

Transport  
for NSW

Preliminary Submission to the Review  
of the *Anti-Discrimination Act 1977*  
(NSW)

October 2023

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## Introduction

Transport for NSW ('Transport') was established in 2011 and is the lead agency of the NSW Transport portfolio. Other agencies include Sydney Trains, NSW Trains, Sydney Metro and Point to Point Commission. Transport is one of the largest employers in the NSW Government sector with over 30,000 employees and has a deeply embedded commitment to diversity and inclusion of our workforce.

Transport currently holds an exemption order under section 126 of the *Anti-Discrimination Act 1977* (NSW) ('the Act') to support targeted recruitment and development programs for women, Aboriginal and Torres Strait Islander people, people with a specific disability, people under the age of 25, and Refugees and Migrants on a relevant visa (**ATTACHMENT A**). The exemption order enables us to run programs and activities to increase the diversity of our workforce, and to contribute to addressing the substantive inequality experienced by certain groups of people in society more broadly.

In addition to our efforts to increase the diversity of our workforce, we also proactively review our policies, procedures, systems and structures to ensure that they do not result in discriminatory (either direct or indirect) outcomes. Through our day-to-day work, we frequently 'engage' with the Act and the protections contained therein.

We welcome the opportunity to provide this preliminary submission into the review of the Act. This preliminary submission makes recommendations on the following points outlined in the review's Terms of Reference:

- whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards (Term of Reference 1)
- whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life (Term of Reference 7)
- exceptions, special measures and exemption processes (Term of Reference 8).

### **Modernising and simplifying the ADA (Term of Reference 1)**

When the Act was first introduced, it was considered to represent leading practice, making NSW the first state or territory in Australia to prohibit racial discrimination, sex discrimination and discrimination based on marital status. Five years after the Act's introduction, homosexuality was included in the Act as a protected attribute, with NSW as the first jurisdiction in Australia to make discrimination on this ground unlawful.

However, the Act is no longer the leader in the field that it used to be. It currently lags behind in the range of protections it offers when compared to other states and territories, as well as those offered by the federal body of anti-discrimination legislation.<sup>1</sup> It uses outdated language that does not reflect current community standards nor terminology widely accepted by NSW Government organisations and others. The Act itself is complex and long, and it contains provisions for administratively cumbersome processes for organisations wishing to use positive discrimination (or affirmative action measures) as a way of addressing substantive inequality and increasing workforce diversity.

For example, the definition of 'disability' in the Act is based on the medical model of disability, which defines disability through the lens of impairment, dysfunction or disfigurement. The leading practice definition of disability, and one adopted by the NSW Government<sup>2</sup> is based on the social model of disability, which defines disability with reference to the interaction between people living with differences and the barriers in the physical, attitudinal, communication and social environment.

*Disability includes long-term physical, mental health, intellectual, neurological, or sensory differences which, in interaction with various attitudinal and environmental barriers, may hinder full and effective participation in society on an equal basis with others. ’*

Other examples of outdated language in the Act include the use of the term ‘homosexuality’, which means the Act does not protect bisexual, heterosexual or other diverse sexualities from discrimination. Protections concerning ‘transgender status’ in the Act only cover individuals who identify as a person of the opposite sex. This excludes people who identify as ‘non-binary’ or gender diverse from protection under the Act. Updating the language in the Act to ‘sexual orientation’ and ‘gender identity’, would remedy the issue.

Both the federal body of anti-discrimination laws and the Act apply in NSW. However, there are significant differences between the protected attributes covered by the Act, and those covered by the federal anti-discrimination laws. This places an added burden on organisations and individuals who want to ensure that they are complying with the relevant legislation. It also makes it more difficult for individuals who want to make a complaint (and seek a remedy) to determine the appropriate forum.

In its review of the Act the New South Wales Law Reform Commission (LRC) should consider modernising the language of the Act to align with leading practice. This would ensure that the Act reflects community attitudes and existing practices of inclusion in existence in many workplaces, including the NSW Government. Further, the LRC should review the protected attributes and available remedies currently contained in the body of federal anti-discrimination legislation, and consider aligning the available protections and remedies with the federal jurisdiction.

#### **Recommendation 1**

That the review of the Act focuses on modernising and simplifying the Act by:

- updating language to reflect leading (and evolving) practice
- considering alignment with the federal body of anti-discrimination legislation as a minimum standard for protected attributes and available remedies.

#### **Positive obligations to prevent harassment, discrimination, and vilification (Term of Reference 7)**

The Act is currently based on a ‘passive’ model of legislation. The law places obligations on organisations to comply, but the burden of seeking a remedy is on individuals who have experienced discrimination, harassment or vilification. The Act places no positive (or proactive) obligation on organisations to *prevent* discrimination, harassment or vilification.

In December 2022, the *Sex Discrimination Act 1984* (Cth) (SDA) was amended to include a positive duty for employers and persons conducting a business or undertaking (PCBUs) to take reasonable and proportionate measures to **eliminate** the following forms of unlawful behaviour as far as possible: sex discrimination, sexual harassment, harassment on the ground of sex, subjecting a person to a hostile working environment on the ground of sex, and victimisation (the positive duty).

The positive duty brings employers’ discrimination and harassment obligations in line with safety obligations that currently exist under workplace health and safety legislation. The benefit of the positive duty is that it is focused on preventing harm – rather than simply responding once the harm has already occurred.

Although the positive duty has only been in force for less than a year<sup>3</sup> it has already started to bring about significant cultural change. It is reshaping the way that organisations like Transport understand the role that employers and workplaces can play in primary prevention, as well as informing their approach to the prevention of and response to inappropriate or unlawful workplace behaviours.

For example, in response to the introduction of the positive duty, Transport has commenced a program of work to identify and remedy (where possible) structural and systemic inequalities embedded in industrial instruments, policies, procedures and practices. The objective of the work is to ensure that Transport's workplaces are free from direct or indirect discrimination on any ground.

Further to this, the introduction of the positive duty has transformed the way in which the prevention of inappropriate workplace behaviours, including discrimination and harassment, is embedded in the organisation's governance and strategic planning processes. Greater consideration and emphasis is given to the need to understand the extent of risk, undertake preventative measures, and to consider preventative measures as part of any response to avoid future harm.

In its review of the Act the LRC should consider amending the Act to include a positive duty to prevent discrimination, harassment, and vilification on the grounds of all of the protected attributes contained therein. A positive duty is likely to bring about significant cultural change in organisations and inevitably lead to a significant and sustained reduction in those behaviours over the medium to long term. This would further enhance the alignment between the Act and the federal SDA, and facilitate further future alignment, as the Australian Human Rights Commission has recommended that all federal anti-discrimination laws be amended to include a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination.<sup>4</sup>

### **Recommendation 2**

That the Act be amended by introducing a positive obligation on employers to take reasonable and proportionate measures to prevent -or eliminate -discrimination, harassment and vilification on the basis of all protected attributes contained in the Act.

### **An obligation to make reasonable adjustments to promote full and equal participation in public life (Term of Reference 7)**

Unlike the *Disability Discrimination Act 1992* (Cth) (DDA), the Act does not currently include a requirement for employers (or anyone) to make reasonable adjustments to support the full and equal participation of people with disability in employment or other areas of public life. This is a significant gap in the Act, and does not address the systemic or structural barriers that lead to the significant underemployment and lack of participation in the workforce by people with disability.<sup>5</sup>

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability made several recommendations to increase the workforce participation of people with disability.<sup>6</sup> The recommendations relevant to public sector agencies were to:

- establish specific and disaggregated targets for disability employment in the public sector (recommendation 7.18), and
- establish specific disability employment targets for new public service hires in agencies and departments (recommendation 7.19).

In its review of the Act the LRC should consider introducing a requirement to provide reasonable adjustments for people with disability. Although such an obligation exists in the DDA, the introduction of an obligation in line with the federal legislation into the Act would likely have a significant positive impact on the ability of people with disability to fully participate in employment and other areas of public life on an equal basis with others. The lack of such an obligation in the Act is not in keeping with NSW Government policy on increasing the employment of people with disability, or community standards.

### **Recommendation 3**

That the Act be amended to include an obligation for employers, educators and the providers of goods and services to make reasonable adjustments to support the full and equal participation of people with disability in all areas of public life.

### **Exceptions, special measures and exemption processes (Term of Reference 8)**

Currently organisations wishing to increase workforce diversity or to address substantive inequality through measures of 'positive discrimination', such as targeted recruitment programs of women into male dominated areas or industries, are required to apply for an exemption order under section 126 of the Act. The current process for applying for an exemption is cumbersome, administratively burdensome for organisations, and not fit-for-purpose for larger organisations with multiple divisions or agencies with differing workforce profiles.

In order to obtain an exemption, an organisation must lodge an application containing the following information:

- a) information about the organisation and what it does, including:
  - the organisational structure (which may include workforce participation rates) and how the proposed exemption programs fit within the organisational structure and why the position or program would benefit the target group
  - any other policies or initiatives undertaken or implemented to address discrimination and how the proposed exemption corresponds to these.
- b) Information about why the exemption is being applied for, including:
  - the sections of the Act that an exemption is required from
  - the length of time the exemption is applied for and the reasons for that length of time
  - an outline of the scope and terms of the exemption (e.g. details of the positions to be designated or an overall workforce participation target)
  - if the application is urgent and the reasons for this
  - an outline of how the proposed exemption meets the criteria in the regulation.
- c) Information about each of the six factors which the President of the Anti-Discrimination Board must take into account when deciding whether to grant an exemption. The six factors are:
  - whether the proposed exemption is appropriate or reasonable
  - whether the proposed exemption is necessary

- whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought
- whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption
- the public, business, social or other community impact of the granting of the proposed exemption
- any conditions or limitations to be contained in the proposed exemption.

d) Any supporting documents.

Transport currently holds an exemption order under section 126 of the Act to support targeted recruitment and development programs for women, Aboriginal and Torres Strait Islander peoples, people with a specific disability, people under the age of 25, and Refugees and Migrants on a relevant visa. The exemption, which is in force for five years, covers Transport for NSW, the State Transit Authority, Sydney Trains, NSW Trains, Sydney Metro Authority and the Point to Point Commission. Altogether, these agencies within the Transport cluster cover approximately 30,000 employees. Each agency covered by the exemption order has a different workforce profile (different roles and work types ranging from 'blue-collar' frontline roles to professional office-based roles) and operates in different and varying geographic locations.

For Transport to ensure that the exemption order can accommodate varying recruitment and development programs across a large workforce spread over multiple agencies, the categories of exemption applied for are necessarily very broad. While the broad categories create flexibility for targeted diversity programs, they also create challenges for an organisation when seeking to renew or extend an exemption order. Due to the broad categories contained in our exemption order, it can be difficult to demonstrate how the full breadth of the exemption order has been effectively used across all the agencies. In practice, it may be that only parts of the exemption order have been used, but applying for a narrower category of exemptions would carry the risk of one of the agencies either potentially being in breach of the exemption order or needing to seek an amendment to the exemption order, which creates further administrative burden.

Under the federal body of anti-discrimination legislation, organisations that wish to increase workforce diversity or to address substantive inequality through measures of 'positive discrimination' are not required to seek an exemption. Rather, exemptions are dealt with through a mechanism of 'special measures', which in practice act as a defence to a possible claim of unlawful discrimination. In order to be able successfully use the defence of a 'special measure', an organisation will need to demonstrate that one of the purposes of taking the special measure is to achieve 'substantive equality'. This can be done through demonstrating the following:

- identifying the substantive inequality an activity is trying to address (for example, the representation of women in male dominated industries, or the employment of people with disability)
- considering how the proposed activity will achieve substantive equality
- considering whether the activity is proportionate and appropriately targeted – i.e. not using 'positive discrimination' beyond what is necessary to achieve substantive equality in the relevant area

- considering how progress towards achieving substantive equality is measured to ensure that the activity is not in place for longer than is required (although special measures are not time-limited if a substantive inequality persists), and
- considering how the proposed action links to broader organisational diversity goals.

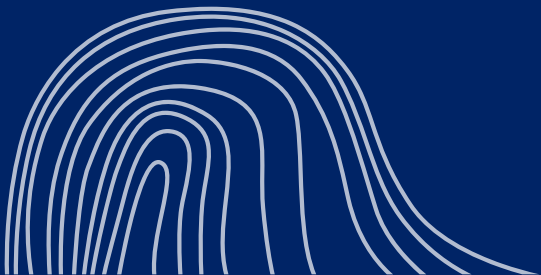
In its review of the Act, the LRC should consider abolishing the current exemption application process and replacing it with a 'special measures' mechanism that aligns with the body of federal anti-discrimination legislation.

The mechanism in place under the federal anti-discrimination laws is more efficient and effective than the current exemption application process under the Act. While it requires an organisation to apply rigour when considering measures of 'positive discrimination' it removes the significant administrative burden imposed by the exemption application process, and for organisations as large and diverse as Transport, the need to apply for broad exemptions in force for an extended period which may not be utilised to their full extent, rather than risk being in breach of the legislation.

**Recommendation 4**

That the Act be amended to remove the need to apply for an exemption for measures of 'positive discrimination' and consider replacing the relevant provisions with special measures provisions that align with federal anti-discrimination legislation.





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<sup>1</sup> *Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 and Regulations 2018 (Cth), Disability Discrimination Act 1992 and Regulations 2019 (Cth) and Age Discrimination Act 2004 and Regulations 2020 (Cth), and the Australian Human Rights Commission Act 1986 and Regulations 2019 (Cth).*

<sup>2</sup> See <https://www.psc.nsw.gov.au/culture-and-inclusion/disability-employment/understanding-disability/what-is->

[disability#:~:text=Disability%20includes%20long%2Dterm%20physical,an%20equal%20basis%20with%20others.](#)

<sup>3</sup> The Australian Human Rights Commission's associated enforcement powers will commence in December 2023.

<sup>4</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws – Summary Report*, (2021) at 10-11 < <https://humanrights.gov.au/sites/default/files/2023-08/Discrimination%20Law%20Position%20Paper%20Summary%20Report.pdf>>

<sup>5</sup> The labour force participation rate for people with disability aged 16-64 years was 53.4%, compared with 84.1% of people without disability. Australian Bureau of Statistics.

<sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report, Volume 7, Inclusive Employment, Education and Housing*, September 2023 <<https://disability.royalcommission.gov.au/publications/final-report>>.

# Anti-Discrimination Act 1977

## EXEMPTION ORDER

Under the provisions of section 126 of the *Anti-Discrimination Act 1977* (NSW), the exemption order granted to the Transport Cluster - comprising Transport for NSW, the State Transit Authority, Sydney Trains, NSW Trains, Sydney Metro Authority and Point to Point Commission - on 14 April 2022 is HEREBY VARIED to read:

### *1. Women*

- 1.1. Targeted support to women in preparation for recruitment processes;
- 1.2. Targeted recruitment of women into senior service roles;
- 1.3. Targeted recruitment of women into entry level employment programs including graduate programs, scholarship programs, traineeships and apprenticeships;
- 1.4. Targeted recruitment of women into Science, Technology, Engineering, Mathematics and Construction roles (STEMC) and other non-traditional roles;
- 1.5. Targeted recruitment of women into frontline service delivery roles;
- 1.6. Targeted development programs for women including targeted talent management programs, leadership development, coaching, shadowing and sponsorship development opportunities;
- 1.7. Capability development, mentoring and connecting programs for women leaders and potential leaders.

### *2. Aboriginal and Torres Strait Islanders*

- 2.1. Targeted support for Aboriginal and Torres Strait Islanders in preparation for recruitment processes;
- 2.2. Targeted recruitment of Aboriginal and Torres Strait Islanders into senior service roles;
- 2.3. Targeted recruitment of Aboriginal and Torres Strait Islanders into entry level employment programs including graduate programs, scholarship programs, traineeships and apprenticeships;
- 2.4. Targeted recruitment of Aboriginal and Torres Strait Islanders into frontline service delivery roles;
- 2.5. Targeted development programs for Aboriginal and Torres Strait Islanders including targeted talent management programs, leadership development, coaching, shadowing and sponsorship development opportunities;
- 2.6. Capability development, mentoring and connecting programs for Aboriginal and Torres Strait Islanders leaders and potential leaders.

### *3. People with a specific disability*

- 3.1. Targeted support for people with a specific disability in preparation for recruitment processes;
- 3.2. Targeted recruitment of person with a specific disability;
- 3.3. Targeted recruitment of people with a specific disability into entry level employment programs including graduate programs, scholarship programs, traineeships and apprenticeships;
- 3.4. Targeted recruitment of people with a specific disability into frontline service delivery roles;
- 3.5. Targeted development programs for people with a specific disability including targeted talent management programs, leadership development, coaching, shadowing and sponsorship development opportunities;
- 3.6. Capability development, mentoring and connecting programs for people with a specific disability at or post entry level employment

programs and making the transition from such programs into roles within the Transport Cluster.

#### *4. People under the age of 25*

4.1. Targeted support of people under the age of 25 in preparation for recruitment processes;

4.2. Targeted recruitment of people under the age of 25 into entry level employment programs including graduate programs, scholarship programs, traineeships and apprenticeships;

4.3. Targeted recruitment of people under the age of 25 into frontline service delivery roles;

4.4. Targeted development programs for people under the age of 25 including targeted talent management programs, leadership development, coaching, shadowing and sponsorship development opportunities.

#### *5. Refugees and migrants on a relevant visa\**

5.1. Targeted support for refugees and migrants on a relevant visa in preparation for recruitment processes;

5.2. Targeted recruitment for refugees and migrants on a relevant visa for roles including graduate programs, scholarship programs, traineeships and apprenticeships;

5.3. Targeted recruitment for refugees and migrants on a relevant visa for non-STEMC related frontline roles; and

5.4. Targeted career development programs for refugees and migrants on a relevant visa.

\* A relevant visa includes Bridging Visa A – subclass 010, Bridging Visa B – subclass 020, Bridging Visa C – subclass 030, Bridging Visa E – subclasses 050, 051, Global Special Humanitarian Visa – subclass 202, Refugee visa – subclasses 200, 201, 203, 204, Protection Visa – subclass 866, Temporary Protection Visa – subclass 785, Safe Haven Enterprise Visa – subclass 790 and Resolution of Status Visa – subclass 85.

This exemption will remain in force until 13 April 2027.

Dated 7 June 2023

Helen McKenzie  
**President**  
**Anti-Discrimination NSW**