Preliminary submission of the Australian Discrimination Law Experts Group

in response to the

New South Wales Law Reform Commission's Call for Preliminary Submissions for the Anti-Discrimination Act Review

13 October 2023

Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group (**ADLEG**), a unique, national group of legal scholars with significant experience and expertise in discrimination and equality law and policy.

This preliminary submission focuses on key questions raised in the Terms of Reference for the New South Wales Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (**the Act**). It focuses on issues that the Commission should consider in the review, and does not represent the entirety of ADLEG's views with respect to the specific issues that will be raised in the Consultation Paper.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry by e-mailing:

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Overview

In this submission, ADLEG responds to the call by the NSW Law Reform Commission (**Commission**) for *preliminary submissions on issues relevant to the terms of reference*, taking the opportunity to *suggest what the NSWLRC should consider in this review*.

ADLEG understands that the Commission's consideration of the preliminary submissions will lead to publication of a Consultation Paper on which more detailed submissions will be invited.

Suggesting what the Commission should consider in its review, ADLEG's preliminary submissions are as follows:

1. It is not feasible to amend the current Act: protection against discrimination in NSW requires a fresh start.
2. Discrimination legislation is intended to have a normative effect on social attitudes and behaviour, as well as operating as an effective guide to rights holders and duty bearers alike.
3. The objectives of a discrimination statute, and the aims it pursues to achieve that objective, are essential to a clear understanding of the purpose of the statute, to the educative purpose of the statute, and to its beneficial interpretation.
4. It is no longer tenable to address and prevent discrimination, harassment and vilification in society by relying only or even principally on complaints made by individual victims.
5. The focus of discrimination legislation should be on, and the protection under the legislation should be available to, those who are within the objective of the Act consistently with its underpinning philosophical rationale, and should ensure that intersectional forms of discrimination can be dealt with effectively.
6. Drawing a distinction between 'direct' and 'indirect' discrimination is artificial, confusing and costly, and fails to reflect the actual experience of discrimination.
7. The proliferation of exceptions to the coverage of an anti-discrimination statute undermines its credibility, compromises its normative effect and, most importantly, exposes vulnerable people to discrimination without sufficient justification.

These are discussed in more detail below.

1. A fresh start is required

ADLEG submits that it is not feasible merely to amend the current Act. Discrimination protection in NSW requires a fresh start.

Accordingly, the Commission should consider a statute that responds to significant changes in society, is informed by recent extensive reviews and reforms of similar laws in Australia and by international practice, and adopts contemporary positive measures to reduce if not prevent the occurrence of discrimination, harassment and vilification.

Changes in society that a discrimination statute must respond to include the potential for bias within AI, the unequal impacts of climate change on vulnerable populations, the growing understanding of neurodiversity, and new conceptions of gender and sexuality.

Social changes such as these are continuing, and a discrimination statute must have the flexibility to respond readily, and not languish behind social expectations and needs as the current Act does.

Recent extensive reviews and reforms of similar laws in Australia which should inform the Commission include those undertaken in Queensland, Western Australia, ACT and Victoria, listed in Appendix A.

Laws and reports on international practice which should inform the Commission include those in the United Kingdom, Europe, Canada and South Africa, listed in Appendix A.

2. Normative and guiding effect

ADLEG submits that a discrimination statute is intended to have normative effect, and must operate as an effective guide to conduct for rights holders and duty bearers alike.

Accordingly, the Commission should consider ensuring that a fresh discrimination statute is drafted in plain language, adopts a clear and accessible architecture, is supplemented by authoritative guidance, and is widely promoted.

Plain language and clear and simple structure will contribute to the statute's being an accessible and useful document that can be relied on to give direction to both rights holders and duty bearers.

Wide promulgation would be the responsibility of the state agency, the NSW Anti-Discrimination Board, which should be adequately funded for this purpose.

3. Objectives

ADLEG submit that the objective of a discrimination statute, and the aims it pursues to achieve those objectives, are essential to a clear understanding of the purpose of the statute, to the educative purpose of the statute, and to its beneficial interpretation.

Accordingly, the Commission should consider and decide on and explicitly state the philosophical conception of 'freedom from discrimination' and 'substantive equality' that the reforms are oriented to and a new statute is committed to.

Scholarly literature canvasses a range of theoretical bases for discrimination laws. In practice, and defensibly in theory, discrimination laws are philosophically underpinned by a commitment to the promotion of equality and the right of non-discrimination, preventing and redressing harm caused to people whose membership of particular social groups exposes them to heightened risk of adverse treatment or which appropriately founds distinct needs.

A statement to this effect by the Commission, supported by a reasoned analysis of the literature, will provide clear direction to those making submissions to the Commission and, in the long term, to all who engage with the new statute.

Further, the Commission should consider and decide on and explicitly state the objectives and aims of the statute. The objective and aims will reflect the underpinning philosophical rationale of the statute, inform key definitional decisions, and be an aid to judicial interpretation.

Finally, the Commission should consider current approaches to statutory interpretation in Australia, and to taking steps to ensure that judicial interpretation is purposive and consistent with the objective of eliminating discrimination and other prejudice-based attitudes, explicit and implicit.[1]

We note the Australian scholarship in this issue to which there is a link in Appendix A.

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[1] See Alice Taylor, *Interpreting discrimination law creatively: Statutory discrimination law in the UK, Canada and Australia*, Hart Publishing, Oxford, 2023.

4. Not rely on individual complaints

ADLEG submits that it is no longer tenable to address and prevent discrimination, harassment and vilification in society by relying on complaints made by individual victims, a mechanism that imposes the burden of addressing discriminatory conduct on the victims of that conduct.

Accordingly, the Commission should consider a range of complementary, additional and alternative statutory measures to both address and prevent discrimination, harassment and vilification. Some of these measures are noted below.

ADLEG will address this issue in detail in a submission to the Consultation Paper, but notes at this stage the discussion of alternative approaches in, for example:

- Belinda Smith, 'It's About Time – For a New Regulatory Approach to Equality'.[2]
- Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions'.[3]
- Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws'.[4]
- Paul Harpur and Ben French, 'Is it safer without you?: analysing the intersection between Work Health and Safety and Anti-Discrimination Laws'.[5]
- Robin Banks, *A rose is a rose: But not all discrimination smells the same.*[6]

We note the further Australian scholarship in this issue to which there is a link in Appendix A.

Generally speaking, the measures we note are the same as or consistent with a model of state regulation and enforcement such as we are familiar with in Australia in the area of work safety.

Report III (Part 1B) of the 98th Session of the 2009 International Labour Conference – General Survey concerning the *Occupational Safety and Health Convention, 1981* (No 155), the *Occupational Safety and Health Recommendation, 1981* (No 164), and the Protocol of 2002 to the *Occupational Safety and Health Convention, 1981* – reported favourably on the effectiveness of work safety regulation in Australia and elsewhere:

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2 (2008) 36(2) *Federal Law Review* 117 <http://classic.austlii.edu.au/au/journals/FedLawRw/2008/5 html>.

3 (2010) 36(3) *Monash University Law Review* 103 <http://classic.austlii.edu.au/au/journals/MonashULawRw/2010/28 html>.

4 (2019) 32(2) *Australian Journal of Labour Law* 219 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299784>.

5 (2014) 30(1) *Journal of Health, Safety and Environment* 167 <https://espace.library.uq.edu.au/view/UQ:331259>.

6 PhD Thesis, University of Tasmania, 2023, Chapter 10.

> 107… strategies [that] are remedial in nature … seek to ensure that problems found are rectified. This can be done by issuing "improvement notices", as in Australia (Western Australia) and the United Kingdom, "remedial measures orders" and training orders, as in Australia (Northern Territory) and The former Yugoslav Republic of Macedonia, and legally binding "enforceable undertakings" in .Australia (Queensland). The ten enforceable undertakings accepted in 2004–05 were estimated to lower the costs to workplaces, industry and the Queensland community by about A$1.6 million. In Canada (Ontario) successful "proactive" inspections are used as an incentive to reduce the frequency of regular inspections.

Since the ILO report, Safe Work Australia's *National Compliance and Enforcement Policy*[7] provides a framework for regulators to monitor compliance through inspections and audits, and to receive incident notifications and requests from businesses and workers for assistance with work safety issues.

The Commission should consider, as alternatives or complements to individual complaints, the various measures below as indicative of the wide range of contemporary approaches to public regulation of harmful behaviour, illustrated by the way in Safe Work Australia acts to ensure workers' safety.

Positive duties

Australian jurisdictions are increasingly considering and enacting positive duties to ensure more effective preventive approaches within discrimination law. ADLEG strongly supports this approach and has recently made submissions on the framing of such a duty that we urge the Commission to consider.[8] Such a duty should apply in respect of all protected attributes and all forms of prohibited conduct.

Industry codes

Consideration could usefully be given to empowering the approval of industry codes of practice to provide clear guidance to specific industries. ADLEG has previously recommended

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7 Safe Work Australia, *National Compliance and Enforcement Policy* (2020) <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/national-compliance-and-enforcement-policy>.

8 Australian Discrimination Law Experts Group, Submission No 4 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, 11 October 2022, 15–19 <https://drive.google.com/file/d/1OHcEzj1_ZAOHSak0CO6uXmAHzZJSR2Iv/view>.

the enabling of guidelines and/or codes of practice.[9] Such guidelines and codes can usefully work with exemption-granting mechanisms to improve compliance.

Standards

The *Disability Discrimination Act 1992* (Cth) (DDA) provides for the making of standards in key areas of activity.[10] Such standards have been developed in the areas of education, public transport and premises. Such standards can be valuable but only if they are accompanied by rigorous and publicly accountable monitoring and compliance mechanisms, and are tailored for their application for different attribute groups.

The Canadian Government has adopted a rigorous approach to development and compliance in its *Accessible Canada Act*, SC 2019, c 10.[11]

Action Plans

As with standards, the DDA provides a mechanism whereby organisations can develop, in conjunction with people with disability, a disability action plan to address identified barriers to equality for people with disability.[12] These action plans can address, for example, barriers in employment, barriers in service delivery, etc. Such action plans can be lodged with the Australian Human Rights Commission and are then publicly available.[13]

Canada has a mechanism whereby organisations subject to the *Employment Equity Act* are required to develop an employment equity plan.[14] These plans are to eliminate barriers to employment experienced by women, Aboriginal peoples, people with disabilities and members of visible minorities. In this way, the Canadian approach is much broader than the existing framework in Australia under the *Workplace Gender Equality Act 2012* (Cth), and in some

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9 Discrimination Law Experts' Roundtable, Report on recommendations for a consolidated federal anti-discrimination law in Australia, 29 November 2010, updated 31 March 2012, 10–12, 22–23 <https://drive.google.com/file/d/1VUewym0n-Q6aNm6n_aYSTvxoCQk4MDFb/view>; Discrimination Law Experts Group, Submission No 207 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 18 December 2012, 32–33, 35–36 <https://drive.google.com/file/d/1eIs8v28UKA_r5MlXjIyMqpQ27buhZ5V0/view>.

10 *Disability Discrimination Act 1992* (Cth) Part 2, Division 2A.

11 *Accessible Canada Act*, SC 2019, c 10 <https://laws-lois.justice.gc.ca/eng/acts/a-0.6/>.

12 *Disability Discrimination Act 1992* (Cth) pt 3.

13 Australian Human Rights Commission, *Register of Disability Discrimination Act Action Plans* (undated) <https://humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans>.

14 *Employment Equity Act*, SC 1995, c 44 <https://laws.justice.gc.ca/eng/acts/E-5.401/>.

ways is closer in scope to the now-repealed Part 9A of the NSW *Anti-Discrimination Act* which required NSW authorities to develop and implement an equal employment opportunity management plan in respect of employment opportunities for women, members of racial minorities and people with disability.[15]

Binding enforceable undertakings

Binding enforceable undertakings are commonly used as a regulatory tool in other jurisdictions, either in their own right or in the context of audits and exemptions as we note below.

Audits

A feature of both the US and Canadian jurisdictions is use of audit powers to ensure active approaches to compliance. In the USA, this includes 'pattern and practice reviews' to identify systemic violations of rights.[16] In Canada, under the *Employment Equity Act*, the Canadian Human Rights Commission is empowered and resourced to conduct compliance audits, and to accept written undertakings, in respect of employer obligations under the Act.[17]

Exemptions as a compliance measure

A mechanism that can be used to drive compliance, but has historically had limited use, is the granting of time-limited exemptions with conditions that require specific actions, potentially in the form of a binding undertaking provided by the organisation seeking the exemption.

An example is an exemption granted under the *Disability Discrimination Act 1992* (Cth)[18] to the Prime Media Group of companies, the WIN Corporation group of companies and the Macquarie Southern Cross Media Group exempting them 'from section 24 of the DDA so far as it relates to the captioning of television programming'.[19] The exemption sets out the

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15 *Anti-Discrimination Act 1977* (NSW) Part 9A (repealed in 2014); The objects of Part 9A were to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability, and to promote equal employment opportunity for women, members of racial minorities and persons who have a disability.

16 For discussion of this mechanism, see Robin Banks, *A rose is a rose: But not all discrimination smells the same* (PhD Thesis, University of Tasmania, 2023) 299–300.

17 Ibid.

18 *Disability Discrimination Act 1992* (Cth) s 55(1).

19 Australian Human Rights Commission, *Temporary Exemption: Regional Television Captioning* (12 May 2009) <https://humanrights.gov.au/our-work/legal/temporary-exemption-regional-television-captioning?_ga=2.216447955.451010415.1697073218-2033322919.1696553856>.

conditions on which the exemption was granted, which include increasing captioning levels over a specified period, reporting and consultation obligations, and specific areas for captioning.

Counsel assisting

In the first decade of federal discrimination complaints, the Australian Human Rights Commission had jurisdiction for hearing and determining complaints. This was done by specialist hearing commissioners with counsel assisting. This meant that the decision maker had access to expert legal submissions irrespective of the legal representation of the parties. This ended when the federal decision making jurisdiction shifted to the federal court system.

In 1981 the NSW Act was amended to insert section 101A which allowed the then NSW Equal Opportunity Tribunal to make arrangements with the NSW Anti-Discrimination Board, as it then was, for an officer of the Board to assist the Tribunal, and from time to time the Tribunal made use of this. The officer of the Board actually instructed counsel who appeared, effectively, as counsel assisting. The same provision is now made in s 99 of the Act, but is not used for want of resources.

The presence of counsel assisting the decision-making tribunal is an ongoing feature of federal discrimination law in Canada.[20]

Prosecution

One mechanism to move away from reliance on individual complaints is to provide a mechanism for prosecution of breaches by a state authority. This can be prosecution of breaches of the prohibition against discrimination as is the case in the USA, or prosecution of breaches of compliance obligations as is the case in Canada.[21]

Orders and remedies

The recent work done by Thornton, Pender and Castles for the Federal Attorney-General's Department, *Damages and costs in sexual harassment litigation*[22] highlights ongoing issues in

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[20] Data analysis indicates that the shift to the federal court system in Australia has seen a steady and continuing decline in the rate of success of complainants in federal discrimination cases: Banks (n 11) figure 5-2, 108. In contrast the rate of success of complainants in federal discrimination cases in Canada has remained steady over approximately the same period at between 50 and 60% (current data analysis being undertaken).

[21] These and other approaches adopted in comparable overseas jurisdictions are discussed in Banks (n 11) Chapter 10, in particular pages 299–307.

[22] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and costs in sexual harassment litigation* (2022, Australian National University).

respect of the levels of damages and other orders made by courts and tribunals in Australia. While the focus in the report is on sexual harassment, it highlights that other areas of discrimination lag behind contemporary standards in the levels of damages that awarded where discrimination has been proven.

An ongoing concern for ADLEG and others is the failure of decision-making bodies, when discrimination is proven, to consider and make orders to address the systemic nature of much discrimination experienced in Australia. It is apparent that very clear statutory powers and direction are needed for a decision-making body to consider whether the proven discrimination was systemic in nature, and to order remedies that are systemic in effect. Again, the approach of the federal tribunal in Canada is distinctly different from that in Australia.

5. Scope of protection

ADLEG submits that the focus of the Act should be on, and the protection of the Act should be available to, those who are within the objective of the Act consistently with its underpinning philosophical rationale.

Accordingly, the Commission should consider how best to identify the people whom the Act is intended to protect.

Regard could be had to legislation elsewhere that lists a large number of protected attributes, for example the Tasmanian *Anti-Discrimination Act 1998*,[23] the Victorian *Equal Opportunity Act 2010*[24] and the *Anti-Discrimination Act 1992* (NT).[25]

Regard could also be had to an alternative approach that relies on an inclusive list of attributes that accord with the objective of the legislation, such as is found in the South African legislation, discussion below, or that relies on the objective of the legislation to define the scope of coverage in any particular case.

The scope of protection offered by the Act must be guided by the objective and aims of the Act. The Act may be, for example, explicitly committed to the promotion of equality and the right of non-discrimination, and to preventing and redressing harm caused to people whose membership of particular social groups exposes them to heightened risk of adverse treatment. If the approach is taken to list specific attributes as protected, then the listed attributes will be within this scope.

We note the Australian scholarship in this issue to which there is a link in Appendix A.

Contemporary coverage of attributes

The NSW Act lags behind other Australian jurisdictions in terms of attributes identified as protected grounds. Consideration should be given to ensuring that the scope of protection in NSW is at least as comprehensive as that found under existing discrimination law protections (including employment discrimination under the *Fair Work Act 2009* (Cth)). For a discussion of this proposed scope, ADLEG recommends consideration of the recommendations and

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23 *Anti-Discrimination Act 1998* (Tas) s 16.

24 *Equal Opportunity Act 2010* (Vic) s 6.

25 *Anti-Discrimination Act 1992* (NT) s 19.

supporting text found in its recent submission to the Law Reform Commission of Western Australia.[26]

Inclusive list approach

The evolution of social understandings of discrimination has led to a burgeoning of new attributes in state and federal discrimination law in the decades since these laws were first enacted. This raises the question of whether the addition of such attributes should continue to occur via legislative reform or whether the courts should be given a greater role in determining whether offending conduct fits within a listed attribute or constitutes discrimination based on a new attribute because it meets the definition of unlawful discrimination. A further possibility is for a body with oversight of the Act to regularly review the need to add new attributes or reword existing ones due to changing language and social meanings.

South African courts have performed this judicial function in the context of an equality right that contains a non-exhaustive list of attributes/grounds.[27] Courts have found that HIV/AIDS status is a ground of discrimination as is migration status. Reform of the NSW Act could consider alternative legislative mechanisms to address the challenge of the growth or evolution of attributes.

Intersectionality

Much has been written about intersectional[28] forms of discrimination and the current inability of Australian discrimination laws to recognise and remedy such discrimination.[29]

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26 Australian Discrimination Law Experts Group, Submission to the Law Reform Commission of Western Australia Project 111: *Review of the Equal Opportunity Act 1984* (WA), 30 November 2021, 4–6, 19–39, <https://drive.google.com/file/d/1m9bo2fIwZ9kyTR7pZ8tCqGEWT35YXUqU/view>. For an overview of all protected attributes found in Australian discrimination laws, see Banks (n 6) Appendix 1, Tables A1–6 to A1–9, 420–34.

27 Cathi Albertyn and Beth Goldblatt, 'Equality' in Constitutional Law of South Africa, 2nd Edition (CLOSA) <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap35.pdf>.

28 Kimberlé W Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Legal Forum* 139; Kimberlé W Crenshaw, 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' (1991) 43(6) *Stanford Law Review* 1241; Elizabeth R Cole, 'Intersectionality and research in psychology' (2009) 64(3) *American Psychologist* 170 Shreya Atrey, *Intersectional discrimination* (Oxford University Press, 2019).

29 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.

ADLEG has consistently argued that reform is needed to Australian discrimination laws to ensure those experiencing intersectional discrimination are able to have the entirety of their experience recognised. In previous submissions, ADLEG has recommended that consideration be given to the approach taken in Canada under section 3.1 of the *Canadian Human Rights Act*, RSC 1985, which says: 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.'[30]

[30] See, for example, Australian Discrimination Law Experts Group, *Submission in response to the NT Consultation Draft Anti-Discrimination Amendment Bill 2022*, 12 August 2022 <https://drive.google.com/file/d/1I0NhyIUuu_2z1tk-n7xoKQdnHVS3wU-U/view>; Australian Discrimination Law Experts Group, Submission to the Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act*, 1 March 2022, 25 <https://drive.google.com/file/d/1g1AlSDhixcyGLa2M6FXaQ5viBcR_Usp4/view>; Australian Discrimination Law Experts Group, Submission to the Law Reform Commission of Western Australia Project 111: *Review of the Equal Opportunity Act 1984* (WA), 30 November 2021, 47 <https://drive.google.com/file/d/1m9bo2fIwZ9kyTR7pZ8tCqGEWT35YXUqU/view>.

6. Prohibition should reflect the actual experience of discrimination

ADLEG submits that drawing a distinction between 'direct' and 'indirect' discrimination is artificial, confusing and costly, and fails to reflect the actual experience of discrimination.

Accordingly, the Commission should consider alternative approaches to identifying and defining the conduct that the Act is intended to address, having regard to understandings of discrimination and prejudice-based conduct found in psychology.[31] Banks identifies the importance of understanding that prejudice-based conduct takes different forms depending on the targeted attribute and is driven by different emotions. So, for example, much of what is experienced by older people, young people and people with many disabilities is forms of over-protectiveness or paternalism. This is likely to be less readily understood to be 'less favourable' treatment by those who have not personally been subjected to decisions and actions based on over-protection or paternalism.

In relation to discrimination, people experience deliberate or inadvertent treatment that reflect (usually negative) stereotypes of people with a particular attribute, or that ignore the effects of those attributes on the person's capacity to engage with systems and practices.

The categories of 'direct' or 'indirect' are drafting efforts to capture different ways in which a person is disadvantaged because of their attribute, but they do not reflect a person's actual experience of discriminaion. The artificial distinction between 'direct' and 'indirect' becomes the subject of unnecessary and often convoluted legal argument.

For example, when a developer creates a building with inadequate accessibility for people with mobility impairments (eg, only stairs) even after this issue has been brought to their attention, is this direct discrimination of a person with mobility impairment because the developer has treated the person less favourably, or is it remain indirect discrimination because a person with mobility impairment cannot meet the requirement to use the stairs. The real question is whether or not the development fails to ensure equality of opportunity for people with mobility impairment, rather than a nice legal question of whether the conduct is characterised as direct or indirect discrimination. Even on the legal question, the example shows the error of the established Australian jurisprudence that insists that the two categories are mutually exclusive.

Further, the Commission should consider reforms to ensure that systemic patterns and practices that are discriminatory in effect are fully caught by the prohibition of discrimination.

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[31] Banks (n 6) Chapter 7 and Table 10-6, 290.

The many additional prohibitions in discrimination laws in Australia show that discrimination may be experienced differently in particular circumstances.

For example, the express prohibition of sexual harassment found in all Australian discrimination laws reflects the understanding that sex discrimination can take the form of sexual harassment, as identified in *O'Callaghan v Loder*[32] and *R v Equal Opportunity Board & Anor*,[33] avoiding the need to re-litigate and re-interpret the issue. Similarly other forms of discriminatory harassing or insulting conduct have been prohibited in their own right in some Australian discrimination laws.[34] Other discriminatory conduct or discrimination-related conduct prohibited under various laws includes advertising or promoting discrimination or the intention to discriminate; aiding, causing or permitting discrimination; and vilification or incitement.[35]

These additional prohibitions suggest how measures can be taken, and systems and practices can be designed, to recognise and take account of the diverse ways in which people face prejudice-based conduct.

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32 *O'Callaghan v Loder and the Commissioner for Main Roads* (1983) 3 NSWLR 89 (21 June 1983).

33 *R v Equal Opportunity Board & Anor; Ex Parte Burns and Anor* [1985] VR 317 (4 May 1983).

34 *Disability Discrimination Act 1992* (Cth) ss 35, 37, 39 (narrow scope of prohibition of disability harassment); *Anti-Discrimination Act 1992* (NT) s21(1)(b) (prohibition on harassment on any of the protected grounds); *Anti-Discrimination Act 1998* (Tas) s17(1) (prohibition on conduct that offends, humiliates, intimidates, insults or ridicules on the basis of 14 of the listed attributes). See Banks (n 6) Table A1-11, 443, for details of the range of provisions that deal with such conduct as well as other conduct prohibited under discrimination laws.

35 Banks (n 6) Table A1-11, 443.

7. Impact of exceptions on effectiveness

ADLEG submits that the proliferation of exceptions to the coverage of a discrimination statute undermines its credibility, compromises its normative effect and, most importantly, exposes vulnerable people to discrimination without sufficient justification.

Accordingly, the Commission should consider alternative approaches to statutory provisions that allow conduct that would otherwise be unlawful. The NSW Act is a clear example of the proliferation of exceptions and the failure of legislation to be kept up to date with contemporary societal expectations.

Exceptions or defences in the Act largely reflect the views and attitudes of those in positions of power in the 1970s, and continue to provide a means for well-resourced and powerful sectors of society and their members to use aggressive litigation strategies to defend their actions under outdated legislative exceptions.

As well as posing legal and procedural barriers to an individual when they challenge the treatment they have suffered, exceptions undermine the normative effectiveness of discrimination laws. They send a message to people and organisations that are privileged by having exceptions potentially protecting their conduct can operate without considering the effect of their conduct on less powerful, marginalised or vulnerable people and communities.

The protections in the NSW Act are riddled with exceptions and defences, accumulated over time so as to pare back and in many cases negate protections, validating discriminatory treatment for a diverse range of justifications, and at times without apparent justification. A striking example is the continuing exception - unique to NSW - for private educational authorities (private schools), permitting them to discriminate against students with disability and other protected attributes,[36] including making it lawful for such educational authorities to refuse a person's enrolment because of the existence of a disability.

Further, the Commission should consider, before making any recommendations, the Consultation paper and pending Final Report of the Australian Law Reform Commission on Religious Educational Institutions and Anti-Discrimination Laws and the Australian Human Rights Commissions' report, *Free and Equal: A reform agenda for federal discrimination law*.[37]

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[36] *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'private education authority'); s 49L(3)(a).

[37] Australian Human Rights Commission, Free *and Equal: A reform agenda for federal discrimination law* (2021).

Conclusion

In this submission ADLEG identifies matters that the Commission must consider in its landmark review of outdated but vital legislative protection against discrimination. Of the very many matters that have to be addressed in a review, we have been careful to identify the few that, in our submission, are central to both modernising and setting new standards for legislative protection in Australia.

We anticipate that consideration of issues that these matters raise will result in a detailed and wide-ranging Consultation Paper. We anticipate too that many of the issues will attract some level of controversy and disagreement; it would scarcely be a law reform inquiry if they did not.

ADLEG looks forward to the opportunity to make submissions on a challenging and far-sighted Consultation Paper. In the meantime, we are happy to answer any questions and to provide further information. Please let us know if we can be of further assistance in this inquiry by e-mailing

Appendix A: List of resources recommended to the NSW LRC's review of the NSW *Anti-Discrimination Act*

Australia

Reports and submissions

Australian Discrimination Law Experts Group, various submissions, including particularly submissions to Queensland and WA processes: <https://www.adleg.org.au/submissions>.

Law Reform Commission of Western Australia, *Review of Equal Opportunity Act 1984 (*WA) *Project 111 Final Report* (2022) <https://www.wa.gov.au/government/announcements/law-reform-commission-report-calls-update-of-anti-discrimination-laws>.

Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) <https://www.qhrc.qld.gov.au/about-us/law-reform/documents>.

ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (2015) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ACTLRAC/2015/3.html>.

Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, 2008 <http://www.daru.org.au/wp/wp-content/uploads/2013/03/An-Equality-Act-for-a-Fairer-Victoria_20082.pdf>.

Empirical research

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Australian scholarship

- General texts
- Purpose and Theory
- Areas of Prohibition
- Protected attributes
- Intersectionality
- Enforcement
- Positive action

International examples and resources

South Africa

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1. Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
2. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
3. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
4. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

Scandinavia

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International

The *Declaration on the Principles of Equality* (2008, The Equal Rights Trust) provides an international expert groups' view on how the right to equality has developed in international and domestic law, with a particular focus on the integration of the right to substantive

equality and addresses the issue of the scope of protection against discrimination in paragraph 5. After detailing a list of prohibited grounds of discrimination, the text goes on to state:

Discrimination based on any other ground must be prohibited when such discrimination (1) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

An overview and links to the document and related documents can be found at: https://en.wikipedia.org/wiki/Declaration_of_Principles_on_Equality

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