



**AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™**

**SUBMISSION IN RESPONSE TO THE AUSTRALIAN LAW REFORM COMMISSION’S REVIEW OF
THE ANTI-DISCRIMINATION ACT 1977 (NSW)**

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ABOUT AUSTRALIAN LAWYERS FOR HUMAN RIGHTS (ALHR)

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

EXECUTIVE SUMMARY

ALHR is grateful for the opportunity to make the following submission in response to the NSW Law Reform Commission's inquiry into NSW anti-discrimination laws, particularly the inadequacy of the *Anti-Discrimination Act 1977* (NSW) ('ADA'). We commend the NSW Government on its commitment to reviewing the ADA and regulatory framework to determine whether it needs to be modernised and simplified to better promote the equal enjoyment of human rights, and reflect contemporary community standards.

The ADA has been in force for almost half a century. While it was progressive at the time of its enactment, it now requires significant amendment to better promote and protect societal standards and values, and to comply with Australia's international human rights obligations. Ultimately, we submit that implementing a NSW Human Rights Act is a necessary step for NSW to conform with Australia's international human rights obligations, and to make an impactful legislative change in support of anti-discrimination in NSW.

This submission is grounded on the principles set out in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, which provides that:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...[t]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.'

And Article 2(1), which states:

'Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind such as race colour, sex, language, religious, political or other opinion, national or social origin, property birth or other status.'

Discrimination undermines the principles of human dignity and equality, which are fundamental to the ICCPR and many other human rights instruments. New South Wales should strive to implement robust anti-discrimination legislation in order to uphold human rights, promote social cohesion and foster inclusive and equitable social practices across the state.

Recommendations:

1. **Amend the structure of the ADA:** Restructure the ADA for clarity, eliminating redundancy, and improving accessibility. Consolidate protected attributes into a concise list with uniform discrimination provisions to enhance understanding and compliance.
2. **Expand the range of attributes protected:** Broaden the protected attributes to bring into line with other States and Territories.
3. **Introduce a positive duty for reasonable adjustments:** Impose a positive obligation on employers, educators, and service providers to make reasonable adjustments for individuals with disabilities, promoting equality and participation.
4. **Revise the direct discrimination test:** Replace the comparator test with a "detriment test".
5. **Unify discrimination definitions:** Streamline discrimination definitions to eliminate the distinction between "direct" and "indirect" discrimination.
6. **Amend sexual harassment provisions:** Revise the definition of sexual harassment, expand its scope to cover online interactions, and include a positive duty on employers to prevent harassment.

7. **Clarify religious exceptions:** Limit the broad religious exemptions in Section 56(d) of the ADA to ensure compliance with international human rights standards.
8. **Amend the private school exception:** Remove the exemption allowing private educational authorities to discriminate based on various attributes, promoting inclusivity.
9. **Introduce a positive duty to prevent discrimination:** Implement positive duties that require proactive measures to prevent discrimination.
10. **Align vilification provisions with the Crimes Act:** Ensure that the ADA's vilification provisions align with the *Crimes Act 1900* (NSW) to provide consistent protection against vilification.
11. **A NSW Human Rights Act:** The introduction of a NSW Human Rights Act is crucial to align NSW with international human rights obligations and provide broader protections against discrimination.

REFORM TO THE ANTI-DISCRIMINATION ACT 1977 (NSW)

ALHR submits that the ADA currently fails to provide adequate protection against discrimination. The range of groups protected by the ADA are too narrow and further limited by use of outdated terminology. The current test to determine whether discrimination has occurred is poorly drafted, giving rise to uncertainty as to the application of the ADA. The exceptions permitting discrimination are too broad and allow for certain organisations and people to discriminate in circumstances which do not conform with community standards. The ADA is also overly complex and repetitive, making it difficult to understand, this is particularly concerning as it may impede access to justice for persons affected by discrimination, due to an inability to understand and use the ADA, which is inconsistent with the rule of law. The ADA may also result in organisations, businesses and NGOs, being unaware of, or misunderstanding, their obligations under the ADA

The current ADA has regularly been the subject of criticism for its deficiencies in addressing contemporary discrimination issues.¹ Recent amendments, like the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW), have been considered too broad and potentially infringing on freedom of expression without adequately distinguishing between criticism of ideas and vilification of individuals based on their religious beliefs.

Moreover, the patchwork approach to amending the Act has resulted in limited and fragmented protections, which are difficult for individuals to understand and access. ALHR advocates for a comprehensive reform of the Act, to ensure it provides robust and effective protections, for all individuals in NSW.

ALHR RECOMMENDATIONS

1. Amend the structure of the ADA

The ADA is overly complex and repetitive. The Act does not provide one concise list of protected attributes and then set out the areas in which discrimination is prohibited.² Rather, the ADA divides each attribute into separate parts and subsequently sets out under each part the areas in which discrimination is prohibited and the exceptions that apply for that protected attribute. This layout

¹ See Public Interest Advocacy Centre (PIAC)'s *Leader to Laggard: The case for modernising a NSW Anti-Discrimination Act* 6 August 2021 <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/>

² This alternative approach is taken by Victoria, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory.

results in the ADA being overly repetitive as many of the provisions are essentially the same. The minor inconsistencies between each part make it difficult to determine how the ADA applies in these circumstances and whether the subtle differences in wording are intended to result in a different interpretation of each provision. The ADA should be amended to expand the attributes protected against discrimination, but implement a more uniform approach to discrimination that is easier to access and understand, with improved capacity to address all forms of discrimination, promote substantive equality, and implement Australia's international obligations.

2. Expand the range of attributes protected against discrimination

At present, the ADA only prohibits discrimination based on race, sex, transgender status, homosexuality, age, marital or domestic status, disability, and responsibilities as carer. This very limited range of protected attributes provides insufficient protection to the broader community as well as many vulnerable, marginalised, and disadvantaged groups. There have been recent amendments to make it unlawful to, “*by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, because of their religious belief, affiliation or activity*”. People who do not have a religious belief or affiliation or do not engage in religious activity are also protected under the new law. In any event, this patchwork approach is indicative of the ADA requiring a complete review.

Sex Characteristics

The list of protected attributes in the ADA should be amended to include “sex characteristics” as it currently fails to protect intersex people (people with variations of sex characteristics). This demonstrates a failure to keep pace with advances in society as the Commonwealth, Tasmania, South Australia, and the Australian Capital Territory all recognise this as an attribute in need of protection, having included it within their anti-discrimination legislation.³

The reference to “homosexuality” is a significantly limiting term. It fails to ensure bisexual, pansexual, omnisexual, asexual, or heterosexual people are protected against discrimination. NSW is the only state in Australia which does not offer this protection. The term “homosexuality” should at least be replaced with “sexual orientation” which would make the terminology consistent with the *Sex Discrimination Act 1984* (Cth), however, we suggest a broader definition encapsulating bisexuality and asexuality,⁴ to ensure greater protection is afforded to all persons.⁵

Gender Identity

The use of the term “transgender status” in the current legislation is limited insofar as it only captures people who identify as a member of the opposite sex to what that person was assigned at birth. This does not protect non-binary people. Amending the term “transgender” to “gender identity” is a more inclusive category encompassing both transgender and non-binary people.

Religious belief or activity

The protected attributes do not include discrimination based on religious belief (including no belief), an activity which is protected in all Australian jurisdictions except NSW, South Australia, and the Commonwealth. This is significant because religious discrimination is a major societal issue which Australia continues to struggle with. A recent example can be seen from a report released by the Australian Human Rights Commission in 2021 which revealed that 80 per cent of Australian Muslims

³ Other Australian states are currently looking at amending their legislation to include “sex characteristics” as a protected attribute.

⁴ ALHR endorses the definition proposed by Equality Australia.

⁵ ALHR endorses Alistair Lawry ‘*What’s Wrong with the NSW Anti-Discrimination Act 1977?*’ 25 February 2016 (edited 11 March 2023) <https://alastairlawrie.net/2016/02/25/whats-wrong-with-the-nsw-anti-discrimination-act-1977/>

have experienced prejudice or discrimination. ALHR submits that 'religious belief and activity' should be included as a protected attribute in the ADA and that protection should include not holding a religious belief or view and not engaging in, or refusing to engage in a lawful religious activity.

Relationship status

The outdated reference to "marital or domestic status" should also be amended to "relationship status" to include different types of relationships.

Lawful sexual activity and sex work

The ADA does not contain any references to lawful sexual activity and sex work. 'Lawful sexual activity' is included in Queensland, Tasmanian and Victorian anti-discrimination legislation, however, we suggest the inclusion of both 'lawful sexual activity' and 'sex work', defined separately to acknowledge that past and present sex workers face specific discrimination and unfair treatment across a broad range of areas.⁶

Disability

An open discussion with the disability community should be had to ascertain whether the definition of 'disability' in the ADA should be updated. It currently uses terminology such as 'malfunction, malformation or disfigurement' which may be considered offensive and inconsistent with our current understanding of disability.

3. Introduce a positive duty to make reasonable adjustments

The ADA only prohibits discrimination, making no effort to actively promote equality. For example, whilst the ADA prohibits disability discrimination, it does not require steps be taken to make reasonable adjustments to accommodate a person's disability.

ALHR strongly believes that the ADA needs to be amended so that it imposes a positive obligation on employers, educators, providers of goods and services and others to make reasonable adjustments. Whilst the requirement to make reasonable adjustments is implicit in the requirement to avoid indirect discrimination, introducing an explicit obligation would arguably assist and motivate more employers, educators, and other bodies, to develop clear policies on reasonable adjustment. This would promote equality by enabling the full and equal participation of people with disability in all areas of public life.

4. Avoid requiring the use of a comparator test in establishing "direct discrimination" and instead use a detriment test as is used in the *Discrimination Act 1991* (ACT)

ALHR submits that a major problem with the current test for discrimination is that it requires a 'comparator'. For example, section 24 of the ADA sets out what constitutes discrimination on the ground of sex and provides that conduct or treatment is discriminatory against a woman if the perpetrator treats the woman less favourably than they treat or would treat a man in the same situation. This is a confusing and problematic test as it involves a theoretical question of how a person would allegedly behave. It also results in many practical difficulties because what may be considered discriminatory to a woman would not be considered discriminatory to a man. It is an entirely unnecessary element of the legislation and should be replaced with the "detriment test" as is legislated by the *Discrimination Act 1991* (ACT) which defines discrimination as a person being treated *unfavourably* because that person has one or more protected attribute(s). ALHR submits that this

⁶ See Scarlett Alliance, 'Briefing Paper: Anti-Discrimination and Vilification Protection for Sex Workers in Australia' February 2022 https://scarlettalliance.org.au/wp-content/uploads/2022/07/Anti_Discrim2022.pdf

amendment is necessary to ensure that the ADA is accessible and provides adequate protection against discriminatory conduct by providing a simple and clear definition of discrimination.

5. Unify the definition of “direct discrimination” and “indirect discrimination”

Another practical difficulty with the ADA is the implicit separation of discrimination into “indirect discrimination” and “direct discrimination”.⁷ It is often very difficult to identify which actions amount to direct or indirect discrimination as there is often an element of both and it is an unnecessary distinction. ALHR submits that this definition should be unified to make it clearer and more consistent with the objects of the legislation. Alternatively, the test for discrimination should be amended to make it clearer that discrimination can be direct, indirect or both. At present, the test appears to require that the aggrieved person suffer either direct or indirect discrimination.

6. Amend the definition of sexual harassment and extend the prohibition

ALHR submits that the definition of sexual harassment in the ADA fails to capture the different forms of sex-based harassment. Section 22A of the ADA defines sexual harassment as ‘*an unwelcome sexual advance... an unwelcome request for sexual favours or... other unwelcome conduct of a sexual nature... in circumstances in which a reasonable person... would have anticipated that the other person would be offended, humiliated or intimidated.*’ Unlike the *Sex Discrimination Act 1984* (Cth) (SDA), ‘conduct of a sexual nature’ is not defined. The SDA contains an expansive definition of ‘conduct of a sexual nature’ to include ‘making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.’ The ADA should include a similarly expansive definition of ‘conduct of a sexual nature’ that should expand the definition in the SDA to include making a statement of a sexual nature to a person, or in the presence of a person *or about a person whether or not in that person’s presence...*’.

The Australian Human Rights Commission noted that a clear limitation of this definition is that it does not extend to prohibit creating or facilitating an environment which is intimidating, hostile, humiliating, or offensive to another sex.⁸ ALHR submits that the definition needs to be amended to expressly include sexual harassment in this context. One effect of this amendment would be to extend liability for the prohibition of sexual harassment in the workplace and incentivise employers to take more accountability in ensuring they are not fostering an environment conducive of sexual harassment. Notably, ALHR is of the view that a positive duty on employers to take measures to address and prevent discrimination should be explicitly incorporated into the protections for each protected attribute.

In the current climate of remote work and online interactions between workplace participants, the definition of workplace should be expanded to clearly include online or virtual places where workplace participants interact including social media.

The ADA does not prohibit sexual harassment in all areas of public life. The Act makes sexual harassment unlawful in employment, qualifying bodies, employment agencies, educational institutions, provision of goods and services, accommodation, land, sport and state laws and programs. This can make it difficult for a person to demonstrate they have been sexually harassed in an area covered by the ADA. For example, the Act makes it unlawful for a workplace participant to sexually harass another workplace participant in the same workplace. It defines workplace participant to mean volunteers and unpaid trainees, however, it does not extend to other unpaid workers. It also does not contemplate the fact that the digital world has the effect of a “workplace” extending beyond bricks and mortar.

⁷ Section 24 of the ADA provides an example of the implicit separation of discrimination.

⁸ Recommendation 16. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020.

The prevalent nature of sexual harassment in modern day society highlights the need for sexual harassment protections to extend to all persons regardless of the situation. Queensland and Tasmania have legislated to make it unlawful to sexually harass another person in all circumstances. ALHR recommends that the ADA be amended to provide the same blanket protection as this would simplify the operation of the Act, increase its effectiveness, and send a clear message that sexual harassment is unacceptable in all circumstances.

7. Clarify the religious exceptions

ALHR submits that the broad exemption provided to religious organisations under section 56(d) of the ADA which allows religious organisations to discriminate against people accessing their services and employees based on any protected attribute should be amended to limit the operation of this exemption. This exemption permits religious organisations to discriminate in the provision of and access to a wide range of services including religious educational institutions, healthcare centres, accommodation and housing, disability, and other social services. This is particularly concerning in circumstances where many healthcare and educational organisations in NSW are religious organisations. This is inconsistent with current societal standards and values, particularly where the service being provided is a public service receiving government funding.

In addition, section 56(d) of the ADA in its current form is inconsistent with Article 18 of the ICCPR and other normative principles of International Human Rights Law. ALHR believes that this exemption is outdated and unjustified. Accordingly, we submit that the exemption be removed from the Act.

8. Amend the private school exception

The ADA currently allows private educational authorities to discriminate against students, lecturers, teachers, and other staff based on sex, transgender status, homosexuality, marital or domestic status, and disability. This exemption applies irrespective of whether the private educational institution is religious. The ADA is the only anti-discrimination legislation in Australia to provide such an exemption. ALHR strongly believes that this exemption is outdated and unjustified. Accordingly, we submit that the exemption be removed from the Act.

9. Introduce a positive duty to prevent discrimination

Positive duties reduce the burden on those experiencing discrimination by requiring preventative measures to be in place. This approach requires duty holders to take reasonable steps to address systemic issues and eliminate unlawful discrimination before it happens, possibly reducing the number of complaints over time.

There is an established approach under Commonwealth law, where certain entities have a positive duty to prevent sex discrimination and sexual harassment in workplaces.⁹ Victoria, the Northern Territory and the Australian Capital Territory have also introduced positive duties in their anti-discrimination framework and Queensland and Western Australia are considering similar reforms.¹⁰

VILIFICATION PROVISIONS NEED TO BE ALIGNED WITH THE *CRIMES ACT 1900* (NSW)

ALHR commends the NSW Government on the amendments it made to the *Crimes Act 1900* (NSW) in 2018 which introduced a criminal offence for '*publicly threatening or inciting violence on grounds of*

⁹ *Sex Discrimination Act 1984* (Cth) s 47C.

¹⁰ *Equal Opportunity Act 2010* (Vic) Part 3; *Anti-Discrimination Act 1992* (NT) Part 2A; *Discrimination Act 1991* (ACT) Part 9; Queensland Human Rights Commission (2022) [Building Belonging Report](#), rec 15 and at 230; Queensland Government (2022) [Final Queensland Government response to the Queensland Human Rights Commission's report, Building belonging: Review of Queensland's Anti-Discrimination Act 1991](#), items 15.1-15.3. Law Reform Commission of Western Australia (2022) [LRCWA Report](#), recs 121, 125 and at 239, 241; The Hon John Quigley, Attorney General (2022) '[WA's anti-discrimination laws set for overhaul](#)', 16 August.

race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status, with a maximum penalty of 3 years. This demonstrates the seriousness with which the Government treats vilification and hate crimes and reflects the community's condemnation of such conduct. However, the ADA provisions are inconsistent with the *Crimes Act* provisions.

The ADA provides that it is '*unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons*' on grounds of race, transgender status, homosexuality, and HIV/AIDS status. This provides significantly less protection than the *Crimes Act* provisions as it does not protect people from vilification based on their religious views, sexual orientation, gender identity, or intersex status. This inconsistency means that people may be protected under criminal law against vilification but have no civil recourse under the ADA. The ADA should be amended to provide the same protections afforded by the *Crimes Act*.

While the ADA should include a provision prohibiting religious vilification, it must ensure that it sufficiently distinguishes between freedom of expression regarding ideas and beliefs of a religion, as opposed to vilification against people because of religious beliefs they have or express. This issue was highlighted by the former UN Special Rapporteur on Freedom of Religion or Belief, outlining the need for governments who are attempting to combat intolerance and incitement to violence based on religion to ensure an appropriate balance is struck between freedom of expression and freedom of religion.

ALHR submits that the vilification provisions need to clearly outline what constitutes racial vilification and clearly distinguish it from freedom of expression.

Victoria, Queensland, the Australian Capital Territory, and a significant proportion of the Western democratic world have all legislated a Human Rights Act which assists in governing the inter-relationship between freedom of religion and free speech in the context of promoting and protecting human rights. This has proved to be a useful legislative instrument in the context of providing appropriate safeguards against racial vilification which supports ALHR's submission that a Human Rights Act is needed to advance NSW current anti-discrimination laws and ensure they keep up with modern times.

The ALHR did not support the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW), while prohibiting religious vilification is welcome in principle, it is our view that the wording was too vague and we would have preferred protections to be excluded for unlawful activity and organisations.

A NSW HUMAN RIGHTS ACT IS NECESSARY TO PROVIDE APPROPRIATE AND EFFECTIVE PROTECTIONS AGAINST DISCRIMINATION

ALHR endorses the need to examine the protections, processes, and enforcement mechanisms in other Australian and international anti-discrimination and human rights laws, including those in place in other states. While Victoria, Queensland, and the Australian Capital Territory have enacted Human Rights Acts, NSW remains an outlier in this regard. ALHR submits that the introduction of a NSW Human Rights Act is essential to ensure a comprehensive legislative framework for the protection of human rights and to demonstrate NSW's commitment to upholding its international obligations.

ALHR strongly believes that a NSW Human Rights Act is the most effective means of aligning NSW laws with Australia's international human rights obligations under the core human rights treaties to which Australia is a party. A NSW Human Rights Act can serve as the necessary mechanism to integrate these obligations into domestic law, providing a clear and comprehensive framework for the protection and promotion of human rights in the state. It would ensure that fundamental rights such as the right to equality and freedom from discrimination are protected for all people in all areas of life,

thus fostering a culture which supports human rights and ensuring that laws and policies are developed in line with human rights principles.

A Human Rights Act would require the NSW parliament to consider the impact of current and future laws on human rights and consider human rights when developing policies. It would enable NSW courts to consider the compatibility of NSW laws with human rights standards and therefore promote and encourage a more inclusive, open, and transparent dialogue on the Government's compliance with anti-discrimination laws and how laws can and should operate to safeguard against discrimination.

Anti-discrimination protections must be accompanied by a legal framework that comprehensively provides for the protection and articulation of human rights for the people of NSW. The Anti-Discrimination Act is not a substitute for a Human Rights Act. NSW's *Anti-Discrimination Act* only provides protection against discrimination for people who can demonstrate that they have been discriminated against based on a limited number of protected attributes within a restricted number of areas of public life. For instance, discrimination based on race is only prohibited in relation to work, education, provision of goods and services, accommodation, and participation in registered clubs. A Human Rights Act would offer protection for all persons against discrimination in a broader set of circumstances, such as areas affecting a person's right to life, right to vote, right to be free from torture and everyone's right to equality before the law. All these rights are not currently explicitly protected by legislation in NSW.

A Human Rights Act would promote equality and access to justice, ensuring the NSW government of today, and importantly in years to come, safeguards against discrimination. Therefore, it offers greater protection for everyone in NSW against the unjust or arbitrary exercise of public power which could negate the benefits offered by the *Anti-Discrimination Act*. It also offers a greater range of enforceable remedies and an avenue for justice to anyone who has had their human rights violated.

The introduction of a Human Rights Act which clearly sets out the human rights every person in NSW is entitled to and the responsibilities of organisations and businesses in upholding and promoting these rights would foster greater community awareness and respect for these rights.

We strongly believe that a NSW Human Rights Act, in addition to other steps, can satisfy NSW's obligations to make laws consistent with Australia's international human rights obligations and offer all persons in NSW with the best protection against discrimination.

CONCLUSION

ALHR submits that comprehensive reform of the ADA is necessary to ensure it offers extensive protection to vulnerable, marginalised and disadvantaged groups. ALHR urges the NSW Law Reform Commission to consider the importance of Australia's international human rights obligations in its review of the ADA. We strongly advocate for the adoption of a NSW Human Rights Act as the most appropriate way to ensure that NSW's laws are consistent with these obligations. This comprehensive legislative approach is essential to safeguarding the human rights of all individuals in NSW and creating a society that values equality, inclusivity, and diversity.

Thank you for considering our submission. We would be very willing to meet with and discuss our preliminary submission with the New South Wales Law Reform Commission to help inform your research and we look forward to contributing to further consultations in the future.

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Australian Lawyers for Human Rights