Review of Anti-Discrimination Act 1977 (NSW)
Unions NSW Preliminary Submission
October 2023

Unions NSW

About Unions NSW

Unions NSW is the peak body for trade unions and union members in New South Wales. We have 48 affiliated trade unions and trades and labour councils, who collectively represent more than 600,000 union members working across all industries in NSW. Affiliated unions cover the spectrum of the workforce in both the public and private sectors.

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List of abbreviations

Abbreviation	Meaning
AD Act NSW	*Anti-Discrimination Act 1977* (NSW)
AMWU	Australian Manufacturing Workers Union
ETU	Electrical Trades Union
FW Act	*Fair Work Act 2009* (Cth)
IEU	Independent Education Union
NCAT	NSW Civil and Administrative Tribunal
NSWIRC	NSW Industrial Relations Commission
NSWNMA	NSW Nurses and Midwives Association
SD Act	*Sex Discrimination Act 1984* (Cth)
ToR	Term of Reference
UWU	United Workers Union

Contents

Introduction

1. Unions NSW welcomes the opportunity to make a submission to the NSW Law Reform Commission review into the *Anti-Discrimination Act 1977* (NSW) ("**AD Act NSW**"). As the NSW peak industrial organisation for employees and unions, our submission focusses on reforms that Unions NSW believes are required to strengthen anti-discrimination protections in the workplace.

2. Our overall view is that the AD Act NSW must be amended to keep pace with modern understandings of anti-discrimination and be consistent with the generally better protections in other jurisdictions in Australia. We provide in these preliminary submissions 23 recommendations addressing 8 out the 12 terms of reference for this review.

Part 1: Range of attributes protected (ToR 1)

Recommendation 1: Add protected attribute: Trade union or industrial activity

3. We recommend "trade union activity" or "industrial activity" to be a protected attribute in the AD Act NSW.

4. Union delegates and members are targeted at work for standing up for their rights. As such, they should be protected against discrimination in NSW state anti-discrimination laws. Recent examples from court and tribunal decisions include:
    a. In 2023, a court found that a lift repair company terminated two employees within one month of them agreeing to become union delegates for the ETU and AMWU. The court said the termination was to send "a clear message to other employees that engaging with the unions, and pressing workplace rights, was likely to result in serious consequences in terms of continued employment" and ordered $200,000 in compensation and penalties.[1]
    b. In 2021, a AMWU union delegate and 25-year employee of a potato processing plant was reinstated to his job by the FWC after he was sacked and falsely accused by his employer of lying and falsifying documents.[2]
    c. In 2020, a UWU union delegate at a casino was awarded compensation for discrimination by his employer when he spoke to the media in his role as a delegate about his employer refusing to provide workers with assurances about the employment conditions of workers during the sale of the casino to another company.[3]

5. Various jurisdictions in Australia already protect discrimination against trade union activity or industrial activity: Commonwealth, Victoria, Queensland, Tasmania, NT

[1] *Australian Manufacturing Workers' Union v United Lift Services Pty Ltd* [2023] FedCFamC2G 275; *Australian Manufacturing Workers' Union v United Lift Services Pty Ltd (No 2)* [2023] FedCFamC2G 614.
[2] *Moszko v Simplot Australia Pty Ltd* [2021] FWCFB 6046; see also the first instance decision at *Moszko v Simplot Australia Pty Ltd* [2021] FWC 2404.
[3] *Kidman V Casino Canberra Ltd* [2020] ACAT 50.

and ACT.[4] The addition of this attribute to AD Act NSW will bring NSW in line with these jurisdictions.

Recommendation 2: Add protected attribute: Being subjected to family and domestic violence

6. We recommend "being subjected to family and domestic violence" to be a protected attribute in the AD Act NSW.

7. Anti-discrimination law must play its part in reducing the incidence of family and domestic violence. The Australian Bureau of Statistics estimates that 3.8 million Australian adults (20% of the population, 2.7 million women and 1.1 million men) have experienced physical and/or sexual family and domestic violence.[5] Family and domestic violence has serious consequences on workers, including not being able to attend work or not being able to fully participate in the workplace.

8. The ability to discriminate against a person experiencing family and domestic violence (e.g. terminate a person's employment) entrenches that person in violence. If workers were protected against discrimination on this basis, workers will feel more supported to disclose their status without fearing negative consequences at work.

Recommendation 3: Add protected attribute: Pregnancy

9. We recommend "pregnancy" to be a protected attribute in the AD Act NSW. We provide three reasons for our proposal.

10. First, by not having pregnancy as its own attribute, the AD Act NSW is out of step with the anti-discrimination laws of *every other state*.[6] Pregnancy is not a protected attribute in its own right in the AD Act NSW. Rather, pregnancy is part of the definition of the discrimination on the ground of sex in s 24(1B) of the AD Act NSW.

11. Second, the benefit of having a pregnancy as its own attribute means that the characteristics of being pregnant (e.g. morning sickness, tiredness, increased urination etc) are unequivocally protected by the AD Act NSW. The current protection arguably only applies to the *fact of* being pregnant as an extension of the "sex" characteristic by virtue of 24(1B) of the AD Act NSW.

12. Third, the current treatment of pregnancy as a characteristic of sex (women) in the AD Act NSW may exclude people who are pregnant but are not women (e.g. transgender men or transmasculine people).

Recommendation 4: Add protected attribute: Political view or activity

[4] *Equal Opportunity Act 2010* (Vic) s 6(f); *Anti-Discrimination Act 1991* (Qld) s 7(k); *Anti-Discrimination Act 1998* (Tas) s 16(1)(l); *Discrimination Act 1991* (ACT) s 7(1)(j); *Anti-Discrimination Act 1992* (NT) s 19(1)(k).
[5] Australian Bureau of Statistics, *Personal Safety, Australia, 2021-22 financial year (ABS website)* (accessed 2 October 2023).
[6] *Equal Opportunity Act 2010* (Vic) s 6(l); *Anti-Discrimination Act 1991* (Qld) s 7(c); *Equal Opportunity Act 1984* (SA) ss 85T(1)(c) and 85T(4); *Equal Opportunity Act 1984* (WA) s 10; *Anti-Discrimination Act 1998* (Tas) s 16(1)(g); *Discrimination Act 1991* (ACT) s 7(1)(o); *Anti-Discrimination Act 1992* (NT) s 19(1)(f)

13. We recommend "political view or activity" to be a protected attribute in the ADA NSW.

14. In addition to workplace activism, unions have a proud history of participating in social movements, community, and political campaigning. Political and social movements have fought for things we consider part and parcel of Australian life such as women's right to vote and equal pay, indigenous land rights, marriage equality and heritage protection. No one should be discriminated against for their political activity. Anti-discrimination law should play a part in protecting the equality of those who express their political views and participate in political activity.

Recommendation 5: Add protected attribute: Irrelevant criminal record

15. We recommend the addition of "irrelevant criminal record" as a protected attribute in the AD Act NSW.

16. It is appropriate for certain jobs to exclude people with certain types of criminal records. However, the ability for employers to discriminate in this way should not be unqualified. Having a criminal record has adverse consequences for a person's employment, employment prospects and economic security. Anti-discrimination law should play a part in protecting the equal participation of workers with a criminal record in the part of the workforce for where their criminal record is irrelevant to the job that they hold or are applying for.

Recommendation 6: Add protected attribute: Sexuality

17. We recommend the addition of "sexuality" as a protected attribute in the AD Act NSW.

18. The AD Act NSW prohibits discrimination on the ground of "homosexuality",[7] which is defined to include a "male or female homosexual".[8] This is an outdated and narrow term and should be replaced with "sexuality", which is more encompassing. The current limitation of "homosexuality" to "male or female homosexual" excludes bisexuality and other forms or sexuality.

Recommendation 7: Add protected attribute: Intersex status

19. We recommend the addition of "intersex" as a protected attribute in the ADA NSW.

20. Section 38A(c) ADA NSW currently protects a person of "indeterminate sex" but only if that person "identifies as a member of a particular sex by living as a member of that sex" within the definition of a "transgender person". While this definition may protect some intersex people, this protection is indirect and not all intersex people are protected from discrimination within this definition.

[7] AD Act NSW ss 49ZF-49ZR
[8] AD Act NSW ss 4 definition of "homosexual"

21. It is more appropriate to recognise intersex and transgender as separate attributes, as these terms have significant differences. "Transgender" or "trans" are "umbrella terms used to refer to people whose assigned sex at birth does not match their gender identity. Trans people may choose to live their lives with or without modifying their body, dress or legal status, and with or without medical treatment and surgery".[9] "Intersex" is "an umbrella term that refers to individuals who have anatomical, chromosomal and hormonal characteristics that differ from medical and conventional understandings of male and female bodies".[10]

Recommendation 8: Add protected attribute: Religion

22. We recommend the addition of "religion" as a protected attribute in the ADA NSW.

23. People should not be discriminated against based on their religious belief or lack of religious belief. We point to the example provided by NSWNMA in this regard. Nurses and midwives who are members of NSWNMA have expressed concerns about discrimination with regards to religious dress such as wearing headscarves.[11] We say that religious discrimination such as the example provided have no place in a modern Australia.

Recommendation 9: Recognise the intersectionality of protected attributes

24. We recommend the AD Act NSW recognise that discrimination can be because of the intersection or compounding effect of more than one protected attribute.

25. Section 4A of the AD Act NSW recognises that discrimination can be done for multiple reasons or "2 or more reasons". However, s 4A does not explicitly recognise the intersection, compounding or overlap of those multiple reasons. The approach in s 4A is what is described as an "additive" approach[12] to discrimination in contrast to the "compounding" or "multiplicative" approach.

26. The Commission for Gender Equality in the Public Sector in Victoria provides a succinct example of the idea of how the "additive" approach to multiple discrimination or the failure to recognise compounding effect of more than one protected attribute can lead to absurd consequences. The Commission says:[13]

> *The concept of intersectionality was coined by Professor Kimberlé Crenshaw in 1989. In developing 'intersectionality' as a concept, Crenshaw cited a court case where a group of African-American women argued that a manufacturing company had refused to hire them on the basis on their race and gender. However, the court ruled that the company was not guilty of discriminatory*

[9] Australian Institute of Family Studies, Australian Government, "LGBTIQA+ glossary of common terms" (February 2022, website) (see definition of "Transgender/Trans" under heading "Gender")
[10] Australian Institute of Family Studies, Australian Government, "LGBTIQA+ glossary of common terms" (February 2022, website) (see definition of "Intersex" under heading "Bodies and variations in sex characteristics")
[11] NSW Nurses and Midwives Association, Preliminary Submission to NSW Law Reform Commission, *Anti-Discrimination Act review* (27 September 2023) p 2
[12] Alysia Blackham and Jeromy Temple, "Intersectional Discrimination in Australia: An Empirical Critique Of The Legal Framework", [2020] 43(3) *UNSW Law Journal* Volume p 777
[13] Commission for Gender Equality in the Public Sector, Victorian Government, "Applying intersectionality' (February 2022, website)"

> *hiring practices based on race, because they had hired African-American men to work on the factory floor.*
>
> *The court also ruled that the company had not discriminated on the basis of gender, as they hired white women for office-based roles. What the court failed to consider was the intersection of race and gender and the compounded discrimination faced by African-American women.*

27. There are international examples of recognising intersectionality in discrimination law. For example, section 3.1 of the Canadian *Human Rights Act*, RSC 1985, c H-6 provides, "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". We propose a recognition of intersectionality similar to that contained in the Canadian *Human Rights Act*.

Part 2: Tests for discrimination (ToR 3)

Recommendation 10: Remove the requirement of a comparator

28. We recommend the removal of the comparator requirement in the AD Act NSW to prove discrimination. A complainant should not need to prove that they were treated "less favourably" because of an attribute, just that they were treated "unfavourably".

29. The AD Act NSW requires that a complainant with a protected attribute prove that they were treated "less favourably" than in the same circumstances the perpetrator treats or would treat a relevant comparator. For example, section 7(1)(a) provides:

> *(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of race if the perpetrator—*
> *(a) on the ground of the aggrieved person's race or the race of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race*

30. The comparator requirement is problematic for at least three interrelated reasons. First, it is an artificial way of conceptualising discrimination. Second, it has led to confusing methods of describing who a relevant comparator is. Third, the comparator requirement misunderstands the context in which discriminatory conduct occurs. A good example is a case of trade union activity discrimination in the Queensland anti-discrimination jurisdiction: ***Stone & Spelta*** *v Brisbane City Council* [2015] QCAT 507. We focus in the submission the impact of an artificial comparator on the attribute of "trade union activity",[14] even though the problem of the comparator requirement spans various protected attributes.

[14] See in this submission "Recommendation 1: Add attribute: Trade union or industrial activity"

31. In *Stone & Spelta*, Mr Stone and Mr Spelta's were union members. Mr Spelta was also union delegate who represented his colleagues in the workplace. Their employment was terminated after they took unprotected industrial action. 38 other union members also took unprotected industrial action but their employment was not terminated, and were merely issued with warning letters.

32. The employees, employer, and tribunal member each cast the requirement of the comparator in different ways:[15]

> ***Comparison with another person in circumstances that are the same or not materially different.***
>
> *[29] Mr Stone and Mr Spelta's case suggests the appropriate comparator must be the 38 other bus drivers who they say participated in the industrial action. Given the description in the evidence of those people as members of the Union, I do not think they can properly be considered a comparator as they bear a hallmark of the attribute "trade union activity".*
>
> *[30] The Council says the comparator must be a person who engaged in unprotected industrial action but who is not a Union member.*
>
> *[31] I find that the comparison which must be undertaken should be by reference to a person who did not engage in trade union activity, that is, who was not a Union member or delegate and who did not involve himself in industrial issues - but in any event:*
>
> *(a) put passengers off a City Sights bus service in order to stop work without a lawful reason; and/or*
> *(b) stopped work without a lawful reason; and/or*
> *(c) was not at work when directed to resume work; and*
> *(d) had previously been advised stopping work for an unlawful reason was unacceptable.*
>
> *[32] In the circumstances of this case, the comparator is a hypothetical person.*

33. Our view is all three ways of casting the comparator requirement, especially the approach of the employer and tribunal member, are artificial, confusing and lacking the real-life context in which discrimination on the basis of trade union activity occurs. Consider a workplace where union membership is high. In such a workplace, a union member can *never* prove that they have been discriminated against on the basis of trade union activity. Applying the reasoning of the employer and tribunal member, there will unlikely be a relevant comparator within the workplace or "in the same circumstances" where most employees are ostensibly "in the same circumstances" as they are mostly union members.

34. Mr Stone and Mr Spelta are noted to be quite active in the workplace. Mr Spelta is a union delegate[16] while Mr Stone was "raising safety issues, representing the Union's views and disputing the calculation and payment of entitlements to City

[15] ***Stone & Spelta*** *v Brisbane City Council* [2015] QCAT 507
[16] *Stone & Spelta* [20]

Sights' drivers and attending the QIRC in a dispute over City Sights drivers' wages and conditions."[17] As such, one obvious possible difference between Mr Stone and Mr Spelta, and the other 38 employees is their *level of union activity*. They may have been discriminated against because they were more vocal advocates in the workplace. The comparator exercise artificially focuses on finding the appropriate comparator. For example, the tribunal member said that the other 38 union members could not be a relevant comparator because "they [also] bear a hallmark of the attribute "trade union activity"" but fails to understand that discrimination can also occur because of degrees of trade union activism within the workplace.

35. The proposed "unfavourable treatment" approach discards the requirement of a comparator and does away with the artificiality of the comparator exercise. This does not mean there is no comparative analysis. Of course, the example we provide advocates for a comparison of the employees' degree of union activity. Requiring the complainant to prove "unfavourable treatment" is a more realistic way of analysing and describing discrimination because it does not require the search for a "strawman" comparator which may not exist or which may be unsuited to the context of discrimination within a particular workplace or circumstance. In an "unfavourable treatment" analysis, the real cause of discrimination is more likely to be found such as whether union delegates are being targeted because of their higher degree of trade union activity within the workplace.

Part 3: Positive obligations (ToR 6) and Protections against sexual harassment (ToR 5)

Recommendation 11: Add positive obligation on employers to prevent discrimination and harassment

36. We recommend that the AD Act NSW be amended to impose a positive duty on employers to prevent discrimination and harassment by or of their workers as far as is possible. The duty should extend to all protected attributes and be supported by codes of practice that would set out the steps required to be taken by employers to meet the duty and this should be reviewed and updated on a regular basis.

37. The importance of positive duties to protect workers from discrimination and harassment has received prominence in the context of sexual harassment in the last few years. Victoria has had a positive duty to prevent sexual harassment since 2010,[18] and the Commonwealth followed in December 2022.[19]

38. We advocate for a positive duty to prevent discrimination and harassment on the basis of all protected attributes. The criticism applied to the "complaints-based" nature of sexual harassment protections can be applied to anti-discrimination law generally. The "complaints-based" model requires victims of discrimination to

[17] *Stone & Spelta* [19]
[18] *Equal Opportunity Act 2010* (Vic) s 15
[19] SD Act Cth s 47C

recognise the discriminatory conduct and bear the burden of making a complaint before any action will be taken. Conversely, a positive duty that requires employers to prevent discrimination and harassment by or of their workers as far as is possible shifts this burden. An employer subject to the positive duty must take proactive and preventative action.[20]

Recommendation 12: Add positive obligation on employers to make reasonable adjustments for workers with a disability

39. We recommend that the AD Act NSW be amended to add an obligation for employers to make reasonable adjustments for workers with a disability.

40. There is no specific obligation in the AD Act NSW to provide reasonable adjustment for workers with a disability, subject to some limited circumstances where not providing certain "services or facilities" to a worker with a disability will be indirect discrimination. For example, Anti-Discrimination NSW provides an example of a successful mediation of a disability discrimination complaint against an employer for failing to provide equipment and training to a worker relating to her hearing disability.[21] However, cases interpreting section 49B have consistently affirmed that "the disability discrimination provisions in the [AD Act NSW] do not require an employer to alter the duties of a job in order to accommodate a person with a disability in any circumstances".[22]

41. In our view if an employee with a disability is able to adequately perform the genuine and reasonable requirements of their employment, employers should make reasonable adjustments for that employee to perform those requirements. There is room for AD Act NSW to be more inclusive of workers with a disability. The legislative choices available for NSW Parliament include existing positive obligations on employers to provide reasonable adjustments for workers with a disability from other jurisdictions, such as s 20 of the *Equal Opportunity Act 2010* (Vic) and s 15(2) of the *Disability Discrimination Act 1992* (Cth).

Recommendation 13: Add positive obligation on employers to redeploy workers or offer suitable duties with a disability

42. We also recommend that the Law Reform Commission consider a further positive obligation on employers to redeploy workers or offer suitable duties with a disability.

43. As an extension to the reasonable adjustments obligations, employers should be required to examine their operations and options for a worker holistically before terminating the service of workers with a disability.

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[20] See, for example, the reasoning in Australian Human Rights Commission, 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces' (Final Report, 2020) p 479

[21] Anti-Discrimination NSW, "Disability discrimination case studies: Negative comments about hearing loss and equipment not provided" (Webpage, April 2021)

[22] *Laycock v Commissioner of Police, NSW Police* [2006] NSWADT 261 [57]; affirmed on appeal in *Laycock v Commissioner of Police, NSW Police (EOD)* [2007] NSWADTAP 34 [41]-[42] and in subsequent cases such as *Edmundson v Endeavour Foundation* [2011] NSWADT 96 [19]; *McLachlan v Endeavour Coal Pty Ltd* [2009] NSWADT 312 [52]

44. The AD Act NSW anti-discrimination laws narrowly focus upon the "particular work" of a worker with a disability. The is anachronistic and fails to recognise two things. First, that many employers have the capacity to reassign workers or offer other suitable duties within their enterprise. Second, many modern workplaces now have more inbuilt flexibilities that employers can use to better accommodate workers with a disability.

45. We propose a legislative approach akin to that found in workers compensation legislation. We draw your attention to s 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) which protects workers with a disability by obliging their employers to explore and, where possible, offer suitable duties or redeployment, instead of proceeding to termination where the inherent requirements of particular work cannot be fulfilled:

> ***9 Employer must provide suitable work***
>
> *(1) If a worker who has been totally or partially incapacitated for work as a result of an injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer liable to pay compensation to the worker under this Act in respect of the injury must at the request of the worker provide suitable employment for the worker.*
>
> *Maximum penalty—50 penalty units.*
>
> *(2) The employment that the employer must provide is employment that is both suitable employment (as defined in section 32A of the 1987 Act) and (subject to that qualification) so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was at the time of the injury.*
>
> *(3) This section does not apply if—*
>
> *(a) it is not reasonably practicable to provide employment in accordance with this section, or*
>
> *(b) the worker voluntarily left the employment of that employer after the injury happened (whether before or after the commencement of the incapacity for work), or*
>
> *(c) the employer terminated the worker's employment after the injury happened, other than for the reason that the worker was not fit for employment as a result of the injury.*

46. Aligning anti-discrimination law with workers compensation laws to oblige employers to explore and offer suitable duties or redeployment would have the added benefit of eliminating the confusion which arises when workplace injuries are disputed or where a worker has a combination of workplace and non-work related injuries.

Part 4: Exceptions, exemptions and special measures (ToR 7)

Recommendation 14: Remove wide-ranging exceptions for private educational authorities to discriminate

47. Unions NSW agrees with the IEU submission that there should be a review of the broad scope of exemptions under the Act for employees in private educational institutions.[23] Many of the existing exemptions are unrelated to the religious ethos of non-government schools.

Recommendation 15: Remove exceptions for small employers to discriminate

48. We recommend that the wide-ranging exceptions for smaller employers to discriminate be removed.

49. Small employers are allowed to discriminate "where the number of persons employed by the employer, disregarding any persons employed within the employer's private household, does not exceed 5". This exception allows small employers to discriminate on the basis of sex,[24] marital or domestic status,[25] transgender status,[26] disability,[27] carer responsibility,[28] and homosexuality.[29] Why should a small employer be able to discrimination against a woman, a carer or a lesbian in employment? This has no place in modern Australia and is out of step with other jurisdictions in Australia. This exemption is unreasonable and concerning given the numbers of people employed by small employers in NSW is more than 25% of the workforce.[30]

Part 5: Adequacy and accessibility of complaints procedures and remedies (ToR 8)

Recommendation 16: Improve resourcing of Anti-Discrimination NSW such that complaint processing times can be decreased

50. We recommend that the resourcing of Anti-Discrimination NSW of complaints-handling and investigative staff be increased to an appropriate level such that conciliation and investigation of claims can be completed within a reasonable timeframe.

51. On this issue, we draw the NSWLRC's attention to the submission made by the New South Wales Nurses and Midwives' Association ("**NSWNMA**") to this review on 27 September 2023. They say:[31]

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[23] Independent Education Union of Australia NSW/ACT Branch, Submission to NSW Law Reform Commission, *Anti-Discrimination Act review* (27 or 29 September 2023)
[24] AD Act NSW s 25(3)(b)
[25] AD Act NSW s 40(3)(b)
[26] AD Act NSW s 38C(3)(b)
[27] AD Act NSW s 49D(3)(b)
[28] AD Act NSW s 49V(3)(b)
[29] AD Act NSW s 49ZH(3)(b)
[30] Australian Bureau of Statistics, *Australian industry 2021-22 financial year* (Catalogue No. 8155.0, 26 May 2023) and Unions NSW calculations. We arrived at the 25% figure for NSW by looking at the spreadsheet with the code and title "81550DO007_202122 Australian Industry, 2021-22". For 2021-22, employees employed by "micro businesses" in NSW were 1,006,000 out of a total of 4,013,000 employees in NSW. Micro businesses are defined as those with 0-4 employees. This is not an exact match with the "small employer" referred to in the exception which is 0-5 employees "disregarding any persons employed within the employer's private household".
[31] NSW Nurses and Midwives Association, Preliminary Submission to NSW Law Reform Commission, *Anti-Discrimination Act review* (27 September 2023) p 5

> *On our most recent application to Anti-Discrimination NSW in August of this year, we were informed that the preliminary assessment of our member's claim would not commence for six months. In matters involving loss of employment, such a delay can serve as significant deterrent for victims of discrimination to make complaints and can compound the psychosocial effects of discrimination on victims.*

Recommendation 17: Add NSW Industrial Relations Commission or Industrial Court as alternative jurisdiction

52. We recommend that the NSWIRC (or a returned NSW Industrial Court or both) have concurrent jurisdiction over anti-discrimination complaints under the ADA NSW for work-related complaints.

53. There are three immediate benefits in this proposal. First, the NSWIRC is an expert and specialist body dealing with workplace disputes. As such, it is better appraised with workplace issues than a generalist tribunal such as NCAT.

54. Second, for work-related complaints, the NSWIRC can be a one-stop shop for discrimination complaints as it already exercises both conciliation and arbitral functions. This is a simpler process for workers, such as those in precarious employment arrangements, and those on low wages including those employed in the highly feminised and highly diverse disability and community services sectors as 'platform workers' who are less likely to have the resources to deal with more lengthy and complex processes offered by other agencies. We contrast this with the current two-stage split between Anti-Discrimination NSW and NCAT in exercising conciliation and arbitral functions under the ADA NSW.

55. Third, the first return date at the NSWIRC usually happens within a few weeks of the filing of a complaint. There are also options to request that the NSWIRC hear a matter urgently, within a few days. These timeframes are significantly quicker than the six months commencement of preliminary assessment as described by NSWNMA in their submission.[32]

56. Obviously, giving extra responsibilities to the NSWIRC must be accompanied with additional resourcing. The increase in resourcing must be appropriate to cover any increase in responsibilities.

Recommendation 18: Allow complainants to have direct access to tribunals for complaints

57. We recommend a right of direct access to courts and tribunals for breaches of the ADA NSW, such as that which currently exists in Victoria.[33]

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[32] NSW Nurses and Midwives Association, Preliminary Submission to NSW Law Reform Commission, *Anti-Discrimination Act review* (27 September 2023) p 5

[33] *Equal Opportunity Act 2010* (Vic) s 122 ("A person may make an application to the Tribunal in respect of an alleged contravention of Part 4, 6 or 7, *whether or not* the person has brought a dispute to the Commission for dispute resolution.")

58. There is currently a two-stage complaints process under the ADA NSW.[34] The first stage requires the complainant to make a complaint to Anti-Discrimination NSW. Only if Anti-Discrimination NSW refers the complaint to NCAT does the second stage commence, being that the complainant can then access NCAT to have their discrimination claim assessed.

59. This two-stage complaints process is long, cumbersome and is therefore discouraging of those who may otherwise wish to make a complaint. Again, using the words of NSWNMA, "such a delay can serve as significant deterrent for victims of discrimination to make complaints and can compound the psychosocial effects of discrimination on victims."[35]

Recommendation 19: Remove compensation cap

60. We recommend the removal of the compensation cap in the AD Act NSW.

61. We provide three main reasons. First, the NSW cap of $100,000 is a patently insufficient amount in 2023. Damages in discrimination claims in other jurisdictions now are routinely above $100,000. At this amount, it is also not economically viable for a worker to choose to pursue a claim with the assistance of a paid legal representative. Second, all jurisdictions in Australia other than NSW, WA and NT have no cap for damages or compensation. The position in NSW should be consistent with the majority of states and territories. Third, $100,000 is not a sufficient deterrent against poor behaviour by employers.

Recommendation 20: Extend time limits to 6 years

62. We recommend the time limit to bring a complaint in the Act NSW be extended to 6 years, which is the general civil claim time limit.[36]

63. Section 89B of the AD Act provides that a complaint may be declined if the conduct occurred more than 12 months prior to the complaint being made.

64. Short time limits are a significant and unnecessary barrier for the reporting of discrimination and harassment. The 12-month time limit does not account for the context in which discrimination and harassment occurs. Discrimination and harassment can often be traumatic and embarrassing. It often happens when there is a power imbalance between the harasser and the person being harassed. Those who have been discriminated against may not immediately come forward for fear of not being believed or retaliation. The extension of the time limit would encourage more complainants to come forward.

Recommendation 21: Strengthen vicarious liability provision

65. In the employment context, we recommend amending the vicarious liability provisions in the AD Act NSW:

[34] AD Act NSW Part 9
[35] NSW Nurses and Midwives Association, Preliminary Submission to NSW Law Reform Commission, *Anti-Discrimination Act review* (27 September 2023) p 5
[36] See, for example, FW Act Cth, s 544

a. To attribute liability on the employer for all conduct which is done "in connection with" the employment of an employee; and
b. To remove the ability for employers to avoid liability by post facto "unauthorising" the discriminatory conduct.

66. The vicarious liability provisions in the AD Act NSW appear to allow an employer to escape liability for its employee's discriminatory conduct merely by telling the employee *after* the conduct had taken place that the employer did not authorise the conduct. Section 53(1) of the AD Act NSW confusingly provides:

    An act done by a person as the agent or employee of the person's principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also 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.*

    [emphasis in **bold** added]

67. The ability for employers (and principals) to post facto "unauthorise" discriminatory conduct is a plausible interpretation of section 53(1). The ability of an employer to avoid liability in this way renders this provision useless.

68. The AD Act NSW should instead adopt the standard formulation of vicarious liability, such as that contained in section 106 of the SD Act, where employers are vicariously liable for discriminatory conduct of its employees done in connection with" the employment of an employee.

Part 6: Powers and functions (ToR 9) and any other matters relevant (ToR 12)

Recommendation 22: Add union enforcement powers

69. We recommend that unions should be given powers under the AD Act NSW to enter and investigate workplaces in relation to suspected cases discrimination and sexual harassment.

70. Unions are experts in workplaces and the needs of workers they represent. In both state and federal jurisdictions, unions are the main enforcers of workplace laws. As such, unions are also best placed to enforce anti-discrimination laws and provide the unique and essential support to workers who are experiencing harassment and discrimination. Having unions as a partner in enforcement lightens the resourcing burden of Anti-Discrimination NSW.

Recommendation 23: Revise structure of the Anti-Discrimination Act

71. We recommend the structure of the AD Act NSW be revised to accord with the modern structure of anti-discrimination legislation such as in the FW Act or *Equal Opportunity Act 2010* (Vic), where protected attributes are handily in a single section.

72. The current structure of the AD Act NSW places each protected attribute and exceptions to that attribute in their own parts, with between 10-20 sections dealing with each attribute. This is confusing and repetitive and makes the legislation unnecessarily long. For example, various protected attributes have been added to the AD Act NSW since the first iteration of the legislation. Confusingly, between the consecutive numbers of sections 49 and 50, there are 80 sections named 49A to 49ZYY dealing with 6 protected attributes.

Conclusion

73. Thank you for the opportunity to provide a preliminary submission. We hope our recommendations help contribute to the review's modernisation of the AD Act NSW and expand its protective scope. We look forward to the next stages of the review.