MODERN, FAIR, EQUAL: MAKING DISCRIMINATION LAWS WORK FOR LGBTIQ+ COMMUNITIES

SUBMISSION BY EQUALITY AUSTRALIA TO THE NSW LAW REFORM COMMISSION'S REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW): UNLAWFUL CONDUCT (AUGUST 2025)

29 August 2025

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INTRODUCTION

Equality Australia is grateful for the opportunity to make a submission in response to the Consultation Paper (Consultation Paper) on Unlawful Conduct to the New South Wales Law Reform Commission's (NSWLRC) review (the Review) of the *Anti-Discrimination Act 1977* (NSW) (the Act).

We made a Preliminary Submission to the Review, and this submission is an extension of what we raised initially. Our view expressed there remains – that given the many fundamental deficiencies in the Act at present, it is time for New South Wales to replace the Act with a new Equality Act that reflects best practice and meets contemporary needs.

Given Equality Australia works to ensure equality for LGBTIQ+ people and their families, our submission focusses on the deficiencies in the Act which particularly affect our communities. However, LGBTIQ+ people have many intersecting identities and experiences, and we support extending protections to all people who experience discrimination, harassment and vilification, and need these legal protections.

Key priorities for reform for our communities are:

- modernising protected attributes so that they accurately capture and reflect contemporary terminology in relation to our communities.
- fixing fundamental flaws in key definitions for direct and indirect discrimination and recognising combined grounds discrimination.
- removing outdated exemptions, and refining others to achieve the right balance.
- strengthening vilification laws so they are better designed to provide redress for the harm caused by hate.
- extending the areas of activity to ensure that the state of New South Wales has responsibilities under the law, other than when providing services.
- bringing the Act's approach to liability into better alignment with other Australian jurisdictions.
- adopting a proactive approach to discrimination law to achieve substantive equality.

BACKGROUND

Equality Australia has consistently advocated for comprehensive, human rights-based laws to protect people from discrimination and vilification. This commitment is evident in our recent engagements with law reform processes in New South Wales:

- **August 2023:** We made a Preliminary Submission to the New South Wales Law Reform Commission's (NSWLRC) review of the Anti-Discrimination Act 1977 (NSW) (**Preliminary Submission**), emphasising the need for updated civil protections that reflect contemporary community standards.
- **April 2024:** We made a submission to the NSWLRC on the effectiveness of section 93Z of the Crimes Act highlighting the necessity of laws that effectively address serious vilification and hate-based conduct targeted at LGBTIQ+ individuals and communities.
- **February 2025:** In response to the New South Wales government's introduction of strengthened hate crime laws focusing on antisemitism, we made public comment on

the need for the inclusion of all vulnerable minorities, including the LGBTIQ+ community, in these protections.

- **August 2025:** We made a submission earlier this month to the NSW Independent Review of Criminal Law Protections against the Incitement of Hatred, to raise the need for new criminal laws against hate in NSW to be expanded to protect LGBTIQ+ communities.

COMMUNITY SURVEY

This submission is informed by a community consultation conducted through an online survey that ran from 19 June 2025 to 7 August 2025. LGBTIQ+ community members were recruited by email and social media. Equality Australia received 493 responses.[1] The survey called for a series of qualitative and qualitative responses, and the results are reported in relevant sections throughout this submission.

DEMOGRAPHICS

Of the people who completed the survey, around 50.2% were female, 31.6% were male, 12.3% were non-binary, 3.4% were a different gender and the remainder opting not to say. 26.5% of survey participants had a gender that was different from the sex assigned to them at birth (in other words, transgender).

Around 35.2% identified their sexuality as lesbian or gay, 25.5% as straight, 17.4% as bisexual, 11.5% as queer and 4.5% as asexual, and around 0.8% as questioning, with the remainder opting not to say.

While 65% were living in cities, around 1 in 4 survey participants were from regional areas and 5.7% were living rurally, and 1.2% remotely, with the remainder preferring not to answer.

People with variations of sex characteristics (intersex people) made up 2% of the sample. This is a good representative sample, as an estimated 1.7% of the population is intersex.[2]

The response rate from Aboriginal respondents was 2.2%, and no responses were received from Torres Strait Islander people. This was an underrepresentation considering that 3.2% of Australians identified as First Nations in the last Census.[3]

People from a diverse range of ages answered the survey, but with the results skewing older when compared to the broader community, with the median age of survey participants being around 44 years old.[4] The largest segment of participants were from the 55–64-year-old age bracket, followed by the roughly equal 25–34-year-old and 35–44-year-old brackets, and then 45-54 year olds, 18–24-year-olds, people aged 75+ and a small number of participants being under 18.

[1] No questions were mandatory, so not every participant answered every question. Percentages are drawn from valid answers, not from the sum total.

[2] Accurate estimations of intersex populations are difficult to obtain. InterAction cite a systematic review calculating an estimate of around 1.7% of all live births. For more information, see 'Demographics', *InterAction for Health and Human Rights* (Website, last reviewed 11 June 2024) https://interaction.org.au/demographics/.

[3] 'Australia: Aboriginal and Torres Strait Islander population summary', *Australian Bureau of Statistics* (Web page, 1 July 2022) https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary.

[4] Population data from the last Census indicates that 49.3% of the population were male with a median age of 37 years old, and 50.7% of the population were female with the median age of 38 years old, see Australian Bureau of Statistics, *Census of Population and Housing: Population Data Summary, 2021* (28 June 2022) Data Table for Population data summary, Table 3.

HOW LGBTIQ+ PEOPLE EXPERIENCE DISCRIMINATION, HARASSMENT AND VILIFICATION

EXTENT OF DISCRIMINATION AND HATE

Around 73% of survey participants responded that had experienced unfair treatment because of personal characteristics, like sexual orientation, gender identity, sex characteristics, disability, age, religion, or a combination of these.

Our survey participants shared many examples of unfair treatment they had experienced based on one or more of their attributes, and a selection are set out below:

"*I have been called names behind my back, excluded from conversations within the work place and treated as lesser even in situations where I am working harder than others.*"

– Queer, trans man aged 18-24, based in Regional NSW

"*I have been refused services at businesses, I have been discriminated against and verbally harassed at work because of who I love. I have been verbally harassed in public as well as in my workplace by clients.*"

– Lesbian woman aged 45-54 aged, based in Sydney metropolitan area, NSW

"*Since being found out to be transgender almost all the projects I've been invited to help with and be paid have stopped inviting me because transgender people are not welcomed…[I've] [b]een stalked and harassed on the street, at train stations and on trains…The distress and harassment I face from people diminishes my safety, belonging, mental health, financial status (on the edge and struggling) and so many more areas of life.*"

– Lesbian, trans woman aged 45-54 aged, based in Regional NSW

"*I get sexually harassed - not only as a woman but as a lesbian, people don't treat my relationships as seriously as they would a heterosexual one. I also get ableist remarks (get called 'retarded', etc.) for being autistic and having ADHD*"

– Lesbian woman aged 18-24 aged, based in Sydney metropolitan area, NSW

Incidents and attacks at the more serious end of the scale were also shared with us. While it is clear that unfair treatment is part of the broader picture of marginalisation of LGBTIQ+ people, it may also be argued that the festering of discrimination enables more serious crimes founded on anti-LGBTIQ+ prejudice, to occur.

"*I've been sexually assaulted and sexually harassed because of my sexuality. I have been vilified because of my sexuality, and more recently I made a formal complaint at work after a colleague made a homophobic comment to me in a work meeting.*"

– Gay man aged 25-34 based in Regional NSW

"*I had been beaten until unmoving for coming out as queer. This was not done by strangers, nor law enforcement but by people who I once considered my "friends.*"

– Bisexual girl, aged under 18 based in Sydney metropolitan area, NSW

Our survey participants also shared with us the painful way in which incidents of unfair treatment have negatively affected their sense of self and their relationship to the broader community. Some participants felt the need to hide who they are. It is also clear that people from the LGBTIQ+ communities are facing this marginalisation across age brackets and geographical locations in New South Wales.

"*It made me feel sick, unaccepted, inadequate, not worthy.*"

– Gay man aged 25-34 based in Regional NSW

"*It made me feel unwanted and like there was something wrong with me. Self-hate because I didn't choose to be this way and I don't want to stay untrue to myself.*"

– Bisexual, trans femme person aged 25-34 based in Sydney metropolitan area, NSW

Around 67% had either been a victim of or witnessed hate speech in public targeting a group that they are part of (e.g. trans, intersex, gay etc). There were several responses indicating that such incidents, particularly if they had been the victim of hate speech, made participants feel isolated, frightened, angry, vulnerable and in the more severe cases, led to suicidality. A selection of responses we received on the impact of hate speech, are set out below:

"*I was forced to live a lie and prevented me from reaching out for resources and help.*"

– Bisexual, trans non-binary person aged 45-54 based in Regional NSW

"*Want to die. Want to withdraw.*"

– Lesbian, trans woman aged 45-54 based in Regional NSW

"*Experiencing public ridicule was hurtful. I felt ashamed to be different sometimes. Reading hateful media messages and stories was also very demoralising.*"

– Gay man aged 65-74 based in Sydney metropolitan area, NSW

Considering the responses as a whole, our community survey revealed the following key themes:

- **Place matters** – Experiences varied significantly depending on location, with geography in New South Wales strongly influencing participants' sense of inclusion and safety. Schools and workplaces were consistently identified as settings where discrimination and exclusion were experienced.
- **Identity expression** – The ability to express and have one's personal identity validated emerged as a recurring and important theme.
- **Faith-based settings** – The intersection between LGBTQ+ identities and faith-based environments (such as schools, workplaces and service providers) was pronounced, with widespread concern about discrimination and the impact of legal exemptions.

FIXING THE FUNDAMENTALS

The legal framework of the Act requires substantial reform. In this section, we highlight foundational problems with the structure of the Act that must be addressed in any future anti-discrimination legislation in New South Wales. Reviews over several decades have consistently found that the current legal tests for direct and indirect discrimination are not fit for purpose, and have recommended updates to ensure the law provides effective protection against discrimination.

IMPROVING DEFINITIONS OF DISCRIMINATION

The current definitions of 'direct' and 'indirect' discrimination in the Act are complex and out of date with best practice definitions in other federal, state and territory laws. They make it difficult for people who experience discrimination to seek a remedy, particularly if intersectional forms of discrimination are alleged.

Direct discrimination

Question 3.1

The current definition of direct discrimination requires complainants to prove their treatment was less favourable than a comparator in the same or materially similar circumstances.[5] The legal test generates significant uncertainty and legal complexity.

In many cases, there is no actual comparator arising on the facts, requiring courts to construct a hypothetical one. This approach leads courts down an artificial and unhelpful line of inquiry, diverting attention from the deeper, underlying question: did the complainant suffer a detriment because of who they are? As a result, very few complaints of discrimination are ultimately successful in the courts. In contrast, sexual harassment claims are more likely to succeed. This difference reflects the relatively straightforward legal test for sexual harassment, which stands in stark contrast to the overly complex and technical tests for discrimination.

The ACT and Victoria have both removed the comparator test from their definitions of direct discrimination, preferring a simpler *unfavourable treatment* test.[6] The Queensland Human Rights Commission and Western Australian Law Reform Commission made similar recommendations for reform in those jurisdictions.[7] While the Queensland law has also been amended, the relevant provision has yet to commence at the time of writing.[8]

Under the unfavourable treatment model, comparators can still play a role in determining whether discrimination has occurred, but they are no longer central to the analysis. Where a comparison is

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[5] *Anti-Discrimination Act* (NSW) ss 7(1)(a), 24(1)(a), 38B(1)(a), 39(1)(a), 49B(1)(a), 49T(1)(a), 49ZG(1)(a), 49ZYA(1)(a).

[6] *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1). See also *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869, [51]-[53]; *Tsikos v Austin Health* [2022] VSC 174, [47] where the Supreme Court of Victoria endorsed the decision in *Slattery*.

[7] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 20 (see recs 3.1-3.3), 88-95 https://www.qhrc.qld.gov.au/about-us/reviews/ada; Queensland Government, *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (16 December 2022) items 3.1-3.3 https://www.publications.qld.gov.au/dataset/qld-govt-response-qhrc-anti-discrimination-act-review/resource/c0fd9b56-1086-4a1e-87e1-81b4a9aae7aa; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) recs 5 and 13 and at 52-55, 63-64 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa; 'WA's anti-discrimination laws set for overhaul', *Government of Western Australia: WA.gov.au* (Media statement, 16 August 2022) https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/WA's-anti-discrimination-laws-set-for-overhaul-20220816.

[8] *Respect at Work and Other Matters Amendment Act* 2024 (Qld) s 7B.

helpful, the parties can raise it. However, the requirement to construct a hypothetical comparator, particularly where it distracts from the real issue.

> *When we asked survey participants about how direct discrimination should be defined, 84.8% supported the removal of the comparator test and a shift to an unfavourable treatment approach.*

Another benefit of moving away from a strict comparator model is that it allows for better recognition of intersectional discrimination. Under the current approach, identifying an appropriate comparator becomes nearly impossible. For example, if the discrimination is based on a person being both queer and a person of colour, who is the correct comparator? A straight white person? The complexity of this exercise discourages courts from properly considering intersectional treatment, even though it is a common feature of discrimination, especially for marginalised sub-groups.

Indirect discrimination

Questions 3.2 and 3.3

To establish indirect discrimination, the Act requires complainants to prove that they are unable to comply with a requirement, condition, or practice with which a 'higher proportion' of people without the attribute are able to comply.[9] The inability to comply and proportionality elements are out of step with contemporary definitions of indirect discrimination.

Firstly, we think that there is no need to retain the element of 'compliance' with a term – this is evident from the fact that laws in four Australian jurisdictions are working well without it.[10] Additional elements that overly complicate the process of establishing indirect discrimination should be removed. While 'cannot comply' has been read down to include situations involving 'suffering serious disadvantage in complying',[11] the plain wording (in absence of reading the case law) can still create confusion.

The law currently places a high evidentiary burden on complainants, and can involve complex statistical analysis to show a difference in impact between the base group and the group with the protected attribute. When most complainants are self-represented, this technical requirement creates a major barrier. For communities that are under-researched, such as LGBTIQ+ people, the necessary statistical evidence often does not exist.

The ACT, Victoria, Tasmania and the Commonwealth *Age Discrimination Act* and *Sex Discrimination Act 1984* (***Sex Discrimination Act***) have implemented a 'disadvantage' test.[12] The Queensland Human Rights Commission and Western Australian Law Reform Commission made similar recommendations for reform.[13] Again, Queensland has enacted but not yet commenced the change.[14]

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[9] *Anti-Discrimination Act* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b)-(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).

[10] ACT, Victoria, Tasmania and the *Sex Discrimination Act 1984* (Cth).

[11] *Hurst v Queensland* [2006] FCAFC 100; (2006) 151 FCR 562.

[12] See *Discrimination Act 1991* (ACT) s 8(3); *Equal Opportunity Act 2010* (Vic) s 9(1)(a); *Anti-Discrimination Act 1998* (Tas) s 15(1); *Age Discrimination Act 2004* (Cth) s 15(1)(c); *Sex Discrimination Act 1984* (Cth) s 7B(1).

[13] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) rec 3.5 and at 96-101 https://www.qhrc.qld.gov.au/about-us/reviews/ada; Queensland Government, *Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (16 December 2022) item 3.5 https://www.publications.qld.gov.au/dataset/qld-govt-response-qhrc-anti-discrimination-act-review/resource/c0fd9b56-1086-4a1e-87e1-81b4a9aae7aa; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 5 (rec 9), 57-58 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa; 'WA's anti-discrimination laws set for overhaul', *Government of Western Australia: WA.gov.au* (Media statement, 16 August 2022) https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/WA's-anti-discrimination-laws-set-for-overhaul-20220816.

[14] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7B.

Our community survey participants strongly supported the shift to focussing on whether a rule or requirement puts some people at a disadvantage (88.9%).

Of the available options, the preferred approaches are found in the ACT law and in the yet-to-commence amendments in Queensland. These models make it clear that it is not necessary to prove disadvantage to an entire group. It is enough to show that the condition, requirement or practice disadvantages the complainant themselves because they have a protected attribute.

Comparisons between a base group and narrower group of people with the protected attribute may remain part of the analysis because the concept of disadvantage inherently involves some comparison — where one group experiences poorer treatment than another resulting from a neutral term. However, this does not mean courts need to engage in overly technical statistical analysis in order to make this comparison effectively.

Question 3.4

Following recent recommendations to expand the list of factors used to assess reasonableness in Western Australia and Queensland,[15] we suggest adopting a broader list of relevant considerations. The benefit of this change is that it shifts the assessment away from a narrow cost–benefit analysis and instead frames it through a human rights lens, focusing on the dignity, equality, and participation of the affected individual or group. However, we recommend that this list of considerations not be mandatory. Requiring courts to consider each factor in every case may create an overly onerous process and unduly constrains judicial discretion.

Our preferred approach is a non-exhaustive list of optional considerations as follows:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice;
- whether any adjustment could be made to the condition, requirement or practice to reduce the disadvantage caused;
- whether there is an alternative condition, requirement or practice that would achieve the result sought by the person imposing, or proposing to impose, the condition, requirement or practice and would result in less disadvantage;
- the cost of any adjustment or any alternative condition, requirement or practice;
- the financial circumstances of the person imposing, or proposing to impose, the condition, requirement or practice;
- any other relevant matter.[16]

The Consultation Paper asks whether a proportionality approach may be preferrable over the traditional 'reasonableness' consideration which has always been a feature of Australian laws.[17] A proportionality test typically involves structured steps (legitimate aim, suitability, necessity, and

[15] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 5 (rec 10), 59-60 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 21 (rec 3.6), 101-103 https://www.qhrc.qld.gov.au/about-us/reviews/ada.

[16] *Respect at Work and Other Matters Amendment Act* 2024 (Qld) s 7B.

[17] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 32-33.

balance), while reasonableness tests incorporate similar ideas, but in a way that is more flexible and familiar in the Australian anti-discrimination context. We consider that our suggested broader, contextual approach to assessing reasonableness will, in effect, operate similarly to a proportionality test — particularly by requiring decision-makers to weigh disadvantage against the objective being pursued.

We are concerned that using only the language of 'a proportionate means of achieving a legitimate aim,' as used in the UK's *Equality Act 2010* (UK),[18] without further statutory guidance, may lead to uncertainty in interpretation and application. Careful consideration would be required about whether the UK case law would be sufficient to draw upon to bridge this gap within the New South Wales context.

We note the Consultation Paper cited the Australian Human Rights Commission (**AHRC**) stating describing the capacity of the UK proportionality test to 'enable more rigour and specificity'. [19] However, we also note, that in the same report, *Free and Equal: A reform agenda for federal discrimination law*s, the AHRC states that an extended list of factors to assess reasonableness, as used in Victoria, is similar to the UK proportionality test and comes close to it in practice. The approach of including a list of factors to assess reasonableness would enable greater specificity and rigour, and enable litigants to draw upon the decisions across multiple jurisdictions.

Question 3.5

Characteristics extensions for attributes should apply to both direct and indirect discrimination, as is already the case in Queensland, ACT, Victoria, and has been recommended for the Western Australian law.[20] This would particularly aid in situations where a policy is indirectly discriminatory because of characteristic of a protected ground.

For example, a characteristic of being a trans man may include the need for smaller-sized men's clothing. A failure to provide appropriately sized men's staff uniforms could therefore amount to indirect discrimination on the basis of gender identity (as a characteristic that a trans man generally has or is imputed to the group).

Discrimination can be at once direct and indirect

Question 3.7

We do not recommend removing the distinction between direct and indirect discrimination. These concepts are well-established in Australian law and have an educational aspect for the community by helping illustrate the different ways in which discrimination can occur. In the absence of the distinction, we would fear that indirect discrimination, being the more complex and less obvious type, would be overlooked or underenforced.

However, we do support a more flexible approach that recognises a single incident may amount to both direct and indirect discrimination (rather than the concepts being considered mutually exclusive). This would reduce the tendency of courts to become overly focused on categorisation. In practice, complainants are often forced to choose one path over the other, and we have seen cases fail simply

[18] *Equality Act 2010* (UK) s 19(2)(d).

[19] Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021) 296-7 https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws.

[20] Law Reform Commission of Western Australia, Review of the Equal Opportunity Act 1984 (WA), Project 111, Final Report (2022) 65.

because the wrong framing was chosen — despite the facts potentially supporting a successful claim under the alternative test.

RECOMMENDATIONS

To improve the definitions of direct and indirect discrimination, we recommend:

- retaining the distinction between direct and indirect discrimination, allowing flexibility for a single act, decision or policy to constitute both direct and indirect discrimination.
- removing the requirement to identify a comparator, adopting the 'unfavourable' treatment approach from Victoria and ACT.
- replacing the current test for indirect discrimination with a 'disadvantage' test that does not require consideration of compliance with the term, proportionality of those who can comply, nor the complainant to establish disadvantage to an entire group.
- expanding the grounds for reasonableness based on Queensland reforms (uncommenced).
- ensuring that characteristics extensions apply to direct and indirect discrimination (and also vilification, as explored further on page 45).

MODERNISING THE ATTRIBUTES

It is important to include separate attributes that cover each of the sub-populations falling within the broader LGBTIQ+ population.

The LGBTIQ+ population includes:

- lesbians, gay men, bi+ and queer people whose sexual orientation is defined by the gender(s) to whom they are emotionally, romantically or sexually attracted.
- asexual and aromantic people whose sexual orientation is defined by varying degrees of romantic or sexual attraction (or lack of attraction) to other people.
- trans and gender diverse people whose gender differs from the one presumed for them at birth, and which includes people who identify as male or female, non-binary, agender and genderfluid, among other gender identities.
- intersex people who have innate variations of physical sex characteristics (such as chromosomal, hormonal or genital variations) that do not conform to medical or social norms for male or female bodies.

People within the broader LGBTIQ+ population may belong to one or more of these sub-populations, depending on their gender, whether they were born with a variation of physical sex characteristics and the genders to whom they are attracted or intimately involved, if attracted to or intimately involved with others at all. That is why separate attributes are used in most federal, state and territory laws to cover these different aspects of personality. These attributes also recognise that different forms of prejudice, such as homophobia, biphobia, transphobia and discrimination against intersex people, can manifest in different ways, and people who belong to more than one subpopulation may experience intersectional forms of discrimination. For example, a trans woman who is attracted to women may experience discrimination in the provision of services both on the basis of her transgender status and because she is attracted to women. We explore how to best capture intersectional discrimination later in this section on page 25.

The Act has fallen significantly out of step with the names and definitions of protected attributes used in federal, state and territory laws. There is inconsistency within the Act itself between the attributes

protected from discrimination and those protected from vilification, as well as between the Act and other legislation such as the *Crimes Act 1900* (NSW). These inconsistencies create uncertainty in statutory interpretation, as courts may be left to resolve conflicting terms, definitions or legislative purposes across related laws. This can undermine the clarity, accessibility and effectiveness of protections, and increase the risk that vulnerable groups fall through the gaps.

The Act currently uses outdated definitions of 'homosexuality' and 'transgender status'.[21] These definitions exclude bisexual and asexual people from protections based on sexuality, and non-binary people from protections based on gender identity, among others. In addition, there are currently no separate protections in the Act to protect intersex people from discrimination.[22] We explain in further detail in the following sections, how to modernise the Act and best protect all of these groups.

If the Review is minded to recommend the repeal and replacement of the Anti-Discrimination Act, which was the conclusion reached by the Queensland Human Rights Commission review and suggested as an option by the Western Australian Law Reform Commission,[23] we recommend a complete restructure of the legislation.

We suggest adopting the model used in most state and territory jurisdictions such as Queensland, Victoria and the Northern Territory, where the Act begins with a list of protected attributes, rather than embedding each attribute within the legal tests for direct and indirect discrimination and vilification. This avoids the need to constantly repeat similar text throughout the legislation for each attribute, reduces complexity for readers, and simplifies the process of amending the protected attributes or inserting new attributes as the need arises. This approach also better enables the inclusion of 'association with a person who has a protected attribute' as a standalone ground, which we discuss in further detail at page 24 of this submission.

SEX/GENDER DISCRIMINATION

Question 4.7(1)

Name of protected attribute

We do not hold strong views on whether the attribute is named 'sex' or 'gender', though we note that most jurisdictions use 'sex', with the exception of Tasmania, which uses 'gender'. What matters more is that the law avoids creating two separate and potentially conflicting concepts of sex and gender. A single, clear and inclusive attribute should be adopted, rather than attempting to define both separately.

Care must be taken to avoid separating the attributes of sex or gender and gender identity in ways that produce exclusionary outcomes for trans people. All people have a sex / gender (such as male, female or non-binary), and all people have a gender identity (such as transgender, cisgender or non-binary). The law should reflect this reality without artificially dividing concepts that, in practice, often overlap.

Although only applicable to those who have formally amended their sex marker (i.e. not all trans people), from 1 July 2025, those who have updated their records must be treated as their sex under all

[21] *Anti-Discrimination Act 1977* (NSW) ss 4, 38A(a)-(c).

[22] There is arguably a protection for people of 'indeterminate sex' under the definition of transgender status, which is an inappropriate conflation of two different (yet sometimes overlapping) populations.

[23] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 39-40 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.

state laws.[24] The law must be written in such a way to ensure the gender recognition scheme in the Births, Deaths and Marriages Registration Act is congruent with the state's anti-discrimination law.

Meaning of 'sex'

Consistent with the beneficial and protective nature of discrimination law, definitions of protected attributes should not be overly restrictive or narrow. The attribute of 'sex' should be understood in an inclusive and expansive way that goes beyond biological characteristics to encompass social, legal and cultural recognition.

We do not consider there to be benefit in attempting to define 'sex' (or 'gender' if that option is preferred), since it can and does take its ordinary meaning in the statutory context. Any attempts to limit sex to notions like 'biological sex at birth' or 'biological sex' are reductive, unscientific, and lead to unjust outcomes for trans people.

It is also unclear what, in practice, would constitute 'biological sex' for legal purposes. Would it be based on the assignment of at birth, hormone levels, chromosomes — despite most people never having undergone chromosomal testing — or secondary sex characteristics such as facial hair or breast development? These approaches are not only arbitrary, but unworkable in legal contexts. For example, a trans man who has undergone testosterone treatment may be indistinguishable in appearance from a cisgender man, is socially recognised as male, and lives his life as a man. On what basis would the law claim otherwise? Rather, the person's sex should be observed at the relevant time — when the discrimination occurred, not based on their designation of sex at birth.

The risks of narrowing the definition of sex are evident in the case of *Tickle v Giggle*,[25] where the court was asked to consider whether a trans woman who had legally changed her sex marker and was recognised socially and legally as a woman could be excluded from a platform on the basis of her so-called 'biological sex'. Consistent with earlier case law, the tribunal rejected the attempt to restrict the meaning of 'woman' to exclude trans women, confirming that legal and lived identity are relevant to the attribute of sex. This matter is currently on appeal, with the decision to be handed down by February 2026.[26]

The Western Australian Law Reform Commission erred in its review of anti-discrimination law when it appeared to treat 'sex' as referring only to a person's 'biological sex' assigned at birth, because it failed to engage in any way in the relevant case law on the topic.[27] In contrast, the Queensland Human Rights Commission's review of Queensland's *Anti-Discrimination Act* explicitly rejected this narrow construction, instead recommending that the law recognise sex in a way that reflects a person's lived and legal identity. [28]

Tickle v Giggle follows a significant line of case law that has considered the legal definitions of 'sex', 'man' and 'woman' in other legislative contexts, with each arriving at a position that has rejected the

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[24] *Births Deaths and Marriages Act 1995* (NSW) s 32H(1) states that a person whose record of sex is altered under this part is, for the purposes of a law of this State, a person of the sex stated in the altered record.

[25] *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960.

[26] See the Federal Court of Australia online file for *Giggle for Girls Pty Ltd v Roxanne Tickle* (Appeal), in which Equality Australia was an intervening party.

[27] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 113 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.

Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 277-78 https://www.qhrc.qld.gov.au/about-us/reviews/ada.

idea of a person's sex being defined solely by biological characteristics observed at birth. For example, see:

- *R v Harris* (1988) 17 NSWLR 158, 193-194 (Mathews J; Street CJ agreeing). Mathews J (Street CJ agreeing) expressly reject an approach which would regard 'biological factors as entirely secondary to psychological ones': at 193 (concerning whether a trans woman was a 'male person' for the purposes of a sexual offence)
- *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, 304-305 (Black CJ; Heerey J agreeing), 325-326 (Lockhart J; Heerey J agreeing) (concerning a social security payment)
- *Kevin v Attorney-General (Cth)* (2001) 165 FLR 404, 475 [329] (Chisholm J), affirmed on appeal in *Attorney-General (Cth) v Kevin* (2003) 172 FLR 300 (concerning whether the meaning of 'man and woman' for the purposes of marriage)
- *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528, 531 [4] (considering whether a trans woman is a woman for the purposes of the Western Australia's gender recognition legislation)
- *Attorney-General for NSW v FJG* [2023] NSWCA 34, [71] per Beech-Jones JA with whom Bell CJ and Ward P agreed (in which the court recognised that a person's sex is statutory concept which could have three different meanings in three different statutes which have changed over time)
- *Registrar of Births Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490 (determined that a person's sex could be 'non-specific')
- *AB v Western Australia* (2011) 244 CLR 390 (trans men who had undergone mastectomies and hormone treatment were of male sex, because of social recognition as their sex, and there was no need to scrutinise the person's bodies (particularly genitalia) to make that determination.

An expansive understanding of 'sex' is consistent with the protective purpose of discrimination law, which must apply equally to trans and cisgender people.[29] The position in New South Wales should be made much clearer on this point, given the Act uses binary gendered language[30] and appears to suggest that only so-called 'recognised' transgender people become members of the same sex as they identify.[31]

Whatever approach is adopted in defining or describing the attribute of sex, it is essential that trans people are not deprived of the ability to claim sex discrimination in the same way that cisgender people can make such a claim. For example, a trans woman may need protection from discrimination precisely because she is a woman — not because she is trans. It is inappropriate and invasive to require her to disclose her trans status in order to claim the same rights as other women. For instance, in a situation where all female employees in a workplace are made redundant, whether any individual woman within the group is transgender should be irrelevant to her right to legal protection.

[30] For example, references are made to 'men and women' and people of the 'opposite' (rather than a different) sex.

[31] See e.g., *Anti-Discrimination Act 1977* (NSW), ss 31A(4), 38B(1)(c).

Remove binary language

Definitions of 'sex', 'woman' and 'man', where there is even a need to use these terms in the legislation, are best left undefined. These concepts are complex, overlapping, and shaped by evolving social and legal understandings. Attempting to reach a fixed or consensus definition is both impractical and unnecessary.

The language in anti-discrimination law must be updated to ensure that non-binary and other gender diverse people are not excluded by binary terminology. This was effectively addressed in the 2013 amendments to the federal *Sex Discrimination Act 1984* (Cth), which removed the definitions of 'man' and 'woman' and replaced the term 'opposite sex' with 'different sex'.[32] Similar reforms are needed in New South Wales to ensure inclusive and contemporary protections for all people, regardless of gender identity.

RECOMMENDATIONS

- Ensure that sex or gender-based discrimination protections in anti-discrimination legislation do not discriminate against trans people, by ensuring the attribute of 'sex' or 'gender' does not import a gender binary and is not defined, or could be misinterpreted to mean sex assigned sex at birth.
- The legislation should not refer to terms like 'opposite sex', instead preferring 'different sex'.
- 'Sex' should not be defined in the Act, and if it is necessary to retain terms like 'man' or 'woman' they should not be defined.

PREGNANCY AND BREASTFEEDING

Question 4.7(2)

Most jurisdictions separately recognise the attributes of breastfeeding and pregnancy, but they may be recognised as characteristics of sex discrimination. It would be much more straight forward to have these as separately protected attributes, as it reduces potential hurdles for the complainant and makes the law clearer for those who must comply with it.

Should the relevant pregnant or breastfeeding person not be a woman, such as a non-binary person or a trans man, or is a woman who has induced lactation (including as an adoptive parent or parent of a child born via surrogacy) they may not be as clearly protected, or may have additional difficulty establishing that they are protected under sex discrimination.

In our view, the binary language in a section that clarifies that granting a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding does not constitute sex discrimination against a man[33] is redundant. The situations contemplated by this section, such as providing a private space for breastfeeding, or providing additional leave entitlements for those who give birth, will be already covered by special measures. If there is a need to retain this position, the binary language would need to be removed (consistent with our advice above in relation to binary terms).

RECOMMENDATIONS

- Separately include the protected attributes of breastfeeding and pregnancy.

[32] See *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1, cls 8, 14.

[33] *Anti-Discrimination Act 1977* (NSW) s 35.

SEXUAL ORIENTATION

Question 4.4

The term 'sexual orientation', which is presently used in the *Crimes Act 1900* (NSW) is a more appropriate term compared with the term 'homosexuality' which is the current wording in the Act. The Yogyakarta Principles, which are instructive on the application of international human rights law in relation to sexual orientation, uses the term 'sexual orientation' and defines it as 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.[34]

'Sexual orientation' is more reflective of the diverse range of sexual orientations in our community and would fix the current gap in the 'homosexuality' attribute which excludes bisexual and asexual people from being protected, as identified in our Preliminary Submission to this review.[35]

Respondents to our community survey overwhelmingly supported the protections for all sexual orientations, including bisexual, pansexual, queer, asexual, heterosexual (94.8%)

The best approach to take would be for the Act to use the term sexual orientation based on the broad framing of the Yogyakarta Principles but expanded further to include the lack of attraction to any gender, in order to include asexual people.

The need for anti-discrimination protections to be in place for asexual people is two-fold:

1. Asexuality is a valid orientation in its own right, characterised by experiencing little, rare, or no sexual attraction; and
2. Asexual people face discrimination on the basis of their sexual orientation, as explained below.

La Trobe University's Private Lives 3 study found that asexual people also had the lowest proportion of all sexual orientations included in the study, of currently feeling accepted 'a lot/always' at work.[36] A lower proportion of asexual people felt this way in the context of accessing a health or support service compared to all other sexual orientations, except for people who identified as queer, and also had the lowest proportion of respondents responded with 'very good /excellent' general health (17.8%) across all sexual orientations.[37]

Further, Ace & Aro Collective AU found that, in relation to their asexual identity:

- 18.74% of people had experienced some form of sexual violence (of all respondents, 18.36% experienced sexual harassment, 5.88% stalking, 7.98% rape threats, 11.82% sexual assault and 5.16% rape);[38]

[34] *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) 6 n 1.

[35] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 5.

[36] Private Lives 3, 39.

Ibid 39, 43.

[38] Kate Wood, "'I don't know if this counts but…": A detailed study of acephobic discrimination, violence, oppression and hate crime"' (Asexual Lived Experiences Survey 2021: Final Report, Revised Edition, Ace & Aro Collective and ACT Aces, March 2024) 130, 132 https://acearocollective.au/read-the-report/.

- 22.26% of people had experienced some form of physical violence and threats (of all respondents, 6.12% experienced assault, 11.64% threats of violence, 13.62% online threats, 4.08% property damage, 10.74% self harm/suicide baiting).[39]

The wording of the definition of 'sexual orientation' could be adopted from the *Respect at Work and Other Matters Amendment Act 2024* (Qld) in Queensland,[40] which sought to insert the following definition into the *Anti-Discrimination Act 1991* (Qld):

> '***sexual orientation***, of a person, means the person's capacity, or lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender.'[41]

The broad wording in this definition extends to sexual orientations beyond homosexuality, and the phrase 'lack of capacity' explicitly extends protections to asexual people. However, we would make one clarification which is that the word 'gender' when used in the definition should be instead replaced with 'sex' if the term 'sex' discrimination (rather than gender discrimination) is retained in the Act. This will avoid fragmenting the meaning of gender and sex throughout the Act.

Other jurisdictions, such as the ACT, have taken a different approach to ensuring the attribute relating to 'sexual orientation' is inclusive. The ACT defines 'sexuality' as *including* heterosexuality, homosexuality and bisexuality.[42] The use of the term '*includes*' replaced a previously exhaustive definition limited *only to* heterosexuality, homosexuality and bisexuality.[43]

In our recommendations, we suggest adopting aspects of both the Queensland and ACT approaches.

> "*Homosexual is only one way to be non-conforming sexually. I am on the Asexual spectrum as well as considering myself pansexual in terms of romantic attraction. The concept of "homosexual" as the only alternative to "heterosexuality" is insufficient and not representative of the human experience*"
>
> **– Queer, trans woman on the asexual spectrum, aged 55-64 based in Sydney metropolitan area, NSW**

RECOMMENDATION 5

- Replace the attribute of 'homosexuality' with 'sexual orientation'.
- Define 'sexual orientation' to mean a person's capacity, or lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender/sex or the same gender/sex or more than one gender/sex, including homosexuality, bisexuality and asexuality.

GENDER IDENTITY

Question 4.8

[39] Ibid 145, 147.

[40] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 52 (the commencement of which has been paused for the time being).

[41] *Respect at Work and Other Matters Amendment Act 2024* (Qld) cl 52, sch 1 (definition of 'sexual orientation') (provision not yet commenced).

[42] *Discrimination Act 1991* (ACT) Dictionary (definition of 'sexuality').

[43] See *Justice Legislation Amendment Act 2020* (ACT) s 65.

Part 3A of the Act, covers discrimination on 'transgender grounds'.[44] As identified in our Preliminary Submission, the term of 'transgender grounds' used in the Act excludes people who are non-binary,[45] and differs from the use of the attribute of 'gender identity' in the anti-discrimination laws of Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory and Northern Territory, and under federal law as observed in the Consultation Paper.[46]

91.5% of the participants to our community survey were supportive of the use of the term 'gender identity' rather than 'transgender' in order to include non-binary people and the concept of gender expression

The Yogyakarta Principles define 'gender identity' as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'[47] This definition is resembled but not adopted verbatim in the *Sex Discrimination Act 1984* (Cth) and s 93Z of the *Crimes Act 1900* (NSW) as noted by the Consultation Paper:[48]

We note that the Commission is also considering the definition used in Queensland law, which differs slightly, and we would support implementing this definition, as follows:

> '***gender identity***, of a person—
>
> (a) is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
> (b) without limiting paragraph (a), includes—
> (i) the person's personal sense of the body; and
> (ii) if freely chosen—modification of the person's bodily appearance or functions by medical, surgical or other means; and
> (iii) other expressions of the person's gender, including name, dress, speech and behaviour.'[49]

The Review may also consider the interpretation of 'gender identity' that will be ultimately adopted by the full Federal Court in the yet to be decided *Giggle for Girls & Anor v Tickle* appeal proceeding.[50] Should the case establish clear authority on the meaning of 'gender identity,' we would prefer New South Wales adopt the definition used in the Commonwealth, *Sex Discrimination Act* and *Crimes Act*

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[44] Section 38A defines transgender persons as those who (a) identity as a member of the opposite sex by living or seeking to live as one, (b) have identified as a member of the opposite sex by living as one, or (c) if of indeterminate sex, identifies as a member of a particular sex by living as one. This definition includes people regarding of whether they are a 'recognised transgender person', and includes people perceived as being transgender.

Section 4 of the Act defines 'recognised transgender person' as a 'a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction'. That is, a recognised transgender person would have changed their birth certificate to indicate the sex with which they identify.

[45] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 5.

[46] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 61 citing *Sex Discrimination Act 1984* (Cth) s 5B; *Discrimination Act 1991* (ACT) s 7; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16; *Discrimination Act 1992* (NT) s 19.

[47] *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) 6 n 2.

[48] See NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 61 citing *Sex Discrimination Act 1984* (Cth) s 4 and *Crimes Act 1900* (NSW) s 93Z.

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

[50] 'Giggle for Girls Pty Ltd v Roxanne Tickle (the Appeal): Online fine', *Federal Court of Australia* (Web page, 12 August 2025) https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/giggle-for-girls-v-roxanne-tickle.

1900 (NSW). It has taken 12 years for a superior court to consider this term under the Sex Discrimination Act, and consistency would bring real benefits — particularly if the case produces an authoritative, inclusive interpretation that New South Wales can draw upon.

We further note that the Consultation Paper refers to the analysis of the *Sex Discrimination Act* definition in *Tickle v Giggle* as inclusive of 'other kinds and aspects of gender identification' beyond transgender and cisgender identities'.[51] While the Yogyakarta Principles provide an expansive definition, it may be clearer and more accessible to also include the terms 'transgender' and 'non-binary' explicitly, to alleviate any ambiguity that the about who is intended to be protected by the attribute.

The definition in the *Anti-Discrimination Act 1998* (Tas) is worth considering, which effectively uses the same definition in full, but has included a further phrase at the end of the definition, being ', and may include being transgender or transsexual'. For the present purpose, this approach can be adapted into a phrase that states ', and may include being non-binary', to be inserted at the end of the definition of gender identity under the Act.[52]

In the alternative, the law could include a note which consists of the definition of gender identity, and states words to the effect of: 'an example of a *gender identity* is transgender or non-binary'. Such a note would ensure further clarity in the interpretation of the term and provide certainty to the affected groups that they enjoy anti-discrimination protections.

> "*The changes implemented by the Equality Legislation Amendment (LGBTQIA+) allowing for non-binary as an option for sex-markers was a fantastic first step… I'm extraordinarily grateful for this piece of legislation. However, further change is needed to recognise non-binary folk in the eyes of the law, and to put an end to the trans-medical narrative that gender identity must be intrinsically tied to sex.*"
>
> – **Queer, trans woman, aged 25-34.**

RECOMMENDATIONS

- Replace the attribute of 'transgender grounds' with 'gender identity'
- Define 'gender identity' consistently with the Yogyakarta Principles, adopting either the definition from Queensland, or the Sex Discrimination Act (and New South Wales Crimes Act), subject to developments in the meaning of gender identity under the *Sex Discrimination Act*

SEX CHARACTERISTICS

Question 5.2

Unfortunately, people who have innate variations of sex characteristics experience various kinds of discrimination and verbal abuse when receiving education, when obtaining goods and services (particularly in medical settings), and in employment, and also often experience discrimination when accessing insurance. While research on this population group is very limited, the information available

[51] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 62 citing *Tickle v Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960, [74].

[52] For reference, the Oxford Dictionary's defines 'non-binary' as follows: 'Of a person: not identifying as male or female; having a gender identity that does not conform to traditional binary notions of gender (according to which all individuals are exclusively either male or female). Also: designating such a gender identity; of or relating to (people with) such a gender identity.', see *Oxford Dictionary* (online, 27 August 2025) 'non-binary' (def 2b).

indicates that experiences of discrimination by strangers are common in Australia.[53] A 2020 survey from the United States found that intersex people experience even higher rates of stigma and discrimination compared with LGBTQ+ peers, and also showed high rates of avoidance behaviour to prevent experiences of discrimination in medical and other settings.[54] While there is limited data on experiences of vilification, it is possible to observe high rates of online abuse directed at sports women who are, or are presumed to be, intersex.

> "*I was born with an IS condition and assigned male at birth. In spite of surgery as a child (so I could at least urinate), my mind (to me) was female. I transitioned to female many years ago, and thankfully had no issues 'passing' (as is often the case with people who have IS conditions). I completed university and had a long career in employment services. I have an 'adopted' family and am a grandmother to three lovely young Australians. I will never understand how a society can discriminate against people such as myself. Luckily, I have not encountered this issue, but it has always been an underlying worry, especially how 'exposure' might have impacted my family. I want to see this sorry state of affairs fixed, especially for others who may not have been as lucky as me.*"
>
> – **Trans woman with variation of sex characteristics, aged 65-74 based in Regional NSW**

As noted in our Preliminary Submission to the NSW Law Reform Commission, there are currently no protections in the Act for people with intersex characteristics,[55] and as the Consultation Paper notes, this is unlike most other Australian discrimination laws.[56] After outlining the options below, we ultimately recommend that the attribute of 'sex characteristics' is incorporated into the Act.

As identified by the Consultation Paper, and noted in our Preliminary Submission,[57] there are three alternative approaches which may be taken to define a sex characteristics attribute.[58]

Approach 1: 'intersex status'

As the Consultation Paper notes, the recent s 93Z of the *Crimes Act* makes it an offence to publicly threaten or incite violence towards an individual or a group because of a prescribed attribute, and this includes intersex status. Section 93Z defines intersex status as:[59]

> 'the status of having physical, hormonal or genetic features that are—

[53] 66% of participants in a study experienced discrimination on the basis of their intersex variation from strangers, see 'New publication "Intersex: Stories and Statistics from Australia"', *InterAction for Health and Human Rights* (Blog Post, revised 11 June 2024) https://interaction.org.au/30313/intersex-stories-statistics-australia/.

[54] Caroline Medina and Lindsay Mahowald, 'Key Issues Facing People with Intersex Traits', *The Center for American Progress* (online, 26 October 2021) https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/.

[55] Again, as noted in our Preliminary Submission, while there arguably a protection for people of 'indeterminate sex' under the definition of transgender status, this would be an inappropriate conflation of two different, albeit sometimes overlapping, populations; see Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 5, n 2.

[56] N NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 82 citing *Equal Opportunity Act* (2010) (Vic) s 6(oa); *Discrimination Act 1991* (ACT) s 7(v); *Sex Discrimination Act 1984* (Cth) s 5C; *Equal Opportunity Act 1984* (SA) s 29; *Anti-Discrimination Act 1998* (Tas) s 16(eb); *Anti-Discrimination Act 1992* (NT) s 19(ca); *Anti-Discrimination Act 1991* (Qld) s 7(o); *Fair Work Act 2009* (Cth) s 351(1).

[57] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 8.

[58] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 82-3.

[59] *Crimes Act 1900* (NSW) s 93Z(3) (definition of 'intersex status').

(a) neither wholly female nor wholly male, or

(b) a combination of female and male, or

(c) neither female nor male.'

This definition is also used under the *Sex Discrimination Act* and *Fair Work Act*.[60] This definition is not preferred as it may continue to lead to misconceptions that being intersex is a 'third sex'. As InterAction for Health and Human Rights (**InterAction**), the leading national body by and for people with innate variations of sex characteristics in Australia, explains:

> 'Harms associated with assumptions about our identities can arise from assumptions that we have a nonbinary gender identity, or that we are female or male, that we are not female or male enough, that we are queer, that we are heterosexual, or that being intersex means we are old enough to freely express an identity. We are not a homogeneous population.'[61]

In light of this, Approach 1, while having been adopted already in NSW and at the Commonwealth level, could contribute to entrenching an outdated definition that can continue to lead to incorrect assumptions about intersex people's lived experiences.

> "*Many intersex people have immutable variations of sex characteristics that don't fit into the sex / gender binary while not even having an "intersex status". Many of us don't have the official intersex status because our genitals at birth were close enough to either male or female to pass as normal rather than abnormal such as myself. Many intersex people don't start developing variant sex characteristics until we go through puberty, if we even go through puberty at all. The anti-discrimination laws should take this into account because our discrimination isn't ever based off of a status we have in our medical records, it's always based off our presentation and/or immutable variations in sex characteristics.*"
>
> **– Genderfluid person with variation of sex characteristics, aged 18-24 based in Sydney metropolitan area, NSW**

Approach 2: 'sex characteristics'

The second approach the Consultation Paper canvases is a more widely adopted attribute of 'sex characteristics' and corresponding definition.[62] The definition used by the Australian Capital Territory, Victoria, Tasmania, Northern Territory and Queensland, which draws from the *Yogyakarta Principles plus 10*, is 'a person's physical features relating to sex, including—

(a) genitalia and other sexual and reproductive parts of the person's anatomy, and
(b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty'.[63]

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[60] *Sex Discrimination Act 1984* (Cth) ss 4 (definition of 'intersex status'), 5C; *Fair Work Act 2009* (Cth) ss 12 (definition of 'intersex status'), 351(1), 772(1)(f).

[61] 'Discrimination', *InterAction for Health and Human Rights* (Web page) https://interaction.org.au/discrimination/.

[62] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 315 https://www.qhrc.qld.gov.au/about-us/reviews/ada, citing *The Yogyakarta Principles Plus 10* (adopted 10 November 2017, Geneva) 6. See also Intersex Human Rights Australia, Submission No PAD02 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (February 2022) 8.

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

We understand the Commission has considered our commentary in the Preliminary Submission on how the interaction between 'sex characteristics' and the existing comparator test may not function well for the purposes of protecting people with intersex characteristics.[64] As we noted then, InterAction (formerly, Intersex Human Rights Australia) preferred 'sex characteristics' on the basis that it would apply to everyone and not distinguish intersex people as having a separate identity or necessarily identity as other than male or female simply because of their intersex variation.[65] The fact that an appropriate comparator would be difficult to apply to the attribute, as is the case for many other attributes too, is a further compelling reason for the Commission to recommend a shift away from the comparator test, as discussed on page 7 of this submission.

Approach 3: 'variation of sex characteristics'

As the Consultation Paper notes, a further alternative framing is 'variation of sex characteristics,' which was included in the proposed amendments to the Act within the initial iteration of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) (**Equality Bill**).[66] This initial version of the Equality Bill used the following definition for people with a variation of sex characteristics:

(a) means a person who has an innate variation of primary or secondary sex characteristics that differ from norms for female or male bodies, and
(b) includes a reference to the person being thought of as having a variation of sex characteristics, whether the person has, or had, a variation of sex characteristics.[67]

While this version of the attribute and definition were removed from the Equality Bill before being passed into law, it is noted that the reforms as passed, insert the term 'variations of sex characteristics' into other legislation, albeit without defining it further.[68]

Suggested approach

Should the comparator test be abolished, we endorse the adoption of Approach 2 above. However, if this is not the case, the appropriate approach to take would be Approach 3, with the caveat that it would require future consideration to be given to amending the *Crimes Act 1900* (NSW) s 93Z to ensure consistency across NSW laws on this issue.

RECOMMENDATIONS

- Include sex characteristics as a protected attribute.
- If the comparator test is **removed** – define the attribute as: 'a person's physical features relating to sex, including (a) genitalia and other sexual and reproductive parts of the person's anatomy, and (b) the person's chromosomes, genes, hormones, and secondary physical features that emerge as a result of puberty'
- If the comparator test is **retained** – frame the attribute as 'variations of sex characteristics' and use the following definition for people with variations of sex characteristics '(a) a person who has an innate variation of primary or secondary sex characteristics that differ from norms for female or

[64] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 83.

[65] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 8.

[66] Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), First Print, sch 1 [13].

[67] Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW), First Print, sch 1 [13].

[68] *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) schs 1 [2(1)(b)], 2 [1], 3 [1], 4 [2] amending respectively, *Births, Deaths and Marriages Registration Act 1995* (NSW) s 16, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(b), *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7 and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

male bodies, and (b) includes a reference to the person being thought of as having a variation of sex characteristics, whether the person has, or had, a variation of sex characteristics'

RELIGIOUS BELIEF OR ACTIVITY

Question 5.2

We support the inclusion of 'religious belief or activity' as a protected attribute, consistent with federal law and the approach in most states and territories. This would address a significant gap in New South Wales law, which currently protects against discrimination for some ethno-religious groups (such as Sikhs and Jews) but not for people of faith more broadly. The Act should also clarify that religious belief or activity includes either holding or not holding a religious belief.

Being religious and being LGBTQ+ are not mutually exclusive. In fact, people who belong to both communities can experience a distinct form of intersectional discrimination. This type of discrimination should be clearly recognised and prohibited in New South Wales law.

For example, Karen Pack — a deeply religious woman — lost her job after becoming engaged to her now wife:

> *In 2020, Karen was fired from her role as a teacher at a Baptist tertiary college in Sydney after she became engaged to her same-sex partner, Bronte. Karen was employed by the college in February 2018 and lectured in chaplaincy and spiritual care, a post-graduate program she had been engaged by the college to develop.*
>
> *In a statement emailed to Karen's students after her employment was terminated, the college admitted that Karen had a 'deep and abiding faith in Jesus' and was an 'excellent and committed educator'. It explained that the decision to end her role was made by the Principal with the support of the College Board and Leadership Team, based on the position held by the college on same-sex marriage.*
>
> *Despite the school's statement to students, the Principal of the college later publicly denied firing Karen and asserted that she had agreed to resign from her role because she could no longer adhere to a key value of the college about the nature of marriage. The Principal of the College further explained his decision to terminate Karen's employment to the Parliamentary Joint Committee on Human Rights as him having 'entered a very strong pastoral conversation' with Karen, in which 'we [sic]came to the conclusion that this was not where should continue to exercise her gift, which is a very strong gift'.*[69]

As outlined in our 2024 report *Dismissed, Denied and Demeaned*, around 1 in 4 LGBTIQ+ people identify with a religion or faith, and 2 in 5 of these pray once a week or more regularly, with many describing religion or faith as very or extremely important in shaping their lives.[70]

RECOMMENDATION

- Include the attribute of 'religious belief or activity', defined in a way that clarifies that it includes holding, or not holding a particular belief, and engaging or not engaging in a religious activity.

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[69] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) 20 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[70] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) xv at A.1 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

ASSOCIATION

Question 4.9(2)

As canvassed in the Consultation Paper, under the Act the protection for relatives and associates of people of a recognised attribute only applies to direct discrimination and even in that case, does not apply to carer's responsibility.[71] Further, the Consultation Paper observes that the protection also does not extend to indirect discrimination with respect to any of the protected attributes under the Act.[72] We initially outlined in our Preliminary Submission to this Review that all protected attributes should have protections for personal associates (e.g. protection for children who are discriminated against because of the sexual orientation of their parents), in line with laws in other states and territories.[73]

However, the scope of protections provided under the Act fail to cover those who do not have a personal relationship with one or more persons with a protected attribute, but who face discrimination, or vilification due to their support or perceived support for a person or a group of people with a protected attribute.

Some states and territories have a broader approach to covering associates, which is not limited to personal relationships. An example of a broader definition is:

> 'association with, or relation to, a person identified on the basis of any of the above attributes.'
>
> ***relation***, in relation to a person, means relation to the person by blood, marriage, affinity or adoption, and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first person.[74]

We addressed the issue of associates in our submission to the Victorian Department of Justice and Community Safety in relation to Victoria's laws on hate conduct and vilification and our submission to the NSW Department of Communities and Justice for its review of criminal law protections against the incitement of hatred.[75] We took (and still hold) the view that protections based on 'association' should not be limited to those defined by a personal relationship with a person who has a protected attribute, and should be extended to people based on their actual or perceived support for people or groups with one or more protected attribute.[76]

Examples of people would benefit from this expansion include active allies of a particular community, supportive bystanders in instances of discrimination or vilification, and owners, workers, contractors,

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[71] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 63 [4.119] citing *Anti-Discrimination Act 1977* (NSW) ss 7(1), 24(1), 38B(1)(a)–(b), 49B(1), 49ZG(1), 49ZYA(1).

[72] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 63 [4.119].

[73] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 9, wherein we also noted 'Anti-discrimination legislation in other states and territories include personal associates as its own protected attribute, see: *Discrimination Act 1991* (ACT) s 7(1)(c); *Equal Opportunity Act 2010* (Vic) s 6(q); *Anti-Discrimination Act 1991* (Qld) s 7(p); *Anti-Discrimination Act 1992* (NT) s 19(1)(r); *Anti-Discrimination Act 1998* (Tas) s 16(s).

[74] *Anti-Discrimination Act 1991* (Qld) s 7(q), sch 1 (definition of 'relation').

[75] Equality Australia, Submission to the Department of Justice and Community Safety (Vic), *Strengthening Victoria's laws against hate speech and hate conduct* (17 October 2023) 10-11, item 1.6 https://equalityaustralia.org.au/resources/vic-anti-vilification-submission/; Equality Australia, Submission to the Department of Justice (NSW), *Independent review of criminal law protections against the incitement of hatred* (6 August 2025) 17-19 https://equalityaustralia.org.au/resources/submission-a-safer-nsw-for-lgbtiq-communities/.

[76] Equality Australia, Submission to the Department of Justice and Community Safety (Vic), *Strengthening Victoria's laws against hate speech and hate conduct* (17 October 2023) 10 https://equalityaustralia.org.au/resources/vic-anti-vilification-submission/.

attendees or other parties involved with inclusive or known LGBTIQ+ events, venues or shops who themselves not LGBTIQ+.[77]

> *…the law should protect people associated with someone discriminated against, as no one should face unfair treatment for supporting or being related to others.*
>
> **– Queer, trans man, aged 18-24 based in Regional NSW**

RECOMMENDATIONS

- Protect associates of other attributes through a separate 'association' attribute, defining it broadly to include people who are relatives and anyone else otherwise associated.

PAST AND FUTURE ATTRIBUTES

Question 4.9(1)

As noted in the Consultation Paper, only certain attributes are currently protected from discrimination based on a past or future attribute.[78] We support clarifying that, for all protected attributes, discrimination can occur because of an attribute a person once had, even if that attribute is not present at the time the discrimination occurs. A clear application would be in relation to discrimination against sex workers, since people could be working in a different industry now but discriminated against because of the kind of work they used to do.

In the LGBTIQ+ context, this clarification would protect people who have previously identified their sexuality or gender identity in a particular way, where that former identity becomes the basis for discriminatory treatment. Such as, a person who previously identified as lesbian, but no longer does, and is discriminated against by a service provider because of her past relationships with women.

While less common, future attributes can have a beneficial role to play too, such as protecting potential pregnancy. However, this could have a broader application to other attributes. For example, a person who is planning to affirm their gender, come out as gay, or access IVF with a same-sex partner should be protected from discrimination on that basis, even if they have not yet done so at the time of the discrimination. These situations might sometimes fall under presumed attributes, but not always.

RECOMMENDATION

- Extend protections from past or future discrimination to all protected attributes.

INTERSECTIONAL DISCRIMINATION

Question 3.8

The Act does not presently protect against discrimination based on more than one attribute or provide recourse that truly accounts for the combined effect of discrimination against a person on more than ground in a given instance or series of instances (**intersectional discrimination**).

An example of this could be a gay Hindu man of Indian origin, facing discrimination due to a combination of two or more of these identities. It would be reductive of his experiences to place the onus on the complainant to prove that he was discriminated against on the basis of each of these

[77] Equality Australia, Submission to the Department of Justice and Community Safety (Vic), *Strengthening Victoria's laws against hate speech and hate conduct* (17 October 2023) 10 https://equalityaustralia.org.au/resources/vic-anti-vilification-submission/.

[78] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 63.

identities, individually. A fairer way to assess discrimination is to consider the combined effect of the complainant being discriminated on the specific combination of their identities, which may make them more susceptible to discrimination or vilification in some contexts.

In order for the Act to grapple with discrimination as it occurs in the real world, it needs to account for intersectional discrimination, and Equality Australia would be in strong support of such a move, consistent with our Preliminary Submission.[79]

The Consultation Paper canvasses two possible approaches to covering intersectional discrimination in the Act.

Approach 1: '1 or more protected attributes'

As the Consultation Paper notes the ACT is only Australian jurisdiction currently providing for protection from intersectional discrimination, whereby protections are in place for people experiencing either direct or indirect discrimination because of '1 or more protected attributes'.[80] The key issue with this approach is cited in the Consultation Paper is that it does not allow for the compounded effect of simultaneous discrimination on multiple grounds, and instead takes what Blackham and Temple describe as an 'additive' approach, whereby discrimination on each ground is considered separately, for example, in the case of the young person of Croatian heritage who was the complainant in a proceeding cited in their article, the ACT Civil & Administrative Tribunal seemingly considered discrimination on the basis of age and that of race, experienced by her, separately.[81] This is not reflective of the reality of discrimination; people cannot simply only identity as one attribute or another and are instead a combination of attributes.[82]

Approach 2: Combined effect

The second approach considered by the Consultation Paper was that of prohibiting discrimination based on the combined effect of two or more protected attributes, and this approach was enacted in the *Respect at Work and Other Matters Amendment Act 2024* (Qld) though the provision has not yet commenced. The new provision provides that discrimination on the basis of an attribute of a person with 2 or more attributes, includes discrimination in relation to:

(a) any of the attributes;

(b) 2 or more attributes; or

(c) the combined effect of 2 or more attributes.[83]

The key wording is at s 7A(2)(c) relating to the combined effect.

This approach was endorsed earlier in the Queensland Human Rights Commission's Building Belonging Report which notes that '[o]ne of the most frequently reported issues to the Review was that people who experience discrimination because of combined grounds are not adequately recognised or protected by the Act'. The report also noted the review being informed that 'people who experience

[79] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 22.

[80] *Discrimination Act 1991* (ACT) ss 8(2)-(3).

[81] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 781.

[82] See *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 SCR 554 [152]-[153].

[83] Section 7A of *Respect at Work and Other Matters Amendment Act 2024* (Qld), intended to amend section 8 of the *Anti-Discrimination Act 1991* (Qld),

discrimination because of a cumulative effect of having more than one protected attribute are at greater risk of experiencing discrimination but also find it harder to bring and prove a claim'.[84]

As the Consultation Paper notes, the move towards incorporating combined effect or combined grounds into discrimination law has been occurring overseas, with Canada having implemented it and the United Kingdom (**UK**) having implemented the necessary wording but with the provision yet to commence, subject to the outcome of a recently concluded consultation process by the UK Government.[85]

The wording in the *Canadian Human Rights Act* 1985 (Canada) s 3.1 has enabled the normalisation of discrimination claims in relation to the compounded effect of being discrimination against due to multiple prohibited grounds and has helped better harmonise their law with the reality of discrimination.[86] Critically, 'combined effect' has been interpreted by the Canadian Human Rights Tribunal as being able to be used by complainants where they may be unable to satisfy the test for discrimination on one ground alone, which can assess in a holistic and flexible way, subtle forms of discrimination.[87] This echoes the understanding of intersectional discrimination by the Federal Court of Appeal in Canada, which observed that '[w]hen analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge.'[88]

The adoption of similar wording can improve access to recourse for discrimination for people in such a position in New South Wales.

> *"I am both queer and have a disability. I feel that this more than doubles my chance of being discriminated against. I'm simply more vulnerable than someone that only has one of these traits."*
>
> **– Bisexual/pansexual, trans woman aged 35-44 based in Sydney metropolitan area, NSW**

RECOMMENDATION

- Clarify that discrimination can occur in relation to: (a) any of the attributes; (b) 2 or more attributes; or (c) the combined effect of 2 or more attributes.

AREAS AND EXEMPTIONS

Based on our survey data, the area of work predicably emerged as the most common setting for perceived unfair treatment on the basis of protected attributes, followed by schools, and health and other social services as frequent contexts.

[84] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 50 https://www.qhrc.qld.gov.au/about-us/reviews/ada.

[85] *Equality Act 2010* (UK) s 14; see 'Closed call for Evidence: Equality law call for evidence', *Gov UK* (Web page) https://www.gov.uk/government/calls-for-evidence/equality-law-call-for-evidence which concerns the shaping of the Equality (Race and Disability) Bill in the UK and includes questions as to strengthening protections against combined discrimination, which is relevant to section 14.

[86] See, eg, *Peters v United Parcel Service Canada Ltd and Gordon* [2022] CHRT 25.

[87] See *Mr X v Canadian Pacific Railway* [2018] CHRT 11 [296]; *Turner v Canada (Attorney General)* [2012] FCA 159 [48]-[49].

[88] *Turner v Canada (Attorney General)* [2012] FCA 159 [48].

AREA OF STATE LAWS AND PROGRAMS

Question 6.12(2)

The Act does not protect people against discrimination in the administration of state laws and programs, other than in the relation to sexual harassment.[89] This leaves a gap in protection where powers or discretions are exercised in discriminatory ways in contexts where it is not possible to identify the provision of a service, such as in the exercise of police powers, prisons, or involuntary mental health detention.[90]

All federal anti-discrimination laws prohibit discrimination in the administration of laws and programs, as do a number of state and territory laws, such as in the exercise of powers or functions under a state law.[91] These laws recognise that the state must be held to at least the same standard as private actors when exercising its authority.

> *"I was targeted by police when I've just been walking down the street in the middle of the day when I was a uni student…undercover police pulled up beside me and threatened to take me to the police station unless I told them all my details and what I was doing…"*
>
> **– Queer woman, aged 45-54 based in regional NSW**

This protection is especially important for LGBTIQ+ people, who may be subject to harmful treatment when interacting with the state outside traditional 'service' contexts. For instance, an intersex person detained in prison may be denied access to hormones, or a non-binary person may face discriminatory treatment by police during a street stop. Another example is the removal of a child from the care of a rainbow family by child protective services. These are not services, but they are interactions where anti-discrimination protections must still apply, as they can involve some of the most critical and systemic forms of harm.

RECOMMENDATION

- Create a new area of the administration of state laws and programs, which covers discrimination in the performance of state functions, exercise of powers, or carrying out of responsibilities in relation to state laws or in state-run programs.

RELIGIOUS EXEMPTIONS

The Act contains numerous exemptions that leave people who have experienced discrimination with insufficient protections. For LGBTQ+ people,[92] the exemptions which are most concerning include:

- sections 38C(3)(c), 38K(3), 49ZH(3)(c) and 49ZO(3) which provide private educational institutions with exemptions that allow them to discriminate against applicants or employees and students on the basis of transgender status or homosexuality;[93]

[89] *Anti-Discrimination Act 1977* (NSW) s 22J.

[90] See *Commissioner of Police v Mohamed* [2009] NSWCA 432 cf *Robinson v Commissioner of Police, NSW Police Force* [2013] FCAFC 64.

[91] *Sex Discrimination Act 1984* (Cth) ss 26, 28L; *Disability Discrimination Act 1992* (Cth) s 29; *Racial Discrimination Act 1975* (Cth) s 10(1); *Age Discrimination Act 2004* (Cth) s 31; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Anti-Discrimination 1992* (NT) s 28(g); *Anti-Discrimination Act 1991* (Qld) s 101.

[92] In this section, use the acronym LGBTQ+ rather than LGBTIQ+ to acknowledge that religious schools do not generally seek to discriminate on the grounds of having a variation of sex characteristics (being intersex).

[93] Exemptions also apply to the attributes of sex, martial or domestic status, disability and age.

- section 56(c) which allows religious bodies to discriminate in the appointment of any person in any capacity; and
- section 56(d) which provides a broad exemption in respect of any other act or practice of a religious body that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The religious exemptions under ss 56(c)-(d) apply to a body that is established to propagate religion. These provisions have been interpreted broadly to include, for example, faith-based agencies like Wesley Dalmar that provide state-sanctioned assessment for foster care.[94] There are no equivalent provisions to s 56(c) in any other state or territory laws,[95] and whilst other state and territory laws do have similar provisions to that of s 56(d), those provisions are much more limited in their application.[96]

The impact of the private schools' exemptions is far-reaching, with approximately 36% of all students attending non-government schools and 38% of school staff, including teachers, specialist support staff and other employees, working in them. [97]

In respect of the exemptions for private schools, New South Wales is an outlier in that broad exemptions are available to *all* private educational institutions, religious or otherwise.[98] These exemptions should simply be removed from the Act and not included in any future legislation. To do so would be to bring New South Wales into alignment with Queensland, ACT, South Australia, Tasmania, and the NT where it is already unlawful to discriminate against students or prospective students.[99] Western Australia is likely to also remove a provision that is similar in effect, following the 2022 recommendations of its law reform body.[100] At the Commonwealth level, the ALRC has recommended the same change to protect students from discrimination.[101]

In summary of our overall position:

- No exemptions should be retained that allow discrimination in relation to students at religious schools under the guise of maintaining the religious ethos of a school.

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[94] *OV v QZ (No. 2)* [2008] NSWADT 115 [68]-[79] (overturned on appeal, but on different grounds); *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155 [32]; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 [30], [34].

[95] Note: South Australia also has an exception allowing discrimination in relation to the administration of a body established for religious purposes in accordance with the precepts of that religion: s 50(1)(ba). However, this exception is different to s 56(c) and the former Liberal South Australian government was committed to its repeal and replacement with a religious practice exception similar to other states and territories.

[96] See *Equal Opportunity Act 2010* (Vic) ss 39, 61, 82A, 83, 84; *Discrimination Act 1991* (ACT) ss 32, 33B, 33C (as amended by *Discrimination Amendment Act 2023* (ACT) ss 9, 10); *Anti-Discrimination Act 1992* (NT) ss 35A, 37A, 40(3)-(6) (as amended by *Anti-Discrimination Amendment Act 2022* (NT) ss 16-18); *Anti-Discrimination Act 1998* (Tas) Pt 5, Div 8. See also recommendation 38 in Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 378 https://www.qhrc.qld.gov.au/about-us/reviews/ada; See recommendations 76 to 77 in Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 176-7 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.

[97] Australian Law Reform Commission, *Maximising the realisation of human rights: Religious educational institutions and Anti-discrimination laws* (ALRC Report 142, December 2023) 7 https://www.alrc.gov.au/publication/adl-report-142/.

[98] *Anti-Discrimination Act 1977* (NSW) ss 38C(3)(c), 38K(3), 49ZH(3)(c) and 49ZO(3).

[99] Australian Law Reform Commission, *Maximising the realisation of human rights: Religious educational institutions and Anti-discrimination laws* (ALRC Report 142, December 2023) https://www.alrc.gov.au/publication/adl-report-142/ - a useful state by state comparison is available in the report in Table 12.4 in Chapter 12 and Appendix E.

[100] See recommendation 81 in Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 187 (https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.

[101] See recommendation 1 in Australian Law Reform Commission, *Maximising the realisation of human rights: Religious educational institutions and Anti-discrimination laws* (ALRC Report 142, December 2023) 14-16, 35 https://www.alrc.gov.au/publication/adl-report-142/.

- There should be no religious exemptions applying to the attributes of sexual orientation, gender identity and sex characteristics in employment, education or the provision of goods, services, facilities or accommodation to the public.
- In respect of any future protected attribute of religious belief or activity, there should be a limited exemption applying to religious bodies only in circumstances where religion is directly relevant to a role or the service in question, and the discrimination would be reasonable and proportionate in all the circumstances of the case.
- We support targeted religious exemptions for religious leaders, the education of religious leaders, and for the purposes of participation in religious practice or observances (similar to those in most federal, state and territory laws), consistent with international human rights law.[102]

Limiting religious exemptions consistent with the above, would be in line with recent reforms and recommendations at the state and territory level.[103] Our position also broadly aligns with the recommendations of the ALRC regarding its recent review of federal exemptions in the *Sex Discrimination Act*.[104]

The case for reform

Over the years, Equality Australia has supported many people who have experienced discrimination based on their sexual orientation or gender identity, or because they have LGBTQ+ affirming religious beliefs concerning sexuality or gender. Among those affected are teachers who have lost their jobs, students denied leadership opportunities or forced to change schools, and parents distressed by religious schools requiring them or prospective staff to affirm discriminatory views about LGBTIQ+ people as conditions for employment or enrolment.

In May 2024, Equality Australia published a detailed report entitled *Dismissed, Denied, Demeaned*, on how discrimination against our communities is experienced in faith-based settings. The report found that independent schools are more likely to be discriminatory rather than affirming places for LGBTQ+ people. Nearly 4 in 10 independent schools show evidence of LGBTQ+ discriminatory practices, compared with 3 in 10 schools that do not. 9 in 10 of the Catholic educational authorities we reviewed, who together educate 70% of all students in Australian Catholic schools, publish so little information about their position on LGBTQ+ inclusion that prospective parents, students or employees are not able to know from publicly available information whether they will be welcomed or included as LGBTQ+ people. As many as 1 in 3 independent schools require staff to be practising Christians, regularly attend Church and/or maintain 'a Christian lifestyle'. The report also contains 26 case studies that illustrate the depth and breadth of the problem in Australia, including examples from New South Wales. [105]

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[102] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

[103] See *Equal Opportunity Act 2010* (Vic) ss 39, 61, 82A, 83, 84; *Discrimination Act 1991* (ACT) ss 32, 33B, 33C (as amended *by Discrimination Amendment Act 2023* (ACT) ss 9, 10); *Anti-Discrimination Act 1992* (NT) ss 35A, 37A, 40(3)-(6) (as amended by *Anti-Discrimination Amendment Act 2022* (NT) ss 16-18); *Anti-Discrimination Act 1998* (Tas) Pt 5, Div 8. See also recommendation 38 at Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 374-378 https://www.qhrc.qld.gov.au/about-us/reviews/ada and recommendations 76-77 at Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 176-178 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa.

[104] Australian Law Reform Commission, *Maximising the realisation of human rights: Religious educational institutions and Anti-discrimination laws* (ALRC Report 142, December 2023) https://www.alrc.gov.au/publication/adl-report-142/.

[105] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) 13-24 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

The stories of our communities must inform not only the narrowing of religious exemptions in the current New South Wales Act but must also shape the contours of any religious exemptions in a future law that protects against discrimination based on religious beliefs or activities.

Experiences in schools – recent community survey

This section presents the findings from our community survey specifically concerning experiences and views on religious exemptions. Negative experiences in private schools in New South Wales, whether directly experienced or witnessed, or heard about from others, were reported by 122 survey participants, representing around 22% of the 493 responses. This is a notably high proportion. Just over 97% of participants in our community survey strongly support change to religious exemptions in New South Wales that permit this widespread discrimination.

STUDENT EXPERIENCES

Community survey participants provided further information about experiences in private schools as students. The themes that we heard about private schools in relation to students, were as follows:

- **Bullying and harassment** – Verbal abuse, physical violence, and vilification by peers and staff; often ignored or condoned (either implicitly or explicitly) by the school.
- **Religious-based shaming** – Told their identity was sinful, that they would go to hell, or subjected to homophobic and transphobic teachings.
- **Denial of enrolment or opportunities** – Refused admission, leadership roles e.g. prefects or head of house, participation in school events, or school formal attendance based on identity.
- **Suppression of identity** – Forced to hide their sexual orientation or gender identity; told not to talk about it.
- **Suppression of visibility and support** – LGBTQ+ clubs shut down, resources removed, or discussion of LGBTQ+ issues prohibited.
- **Gender-based restrictions** – Enforced uniforms based on assigned sex at birth, refusal to recognise gender identity, gendered language rules.
- **Institutional inaction** – Complaints ignored, bullying unchecked, discriminatory policies upheld.
- **Psychological harm** – Long-term trauma, anxiety, and internalised shame from hostile environments.

Examples of what we heard in the community survey about the experiences of students are as follows:

My now ex-boyfriend went to a Catholic school as an openly homosexual man, and was denied opportunities such as school caption based on his sexual orientation even though he was high in the polls and an incredible student (grades, intelligence and behaviour wise).

My friend's son identifies as gay and was bullied relentlessly at a private catholic school. His parents had to intervene. The school was not helpful. This is only 7-8 years ago. Appalling. Fortunately, his parents did not let up, and the school had to take action. Sadly, this level of support is not the case for

every child in the same situation.

The daughters of a same sex marriage were refused admission to a school in Broken Hill.

Bullying was completely ignored for people facing it because of their transness or queerness, teachers actively argued against trans rights, you had to wear the uniform assigned to the gender you were assigned at birth, they would reject new students who were trans.

Routine bullying that was not managed by the school led to the boy deciding to leave the school. The last straw came when his clothes were removed during a swimming class and he was left naked to make his way home. He was too frightened to go to the school staff for help, because he hadn't had any help in earlier incidents.

A friend was forced to write an essay regarding homosexuality being a sin for their trial HSC.

Gay students were told that they were not accepted in God's eye and that they would go to hell and the staff would try and convert them. Also the student told their Teacher that they were Aboriginal and the teacher would laugh and say 'no you are not'.

I was regularly beaten and harassed as an effeminate male, attracted to males, in the private religious all boys school I attended. I believe the staff turned a blind eye because their values aligned with my those beating me up regularly.

I went to a Christian school. In year 9, I wore a dress my mother owned to school camp, when we were asked to come dressed as what we'd like to be when we "grew up" By Year 11, the school counselor had referred me to the local hospital for mental health treatment.

I was enrolled at a private school for most of high school and it was an awful experience for me and my fellow LGBTQ+ peers. We were, quite literally, told to pray the gay away.

Person I know was not allowed to attend school formal if they brought someone of same sex.

Being a trans man on testosterone I cannot participate in sporting events due to feared ridicule if I were to join the men's events. To attend school camps I need to have a private room so I can take of my binder without others present, this often means having to have many meetings with the camp organisers or not being able to go.

I went to a catholic private school for many years, and found it extremely difficult to get the school to allow me to either wear the boys uniform, or encourage them to allow girls to wear pants as a part of the usual uniform. by the time they did introduce them, I had already left.

Have friends who are survivors of abhorrent institutionalised abuse within private religious schools - specifically homophobic content pushed in school/church within 'teachings'.

I was excluded and bullied relentlessly from staff and students when I was a student at an all boys school. I was called a faggot everyday in front of teachers who did nothing, teachers who wanted me punished for not being cis-het.

From the stories I've heard, queer students at private schools face punishment, discrimination and abuse akin to conversion camps simply for being queer, while cultivating an environment that is outwardly hostile to anything that deviates from what's "normal". This can be as small as banning long hair on boys and as extreme as physical punishment, but its most commonly in the form of disciplinary action and mark downs on test / assignments for arbitrary reasons. The kids that go to these schools didn't choose to, it was a choice by their parents when they kids were really young, the queer kids that are trapped in these institutions leave with internalized trauma from years of abuse, and the non-queer kids often leave with an internalized distain or even hatred for those that are different.

They threatened to call DOCS on my parents and forced me out of their school because I had identity questions.

Repression and brain washing in formative years creates significant psychological issues in adulthood which has significant implications to economic and social issues. If you believe sexual orientation is a psychological issue, I hypothesise that the 'cause' has happened before school age, therefore no amount of heteronormative education will make someone heterosexual and "normal". Given tort law, I am surprised that religious schools have not been successfully sued by someone who has been psychologically harmed by private religious schools repression on sexual identity — it would be difficult but legislative protections would be easier.

STAFF EXPERIENCES

Key themes drawn from the further information on staff experiences can be summarised as follows:

- **Fear and concealment** – Teachers and staff felt they had to hide their sexual orientation or gender identity to avoid being dismissed or ostracised.
- **Job loss and career barriers** – Terminations, resignations under pressure, and being passed over for promotions because of identity.
- **Ostracism and hostile workplace culture** – Colleagues withdrawing support or socially excluding LGBTQ+ staff.

- **Suppression of LGBTQ+ initiatives** – Staff-led support programs for students dismantled by school leadership.
- **Self-censorship** – Prohibited from mentioning same-sex partners or discussing LGBTQ+ topics.
- **Institutionalised discrimination** – Discrimination defended as part of the school's religious ethos.

A selection of responses to our survey in relation to the experiences of staff follows below:

Forced to conform to my assigned gender at birth, including forcing changing my physical appearance.

I felt 'unsafe' working in a private girls' school because I didn't know what could happen if they found out I was gay. I left the school of my own accord.

I am under pressure to conceal my identity; I work at a religious school.

I felt 'unsafe' working in a private girls' school because I didn't know what could happen if they found out I was gay. I left the school of my own accord.

I am a retired independent school teacher of over 30 years. During my time in that milieu, I know, first- and second-hand, through my contacts, of several cases of discrimination against teachers: most particularly in new-wave evangelical protestant based schools, to a lesser extent in Catholic-connected schools and very rarely in "old", established protestant sect based schools. The major threads are: ostracizing "deviant" teachers, moving teachers on or, less commonly, outright sacking them and hence potentially destroying their careers. I must say that these things became somewhat less common as time went in and society changed, and as good, dedicated teachers became more scarce. However, the issue has not disappeared.

I had started a LGBTQIA+ club to support and advocate for students and the wider community at a private Catholic high school. I was forced to take it down by the school. Students had came out of the closet and all members were made to feel unloved/unwanted and that we should keep our identities a secret/hidden.

I had a friend who had to leave a teaching position at a private religious school because of their sexuality. They were essentially pushed out and ostracised from work colleagues who had been friends before.

My friend who works at a private Christian school is not out as a lesbian for fear it would impact how her colleagues, students and parents would see her. A

family member who has worked across many private religious schools very much observed a don't ask, don't tell vibe.

I had a friend who went to a private school in NSW. They're bi. Every few months they'd have to deal with an assembly where somebody brings up queer people going to hell, etc.

My partner was asked to speak on a panel at a private religious school, but was then told he wasn't allowed to mention his husband, while other heterosexual panelists mentioned their spouses.

I am aware of many teachers who were denied the right to be themselves and forced to adopt a "heterosexual" role simply to keep their employment.

I've been accused of 'gender whispering' in the past, with demands by parents to go back into the closet. This was only resisted because my centre is public and my manager said that request would violate the act.

Religious personnel exceptions

Question 7.1

In the preceding section, we have established a clear case for narrowing the overly broad exemptions that apply to religious personnel — particularly teachers and other school staff.

> *Given the above experiences, it is unsurprising that only 2.7% of survey participants thought that private schools should retain the broad licence they currently have to discriminate.*

As discussed in the Consultation Paper, there are several viable options to narrow the current exemptions for staff in religious schools and other religious bodies under section 56(c) of the Act. We would broadly support reforms that:

- Confine any 'preferencing' provision to the point of hiring, allowing religious employers to preference candidates who share their religion, but not to discriminate based on the extent of adherence or conduct — which would disproportionately impact LGBTQ+ people.
- Create a separate, narrow exemption (only on the basis of religious belief or activity) that permits discrimination where the teaching, observance or practice of the religion is an inherent requirement of the role, and which applies for the duration of the employment relationship.
- Require reasonableness and proportionality as necessary considerations before the exemption can be relied upon.
- Limit the scope so that discrimination is permitted only on the grounds of religious belief or activity (assuming this becomes a protected attribute in the Act).

Religious service providers

Question 7.2

Every day our communities rely on health care, aged care, domestic and family violence services, disability care, housing and homelessness, and financial support services delivered by religious institutions.

> *97.5% of participants in our community survey thought that faith-based service providers should not have a special ability to discriminate against people. Participants emphasised that availability and quality of services and care must take a higher priority than the religious beliefs of the organisation, and many shared a view that where a service is publicly funded, discrimination should not be allowed.*

Our *Dismissed, Denied, Demeaned* report documents concerning examples of open discrimination by major faith-based service providers. We also identified aged care, health, and social service providers linked to religious groups that labelled homosexuality a 'sexual sin' or a 'manifestation of brokenness,' spread misinformation about transgender people, opposed bans on conversion practices, and in some cases had discrimination complaints lodged against them — despite receiving hundreds of millions in public funds. Overall, our report found that almost 1 in 10 of Australia's largest faith-based service providers *publicly* discriminate against LGBTQ+ people, with a further 4 in 10 unclear in their position on LGBTQ+ inclusion.[106]

One example from the report highlights the real-world harm that can occur when LGBTQ+ people face discrimination from faith-based service providers when the stakes involved are a direct threat to safety or housing:

> *In 2015, Harley fled intimate partner and family violence, seeking accommodation at a refuge provided by a faith-based organisation in Victoria. During their time at the refuge, they were counselled against disclosing their sexuality or wearing rainbow items of clothing. They were told they were 'going to hell' by a staff member who said they would 'pray for God to show them the way'. Harley left the refuge and spent three nights sleeping on the streets instead. In 2021, Harley and their wife sought emergency accommodation from a different faith-based organisation. This time, Harley's wife (who is a trans woman) was told that she would need to go to a men's shelter rather than access the same facility as Harley.*[107]

Currently, New South Wales provides very broad exemptions for faith-based service providers, when compared with other jurisdictions. Discrimination is allowed when providing services, goods or accommodation based on sexual orientation or gender identity under general exemptions for religious bodies. The exemptions apply to discrimination based on any protected attribute 'that conforms to the doctrines … **or** is necessary to avoid injury to the religious susceptibilities of the adherents' of the organisation's religion.[108] In contrast, other jurisdictions such as the ACT, Queensland, and the Northern Territory require both elements to be met — that the conduct conforms to religious doctrines (conformance limb) **and** that it is necessary to avoid injury to the religious susceptibilities of adherents (avoidance of injury limb) — before an exemption can apply.

The ACT model also distinguishes between services provided by faith-based organisations to the general public or outside of religious observance, and those provided specifically to members of their

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[106] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) xviii -xix, 45-57 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[107] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) 18 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[108] *Anti-Discrimination Act 1977* (NSW) s 56(d) (emphasis added).

faith community, with broader exemptions applying only to the latter. In Victoria, further limits apply where faith-based service providers receive government funding.[109]

We are in favour of the following options set out in the Consultation Paper to limit the scope of section 56(d) which broadly allows for discrimination against LGBTQ+ people receiving services:

- Limiting the protected attributes it applies to, ideally limiting discrimination to only the grounds of religious belief or activity (as recommended by the review of Queensland laws[110])
- Requiring reasonableness and proportionality (as is the case in ACT, Victoria, and has been recommended for implementation in Western Australia and Queensland)
- Carving out certain forms of service provision (e.g. aged care[111] – consistent with federal law, and provision of accommodation, as recommended by the ALRC).[112]

Consistent with other Australian jurisdictions, we also support requiring that both the conformance and avoidance of injury limbs be satisfied in order for the exemption to apply.

> "*Religious organisations shouldn't be given special rights to treat certain people differently that can or may cause harm or prevent them from getting the care they need.*"
>
> – **Bisexual/pansexual, trans-femme genderfluid person aged 25-34 based in Sydney metropolitan area.**

Written policies as a prerequisite to discriminate

Laws in South Australia and the Australian Capital Territory allow religious schools to discriminate against staff on certain grounds if they first publish a written policy on their position. We strongly oppose any provision for an employer or service provider to maintain a written policy outlining their intention to discriminate and the manner in which they will do so as a prerequisite to be able to discriminate against LGBTQ+ people or people of different faiths or beliefs. This approach risks legitimising and embedding harmful practices, and the very act of publishing such a policy can cause real harm to the people it targets.

The Citipointe case, where both parents and teachers were required to sign anti-gay and anti-trans contracts at the start of a new school year (only to be withdrawn under after public outcry), showed how such policies can encourage discriminatory policies to be drafted, rather than preventing them.[113] This is an excerpt of the Citipointe enrolment sent to all parents:

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[109] *Equal Opportunity Act 2010* (Vic) s 82B.

[110] See recommendation 38 at Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 378 https://www.qhrc.qld.gov.au/about-us/reviews/ada. Note that our wording doesn't include reference to doctrines of the *religious body*, rather doctrines of the *religion* in which the religious body is based.

[111] *Sex Discrimination Act 1984* (Cth) ss 23(3A), 37(2).

[112] See recommendation 1 at Australian Law Reform Commission, *Maximising the realisation of human rights: Religious educational institutions and Anti-discrimination laws* (ALRC Report 142, December 2023) 14-16, 35 https://www.alrc.gov.au/publication/adl-report-142/.

[113] Ben Smee, 'Brisbane's Citipointe Christian College withdraws anti-gay contract but defends 'statement of faith', *The Guardian* (online, 3 February 2022) https://www.theguardian.com/australia-news/2022/feb/03/brisbanes-citipointe-christian-college-withdraws-anti-gay-contract-but-defends-statement-of-faith.

> We believe that any form of sexual immorality (including but not limited to; adultery, fornication, homosexual acts, bisexual acts, bestiality, incest, paedophilia, and pornography) is sinful and offensive to God and is destructive to human relationships and society.[114]

Given that the enrolment contract was introduced during national debate on the federal Religious Discrimination Bill — which included provisions on written policies — it is likely the school was influenced by, and drafted the contract in anticipation of, the Bill's passage into law.

Aside from encouraging more harmful policies to be drafted in a range of settings, we have found no evidence that requiring transparency in this form reduces discrimination. In our *Dismissed, Denied, Demeaned* report we found more evidence of discrimination in South Australian schools, where the written policy was a requirement to enliven a religious exemption. Where language was included in South Australian school policies, it was rather 'coy' and indirect, and would not provide any kind of genuine 'buyer beware' for prospective teachers or students.[115]

RECOMMENDATIONS

- Remove broad exemptions for private educational institutions, including those in sections 38C(3)(c), 38K(3), 49ZH(3)(c), and 49ZO(3), which allow discrimination against students and staff based on the gender identity and sexuality.
- Remove section 56(c), and create two new exemptions in its place:
  - An exemption which allows religious bodies to preference staff based on their religion (not their religious belief or activity), confined to the initial point of hiring only.
  - An exemption, applying throughout the employment relationship, for roles where duties of the work involve participation by the worker in the teaching or practice of the relevant religion, applying only on grounds of religious belief or activity, subject to reasonableness and proportionality requirements.
- Limit section 56(d) exemption by applying it only to the attribute of religious belief or activity, requiring both that the discriminatory act conforms to religious doctrines *and* that it is necessary to avoid injury to religious adherents, only where reasonable and proportionate, carving out aged care and accommodation services from the scope of the exemption.
- Do not adopt a requirement for written policies outlining discriminatory intent as a prerequisite for discrimination in relation to education, goods and services, or work.

ADOPTION SERVICES

Question 7.4

As noted in our Preliminary Submission, section 59A was introduced into the Act to coincide with adoption equality for same-sex couples, when two of the four adoption agencies in NSW – Anglicare and CatholicCare (now Family Spirit) – threatened to withdraw their adoption services if they were required to facilitate adoption to same-sex couples.[116] This section targets only LGBTQ+ people,

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[114] The full contract remains publicly available as it was tabled in parliament - see *Template Contract of Enrolment*, Christian Outreach Centre trading as Citipointe Christian College (at January 2022) https://www.parliament.qld.gov.au/Work-of-the-Assembly/Tabled-Papers/docs/5723t796/5723t796-41c2.pdf.

[115] [115] Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) 34 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[116] Equality Australia, Submission No PAD07 to New South Wales Law Reform Commission, *Preliminary Submissions to review of the Anti-Discrimination Act 1977 (NSW)* (30 August 2023) 15; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Adoption by same sex couples* (Report, 8 July 2009) [6.43]-[6.52] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2098#tab-reportsandgovernmentresponses.

because the exemptions only apply in relation to discrimination provisions under Part 3A (discrimination on transgender grounds) and Part 4 (discrimination on the ground of homosexuality).

> *Of our survey participants, 96.3% were against adoption services being allowed to refuse people based on their sexual orientation or gender identity.*

At the time of our Preliminary Submission, we were able to identify two adoption providers who were openly discriminating against our communities. While its policies are no longer publicly available, Anglicare appears to be continuing to discriminate based on sexual orientation or marital status in their adoption eligibility requirements.[117]

The result of this discrimination is that same-sex and unmarried couples have fewer agencies willing to assess their eligibility for adoption and offer relinquishing parents the broadest choice of potential parents for their child. Anglicare's (or Anglican Community Services) latest funding figures indicate that it received roughly $306.3 million in government funding while almost all of the funding received by Family Spirit was from governments, being approximately $13.7 million.[118]

As canvassed in the Consultation Paper, the argument presented by some faith-based adoption agencies is a belief that same-sex adoption is incompatible with some religious views about child raising, while others, including Equality Australia argued that faith-based adoption services should not be allowed to discriminate when providing services for which they receive public funding. The wellbeing of children and the ability for them to be raised in a loving home should be the paramount consideration in relation to adoption, and this is consistent with the concept of the best interests of the child that is central to children's rights. All peer-reviewed research over the last 40 years shows that children are thriving when raised by same-sex couples.[119]

> *"Research clearly shows there are no negative impacts of being parented by queer parents. Child protection wants kids out of the system. Let people who want to love these kids love them. This also applies to foster carers who are discriminated against in the same way."*
>
> **– Genderqueer person, aged 25-34, Regional NSW**

For these reasons, we suggest repealing s 59A from the Act entirely and not introducing a similar provision in any future NSW anti-discrimination law.

RECOMMENDATIONS

- Repeal section 59A in its entirety, and do not replace it with a similar exemption.

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[117] See, eg, Lorena Allam, 'Anglicare Sydney refused to assess Aboriginal baby's aunt as carer because she was in same-sex relationship, court hears', *The Guardian* (online, 6 February 2024) https://www.theguardian.com/australia-news/2024/feb/06/anglicare-court-case-aboriginal-baby-daisy-aunt-refused-same-sex-relationship; *Re Daisy Logan* [2023] NSWChC 16.

[118] 'Anglican Community Services', *Australian Charities and Not-for-profits Commission: Charity Register* (Web page) https://www.acnc.gov.au/charity/charities/b7633d8a-38af-e811-a963-000d3ad244fd/profile; 'Family Spirit Limited', *Australian Charities and Not-for-profits Commission: Charity Register* (Web page) https://www.acnc.gov.au/charity/charities/c95d9bad-3aaf-e811-a963-000d3ad24077/profile; see also Equality Australia, *Dismissed, Denied, and Demeaned: A National Report on LGBTQ+ Discrimination in Faith-Based Schools and Organisations* (Report, March 2024) 73 https://equalityaustralia.org.au/resources/dismissed-denied-and-demeaned-a-national-report-on-lgbtq-discrimination-in-faith-based-schools-and-organisations/.

[119] Susan Golombok, 'The psychological wellbeing of ART children: what have we learned from 40 years of research?' (2020) 41(4) *Reproductive BioMedicine Online* 743, 743-745 ; Deborah Dempsey, 'Same-sex parented families in Australia' (Australian Institute of Family Studies, CFCA Paper No. 18, 2013); Nanette Gartrell et al, 'The National Lesbian Family Study: 2. Interviews with Mothers of Toddlers' (1999) 69(3) *American Journal of Orthopsychiatry* 362, 367-369; Nicola Carone, et al, 'Two Decades of Psychological Adjustment of Donor-Conceived Offspring of Lesbian Parents: Examining Donor Contact and Type' (April 2025) *Reproductive BioMedicine Online* 1, 5-10; Susan Golombok, et al, 'Long-Term Outcomes for Families Created by Assisted Reproduction: Parents and Children at Age 20' (2023) 59(7) *Developmental Psychology* 1304.

SUPERANNUATION

Question 6.5

It is unlawful to discriminate against transgender people in superannuation in NSW under Commonwealth law. However, section 38Q of the Act provides a broad exception to Part 3A, requiring transgender persons to be treated as being of the opposite sex to which they identify in the administration of a superannuation or provident fund or scheme.[120] This is out of step with the Commonwealth *Sex Discrimination Act* which does not include an exemption allowing discrimination in superannuation on the basis of gender identity (nor do most other state or territory laws).

As suggested in the Consultation Paper, federal law prevails over inconsistent state law and that state law is invalid to the extent of the inconsistency, pursuant to s 109 of the *Australian Constitution*. The primary reason for the inconsistency arising is due to the fact that superannuation is governed under federal legislation.[121] As a result, if challenged, the provision is not likely to stand up to a constitutional challenge of its validity.

New South Wales should be proactive in avoiding a clash between the Act and the *Sex Discrimination Act* by removing this exception, rather than creating legal uncertainty for employers, employees and superfunds alike which could lead to avoidable litigation needing to occur to overcome discrimination that may result from section 38Q being in force.

We agree with the NSW Law Reform Commission's prior recommendation in 1999 to repeal section 38Q as it could not see any justification for this exception being retained[122] – neither can we. Chief among the concerns as to the exception's retention is the inaccuracy and inequity stemming from assumptions made in relation to a transgender person's superannuation benefit based on the opposite gender to which they identify.[123] While likely constitutionally invalid anyway, the law remaining on the statute books is extremely stigmatising and could encourage discrimination against trans customers, such through misgendering or deadnaming.

Such an exception should not be introduced into any future iteration of anti-discrimination laws in New South Wales.

RECOMMENDATIONS

- Repeal section 38Q and do not introduce exceptions which can enable discrimination against transgender people in the area of superannuation

TRANS SPORT INCLUSION

Question 7.7

The exception under the Act allowing discrimination in sport against transgender people is broader than comparable laws, including under Commonwealth laws.[124] Section 38P provides that nothing under Part 3A renders unlawful the exclusion of a transgender person from participation in any

[120] *Anti-Discrimination Act 1977* (NSW) s 38Q.

[121] See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth).

[122] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, November 1999) [6.401]-[6.403].

[123] Ibid.

[124] See, for example: *Sex Discrimination Act 1984* (Cth), s 42; *Equal Opportunity Act 2010* (Vic), s 72; *Anti-Discrimination Act 1991* (QLD), s 111; *Equal Opportunity Act 1984* (WA), s 35; *Equal Opportunity Act 1984* (SA), s 48; *Anti-Discrimination Act 1992* (NT), s 56; *Anti-Discrimination Act 1998* (Tas), s 29; *Discrimination Act 1991* (ACT), s 41.

sporting activity for members of the sex with which the transgender person identifies, exception in relation to coaching, administration or prescribed sporting activities under regulation.[125]

Importance of trans inclusion in sport

Participation in sports significantly enhances health and wellbeing, and it fosters a sense of belonging. While many trans people across Australia have found supportive and affirming leagues and clubs, trans community sport participation remains very low. There has in fact been a decrease in participation as recently found in the *Free to Exist Report* published in 2024 which found from 2019 to 2024, the participation rate of trans women in competitive sport declined from 43.8% to 25%, and for trans men from 23.5% to no current participation.[126]

Recent research indicates that only a third of trans people surveyed felt comfortable engaging in sporting activities, even less so among trans women and girls.[127] Contributing factors included concerns about acceptance, exclusionary rules and invasive policies.[128]

Negative campaigns about trans women playing community sport have incited violence and led to doxxing, threats and intimidation, forcing trans women to stop playing or take protective legal action, and compounding poorer mental and physical health outcomes.[129] Public conversations about trans girls' and women's participation in sport have adverse impacts on the trans community and deter their participation in the sports they love at a community level.

Science on the inclusion of trans women

There is currently no empirical evidence to support blanket bans of trans people from sport, and claims that trans women and girls have an inherent physical advantage over cisgender women and girls are exaggerated. Ideologically driven assumptions and generalisations, along with intentional misinformation, are increasingly prevalent and continue to feed a harmful culture war against trans communities.

A recent Australian narrative review[130] examined the impact of gender affirming hormone therapy on physical performance, muscle strength, and markers of endurance. This review found that the use of feminising hormone therapy (estrogen, androgen blocker and progesterone) had a significant impact on trans women's bodies including increasing fat mass by approximately 30% and decreasing muscle mass by approximately 5% after 12 months, which then continued to steadily decline beyond 3 years.[131]

After 2 years of gender affirming hormone therapy, no advantage to a 12% difference was observed for physical performance measured by running time in trans women when compared with cisgender

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[125] *Anti-Discrimination Act 1977* (NSW) s 38P.

[126] Ryan Storr et al, *Free to Exist: Documenting participation data on LGBTIQA+ young people in sport and physical activity* (Swinburne University of Technology, RMIT University, University of South Australia and Department of Health (Vic), May 2025) 15 https://www.vichealth.vic.gov.au/sites/default/files/2024-05/Free_to_Exist_Report_2024.pdf.

[127] Sasha Bailey et al, 'Participation, barriers, facilitators and bullying experiences of trans people in sport and fitness: findings from a national community survey of trans people in Australia' (2024) 58(23) *British Journal of Sports Medicine* 1434, 1436 https://bjsm.bmj.com/content/58/23/1434.

[128] Ibid 1437-8.

[129] See, eg, *Smith v Blanch* [2025] NSWCA 188; *Riley Dennis v Kirralie Smith* (Local Court of New South Wales, Deputy Chief Magistrate S. Freund, 26 August 2025); *Stephanie Blanch v Kirralie Smith and Gender Awareness Australia Limited t/as Binary Australia* (Local Court of New South Wales, Deputy Chief Magistrate S. Freund, 26 August 2025).

[130] Ada S Cheung et al, 'The Impact of Gender-Affirming Hormone Therapy on Physical Performance' (2024) 109(2) *The Journal of Clinical Endocrinology & Metabolism* 455.

[131] Ibid 457.

women.[132] By 4 years, there was no advantage in relation to completing sit-ups and running.[133] The research in this area is limited but understanding will grow over time if appropriate investment is made into further studies.

The way forward

We suggest amending s 38P (or replacing this exemption in any future anti-discrimination law) with a narrower exemption that:

- does not apply to children under 12 years old (consistent with Commonwealth, Victorian, Queensland, the Northern Territory and Tasmanian law);[134]
- limits the exemption to competitive sporting activity, rather than any sporting activity (consistent with Commonwealth, Victorian, Queensland, Western Australian, South Australian, the Northern Territory, Tasmanian and ACT law);[135]
- ensures the exemption does not apply to umpiring or refereeing (consistent with Commonwealth, Victorian, Queensland, Western Australian, the Northern Territory, Tasmanian and ACT law);[136]
- adds a requirement that any restriction on participation[137] only be permitted to the extent that the strength, stamina or physique of competitors is relevant, and where reasonable and proportionate in all the circumstances of the case (building upon the approach taken under Commonwealth, Victorian, Queensland, Western Australian, South Australian, the Northern Territory and ACT law).[138] The reason for adding the proportionality requirement is to bring the exemption in line with international human rights law, and would also be consistent with the principles set out in Australian Sports Commission's *Transgender & Gender Diverse Inclusion Guidelines for High Performance Sport.*[139]
- the exception should additionally provide that in determining what is a 'reasonable' restriction, a person must have regard to:
    - the nature and purpose of the activity; and
    - the consequences of the restriction for people of the restricted sex or gender identity; and

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[132] Ibid 461.

[133] Ibid.

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

[135] *Sex Discrimination Act 1984* (Cth) s 42(1); *Equal Opportunity Act 2010* (Vic) ss 72(1)-(2); *Anti-Discrimination Act 1991* (QLD) s 111(1); *Equal Opportunity Act 1984* (WA) s 35(1); *Equal Opportunity Act 1984* (SA) s 48; *Anti-Discrimination Act 1992* (NT) s 56(1); *Anti-Discrimination Act 1998* (Tas) s 29; *Discrimination Act 1991* (ACT) s 41(1).

[136] *Sex Discrimination Act 1984* (Cth) s 42(1); *Equal Opportunity Act 2010* (Vic) ss 72(1)-(2); *Anti-Discrimination Act 1991* (QLD) s 111(1); *Equal Opportunity Act 1984* (WA) s 35(1); *Equal Opportunity Act 1984* (SA) s 48; *Anti-Discrimination Act 1992* (NT) s 56(1); *Anti-Discrimination Act 1998* (Tas) s 29; *Discrimination Act 1991* (ACT) s 41(1).

[137] We recommend the term 'restrict participation' rather than 'exclude', such as is the case in the Queensland law. See *Anti-Discrimination Act 1991* (Qld) s 111.

[138] *Sex Discrimination Act 1984* (Cth) s 42(1); *Equal Opportunity Act 2010* (Vic) s 72(1); *Anti-Discrimination Act 1991* (QLD) ss 111(1)(a) and (3); *Equal Opportunity Act 1984* (WA) s 35(1); *Equal Opportunity Act 1984* (SA) s 48(a); *Anti-Discrimination Act 1992* (NT) s 56(1)(a); *Discrimination Act 1991* (ACT) s 41(1).

[139] Australian Sports Commission, *Transgender & Gender Diverse Inclusion Guidelines for High Performance Sport* (2019) 6-8.

- whether there are other opportunities for people of the restricted sex or gender identity to participate in the activity.[140]

RECOMMENDATIONS

- Repeal s 38P in its current form.
- Insert a provision for a restriction to participation exemption which sets out that the exemption: (a) does not apply to children under 12 years of age, (b) is limited to competitive sporting activity, (c) does not applying to umpiring or refereeing, (d) is only permitted to the extent that the strength, stamina or physique of competitors is relevant, and where reasonable and proportionate in all the circumstances of the case.
- Define the factors for determining what is a 'reasonable' restriction, based on section 72(1B) of the *Equal Opportunity Act 2010* (Vic).

STRENGTHENING VILIFICATION LAWS

In our recent submission to the independent review on hate speech in criminal settings in New South Wales led by the Hon. John Sackar AM KC (the Sackar Review), we outlined the persistent and escalating problem of vilification and hate-motivated conduct in New South Wales. We also emphasised the need for criminal law reforms and vilification provisions to be implemented in a consistent and complementary way, particularly in relation to protected attributes.

Refer to the section *Modernising the Attributes* on page 11 for our preferred framing of attributes, which should be consistent between the discrimination and vilification provisions in the Act.

There is strong justification for explicit protections on the basis of sexual orientation, gender identity and sex characteristics in the Act. Our submission to the Sackar Review includes 16 case studies, along with multiple other examples, illustrating how hatred and prejudice towards our communities frequently manifests as unlawful vilification.

> *(Hate speech) is dehumanising and wears away at your self esteem and sense of self, it makes you feel less than, not as important, not worth compassion, not worth basic decency or privacy.*
>
> — **Queer, trans, non-binary person aged 35-44 based in Sydney metropolitan area**

The most common types of conduct that LGBTIQ+ people experience includes:

- verbal abuse
- written and verbal threats of abuse, physical violence, physical attack and assault, both in person and online
- threats of abuse including through the use of graffiti
- physical attack or assault, including sexual assault
- harassment, such as being spat at and offensive gestures
- deliberate damage to property, vandalism and theft.

Note: While it may not be within the scope of this Consultation Paper (presumably in the next paper yet to be released), we strongly recommend the option of community organisations making 'relevant

[140] *Equal Opportunity Act 2010* (Vic) s 73(1B)(b).

entity' complaints about vilification as available in Queensland[141], a provision that has led to significant case law.[142] This approach is one avenue to address a wider concern of placing the whole burden of enforcement for vilification against a whole community on the shoulders of one individual complainant.

66.3% of our community survey participants have seen or experienced hate speech or public abuse targeting a subset of the LGBTIQ+ community of which they are a part

INCITEMENT-BASED VILIFICATION

Question 8.2(2)

We do not think that any changes are necessary to the test for incitement-based vilification. We would specifically urge against any attempt to change the wording to include the words 'likely to incite' as has been adopted in Victoria.

The New South Wales case law (as well as Queensland law, which was based on New South Wales) has well established that 'incites' does not require that anyone was actually incited, but rather requires consideration of whether the ordinary observer would consider they were being urged on to hatred,[143] i.e. that the conduct was capable of inciting, without the need to show it succeeded in inciting. Adding the term 'reasonably likely to incite' might infer that 'incites' does mean actual incitement.

The term 'likely' can take on several meanings contextually. It could be interpreted as 'might happen' or 'likely to result in', or could even be interpreted to mean 'more likely than not' (i.e. over 50% chance) or even 'probable'.

A potential interpretation that either actual incitement or 'likely' incitement is needed might have the unintended consequence of raising rather than lowering the bar higher for complainants to prove. While the chance of this incorrect interpretation could be mitigated by clear explanatory notes, we are not convinced that this change is necessary.

HARM-BASED VILIFICATION

Question 8.2(1)

We support introducing a new harm-based vilification protection in addition to the existing incitement-based provision. Given the strong body of case law on the meaning of vilification in New South Wales and like jurisdictions, we would not support replacing it entirely with the new harm-based test. Based on how few matters make it to final hearing, it will take many years for courts to develop case law on how to interpret the new provision.

The harm-based vilification approach recognises the harm experienced by people and groups who are the target of hate by directly prohibiting conduct that undermines their sense of safety, belonging and dignity.

Discussion of the harm-based test arose from a Victorian parliamentary inquiry, where the Committee ultimately adopted the following formulation: 'a reasonable person would consider hateful, seriously contemptuous, or reviling, or seriously ridiculing of a person or a class of persons.' We broadly agree with the Committee's reasoning in reaching this conclusion, which sought to avoid the concerns that

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[141] *Anti-Discrimination Act 1991* (Qld) s 134. The organisation must be making a complaint in good faith, about relevant persons for the relevant entity, and it is in the interests of justice to accept the complaint.

[142] See *GLBTI v Wilks & Anor* [2007] QADT 27; *Australian Muslim Advocacy Network & Islamic Council of Queensland v Anning* [2021] QCAT 452.

[143] *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77.

arose around section 18C of the *Racial Discrimination Act* — specifically, that including terms such as 'insult' or 'offend' set too low a threshold (or were at least perceived to do so).[144]

> *Community survey participants were strongly in favour of this approach, with 78.3% agreeing with the statement that the law should focus more on how the people in the targeted group experience the abuse, rather than only whether it urges others to hatred.*

There are strong benefits in clearly defining a 'reasonable person' in the legislation as being a person from the perspective of the target group. The use of a simple 'reasonable person' test can otherwise result in unintended consequences. For example, in *Bennett v Dingle*, the respondent told the complainant that he was a 'big fat Jewish slob' and that 'Hitler was right about you bastards' at a local dog park. VCAT assumed the relevant audience was 'the ordinary member of the class of persons being non-Jewish members of the public present in the park when the words were uttered'. On that basis, VCAT concluded that it was doubtful the 'ordinary non-Jewish person would perceive the words as going beyond venting'.[145]

While harm-based tests have been criticised for a perceived lack of objectivity, they in fact require an objective assessment based on a reasonable person — though this reasonable person is drawn from a smaller, more specific group within society, rather than the broader societal standard, which is implicitly modelled on a white, able-bodied, cisgender, heterosexual, middle-class individual. While broader 'reasonable person' tests have a role in the law, they can be particularly problematic when addressing bias against marginalised communities — especially where there is widespread ignorance or misunderstanding of their lives and experiences.

ATTRIBUTES FOR VILIFICATION

Question 8.1(2)

We asked survey participants to tell us if further attributes needed protection from vilification. Of those who answered the question, 87.1% responded that there should be additional protections, and the most common responses for groups in need of this protection were:

- people with disability (144 responses) or neurodiversity (10 responses)
- sex / gender (140 responses)
- intersex people (101 responses
- sex workers (99 responses).

These additional attributes reflect the new protections in Victoria, with the exception of sex workers. However, there is precedent for protecting sex workers in Tasmania and Northern Territory laws.[146] Our community survey responses indicated that moralising stereotypes and dehumanising labels directed at people in the sex work industry are a key driver of incitement to hatred against this community.

We understand that submissions will be made on behalf of people with disability and sex workers, who may be better placed to provide detailed recommendations on how protections against vilification should apply to these groups.

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[144] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, 'Inquiry into anti-vilification protections' (Committee Final Report, 3 March 2021) 120-121 https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-anti-vilification-protections/reports.

[145] *Bennett v Dingle* [2013] VCAT 1945.

[146] *Anti-Discrimination Act 1998* (Tas) s 19; *Anti-Discrimination Act 1992* (NT) s 20A (note that this provision may be amended but will retain the sex worker attribute if the Anti-Discrimination Amendment Bill 2025 passes.

In addition to considering extensions to the attributes protected under vilification laws, we recommend updating the law to ensure that the characteristics extension for attributes applies to vilification, as it currently does for direct discrimination (and, as noted in our response to Question 3.5 on page 10, should also extend to indirect discrimination). This would specifically address a problem that has arisen in Queensland, where a respondent was able to successfully argue that attacks on drag queens do not fall within vilification protections on the basis of gender identity or sexual orientation.[147] This could be achieved by creating a standalone provision that clarifies the way that protected attributes are defined throughout the Act, ensuring it includes a characteristic that people with the attribute generally have, or are presumed to have.

OTHER ISSUES REGARDING VILIFICATION

There is merit in clarifying that conduct constituting vilification may involve a course of conduct, rather than being limited to a single act. Vilification often escalates over time, and the cumulative impact of repeated behaviour may be crucial to establishing the intent to incite hatred, serious contempt, revulsion, or severe ridicule. While a single act should still be sufficient where the threshold is met, recognising that a pattern of conduct can form the basis of the offence would reflect the reality of how vilification frequently occurs.

The recently passed Victorian law confirms that conduct can be constituted by a single occasion or by a number of occasions over a period of time.[148] This approach is also reflected in the Scottish hate crime legislation, which clarifies that hate conduct can consist of a single act, or a course of conduct.[149]

Private land

Question 8.3

The Act should clarify that a public act can occur on private land, to ensure situations that should fall within the scope are not excluded. For example:

- On school grounds where members of the public can visit.
- In publicly accessible areas of workplaces, such as private hospital waiting rooms.
- Where flags or emblems are displayed on the front of private dwellings but are visible from the road.

Exemptions to vilification

Questions 8.4 and 7.3

The orthodox approach vilification exemptions is reflected in section 20C of the Act currently, providing that none of the below are unlawful:

- A fair report of a public act.
- A communication that would be subject to a defence of absolute privilege.

[147] Refer to *Valkyrie and Hill v Shelton* [2023] QCAT 302 [302], where the conduct was determined not to be on the ground of the attribute of sexuality or gender identity but because of a concern that drag queens shouldn't be around children, since not all drag queens are trans or gay [313]. We note that this argument may not hold up under appeal, and the appeal decision has yet to be handed down. However, the Queensland legislation has been updated to respond to this issue in the *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 21 (not yet commenced).

[148] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 195N.

[149] *Hate Crime and Public Order (Scotland) Act 2021* s 4.

- A public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Confusingly, there is inconsistency in the wording of the provisions that safeguard speech in the public interest, between the race vilification provisions (set out above), and provisions relating to other attributes.

Public interest discussions that are explicitly not unlawful, in relation to transgender, HIV/AIDS and religious vilification include those 'for religious discussion or instruction purposes'. Different wording again appears in relation to homosexual vilification – the term 'religious instruction' is used.

It is unclear why three different formulations of the public interest discussion exemption are included in the Act. This inconsistency reduces the law's educational value for the community and risks unanticipated or unintended outcomes in statutory interpretation. Arbitrary differences between the provisions create confusion, particularly where a person is subjected to vilification on multiple grounds, such as race and sexuality, and must navigate different exemptions for the same conduct.

As noted previously in this submission, the Act should be restructured. We suggest that vilification is set out in such a way that lists the attributes for vilification, and then the meaning of vilification, and the relevant exemptions a single time rather than repeating the same or similar text throughout the Act. This would also allow for consistency in the application of vilification exemptions whichever attribute/s are involved.

While we consider that religious discussion or instruction is already a form of discourse that would generally fall within the public interest exemption — whether explicitly mentioned or captured under 'other purposes in the public interest' — there is merit in ensuring it does not extend to speech that strays too far from the doctrines or teachings of established religions. Religious grounds are sometimes used as a smokescreen for harmful speech. For this reason, we would support a clarification, similar to that recently enacted in Victoria, which defines 'religious purpose' as including worship, observance, practice, teaching, preaching and proselytising in conformity with the doctrines, beliefs or principles of that religion.[150]

Although not raised in the Consultation Paper for consideration as an option for inclusion in the civil law, we have recently noted our major concerns about the use of the phrasing 'otherwise referencing' a religious text in new 93ZAA(2) of the *Crimes Act.*[151]

As the Consultation Paper points out, in only a minority of states (New South Wales, Queensland and the Northern Territory) religious bodies and faith-based organisations currently have broad exemptions that extend to all contraventions in the Act, therefore applying to vilification. Consistent with prior findings of this Commission in 1999, such broad exemptions should not apply to vilification, as this overly broad approach is unjustifiable.

RECOMMENDATIONS

- Ensure protections from vilification for people based on their sexual orientation, gender identity, and sex characteristics.
- Ensure it is unlawful to vilify a person because of characteristics a person with the attribute generally has or is generally imputed to the attribute.

[150] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010* (Vic) s 102G(2) (uncommenced).

[151] Equality Australia, Submission to the Department of Justice (NSW), *Independent review of criminal law protections against the incitement of hatred* (6 August 2025) 14-15 https://equalityaustralia.org.au/resources/submission-a-safer-nsw-for-lgbtiq-communities/.

- Retain the incitement-based test.
- Add a second harm-based form of vilification that involves engaging in a public act that a reasonable person would consider hateful towards, reviling, seriously contemptuous of, or seriously ridiculing of another person or group, and defining a reasonable person to mean a reasonable person from the target group.
- Clarify that a 'public act' can occur on private land.
- Clarify that vilification (either incitement or harm-based) can involve a course of conduct.
- Create a single public interest speech exemption that applies to all attributes in relation to vilification, and if religious discussion or instruction is included explicitly, clarify that it involves practice, teaching, preaching and proselytising in conformity with the doctrines, beliefs or principles of that religion.
- When redrafting section 56 of the Act, ensure that it does not apply to vilification.

ADDRESSING HARASSMENT

SEXUAL HARASSMENT

Question 9.1

Sexual harassment is a key issue of concern for LGBTIQ+ communities. The Australian Human Rights Commission found in 2022, through its fifth national survey on sexual harassment in Australian workplaces that 46% of people who identify as gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure, questioning or other, 70% of people with an intersex variation have experienced work-related sexual harassment in the past 5 years.[152] This is disproportionately higher than the rate faced by the community at large (33% overall, with 41% of women facing sexual harassment and 26% of men, generally).[153] The framing of sexual harassment under the Act could have a meaningful impact in improving protections for LGBTIQ+ people.

Under the Act, a person sexually harasses another person if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
(b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Reasonable person test

As explained in the Consultation Paper, the 'reasonable person' test, being 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated', differs from the Commonwealth *Sex Discrimination Act* in two ways:[154]

[152] Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (November 2022) 12 https://humanrights.gov.au/time-for-respect-2022.

[153] Ibid.

[154] NSW Law Reform Commission, *Review of Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025) 198-199.

- The Act uses the phrase 'having regard to all the circumstances' and does not list the relevant circumstances, unlike in the *Sex Discrimination Act* which sets out relevant matters to be considered, including:
    - the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, disability, race, colour or national or ethnic origin of the person harassed,
    - the relationship between the person harassed and the harasser, and
    - any other relevant circumstance.
- The Act uses a higher threshold for the reasonable person test, where a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated, whereas the *Sex Discrimination Act* only requires that a reasonable person would have '**anticipated the possibility**' that the person harassed would be offended, humiliated or intimidated.

We are in favour of the list of relevant circumstances being included as they can provide certainty for complainants, the community at large and decision-makers, that protected attributes are accounted for in instances of sexual harassment. It is also reflective of the need to address the intersectional nature of sexual harassment, as indicated by the disproportionately higher levels of sexual harassment faced by people from marginalised communities, including LGBTIQ+ communities, as set out above.

Additionally, lowering the threshold of the reasonable person test to 'anticipate the possibility' would render the Act consistent with the approach taken federally, as well as Queensland and Northern Territory,[155] and enable better accessibility to legal recourse against perpetrators of sexual harassment. It is telling that these jurisdictions have had relatively recent reviews and amendments of their discrimination laws over the past few years, which accounted for the issue of sexual harassment.[156]

Scope of circumstances in which sexual harassment applies

An additional matter for consideration in relation to the scope of sexual harassment protections are the areas in which they apply. To this end, part 2A of the Act prescribes certain areas such as work relationships, provision of goods and services, accommodation, land and sport. Sexual harassment protections should not be confined to certain areas and should have broad coverage across all areas of public and private life. An example of a regime with broad protections in this vein is that of Queensland.[157]

RECOMMENDATIONS

- Insert a list of relevant matters to be considered for the reasonable person test, similarly to section 28A(1A) the Commonwealth, *Sex Discrimination Act*
- Lower the threshold for the 'reasonable person' test such that the complainant need only demonstrate that a reasonable person would have 'anticipated **the possibility**' that the person harassed would be offended, humiliated or intimidated

[155] *Anti-Discrimination Act 1991* (Qld) s 119; *Anti-Discrimination Act 1992* (NT) s 22(2)(e).

[156] See Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 130-141 https://www.qhrc.qld.gov.au/about-us/reviews/ada; 'Exposure Draft Anti-Discrimination Amendment Bill 2022', *Northern Territory Government: Attorney-General's Department* (web page) https://agd.nt.gov.au/law-reform-reviews/published-reports-outcomes-and-historical-consultations/historical/2022/exposure-draft-anti-discrimination-amendment-bill-2022.

[157] *Anti-Discrimination Act 1991* (Qld) s 119.

- Expand the applicability of sexual harassment to all areas of public and private life, rather than continuing to confine it to certain prescribed areas as presently set out in the Act

OTHER FORMS OF HARASSMENT

Question 9.7

Whilst the Act currently only provides protections against sexual harassment,[158] harassment based on other protected attributes may be recognised as a form of discrimination under the Act.[159] At the Commonwealth level, the *Sex Discrimination Act* and *Disability Discrimination Act 1992* (Cth) provide separate harassment protections based on sex, sexual harassment, and disability respectively.[160] Western Australia, Tasmania and the Northern Territory also have protections against harassment based on protected attributes, in addition to sexual harassment, in their discrimination laws.[161] These protections may make it simpler to bring a discrimination case when it only involves harassment, avoiding the need to rely on the more complex definitions of discrimination.

When comparing the results of the 2012 *Private Lives 2* and 2020 *Private Lives 3* studies, it appears that there has been an increase in the proportion of people who have experienced violence and harassment due to their sexual orientation or gender identity.[162] The latest *Private Lives* study showed that around 1 in 4 LGBTIQ people experienced harassment (such as being spat at or offensive gestures) in the past 12 months because of their sexual orientation or gender identity.[163] Among young same sex attracted and gender questioning young people, the *Writing Themselves In 3* report shows that 61% have experienced verbal abuse and 18% have experienced physical abuse, with 80% of all abuse reported having occurred at school.[164]

At the federal level, the recent introduction of stand-alone provisions on sex-based harassment[165] was a missed opportunity, as they failed to capture related conduct based in homophobia and transphobia — behaviours that are similarly rooted in misogyny and rigid gender norms. Harassment based on sexual orientation, gender identity or sex characteristics can be just as damaging and should be equally recognised and addressed.

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[158] See *Anti-Discrimination Act 1977* (NSW) pt 2A.

[159] See *Hall v A & A Sheiban Pty Ltd* (1988) 20 FCR 180 [235], [250] (per Wilcox J); *O'Callaghan v Loder* (1983) 3 NSWLR 89 [92]; *Elliot v Nanda* (2001) 111 FCR 240 [107]-[110]; *Daniels v Hunter Water Board* (1994) EOC [92]-[626]; *Qantas Airways v Gama* (2008) 157 FCR 537 [73]-[78] (as per French and Jacobson JJ).

[160] *Sex Discrimination Act 1984* (Cth) ss 28A, 28AA; *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39.

[161] See *Equal Opportunity Act 1984* (WA) ss 49A-49D (racial harassment); *Anti-Discrimination Act 1998* (Tas) s 17(1) (harassment based on race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability); *Anti-Discrimination Act 1992* (NT) s 20(1)(b) (all protected attributes).

[162] William Leonard et al, 'Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians' (Australian Research Centre in Sex, Health and Society, La Trobe University, 2012) 47 (***Private Lives 2***); Adam O. Hill et al, 'Private Lives 3: The health and wellbeing of LGBTIQ people in Australia' (Australian Research Centre in Sex, Health and Society, La Trobe University, 2020) 40 (***Private Lives 3***). For example, 25.5% of participants in *Private Lives 2* reported verbal abuse, compared to 34.6% in *Private Lives 3;* 15.5% reported harassment such as being spat at or offensive gestures in *Private Lives 2*, compared to 23.6% in *Private Lives 3*; 2.9% reported sexual assault in *Private Lives 2*, compared to 11.8% in *Private Lives 3*; and 1.8% reported experiencing a physical attack or assault with a weapon in *Private Lives 2*, compared to 3.9% in *Private Lives 3*. While the surveys each asked slightly different questions which makes it difficult to draw direct comparisons, this data suggests an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity).

[163] *Private Lives 3*, 40.

[164] Hillier et al, *Writing Themselves In 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2010) 39.

[165] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

Although sex-based, race-based, ableist, homophobic or transphobic harassment are already types discrimination based on protected attributes, there may be benefit in removing any residual doubt that the law covers harassment within the scope of direct discrimination. .

RECOMMENDATION

- Create a stand-alone protection from harassment based on sex, sexual orientation, gender identity and sex characteristics.
- In the alternative, including a clarifying provision in the meaning of direct discrimination that clarifies that harassment on the basis of a protected attribute is a form of direct discrimination.

LIABILITY

Question 10.4

Under the current Act, a person or organisation found vicariously liable has two possible defences: demonstrating that they took 'all reasonable steps' to prevent the conduct, or arguing that they did not *authorise* the actions of their employee or agent. New South Wales stands alone in allowing this second form of defence.[166]

This approach is out of step with the rest of the country and weakens protections. It is hard to conceive of a situation where an employer would ever formally 'authorise' much of the conduct that is prohibited by the Act. Given the already significant challenges in bringing and proving these claims, there is no sound policy basis for retaining this provision. Other Australian jurisdictions apply only the 'reasonable steps' standard — and New South Wales should align with this common approach.

RECOMMENDATIONS

- Remove the defence under section 53(1) which excuses contraventions when a principal or employer did not authorise the act.

PREVENTING HARM

SUBSTANTIVE EQUALITY

Substantive equality goes beyond treating everyone the same — it recognises that historical and systemic disadvantage means some groups, including LGBTIQ+ people, face unique barriers to full participation in public life.

Achieving substantive equality in New South Wales requires proactive measures to remove those barriers, address systemic discrimination, and prevent harm before it occurs. For LGBTIQ+ communities, this means ensuring that laws and policies do not just prohibit discrimination after the fact, but actively create environments where discrimination, harassment, vilification, and victimisation are less likely to happen in the first place.

[166] *Anti-Discrimination Act 1977* (NSW) s 53.

POSITIVE DUTY

Question 11.3

The Act does not currently include positive duties requiring duty holders under the Act to take reasonable steps to prevent harassment, discrimination, vilification or victimisation. By contrast, under Commonwealth law, certain entities have a positive duty to prevent sex discrimination and sexual harassment in workplaces.[167] Victoria, the Northern Territory, Queensland[168] and the ACT have also introduced positive duties in their anti-discrimination framework and this has been recommended in WA.[169]

> *Community support for a positive duty to eliminate discrimination is very high – with 92.3% support among our survey participants.*

Positive duties reduce the burden on individuals who experience discrimination by seeking to prevent discrimination before it happens. They would make a tangible difference where practices and policies could be reviewed to address systemic issues and eliminate unlawful discrimination before it happens.

The current discrimination framework in New South Wales largely places the burden of policing compliance on the individuals most affected when that burden could be lessened by giving more powers to a regulatory agency to investigate a potential breach and take appropriate steps where a contravention has occurred. This is particularly important if a positive duty is to be introduced in NSW.

> "*It makes sense to include organisations/businesses in the legislation so they are required to ensure their area of control fosters respect and inclusion, and doesn't become a hotbed of prejudice and discrimination. I understand employers are required to provide safe environments for their workers, and that should extend to all organisations/businesses that deal with the public.*"
>
> - **Trans woman with a variation of sex characteristics aged 65-74, based in Regional NSW**

We recommend that the Anti-Discrimination Board (or a similar body) be given appropriate regulatory powers and funding to perform functions similar to other regulatory bodies where serious or systemic discrimination, harassment or vilification has occurred. These functions should include:

- the power to undertake investigations, including compel the production of documents or information from witnesses
- the power to enter enforceable undertakings
- the power to issue lower-level fines as part of a compliance notice power
- the power to seek larger civil penalties from a court for failure to comply with the law or an enforceable undertaking.

To promote transparency and so that the regulatory body can rely on its soft powers before taking stronger regulatory approaches, it should also have the capacity to make public reports in relation to

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[167] *Sex Discrimination Act 1984* (Cth) s 47C.

[168] Uncommenced at time of writing.

[169] *Equal Opportunity Act 2010* (Vic) Part 3; *Anti-Discrimination Act 1992* (NT) Part 2A; *Discrimination Act 1991* (ACT) Part 9; *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25; See recommendations 121 and 125 at Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 239, 241 https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984-wa; 'WA's anti-discrimination laws set for overhaul', *Government of Western Australia: WA.gov.au* (Media statement, 16 August 2022) https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/WA's-anti-discrimination-laws-set-for-overhaul-20220816.

matters involving serious or systemic discrimination, harassment or vilification, and to make public reports on the degree of compliance with the positive duty and related matters. The ability to publish action plans would also provide further transparency and encourage compliance.

These functions should be exercisable subject to standard duties to afford procedural fairness to all parties and should be appropriately reviewable by a tribunal or court.

A helpful model for drafting of these provisions is at section 25 of the *Respect at Work and Other Matters Amendment Act 2024* (Qld).

RECOMMENDATION

- Create an enforceable positive duty that applies to all contraventions, areas and attributes under the Act.
- Ensure that the Anti-Discrimination Board (or another relevant entity) has the necessary regulatory powers available to enforce the positive duty.