Jumbunna
Institute for Indigenous
Education and Research

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UTS Public

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NSW Law Reform Commission
Locked Bag 5000
PARRAMATTA NSW 2124

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

Dear Sir/Madam

ANTI-DISCRIMINATION ACT REVIEW – PRELIMINARY SUBMISSIONS

We refer to the review and report on the *Anti-Discrimination Act 1977* (NSW) (the 'Act') pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW).

We also note the Terms of Reference outlining the scope of this review.

About Jumbunna Institute

The Jumbunna Institute for Indigenous Education and Research aims to produce the highest quality research on Indigenous legal and policy issues and to develop highly skilled Indigenous researchers.

The Jumbunna Institute Indigenous People and Work Research and Practice Hub

The Hub is a world first platform, run by the Jumbunna Institute for Indigenous Education and Research to specifically look at the employment contributions and experiences of Indigenous people.

'The Hub' goes beyond statistics and policy statements to focus on the experiences of Indigenous people and their views, concerns and aspirations when it comes to their employment. It offers a point of collaboration across the diversity, Indigenous and research sectors to drive real change. In practice, this means providing events, training, research and discussion on all things related to Indigenous employment.

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Submissions of proposed Terms of Reference

We lend our strong support for all of the Terms of Reference as stipulated by the NSW Law Reform Commission ('NSWLRC').

In addition, we submit as follows:

The current Act is very repetitive, with the same provisions on various kinds of discrimination being repeated for each protected area/characteristic. This should be consolidated and expressed in clear, plain language.

1. We seek the recognition of *systemic* discrimination within the Act and ability to make findings on *systemic* discrimination. This would be applicable to each protected area/characteristic. Often, you can see the outcomes of discrimination at the macro level, what you cannot always find is evidence making the link between the individual case, the protected characteristic and the less favourable treatment. What is needed is the ability to make findings in relation to a company/firm or govt agency, or an industry in a way similar to the establishing of systemic undervaluation of wages on a gendered basis as you can under the NSW *equal remuneration principle: see* ***Miscellaneous Workers Kindergarten and Child Care Centres etc (State) Award*** (2006) 150 IR 290. Importantly, this can be done without the need for a male comparator, and as you now can in the federal IR system under the 2022 legislative changes to the *Fair Work Act*.

2. Consideration should be given to whether the law should retain the need to establish *less favourable treatment* compared to *another person or persons who do not have the protected characteristic.* This would be controversial but an important reform in modernising what we mean by discrimination.

3. Relatedly, should there be at least in relation to employment discrimination a *reverse onus* once an applicant has established the key elements, of the kind you see in the *Fair Work Act*: see ss340, 341 and key s362 of the *Fair Work Act* 2009 (Cth).

4. The various grounds need modernising and possibly widening. For example, the protected ground of *homosexuality* could be replaced with or extended into the wider term *sexuality.* While there is currently protection for transgender and gender diverse persons, that could be replaced or extended to protection from discrimination on the ground of *gender* or *gender identity.*

5. The Act should cover not only government departments, or NGO's but any body or entity contracting to and providing goods and services to any aspect of State or Local government when acting in that capacity. A version of this is included in the *Public Disclosures Act* 2022 (NSW).

6. The powers and orders able to be made by the Tribunal needs serious updating. The caselaw has been very restrictive in this regard as to quantum and the legislation at s108(2)

needs review. For example, if an order is made pursuant to s108(2)(f), is the Tribunal able to make consequent orders to correct the contract going forward, or is it limited, for example, to the power in s108(2)(d)? The Tribunal should be given a wide jurisdiction to make *any decision or order as seems just and appropriate in the circumstances of the case before it*, including any temporary or interim order(s). The money limit should be abolished, or linked to an appropriate Court level, perhaps District Court. The power to make such orders could be limited to tribunal members who are judges.

7. The time it takes to progress through the ADB President (screening, conciliation) and Tribunal (hearings) is too long. It needs to be much faster. If NCAT is not to be better resourced:

- The President or delegate who conciliate should extend also to members of the NSW IRC as 95 per cent of discrimination cases are related to, or arise from employment.
- The same jurisdiction as it reposed in the NCAT to hear and decide matters under the ADA should also be conferred on the NSW IRC or just transferred from NCAT to the IRC.

9. The ADB President should be a Judge. At present, the ADB President is a public servant. The HREOC President is a Federal Court judge. The President of our State NCAT is a Supreme Court judge. The President of the NSW Personal Injury Commission is a District Court judge. The Deputy President of the Occupational and Regulatory Division of NCAT is also a District Court judge. The work of the ADB is no less important and should be accorded at least the same status as these other bodies.

10. **Costs.** While we do not want applicants exposed to adverse costs orders when they lose, it is also largely uneconomic for applicants to bring cases. Even where they win, they do not have their legal costs paid for. In NSW, the general rule is that each party bears their own costs. However, the Tribunal may award costs 'only if it is satisfied that there are special circumstances warranting an award of costs.' In determining whether there are 'special circumstances', the tribunal may have regard to various factors: *Civil and Administrative Tribunal Act* 2013 (NSW) s 60, including:

• whether a party's conduct unnecessarily disadvantaged another party;
• whether a party unreasonably prolonged the proceedings;
• the relative strengths of the parties' claims;
• the nature and complexity of proceedings;
• whether the proceedings were frivolous, vexatious or lacking in substance.

A useful discussion paper covering the situation across Australia (at pp18-20) and in some overseas jurisdictions (p21) can be found here https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/user_uploads/discussion-paper-review-appropriate-cost-model-commonwealth-anti-discrimination-laws.pdf

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11. The *asymmetrical costs (equal access) model* at pp28-29 of this paper is preferred, for the reasons set out in that paper. It removes barriers that currently exist to applicants being able to bring their cases forward for Tribunal determination. It would enable the Tribunal to make cost orders in matters that recognise the power imbalance between individuals and institutions, including those of the State as well as in the private sector. Such a reformed costs regime would also better reflect the nature of matters arising under the ADA as *public interest litigation* and not merely individual private parties pursuing their own legal rights. The outcome of these proceedings has a wider implication beyond the specific parties and a changed costs regime as proposed would be an appropriate reflection of this.

I can be contacted on should clarification be required.

Yours faithfully

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