



Greens NSW submission to the
**NSW Law Reform Commission review of the
Anti-Discrimination Act**

16 October 2023

1. Introduction

The Greens welcome the opportunity to make a submission to the NSW Law Reform Commission's independent review ('the Review') of the *Anti-Discrimination Act 1977 (NSW)* ('the Act'). This submission has been prepared by the office of Jenny Leong MP, NSW Greens spokesperson on Anti-Discrimination and Human Rights, on behalf of the NSW Greens. The Greens have long been in support of calls by many organisations for a holistic review, and are pleased that it is finally underway.

In the 46 years since the Act was introduced, the social, cultural, and legal contexts within which it is situated have changed considerably. While the Act was groundbreaking at the time of its introduction in making NSW the first State or Territory to establish protections from discrimination on the grounds of sex and marital status, in the more than four decades since it has fallen behind parallel anti-discrimination legislation around the country. Nearly thirty years after the last comprehensive review of the Act by the NSW Law Reform Commission in 1993, the majority of the Commission's recommendations are yet to be implemented.

In an open letter to then-NSW Attorney General Mark Speakman in August 2021, the Public Interest Advocacy Centre (PIAC), ACON, Community Legal Centres NSW, People with Disability Australia, Women's Electoral Lobby (NSW), Intersex Human Rights Australia, The Gender Centre, and the Gay & Lesbian Rights Lobby wrote:

*"This legislation is failing in its fundamental duty to protect vulnerable people in NSW against discrimination and vilification. [...] the Anti-Discrimination Act compares poorly to every other Commonwealth, State and Territory anti-discrimination law."*¹

The open letter highlighted the primary concerns of the signatories, which included the lack of protections against discrimination to all community groups who need, significant gaps in the

¹ Public Interest Advocacy Centre, Open letter re Independent Review and Comprehensive Reform of the Anti-Discrimination Act 1977 (NSW), 6 August 2021, available at: <https://piac.asn.au/2021/08/05/open-letter-re-independent-review-and-comprehensive-reform-of-the-anti-discrimination-act-1977-nsw/>

areas of public life where vilification and discrimination are outlawed, and the breadth of exceptions allowed within the Act.

The Greens share each of these concerns. In this submission to the Review and in line with the terms of reference, we outline the basis for our concerns and highlight what we consider to be additional shortcomings of the Act: its outdatedness in the face of a radically changed culture, its concerning religious vilification protections, and its restrictive approach to accessibility and intersectionality.

Our office would welcome the opportunity to speak to any part of this submission as part of this Review and can be contacted by email to newtown@parliament.nsw.gov.au or on (02) 9517 2800.

2. An inconsistent approach to protection

While the Act protects some community members from discrimination and vilification, it does not encompass the full range of attributes that warrant protection. The non-exhaustive range of attributes protected by the Act results in an uneven level of protection across our communities - sending a dangerous political message of whose interests and rights are considered worthy of protection over others.

2.1. Non-binary people, bisexual people, and people with innate variations of sex characteristics

While s 93(7) of the *Crimes Act 1900 (NSW)* makes “publicly threatening or inciting violence on the grounds of [...] sexual orientation, gender identity, intersex status, or HIV/AIDS status” a criminal offence, no similar civil protections for these groups are conferred by the Act.

Indeed, the limited scope of protections for certain members of the LGBTQIA+ community under the Act is cause for serious concern. The Act only confers protection from discrimination and vilification on the basis of “homosexuality”, in effect making NSW the only Australian jurisdiction

in which bisexual people are not protected from discrimination and vilification. As PIAC notes,² this significant gap could be easily remedied - and protections simultaneously extended to heterosexual people - by replacing references to “homosexuality” within the Act with “sexual orientation”.

Beyond this, the Act presently does not grant protections to people with innate variations of sex characteristics, who are covered by equivalent legislation in Tasmania, the ACT, and South Australia, in addition to the *Sex Discrimination Act 1984* (Cth). It also limits protections on the basis of transgender status only to people who identify “as a member of the opposite sex”,³ and thereby falls short of protecting people who identify as non-binary or gender diverse.

The Greens are concerned that these omissions leave a significant portion of the LGBTQIA+ community exposed to the risk of vilification and discrimination and undermine the significant expansion of LGBTQIA+ rights in the years since the Act’s introduction.

2.2. People with HIV/AIDS

Notably, the s 49ZXB of the Act only establishes protections against vilification on the basis of HIV/AIDS status, with no parallel protections against discrimination. It is our view that this oversight needs to be corrected, and protections on this basis extended to include discrimination.

2.3. Occupation or irrelevant criminal record

The Act fails to establish protections on the basis of a person’s profession, trade or occupation or irrelevant criminal record, attributes that are protected in other Australian jurisdictions. The former is of particular concern for people who work in industries that remain highly contested and marginalised, such as the sex work sector. While sex work in NSW has been largely

² Public Interest Advocacy Centre, *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act*, 28 July 2021, p4, available at: <https://piac.asn.au/2021/07/28/leader-to-laggard-the-case-for-modernising-the-nsw-anti-discrimination-act>

³ See s 38A of the Act

decriminalised, the Act has not been updated to reflect this shift and extend necessary protections to sex workers.

As the Sex Workers Outreach Project (SWOP) wrote in a 2022 submission to the Queensland Human Rights Commission:

“As we approach thirty years of improved laws, in NSW we are acutely aware that the honourable intentions of these legislative improvements are routinely undermined by the lack of adequate anti-discrimination protections for sex workers. Despite law reform, sex workers in NSW still regularly experience discrimination in relation to education, provision of goods and services, professional qualification/membership, employment, housing, banking, and vilification. Our lesson from New South Wales is that Anti-Discrimination protections are essential to sex workers accessing the full benefits of decriminalisation.”⁴

A 2020 survey of sex workers conducted by Scarlet Alliance, the Australian Sex Workers Association, in partnership with the UNSW Centre for Social Research in Health found that 96% of sex workers had experienced stigma or discrimination in relation to their occupation in the twelve months prior.⁵ In spite of this, sex workers who are subject to discrimination or vilification currently have no avenues of recourse under the Act or other legislation.

In 2020, the Greens introduced the Anti-Discrimination Amendment (Sex Workers) Bill into the NSW Parliament, in an attempt to address the discrimination specifically faced by sex workers.⁶

Similarly, the Act falls short of offering community members any protection from discrimination or vilification on the basis of an irrelevant criminal record. This creates a troubling loophole in

⁴ Sex Workers Outreach Project, Submission: Review of the Anti Discrimination Act - Queensland, p2, available at: https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0007/38617/Sub.121-Sex-Workers-Outreach-Project-Inc-SWOP-NSW_Final.pdf

⁵ Scarlett Alliance and UNSW Centre for Social Research in Health, Stigma Indicators Monitoring Project, January 2021, available at: <https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/arts-design-architecture/ada-faculty/csrh/2022-01-stigma-indicators-summary-sw-2021.pdf>

⁶ Abigail Boyd MLC, Anti-Discrimination Amendment (Sex Workers) Bill 2020, available at: https://www.abigailboyd.org/anti_discrimination_amendment_sex_workers_bill_2020

which people with a criminal record can be legally discriminated against in a breadth of contexts, including Government run services and supports like the NSW social housing waiting list.

In August 2017, the NSW Coalition Government implemented a new Local Housing Allocation Strategy for Land and Housing Corporation (LAHC) owned public housing properties in the inner city. This strategy, which remains in place, immediately made anyone on the social housing waiting list with a drug conviction within the prior 5 years ineligible for public housing in the Inner City.⁷ The Greens consider this a wholly unacceptable situation, particularly given the worsening housing crisis, and believe it clearly highlights the need to revisit the lack of protections on the basis of an irrelevant criminal record.

2.4. People with a disability

The Greens are concerned by the outdated terminology used in s 49B of the Act, which pertains to people with a disability. In this section, the term “disability” is still defined as a “malfunction, malformation, or disfigurement” - a clear deficit frame that is out of step with the modern understanding of disability.

It is critical that disability advocacy groups and representative organisations, as well as disabled people are directly consulted as part of these reforms given the significant impacts discrimination has on these communities.

We are also troubled that the Act does not presently require employers, educators, providers of goods and services, and others to make “reasonable adjustments” to support the full and equal participation of people with disability in public life. In practice, this means any of the aforementioned entities can indirectly discriminate against people with a disability if they can show that accommodating people with a disability would cause them “unjustifiable hardship”.

⁷ Christopher Knaus, NSW Coalition’s public housing ban for drug dealers would hit innocent, experts warn, 5 April 2018, available at: <https://www.theguardian.com/australia-news/2018/apr/05/nsw-coalitions-public-housing-ban-for-drug-dealers-would-hit-innocent-experts-warn>

The Greens consider this an unacceptable loophole that must be closed to ensure equal protections across the full spectrum of abilities.

3. Exceptions

As the NSW Council for Civil Liberties said in August 2023: “We want an Anti-Discrimination Act that does not discriminate.”⁸ While in theory this is a simple proposition, Part 6 of the Act carves out a number of avenues for discrimination, providing what The Guardian Australia reported as “the widest exceptions to discrimination of any act in the country.”⁹ This is particularly true in the case of non-government educational institutions, which are afforded more leeway in NSW than in any other State or Territory to discriminate against students and staff on the basis of sex, disability, transgender status, homosexuality, and marital or domestic status.

The Greens are opposed to the provision of any exceptions to the blanket obligation not to discriminate or vilify. We do not believe that piecemeal exceptions should be carved out of the Act to allow institutions or individuals to discriminate. This approach enables the granting of exceptions particularly to those with the wherewithal and means to lobby lawmakers and other stakeholders to allow them to ‘legally’ discriminate.

The Greens support the exclusion of any exceptions from the Act, and instead support a requirement for all individuals, groups, or institutions wishing to gain an exemption from the Act, on whatever basis, to apply to Anti-Discrimination NSW (‘ADNSW’). Taking this approach will make it clear that the ADA is there first and foremost to protect people from discrimination. We recognise that there may be some legitimate reasons for exemptions, but do not support blanket exceptions that allow whole sectors or types of organisations to discriminate against whole sections of the population.

⁸ NSW Council for Civil Liberties, Guardian Aus: NSW Council for Civil Liberties says religious vilification bill allows organisations ‘to discriminate against others’, 1 August 2023, available at: https://www.nswccl.org.au/guardian_au_nsw_council_for_civil_liberties

⁹ Christopher Knaus, Advocates say NSW anti-discrimination laws are failing vulnerable, 6 August 2023, available at: <https://www.theguardian.com/australia-news/2021/aug/06/advocates-say-nsw-anti-discrimination-laws-are-failing-vulnerable>

4. Modernisation in response to a changing culture

Since the introduction of the Act in 1977, the social and cultural landscape in NSW has evolved significantly and for the better in several key regards. The decriminalisation of most aspects of sex work in 1995, legalisation of marriage equality in 2017, and decriminalisation of abortion in 2019 were all victories hard won by advocacy and community groups and reflect a broader shift toward more progressive and inclusive values across society. Beyond this, the 2017 #MeToo movement led to a widespread - and still ongoing - reckoning with misogyny and sexism in all spheres of public life.

Yet the Act has failed to keep up with these seismic cultural shifts. Its stagnance in the face of evolving community attitudes toward marginalised groups and individuals has led community groups to declare that “the ADA is out of step with community expectations”.¹⁰ The Greens agree with this assessment, and wish to see the Act strengthened and modernised to reflect the present day context and social climate.

4.1. Protections for First Nations people

While NSW society has undergone significant progressive change since the introduction of the Act over 30 years ago, this progress has not been consistent across all public spheres. The Greens recognise that First Nations people and communities are still disproportionately subject to discrimination and vilification, and that significant action is required to address this. Existing protections against vilification and discrimination on the basis of race notwithstanding, colonisation and ongoing institutional racism toward First Nations people and communities specifically mean that the experiences of these individuals and communities should be treated distinctly from those of other migrant and non-white community groups and individuals.

¹⁰ Ibid n. 2

As such, we believe that as part of this Review it is imperative that robust, genuine consultation - and co-design with - First Nations groups and organisations be undertaken to inform protections in this regard.

4.2. Outdated sexual harassment provisions

One of the most significant shortcomings of the Act is its outdated approach to sexual harassment. Part 2A of the Act, which prohibits sexual harassment, was introduced in 1997 and since this time has not undergone any amendments despite the significant shifts within workplaces and broader NSW society. As such, the Act adopts a definition of sexual harassment that is restricted to conduct “of a sexual nature”¹¹ and does not recognise the full spectrum of behaviour that should be prohibited.

This is similar to the drafting of s 28A of Part 1, Division 3 of the *Sex Discrimination Act 1984* (Cth), which also defines sexual harassment as “an unwelcome sexual advance, or an unwelcome request for sexual favours” or “unwelcome conduct of a sexual nature” in circumstances where a reasonable person would anticipate that the person on the receiving end of the behaviour would be offended, humiliated, or intimidated.

However, in its 2020 Respect@Work Inquiry, the Australian Human Rights Commission recommended reform¹² of the Commonwealth provisions in Part 1, Division 3 to expressly prohibit:

- Sex-based harassment; and
- Creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

¹¹ See s 22A(b) of the Act

¹² Australian Human Rights Commission, *Respect @Work: Sexual Harassment National Inquiry Report* (2020), 29 January 2020, p43, available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>

While The Greens do not offer precise wording for similar reforms to the Act, we strongly support the definition of “sexual harassment” being broadened to recognise the spectrum of harmful behaviour in this regard.

The Greens are also deeply concerned by the Act’s failure to prohibit sexual harassment in all areas of public life. Unlike counterpart anti-discrimination legislation in Queensland, the Act leaves numerous gaps in which it is unclear whether someone has a course of action against sexual harassment; for example in registered clubs, situations of unpaid work, or self-employment. We believe that coverage of the Act needs to be extended to fill each of these gaps as a matter of priority, so everyone is protected from sexual harassment in every public arena.

4.3. Online vilification

The Greens understand that the general attitude amongst legal experts is that actions undertaken online may constitute a “public act” giving rise to remedy through existing vilification provisions in the Act. That said, we are concerned that as new social media and online technologies proliferate, there is a need to address how people are protected against vilification in the online space.

In April 2023, a survey conducted by the Trans Justice Project and Victoria Pride Lobby found that 49% of trans respondents had experienced anti-trans hate online in the year prior.¹³ With anti-trans rhetoric and other forms of hate speech on the rise both online and in person, The Greens believe it is timely and important for this Review to consider whether targeted protections in this regard are appropriate and necessary.

Amnesty International’s Toxic Twitter report in 2018 found that “The violence and abuse many women experience on Twitter has a detrimental effect on their right to express themselves

¹³ Emily Chudy, Half of all trans Australians experience hate, study finds, 8 September 2023, available at: <https://www.thepinknews.com/2023/09/08/australia-anti-trans-hate/>

equally, freely and without fear.”¹⁴ It is clear that the impact of vilification online extends beyond this platform to many other social media platforms and as these reports and the establishment of the Federal eSafety Commissioner demonstrates, there is a lot more work that needs to be done in this space.

It is critical that this Review consider whether the Act provides adequate protection and remedies for handling the significant increase in online vilification as these platforms and their use have expanded.

5. Concerning protections from religious vilification

The Greens have serious concerns with the protections against religious vilification conferred by the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* ('the Bill'), which was introduced by the Minns NSW Labor Government and passed NSW Parliament in August 2023. We expressed these concerns at the time of debating the Bill and, with the support of PIAC and the NSW Council for Civil Liberties, attempted to bring reasonable amendments that would address each of these concerns in turn. We understand that the new s 49ZD contained in this Bill is also under consideration as part of this Review.

The Greens did not support the introduction of new protections from religious vilification before the completion of this Review and ahead of any efforts to close the coverage gaps identified in Section 2 of this submission. At the time, we cautioned against this ad hoc approach to reform and the message it sent to communities that the rights and interests of some community groups - namely people of faith - were considered more worthy of protection than others. In particular, we expressed concern about the lack of protections for several subsets of the LGBTQIA+ community, as outlined in Section 2.

The Greens continue to hold this concern and believe it is imperative that any changes to the Act following this Review are undertaken in a sensitive, strategic manner so that protections against

¹⁴ Amnesty International, *Toxic Twitter - A Toxic Place for Women*, March 2018, available at: <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1-1/>

discrimination and vilification are extended to all who require them in an equal and consistent manner.

5.1. Extension of protections beyond natural persons

One of the key objects of The Greens' amendments to the Bill was to ensure that only natural persons - and not corporations - are protected from religious vilification. This position was supported by both PIAC and Council for Civil Liberties, who similarly took issue with the Bill's usage of the term "person" and derivatives thereof. As the former wrote in a letter to the Attorney-General, Shadow Attorney-General, and crossbench Members of the Legislative Assembly:

*"This is also a problem in practice, as it would allow larger, well-funded and resourced religious organisations to bring vilification complaints against individuals, with a potentially chilling effect on public criticism of these bodies."*¹⁵

The Greens share these grave concerns of the "potentially chilling effect" on civil society that granting protection to organisations is likely to have. Beyond this, we are opposed to the principle of organisations being granted protections from vilification and agree with the Australian Discrimination Law Experts Group's assertion that while bodies corporate and other organisations should "be prohibited from *engaging in* discriminatory conduct, such bodies should not be permitted to themselves *bring a claim of discrimination*."¹⁶ It is our view that this logic should be extended to considering whether organisations warrant protection against vilification.

¹⁵ Ibid n. 2.

¹⁶ Australian Discrimination Law Experts Group, Submission re the Religious Discrimination Bill 2019 (Cth) Second Exposure Draft, 30 January 2020, p28, available at: <https://www.adleg.org.au/submissions/federal-religious-discrimination-bill-second-exposure-draft-jan-2020>

5.2. Protection of unlawful religious activity

The Greens amendments to the Bill also sought to restrict the scope of protected religious activity only to activity not unlawful under another Act or otherwise, as is the case under both Queensland and Victorian anti-discrimination law. Again, this was consistent with the approach recommended by PIAC, who described the protection of unlawful religious activity as “excessively broad”¹⁷ and questioned why those engaging in unlawful religious activity should receive greater protections than those engaged in, for example, lawful charitable or community activity.

It remains the view of The Greens that only lawful religious activity should be protected from vilification under the Act. We do not wish to see a situation in which fair public criticism of an unlawful religious act - for example praying within the safe access zone outside an abortion provider clinic - can be the subject of a civil claim for religious vilification. Such a situation would, in our view, have the effect of muzzling fair criticism and denunciation of unlawful religious activity that intimidates or impinges on the freedoms of others.

5.3. Lack of clear definition of “religious belief”

In 2021, The Greens supported an earlier iteration of the Bill, brought by then-Shadow Attorney-General Paul Lynch (‘the Lynch Bill’), that clearly defined “religious belief and affiliation”. In the Lynch Bill, this term was defined in the same manner as in s 93Z of the *Crimes Act 1900* (NSW): as “holding or not holding a religious belief or view”. Disappointingly, this definition was absent from the Bill that passed NSW Parliament in August 2023.

The Greens sought to amend the Bill to bring it in line with the wording of the Lynch Bill - which at the time had cross-partisan support - and s 93Z of the *Crimes Act 1900* (NSW) and eliminate any ambiguity as to the interpretation of “affiliation” in this context. It is our view that inserting a clear definition along the lines described above remains necessary to prevent the bringing of religious vilification claims by individuals who do not genuinely hold or not hold a religious belief or view.

¹⁷ Ibid n. 2.

6. Accessibility & intersectionality

The piecemeal reforms of the Act undertaken since 1977 have resulted in a complex, confusing structure that is all but impenetrable to the average community member seeking remedy for discrimination or vilification. In their 2021 report “Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act”, PIAC acknowledged that the idiosyncratic and repetitive structure of the Act makes it “confusing – even for legal practitioners who use it frequently”.¹⁸ This is a significant stumbling block for a piece of legislation that is supposed to provide an accessible pathway for making a complaint to Anti-Discrimination NSW and enable the conciliation of these complaints without legal representation, and The Greens believe this must be addressed.

Beyond looking to anti-discrimination laws in Victoria, Queensland, Tasmania, and the Northern Territory that adopt a clearer and more comprehensible structure than the Act, significant reform is necessary to recognise that discrimination and vilification often occur at the nexus of several grounds. For example, it is not uncommon for behaviour that discriminates toward a person of colour who identifies as female to be on the basis of both their gender and race. The current structure of the Act does not recognise this reality, and instead treats discrimination and vilification on the basis of different attributes as mutually exclusive.

6.1. Expanding the jurisdiction of ADNSW

The Greens recognise that enhancing the accessibility of remedies through ADNSW will require more than simply amending the Act. It is our view that accessibility could also be improved by relieving some of the burden on people who have experienced discrimination or vilification to make a complaint and empowering ADNSW to undertake proactive systemic issues work and analysis.

¹⁸ Ibid n.2, p14.

The Greens would like to see consideration of a model of expanded jurisdiction for ADNSW that enables it to undertake inquiries and proactively conduct research to identify and address systemic issues, rather than relying on individual complaints data. It is our view that consideration of this and possible models should form part of this comprehensive Review.

This expanded jurisdiction could also be supported by the provision of greater funding for community education and outreach, as well as legal aid, legal centres and in-house legal support that would assist those without the means to seek independent legal representation to bring a complaint themselves. This could be supplemented by additional resourcing to the ADNSW for the purposes of monitoring for emergent and systemic issues, as well as the introduction of a requirement for ADNSW to regularly report on these issues to a higher body such as NSW Parliament.

6.2. A broader framework for human rights

The Greens recognise that anti-discrimination law does not exist in a vacuum, and must be supported by a broader commitment to equality through a robust human rights framework. We know that offering remedies for those who have suffered discrimination or vilification is not the same as preventing these acts from occurring in the first place, and that both preventive and remedial measures are necessary.

As such, beyond strengthening this Act we are strongly supportive of the establishment of a NSW Human Rights Act or Charter that - akin to human rights legislation in Victoria, Queensland and the ACT - makes it clear that all people in those jurisdictions have human rights that must be respected and protected.

7. Conclusion

The NSW Anti-Discrimination Act once represented the leading age of anti-discrimination law in this country: following this Review, we hope to see it resume this status once again. While The

Greens are acutely aware of the aforementioned numerous shortcomings of the Act in its current form, we believe that reforms could help address these shortcomings and strengthen and expand protections for groups in our community that require them.

As the Review progresses we look forward to engaging in more detail in relation to each of the above points in due course, and to working with community groups and civil society organisations, and the people impacted by this reform, to ensure their concerns are heard and addressed.