

# Preliminary submission to the review of the *Anti-Discrimination Act 1977* (NSW)

September 2023

Community Legal Centres NSW welcomes the opportunity to provide a preliminary submission to the review of the *Anti-Discrimination Act 1977* (NSW). Community Legal Centres NSW is available to discuss our submission with the New South Wales Law Reform Commission to help inform the process, and provide case studies to illustrate existing issues in the NSW anti-discrimination framework. This submission is not intended to be comprehensive.

## About Community Legal Centres NSW

Community Legal Centres NSW is the peak representative body for 41 community legal centres in NSW and represents the views of Community Legal Centres to the government and broader community. Community Legal Centres NSW supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW. Community Legal Centres are independent non-government organisations that provide free legal services people experiencing deep and persistent disadvantage and dislocation.

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## Addressing the Terms of Reference

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

1. Community Legal Centres NSW recommends that the *Anti-Discrimination Act 1977* (NSW) (The Act) is modernised and simplified to ensure that it effectively promotes the equal enjoyment of rights, aligns with contemporary community standards and contributes to a more just and inclusive society.
2. The Act should incorporate the non-discrimination clauses found in key human rights instruments to which Australia is a signatory, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). By integrating these provisions into the Act, it ensures that our legislation is in line with our international commitments to uphold human rights.
3. In addition to incorporating existing international commitments, the Act should be future-proofed to adapt to evolving societal norms and standards. It should include provisions that allow for flexible responses to emerging forms of discrimination and inequalities.
4. The definition of discrimination in the Act is currently split into two types, direct and indirect discrimination which can lead to complexities and challenges in legal interpretation. Combine these into one definition to reduce confusion.

### Terms of Reference 2: whether the range of attributes protected against discrimination requires reform

5. The range of attributes protected against discrimination should be expanded to align with contemporary norms and standards.
6. The Act should explicitly include provisions aimed at safeguarding rights on sexual orientation, gender identity and expression, and sex characteristics or variations of sex characteristics.
7. The Act should also include specific protections for older people to address issues related to age discrimination. As the population ages, it becomes increasingly important to safeguard the rights and dignity of older Australians.
8. The following attributes are protected in other jurisdictions in Australia and should be included in NSW legislation:
  - victim-survivors of family and domestic violence;
  - victim-survivors of gendered-based violence;
  - immigration status;
  - political conviction/opinion;
  - industrial/trade union activity;

- profession, trade or occupation;
  - sex work and sex workers;
  - irrelevant criminal record;
  - lawful sexual activity;
  - accommodation status;
  - genetic information;
  - medical record; and
  - physical appearance.
9. Sex workers must be protected not only in the course of performing sex work but also in all other aspects of their lives. This recognition is essential to address the unique and often severe forms of discrimination and violence that sex workers face.
  10. To ensure that the Act remains adaptable and responsive to evolving social norms, the Act should contain a non-exhaustive list of protected attributes. This approach allows flexibility to extend protections to particular groups as needed, reflecting the changing nature of discrimination and inequality in our society.
  11. The Act should recognise intersectional discrimination. Discrimination may occur when individuals are subjected to unfavourable treatment due to the intersection of multiple protected attributes. Intersectional discrimination acknowledges that individuals' experiences of discrimination can be shaped by the interplay of various aspects of their identity. It is imperative to consider these intersecting attributes when investigating and addressing instances of discrimination to ensure comprehensive protection of individuals' rights and dignity.
  12. Protection should extend to a person associated or in relation to a person who has any of the above attributes.

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

13. The Act's existing tests for discrimination are generally effective. They recognise that discrimination can occur regardless of the intent behind an action, as it is the consequences and outcomes that matter most in the experience of those affected. This approach acknowledges the complex and nuanced nature of discrimination, which can often be subtle or indirect.
14. The Act currently requires a comparator – a person or group of persons who are in a similar situation but not possessing the protected attribute in question – to establish that discrimination has occurred. Remove this requirement and instead focus on the concept of unfavourable treatment to make it easier to identify and address instances of discrimination.
15. This shift simplifies the burden of proof for individuals who have experienced discrimination and ensures that the focus remains on whether unjust treatment occurred rather than the existence of a suitable comparison.
16. The reasonable person test could be modified to be a reasonable person who shares the attribute of the complainant. This modification would take into account the unique perspectives and experiences of individuals with specific attributes.

**Terms of Reference 5: The adequacy of protections against vilification, including whether these protections should be harmonised with the criminal law.**

17. The offence at schedule 18 of the Summary Offences Act (living on the earnings) should be removed.
18. Harmonise protections against vilification with Section 93Z of the Crimes Act. Vilification, particularly when it incites hatred or violence against certain groups or individuals based on attributes such as race, religion, or gender, can have severe societal consequences. Aligning civil protections against vilification with criminal law, including Section 93Z of the Crimes Act, can provide a unified and robust response to such harmful behaviour.

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

19. The Act is currently inadequate and does not offer sufficient safeguards against sexual harassment. It should be amended to reflect the recent changes to the *Sex Discrimination Act 1984* (Cth) particularly in regards to:
  - the positive duty for Persons Conducting a Business or Undertaking (PCBUs) which requires organisations to take proactive steps to prevent and address sexual harassment within their premises;
  - the introduction of the offence of subjecting someone to hostile workplace on the basis of sex; and
  - the new offence of harassment on the basis of sex.

**Terms of reference 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**

20. The Act should include positive obligations to prevent harassment, discrimination, and vilification, as well as provisions for making reasonable adjustments to promote full and equal participation in public life. The inclusion of such positive obligations would represent a significant step toward creating a more inclusive and equitable society.
21. Positive obligations within the Act would establish a proactive framework for preventing harassment, discrimination, and vilification. These obligations would require individuals, organisations, and institutions to take active measures to foster a culture of respect and inclusivity, reducing the incidence of harmful behaviours.
22. The current Act does not prohibit discrimination in all areas of public life. A different approach is to amend the Act to apply discrimination in all areas of public life, with an exception for 'private conduct'.
23. The Act should also include provisions for making reasonable adjustments to ensure that all individuals have the opportunity to participate fully and equally in public life. This

includes access to education, employment, public services, and other facets of society. Reasonable adjustments are essential for removing barriers that may disproportionately affect people with disability and others who are experiencing deep and persistent disadvantage or dislocation.

24. These positive obligations are in line with international human rights standards, including the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
25. These obligations make it clear that proactive measures must be taken to create inclusive and respectful environments.

#### **Terms of reference 8: Exceptions, special measures, and exemption processes.**

26. The Act should uphold the principles of equality and non-discrimination across all protected attributes.
27. There should not be a hierarchy of protected attributes. Discrimination and unequal treatment can occur across various characteristics, and all individuals should be equally protected under the law. Exemptions or exceptions based on certain attributes can undermine the Act's core objective of promoting equality.
28. Exemptions should be narrowly tailored and based on clear and compelling reasons. Any exemptions that perpetuate discrimination or unequal treatment should be removed.
29. In particular, remove exemptions for religious bodies and private educational institutions that allow discrimination against LGBTIQ+ people as a condition of employment, education or the general provision of goods, services and accommodation.
30. Subsection 53(1) of the Act should be updated. Delete the following words: *unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.*
31. Subsection 53(3) reflects the obligations imposed on employers (liable unless it took all reasonable steps to prevent the act), and the test for vicarious liability, in other discrimination legislation, including the *Sex Discrimination Act 1984* (Cth). The Act should be updated to include obligations on franchisors to ensure franchisees comply with the Act. The Act should be updated to include a mechanism to make franchisors vicariously liable for the actions of its franchisees (in addition to the existing accessory provisions).
32. Special measures are essential to address historical and systemic disadvantages faced by certain groups. These measures should align with international law and should be compensatory and timebound. Special measures are not about creating new hierarchies but are intended to rectify existing inequalities and promote substantive equality. They should be based on clear criteria and periodically reviewed to ensure their ongoing relevance.
33. Any exemptions, special measures, or must be clearly defined within the Act, and the processes for applying them transparent. This transparency helps ensure that the Act is applied consistently and fairly.

#### **Terms of reference 9: The adequacy and accessibility of complaints procedures and remedies.**

34. The current compensation cap of \$100,000 is outdated and does not align with the understanding of the serious and long-lasting effects of discrimination and sexual harassment. To ensure that complainants are adequately compensated for the harm they have suffered, the Act should consider raising the compensation cap to reflect the true impact of these violations.
35. It is essential that the Act includes provisions to protect the personal identity of complainants, especially in cases involving sensitive issues such as sex work. Complainants should have the right to maintain their personal identity confidential throughout the complaint process. This is a critical safety measure for individuals who may not routinely share their legal names with clients or premises owners/operators.
36. Protections should be introduced to limit the misuse of confidentiality provisions in settlement agreements.
37. A mechanism should be established to allow successful applicants to enforce compensation payments. This ensures that individuals who have suffered discrimination or harassment receive the compensation they are entitled to, even in cases of insolvency or bankruptcy of the respondents.

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

38. The powers and functions of the Anti-Discrimination Board of New South Wales (NSW) and its President are essential in addressing discrimination within the jurisdiction are inadequate in effectively addressing systemic discrimination.
39. The Anti-Discrimination Board should have the authority to impose more substantial civil penalties on individuals, organisations, or entities found guilty of engaging in discriminatory practices. Increasing the severity of penalties can serve as a stronger deterrent and a more effective means of discouraging discrimination.
40. Granting the Board the power to conduct investigations and pursue complaints on behalf of complainants would empower the Board to proactively address instances of discrimination, especially when systemic issues are at play. It can also help in cases where individuals may fear retaliation or lack the resources to pursue a complaint independently.
41. To effectively address systemic discrimination, the Anti-Discrimination Board should be mandated to collect and analyse data on discrimination complaints, identifying trends, and patterns that may indicate systemic issues. Regular reporting on these findings can lead to informed policy changes and targeted interventions.

**Terms of reference 11: The protections, processes, and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws.**

42. The Act should implement the non-discrimination clauses found in human rights instruments to which Australia is a signatory. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights

of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Aligning the Act with these treaties ensures that it reflects Australia's international commitments to non-discrimination and human rights.

43. The Act should be designed to be flexible enough to adapt to evolving societal standards and emerging forms of discrimination. This includes incorporating protections for LGBTQI people and older people, recognising that discrimination can take new forms and affect different groups over time. Ensuring that the Act remains relevant in the face of changing social norms and demographics is essential.

**Terms of reference 12: The interaction between the Act and Commonwealth anti-discrimination laws.**

44. Efforts should be made to harmonise definitions and standards of prohibited discrimination across state and federal anti-discrimination laws. This alignment ensures that similar conduct is treated consistently, regardless of the jurisdiction in which a complaint is filed. Harmonisation can also reduce legal complexity and enhance clarity for both complainants and respondents.

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

45. Consider adopting a new term of reference exploring whether settlement practice, including the use of confidentiality provisions, requires reform.