NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124
nsw-lrc@justice.nsw.gov.au

29 September 2023

Anti-Discrimination Act Review

This submission responds to the invitation to provide preliminary submissions on issues relevant to the Commission's Terms of Reference regarding the review of the *Anti-Discrimination Act 1977* (NSW).

The following paragraphs reflect teaching and peer-reviewed research by the authors over the past two decades and cited submissions to national, state and territory inquiries regarding discrimination, vilification, human rights frameworks, mental health and inclusion. They do not represent what would be reasonably construed as a conflict of interest and are independent of any advocacy body.

We suggest that they be considered alongside the Commission's scrutiny of the recommendations in the final report of the Royal Commission into Violence, Neglect, Abuse and Exploitation of People with Disability.

Preliminary comment

A salient objective of any anti-discrimination statute is to underpin community awareness of (and respect for) human rights values, rather than to narrowly deter and remediate injury such as exclusion and vilification. Those values encompass both responsibilities and rights, with individual and institutional obligations often being under-recognised in an environment of 'rights talk'.

We recommend that the Commission should consider a restatement of the NSW anti-discrimination regime as part of a broader principles-based Charter of Rights and Responsibilities, drawing on models provided by for example the Victorian Charter of Rights and Responsibilities, the Canadian Charter, the New Zealand 1990 Bill of Rights and the European Union Charter of Fundamental Rights.

The Victorian Charter demonstrates that a broader NSW statute is constitutionally permissible and administratively viable. Restating the Anti-Discrimination Act provides an opportunity to strengthen the legitimacy of public administration (necessary given independent studies of community disengagement or distrust of government and the justice system as captured by special interests). It also provides a basis for building community awareness, appropriate given evidence during debate about the national Voice that many people do not understand fundamental political processes and principles.

Terms

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

Building on our own research and independent studies of rights-centred law reform initiatives elsewhere in Australia and overseas we consider that the NSW anti-discrimination regime both should and can be modernised to reflect community values and meet the needs of

individuals/groups who either experience discrimination or who are uncertain about rights and responsibilities.

2. whether the range of attributes protected against discrimination requires reform

It is necessary to update the attributes to address discrimination regarding matters such as neurodiversity that have been inadequately recognised in the past, are significant in increasingly digitalised work practices and can be addressed through both specific accommodations and respect for difference.

Another key point is that coverage of the existing Act with respect to gender diversity is inadequate. Although the current legislation addresses discrimination against people who identify or are perceived as transgender (eg s38A), the current Act lacks mechanism for recognising other gender diversity, which is increasingly recognised in other laws, and throughout the community.

Amending the Long Title of the Act to explicitly identify age, disability and gender discrimination, in addition to sex and race discrimination, would formally signify that those attributes are regarded as having equal priority alongside sex and race as protected attributes under the Act.

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

Significantly, the term 'public life' does not appear anywhere in the Act. Instead, readers are left to infer what public life is from a exhaustive list of contexts provided by the Act (employment, education, accommodation, goods and services provision etc); and from reference to 'public acts'. We contend that this is an area that requires significant reform, particularly in light of the amplification of particular view points and perspectives enabled by technological developments including social media in recent decades, and the increasing role of government in a wide range of activities, including as a function of increasing government regulatory intervention in areas that were traditionally viewed as private.

Noting that this expansion seems unlikely to stop, and that its trajectory is unpredictable, we suggest that a principles based definitional approach, relating to the accessibility of the public or community to certain activities, recordings, or other acts or communications, may be a more robust approach than merely creating an exhaustive list of examples.

Given that much public life occurs online some consideration of action under the Act to address online harms is desirable. That consideration would encompass scope for development of a more coherent national regime that in part is founded on the Commonwealth's powers regarding telecommunications and corporations, relevant for example in requiring a more positive approach by platform operators such as Alphabet, Microsoft, Meta, and X.

We also note that the current Act refers 'Public Acts' as for example including screening and playing of tapes or other recorded material. Given that much recorded material no longer exists in tangible form, such as tapes, it may be timely to update the references to various technological media to clarify expressly that the provisions attach to the content of the recording, rather than the storage format the recording is stored within.

4. **whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination**

The existing tests, based on comparison with a hypothetical comparator who lacks the attribute in question, and capture both direct and indirect discriminatory acts, have the advantage of consistency with other anti-discrimination laws. In common with those other laws, however, they suffer the same challenges in terms of the evidentiary burden required to satisfy the tests. It is our experience in particular that the test for indirect discrimination is difficult to explain to employers and others particularly when there may only be a small number of people with the relevant attribute conceivably affected – i.e. an argument that a particular change in workplace practices indirectly discriminates against employees on the grounds of a neurodiverse attribute, however only one employee identifies as having that attribute, it is often contended that the disadvantage is the result of a personal attribute or characteristic of the individual, rather than the protected attribute.

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

In seeking to signal the community's abhorrence of vilification, the community's recognition of the range of harms attributable to vilification and to deter egregious vilification it is necessary to align penalties with criminal law, provide for action by the state and strengthen penalties.

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

It is axiomatic that in updating the NSW anti-discrimination regime the legislation should cover harassment based on other attributes: an obvious example is the need for better clarification of the margins around sex and gender discrimination, with a view to explicitly expanding harassment protections to incorporate the latter. However all grounds of discrimination – race, age, disability – have been the focus of harassment historically, and all harassment on any of the protected grounds should be covered by the Act. (We do not, however, comment at this time on the relative proportionality of protection, noting the significant blurring between sexual harassment and assault, which may distinguish it from harassment on other grounds).

7. **whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life**

Consistent with community expectations and with the emphasis above on responsibilities as a correlate of rights it is essential that the legislation should include both positive obligations and requirements regarding reasonable adjustments.

We note that historically a range of accommodations in the public and private sectors, such as ramps and signage, have been opposed as either unnecessary or unaffordable. That experience provides an empirical basis for challenging assertions that accommodations either can not or should not be provided.

Research on neurodiversity for example indicates the scope for improved work practices and environments for foster productivity on the part of employees with ADHD. Research also highlights systemic discrimination against those employees.

8. exceptions, special measures and exemption processes

We note concerns about exceptions being applied on a unilateral basis to certain bodies – particularly religious education and healthcare providers – who receive public funding for performing public services, but nonetheless perceive that they retain a right to discriminate against people on the basis of religious views. It is our contention that if these organisations are unable to comply with human rights protections enshrined in law, they should not receive public funding for the provision of those services.

9. the adequacy and accessibility of complaints procedures and remedies

Remedies are often symbolic rather than significant; complainants may experience significant challenges in making and pursuing complaints, for what are perceived to be peppercorn outcomes. Consequently much of the public signalling value of anti-discrimination laws may be lost. We note, however, that general deterrence should only be one means of conveying societal intolerance of discrimination: our preference would be for greater engagement and education in order to prevent discrimination in the first place.

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

It is appropriate that the Board be able to be tasked by the Minister, and also that it review legislation. A feedback mechanism that may be worth incorporating into the Act is one by which the Board, should it deem it necessary, can report back to the Minister matters which it considers require legislative or policy responses and which the Minister, should they choose not to act on the Board's recommendations or concerns, may be required to table in parliament.

Such a mechanism renders more effective and independent the role of the Board, and frees it from potential disregard or deprioritisation of its concerns and recommendations, in favour of a fully bilateral feedback loop between regulators and lawmakers.

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

See above

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

To the maximum extent possible, we contend that Antidiscrimination laws should be consistent between the Commonwealth, the States, and the Territories. For a range of reasons associated with Australia's constitutional arrangements, we do not have a Bill of Rights which applies uniformly Australia-wide. We do, however, have a number of international human rights obligations which we are legally and ethically required to uphold. Australia's current human rights framework is both piecemeal and threadbare in comparison to other countries: an effort to achieve uniformity – or at least greater consistency – across jurisdictions is a desirable goal.

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

As per above, consideration of the wide-ranging recommendations in the Royal Commission is desirable.

Dr Bruce Baer Arnold
Associate Professor, Law
University of Canberra

Dr Wendy Bonython
Associate Professor, Law
Bond University