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## **Independent Education Union of Australia NSW/ACT Branch**

### **SUBMISSION**

### **NSW Law Reform Commission – *Anti-Discrimination Act* Review**

### **15 April 2024**

We appreciate the opportunity to provide a comprehensive submission to the NSW Law Reform Commission regarding the operation of the *Anti-Discrimination Act 1977* (NSW) (AD Act). We provide this submission as a supplement to the preliminary submission that we provided on 27 September 2023.

#### **About the Independent Education Union of Australia NSW/ACT Branch (IEU)**

The Independent Education Union of Australia NSW/ACT Branch (IEU) is a branch of a federal union that represents teachers, professional, support and administrative staff employed in non-government educational institutions across Australia. In NSW and the ACT, our branch represents approximately 32,000 members employed predominantly in Catholic and independent schools that may be operated or administered by religious bodies. Beyond this, we also represent employees in early childhood education and care centres (ECECs) and post-secondary school settings such as private vocational colleges and English language colleges catering for international students.

#### **IEU Overview and Scope of Submission**

The IEU recognises that Australia's anti-discrimination and equal opportunity laws are based on the concept of human rights as a universal entitlement and fundamental to society. At an international level, human rights have been enshrined in instruments such as treaties, conventions and declarations that members of the international community have agreed on.

The AD Act was enacted to combat discrimination and promote equality of opportunity across various domains of public life. It addresses discrimination based on sex, race, marital status, and other protected attributes. The Act applies to employment, accommodation, goods and services, and education (race only). At the time, its establishment marked a significant step toward fostering a fair and inclusive society. Since its enactment, the AD Act is long overdue for reform to ensure that the AD Act serves its purpose and continues to provide effective remedies for people in NSW.

The IEU broadly supports the proposed terms of reference for this review. We are a firm believer that every person living in NSW should be free from discrimination, harm and prejudice.

Our submission outlines select key areas which centres around the application of AD Act within employment context for those working in private educational institutions or religious bodies. We will draw on the experience of our members and our dealing with matters pertaining to issues that arise in private educational institutions that currently benefit from exemptions under this Act. The IEU strongly advocates for the removal of these exemptions to align our laws with modern community standards.

### **1. Whether the AD Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards**

The IEU is of the view that consultation should be a key element of any revision to the AD Act to modernise and simplify the AD Act to better serve its objects.

The AD Act was implemented in 1977 with minimal revisions since its inception, failing to adequately acknowledge and reflect shifts in contemporary societal values and evolving social norms. The IEU strongly advocates for the simplification of language and processes whenever amendments are introduced with the effect of better access to justice, both in educational and enforcement contexts.

Any proposed changes to language used in the AD Act must ensure that there is capacity to address emerging issues or new forms of discrimination that jeopardise the pursuit of an equal, just, and inclusive society.

As is the case in any law reforms, the IEU considers that consultation should be a fundamental component of any revision to the AD Act, aimed at modernising and streamlining it to better fulfill its objectives.

### **2. Whether the range of attributes protected against discrimination requires reform and whether the areas of public life in which discrimination is unlawful should be reformed**

The IEU broadly endorses the position advanced by Equality Australia in its submissions, particularly with reference to their 2024 report titled *'Dismissed, Denied and Demeaned'* as it reports on the experience of teachers and employees of faith-based schools. The IEU experience aligns with the findings of this report, revealing that the protection against discrimination in faith-based schools, which are operated and/or administered by religious bodies, are hindered by the broad scope of exemptions within the AD Act.

The IEU provides further submissions on exemptions under the relevant part of the submissions below.

### **3. Whether the AD 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**

In recent times, we have seen the move towards positive duty towards elimination of sexual harassment. The positive duty was initially introduced under Work Health Safety laws which created an obligation on all relevant stakeholders to undertake steps to eliminate or minimise risks to health and safety. The IEU would strongly support the inclusion of positive obligations within the AD Act to prevent harassment, discrimination, and vilification, and to make reasonable adjustments promoting full and equal participation in public life.

Positive obligations are essential to proactively address systemic discrimination because they mandate collective responsibility to create an inclusive environment where everyone can participate fully without barriers. Within an employment context, by imposing duties on employers to actively prevent discrimination and harassment, it reinforces the notion that everyone shares in this responsibility.

The IEU strongly advocates for employers to offer education and training on recognising various forms of workplace discrimination and implementing measures to prevent such discrimination from occurring.

#### 4. Exceptions, special measures and exemption processes

The AD Act includes extensive exceptions and exemptions that diminish the intended protections it aims to offer. The IEU stands in opposition to these exemptions because these protections should be to the benefit of all individuals.

(a) Exception under section 56: Religious Bodies

This section provides general exception for 'religious bodies' from the operation of the AD Act.

The definition of 'religious bodies' captures those members of the religious orders but also *'any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'*.

Accordingly, it is not unlawful for a religious body, in the above circumstances, to discriminate on the grounds of race, sex, transgender, marital or domestic status, disability, responsibilities as a carer, homosexuality or age. These exceptions are often invoked in our non-government educational settings.

(b) Exemption of private educational authority under section 25: Sex Discrimination

Section 25 provides a range for protections for employees and applicants for employment against discrimination on the grounds of sex. However, pursuant section 25(3)(c) the protection does not apply to employment by a 'private educational authority'.

The term 'private educational authority' is defined under section 4 to include *'a person or body administering a school, college, university or other institution at which education or training is provided, not being-- (a) a school, college, university or other institution established under the Education Act 1990, ... or (b) an agricultural college administered by the Minister for Agriculture.'*

The IEU finds no justifiable reason why employees or prospective employees of a private educational authority should not be granted the same protections against sex discrimination as those outside this sector.

(c) Exemption of private educational authority under section 49D: Discrimination on the ground of Disability

Section 49D provides that it is unlawful for an employer to discriminate on the ground of disability against employees and applicants for employment. Again, there is an exemption for employment by a private educational authority in s 49D(3)(c) which captures the same group of employers described above.

The IEU is of the view that discrimination against employees or applicants with disabilities is a serious issue that undermines their rights and access to equal opportunities. The exemptions of private education authorities from the obligation to prevent disability discrimination sends a harmful message that discrimination against people with disabilities is acceptable or permissible under certain circumstances.

Contrary to the aims of the AD Act, the exemption creates barriers to full participation and inclusion for individuals with disabilities.

(d) Exemption of private educational authority under section 40: Discrimination on the ground of Marital or Domestic Status

Pursuant to s40, it is unlawful for an employer to discriminate on the ground of marital or domestic status against employees and applicants for employment. There is an exemption for employment by a 'private educational authority' in Section 40(3)(c) as defined in section 4.

The IEU holds the view that an employee's marital or domestic status has no bearing on their ability to fulfill the essential duties of their job. Allowing exemptions for private educational authorities perpetuates unwarranted stigma surrounding marital or domestic status, which does not affect the person's capability or performance in the workplace.

(e) Exemption of private educational authority under section 49ZH: Discrimination on the ground of Homosexuality

Pursuant to section 49ZH, it is unlawful for an employer to discriminate on the ground of homosexuality against employees and applicants for employment. As above, there is an exemption for employment by a private educational authority in section 49ZH(3)(c).

Discrimination against individuals based on their sexual orientation is unjust and harmful, and it undermines their rights and dignity. The IEU does not see any merit in granting exemptions for discrimination based on sexual orientation. We consider this to be harmful and an outright denial of equal opportunities and access to basic rights. The IEU firmly believes that all individuals, regardless of their sexual orientation, deserve equal protection under the law.

(f) Exemption of private educational authority under section 38C: Discrimination on Transgender Grounds

Under section 38C, it is unlawful for an employer to discriminate on transgender grounds against employees and applicants for employment. The AD Act permits an exemption to the prohibition in relation to employment by a private educational authority in section 38C(3)(c).

Similar to above reasons, the IEU sees no reasonable basis for the exemption.

## **5. The adequacy and accessibility of complaints procedures and remedies**

Due to the extensive and broad application of the exceptions and exemptions outlined above, IEU members have had limited to no access to the complaints procedures and remedies available under the AD Act.

The effect of the exemptions mean that IEU members do not enjoy the protections afforded by the AD Act and have not been able to use the remedies as a proper deterrent against discrimination. Moreover, IEU members have not had access to any remedy even if they were to be subjected to discrimination.

## 6. The interaction between the Act and Commonwealth anti-discrimination laws

- a. The *Sex Discrimination Act 1984* (Cth) (**SD Act**) also intersects with religious educational institutions. It stipulates that religious schools can discriminate against individuals based on sexual orientation, gender identity, marital or relationship status, or pregnancy, provided it is done *“in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed”*.

The IEU holds similar concerns to those issues raised with respect to the exceptions and exemptions available under the AD Act.

- b. In addition, the *Fair Work Act 2009* (Cth) (**FW Act**) provides some protection against discrimination under general protection claims. However, such action against an employee or prospective employee on the ground of a protected characteristic is not unlawful where the action is:
  - not unlawful under a relevant federal or state anti-discrimination law (adopting the exceptions in AD Act detailed above);
  - taken because of the inherent requirements of the particular position concerned; or
  - taken by a religious institution against a staff member, in good faith and to avoid injury to the religious susceptibilities of adherents to that religion or creed (section 351(2) of the FW Act).

Considering the above, it is evident that the operations of the AD Act (and its exemptions) have broader implications for the protection against discrimination for individuals residing in NSW.

The IEU’s position remains that it does not support the broad scope of exemptions under the AD Act.

### Closing Submission

As the IEU, we have consistently championed social justice and human rights. We firmly believe that discrimination against any individual or group is wholly unacceptable. Our commitment extends to advocating for the removal of inappropriate exemptions within the AD Act.

In reviewing the AD Act, the IEU believes that there must be consideration for the following:

- **Balancing Rights and Responsibilities:** we advocate for a balanced approach that respects religious autonomy while ensuring a safe and respectful environment for all, particularly for our members employed by private educational authorities.
- **Promoting Inclusivity:** everyone deserves an educational environment where they feel safe, valued, and respected. We call for a commitment to inclusivity, where diversity is celebrated, and discrimination has no place.

We welcome any future opportunities to be further engaged in this consultation and review process.

