and family violence start new jobs as a step towards getting their life back together and often do not qualify to request flexible working arrangements. Halime's story illustrates this issue.

### **Halime's story – discrimination against victim of domestic and family violence in employment**

Halime was a victim of domestic violence perpetrated by her former partner and father of her young child. After separating from her partner, Halime obtained employment in an office administration role. About three months after she commenced employment, her former partner commenced Family Court proceedings in relation to custody of their child.

Around this time Halime also began assisting police in relation to criminal charges against her former partner resulting from the domestic violence.

Because of the potential criminal law proceedings, the need to care for her young child and the pressure of university study, Halime asked her employer for flexible work arrangements. Given that she had been employed for less than one year, she was not entitled to the right to request flexible working conditions in the National Employment Standards.

The employer told Halime that she may need to resign, unless some agreement could be reached about her working hours. A week later, Halime was made redundant, despite staff being advised only a fortnight earlier that no job losses would occur in the near future.

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<sup>34</sup> *Fair Work Act 2009* (Cth) s 106A.

<sup>35</sup> *Fair Work Act 2009* (Cth) s 65.

Protection from discrimination on the ground of experience of domestic and family violence would also strengthen the domestic violence termination provisions in the NSW *Residential Tenancies Act*, which assist tenants to end their tenancies early if they are experiencing domestic and family violence.

We consider that providing for this additional protection from discrimination would result in better outcomes for the victim beyond their experience in accessing employment and housing. For example, research by the Law and Justice Foundation of NSW has found that experiencing domestic and family violence is highly correlated with experiencing a broad range of other legal problems. Respondents to the Legal Australia-Wide Survey who had experienced domestic and family violence in the previous 12 months were 10 times more likely than others to experience legal problems, including a wide range of family, civil and criminal law issues. The research found that the risk of experiencing family law problems was 16 times higher for those who had experienced domestic and family violence.<sup>36</sup> They were also at least three times more likely to experience problems related to employment, financial rights, government payments, health, housing, personal injury and rights issues.<sup>37</sup>

While this research did not examine the role that discrimination based on experience of domestic and family violence may play in creating other legal problems, it demonstrates the significant and compounding disadvantage that victims and survivors of domestic and family violence often experience.

Creating an additional protected attribute of experience of domestic and family violence in the areas of public life that are currently covered by other discrimination laws would address some of this disadvantage, signal that domestic and family violence is unacceptable, provide legal protection from this form of discrimination, and acknowledge the harm it causes to victims.<sup>38</sup>

Providing protection from discrimination based on experience of domestic and family violence is also consistent with Australia's obligations under the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, which requires governments to take appropriate measures to eliminate discrimination against

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<sup>36</sup> Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019) 24.

<sup>37</sup> Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019) 1 and 10.

<sup>38</sup> Yashina Orchiston and Belinda Smith, 'Empowering victims of family violence: Could anti-discrimination laws play a role?' (2012) *Australian Review of Public Affairs*.

women in all areas of life including in employment, and to ensure that women have access to safe and healthy working conditions.<sup>39</sup>

It is also consistent with the *International Labour Organisation Violence and Harassment Convention 2019 (No. 190)*,<sup>40</sup> which Australia has not yet ratified.

### Social origin

Legal Aid NSW supports enforceable remedies for discrimination on the basis of all attributes in the *International Labour Organisation Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (ILO 111)*, including social origin.

The focus of Legal Aid NSW's work is to assist socially and economically disadvantaged people. Although not often framed in such terms, discrimination and disadvantage because of social origin underpins many of our clients' experiences.

Discrimination on the basis of social origin is not unlawful under NSW or federal discrimination law and there is no enforceable remedy.<sup>41</sup> The Fair Work Act includes some protection from discrimination based on social origin, however for many employees this is limited to protection from dismissal. The general protection provisions of the Fair Work Act prohibit discrimination on the basis of social origin. However, this protection is limited to actions which would be unlawful under any anti-discrimination law in force in the place where the action is taken.<sup>42</sup> Discrimination on the basis of social origin is not unlawful under anti-discrimination laws in force in NSW, so employees in NSW cannot use these provisions.

Employees that are not eligible to make a general protections claim about their dismissal under the Fair Work Act can make an unlawful termination claim, which includes protection from dismissal because of social origin.<sup>43</sup> The unlawful termination

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<sup>39</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981) Art 11.

<sup>40</sup> Articles 6 and 10(f).

<sup>41</sup> Any distinction, exclusion or preference made on the basis of social origin is defined as discrimination under section 3(1) of the AHRC Act and regulation 6(a)(iii) of the *Australian Human Rights Commission Regulation 2019* (Cth), however it is not a ground of unlawful discrimination under section 3(1) of the AHRC Act. As a result, there is no enforceable remedy for discrimination on the basis of social origin under the AHRC Act.

<sup>42</sup> *Fair Work Act 2009* (Cth) s 351.

<sup>43</sup> *Fair Work Act 2009* (Cth) s 772.

provisions are intended to give effect to Australia's obligations under a number of treaties including ILO 111.<sup>44</sup>

Elements of social origin that are most relevant in Australia include class and geographic origin or locality. The International Labour Organisation (ILO) Committee of Experts has clarified that these factors are relevant to social origin, although it has not defined class. Academic commentary has described class to include economic capital (income, savings, property), social capital (relationships with others and networks of contacts) and cultural capital (including education, skills, knowledge accents, habits, tastes, interests, manners, lifestyle).<sup>45</sup>

Discrimination based on class or locality is common and can be a high barrier to social mobility and equality. It also remains to some extent socially acceptable. This is demonstrated by the widespread use of derogative terms to describe people appearing to exhibit characteristics consistent with lower class identity, including 'bogan', 'houso', 'bum', 'dero', 'povo', 'pov', 'dole bludger', 'westie', and 'feral'.<sup>46</sup>

Examples of social origin discrimination include hiring practices that prefer applicants from particular areas or who have attended particular schools, or exclude from consideration applicants from other areas or other schools. This can be the result of deliberate discrimination, or unconscious bias or assumptions.

For example, the Victorian Government Recruit Smarter initiative found that CV de-identification leads to better outcomes for applicants from lower socioeconomic suburbs. The Victorian Department of Premier and Cabinet trial found that applicants from lower ranked socioeconomic suburbs were 9.4 per cent more likely to progress

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<sup>44</sup> *Fair Work Act 2009* (Cth) s 771.

<sup>45</sup> Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context" (2016) 39(1) *UNSW Law Journal* 84.

<sup>46</sup> Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context" (2016) 39(1) *UNSW Law Journal* 85, 121 – 122.

through the selection process and receive a job offer after their CV had been de-identified to remove their home address.<sup>47</sup>

Kathy's story is an example of social origin discrimination in employment.

### **Kathy's story – social origin discrimination in employment**

Kathy was 23 years old and had lived in out of home care provided by the State from the age of three until she turned 18. Kathy obtained casual employment with a non-government organisation as a support worker. Her job involved supervising children living in out of home care, taking children out for activities, preparing meals, cleaning, staying overnight and other house duties.

After a few months of employment, Kathy was required to undertake a probity check. Despite having no criminal record and a working with children check, Kathy failed the probity check.

The State considered that Kathy's history of having grown up in out of home care would mean that she would find it difficult to perform her job as it may trigger distressing memories from her past. This issue was not discussed with Kathy as a work health and safety concern. The State and the employer also did not discuss possible steps to mitigate the impact that the role may have had on her. The State instructed the non-government organisation to dismiss Kathy. Because she had not been employed for six months, she was unable to lodge an unfair dismissal claim.

Other examples of social origin discrimination include private tenancy applications that ask if the applicant has made any application for social housing and discrimination against homeless people (homelessness can be considered relevant to social origin).

We support an enforceable remedy for discrimination on the basis of social origin in employment, and consideration for protection from discrimination based on social origin in other areas of public life. This would acknowledge, and go some way to addressing, the wide-ranging disadvantage experienced by many people because of their socio-economic background or status.

### **Profession, trade or occupation**

Legal Aid NSW recognises that sex workers can face discrimination and stigma because of their job. We support consideration of NSW adopting a similar approach to Victoria,

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<sup>47</sup> Department of Premier and Cabinet Victoria and the Centre for Ethical Leadership University of Melbourne, *Recruit Smarter* (Report Findings, December 2018) 11.

where discrimination because of profession, trade or occupation<sup>48</sup> is unlawful in areas of public life including work, education, goods and services, sporting clubs, and accommodation services, or the Northern Territory, where “employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work” is a protected attribute.<sup>49</sup>

### Recommendation 13

The following protected attributes should be added to the new ADA:

- religion
- irrelevant criminal record
- experience of domestic and family violence
- social origin, and
- profession, trade or occupation.

### 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?

We recognise that understandings of discrimination develop over time and that there will likely be a need to recognise additional protected attributes in future. We understand that this proposal is aimed at addressing the need for the ADA to change and adapt with society. However, our preference is to expressly list protected attributes in the ADA rather than include an open-ended list of protected attributes. We support amending the ADA where appropriate to ensure that it remains current and beneficial to the people of NSW.

In our view, the list of protected attributes performs an educative function for both duty-holders and people with protected attributes. It informs people that certain forms of discrimination are unlawful in NSW.

Requiring complainants and duty holders to be familiar with the grounds recognised in developing case law would be more opaque and less effective in preventing

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<sup>48</sup> *Equal Opportunity Act 2010* (Vic) s 6(la).

<sup>49</sup> *Anti-Discrimination Act 1992* (NT) s 19(ec).

discrimination. In our view, clarity should be a key consideration in the development of anti-discrimination laws.

Our preference is for reforms that are guided by the principles discussed above (at question 5.1) and that are subject to community and expert consultation and feedback, rather than on a case-by-case basis.

#### *Recommendation 14*

The new ADA should retain an exhaustive list of protected attributes, rather than an open-ended list of protected attributes.

## 6. Discrimination: Areas of public life

### Question 6.1: Discrimination at work - coverage

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

Unpaid workers are not included in the definition of employment under the ADA and are not protected from discrimination on the grounds of race, sex, transgender status, marital or domestic status, disability, carer's responsibilities, homosexuality or age. However, unpaid trainees and volunteers are included in the definition of "workplace participant" and are covered by the protections against sexual harassment in the workplace.<sup>50</sup>

This is a significant gap that leaves many people vulnerable to discrimination without recourse. The most recent General Social Survey conducted by the Australian Bureau of Statistics found that one quarter of Australians aged 15 years and over participated in unpaid voluntary work through an organisation in 2020.<sup>51</sup> There are high rates of volunteering among people aged 40-54 (31 per cent) and people aged 15-24 (19 per cent). This figure does not include people who did unpaid work under some form of compulsion because of unemployment (for example, work for the dole) or as part of study commitments.<sup>52</sup>

Unpaid interns can be particularly vulnerable to mistreatment in the workplace. Many are young people with limited workplace experience. Interns, regardless of their age, may feel that they must tolerate mistreatment in order to get experience, paid work or positive references. The lack of legal protection for this group can reinforce this perception.

#### Recommendation 15

The definition of employment in section 4 of the ADA should include voluntary workers.

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<sup>50</sup> *Anti-Discrimination Act 1977* (NSW) s 22B(9).

<sup>51</sup> The rate in 2020 was lower than in 2019 when it was 30 per cent. As the General Social Survey was carried out over four months from June to September 2020 during the COVID-19 pandemic and restrictions, it is likely that volunteer numbers have increased since 2019.

<sup>52</sup> General Social Survey: Summary Results, Australia methodology, Latest release 2020 available at <<https://www.abs.gov.au/methodologies/general-social-survey-summary-results-australia-methodology/2020>>

## Question 6.2: Discrimination in work – exceptions

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

### Removal of the exception for small businesses

Protection from discrimination in employment because of sex,<sup>53</sup> carer's responsibilities,<sup>54</sup> homosexuality,<sup>55</sup> transgender status,<sup>56</sup> marital or domestic status<sup>57</sup> and disability<sup>58</sup> under the ADA do not apply to employers with less than six employees, however the protection from racial discrimination<sup>59</sup> and age discrimination<sup>60</sup> is not limited in this way. This leaves many employees vulnerable to common forms of discrimination without recourse under the ADA, especially workers in regional areas where the number of small businesses is generally greater and employment options are less. The small business exception also adds complexity and limits the usefulness of this jurisdiction.

We consider that the exception for employers "where the number of persons employed by the employer, disregarding any persons employed within the employer's private household, does not exceed 5"<sup>61</sup> should be removed.

### Recommendation 16

The new ADA should not include exceptions to prohibitions against discrimination for small businesses.

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<sup>53</sup> *Anti-Discrimination Act 1977* (NSW) s 25(3)(b).

<sup>54</sup> *Anti-Discrimination Act 1977* (NSW) s 49V(3)(b).

<sup>55</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZH(3)(b).

<sup>56</sup> *Anti-Discrimination Act 1977* (NSW) s 38C(3)(b).

<sup>57</sup> *Anti-Discrimination Act 1977* (NSW) s 40(3)(b).

<sup>58</sup> *Anti-Discrimination Act 1977* (NSW) s 49D(3)(b).

<sup>59</sup> *Anti-Discrimination Act 1977* (NSW) s 8.

<sup>60</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZYB.

<sup>61</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(b), 38C(3)(b), 40(3)(b), 49D(3)(b), 49V(3)(b), 49ZH(3)(b).

### 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”?
- (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?

Legal Aid NSW supports expanding the definition of “educational authority” to include all early childhood education and care settings. The new ADA should also expressly state that the protected area of education includes online learning. Classrooms are increasingly moving online, and in our experience, this brings new forms of discrimination in relation to access to virtual classrooms and online assessments.

#### Disability exception

Legal Aid NSW supports replacing the disability exceptions contained in subsections 49L(4)-(5) of the ADA with a requirement for educational authorities to provide adjustments, unless making the adjustment would impose an unjustifiable hardship on the person. We discuss this proposed requirement further at question 11.1. Thomas’s story below illustrates the need for further protections for school students with disabilities.

#### Thomas’s story – discrimination in primary school

Thomas is six years old. He has autism with high support needs. In March 2024 his parents put in an application for him to attend his local primary school. His parents informed the school of his support needs and provided reports from his health care team. The school accepted his application and in December 2024 he attended one day a week for a month to help his transition from preschool to primary school.

On his first official day of primary school in February 2024, the principal of the school informed Thomas’s parents that he would not be able to attend the school because it was not funded to meet his support needs.

None of the staff at the primary school directly said that Thomas having a disability was a problem. However, based on their interactions with staff, Thomas’s parents left their meetings at the school with the strong feeling that the staff considered Thomas’s disability an issue.

This experience was distressing for Thomas and his family. As a result of the school’s decision, Thomas’s parents had to urgently find a new school for Thomas, which meant he had to delay starting primary school by nine weeks.

Thomas then had to start the process of transitioning to school again at a different school.

Thomas's parents approached Legal Aid NSW for assistance to make a complaint to the local primary school to ensure that other families of children with disabilities do not have the same experience.

### Recommendation 17

- The definition of educational authority in section 4 of the ADA should be expanded to include:
  - early childhood education and care settings, and
  - online learning.
- The disability exceptions in section 49L of the ADA should be replaced with a requirement for educational authorities to provide adjustments.

## Question 6.5: Superannuation services and insurance exceptions

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

Legal Aid NSW also invites a close review of the exception afforded to insurance providers to discriminate against individuals with a disability. Legal Aid NSW's experience and research report, *"What's the Risk? Access to insurance for people living with health conditions"*,<sup>62</sup> found that some insurance companies may be inappropriately using this exception to deny cover, provide cover only with exclusions, or premium load (potentially to the extent that the person is priced out of the market).

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<sup>62</sup> Legal Aid NSW, *What's the Risk? Access to insurance for people living with health conditions* (July 2019).

## 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”?

Legal Aid NSW supports expanding the definition and coverage of the protected area of “accommodation” to include other forms of accommodation. In our experience, it can be unclear whether the ADA covers supported housing for people with disabilities. This form of accommodation should be expressly covered.

We also support introducing a positive duty for housing providers to take measures to eliminate discrimination in the area of accommodation. We discuss a positive duty further below at question 11.3 We discuss a duty to provide adjustments at question 11.1.

### Recommendation 18

The definition of accommodation in section 4 of the ADA should be expanded to cover other forms of accommodation, including supported housing for people with disabilities.

## 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 makes discrimination unlawful by registered clubs towards both members and non-members.<sup>63</sup> A registered club is defined as a club that holds a club licence granted under the *Liquor Act 2007* (NSW).<sup>64</sup>

Legal Aid NSW does not consider that protection from discrimination should be confined to clubs with a liquor licence. We support a broader definition of clubs such as that used in section 4 of the DDA:

**club** means 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.

### Recommendation 19

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<sup>63</sup> *Anti-Discrimination Act 1977* (NSW) ss 20A, 380, 48A, 490, 49ZR, 49ZYP.

<sup>64</sup> This permits the club to sell alcohol and requires the club to meet certain conditions in the *Registered Clubs Act 1976* (NSW).

The definition of club in section 4 of the ADA should be aligned with the definition of club used in section 4 of the *Disability Discrimination Act 1992* (Cth).

### 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?

Legal Aid NSW supports extending protections based on carer's responsibilities to all protected areas of public life. The current more limited protection is, in our view, unjustified and disproportionately affects women, who are more likely to be primary carers.

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

Legal Aid NSW supports this approach.

#### Recommendation 20

The new ADA should extend prohibitions on discrimination for all protected attributes to all protected 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?

Legal Aid NSW is concerned that there is currently a lack of clarity over whether the ADA covers certain areas of public life including policing and corrective services (we discuss these concerns further below).

To address gaps in protection, Legal Aid NSW supports explicitly listing the areas of public life that are covered by discrimination law and explicitly extending protections to new areas, to give clarity to both duty holders and members of the public.

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

#### State laws and State programs

Legal Aid NSW has assisted clients who have experienced discriminatory treatment by State-funded agencies, such as derogative racial taunts by NSW Police, or differential treatment in response to reports of crimes. However, the extent to which the

performance of public functions and duties by government bodies such as police are considered a 'service' under the ADA is limited and unclear.<sup>65</sup>

Legal Aid NSW supports an additional area of public life in the ADA, of the administration of state laws and programs, similar to section 101 of the Queensland Act<sup>66</sup> which provides:

Discrimination in administration of State laws and programs area

A person who—

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or
- (b) has any other responsibility for the administration of State law or the conduct of a State Government program; must not discriminate in—
- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility.

A similar approach is taken in the DDA<sup>67</sup>, and was also recommended by the WA Law Reform Commission.<sup>68</sup>

Alternatively, we support 'service' being defined to expressly include statutory functions that a State government agency is bound to carry out.

This protection should extend to forms of public participation and civic engagement. For example, it should be prohibited to discriminate against people with protected attributes in the provision and operation of government consultations, public forums and other community initiatives.

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<sup>65</sup> Sexual Harassment is unlawful in the area of State laws and programs. *Anti-Discrimination Act 1977* (NSW) s 22J.

<sup>66</sup> *Anti-Discrimination Act 1991* (Qld).

<sup>67</sup> *Disability Discrimination Act* (Cth) s 29.

<sup>68</sup> Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA), (Final Report, August 2022)135.

### Steve and Mary– less favourable treatment of Aboriginal family

Steve and his wife Mary were driving home when their car was hit in the rear by a car behind them. A third vehicle was also involved in the collision.

NSWPF and NSW Ambulance officers attended the collision scene.

Steve and Mary feel they were provided with lesser care and attention including:

- having a blanket taken from their car and given to another woman despite he and his wife being visibly cold and upset
- a delay in ambulance officers checking on them
- Steve simply being advised to “see your GP in the morning” upon advising the ambulance officer he had a sore shoulder and neck
- Steve having to pressure the ambulance officer to put Mary in the ambulance vehicle when she was in the rain trembling and nauseous
- Mary being directed to exit the ambulance vehicle into the rain, so a non-Aboriginal male could take her place, and
- leaving their car at the collision site but removing the others.

### Sporting activities

We support protection from discrimination extending to formally organised sporting activities, similar to the approach taken in the ACT since April 2024.<sup>69</sup> This would capture sporting activities which are subject to a degree of formal organisational structure. For example, a weekly netball competition that is governed by written rules and overseen by a sporting association may be considered to be a formally organised sporting activity; whereas a weekly social football match between friends would be considered informal and not subject to the ADA.

### Digital platforms and online services

Legal Aid NSW supports including an express statement in the ADA that protections apply to digital platforms and online services. As an example (also noted at question 6.3 above), learning is increasingly moving to online platforms, where some of our clients are experiencing new and distinct accessibility issues.

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<sup>69</sup> *Discrimination Act 1991* (ACT) s 23A.

### *Recommendation 21*

- The new ADA should include additional protected areas of life, including:
  - State laws and State programs
  - sporting activities
- The new ADA should expressly prohibit discrimination on digital platforms and online services.

## 7. Wider exceptions

### Questions 7.1 and 7.3: Religious exceptions

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

We consider that exceptions that allow religious organisations (including religious charities, schools, hospitals, aged care facilities and accommodation providers) to discriminate on the basis of religion in connection to employment should be limited to instances where religion is an inherent requirement of the role. We also consider that religious bodies should not be able to discriminate on the basis of religion in connection with the provision of services that are funded by federal, state and territory governments.

We consider that exceptions that allow religious organisations (including religious charities, schools, hospitals, aged care facilities and accommodation providers) to discriminate on the basis of religion in connection to employment should be limited to instances where religion is an inherent requirement of the role. We also consider that religious bodies should not be able to discriminate on the basis of religion in connection with the provision of services that are funded by federal, state and territory governments.

#### Recommendation 22

- In the new ADA, the exceptions for religious bodies to the prohibitions on discrimination should be limited to instances where religion is an inherent requirement of the role.
- The new ADA should not permit religious bodies to discriminate on the basis of religion in connection with the provision of government funded services.

### Questions 7.5 and 7.6: Private educational authorities exceptions

- Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities?
- Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities?

Legal Aid NSW is especially concerned about the breadth of exceptions afforded to private educational authorities under the ADA. These exceptions are not limited to faith-based schools and allow private educational authorities to discriminate against students, potential students, job applicants and existing employees on the grounds of sex (including pregnancy), transgender status, marital or domestic status, disability, age

(exception only applies to education, not to employment) and homosexuality.<sup>70</sup> Legal Aid NSW submits that such sweeping exceptions from unlawful discrimination by private educational authorities fall short of modern community expectations.

The protections afforded to private educational authorities in NSW go far beyond those in place in other states and territories. For example, under the *Discrimination Act 1991* (ACT) it is not unlawful for educational institutions (private or public) to discriminate on the grounds of sex (but only if the institution is conducted solely for students of the opposite sex), religious conviction, or disability.<sup>71</sup> In Victoria, an educational authority that operates an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular disability, may exclude from that institution or program people who do not possess that particular characteristic.<sup>72</sup>

As illustrated by the case study below, the broad exceptions currently afforded to private educational authorities in NSW allow for the kind of discrimination that have no place in the modern society.

#### **Waruni's story – discrimination in employment by a religious school**

Waruni was employed at a religious school as an English teacher and had been employed by the school on a series of fixed term 12-month contracts.

Waruni became pregnant to her de facto partner. She told the school that she was pregnant.

The school informed Waruni that her contract would be terminated because she was pregnant and unmarried.

#### **Recommendation 23**

The new ADA should not contain broad exceptions for private educational authorities in employment and education.

#### **Question 7.9: Voluntary bodies exception**

We note there is a drafting error in subsection 57(b) of the ADA. The definition of “body” is defined to not include “a friendly society registered under the Friendly Societies Act

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<sup>70</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49ZYL(3)(b).

<sup>71</sup> *Discrimination Act 1991* (ACT) ss 36, 46 and 51.

<sup>72</sup> *Equal Opportunity Act 2010* (Vic) s39, 43 and 61.

1989 (**FS Act**).” Since this section was introduced, the FS Act has been superseded by the *Friendly Societies (New South Wales) Act 1997* (NSW).

## 8. 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?

We suggest that the NSWLRC consider the broader definition of “offensive behaviour because of race, colour or national or ethnic origin” in section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA).

Legal Aid NSW considers it is appropriate for civil prohibitions on vilification to be broader than criminal law.

- (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?

We consider that disability vilification should also be added to the ADA. This is strongly supported by findings from the Disability Royal Commission, which documented widespread vilification and abuse of people with disability across Australia.<sup>73</sup>

The existing prohibitions on homosexual and transgender vilification should be broadened to apply to sexual orientation and gender identity.

#### Recommendation 24

- The new ADA should replace the definition of vilification in the ADA with the broader definition used in section 18C of the *Racial Discrimination Act 1975* (Cth).
- The new ADA should include a prohibition against disability vilification.

### Question 8.2: The test for vilification

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

We consider that it is conceptually more straightforward for unrepresented applicants to understand anti-vilification provisions that focus on the direct effect of conduct on the victim.

Under a harm-based test, the evidentiary burden on the complainant is not as onerous. The complainant is not required to identify an audience or prove that an ordinary

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<sup>73</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 4, 427.

member of that audience was incited to feel hatred, serious contempt, or severe ridicule as a result of the respondent's conduct. Instead, the complainant's evidentiary burden focuses on the respondent's conduct and whether it was reasonably likely in all the circumstances to cause harm.

### **Recommendation 25**

The new ADA should replace the incitement-based test with a harm-based test for vilification.

## **8.1 Question 8.5: Religious vilification**

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

Legal Aid NSW considers that the protection from religious vilification should contain appropriate and clear limits.

The protection against religious vilification should:

- protect individuals and groups of people, not organisations, and
- apply to religious belief or affiliation consistent with section 93Z of the *Crimes Act 1900* (NSW).

## 9. Harassment

### 9.1 Question 9.1: The definition of sexual harassment

Legal Aid NSW considers that the protection from sex discrimination and sexual harassment under the ADA should be harmonised with the SDA without limiting or reducing protections.

#### Recommendation 26

The prohibition of sexual harassment in Part 2A of the ADA should be aligned with the prohibition of sexual harassment in Part II, Division 3 of the *Sex Discrimination Act 1984* (Cth).

### 9.2 Question 9.2: Other sex-based conduct

Legal Aid NSW supports incorporating the following changes into a new ADA that would align with recommendations of the *Respect@Work* report that were implemented in the SDA:

- expressly prohibiting sex-based harassment (now section 28AA of the SDA), and
- expressly prohibiting creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex (now section 28M of the SDA).<sup>74</sup>

#### Recommendation 27

The new ADA should expressly prohibit sex-based harassment and creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

### 9.3 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?

Legal Aid NSW supports adopting the SDA's approach.

Currently under the ADA, protection from sexual harassment by one workplace participant towards another workplace participant is limited to conduct that occurs "in a

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<sup>74</sup> AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).

place that is a workplace of both those persons.”<sup>75</sup> The prohibition of sexual harassment by an employer towards an employee or by an employee to another employee is not limited this way, adding complexity to the ADA and limiting the protection from sexual harassment depending on the employment status of the people involved. For example, sexual harassment by an employee towards an unpaid trainee, or by an independent contractor towards an employee engaged by the same organisation, is limited to “a place that is a workplace of both those persons”.

“Workplace” is defined as “a place at which a workplace participant works or otherwise attends in connection with being a workplace participant.”<sup>76</sup> This concept of workplace is too narrow and may exclude behaviour such as online sexual harassment that occurs beyond the physical parameters of the workplace or outside of work hours.

In our experience, workplace sexual harassment often involves the use of technology and social media. We agree with comments in the *Respect@Work* report that:

workers, especially women in industries for whom online spaces constitute a workplace, are experiencing increasingly high levels of technology-facilitated sexual and sex-based harassment...The proliferation of technology in the workplace [i]s causing an increase in online sexual harassment of women generally, but also specifically and acutely to women with a disability, younger women and women in rural, regional and remote areas, who may lack access to adequate support and referral pathways.<sup>77</sup>

Technology facilitated sexual harassment can have equally significant and detrimental impacts as other forms of sexually harassment on victims’ lives, mental health, reputation and careers.

We suggest these issues would be addressed by harmonising the protection from sexual harassment under the ADA with the SDA.

### **Recommendation 28**

The new ADA should prohibit sexual harassment in connection with someone’s status as a worker or person conducting a business or undertaking.

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<sup>75</sup> *Anti-Discrimination Act 1977* (NSW) s 22B(6).

<sup>76</sup> *Anti-Discrimination Act 1977* (NSW) s 22B(9).

<sup>77</sup> AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 130.

## Question 9.7: Attribute-based harassment

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

Legal Aid NSW considers that prohibition against harassment should cover all protected attributes. This would explicitly recognise the development of case law that indicates that harassment will be discrimination where it is based on a protected attribute.

Legal Aid NSW refers to the comments of the Disability Royal Commission that provisions in the DDA prohibiting harassment because of disability in the areas of work, the provision of goods, services and facilities, and education have been ineffective in addressing public harassment experienced by people with disability.<sup>78</sup> We support the Disability Royal Commission's recommendation 4.29 regarding a standalone prohibition of offensive behaviour because of disability or perceived disability in a public place,<sup>79</sup> and support a similar provision in the ADA.

### Recommendation 29

The new ADA should prohibit harassment on the basis of each individual protected attribute and prohibit harassment on the basis of a combination of protected attributes.

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<sup>78</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 318.

<sup>79</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 324.

## 10. Promoting substantive equality

### Question 11.1: Adjustments

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

Legal Aid NSW supports the ADA including an express obligation to make adjustments for people with disability in work, education and the provision of goods and services.

Legal Aid NSW supports the approach recommended by the Disability Royal Commission (recommendation 4.26):

#### **Duty to make adjustments**

It is unlawful for a person to fail or refuse to make an adjustment for:

- (a) a person with a disability; or
- (b) a group of persons with disability

unless making the adjustment would impose an unjustifiable hardship on the person.<sup>80</sup>

The Disability Royal Commission recommended against using the term “reasonable adjustments” for the reason that “this should remove the misconception that reasonableness is an element in deciding whether an adjustment is required.”<sup>81</sup>

Removing the qualifier ‘reasonable’ but maintaining an unjustifiable hardship defence is a practical way to shift the focus from and remove confusion about people with disability and others that need adjustments having to show the reasonableness of any adjustment requests.

We support a similar obligation for pregnancy, breastfeeding and carer responsibilities in work and employment, as recommended by the previous NSWLRC review in 1999.<sup>82</sup>

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<sup>80</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 309.

<sup>81</sup> *Ibid*

<sup>82</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) recommendation 5.

## *Sklavos*

We also wish to draw the NSWLRC's attention to our concerns about the impact of the federal decision of *Sklavos* on disability discrimination complaints made under the DDA.<sup>83</sup>

In summary, the Federal Court in *Sklavos* found that a duty holder who fails to provide reasonable adjustments to a person with a disability only breaches the requirements of the DDA<sup>84</sup> if they did not make the reasonable adjustments "because of" the complainant's disability.<sup>85</sup>

Disability advocates, academics, and lawyers agree that the Federal Court's decision in *Sklavos* has had a chilling and repressive effect on individuals' ability to bring claims for direct disability discrimination.<sup>86</sup>

We recommend that the NSWLRC closely consider this decision, and the drafting of the relevant sections of the DDA, to ensure this interpretation is not available at the NSW level.

## *Recommendation 30*

- The new ADA should include a standalone obligation to provide adjustments for people with a disability unless the making of the adjustment would impose an unjustifiable hardship on the person.
- The new ADA should introduce similar obligations in relation to pregnancy, breastfeeding and carer responsibilities.
- The NSWLRC should give consideration to the issues raised by the Federal Court in the decision of *Sklavos* in any proposal to reform the duty to provide adjustments in the ADA.

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<sup>83</sup> *Sklavos v Australasian College of Dermatologists* [2016] FCA 179.

<sup>84</sup> Disability Discrimination Act 1992 (Cth) s 5(2).

<sup>85</sup> *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 [23].

<sup>86</sup> For example: People with Disability Australia, [Media Release: Reforming the Disability Discrimination Act following the Sklavos decision - People with Disability Australia](#) (Web Page, 10 May 2021), Australian Lawyers for Human Rights, [ALHR – Disability Community Calls For Reform After Discrimination Claims Become 'Impossible To Prove'](#) (Web Page, 3 July 2021).

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

(1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

Legal Aid NSW considers that one of the key weaknesses in discrimination law is the complaint-based model, and supports positive obligations to prevent harassment, discrimination and vilification.

Relationships in which discrimination and harassment occur often involve power imbalances, such as the relationship between employer and employee, landlord and tenant, or insurance company and consumer. Clients to whom Legal Aid NSW provides advice about discrimination are often at a further disadvantage because of their youth, cultural and linguistic background or economic circumstances. Our clients often decide not to lodge a discrimination complaint because they fear the consequences of doing so, or because they perceive the process to be too burdensome.

Emma's story below illustrates the vulnerability of some employees and barriers they perceive to making a complaint.

#### Emma's story – barriers to making a discrimination and harassment complaint

Emma is a young female student who experienced sexual harassment and discrimination as an unpaid intern at a firm.

Emma and a senior employee of the firm commenced a consensual romantic relationship quickly following her interview for the position. During the course of the internship, Emma set clear boundaries that the personal nature of the relationship was only to occur outside of the workplace.

Despite this, the senior employee is alleged to have sexually assaulted Emma in the offices of the law firm. The senior employee also made repeated requests for Emma to provide him with sexually explicit photographs of herself and when she did not, he excluded her from workplace meetings.

After Emma raised her discomfort and distress caused by the senior employee's unwelcome conduct toward her, he responded by threatening to share private information about her. Based on his communications, Emma held the belief that the senior employee could and would take steps to negatively influence her professional prospects and affect her employability.

As a result, Emma suffered from significant physiological and psychological harm. Specifically, she experienced severe disturbances in her sleep, appetite, motivation, impairments in concentration and negative symptoms of depression and intrusive memories and emotions.

Emma felt she could not cease the internship given both the scarcity of internships available and their importance to securing paid employment upon graduation. She also felt that she could not lodge a contemporaneous complaint for fear that the senior employee would damage her reputation in the industry.

Legal Aid NSW supports the introduction of a positive duty on all individuals and organisations that currently have obligations under discrimination laws to take positive measures to eliminate and prevent discrimination. We consider the Victorian and SDA models to provide a good example of how this could operate. A positive duty would encourage individuals and organisations to proactively consider the adequacy and impact of their services, policies and procedures, and take steps to address shortcomings. It would also reduce the burden on individuals to bring complaints to address discriminatory conduct.

A positive duty would not greatly increase the legislative burden on individuals and organisations in the area of employment. Employers can already be held vicariously liable for the discriminatory actions of their employees when they fail to take all reasonable steps to prevent discrimination.<sup>87</sup> Employers can also be held liable under ancillary liability provisions if they aid or permit discrimination.<sup>88</sup> The courts have established that an employer will need to have taken significant action in order to satisfy the court that it took all reasonable steps to prevent discrimination.<sup>89</sup>

Other legislative schemes also impose positive duties on employers. For example, the national work health and safety laws, which require employers to ensure, so far as reasonably practicable, the health and safety of their workers. Given the significant impact that discrimination often has on employee wellbeing, it is arguable that existing work health and safety laws already impose a positive duty on employers to prevent discrimination.

### **Recommendation 31**

The new ADA should introduce a positive duty on all individuals and organisations that currently have obligations under discrimination laws to take positive measures to eliminate discrimination.

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<sup>87</sup> *Anti-Discrimination Act 1977 (NSW)* s 53.

<sup>88</sup> *Anti-Discrimination Act 1977 (NSW)* s 52.

<sup>89</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.



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