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NSWCCL SUBMISSION

NSW LAW REFORM COMMISSION

ANTI-DISCRIMINATION ACT REVIEW

28 September 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introduction

1 The NSW Council for Civil Liberties (***NSWCCL***) welcomes the opportunity to make this submission to the Commission in relation to the review of the *Anti-Discrimination Act 1977* (NSW) (the ***Act***) defined under the terms of reference published on 19 June 2023.

2 It has been almost five decades since the Act was passed. While its length has more than doubled,[1] it has been subject to a proper review only once in its history, culminating in the publication by this Commission in 1999 of *Report 92 – Review of the Anti-Discrimination Act 1977* (***1999 Review***). The terms of reference on that occasion required the Commission 'to inquire into and report on the current scope and operation of the *Anti-Discrimination Act 1977* (NSW) and any related issues', having regard to 'existing Commonwealth laws relating to anti-discrimination' and 'Australia's international human rights obligations as they relate to anti-discrimination', as well as 'any related issues'. While briefer than the present terms of reference, these were no less encompassing.

3 The 1999 Review made 161 recommendations, the vast majority of which have not been adopted. Many of the concerns and observations expressed in the 1999 Review remain valid. The Act, in short, remains in dire need of holistic reform.

4 While this submission addresses each of the terms of reference in turn, our primary areas of focus are as follows:

(a) The ways in which the structure and text of the legislation can be modernised and simplified to better serve its purpose.

(b) The scope for reform to the range and treatment of protected attributes to ensure the Act reflects contemporary community attitudes and best practice in discrimination legislation.

(c) The scope of the anti-vilification provisions and, in particular, the compelling reasons why the recently passed Bill prohibiting religious vilification should be repealed.[2]

(d) The extent and nature of exceptions and exemptions.

(e) The nature and efficacy of remedial mechanisms.

5 When Premier Neville Wran introduced the legislation to Parliament in 1977, he said that 'all human beings are born equal, have a right to be treated with equal dignity and a right to expect equal treatment in society.'[3] This was a vision of equality founded on the idea that in a decent society, all persons can and should expect to be protected against unfair discriminatory treatment.

6 In making this submission, we keep squarely in mind that founding intent which, in our view, has continued vitality. However, our submission also recognises the pragmatic reality that discrimination law involves, inescapably, difficult and complex judgments and trade-offs. Our hope is that with careful attention to concrete ways in which the Act can be improved, those complexities can be successfully navigated and sensible reform can be implemented that ensures the Act can better serve the New South Wales community and better achieve its objects.

1 Modernisation and simplification

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

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[1] The Act as passed in 1977 ran to 62 pages. The current version of the Act runs to 131 pages.
[2] Anti-Discrimination Amendment (Religious Vilification) Bill 2023. Passed by both Houses 3 August 2023. Assent date 11 August 2023.
[3] Quoted in the 1999 Review at [1.2].

1.1 Structure

7 A glaring feature of the Act is its convoluted, repetitive and confusing structure. This is a result of successive amendments being undertaken in a piecemeal way without sufficient attention to the intelligibility of the whole.

8 The Act originally prohibited discrimination on the basis of three protected characteristics:

(a) race (in Pt II);

(b) sex (in Pt III); and

(c) marital status (in Pt IV).

9 Each of Parts II-IV defined and then prohibited discrimination on the basis of the relevant characteristic, 'in work' and 'in other areas'. There was no overarching definition of 'discrimination'. The Act included specific exceptions to each form of discrimination and general exceptions applicable to all three forms. It also established and defined the functions and powers of the Anti-Discrimination Board (***Board***).

10 The Act has retained this structure. Over time, there have been many amendments, at least 90 by our reckoning. Where the amendments have introduced new protected characteristics, this has been achieved by simply adding a new Part that replicates the original system, that is: each Part introduces a new substantive proscription against discrimination with respect to the relevant characteristic.

11 As commentators have pointed out, there is nothing inherently wrong with the fact that the Act has witnessed incremental development.[4] Indeed, this is to be expected and reflects that community attitudes, international standards and the cultural and political life of the country undergo continual evolution. As acceptance of gay and lesbian people grew in NSW, for example, it was appropriate that the Act would be amended (by the inclusion of Part 4C) to prohibit discrimination on the ground of 'homosexuality'.[5] In the 1990's, as acceptance of transgender identity grew, the Act was again amended (by the inclusion of Part 3A) to prohibit 'discrimination on transgender grounds'.

12 The problem is that the resulting document is overly lengthy, difficult to navigate and, perhaps most problematically, fails to articulate a clear concept of the 'discrimination' that the Act renders unlawful.

13 More recent anti-discrimination and equal opportunity legislation takes a different approach. For example, both the *Anti-Discrimination Act 1998* (Tas) and the *Equal Opportunity Act 2010* (Vic) include introductory provisions that apply to all protected attributes and conduct:

(a) Part 4 of the Tasmanian legislation is titled 'Discrimination and prohibited conduct' and outlines the concept of discrimination (as including direct and indirect discrimination and discrimination on the grounds of an attribute) and then covers the application of the Act to certain prohibited conduct and areas of activity.

(b) Part 2 of the Victorian legislation is titled 'What is discrimination?' and, again, provides a substantive articulation of the concept and, together with Part 4, an identification of when discrimination is unlawful.

14 In our view, the Act should be restructured along similar lines. We would embrace the basic structure the Commission put forward in the draft legislation included at Appendix A of the 1999 Review, in particular the inclusion of:

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[4] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination & Equal Opportunity Law* (3rd ed) (Federation Press, 2018), [1.1.2].

[5] The Act defines 'homosexual' to mean 'a male or female homosexual': s 4.

(a) Chapter 2, titled 'What discrimination is prohibited?'

(b) Chapter 3, titled 'What are irrelevant characteristics', which identifies all the protected attributes to which the prohibition in Chapter 2 would apply; and

(c) Chapter 4, titled 'Areas of activity', which identifies all the areas in which the conduct prohibited in Chapter 2 would be actionable.

15 A key benefit of this structure, in addition to being clearer and easier to follow, is that it better recognises the intersection of multiple characteristics and that a person can be discriminated against on the basis of more than one characteristic. Under the current form of the Act, if a person suffers discriminatory treatment on the basis both of their race and their sex (for example), it could be very difficult for them to identify how the Act applies to their situation.

16 Compare sections 7 and 24 of the Act. Section 7 identifies 'what constitutes discrimination on the ground of race'; section 24 identifies 'what constitutes discrimination on the ground of sex'. The provisions are similar. In particular, they both define discrimination as including treating the aggrieved person less favourably on the basis of the relevant characteristic (ss 7(1)(a), 24(1)(a)) and requiring the aggrieved person to comply with a requirement or condition that is unreasonable in the circumstances and which the person, by reason of the protected characteristic, does not or is not able to comply with (ss 7(1)(c), 24(1)(b)).

17 However, there are also differences between sections 7 and 24. Sections 24(1B)-(1C), for example, define the characteristic of sex to include the fact that a woman is or may become pregnant and does or may breastfeed. Because pregnancy and breastfeeding are not characteristics associated with race, it might be thought that the structure employed by the Act makes sense and simply reflects necessary conceptual differences. This is not so. If the Act were restructured in the way described at paragraph 14 above, there would be:

(a) An overall concept of discrimination (we return to the concept of discrimination in sections 1.2 and 3 below.)

(b) A single provision describing protected characteristics that would (i) include both race and sex and (ii) in the case of sex, make clear that breastfeeding and pregnancy are protected sub-characteristics. This was the approach taken in cl 16 of the draft Bill included with the 1999 Review.

18 The same or similar points can be made about each of the other protected characteristics that have, until now, been incorporated in the Act by inclusion of a new Part defining and then prohibiting discrimination in the case of that characteristic.

19 The NSWCCL strongly supports the structure of the Act being modernised and simplified.

1.2 Concept of discrimination

20 In adopting the structure described above and redrafting the legislation accordingly, there would be an excellent opportunity for the Act to articulate a more sophisticated concept of discrimination. This is the topic to which term of reference 3 is addressed. Our submission addresses that topic in section 4 below.

1.3 Specific examples of modernisation

21 Aside from the overall structure and the concept of discrimination, there are also some specific ways in which the Act can and should be modernised. Many of these concern the range of protected attributes; others concern the adequacy of existing tests for discrimination or the exceptions, special measures and exemptions processes. Accordingly, we refer to these specific

measures where they arise under each of the terms of reference considered from sections 2 to 12 below.

2 Range of attributes

Whether the range of attributes protected against discrimination requires reform.

2.1 Introduction

22 Leaving to one side the recently passed *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW), which we address in section 5 below, the Act currently protects against discrimination on grounds of:

- Race: Part 2.
- Sex: Part 3.
- Transgender status: Part 3A.
- Marital or domestic status: Part 4.
- Disability: Part 4A.
- Responsibilities as a carer: Part 4B.
- Homosexuality: Part 4C.
- Compulsory retirement on grounds of age: Part 4E.
- HIV/AIDS: Part 4F.
- Age: Part 4G.

23 NSWCCL is broadly supportive of protections against discrimination on these grounds. However, we do feel there is room for improvement, particularly when it comes to the language employed in the Act in relation to certain attributes. There are also a range of attributes that are not currently protected in the Act but which should be.

24 Further, any reform in relation to the protected attributes under the Act should be sensitive to the underlying objective of promoting enhanced understanding that discrimination can arise at the intersection of a number of protected attributes. This can be achieved by restructuring the Act along the lines suggested above at paragraphs 14 to 15.

2.2 Improvements to existing protections

(a) Introducing protection for 'sexual orientation'

25 Part 4C of the Act concerns discrimination on the ground of 'homosexuality'. Section 49ZF provides that a reference to a person's homosexuality includes a reference 'to the person's being thought to be a homosexual person, whether he or she is in fact a homosexual person or not.'

26 The term 'homosexuality' is outdated and not fit for the purpose of protecting people against discrimination on grounds of the sexual orientation. For example, the term fails to provide protections for bisexual or asexual people against discrimination, and there are no protections in the Act against discrimination on these grounds. This a remarkable omission and it should be addressed in any reform process to ensure the Act is in lockstep with community standards and can achieve its intended purpose.

27 NSWCCL considers that, consistently with the approach taken in the *Equal Opportunity Act 2010* (Vic), one way of addressing these concerns would be to introduce the concept of 'sexual orientation' as a protected attribute into the Act. In defining sexual orientation, it should be made clear that the concept is not confined so as to only provide protection for people who are attracted

to members of the same sex, but extends to ensure protection from discrimination on the basis of all sexual orientations, including bisexuality, asexuality and, indeed, heterosexuality. We consider this would bring the Act more in line with community standards and help to better achieve the underlying purpose of s 49ZE.

(b) Updating definition of 'disability'

28 Part 4A of the Act concerns discrimination on grounds of disability. Disability is defined in s 4 of the Act to mean:

> (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.

29 NSWCCL considers that reform to the Act should include consideration of this provision. We echo the concerns raised by the Public Interest Advocacy Centre (***PIAC***)[6] that terms such as 'malfunction', 'malformation', 'disfigurement' are inappropriate and should be reviewed. The Act should not be framed in a way that perpetuates negative stereotypes around what it means to live with a disability.

2.3 Proposed new protected attributes

(a) Intersex; non-binary people; sex characteristics

30 Part 3A of the Act concerns discrimination on transgender grounds. Section 38A(c) extends this definition to persons who, being of indeterminate sex, identify as a member of a particular sex by living as a member of that sex. NSWCCL is concerned that this formulation of transgender status, being directed at persons who identify as a member of a particular gender, does not protect people with non-binary gender identities or indeterminate sex characteristics. Intersex and non-binary status should be expressly included as protected attributes in the Act.

31 During his recent Second Reading Speech on 24 August 2023 for the Equality Legislation Amendment (LGBTIQA+) Bill 2023 and Conversion Practices Prohibition Bill 2023 (discussed below in section 13), Alex Greenwich MP observed:

> Non-binary people are part of the trans community and might sit inside or outside of the male or female spectrum. All trans people deserve the full protection of the law, and the bill would extend the protected attribute to all of them. The protected ground for homosexuality is limited to lesbians and gay men, excluding people who are bisexual or asexual. New South Wales is the only jurisdiction in Australia without anti-discrimination protections for bisexuals. The bill would replace "homosexuality" protected attribute with "sexuality", to include homosexuality, bisexuality and asexuality.

32 These gaps need to be addressed. They are also intertwined with and related to the lack of protection in the Act on the basis of sex characteristics,[7] about which Mr Greenwich also observed:

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[6] PIAC, *Leader to Laggard: The case for moderninsing the NSW Anti-Discrimination Act* (2021) 4.
[7] Compare *Equal Opportunity Act 2010* (Vic) s 6(oa).

> Having variations in sex characteristics, or being intersex, refers to people with innate variations of primary or secondary sex characteristics that differ from expectations. Their experience of discrimination adds to challenges caused by medical interventions in infancy that have changed their bodies to fit norms without their consent, causing lifelong impacts.

33 Accordingly, in order to ensure reform can address as many of the issues as possible, we recommend the inclusion of express protections for non-binary persons, and a standalone protection against discrimination on grounds of sex characteristics. In addressing the last of these two protections, we consider an appropriate, straightforward, solution would be to follow the approach taken in Victoria in the *Equal Opportunity Act 2010* (Vic), which includes the following definition:

> ***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;

(b) Protections for sex workers

34 The Act does not provide protection against discrimination based on occupation. We are particularly concerned by the lack of protections in place for sex workers.

35 In 2020, the Anti-Discrimination Amendment (Sex Workers) Bill 2020 was proposed to amend the Act to include protections against certain discrimination on grounds of occupation as a sex worker. The importance of these protections was outlined during the Second Reading Speech of Abigail Boyd MLC on 5 August 2020 who outlined some of the problems faced by sex workers in society. Ms Boyd observed:

> [Sex] workers have countless stories of discrimination—everything from a nudge and a wink to the loss of housing or employment, the denial of essential services and serious assault. One sex worker put it this way:
>
> > [Discrimination] means not answering the question "what do you do?" without considering that at best, I'll probably end up answering a bunch of naff questions to satisfy someone's curiosity, at worst, someone will cut off from me and do something hostile. Discrimination means applying for a job and leaving big chunks of things out, hoping the police check doesn't disqualify me. Discrimination means trying to rent a place, to work without being able to declare my income, give a job reference or tell the landlord what I really intend to do there …
>
> The sharp end of discrimination is assault. The Australian Centre for the Study of Sexual Assault notes that few studies have examined the assault of sex workers. In 1991 Roberta Perkins, an Australian sociologist, writer, and transgender and sex worker rights activist, found that 20 per cent of respondents in New South Wales said they had been raped at work—half more than once. Almost half of respondents reported that they had been raped outside of work, almost always by a close contact.

36 The Anti-Discrimination Amendment (Sex Workers) Bill 2020 lapsed on prorogation on 27 February 2023. Accordingly, and reiterating the concerns canvassed above by Ms Boyd, any reform to the Act should include protections for sex workers.

37 The need for such reform was also acknowledged by Mr Greenwich in his Second Reading Speech referred to above, in which Mr Greenwich observed that '[d]iscrimination and vilification against sex workers is common and takes many forms, including a refusal to provide goods and services.' Mr Greenwich also observed that:

Many sex workers are part of or supportive of the LGBTIQA+ community, and they have always marched with us. During consultation, stakeholders unanimously agreed that the bill should protect them.

Discrimination and vilification against sex workers is common and takes many forms, including a refusal to provide goods and services. The bill defines a sex worker as a person who provides sexual services on a commercial basis. The definition covers a range of services in return for payment or reward, including participating in sexual activity like erotic entertainment, BDSM work and pornography. Discrimination against sex workers will be outlawed, including discrimination in the course of doing sex work.

Part 4H of the proposed Equality Legislation Amendment (LGBTIQA+) Bill 2023 is intended to protect sex workers from discrimination.

Part 4H Discrimination on ground of sex work

Division 1 General 50AA Definitions

In this part ***public act*** includes:

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and

(b) any other conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and

(c) the distribution or dissemination of any matter to the public with knowledge the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of—

(i) a person on the ground the person is, or has been, a sex worker, or

(ii) a group of persons on the ground the members of the group are, or have been, sex workers.

Sex worker means a person who provides sexual services on a commercial basis.

50AB What constitutes discrimination on ground of sex work

(1) A person (***the perpetrator***) discriminates against another person (***the aggrieved person***) on the ground of the person is, or has been, a sex worker if the perpetrator—

(a) on the ground of the aggrieved person is, or has been, a sex worker or a relative or associate of the aggrieved person is, or has been, a sex worker, 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 who the perpetrator did not think is, or had been, a sex worker or who does not have a relative or associate who the perpetrator did not think is, or had been, a sex worker, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are, or have not been, a sex worker, or who do not have a relative or associate who is, or has been, a sex worker, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances and with which the aggrieved person does not or is not able to comply.

(2) For subsection (1)(a), something is done on the ground a person is, or has been, a sex worker if it is done on any of the following grounds—

(a) the person is, or has been, a sex worker,
(b) a characteristic that appertains generally to sex workers,
(c) a characteristic that is generally imputed to sex workers

38 NSWCCL considers that it would be appropriate to include sex work as a protected, defined, attribute in the Act to ensure appropriate protections are afforded to sex workers (which should also be a defined term in the Act). We are broadly supportive of pt 4H of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 as a potential model for achieving this. However, we would recommend that a more expressly broad definition of sex worker be adopted so that is clear that it 'covers a range of services in return for payment or reward, including participating in sexual activity like erotic entertainment, BDSM work and pornography'.[8]

(c) Irrelevant criminal record

39 As at December 2021, Australia's imprisonment rate had soared to highest levels in over a century,[9] with the NSW prison population having grown grown by 38% since 2010.[10] It has been observed that the dramatic increase in imprisonment is not just being driven by increase in crime but also systemic failures within the justice system.[11] Although between 30 June 2021 and 30 June 2022, total prisoners in NSW decreased by 6% to 12,372 – 'the largest numerical decrease for any of the states and territories'[12] – high levels of imprisonment continues to be an issue in NSW and Australia more broadly.

40 Former prisoners face an array of challenges when re-integrating into society. NSWCCL therefore considers it appropriate that irrelevant criminal record be introduced into the Act as a new ground for discrimination in the Act. The Australian Human Rights Commission (***AHRC***) observed in 2012 that it had 'received a significant number of complaints from people alleging discrimination in employment on the basis of criminal record'.[13] The AHRC released guidelines for preventing discrimination in employment on the basis of criminal record.[14] Protection against discrimination on grounds of irrelevant criminal record is already in place in other Australian jurisdictions.[15] In our view, the protection should not just apply to discrimination in the workplace but in all areas, including in the provision of goods or services.

(d) Other possible additions

41 In addition to those attributes already discussed, we would generally be supportive of PIAC's proposed list[16] of additional protected attributes, with some minor exceptions.

42 First, protection for political conviction/opinion should be treated under the Act in a similar way to religious belief and affiliation. That is, we would not oppose tailored protections that would prohibit,

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[8] Greenwich, Second Reading Speech on 24 August 2023 for the Equality Legislation Amendment (LGBTIQA+) Bill 2023 and Conversion Practices Prohibition Bill 2023.
[9] See Justice Reform Initiative, 'State of Incarceration Insights into Imprisonment in New South Wales' (December 2021) <3_JRI_NSW_Report_V5_APPROVAL-4.pdf (nationbuilder.com)> 1.
[10] Ibid.
[11] Ibid.
[12] Australian Bureau of Statistics (2022), 'Prisoners in Australia' <Prisoners in Australia, 2022 | Australian Bureau of Statistics (abs.gov.au)> accessed 18 September 2023.
[13] Australian Human Rights Commission, 'Human Rights: On the record' (2012) <Human Rights: On the record | Australian Human Rights Commission>.
[14] Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) <otr_guidelines.pdf (humanrights.gov.au)>.
[15] See, eg, *Anti-Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16.
[16] PIAC (n 6) 4.

for example, an employer terminating an employee's employment on the basis of political belief in appropriate circumstances (for example, there may cases where it is appropriate for employers to base employment decisions on the basis of political belief, such as where a political organisation is the employer). But we are opposed to general protections or exemptions in the Act that would prevent political groups or parties from being criticised for their views, and would not be supportive of protections on political grounds that would supersede other protections in the Act.

43 Secondly, and similarly, while we agree with PIAC that discrimination on the basis of industrial activity/trade union activity should be prohibited, as with religious and political affiliation, we think this protection should clearly attach to the individual and not become a mechanism by which trade union organisations may be insulated from criticism/debate.

3 Areas where discrimination is unlawful

Whether the areas of public life in which discrimination is unlawful should be reformed.

44 The Act prohibits discrimination in:

- the workplace (pt 2, div 2);
- education (s 17);
- the provision of goods and services (s 19);
- accommodation (s 20); and
- registered clubs (s 20A).

PIAC has pointed out there are number of 'gaps' in the Act when it comes to where discrimination is prohibited. They have suggested that an alternative to addressing each of these gaps individually is to amend the Act to prohibit discrimination in *all* areas of public life, and make an exception for private conduct.[17] While we are generally supportive of this approach, we do not think private interactions within or between public agencies and officials should be covered by such a protection.

45 To the extent there are gaps within the Act, these could be also addressed through the introduction of a suitably drafted Human Rights Act in NSW (discussed further in Section 13.2).

4 Adequacy of existing tests for discrimination

Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination.

4.1 'Direct' and 'indirect' discrimination

46 'Discrimination' is a word of wide import and in everyday usage. Discriminating, i.e. 'the process of differentiating between persons or things possessing different properties',[18] is essential for acting intelligently and rationally in the world. But that is, clearly, not what discrimination means or is intended to mean in the context of the Act.

47 The discrimination with which the Act is concerned has at its heart a concept of unfairness. The unfairness inheres in the unequal treatment of people based on characteristics that are inalienable or are associated with entrenched disadvantage. The justification for statutory intervention to prohibit discriminatory conduct arises because society is motivated to prevent and remedy that unfairness and to promote equality.

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[17] PIAC (n 6) 7.
[18] *Street v Queensland Bar Association* (1989) 168 CLR 461, 570 (Gaudron J), quoted in Rees, Rice, Allen (n 4) [3.1.1].

48 For anti-discrimination legislation to do that effectively, it is now generally accepted that the legislation needs to be animated by a substantive and not merely formal concept of discriminatory treatment. In other Australian jurisdictions, including Tasmania and Victoria, this is achieved through separating out 'direct discrimination' from 'indirect discrimination'. The Victorian legislation defines these concepts in this way:

8 Direct discrimination

(1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

Examples

An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.

A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.

(2) In determining whether a person directly discriminates it is irrelevant— (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable; (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

9 Indirect discrimination

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –

a. that has, or is likely to have, the effect of disadvantaging persons with an attribute; and

b. that is not reasonable.

(2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

(3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following–

a. the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;

b. whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;

c. the cost of any alternative requirement, condition or practice;

d. the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;

e. whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or;

f. proposing to impose, the requirement, condition or practice but would result in less disadvantage.

(4) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

Examples

A store requires customers to produce photographic identification in the form of a driver's licence before collecting an order. This may disadvantage a person with a visual impairment who is not eligible to hold a driver's licence. The store's requirement may not be reasonable if the person with a visual impairment can provide an alternative form of photographic identification.

An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.

49 The idea behind making express provision for indirect discrimination, as something distinct from direct discrimination, is that it is easy to overlook the potentially discriminatory effects of conduct that is 'facially neutral' or treats everyone equally in a formal sense. It would be a significant weakness in anti-discrimination legislation if it could not respond effectively to those discriminatory effects.

50 This binary approach does, however, have limitations, including that courts have interpreted direct and indirect discrimination to be mutually exclusive.[19] As the ACT Law Reform Advisory Council (***ACTLRAC***) pointed out, in its review of the *Discrimination Act 1991* (ACT):[20]

[T]he distinction between direct and indirect discrimination can be conceptually difficult for people who want to complain about discrimination, and for people who are trying to comply with the Act and avoid discriminating. This confusion means, for example, that complaints are made about both types of discrimination, but one then has to be chosen if the complaint is taken to the tribunal. This adds to the complexity of the complaints procedure and any subsequent tribunal hearing.

51 An alternative approach is taken in Canada as a result of decisions of Canada's Supreme Court.[21] That approach has been described as a 'unified test'[22] that consists of a single, substantive concept of discrimination that embraces, but it is not defined by reference to, both direct and indirect aspects. The Supreme Court preferred this unified test for several reasons, primarily that the distinction between conduct that is discriminatory on its face and conduct that is discriminatory in its effect is difficult to justify given so few cases can be so neatly characterised.[23] The Court held that a multi-stage approach was appropriate, whereby if a person can establish a prima facie case of discrimination, the burden then shifts to the alleged perpetrator to show why the discriminatory conduct is justified.

52 The ACT Law Reform Advisory Council saw the merits of a single or unified test however ultimately made a different recommendation, namely that the legislation should retain the discrete

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[19] See eg *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, [14]-[18] per Bromberg J, Griffiths J and Bromwich J relevantly agreeing at [179] and [213] respectively.
[20] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (Final Report, 2015), 29, quoted in Rees, Rice and Allen (n 4) at [3.1.13].
[21] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Services Employees' Union* [1993] 3 SCR 3 and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1993] 3 SCR 868, cited in ACTLRAC (n 20) 29.
[22] ACTLRAC (n 20) 29 fn 24.
[23] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Services Employees' Union* [1993] 3 SCR 3, [25]-[49].

concepts of direct and indirect discrimination however clarify that these are not mutually exclusive:[24]

In LRAC's view, the preferable means of reducing the confusion surrounding the concepts of 'direct' and 'indirect discrimination' is to adopt a definition of discrimination which makes it clear that these two ways of understanding discrimination are not mutually exclusive. However, while acknowledging the benefits of adopting a single definition of discrimination, LRAC considers that express references to 'direct' and 'indirect' discrimination perform an important educative function about the different types of discrimination. The preferable way to define discrimination is based on the approach taken by the Discrimination Law Experts' Group, explicitly identifying conduct as 'direct' and 'indirect' discrimination'. Discrimination would therefore be defined as conduct that occurs directly, indirectly, or both directly and indirectly, where discrimination that occurs directly is unfavourable treatment as currently defined in the Discrimination Act, and discrimination that occurs indirectly is the imposition of a condition or requirement or practice as currently defined in the Discrimination Act.

53 We can see the merits of the 'educative function' to which the ACTLRAC referred. We also see the force in the Canadian Supreme Court's observation that a strict distinction between direct and indirect discrimination tends to overlook the fact that cases involving discriminatory conduct may give rise to both of these elements. The important thing, in our view, is that the Act has a clear and comprehensive definition of discrimination that applies to all protected attributes and is substantive and not merely formal. In that circumstance, we would embrace a reform of the Act *either*:

(a) to include a single definition of discrimination along the lines developed in Canada; or

(b) to adopt the definition proposed by ACTLRAC, namely that discrimination is conduct that occurs directly, indirectly, or both directly and indirectly, with the Act then to provide examples of direct and indirect discrimination.

4.2 Comparator test

54 If the Act retains express recognition of direct and indirect discrimination as distinct concepts, we support the replacement of the current 'comparator test' for direct discrimination (see, eg, s24(1)(a)) with a causation requirement. That is, rather than requiring aggrieved persons to frame their complaint by reference to a hypothetical 'comparator' in the same or similar circumstances, the inquiry for whether there was discrimination should be determined based on whether the unfavourable treatment was 'because of' or 'as a result of' the protected characteristic. This is the approach now taken in Victoria and the ACT and represents a more straightforward and less confusing standard.

4.3 Reasonableness

55 The other aspect of the current test for discrimination that we think merits attention is 'reasonableness'. This is an element of each provision of the Act that proscribes discrimination in the form of imposing a requirement or condition with which a person does not or cannot comply by reason of a protected attribute. To take s 24 as an example:

24 What constitutes 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—

[24] ACTLRAC (n 20) 31.

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.

56 Section 24(1)(a) picks up the concept of 'unfavourable treatment'. This is a form of direct discrimination and there is no element of reasonableness. Section 24(1)(b), on the other hand, refers to a form of indirect discrimination and provides that for the conduct to be unlawful it must be 'unreasonable'.

57 The legal standard of reasonableness is as ubiquitous as it is ambiguous. The standard is intended to be 'objective', that is, it is judged according to the standards of a hypothetical reasonable person. It is, however, generally regarded to be less stringent than other standards which might be used and which have been adopted in comparable jurisdictions. For example:

(a) In the United States, the alleged perpetrator (where an employer) must 'demonstrate that the challenged practice is job related for the position in question and **consistent with business necessity**'.[25]

(b) In the United Kingdom, the question is whether impugned conduct is 'a **proportionate** means of achieving a legitimate aim'.[26]

58 These two standards – necessity and proportionality – are not unfamiliar to Australian law.[27]

59 Criticisms have been made of the reasonableness standard, including in the specific context of sex discrimination. Professor Beth Gaze, for example, has argued:[28]

> [T]he Act's substantive provisions are relatively weak. The test for the acceptability of apparently neutral practices which have a disadvantageous effect on women is whether the practice is 'reasonable'. The comparable countries on whose legislation this is based [the United Kingdom and United States] have stronger laws…The meaning of the reasonableness test has been an ongoing battleground, and appellate judges have not been able to clarify the test and how it is to be applied so as to provide adequate guidance for subsequent courts and tribunals. Because of its open texture, the test of reasonableness can be a vehicle for the transmission of traditional views of social practices, and the rejection of any requirement to change.

60 This observation is apposite. The problem with the reasonableness test is, by being so 'open textured' it creates a risk that decisions of courts and tribunals fail to give full weight to the

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[25] 42 USC §2000e-2(k)(1)(A)(i) (2006).
[26] Equality Act 2010 (UK) s 19(2)(d).
[27] See, eg, the current proportionality-based test that governs the *Constitution's* implied freedom of political communication: most recently in *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; and, the 'necessity' test that applies to applications for suppression and non-publication orders in the Federal Court (which has been held *not* to call for a balancing exercise): *Australian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430, [21] (Perram J, citing *Hogan v Australian Crime Commission* (2010) 240 CLR 651.
[28] Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionments and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 918.

beneficial purpose of the legislation and its ambition – articulated by Premier Wran in 1977 (see paragraph 5 above) – of promoting a more equal society.

61 The NSWCCL would support the replacement of reasonableness with a higher standard. Given the increasing trend towards proportionality-style analysis both in international rights law and in Australian courts,[29] we think the Act would benefit from adopting the United Kingdom's test. This will be the most familiar standard for Australian courts and tribunals to apply in a way that strikes an appropriate balance between the interests of aggrieved persons and the legitimate activities and aims of businesses and other organisations.

5 Adequacy of protections against vilification

The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law.

5.1 The test for vilification

62 The current test in the Act for vilification provides that it is unlawful for a person, by a public act, to incite hatred toward, serious contempt for, or severe ridicule of a person or group of persons on grounds of:

- racial vilification: Part 2, div 3A.
- transgender vilification: Division 5.
- homosexual vilification: Part 3A, div 4.
- HIV/AIDs vilification: Section 49ZXB.

63 The test is distinct from that which is imposed at the Commonwealth level by s 18C of the *Racial Discrimination Act 1975* (Cth). Section 18C provides:

> **18C Offensive behaviour because of race, colour or national or ethnic origin**
>
> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
>
> Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.
>
> (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
>
> (a) causes words, sounds, images or writing to be communicated to the public; or
>
> (b) is done in a public place; or
>
> (c) is done in the sight or hearing of people who are in a public place.

[29] See Dane Luo, 'The "March of Structured Proportionality": The Future of Rights and Freedoms in Australian Constitutional Law', (AUSPUBLAW blog, 8 April 2022) <https://www.auspublaw.org/blog/2022/04/the-march-of-structured-proportionality-the-future-of-rights-and-freedoms-in-australian-constitutional-law>.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

64 Section 18C has engendered criticism for its potential to impact freedom of speech. In response to this criticism, the Australian Human Rights Commission (***AHRC***) point out that much of it ignores the operation of s 18D. Section 18D provides:

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The AHRC point out:[30]

> Given the broad protection of free speech in section 18D, we are entitled to ask: Why is that people want to make it acceptable to racially offend or racially insult others in ways that are not done reasonably or in good faith, in ways that have no genuine purpose in the public interest? What is it that people want to say, which they can't already say?

65 We also note that despite the criticism, s 18C has also been defended by legal academics.[31]

66 Without wishing to enter into this debate, we do think that in assessing any reform to the vilification provisions in the Act, the test under the Federal law ought not be imported into the Act. We consider that the test imposed by the Act is appropriate and, subject to the following remarks about promoting greater harmonisation between the Act and criminal law legislation in NSW, we are generally supportive of the test being retained.

(a) Harmonisation of the Act with the *Crimes Act 1900* (NSW)

67 We think the community would benefit from greater harmonisation of the vilification laws in NSW. To that end, we would be supportive of appropriate reform that would result in greater consistency between the Act and the *Crimes Act 1900* (NSW).

68 The Crimes Amendments (Publicly Threatening and Inciting Violence) Bill 2018 (NSW) amended the *Crimes Act 1900* (NSW) by inserting s 93Z. That provision makes it an offence to publicly threaten or incite violence on grounds of race, religion, sexual orientation gender identity or intersex or HIV/AIDS status.

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[30] Australian Human Rights Commission, 'The AHRC and the Racial Discrimination Act: setting the record straight' (7 February 2017) <https://humanrights.gov.au/about/news/opinions/ahrc-and-racial-discrimination-act-setting-record-straight#:~:text=Section%2018C%20of%20the%20Racial,someone%20because%20of%20their%20race.>.

[31] See, eg, Professor Luke McNamara, 'Section 18C is an important part of a civilised society and no threat to free speech' *The Conversation* (14 September 2016) <https://theconversation.com/section-18c-is-an-important-part-of-a-civilised-society-and-no-threat-to-free-speech-64801>.

69 Although NSWCCL embraces the sentiment behind s 93Z, it has produced a multi-tiered – and, at least in certain respects, inconsistent – regime in NSW for regulating vilification. As PIAC have pointed out, the consequence is that 'people of faith (or no faith), bisexuals, non-binary people and people with variations of sex characteristics are protected by the criminal law against public threats of violence, but have no access to a civil remedy under the [Act]'.[32]

70 In our view, these anomalies, which appear to be a by-product of the piecemeal way in which the law in this area has developed over the decades, ought to be addressed in any reform process to the law.

5.2 2023 religious vilification amendment

71 The NSWCCL notes that the *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (***Religious Vilification Amendment***) has now passed Parliament and received assent on 11 August 2023. One issue with the Religious Vilification Amendment is its breadth. While it is legitimate to seek to prevent discrimination based on religion, especially to protect minorities who have historically been discriminated against – for example, Jewish people who have been the target of antisemitism, Muslim women for adopting attire as religious expression etc – broad anti-vilification laws such as the Religious Vilification Amendment mean that groups that are not typically subjected to severe ridicule or targeted discrimination are afforded protections that may not be necessary, potentially at the expense of other social imperatives (such as freedom of speech). Accordingly, NSWCCL is opposed to the Religious Vilification Amendment and considers it to be fundamentally flawed in its current form. It should be repealed in the context of holistic reform for the following further reasons.

72 First, the focus of anti-discrimination law and the existing provisions of the Act is to protect an individual from being subject to unfair treatment by reason of characteristics that are generally innate or immutable or associated with entrenched disadvantage. While freedom of religion is an important individual right protected under international law and under the Australian *Constitution* – and a person's religious beliefs may be deeply meaningful to them and an important constituent of cultural and familial ties – those beliefs are not innate characteristics.[33] They are ideas, albeit ideas that can have a profoundly important impact on a person's life. We see considerable risk in the Religious Vilification Amendment because it fails to recognise this distinction and instead simply mimics the legislative protections that the Act provides to individuals based on their innate characteristics. One danger we therefore foresee is that the Religious Vilification Amendment could operate to prohibit the vilification or severe ridicule of beliefs or views themselves, not only the vilification or severe ridicule of persons on the basis that they hold particular beliefs or views.

73 Secondly, the NSWCCL is particularly concerned with the proposed s 49ZE(1)(b). Section 49ZE(1) provides:

> **49ZE Religious vilification unlawful**
>
> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of—
>
> (a) a person on the ground the person—
>
> (i) has, or does not have, a religious belief or affiliation, or
>
> (ii) engages, or does not engage, in religious activity, or

[32] PIAC (n 6) 8.

[33] Although the NSWCCL notes that s 116 of the *Constitution* is not a personal right or protection and has been interpreted narrowly: see <https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-thought-conscience-and-religion-or-belief>.

(b) a group of persons on the ground the members of the group—

(i) have, or do not have, a religious belief or affiliation, or

(ii) engage, or do not engage, in religious activity.

74 Section 49ZE(1)(b) replicates existing provisions of the Act that prohibit the vilification both of persons and of 'groups of persons'. We do not think it is appropriate simply to adopt that language in the context of religious beliefs or affiliation. Doing so risks effectively extending the protection of the Act to religious institutions or organisations – that is, there is a risk that the Proposed Amendment would create a situation in which severe ridicule or vilification of institutions such as the Catholic Church or the Anglican Church may be taken to constitute severe ridicule or vilification of persons who belong to those organisations, and thus made unlawful. It is essential that citizens remain free to criticise religious organisations or institutions, even if that criticism amounts to severe ridicule or vilification, because those institutions often hold important social and political influence. A functioning participatory democracy depends on debate and criticism as a means of promoting institutional accountability. We are also mindful, in this context, that religious groups and organisations come in many shapes and sizes and the 'beliefs' they hold may be diametrically opposed to one another. For example, it is not clear how s 49ZE(1)(b) would regulate a situation where someone on religious grounds holds and wishes to propagate a belief that persons of a different religious group are subordinate or evil.

75 For the same reason, the Act should also be amended to make clear that, contrary to the default rule of statutory interpretation,[34] where the Act refers to an aggrieved 'person', this does not extend to a corporation or body corporate.

76 NSWCCL would not, however, be opposed to limited and clear protection for engagement in otherwise lawful religious activity accepted as practice by the faith group and genuinely held by the person. Any such reform should be appropriately adapted to make clear that protections are for individuals only and do not extend to religious institutions, and should never operate so as to supersede other protected rights under the Act.

6 Adequacy of protections against sexual harassment

The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes.

77 The only form of harassment that the Act renders unlawful is sexual harassment (Part 2A). Part 2A was inserted in 1997[35] and remains in the form originally enacted. The Explanatory Note to the Bill stated that 'Part 2A is modelled on the provisions relating to sexual harassment in the *Sex Discrimination Act 1984* of the Commonwealth'.[36]

78 In our view, there are three questions pertinent to this term of reference:

(a) whether it is appropriate that the Act deals with sexual harassment as a discrete prohibition;

and if so:

(b) whether the protections in Part 2A are adequate; and

(c) whether harassment of other kinds should also be prohibited.

[34] *Interpretation Act 1987* (NSW) Sch 4 (definition of 'person').
[35] *Anti-Discrimination Amendment Act 1997* (NSW).
[36] Anti-Discrimination Amendment Bill 1996 [Act 1997 No 9] Explanatory Note, p4.

6.1 Harassment as a discrete prohibition

79 The relationship between sexual harassment and sex discrimination is easily misunderstood. Chris Ronalds SC and Elizabeth Raper (as her Honour then was) observed that '[a]ll discrimination laws make harassment unlawful and define it differently from discrimination', however, '[m]any acts of sexual harassment can also be acts of sex discrimination'.[37] It is also, however, possible to conceive of sexual harassment as a type of direct discrimination on the basis of sex – specifically, in the context of the Act, conduct amounting to 'unfavourable treatment' of the sort prohibited by s 24.[38]

80 In addition to the conceptual overlap with discrimination, sexual harassment can also overlap with the criminal law[39] because conduct that amounts to a contravention of s 22A of the Act could also constitute, for example, the offence in New South Wales of sexual touching.[40]

81 While Part 2A, accordingly, does not operate in a vacuum, in our view it was appropriate in 1997, and remains appropriate now, that the Act deal specifically with sexual harassment and not only with sex discrimination. There are three reasons for this view.

82 First, sexual harassment remains unacceptably common in contemporary society. In 2022, the AHRC released its fifth national survey on sexual harassment in Australian workplaces.[41] The key findings included that:[42]

(a) With respect to 'lifetime sexual harassment' (not limited to the workplace), over three quarters of Australians aged 15 or older (77%) have been sexually harassed at some point in their lifetime. The figure was 89% for women and 99% for non-binary Australians.

(b) With respect to workplace harassment, one in three Australians (33%) have been sexually harassed at work in the last 5 years (41% of women and 26% of men).

(c) On the other hand, only 18% of sexual harassment incidents are reported.[43]

83 The Queensland Worksafe Agency has pointed out that these rates are similar to the rates in previous national surveys, reflecting an alarming lack of progress.[44]

84 Secondly, part of the reason that sexual harassment is underreported is that there remains a lack of awareness, education and training, particularly in workplaces[45] but also in the wider community. Legislation can, as we noted at paragraph 53 above, provide an important educative function. Given there are so many victims of sexual harassment in the community, it is important that when they look to their legal rights, they can see a clear articulation of whether and if so, how the conduct against them is wrong. Namely, in the context of the Act, that it amounted to sexual harassment under Part 2A. A victim should not be left to puzzle over whether what happened to them meets the more obscure test of 'unfavourable treatment' in s 24.

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[37] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (4th ed, Federation Press, 2012) 88, 91, citing *O'Callaghan v Loder (No 2)* [1983] 3 NSWLR 89, 92.
[38] See Rees, Rice and Allen (n 4) at [12.1.1].
[39] Ronalds and Raper (n 37) 91.
[40] *Crimes Act 1900* (NSW) ss 61KC, 61KD.
[41] Australian Human Rights Commission, *Time for respect: fifth national survey on sexual harassment in Australian workplaces* (2022)
[42] Ibid 12.
[43] Ibid 14.
[44] Worksafe Queensland, 'Fifth national survey on sexual harassment in Australian workplaces' <https://www.worksafe.qld.gov.au/news-and-events/newsletters/esafe-newsletters/esafe-editions/esafe/december-2022/fifth-national-survey-on-sexual-harassment-in-australian-workplaces#:~:text=The%20Australian%20Human%20Rights%20Commission,in%20the%20last%20five%20years.>.
[45] Australian Human Rights Commission (n 41) 21.

85 Lastly, it might be said that the lack of progress in remedying sexual harassment demonstrates that Part 2A has failed to achieve its intended purpose, because it does not effectively address the conduct it proscribes. That is a fair observation, however, we believe has more to do with the problem of the lack of cultural awareness about sexual harassment and with the difficulties of navigating the Act's remedial and complaints mechanisms (addressed in section 9 below) than with Part 2A itself.

86 We support the Act retaining a discrete proscription for sexual harassment.

6.2 Adequacy of protections in Part 2A

87 In terms of the adequacy of the provisions, we think an aspect of Part 2A that merits attention is its treatment of the circumstances in which sexual harassment is prohibited and how this aligns with legislation in other Australian jurisdictions.

88 The Act proscribes sexual harassment only where it occurs in certain circumstances:

(a) Workplaces or related places: ss 22B, 22C, 22D.

(b) Educational institutions: s 22E.

(c) In the provision of goods or services: s 22F.

(d) In the provision of accommodation: s 22G.

(e) In the course of dealing with respect to interests in land: s 22H.

(f) In a sporting activity: s 22I.

(g) In State laws and programs: s 22J.

89 This sits in the middle of a spectrum, as far as comparable legislation in other jurisdictions is concerned. At one end of the spectrum, the *Equal Opportunity Act 1984* (WA) prohibits sexual harassment (which it defines as '*discrimination involving* sexual harassment') only in three circumstances: employment, education and accommodation (ss 24-26). At the other end of the spectrum, the *Anti-Discrimination Act 1991* (Qld) includes a very wide protection, prohibiting sexual harassment in all circumstances. The Queensland legislation also includes a statement of the purpose or objectives of this approach:[46]

117 Act's freedom from sexual harassment purpose and how it is to be achieved

(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from sexual harassment.

(2) This purpose is to be achieved by–

a. prohibiting sexual harassment; and

b. allowing a complaint to be made under chapter 7 against a person who has sexually harassed; and

c. using the agencies and procedures established under chapter 7 to deal with the complaint.

90 It is fair to say that the workplace is a key area where sexual harassment urgently needs to be addressed. However, having regard to the AHRC's findings about the prevalence of 'lifetime sexual harassment' not limited to the workplace (paragraph 82(a) above), the NSWCCL sees the merit in a broader approach along the lines of the Queensland legislation. This would help to

[46] *Anti-Discrimination Act 1991* (Qld) section 117.

reinforce that sexual harassment is always wrong and provide a clearer path for a victim to seek redress.

91 Aside from the circumstances in which the Act prohibits sexual harassment, another substantive aspect of the prohibition that is worth briefly mentioning is the element of 'reasonableness' in s 22A. Unlike the views we expressed above in relation to 'reasonableness' in the sex discrimination prohibition (s 24 of the Act), we do not recommend that the reasonableness standard be replaced or changed in the context of sexual harassment. This is because it is used in a different way. In the sexual harassment provisions, reasonableness does not operate as a defence or justification available to the alleged perpetrator. Instead, it is simply the touchstone by which the effect of the conduct on the aggrieved person is to be judged – specifically, whether a reasonable person would have anticipated that the conduct would cause the aggrieved person to feel 'offended, humiliated or intimidated'. On balance, we think it is appropriate that that remain an objective standard rather than a subjective one – i.e., it should not be enough to show that, subjectively, the aggrieved person felt offended, humiliated or intimidated.

6.3 Harassment on the basis of other attributes

92 There are examples of legislation in other jurisdictions that prohibits harassment on the basis of attributes other than sex. For example, the *Anti-Discrimination Act 1992* (NT) defines 'discrimination' to include 'harassment on the basis of an attribute' (s 20(1)(b)). Commentators have pointed out that this extended prohibition on harassment has not been the subject of much activity in the Northern Territory,[47] so it is difficult to assess its effect.

93 The NSWCCL is not aware of comprehensive research being undertaken into the prevalence of harassment on the basis of other attributes, similar to the AHRC's national surveys on sexual harassment. This, too, makes it difficult to assess whether there is a need for standalone protections against harassment on the basis of other attributes. Take race, for instance – the use of racially abusive epithets would likely amount to conduct capable of constituting racial discrimination; in more extreme cases, it may also amount to racial vilification. The Act already prohibits both racial discrimination and racial vilification. It is difficult to know whether there is a gap between those two standards that should be filled by a new provision dealing with 'racial harassment', although we note it may ultimately depend on what test(s) is applied.

94 In the circumstances, the NSWCCL considers that the Act should be amended to proscribe harassment on the basis of all protected attributes.

7 Positive obligations to prevent and make reasonable adjustments

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.

95 The Act already requires that 'positive steps' be taken in the context of disability discrimination, however, in a fairly roundabout way. Section 49D, which prohibits disability discrimination by employers, provides that conduct will not amount to unlawful discrimination if meeting the requirements of the person with disability would impose 'unjustifiable hardship' on the employer. However, the Act does not go as far as to say that employers are positively required to take steps to prevent disability discrimination.

96 The NSWCCL supports imposing an obligation on employers and the other organisations and bodies who are subject to the Act, to take reasonable steps to prevent discrimination, harassment

[47] See Rees, Rice and Allen (n 4) [12.8.1].

and vilification. At paragraph 84 above, we referred to one area where this could make a significant difference – as the AHRC noted, the effective prevention of sexual harassment requires better education, training and awareness-raising in workplaces. In our view, it is appropriate and consistent with the Act's objectives for *reasonable* obligations to be placed on employers, organisations and bodies to prevent the conduct the Act prohibits. While the Act cannot, and should not attempt to, be conclusive about what is reasonable, it could stipulate that the question is to be determined having regard to:

(a) the Act's purpose; and

(b) the size and resources of the organisation and any other relevant circumstances.

8 Exceptions, special measures and exemption processes

Exceptions, special measures and exemption processes.

97 The Act contains a number of exceptions to, and mechanisms by which organisations may become exempt from, certain provisions in the Act. There are a wide range of exceptions and how they interact in the broader context of the Act is complex. Speaking generally, while a number of the exceptions are appropriate (at least in principle), some are too broad and others are entirely inappropriate. In this Section we therefore focus on the main exceptions we think should either be reformed or removed from the Act.

8.1 Exceptions

(a) Exceptions for private educational authorities

98 It has been noted by other interest groups and commentators that the Act has the broadest exceptions in Australia for non-government educational institutions.[48] The Act contains a number of exceptions for 'private educational authorities', defined as 'a person or body administering a school, college, university or other institution at which education or training is provided' that is not established under the *Education Act 1990* (NSW), *Technical and Further Education Commission Act 1990* (NSW) or an Act of incorporation of a university or an agricultural college administered by the Minister for Agriculture: s 4 of the Act.

99 Private educational authorities are able to discriminate on a wide range of grounds, even where the authority is not established for a religious purpose:

- Sex: ss 25(3)(c) and 31A(3)(a).
- Transgender status: ss 38C(3)(c) and 38K(3).
- Marital or domestic status: ss 40)(3)(c) and 46A(3).
- Disability: ss 49D(3)(c) and 49K(3)(a).
- Homosexuality: ss 49ZH(3)(c) and 49ZO(3).

These exceptions not only apply in respect of how private educational authorities may discriminate against teachers, staff and lecturers, but students as well.

100 Instead of broad exceptions allowing private educational authorities to discriminate, we think a better approach would be to allow faith-based educational authorities to give preference to prospective students or staff on the basis of religion, or sex in the case of single-sex educational authorities. This would not permit private educational authorities to refuse to admit, or expel, students on the basis of other protected attributes (such as sexual orientation or transgender

[48] PIAC (n 6) 10.

status). Nor would it permit private educational authorities to terminate someone's employment on the basis of other protected attributes.

101 In advancing this submission, NSWCCL notes that protecting young people and students should be a priority of the Act. Students, and younger people more generally, are in a position of heightened vulnerability compared to adults. All students – but particularly LGBTIQ+ students – experience emotional challenges as they enter adulthood. The imposition of additional pressure as a consequence of a potential looming risk of expulsion from school on grounds of transgender status or sexual orientation, is harmful and unacceptable. Any reform to the Act should therefore ensure that students in faith-based educational authorities – and private educational authorities more broadly – are protected from this kind of discrimination, as is the case already in other Australian jurisdictions.[49]

102 While the question is outside of the scope of this Review, NSWCCL continues to question whether government funding should be given to any private educational authority which seeks to avail themselves of these exceptions and discriminate against students and staff.

(b) General exceptions on grounds of religion

103 Section 56 provides general exceptions for religious bodies. It provides:

> **56 Religious bodies**
>
> Nothing in this Act affects—
>
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
>
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
>
> (c) the appointment of any other person in any capacity by a body established to propagate religion,
>
> or
>
> (d) 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.

While sub-sections 56(a)-(b) may be thought to be less controversial, the balance of s 56 – and sub-section 56(d) in particular – is problematic.

104 As PIAC has observed, the provision applies not only to religious educational institutions but also certain 'healthcare, accommodation and housing, disability and other social services'[50]. In our view s 56, and s 56(d) in particular, is too broad and should be removed from the Act. As it stands, we consider there to be a real risk that the Act operates in a way that promotes the interests of religious or religiously-affiliated organisations at the expense of other important social aims, particularly the welfare of children and freedom from unfair discrimination and unequal treatment.

105 Finally, we note that generalised exceptions permitting discrimination on grounds of religion in the provision of goods or services should also not be allowed in any reformed version of the Act. The licence to discriminate enshrined within the current Act must be removed upon any consequent reform.

[49] See, eg, *Anti-Discrimination Act 1991* (Qld) s 109(2); *Anti-Discrimination Act 1998* (Tas) s 51A.
[50] PIAC (n 6) 11.

(c) Other exceptions

106 Section 38C, which prohibits discrimination against a transgender person in work, also contains exceptions for the purposes of employment in a private household, if the number of persons employed by the employer does not exceed five or by a private educational authority: s 38C(3). These exceptions should be repealed. We have already discussed exceptions for private education authorities, and, for similar reasons, do not think it is appropriate that employers should be able to discriminate against transgender people merely because the business they operate employees five or less people.

107 Section 38P of the Act provides a sport exception.

> **38P Sport**
>
> (1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.
>
> (2) Subsection (1) does not apply—
>
> (a) to the coaching of persons engaged in any sporting activity, or
>
> (b) to the administration of any sporting activity, or
>
> (c) to any sporting activity prescribed by the regulations for the purposes of this section.

108 We support:

(a) A repeal of s38P so that the Act prohibited discrimination against transgender persons in amateur or junior sport and in coaching or administration at a professional level; and

(b) The inclusion in the Act of a new mechanism by which professional sport bodies could apply to the Board for an exemption to make rules, codes of conduct and the like which govern participation by transgender persons in professional sport.

109 Section 38Q of the Act provides an exception to discrimination against a transgender person in the administration of a superannuation scheme.

> **38Q Superannuation**
>
> A person does not discriminate against a transgender person (whether or not a recognised transgender person) on transgender grounds if, in the administration of a superannuation or provident fund or scheme, the other person treats the transgender person as being of the opposite sex to the sex with which the transgender person identifies.

A similar exception applies in respect of sex discrimination and superannuation schemes: s 36. Inherent in pt 3A of the Act is recognition that transgender people face harmful discrimination. We see no justification for maintaining provisions such as 38Q of the Act, which perpetuate harmful practices of misgendering.

110 Section 59A provides an exception to adoption services:

> **59A Adoption services**
>
> (1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the *Adoption Act 2000* or anything done to give effect to any such policy or practice.
>
> **Note.** Section 8 (1) (a) of the *Adoption Act 2000* requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.

(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.

(3) In this section, ***faith-based organisation*** means an organisation that is established or controlled by a religious organisation and that is accredited under the *Adoption Act 2000* to provide adoption services.

NSWCCL considers that this exception should be removed. We do not think it is appropriate that there should ever be anything other than the needs of the child taken into account in the provision of adoption services. We note that this would also be consistent with the proposed Equality Legislation Amendment (LGBTIQA+) Bill 2023, sch 1 [41] of which would remove the s 59A exception to from the Act.

8.2 Exemptions

111 The Act provides a regime for persons to apply to be exempt from certain provisions of the Act: see s 126. The exemptions that are currently in place are published online.[51] We understand that although applications may be made for an exemption to any area of the Act, exemptions generally relate to employment and recruitment.[52] A quick review of the exemptions list reveals that most of the exemptions in place are in favour of employers or organisations seeking to employ Aboriginal or Torres Strait Islander people, or women, only to particular roles (or to otherwise increase women or Aboriginal or Torres Strait Islander peoples' representation in particular fields, industries or organisations).

112 We acknowledge there is a need to promote representation of Aboriginal and Torres Strait Islander peoples, women, and in particular cases members of other groups, in the workplace and other areas. We further recognise there may be a need for certain organisations to select employees on grounds of race for particular cultural reasons that may be unique to the role. Accordingly, we think that the exemptions regime that is in place should largely remain intact in any reform process to the Act.

113 We are also aware that there are currently six citizenship-related exemptions in place in favour of employers, most of whom – but not all – operate in the defence and security industries. We do not agree with the principle that a company's access to technology should be restricted if its employees include citizens of certain countries. In matters of national security, a prospective employee's ability to obtain the relevant degree of security clearance should conclusively determine whether the person should be employed. We accept, however, that these exemptions may not arise because of a requirement imposed under Australian law, but under Australian treaty obligations, and that there may not presently be feasible alternatives to compliance with those requirements.

8.3 Special measures

114 NSW is the only jurisdiction in Australia that lacks a special measures provision like s 12 of the *Equal Opportunity Act 2010* (Vic). That section provides:

12 Special measures

(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.

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[51] Anti-Discrimination New South Wales, 'Current Exemptions' <https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/organisations-and-community-groups/exemptions-and-certifications/current-exemptions.html#:~:text=An%20exemption%20is%20an%20approval,area%20covered%20by%20the%20Act>.
[52] Ibid.

Examples

1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.

2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.

3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

(2) A person does not discriminate against another person by taking a special measure.

(3) A special measure must—

(a) be undertaken in good faith for achieving the purpose set out in subsection (1); and

(b) be reasonably likely to achieve the purpose set out in subsection (1); and

(c) be a proportionate means of achieving the purpose set out in subsection (1); and

(d) be justified because the members of the group have a particular need for advancement or assistance.

(4) A measure is taken for the purpose set out in subsection (1) if it is taken—

(a) solely for that purpose; or

(b) for that purpose as well as other purposes.

(5) A person who undertakes a special measure may impose reasonable restrictions on eligibility for the measure.

115 We note that, depending on the wording of the special measures provision, there is potential for overlap with the exemptions regime and, if adopting a provision like s 12 of the Victorian legislation, consideration should be given of the extent to which the exemptions regime could be reconfigured.

9 Adequacy and accessibility of complaints procedures and remedies

The adequacy and accessibility of complaints procedures and remedies.

116 The Act provides for the Tribunal to award various remedies where an aggrieved person substantiates a complaint in relation to a contravention of the Act, including (s 108):

(a) Monetary compensation up to $100,000;

(b) An order enjoining the perpetrator from continuing or repeating the contravening conduct;

(c) An order requiring the perpetrator to publish an apology or retraction;

(d) An order rendering invalid any contract or agreement entered into in contravention of the Act.

117 In the NSWCCL's view, while this represents, conceptually, an appropriate range of remedies, there is a problem of a lack of *accessibility* of relief and the difficulty for aggrieved persons in navigating the complaints procedures.

118 That difficulty is not merely formalistic but represents a substantive flaw in the efficacy of the Act. Commentators have noted, for example, that the cumbersome nature of enforcement mechanisms in anti-discrimination laws is part of the reason those laws have been so underutilised by Indigenous Australians.[53]

119 Accordingly, reform to the complaints procedures should be substantive and structural. We see two basic options for the Commission to consider.

9.1 Regulatory enforcement model

120 First, the Act could be expanded from a complaints model to a regulatory enforcement model, albeit that it could retain complaints procedures. Rather than setting up only a mechanism for private recourse to the President of the Board and then to the Tribunal, the Act would empower an independent regulator to enforce the Act. Such regulators typically operate according to Ayres and Braithwaite's 'enforcement pyramid' model,[54] with a suite of enforcement tools available to the regulator that escalate in severity. The softest options involve education and persuasion; the more severe options involve the regulator imposing penalties or commencing court proceedings.

121 Some commentators in the United Kingdom have argued that this regulatory model should be applied to the enforcement of anti-discrimination and equality legislation.[55] The need for this model, they argue, arises because traditional anti-discrimination legislation is not well suited to the way that contemporary economies and societies are actually structured:[56]

> [The traditional] framework adopts an inconsistent and incoherent approach to different manifestations of inequality. It was designed largely to deal with a model of organisations with hierarchical, vertically integrated and centralised bureaucracies. This is not appropriate for modern flatter organisational structures in which equality depends not simply on avoiding negative discrimination but on the active participation of all stakeholders, on training and improving skills, developing wider social networks and encouraging adaptability.
>
> …
>
> [We propose] a design of an enforcement pyramid which starts from a base of persuasion, information and voluntary action plans, and if these fail, moves upwards to commission investigation, compliance notice, judicial enforcement, sanctions and withdrawal of contracts or subsidies. This builds on three interlocking mechanisms: internal scrutiny by the organisation to ensure effective self-regulation, the participation of interest groups in the process of change, and the commission which provides a back-up role of assistance and ultimately enforcement where voluntary methods fail.

122 Importantly, the regulatory model need not exclude a private complaints mechanism – the Aged Care Quality and Safety Commission, for instance, has both a complaints function and enforcement powers (including banning orders and enforceable undertakings). The functions and powers of a new independent regulator could be tailored to the circumstances of anti-discrimination legislation – including mechanisms:

(a) for the regulator to receive and act on complaints; and

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[53] Rees, Rice and Allen (n 4) at [1.4.3], citing Fiona Allison, 'A Limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2014) 17(2) *Australian Indigenous Law Review* 3.

[54] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

[55] See Bob Hepple, Mary Cousssey, Tufyal Choudhury, *Equality: A New Framework* (Hart, 2000).

[56] Ibid xii–xv.

(b) for the regulator to take legal action in the Tribunal or in the courts on behalf of an aggrieved person or group of aggrieved persons or, for more serious breaches, on the regulator's own behalf.

123 The expansion to a regulatory enforcement model also recognises that placing the onus on an individual to engage in the self help process of making a complaint imposes an additional and unacceptable burden on someone who is already facing discrimination, harassment or vilification. A regulatory enforcement model, in part, eases the burden as the regulator can engage proactively and preventively to shift cultures and enforce the law.

124 The NSWCCL would support further consideration being given to the adoption of a regulatory enforcement model. That would be a very substantial change to the Act's remedial approach and would need to be carefully designed. If it is a path that the Commission or the Parliament is minded to go down, there should be further rounds of public and expert consultation on specific design proposals.

9.2 Reform existing two-stage process

125 Second and alternatively, the Act could retain the existing complaints model but improve the inefficient two-stage process by which it currently operates. At the moment, aggrieved persons must first lodge a complaint with the President. The President can investigate a complaint and then require the aggrieved person and the alleged perpetrator to participate in conciliation. Any agreement reached in the conciliation can be registered and thereby become quasi-binding if enforced in the Tribunal (s 91A(8)).

126 The President, however, has no binding enforcement powers. Instead, there are specific circumstances in which either the President or the parties can refer a complaint to the Tribunal, ie, NCAT (Pt 9, Div 2, Sub 6). The Tribunal has power to order remedies as described in paragraph 116 above.

127 We would support a reform to this process that partially collapses the two stages. Under this alternative approach:

(a) The first step for aggrieved persons would be an *optional* complaint to the President. In addition to conciliation, the President could also make determinations for the award of some relief, for instance, monetary compensation up to $5,000.

(b) An aggrieved person could alternatively apply directly to the Tribunal where they seek higher remedies (eg monetary compensation between $5,000 and $100,000, or injunctive relief) or where do they not wish to participate in conciliation or have already attempted a negotiated resolution.

(c) Complaints lodged to the President at first instance could also be referred to the Tribunal in the range of circumstances for which the Act already provides.

128 This process would increase the work of the Tribunal and the State would need to consider and make provision for the consequent resourcing impacts. However, it would increase the options and flexibility for aggrieved persons and create clearer pathways to meaningful remedies.

9.3 Time limit

129 Apart from these structural problems, a more minor improvement to the Act would be to increase the time limit for complaints. The time limit for making a complaint is currently six months. In our view, this is unduly burdensome on aggrieved persons and we would support this being extended to 12 months with the President and/or the Tribunal to retain a discretion to accept a complaint

made after the 12-month period if satisfied that it is reasonable to do so, in line with the position in Tasmania.[57]

10 Anti-Discrimination Board of NSW

The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination.

130 The Board's complaints function (exercised through the President) is the topic of section 9 above.

131 Beyond complaints, however, NSWCCL would support the Board receiving further powers to address and report on systemic discrimination.

132 The Queensland Human Rights Commission, in its discussion paper prepared for the review of the discrimination legislation in that State, offered this useful explanation of the concept of systemic discrimination:[58]

> What is systemic discrimination?
>
> The Review was told that discrimination can be deeper, wider, and more structurally embedded than what is currently unlawful. This is often referred to as 'systemic discrimination'. This term can mean different things in different contexts, and is also referred to as 'structural discrimination' or 'institutional discrimination'.
>
> Drawing on common components of relevant definitions, systemic discrimination can include:
>
> (a) legal rules, policies, practices, attitudes, or structures entrenched in organisations or broader community
>
> (b) which are often seemingly neutral
>
> (c) but create, perpetuate, or reinforce a pattern of relative disadvantages for some groups; and
>
> (d) can be the result of multiple barriers across multiple systems.

133 The problem with systemic discrimination is that it is not capable of being effectively addressed through individual complaints or even representative complaints. It is necessarily more widespread and diffuse and concerns deep and overlapping structural features of society, the economy and the political system.

134 We would support the Board being equipped with powers to investigate the causes and consequences of systemic discrimination for the efficacy of the Act as a whole and to take steps including:

(a) to publish practice guidance for industries and organisations; and

(b) to report on systemic discrimination and make representations to the Parliament concerning law reform measures to address systemic discrimination.

11 Other Australian and international laws

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

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[57] *Anti-Discrimination Act 1998* (Tas) s 63.

[58] Queensland Human Rights Commission, 'Review of Queensland's *Anti-Discrimination Act 1991*: Discussion Paper' (30 November 2021), Part B, 16.

135 We have referred throughout this submission to various insights that can be gleaned from other Australian and international laws, including:

(a) the *Anti-Discrimination Act 1998* (Tas): see paragraphs 13, 48, 129;

(b) the *Equal Opportunity Act 2010* (Vic): see paragraphs 13, 27, 33, 48;

(c) the *Discrimination Act 1991* (ACT): see paragraph 50;

(d) the Canadian jurisprudence on discrimination: see paragraph 51;

(e) the United States business necessity test: see paragraph 57;

(f) the proportionality standard in the Equality Act 2010 (UK): see paragraph 57;

(g) the *Sex Discrimination Act 1984* (Cth): see paragraph 77;

(h) the *Equal Opportunity Act 1984* (WA): see paragraph 89;

(i) the *Anti-Discrimination Act 1991* (Qld): see paragraph 89;

(j) the *Anti-Discrimination Act 1992* (NT): see paragraph 92;

(k) the *Crimes Act 1900* (NSW); see paragraph 67; and

(l) the Australian *Constitution*; see paragraph 72.

12 Interaction between the Act and Commonwealth anti-discrimination laws

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

136 The complex constitutional and practical considerations that impact the interaction between the Act and Commonwealth legislation[59] are not the focus of our submission. In broad terms, the NSWCCL would be supportive of cooperative arrangements between the Board and Commonwealth agencies being more formalised. The 1999 Review included a recommendation to that effect:

> **Recommendation 1**
>
> Seek to formalise co-operative arrangements between the ADB and HREOC [Commonwealth Human Rights and Equal Opportunity Commission] whereby the ADB is appointed as an agent for HREOC and provides a common reception point for complaints…

137 This recommendation was not adopted.

138 While we are supportive of cooperative arrangements, we do not think the Board should be transformed into a mere agent or reception point of its Commonwealth counterparts. The Act, including the powers and functions of the Board and Tribunal, should be improved to achieve better outcomes for the people of New South Wales.

139 There is a risk that Commonwealth governments in the future may be less inclined to promote the beneficial purpose of anti-discrimination and equality legislation. It is therefore important that the NSW regime can stand alone.

140 At the same time, we recognise that accessibility is improved if aggrieved persons can more easily navigate the overlapping legislative schemes – we think a greater degree of federal cooperation (but falling short of a situation in which the State body becomes an agent of the federal body) is desirable.

[59] Such as the *Sex Discrimination Act 1984* (Cth) and *Racial Discrimination Act 1975* (Cth).

13 Any other matters

Any other matters the Commission considers relevant to these Terms of Reference.

13.1 Equality bills introduced by Alex Greenwich MP

141 As mentioned above, on 24 August 2023, Alex Greenwich MP introduced the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (***Equality Amendment***) and Conversion Practise Prohibition Bill 2023 (***Conversion Amendment***) before the NSW Parliament (collectively, ***Equality Bills***). The Equality Bills are aimed at advancing equality and protections for LGBTIQA+ persons in NSW. A third bill, the Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2023, will be introduced in due course.

142 During the Second Reading Speech for the Equality Bills, Mr Greenwich observed that LGBTIQ+ people endure significantly worse health and wellbeing outcomes 'due to chronic exposure to discrimination and stigma'[60] (citing the *NSW LGBTIQ+ Health Strategy 2022-2027*). The Equality Bills are extensive – according to Mr Greenwich, would constitute 'the most comprehensive LGBTIQA+ reform process in the history of NSW …'.[61] Save perhaps for decriminalisation of same sex sexual intercourse in 1984, we agree with Mr Greenwich's assessment of the extensiveness of his proposed reforms.

143 As foreshadowed earlier, the Equality Amendment proposes extensive changes to the Act. Indeed, Mr Greenwich recognised during his Second Reading Speech that this review into the Act is necessary to ensure the Act is modern and fit for purpose. However, Mr Greenwich went on to observe that while a rewrite of the Act is needed, the process will take time. The Equality Amendment, Mr Greenwich said, 'will provide interim legislative protections within the current framework of the Act that we should introduce now to close loopholes that leave LGBTIQA+ people vulnerable'.

144 The Equality Amendment would, consistently with the recommendations in this Submission, remove exceptions for private education authorities from the Act and 'limit sweeping exemptions that permit religious bodies to discriminate in employment, like firing trans carers or bisexual cleaners, to employment that is relevant to religious practice' (see also sch 1 of the Equality Amendment). The Equality Amendment would also remove exceptions allowing religious bodies to discriminate when providing adoption services and harmonise transgender discrimination exemption in sport with other Australian jurisdictions. As discussed above in Section 2, the Equality Amendment would also introduce additional protections on grounds of sex characteristics and for sex workers.

145 Without commenting on the Equality Bills on the whole and their specific legal drafting, we endorse completely their intent and the law reform matters that they seek to resolve. However, our strong position is that these amendments cannot be made in lieu of wholesale reform to the Act.

13.2 Interaction with potential Human Rights Act

146 NSWCCL has previously endorsed calls for the adoption of a Human Rights Act in NSW.[62]

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[60] Greenwich Second Reading Speech on 24 August 2023 for the Equality Legislation Amendment (LGBTIQA+) Bill 2023 and Conversion Practices Prohibition Bill 2023.

[61] Alexandra Smith, 'Greenwich to introduce long-overdue equality Bill as NSW trails country' (Sydney Morning Herald, 22 August 2023) <https://www.smh.com.au/politics/nsw/greenwich-to-introduce-long-overdue-equality-bill-as-nsw-trails-country-20230821-p5dy5z.html?btis=>.

[62] Human Rights for NSW Alliance, 'Submission to the Australian Human Rights Commission's *Free and Equal: An Australian Conversation on Human Rights* Project' <https://static1.squarespace.com/static/58b61d71e4fcb5aa5a044522/t/5dd355948ca6f6715d3112d1/1574131116357/HR4SWNCF.pdf>.

147 In our view, a robust human rights framework which gave effect to the international conventions and obligations to which Australia is party, and which reflected best practice in rights legislation in comparable jurisdictions, should be enacted as a matter of urgency. 'Negative' protections like those found in discrimination legislation, which prohibit conduct and provide a mechanism for private complaint, will only be optimally effective when they exist in a legal context that *also* includes a comprehensive and enforceable human rights framework.

Yours sincerely,

Josh Pallas
President
NSW Council for Civil Liberties