

29 September 2023

Commissioner Kate Eastman AM SC
NSW Law Reform Commission

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

Dear Commissioner,

Preliminary submission - Review of the Anti-Discrimination Act 1977 (NSW)

1. Women's Legal Service NSW (**WLS NSW**) thanks the NSW Law Reform Commission for the opportunity to provide a preliminary submission to the review of the NSW *Anti-Discrimination Act 1977 (the Act)*.
2. WLS NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, gender-based workplace discrimination, victims support, care and protection, human rights, and access to justice.
3. WLS NSW provides a Working Women's Legal Service (**WWLS**). This service, operating for more than ten years, provides free specialist gendered advice and representation to women subjected to sexual harassment in the workplace, and workplace discrimination based on sex, pregnancy and breastfeeding and carer and family responsibilities.
4. In referring to women this reference is inclusive of all people who have experienced oppression as women, including cisgender, transgender, non-binary and gender diverse people.

Introduction

5. We welcome the review of the *Act*. In this preliminary submission we flag key issues that need to be considered and addressed.
6. We believe an intersectional feminist framework is useful in critically analysing the *Anti-Discrimination Act* and how anti-discrimination law can be improved in NSW. Such a framework promotes positive obligations in order to prevent discrimination occurring in the first place as well as ensuring accessible and effective remedies in response to individual experiences of discrimination that are understood in the context of harmful social constructs. Such a framework also requires recognition of and an effective remedy to structural and systemic discrimination, including intersectional discrimination, with the aim of eliminating this and all forms of discrimination.
7. We strongly believe to adequately protect human rights in NSW we need both a modernised *Anti-Discrimination Act* that strengthens protections and positive obligations as well as a NSW Human Rights



Women's Legal Service NSW
PO BOX 206 Lidcombe NSW 1825
Admin (02) 8745 6900
Fax (02) 9749 4433

www.wlsnsw.org.au
Women's Legal Resources Ltd.
ACN 002 387 699
ABN 88 002 387 699



Act. We note the current Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework and the discussions about the need for both federal and state/territory Human Rights Acts as well as the strengthening of anti-discrimination laws. We support the Australian Human Rights Commission's submission to that Inquiry and make further comments in our submission to that inquiry.¹

Terms of Reference (ToR)

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

8. The Act would benefit from modernisation and simplification, including making clear it will:
 - 8.1 address all prohibited grounds of discrimination,
 - 8.2 promote substantive equality, and
 - 8.3 provide effective remedies against systemic and intersectional discrimination.
9. It is important that the Act gives effect to human rights obligations relating to non-discrimination contained in treaties and international instruments to which we are a signatory.
10. It is also important the Act uses modern and inclusive language.

ToR 2: Whether the range of attributes protected against discrimination requires reform

11. The range of attributes protected against discrimination requires reform.
12. We note other jurisdictions which have recently reviewed their anti-discrimination legislation have recommended expanding or have expanded the list of protected attributes.² We support the expansion of the list of protected attributes in the Act across all areas of public life and inclusion of a non-exhaustive list.
13. We advocate additional protected attributes include the below.

Additional protected attributes

Being a victim-survivor of gender-based violence

14. The CEDAW Committee's General Recommendation No 19 identifies gender-based violence as a form of discrimination against women.³ CEDAW places obligations on State parties to legislate to prohibit, and so eliminate, discrimination against women.⁴ Including the status of being a victim-survivor of

¹ Women's Legal Service NSW (2023) *Submission in response to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework*

² For example, Queensland Human Rights Commission, (2022) *Building belonging - Review of Queensland's Anti-Discrimination Act 1991*; Law Reform Commission of Western Australia (2022) *Review of the Equal Opportunity Act 1984 (WA) Project 111 Final Report; Discrimination Act 1991 ACT, section 7; Equal Opportunity Act 2010 Vic, section 6*

³ CEDAW Committee, *General Recommendation No. 19*, p1 [1].

⁴ International Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), opened for signature 18 December 1979, 1249 UNTS 14 (entered into force 3 September 1981), Articles 1 and 2.

gender-based violence in NSW's anti-discrimination law is therefore consistent with Australia's human rights obligations.

15. The need to recognise domestic and family violence and abuse as a protected attribute has been raised previously by the Australian Human Rights Commission and by state and territory anti-discrimination commissions.⁵ We note inclusion of this protected attribute in some jurisdictions in Australia.
16. We acknowledge the importance of this protected attribute and have long advocated for its inclusion. We also believe it is important to more explicitly recognise sexual violence, and other gender-based violence outside the domestic and family violence context, such as sexual harassment, online abuse and other forms of gendered violence.
17. As noted in CEDAW General Recommendation 35 on gender-based violence, "*gender-based violence*" is a "*more precise term that makes explicit the gendered causes and impacts of such violence....The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.*"
18. The National Plan acknowledges that

While people of all genders can experience gender-based violence, the term is most often used to describe violence against women and girls, because most gender-based violence is perpetrated by heterosexual, cisgender men against women, because they are women....

*Violence experienced by LGBTIQ+ people, particularly by those who are gender diverse such as Brotherboy and Sistergirl communities, is also gender-based violence and shares some of the drivers of violence against women.*⁶
19. We understand gender-based violence to be inclusive of non-binary people.
20. Victim-survivors who are subjected to gender-based violence can experience discrimination in areas of public life such as employment, education and housing and accommodation. For example, a woman may lose work or have their employment terminated as a result of a perpetrator harassing her at her workplace.
21. Including the status of being a victim-survivor of gender-based violence as a protected attribute would play an important role in educating and raising awareness within the wider community about gender-based violence, and, we hope, foster more empathetic approaches to people who are, or who have experienced it.⁷ It would also serve an important normative function, acknowledging that the harm experienced by victim-survivors can be exacerbated by negative or prejudicial attitudes and inflexible policies.⁸

⁵ Australian Council of Human Rights Agencies (December 2012), *Australia's Universal Periodic Review: Progress Report prepared by the Australian Human Rights Commission on behalf of the Australian Council of Human Rights Agencies*, [30].

⁶ *National Plan to End Violence against Women and Children 2022–2032*, p36

⁷ Andrea Durbach (5 December 2011), *Domestic Violence discrimination and the consolidation of Commonwealth anti-discrimination laws*, Safe at Home, Safe at Work Conference.

⁸ Tashina Orchiston and Bella Smith (March 2012), 'Empowering Victims of Family Violence: Could Anti-Discrimination Laws Play a Role', *Australian Review of Public Affairs*.

22. We recommend the inclusion of being a victim of gender-based violence as a protected attribute.

Irrelevant criminal record

23. WLS NSW provides civil and family law legal services to women in prison through the Legal Education and Advice in Prison (**LEAP**) for Women program, a service we have provided for over a decade along with Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre.

24. The high number of women in custody who have experienced child sexual abuse, sexual assault and family violence indicates that the factors leading to a woman having a criminal record can be complex.

25. Discrimination on the basis of an irrelevant criminal record can prevent people from obtaining and maintaining employment and housing.

26. We recommend inclusion of irrelevant criminal record as a protected attribute.

Homelessness/social status

27. Women who experience gender-based violence often also experience homelessness.

28. We also note that poverty is gendered.

29. Social status could be defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

30. It is important homelessness/social status is recognised as a protected attribute.

Sex work and sex workers

31. Sex Workers Outreach Project Inc (**SWOP**) NSW notes that sex workers in NSW "*regularly experience discrimination in relation to education, provision of goods and services, professional qualification/membership, employment, housing, banking, and vilification*".⁹

32. We support inclusion of sex work and sex workers as a protected attribute.

Improving existing protected attributes

33. Some protected attributes need to be updated.

Carer

34. Currently protection from discrimination for a carer caring for someone in need of care or support is restricted to a carer:

34.1 for their own child or step-child,

34.2 any child or adult for whom the person is guardian, has parental responsibility or is an authorised carer, or

⁹ Sex Workers Outreach Project Inc (SWOP) NSW, (2022) *Submission to QHRC Review of the Anti Discrimination Act – Queensland*

34.3 any immediate family member which is defined as a spouse or former spouse, grandchild or step-grandchild, parent or step-parent, grandparent or step-grandparent, brother or sister or step-brother or sister.

35. The definition of “*responsibilities as a carer*” should be updated and expanded to include all kinship relationships or alternatively, all persons who provide care to someone who needs care, (which is inclusive of kinship relationships) other than those who provide that care on a commercial basis.

LGBTIQ+ people

36. Protection is currently limited to discrimination on the basis of being homosexual or transgender. Modern and inclusive language and protections must be available to ensure protections for LGBTIQ people.

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

37. The areas of public life in which discrimination is unlawful should be reformed.

38. All areas of public life should be included to ensure people feel protected by anti-discrimination law in a range of settings, including, for example, when they attend a sporting event.

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

39. The existing tests for discrimination need to be clearer, more inclusive and modernised.

40. We recommend the removal of the comparator test because it is often confusing, difficult to apply and limits the potential for discrimination cases to succeed. In some cases, particularly cases of multiple ground or intersectional discrimination, identifying the appropriate comparator may not be possible.

41. We support a broader more inclusive definition of discrimination that allows consideration of direct and indirect discrimination simultaneously. There has been considerable work undertaken on this, including by the Australian Discrimination Law Expert Group.¹⁰ We recommend consideration of this work in this review.

42. We also recommend acknowledgement of intersectionality in the test for discrimination, in that discrimination can be based on multiple grounds, and such discrimination operates interactively and not independently on each ground.

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

43. The current protections in the Act against sexual harassment are inadequate.

44. We recommend the inclusion of “*harassment on the basis of sex*” and “*subjection to a hostile workplace on the basis of sex*” as unlawful acts to bring the State legislation in line with the protections included in the federal *Sex Discrimination Act*. Although the definition of sexual harassment in the Act is quite broad in that “*conduct of a sexual nature*” includes verbal, non-verbal and physical conduct, there are grey areas where it is not clear that the conduct has a “*sexual*” element. One of the key problematic

¹⁰ Australian Discrimination Law Expert Group (2022) *Submission to the Queensland Human Rights Commission Review of Queensland's Anti-Discrimination Act*

areas is where the behaviour is sexist rather than sexual in nature. The inclusion of harassment on the grounds of sex would address behaviour that degrades women. Similarly, research has shown that sexual harassment is more likely to occur in workplaces that are sexually charged or hostile. It is important to include provisions to address toxic workplace cultures and provisions that can target conduct which is not specifically directed at any individual.

45. We further recommend that the protections relating to a hostile workplace on the ground of sex and harassment on the basis of sex should extend to all protected attributes. Toxic workplace cultures and low-level bullying and harassment can be as harmful as unfavourable treatment by an employer. A worker may have the same substantive opportunities as their co-workers (so, no formal discrimination by the employer) but the interactions between the workers – the culture in the workplace – makes the environment toxic for the individual.

ToR 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

46. We believe it is important for the *Act* to include positive obligations to eliminate harassment, discrimination and vilification in all areas of public life.
47. The need for a positive duty is exemplified by the inadequacy of the current requirement for employers to “*take all reasonable steps*” to prevent sexual harassment in the workplace. This current obligation is reactive and has been shown to be ineffective in addressing the prevalence of sexual harassment.
48. We note positive obligations have been introduced into the federal *Sex Discrimination Act*, and we support the introduction of similar obligations in NSW, not limited to the employment context.
49. To ensure positive obligations are as effective as possible it is important the body enforcing positive duties is properly resourced, empowered and has the necessary skills to undertake this important work.

ToR 8: Exceptions, special measures and exemption processes

50. We welcome further discussion on this term of reference

ToR 9: The adequacy and accessibility of complaints procedures and remedies

51. It is important the complaints mechanism is affordable, accessible and available.
52. We are concerned about the more recent significant delays from the time of lodging a complaint with Anti-Discrimination NSW (**ADNSW**) to the time the complaint process concludes and the impact and/or deterrent this has for complainants and even potential complainants. We understand that this may be predominantly a funding issue, and it is important that ADNSW is properly resourced to ensure timely resolution of complaints.
53. We believe ADNSW should exercise the powers given to it under the *Act* to compel respondents to provide a written response and exercise its power to compel attendance at conciliation. Compelling the parties to engage with the process sends a message that it is to be taken seriously.
54. Another shortcoming of the current process is that applicants have no real way of knowing whether respondents fulfil non-monetary terms in the settlement agreement, such as improving policies and procedures and undertaking training. While a mechanism exists for registering settlements with the NSW Civil and Administrative Tribunal, the existence of this mechanism is not well known – for

example, in our experience conciliators do not inform the parties of this enforcement pathway when matters resolve through agreement. Also, applications to the Tribunal must be lodged within 6 months – however, employers often require 6 months or more to comply with non-monetary terms. Further, enforcement of monetary terms must ultimately be undertaken through a local court enforcement process.

55. We recommend that the process for enforcing agreements be reviewed to ensure it is more streamlined and simplified and the timeframe for accessing enforcement mechanisms extended.

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

56. It is important that the Anti-Discrimination Board of NSW has the power and resources to investigate and initiate proceedings in relation to conduct that appears unlawful without an individual complainant.
57. There should also be provision for representative complaints and complaints by groups on behalf of, or in the interest of members.

ToR 13: Any other matters the Commission considers relevant to these Terms of Reference

Burden of proof

58. Review of the burden of proof should also be considered.
59. Silence as to motive at the time of decision-making often forces an applicant to rely on inference in trying to establish a discriminatory reason.
60. We recommend adopting a model similar to the general protections provisions of the *Fair Work Act 2009* (Cth) wherein the burden of proof is partially reversed – once a person has established adverse action and the existence of a protected attribute, the onus of proof shifts to the employer to show the reason for the action was not discriminatory.
61. This reverse onus model should extend to all discrimination complaints in all areas of public life.

Review of the costs provisions

62. The risk of adverse costs orders is a significant impediment to applicants bringing otherwise meritorious actions.
63. Whilst we acknowledge the current “no costs” regime presents a lesser barrier; we believe there are public benefits in a costs regime that allows a successful applicant to recover costs and we support consideration of a costs model that enables applicants to claim costs against respondents in a wider range of circumstances in discrimination proceedings.
64. An asymmetric costs model (equal access model to costs) has been in place in the UK since 2013 in relation to personal injury claims, referred to as “*qualified one-way costs shifting*”. In short, unsuccessful applicants in personal injury matters will not be liable for the defendant’s costs, except

in limited circumstances.¹¹ We support consultation on whether an asymmetric system of costs allocation could be introduced in NSW for discrimination matters.

65. A costs model of this kind is important for several reasons, including enabling applicants to fund litigation, to encourage respondents to settle matters, and to deter respondents from breaching their obligations under anti-discrimination laws.

If you would like to discuss any aspect of this submission, please contact _____ or _____ on _____.

Yours faithfully,
Women's Legal Service NSW

Philippa Davis
Principal Solicitor

¹¹ *Civil Procedure Rules (UK)*, r44.14-44.17