THE LAW SOCIETY
OF NEW SOUTH WALES

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29 September 2023

Mr Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst,

Review of the *Anti-Discrimination Act 1977* (NSW)

Thank you for the opportunity to provide a preliminary submission on issues relevant to the Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (**Act**). The Law Society's Human Rights and Employment Law Committees have contributed to this submission.

The Law Society supports a comprehensive review of the Act to ensure that discrimination protections in NSW are strengthened and modernised. The Act in its current form has not kept pace with changes in societal understandings of discrimination, nor the increasing body of evidence on its wide-ranging and harmful impacts. Amendments to the Act have been made in a piecemeal fashion that has resulted in legislation that is structurally and conceptually complicated.

Our responses to the Terms of Reference of the Review are **attached**. We proceed from the starting point that a new Act is required to ensure an accessible anti-discrimination regime in NSW, that responds not only to individual instances of discriminatory conduct, but also addresses the systemic issues in this area through a strong focus on prevention and education.

The Law Society has long advocated for standalone human rights legislation in NSW. While an anti-discrimination regime is distinct from human rights legislation, the former nevertheless plays an important role in promoting and protecting the principles of human rights law. We encourage the Commission to be guided by the principles in the *Universal Declaration of Human Rights* as well as the other human rights instruments to which Australia is a party in its consideration of competing interests that may arise over the course of the Review.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at Sophie.Bathurst@lawsociety.com.au or (02) 9926 0285.

Yours sincerely,

Cassandra Banks
President

Encl.

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

REVIEW OF THE *ANTI-DISCRIMINATION ACT 1977* (NSW) – PRELIMINARY SUBMISSION ON TERMS OF REFERENCE 1-10

TERM OF REFERENCE 1: Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

The Law Society considers there is a need to modernise and strengthen anti-discrimination protections in NSW. The Act in its current form is 'cumbersome, wordy, opaque, repetitive and confusing' and is out of step with the more contemporary anti-discrimination legislation in other Australian jurisdictions.[1] In our view, reform will be achieved most effectively by a holistic redraft of the current legislation.

Anti-discrimination law can be complex to comprehend, particularly given the inconsistencies between state and federal regimes. Improving the accessibility and understanding of anti-discrimination law is central to facilitating its purpose of preventing and eliminating discrimination and harassment. From an access to justice perspective, many complainants in anti-discrimination matters are self-represented, and the current structure and wording of the Act may hinder their ability to understand their rights and bring a claim.

The starting point of any examination of an anti-discrimination regime is to clarify its objects, preferably by setting these out in the legislation. In this respect, we note that the anti-discrimination legislation in Victoria,[2] Western Australia,[3] the ACT,[4] and the Northern Territory[5] all contain objects clauses, which serve an educative purpose and assist commissions, tribunals and courts in their interpretive task. Taking the objects of those jurisdictions into account, while noting some variations in approach in jurisdictions with stand-alone human rights legislation, we consider that the objects of the NSW legislation should focus on the prevention of discrimination, harassment and vilification to the greatest extent possible, including its systemic causes.

We also support an approach in the objectives that promotes substantive equality. We note, for example, that Victorian courts have read the *Equal Opportunity Act 2010* (Vic) beneficially in light of the 'emphatic' objects in that legislation which leave 'little if any room to read down general words by implication': see *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1 at [61].

As recommended by the Queensland Human Rights Commission (**QHRC**), in its review of the anti-discrimination legislation in that jurisdiction, the 'cumulative and compounding impact' of intersectional disadvantage on people who experience discrimination on the basis of combined grounds should also be recognised in the objectives.[6]

The rule of construction around beneficial interpretation is well-established in Australian anti-discrimination law (see *AB v Western Australia* [2011] HCA 42 at [24]). However, consideration could also be given to the inclusion of a provision that requires the Act to be interpreted, so far as possible, in a way that is beneficial to a person who has a protected attribute, as well as consistently with the international human rights treaties to which Australia

[1] Simon Rice, 'NSW's anti-discrimination law is confusing and outdated. Why is it lagging behind the country on reform?', *The Conversation* (3 September 2021).
[2] *Equal Opportunity Act 2010* (Vic) s 3.
[3] *Equal Opportunity Act 1984* (WA) s 3.
[4] *Discrimination Act 1991* (ACT) s 4.
[5] *Anti-Discrimination Act 1992* (NT) s 3.
[6] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (**QHRC Building Belonging**) (July 2022) 14.

is a party. This would send a clear signal around the human rights underpinnings of the anti-discrimination regime.

It will be important to consider the structure of the redrafted legislation. The current Act establishes separate parts for the relevant protected attributes (e.g., racial discrimination, sex discrimination, discrimination on transgender grounds) and then lists the circumstances where discrimination is prohibited on the basis of that particular ground, along with any exceptions. By contrast, other jurisdictions (e.g. Victoria, Queensland, Tasmania, the ACT, and the Northern Territory) set out a list of protected attributes, the areas where discrimination is prohibited and any exceptions. While ultimately a matter for Parliamentary Counsel, for reasons of clarity and accessibility, the Law Society strongly encourages consolidation in line with what occurs in other State and Territory jurisdictions, including of the protected attributes, the areas of activity where discrimination is prohibited, and relevant exceptions.

The content and terminology of the Act in its current form is outdated and undermines the relevance of the Act as a tool to protect against discrimination. In this submission, we suggest the need to refine key concepts, including the definition of discrimination. We also note that the current protected attributes require updating, along with consideration of new protected attributes, as well as a reconsideration of the coverage of the Act.

Our overriding view is that a contemporary anti-discrimination regime should have prevention as a core focus and we are therefore supportive of the inclusion of positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life. Where recourse to the complaints system is necessary, such a system should be designed in a way that enhances access to justice.

TERM OF REFERENCE 2: Whether the range of attributes protected against discrimination requires reform

At the current time, the Act prohibits discrimination on the basis of the following attributes: race (s 7), sex (s 24), including pregnancy (s 24(1B)) and breastfeeding (s 24(1C)), transgender status (s 38B), marital or domestic status (s 39), disability (s 49B), responsibilities as a carer (s 49T), homosexuality (s 49ZG), and age (s 49ZYA).

Reform of current attributes

In considering whether the terminology and definition of existing attributes should be updated, we suggest the NSW Law Reform Commission should have regard to contemporary approaches and terminology, including in other Australian state and federal anti-discrimination law, as well as any gaps in protection.[7]

Race (s 7)

At the current time, race is defined under the Act to include 'colour, nationality, descent and ethnic, ethno-religious or national origin'.

As outlined in recent submissions to the Australian Human Rights Commission's (**AHRC**) National Anti-Racism Framework Scoping Report, caste-based discrimination is an 'intersectional system of discrimination' with wide-ranging and severe impacts that should be further recognised as a protected attribute, either through incorporation in the definition of 'race' under s 7 or, perhaps more appropriately, as a stand-alone attribute.[8]

[7] See approach taken in QHRC Building Belonging (n 6) 13.
[8] Australian Human Rights Commission (AHRC), National Anti-Racism Framework Scoping Report 2022 (December 2022) 72.

Further, we are of the view that specific protections should be enacted for people based on their immigration/migration status. Refer to discussion below under the heading *Protection of Additional Attributes*.

Sex (s 24) including pregnancy (s 24(1B)) and breastfeeding (s 24(1C))

We consider that making pregnancy and breastfeeding standalone protected attributes (rather than subsets of the protected attribute of sex) may serve to clarify and strengthen the prohibitions against discrimination on those grounds.

Breastfeeding is dealt with as a separate ground of discrimination under the *Sex Discrimination Act 1984* (Cth) (**SDA**)[9] as well as in Victoria,[10] Queensland,[11] Western Australia[12], Tasmania,[13] the ACT,[14] and the Northern Territory,[15] and pregnancy is dealt with as a separate attribute of discrimination in all states and territories (except NSW). It is therefore also in the interests of harmonisation that pregnancy and breastfeeding are stand-alone attributes in NSW.

Transgender status (s 38B)

Under s 38A of the Act, a transgender person is defined as a person:

> (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
>
> (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
>
> (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
>
> and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

This definition, which takes a binary approach to gender, is not in keeping with contemporary understandings as it omits coverage of people with non-binary or gender diverse identities. We are of the view that it would be preferable that the protected attribute is changed to 'gender identity' (as opposed to 'transgender status'). Any definition of gender identity should not be tied to specific identities and should take into consideration the *Yogyakarta* definition as follows:

> Gender identity is understood to refer to 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.[16]

We are also concerned that the current definition confuses gender identity and intersex status (see s 38A(c) of the Act). Further, the term 'indeterminate sex' is not generally used by persons with variations of sex characteristics and may compound stigma. We suggest that 'sex

[9] *Sex Discrimination Act 1984* (Cth) s 7AA.
[10] *Equal Opportunity Act 2010* (Vic) s 6(b).
[11] *Anti-Discrimination Act 1991 (*Qld) s 7(e).
[12] *Equal Opportunity Act 1984* (WA) s 10A.
[13] *Anti-Discrimination Act 1998* (Tas) s 16(h).
[14] *Discrimination Act 1991 (*ACT) s 7(e).
[15] *Anti-Discrimination Act 1992* (NT) s 19(h).
[16] International Commission of Jurists, 'Yogyakarta Principles: Principles on the application of international human rights laws in relation to sexual orientation and gender identity' (**Yogyakarta Principles)**, March 2007, 8.

characteristics' should be a new, stand-alone attribute to avoid this confusion. Refer to discussion below under the heading *Protection of Additional Attributes*.

Marital or domestic status (s 39)
We consider that the language of marital or domestic status be updated to 'relationship status' to reflect more contemporary language.

Disability (s 49B)
Disability is defined under s 4 of the Act as follows:

> (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
>
> (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
>
> (c) the malfunction, malformation or disfigurement of a part of a person's body, or
>
> (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
>
> (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

We recommend that the NSW Law Reform Commission consult with people with disabilities and organisations that support people with disabilities on the appropriateness of this definition. However, our preference would be alignment to the greatest extent possible with the *Disability Discrimination Act 1992* (Cth) (**DDA**) to promote consistency and provide greater certainty for duty bearers. Disability is defined under s 4 of the DDA as follows:

> ***disability***, in relation to a person, means:
>
> (a) total or partial loss of the person's bodily or mental functions; or
>
> (b) total or partial loss of a part of the body; or
>
> (c) the presence in the body of organisms causing disease or illness; or
>
> (d) the presence in the body of organisms capable of causing disease or illness; or
>
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
>
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
>
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
>
> and includes a disability that:
>
> (h) presently exists; or
>
> (i) previously existed but no longer exists; or
>
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
>
> (k) is imputed to a person.

While there is certain language contained in this provision e.g. malfunction, malformation and disfigurement, that is outdated, the definition in NSW could be updated to reflect contemporary language around disability, while avoiding inconsistency in substance with the DDA.

We understand that in other state and territory reviews of anti-discrimination legislation, some concerns have been raised in relation to whether disability provisions apply to people with mental illness, psychosocial disability and/or people living with HIV. We consider, however, that the definition in the DDA has adequate breadth to cover these conditions. It could also be possible to flag these conditions in a note to the definition to ensure clarity around their inclusion.

In NSW, there is an express exception to disability discrimination if the disability relates to a person's addiction to a prohibited drug (see s 49PA of the Act). We suggest that this exception be removed in line with other jurisdictions and contemporary understandings of disability.

In the context of the protected attribute of disability, we further note that the Act should provide protection for carers, assistants, assistance animals and disability aides, as occurs in the DDA.

Responsibilities as a carer (section 49T)

We consider that the definition of 'responsibilities as a carer', particularly the exhaustive list of what constitutes immediate family, is defined too narrowly and should be reconsidered. We note that family responsibilities is similarly narrowly defined in the SDA.[17]

NSW is a diverse multicultural society, and family and caring relationships often extend well beyond considerations of biology. It is important that this ground reflect the diversity of such relationships, for example the situation where a person receiving care is not part of the carer's immediate family. It may be preferable to leave the definition open so as to accommodate the spectrum of different carer relationships that exist in contemporary society. Alternatively, NSW could adopt the definition under the *Equal Opportunity Act 2010* (Vic), where carer is defined as 'a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis'.[18]

We note that this issue is particularly relevant to Aboriginal and Torres Strait Islander people. We therefore suggest that the ground extend to kinship obligations as well as family and carer responsibilities.

Homosexuality (section 49ZG)

The current ground of 'homosexuality' is narrow and fails to protect people of other sexual orientations, including people who are bisexual or asexual. We consider that 'sexual orientation' is a more contemporary and inclusive term that should be preferred over a definition tied to a specific identity.

Sexual orientation is defined in the SDA as a person's sexual orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex.[19] We note, however, that the definition provided for by the *Yogyakarta Principles* may be more inclusive:

> Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations

[17] *Sex Discrimination Act 1984* (Cth) s 4A.
[18] *Equal Opportunity Act 2010* (Vic) s 4.
[19] *Sex Discrimination Act 1984* (Cth) s 4.

> with, individuals of a different gender or the same gender or more than one gender.[20]

This definition represents best practice in terms of international legal standards and has been adopted in Victoria.[21] We support its adoption in NSW, including expanding the definition to cover people who feel attraction towards all persons irrespective of their gender (pansexuality) and people who experience no sexual attraction to any persons (asexuality).

Protection of additional attributes

In light of changing community expectations and attitudes, coupled with the more extensive protections afforded in other jurisdictions, the question arises as to whether the coverage of the Act is providing robust protection to people in NSW experiencing, or at risk of experiencing, discrimination.

When considering whether additional attributes should be included in the Act, the Law Society is supportive of the threshold questions proposed by the QHRC to determine whether an attribute should be protected in anti-discrimination legislation:

- Is there a gap in protection?
- Is the proposed attribute of a comparable nature to those already covered under the Act?[22]

The use of such threshold questions recognises the value of careful consideration of the introduction of new attributes, given that too lengthy a list may dilute the effectiveness and clarity of existing anti-discrimination legislation and could cause particular difficulties for duty bearers.[23] In light of this, we suggest that consideration be given to the following additional attributes. This is not necessarily a comprehensive list, and the Law Society would be pleased to be consulted on other attributes under consideration by the NSW Law Reform Commission.

Immigration/Migration Status

While the current definition of race under s 7 has been interpreted to be non-exhaustive (see *SUPRA v Minister of Transport Services* [2006] NSWADT 83), explicit recognition of immigration/migration status would be of assistance in the interest of clarity. In the experience of our members working with visa holders and migrants, this group is highly vulnerable to discriminatory and other objectional conduct e.g. underpayment and difficulties in obtaining essential services in the areas of accommodation and banking.

One option would be to extend the definition of race under s 4 of the Act to include immigration or migration status. This aligns with the Tasmanian and Northern Territory approaches.[24] The other option is to enact a standalone ground for immigration/migration status as occurs in the ACT legislation.[25] If either of these options are accepted, careful consideration would have to be given to relevant exceptions that take into account federal and state immigration and citizenship laws, including the provisions of the *Migration Act 1958* (Cth).

Sex characteristics

Advocacy groups have pointed to discrimination faced by people born with atypical sex characteristics, particularly with regard to accessing health services. As noted above, however, the current ground of 'transgender status' conflates the concepts of gender identity and sex characteristics. It is more appropriate to separate these grounds.

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[20] Yogyakarta Principles (n 15) 6.
[21] *Equal Opportunity Act 2010* (Vic) s 4(1).
[22] QHRC Building Belonging (n 6) 309.
[23] Ibid.
[24] *Anti-Discrimination Act 1998* (Tas) s 3 and *Anti-Discrimination Act 1992* (NT) s 4.
[25] *Discrimination Act 1991* (ACT) s 7(1)(i).

While the SDA uses the language of 'intersex status', a more appropriate definition of 'sex characteristics' can be sourced from the *Yogyakarta Principles plus 10*.[26] This language is currently reflected in Victoria. For example, under s 4 of the *Equal Opportunity Act* (Vic), the definition reads as follows:

> ***sex characteristics*** means 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;

Discrimination on the basis of religion

The Act does not protect against discrimination on the basis of religion. This makes NSW, along with South Australia, an outlier among the states and territories. While the Act's definition of race does incorporate 'ethno-religious origin' (s 4), this concept has given rise to definitional difficulties and has been held not to extend to certain religious groups such as people of the Muslim faith: see *Ekermawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 (15 Feb 2019).

Residents of NSW subjected to discrimination in employment on the basis of religion may have protection under the *Australian Human Rights Commission Act 1986* (Cth) and the *Fair Work Act 2009* (Cth). Despite these federal provisions, residents of NSW do not enjoy the same level of protection against discrimination on the ground of religion as residents of most other states and territories.

The Law Society supports in principle the introduction of protections against discrimination on the basis of religion. The right against religious discrimination has a strong basis under international human rights law, including Article 26 of the International Covenant on Civil and Political Rights (**ICCPR**), which affirms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[27]

In the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the UN General Assembly clarified states' obligations in relation to implementing the right against religious discrimination:

> All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

[26] International Commission of Jurists, *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017).

[27] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 26.

> All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.[28]

Consideration will need to be given to the various religious exemptions to anti-discrimination legislation. There is considerable variation among the state and territory jurisdictions around the areas of activity in which these exemptions apply.

The Law Society is of the view that if the Government were to introduce religion/religious belief as an additional protected attribute, this should be defined in such a way so as not to override discrimination on other existing/potential grounds, such as sex, sexual orientation, gender identity and relationship status. In this regard, we point to the changes introduced to the *Equal Opportunity Act 2010* (Vic) by way of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) which sought to strike an appropriate balance.

Subjection to domestic or family violence

It is widely recognised that being subject to domestic or family violence can render a victim-survivor vulnerable to discrimination. As noted by the Committee on the Elimination of Discrimination against Women:

> Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.[29]

There is evidence that victim-survivors may experience particular difficulties in relation to accommodation (e.g. receiving poor references, refusal of requests to make reasonable adjustments for security reasons etc.) as well as in the workplace (e.g. not allowing a victim survivor to take time off work to attend court or move into a shelter; or having employment terminated for reasons relating to the domestic violence).[30]

The AHRC has previously pointed to a number of benefits to recognising domestic and family violence as a ground of discrimination, noting that this could strengthen existing discrimination protections; decrease the social and economic costs of violence against women; serve an educative function; and complement other strategies.[31]

We note that the attribute of 'subjection to domestic or family violence' is protected in the ACT, following a recommendation by the ACT Law Reform Commission.[32] Further, the QHRC and the Western Australian Law Reform Commission, in their recent reviews of anti-discrimination legislation in Queensland and Western Australia respectively, both recommended a new attribute of 'subjection to domestic or family violence'.[33] It is our view that the NSW legislation should follow these recommendations.

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[28] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 3rd Comm, 36th sess, 73rd plen mtg, Agenda Item 75, UN Doc A/RES/36/55 (25 November 1981) art 4.

[29] Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993) para 1.

[30] AHRC, Fact sheet: Domestic and family violence - a workplace issue, a discrimination issue (4 December 2014).

[31] Ibid.

[32] *Anti-Discrimination Act 1991* (ACT) 7(1)(x).

[33] QHRC Building Belonging (n 6) 333 and Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984*, Project 111 Final Report (May 2022) 124.

Term of Reference 3: Whether the areas of public life in which discrimination is unlawful should be reformed

The way in which the Act is currently structured means that it differentiates between the scope of protection offered to people with a different protected attribute. For example, people are protected from racial discrimination in the areas of work (Div 2), education (s 17), the provision of goods and services (s 19), accommodation (s 20) and registered clubs (s 20A). By contrast, people are protected on the ground of their responsibilities as a carer only in the area of work (Part 4B, Div2).

The current piecemeal structure of the Act leads to an inconsistent and unduly complex approach to dealing with the question of coverage. We refer to legislation in other Australian jurisdictions such as in Victoria, Queensland, Tasmania, the ACT, and the Northern Territory, where all attributes are protected across relevant areas of public life. In our view, this approach is preferred, as it takes account of the variety of settings where discrimination occurs and promotes consistency.

The Public Interest Advocacy Centre (**PIAC**) has previously suggested that, rather than defining additional areas where discrimination is unlawful, one approach may be to amend the Act to apply to discrimination in all areas of public life, with an exception for private conduct.[34] In our view, however, this approach may lead to ambiguities regarding the private/public divide, and cause difficulties with compliance by duty holders, who will seek clarity on whether they are affected by the relevant provisions.

We consider that the following areas of public life should be included, subject to relevant exceptions:

- Employment and employment-related areas;
- Education;
- Goods and Services;
- Disposal of land;
- Accommodation;
- Club membership and affairs;
- Administration of state laws and programs;
- Local government.

The above areas are included in most jurisdictions. Another area which warrants consideration is requests for information in the context where the information is requested or required in connection with, or for the purposes of, an act that is itself discriminatory. We note that this ground is protected in the DDA (s 30), the *Age Discrimination Act 2004* (Cth) (s 32), and the SDA (s 27). Further, it appears in the Queensland and Northern Territory regimes, but is drawn more broadly to prohibit asking another person, either orally or in writing, to supply information on which unlawful discrimination *might* be based.[35]

TERM OF REFERENCE 4: Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

<u>Distinction between direct and indirect discrimination</u>

Discrimination is defined under the Act by establishing two distinct types of discrimination, namely direct and indirect discrimination. An example of the tests for direct and indirect

[34] PIAC, 'From Leader to Laggard: The Case for Modernising the NSW Anti-Discrimination Act' (**PIAC, From Leader to Laggard**) (6 August 2021) 7.
[35] *Anti-Discrimination Act 1991 (*Qld) s 124; *Anti-Discrimination Act 1992* (NT) s 26.

discrimination can be seen in s 24 of the Act, which concerns discrimination on the ground of sex:

> (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of sex if the perpetrator—
>
> a) on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or
> b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

The distinction between direct and indirect discrimination is maintained in all state and territory jurisdictions in Australia, although at the federal level both s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) and s 9(1) of the *Racial Discrimination Act 1975* (Cth) do not make this distinction.

Some stakeholders have previously pointed out that there are limitations to the direct/indirect distinction, particularly from an access to justice perspective, with 'people not understanding the different types of discrimination and not correctly identifying which type applies to their particular case'.[36] Others have pointed to international jurisdictions where direct and indirect discrimination are combined into one definition, for example Canada, South Africa, the United States of America, and New Zealand.[37]

On balance, the Law Society considers that the distinction between direct and indirect discrimination should be maintained. It is possible that a definition that combines both forms of discrimination would lead to greater confusion, particularly given the development of Australian jurisprudence on the concept to date. However, the clarity of the Act should be improved by defining discrimination as occurring when a person discriminates either directly or indirectly, or both directly and indirectly, against another person. In addition, both direct and indirect discrimination should be expressly defined.

Discrimination on the basis of combined attributes

The way in which the Act is currently structured means that direct or indirect discrimination have to occur on the basis of one attribute (e.g. on the ground of the aggrieved person's sex). Contemporary approaches to anti-discrimination law recognise that making discrimination contingent on a single attribute (rather than multiple attributes) fails to recognise intersectional experiences of discrimination (e.g. a person may experience discrimination because of the combined grounds of sex, race and disability).

International jurisdictions including the United Kingdom and Canada prohibit discrimination on the basis of a protected attribute or a combination of protected attributes.[38] This is similar to the way in which the *Discrimination Act 1991* (ACT) was amended to introduce the words '1 or more protected attributes' in its definitions of direct and indirect discrimination under s 8(2)

[36] PIAC, From Leader to Laggard (n 34) 5.
[37] QHRC Building Belonging (n 6) 68.
[38] *Equality Act 2010* (UK), s 14; *Canadian Human Rights Act, RSC 1985*, c H-6, pt I, 3.1.

and (3). The Law Society encourages recognition on combined or multiple grounds to address the intersectional experiences outlined above.

Intended future conduct

A further limitation of the Act is that the current definition of discrimination does not encompass intended future conduct. As was noted by PIAC in its discussion paper:

> …even where a person has indicated they will act in a discriminatory manner, the potential victim cannot make a complaint until the discrimination has occurred, precluding any intervention to prevent discrimination.[39]

To overcome this limitation, the Law Society recommends the definitions of direct and indirect discrimination cover future conduct e.g. where a person treats or proposes to treat another person, or where a person imposes or proposes to impose a certain condition or requirement.

Direct Discrimination – Comparator Test

The Act currently uses a comparator test for direct discrimination. For example, in the case of s 24 (see above), it must be established that the complainant (a woman) is treated less favourably than a man would be treated in the same circumstances, or in circumstances which are not materially different. The comparator test is reported by our members to create conceptual difficulties, particularly in matters which are factually dense. It is also of concern that the comparator test is artificial, and a fair or realistic comparison may not always be possible e.g. when a comparison is made between the treatment of an Aboriginal or Torres Strait Islander person and a person who is not an Aboriginal or Torres Strait Islander, such an analysis may omit a nuanced consideration of history and context.

The Law Society supports the introduction of an unfavourable treatment test, as is in place in Victoria[40], and the ACT.[41] This test removes the requirement of the hypothetical comparator, and focuses on whether the person has been treated unfavourably because of the relevant attribute or attributes: see, for example, *Kuyken v Chief Commissioner of Police* [2015] VSC 204 at [94]. While lawyers arguing a matter may seek to make out 'unfavourable treatment' by making comparisons with a person without the relevant attribute/s, the fact that this is not mandatory would lend the Act greater clarity and flexibility.

Indirect Discrimination - Proportionality Test

The Act currently uses a proportionality test for indirect discrimination. Our members, particularly those who work on disability discrimination matters, have pointed out that the proportionality requirement causes difficulties because of the statistical information required to make out this ground. The high evidentiary burden established by the test is particularly prohibitive for complainants who are self-represented and may not have the relevant resources or expertise to address the requirement.

We are of the view that the disadvantage-based test would be preferable. This can be seen in other jurisdictions including Victoria[42] and the ACT,[43] as well as federally under the DDA,[44] the

[39] PIAC, From Leader to Laggard (n 34) 5.
[40] *Equal Opportunity Act 2010* (Vic) s 8.
[41] *Discrimination Act 1991* (ACT) s 8(2).
[42] *Equal Opportunity Act 2010* (Vic) s 9.
[43] *Discrimination Act 1991* (ACT) s 8(3).
[44] *Disability Discrimination Act 1992* (Cth) s 6.

Age Discrimination Act 2004 (Cth),[45] and the SDA.[46] The disadvantage-based test considers whether a condition or requirement has, or is likely to have, the effect of disadvantaging a complainant. The definition in the ACT is to be preferred, as it requires the disadvantage to be in relation to 'the person' with the attribute/s, rather than 'persons with the attribute'. This reduces the burden on the complainant to make out that disadvantage would be experienced by all persons with their particular attribute.

TERM OF REFERENCE 5: The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

In NSW, the Act prohibits civil vilification in relation to the following grounds: race (s 20C); transgender status (s 38S), homosexuality (s 49ZT) and HIV/AIDS status (s 49ZXB). The *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* also introduced a prohibition on religious vilification (Part 4BA of the Act), which will commence on 11 November 2023.

Division 8 of the *Crimes Act 1900* (NSW) also deals with vilification by making it unlawful to, by a public act, intentionally or recklessly threaten or incite violence towards another person or a group of persons on any of the following grounds: race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

The civil provisions contained in the Act are narrower in scope than the criminal provisions in the *Crimes Act 1900* (NSW). At the very least, we consider that those attributes protected under criminal law should be covered by the civil vilification provisions in the Act. The difficulties with bringing an anti-vilification case under the criminal law are well recognised, not least because of the higher burden of proof. If the Government does enact legislation with contemporary terminology (as discussed elsewhere in this submission), it should be made consistent across the civil and criminal vilification laws. At the same time, consideration should also be given to extending the anti-vilification provisions to cover disability.

TERM OF REFERENCE 6: The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

The Law Society suggests that the protections against sexual harassment in NSW should be strengthened in line with what has occurred at the Commonwealth level as a result of the Respect@Work amendments. These include a prohibition on harassment on the ground of sex (or sex-based harassment (see s 28AA of the SDA)) as well as subjecting another person to a workplace environment that is hostile on the ground of sex (see s 28M). We are supportive of extending the protections against sexual harassment to all areas of public life to which the Act will apply (see discussion above on coverage of the Act).

The Law Society would be grateful to be consulted further after preliminary submissions have been made to the NSW Law Reform Commission on the appropriateness of including harassment based on other protected attributes.

[45] *Age Discrimination Act 2004* (Cth) s 15.
[46] *Sex Discrimination Act 1984* (Cth) s 5A(2).

TERM OF REFERENCE 7: Whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

Positive Duty

The introduction of a positive duty to eliminate discrimination, harassment and victimisation would assist in making the anti-discrimination regime in NSW less reactive. Rather than focusing solely on individual complainants, positive obligations on duty holders would help to ensure prevention of discrimination in the first place. A focus on systemic discrimination could assist more people than a solely complaints-based regime, as businesses would be required to account for their cultures and organisational practices.

The *Equal Opportunity Act 2010* (Vic) provides one example of the way in which a positive duty could be drafted. Under s 15, a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. Section 15(6)(a)-(e) sets out mandatory factors to consider in determining whether a measure is reasonable or proportionate, for example the size of the person's business or operations and the practicability and cost of the measures. We note, however, that some commentators have pointed to the fact that while s 17 has a symbolic and educative function, there is 'no individual cause of action if the duty is breached' and the Victorian Equal Opportunity and Human Rights Commission is limited to investigating a breach, rather than taking action against a non-compliant duty bearer.[47] Therefore, it has been suggested that the positive duty would have a greater impact if it was reframed as an enforceable obligation.[48]

Most recently, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) modified the SDA, including by the introduction of a positive duty for employers and persons conducting a business or undertaking (**PCBUs**) to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, and victimisation in relation to those grounds. This amendment reflects Recommendation 17 of the Respect@Work Report.

As concerns the scope and coverage of a duty in NSW, the Law Society considers that it should cover all conduct prohibited by the Act. Limiting the scope, for example, to unlawful sex discrimination and harassment only, would risk creating a 'hierarchy' of protected attributes and undermine the principle of equal and effective prevention.[49] Further, the duty should apply to all persons with obligations under the Act. While concerns may be raised vis-à-vis a perceived regulatory burden, particularly on small to medium businesses, this could be managed, for example by adopting the approach taken in s 15(6) of the *Equal Opportunity Act 2010* (Vic), which is limited to the taking of reasonable and proportionate measures.

The Anti-Discrimination Board of NSW could assist duty holders to understand the duty and comply with it. Examples are the Guidance issued by the Australian Human Rights Commission in relation to the positive duty under the SDA, or the resources of the Victorian Equal Opportunity & Human Rights Commission.[50]

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[47] Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2), 495.
[48] Ibid., 498.
[49] QHRC Building Belonging (n 6) 228.
[50] See Australian Human Rights Commission, The Positive Duty under the Sex Discrimination Act (Webpage) and Victorian Equal Opportunity & Human Rights Commission, Positive Duty (Webpage).

Reasonable adjustments

The Law Society supports the introduction of a positive obligation to make reasonable adjustments for persons with disability across all areas of activity where the Act operates. It is important that this obligation, which is directed to addressing an individual's specific needs, is introduced as well as the positive duty to eliminate discrimination (discussed above) which is concerned with systemic issues.

Under the Act, reasonable adjustments for persons with disability are currently dealt with implicitly in the definition of indirect discrimination. There is a series of 'unjustifiable hardship' provisions. For example, where the provision of certain 'services and facilities' would impose 'unjustifiable hardship', the person with disability can be discriminated against in certain circumstances, for example in the context of work.[51]

The current 'unjustifiable hardship' approach is confusing and fails to clarify the rights and obligations of the parties. By contrast, the enactment of a standalone duty, as occurs in the Victorian Act, would mean that failure to provide reasonable adjustment would be a clear basis to form a cause of action. We suggest that the Act contain a non-exhaustive list of what constitutes a reasonable adjustment (see, for example, s20(3)(a)-(j) of *the Equal Opportunity Act 2010* (Vic)).

TERM OF REFERENCE 8: exceptions, special measures and exemption processes

The Law Society notes the exceptions will each need to be examined individually to determine whether they are necessary as well as reasonable and proportionate in scope. As noted by PIAC in its report, *From Leader to Laggard*, the current Act contains particularly broad exceptions for non-government educational institutions as well as for religious organisations.[52] These demand careful review.

The QHRC used a principled framework for its analysis of the exceptions in that jurisdiction, including:

- the purpose of exceptions and whether that purpose remains relevant and significant;
- how exceptions are being applied, and the nature and impact of discrimination that is being allowed because of them;
- whether the exception perpetuates disadvantage or stigma against particular groups based on irrelevant assumptions or stereotypes;
- approaches to exceptions in other jurisdictions; and
- ways to make the law simpler and easier for duty holders to comply, particularly if there is overlap between state and Commonwealth laws.[53]

The Law Society would be grateful for the opportunity to work further with the NSW Law Reform Commission in its analysis of exemptions as part of this review. While NSW does not have stand-alone human rights legislation, we nevertheless encourage an approach that takes account of human rights considerations, including whether a particular exception is a reasonable and proportionate limitation on rights that achieves a legitimate purpose.

[51] *Anti-Discrimination Act 1977*, s 49M.
[52] PIAC, From Leader to Laggard (n 34) 10-11.
[53] QHRC Building Belonging (n 6) 350.

TERM OF REFERENCE 9: the adequacy and accessibility of complaints procedures and remedies

The Law Society agrees with the suggestions in PIAC's position paper, *From Leader to Laggard*, where its authors set out two ways to improve the adequacy and accessibility of complaints procedures and remedies, including the power imbalance in terms of financial and legal resources that often exists between victims and perpetrators of discrimination.

Requiring complainants to prove each element of their case on the balance of probabilities imposes a substantial burden on them, particularly self-represented litigants, who may struggle to articulate their claim and/or produce supporting evidence. A simple reversal of the burden of proof, however, may unfairly disadvantage respondents and could encourage vexatious disputes.[54] To address these issues, we support what was recommended by the Western Australian Law Reform Commission, namely:

> In respect of direct discrimination, the Act should impose an evidentiary burden on a complainant to establish a prima facie case of discrimination. Once this evidentiary burden has been established, a persuasive burden should be imposed on the respondent to establish that their conduct did not constitute unlawful discrimination.
>
> In respect of indirect discrimination, the complainant should be required to prove a prima facie case that they have a protected attribute, that the respondent has imposed a requirement or condition on them, and that the condition or requirement had, or was likely to have, the effect of disadvantaging the complainant. The evidentiary onus should then shift to the respondent to prove that the requirement was not unreasonable.[55]

We also agree with PIAC's comments regarding the importance of ensuring an accessible representative complaints process in order to enhance access to justice and remove the burden currently carried by individuals in the anti-discrimination regime. This would involve amending the current s 87 to enable representative bodies with sufficient interest in a matter to lodge a complaint about that matter on behalf of the people it represents, without identification of each person on whose behalf the complaint is made.[56]

We also recommend that the NSW Law Reform Commission review the appropriateness of the costs model under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) for the purpose of anti-discrimination proceedings. It is important that any costs model recognise the power imbalance that often exists between complaints and defendants and that it does not deter applicants from making a complaint.

TERM OF REFERENCE 10: The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

Currently, discrimination laws in NSW are focused to a large degree on addressing individual complaints rather than systemic discrimination i.e. the policies and structures that create or perpetuate disadvantage for members of protected groups. We consider it to be in the public interest that the Anti-Discrimination Board of NSW be empowered to address systemic discrimination in a more meaningful way.

[54] See further discussion by the Western Australian Law Reform Commission (n 33) 210-213.
[55] Ibid 213.
[56] PIAC, From Leader to Laggard (n 34) 13.

If a positive duty to eliminate discrimination is introduced in NSW, ensuring the compliance of duty holders would be important. We support an approach that emphasises in the first instance the role of education in addressing issues as they arise. This could also include the option of the Board conducting independent reviews, upon request of a duty holder, to ensure compliance with the law. However, a mechanism by which the Board could conduct investigations, for example in very serious matters, would be an important safeguard.

Section 119 of the Act currently empowers the board to carry out investigations, research and inquiries relating to discrimination and in particular discrimination against a person or persons on a range of grounds. As noted by PIAC, this section has 'evolved gradually and in an ad hoc manner', and existing grounds, for example, race and sex, are excluded.[57]

We consider that the Board should be given a broad and flexible inquiry function to conduct referred as well as own-motion inquiries. The purpose of such inquiries is twofold. First, they would enable identified patterns of discrimination to be investigated. Second, they would allow for general compliance monitoring.

One example of how this could be achieved is found in s 127 of the *Equal Opportunity Act 2010* (Vic), which sets out the criteria for conducting an investigation including, for example, where the matter 'raises an issue that is serious in nature' and there are reasonable grounds to suspect contraventions have occurred. The legislative annotations give the following example where an investigation would be warranted:

> An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.

If such investigatory powers are to be conferred on the Board, consideration should be given to the outcomes of the Board's investigations, which could range from preparing a report to Parliament, to a range of other regulatory mechanisms, including the issuing of enforceable undertakings, compliance notices, and application to a court/tribunal to seek civil penalties for non-compliance. The ability of the Board to undertake this work effectively will naturally depend on funding allocated for its expanded role.

TERM OF REFERENCE 11: The protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

As outlined in this submission, we suggest that the NSW Law Reform Commission carefully consider the protections, processes and enforcement mechanisms in Australian and international anti-discrimination and human rights law, including any reviews around the operation of those regimes, to inform its approach to this review. Many of the recommendations reached by the QHRC and the Western Australian Law Reform Commission in their recent reviews of the anti-discrimination regimes in Queensland and Western Australia respectively, for example, used a human-rights informed analysis that could function as a model for the NSW Law Reform Commission in its task.

[57] Ibid.

TERM OF REFERENCE 12: The interaction between the Act and Commonwealth anti-discrimination laws

The Law Society supports harmonisation, where appropriate, between state and Commonwealth anti-discrimination laws. However, this should not prevent the NSW Law Reform Commission from recommending updates in NSW that may go beyond the protections offered by the Commonwealth, with a view to creating a contemporary anti-discrimination regime in this State that is informed by best practice.