



28 September 2023

### **NSW Aboriginal Women's Advisory Network's submission to the NSW Law Reform Commission on the *Anti-Discrimination Act 1977 (NSW)***

The NSW Aboriginal Women's Advisory Network ('AWAN' or 'the Network') thanks the NSW Law Reform Commission for the opportunity to provide preliminary submissions to the review of the *Anti-Discrimination Act 1977 (NSW)* ('the Act').

The [NSW Aboriginal Women's Advisory Network](#) was established in 2022 and operates as a mechanism to drive Aboriginal-led policy solutions to the NSW Government Closing the Gap Target 13 initiative to reduce the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children by at least 50% by 2031 as progress towards zero.<sup>1</sup>

AWAN works to reduce violence against Aboriginal women and children through the following multi-pronged approach:

- *Educating community* around issues of domestic, family and sexual violence against Aboriginal and Torres Strait Islander women and children.
- *Empowering Aboriginal and Torres Strait Islander women* across New South Wales with opportunities to provide their insights on issues that impact themselves, their families, and their communities.
- *Representing the voices of Aboriginal and Torres Strait Islander women to government* at the NSW State and Australian Federal levels.
- *Representing the voices of Aboriginal and Torres Strait Islander women to frontline services.*
- *Advocating for better protections and support* in community for Aboriginal and Torres Strait Islander women and children.

AWAN's work and our submission to the Commission is informed by the insights shared with us by Aboriginal and Torres Strait Islander women with whom we have consulted with from communities across metropolitan to regional NSW. Whilst our consultations are ongoing, the communities that we have visited so far include Brewarrina, Campbelltown, Dubbo, La Perouse, Mt Druitt, Redfern, Walgett, Wellington and Yarramundi.

AWAN's Executive Council is led by Co-Chairs from Wirringa Baiya Aboriginal Women's Legal Centre ('Wirringa Baiya') and the Aboriginal Legal Service (NSW/ACT) ('ALS'). ALS is the Coalition of Aboriginal Peak Organisations (CAPO) lead on Target 13. Wirringa Baiya is the organisation that auspices the AWAN secretariat. Both Wirringa Baiya and AWAN are gender-specific and sensitive to the culturally diverse needs of Aboriginal and Torres Strait Islander women and children victim-survivors of domestic, family and sexual violence.

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<sup>1</sup> NSW Government, *2022-2024 NSW Implementation Plan for Closing the Gap*, 109.

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1. Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

NSW was a leading jurisdiction in prohibiting racial discrimination and later racial vilification in the *Anti-Discrimination Act 1977* (NSW). Over the decades, however, the Act has fallen behind the anti-discrimination legislation of the Commonwealth and other States and Territories. The Act needs to be modernised and simplified to be fit for purpose and to reflect contemporary community standards and needs.<sup>2</sup>

There are several issues that weaken the usefulness of the Act for contemporary society. First, the Act is extremely complex. The Act has been updated by piecemeal reforms. There is a lack of consistency across the Act, with each protected attribute having its own silo of lengthy legislation. Second, the range of protected attributes that do exist are too narrow. Third, the legal tests to prove discrimination are not fit for purpose, especially where cases involve intersectional discrimination. Fourth, the standard of proof on the complainant is too onerous. Fifth, the exceptions available are too broad, and lack both clarity and consistency. Overall, the complexity of the Act makes it inaccessible to people who have been discriminated against and who want to understand their legal rights and the complaints process. The *Anti-Discrimination Act 1977* (NSW) must be reformed to improve functionality and better serve the community in NSW.

2. Whether the range of attributes protected against discrimination requires reform

The range of attributes protected against discrimination in NSW require reform. The *Anti-Discrimination Act 1977* (NSW) protects the following attributes: Race (section 7), Sex (section 24), Transgender status (section 38B), Marital or domestic status (Section 39), Disability (section 49B), Responsibilities as a carer (section 49T), Homosexuality (section 49ZG), and Age (section 49ZYA).

Whilst the current attributes in the Act are essential, the list of protected attributes in NSW is more limited than comparable lists in other Australian States and Territories. Protected attributes which are covered in other Australian jurisdictions, and which require inclusion in the NSW Act are:

- Subjection to domestic or family violence,
- Irrelevant criminal record,
- Accommodation status,
- Cultural heritage and distinctive spiritual practices of Aboriginal and Torres Strait Islander peoples, and
- Kinship responsibilities.

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<sup>2</sup> This submission has been informed by the work of the Public Interest Advocacy Centre ('PIAC'). We draw reference to PIAC's report, *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act* (Sydney, 2021).

The above expansion of protected attributes would modernise the Act to be more relevant to addressing the forms of discrimination experienced by Aboriginal and Torres Strait Islander peoples.

### Subjection to domestic or family violence

We note regarding subjection to domestic or family violence that the prevalence of domestic, family and sexual violence against women and children in Australia is extremely high with one in four women having experienced violence by an intimate partner or family member since the age of 15.<sup>3</sup> Evidence and research shows that the prevalence of violence is aggravated against Aboriginal and Torres Strait Islander women and girls who face the intersecting oppressions of sexism, racism and the ongoing impacts of colonisation.<sup>4</sup>

We refer to the 2017 report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia. A focus of the Special Rapporteur's report was violence against Aboriginal and Torres Strait Islander women in Australia, in particular the discrimination faced on the grounds of gender, race and class being *“structurally and institutionally entrenched.”* The Special Rapporteur recognised that *“this discrimination, coupled with the lack of culturally appropriate measures to address the issue, fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women.”*<sup>5</sup>

In line with the comments of the Special Rapporteur, statistics reflect that Aboriginal and Torres Strait Islander women are 5.7 times more likely to be killed from family violence, and 33 times more likely to be hospitalised due to family violence than non-Aboriginal and Torres Strait Islander women.<sup>6</sup> These statistics are harrowing and do not capture the many cases of violence that go unreported due to factors such as system distrust, and the lack of resources provided to Aboriginal family violence prevention legal services.<sup>7</sup> Women, in particular Aboriginal and Torres Strait Islander women as such may face discrimination on the ground of subjection to domestic or family violence.

### Irrelevant criminal record

We note regarding irrelevant criminal record that Aboriginal and Torres Strait Islander women are the fastest growing prison population in Australia, being incarcerated at more than 20 times the rate than non-Aboriginal and Torres Strait

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<sup>3</sup> Australian Bureau of Statistics, *Personal Safety Australia* (Released 15 March 2023) (available online at: <https://www.abs.gov.au/>, last accessed 15 September 2023).

<sup>4</sup> Our Watch, *Changing the picture – A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children* (2018, Melbourne) pp 13 – 14 (available online at: <https://action.ourwatch.org.au/resource/changing-the-picture/>).

<sup>5</sup> UN General Assembly, 36<sup>th</sup> session, 11-29 September 2017, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2, 16 at ‘O. Violence against women.’

<sup>6</sup> Based on Commonwealth of Australia data, Budget 2023-24: Women’s Budget Statement, (9 May 2023) 42.

<sup>7</sup> UN General Assembly, 36<sup>th</sup> session, 11-29 September 2017, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2, 16 at ‘O. Violence against women.’

Islander women.<sup>8</sup> A significant reason for this statistic is that Aboriginal and Torres Strait Islander women are misidentified as perpetrators of domestic and family violence when they are in fact the persons most in need of protection. This is another ground upon which Aboriginal and Torres Strait Islander women may face discrimination.

### Accommodation status

We note regarding accommodation status or broader socio-economic status, that Aboriginal and Torres Strait Islander women have been the worst affected by the housing crisis. In March 2023, the number of Aboriginal and Torres Strait Islander women and girls seeking help reached 16,535 per month – up 29 per cent from 12,808 in March 2018, according to the latest data from the Australian Institute of Health and Welfare.<sup>9</sup> Experiencing homelessness and housing insecurity is a common ground of discrimination, which is disproportionately skewed against Aboriginal and Torres Strait Islander women and girls.

### Cultural heritage and kinship responsibilities

Aboriginal and Torres Strait Islander peoples have cultural heritage and distinctive spiritual practices, as well as kinship responsibilities. The Act should be updated to include these distinct protected attributes. In this way, the Act should be improved to reflect the language, practices and relationships relevant to Aboriginal and Torres Strait Islander peoples in communities across NSW.

It is essential that these inclusions, and the manner and form in which these inclusions are expressed in the *Anti-Discrimination Act*, are meaningful and relevant for Aboriginal and Torres Strait Islander peoples. It is essential that these reforms are made in consultation with Aboriginal and Torres Strait Islander peoples in NSW, and their representatives. The process of consultation must be genuine and comprehensive.

### 3. Whether the areas of public life in which discrimination is unlawful should be reformed

The areas of public life in which discrimination is unlawful in NSW should be reformed. The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination in the following public areas: Work (Part 2, Division 2), Education (section 17), Provision of goods and services (section 19), Accommodation (section 20), and Registered clubs (section 20A).

Whilst the current protected areas of public life are essential, the current list fails to adequately capture discrimination in the exercise of government functions. To be fit for purpose and meet contemporary standards, the Act should be reformed to

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<sup>8</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 144), para 11.7.

<sup>9</sup> Homelessness Australia, Latest News, First nations women worst affected by the housing crisis, 7 August 2023 (available online at: <https://homelessnessaustralia.org.au/first-nations-women-worst-affected-by-the-housing-crisis/>) last accessed 25 September 2023.

prohibit discrimination in all areas of public life. Otherwise, the Act must at least be reformed to prohibit discrimination in the exercise of government functions.

#### 4. Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

The existing tests for discrimination are not sufficiently clear or inclusive to reflect modern understandings of discrimination. There are many fault lines with the existing tests for discrimination. The *Anti-Discrimination Act 1977* (NSW) adopts the traditional tests for assessing discrimination. An individual must establish whether they have experienced either direct discrimination or indirect discrimination. That discriminatory treatment must have occurred in the past, as there is no protection in situations where a person indicates that they will act in a discriminatory manner in the future. To establish direct discrimination the treatment must be assessed against a comparator. That comparator is often a hypothetical person. To establish discrimination, complainants must also establish that the treatment was because of a specific attribute that is protected under the Act. These requirements have the cumulative effect of excluding people in NSW who experience intersectional discrimination from protection under the Act.

The existing tests for discrimination do not reflect contemporary community standards or understandings. Under the current test, a complainant may fail to bring a successful complaint of discrimination because they are unable to:

- Identify the correct ground of discrimination (direct or indirect),
- Describe an appropriate hypothetical comparator,
- Artificially compartmentalise the discrimination experienced into one protected attribute when they in fact have experienced discrimination based on intersectional grounds. For example, mistreatment by an employer because the employee was an Aboriginal woman and that mistreatment was because of both race and sex, or
- Prevent and protect themselves from the threat of future mistreatment.

We support the recommendations of the Public Interest Advocacy Centre that the existing standard for establishing discrimination in the Act be modernised to:<sup>10</sup>

- Combine the tests for direct and indirect discrimination into one definition,
- Allow for intersectional discrimination to be covered in the test for discrimination,
- Remove the comparator test for direct discrimination and instead focus on unfavourable treatment, and
- Include 'intended future conduct' in the definition of discrimination.

By way of example, we draw attention to part of the Australian Capital Territory's discrimination definition in the *Discrimination Act 1991* (ACT). This is one approach to be contemplated in the modernising of the NSW Act. We note that this legislation recognises that both direct and indirect discrimination can occur on the grounds of one or more (intersectional) protected attributes. For the case of direct

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<sup>10</sup> PIAC, *Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act* (Sydney, 2021).

discrimination, there is no comparator test. Instead, the legislation focuses on unfavourable treatment:

Section 8: Meaning of *discrimination*:

- (1) For this Act, **discrimination** occurs when a person discriminates either directly or indirectly, or both, against someone else.
- (2) For this section, a person **directly** discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.
- (3) For this section, a person **indirectly** discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.

5. The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

The civil protections against vilification in NSW should be reformed. The *Anti-Discrimination Act 1977* (NSW) protects against vilification on the grounds of: Race (section 20), Transgender status (section 38S), Homosexuality (section 49ZT), and HIV/AIDS status (section 49ZXB).

Whilst the current protections against vilification are essential, the current protections could be improved. In 2018, the *Crimes Act 1900* (NSW) was amended to create a criminal offence for public threats or the incitement of violence on the broader grounds of race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status. This gives further coverage than the civil vilification provisions. Consideration should be had to modernising the protections as relevant to the *Anti-Discrimination Act* to cover further protected attributes, such as disability.

Consideration should also be had to lowering the standard required to establish civil vilification. NSW legislation makes it “unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group of persons” on the stated grounds. The standard set-in comparable Commonwealth legislation, under section 18C of the *Racial Discrimination Act 1975* (Cth), provides that public acts are prohibited “if the act is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate.” As such, the standard under Commonwealth legislation is more accessible than the standard under NSW legislation.

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

### Protections against sexual harassment

The *Anti-Discrimination Act 1977* (NSW) prohibits sexual harassment in certain areas of public life. Sexual harassment is generally limited to “unwelcome conduct of

a sexual nature.” The contexts in which sexual harassment is prohibited against certain persons is in a workplace, and in other limited public areas – for example, educational institutions.

We note in reviewing comparable protections in the *Sex Discrimination Act 1984* (Cth) that the Australian Human Rights Commission in the *Respect@Work* report made the recommendation for changes to that legislation to ensure that sex-based harassment is expressly prohibited. An example of such harassment is the different and harassing treatment women can experience in a workplace. That harassment may not be sexual in nature but instead be gender-based or sexist. Sex-based harassment and sexual harassment often occur together. The Commission separately recommended changes to that legislation to ensure creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

We recommend that these changes are made to the *Anti-Discrimination Act 1977* (NSW) to ensure that sex-based harassment is expressly prohibited and to ensure that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited. These changes will make the NSW Act more comprehensive and fit for purpose.

The Commission in the *Respect@Work* report also recommended that the sexual harassment protections cover all persons in field of work, including paid and unpaid workers, and those who are self-employed. We recommend that this broader protection is adopted in the NSW Act. More broadly, we recommend that protections against sex-based harassment should be extended to apply in all areas of public life.<sup>11</sup>

#### Harassment based on other protected attributes, in particular race-based harassment

We strongly recommend that the *Anti-Discrimination Act 1977* (NSW) must be amended to cover harassment based on other protected attributes, in particular race-based harassment. This must be complementary and in addition to other protections, including protections against racial vilification. We draw upon the work of the Jumbunna Institute for Indigenous Education and Research at UTS and Diversity Council Australia in their report, *Gari Yala (Speak the Truth)*. That report is informed by the responses of over 1000 Aboriginal and/or Torres Strait Islander survey respondents from across Australia about their workplace experiences, with a significant number of responses coming from New South Wales respondents.<sup>12</sup>

We note that over three-quarters of Aboriginal and/or Torres Strait Islander respondents to the Gari Yala survey said it was important for them to identify as

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<sup>11</sup> Australian Human Rights Commission, *Respect@Work: A National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 43: Recommendation 16.

<sup>12</sup> Jumbunna Institute (Brown, C., D’Almada-Remedios, R., Gilbert, J. O’Leary, J. and Young, N.) / Diversity Council Australia, *Gari Yala (Speak the Truth): Centring the Work Experiences of Aboriginal and/or Torres Strait Islander Australians – Synopsis report*, Sydney, Diversity Council Australia/Jumbunna Institute, 2020.



Indigenous within their workplace.<sup>13</sup> However, over a quarter of the Aboriginal and/or Torres Strait Islander people surveyed reported that their workplace was culturally unsafe.<sup>14</sup>

The Jumbunna Institute and Diversity Council Australia found that racist behaviours, such as unfair treatment and harassment based on race, are strongly linked to culturally unsafe workplaces. Aboriginal and Torres Strait Islander workers in culturally unsafe workplaces were four times more likely to have heard racial or ethnic slurs or jokes at work, and three times more likely to have been treated unfairly at work because of their background in the past year compared to those who work in culturally safe workplaces.<sup>15</sup> This research demonstrates the need for harassment based on other protected attributes, in particular race, to be covered under the Act.

The Network notes that whilst harassment often occurs within the workplace, the experience of harassment is not confined to the workplace. To meet contemporary community standards and to set legislation that supports a culture against discrimination, the NSW civil protections should apply in all areas of public life.

7. Whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

The *Anti-Discrimination Act 1977* (NSW) should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life. This would create significant systemic, structural and cultural change for the benefit of many groups of people in NSW who are discriminated against and whose participation in public life is limited by factors which can be reasonably adjusted in their favour. Such changes would create more inclusive public environments that better promote the equal enjoyment of rights and reflect contemporary community standards.

Separately, we want to draw attention to the fact that State laws and programs are only mentioned in one section in the Act. Specifically, sexual harassment is the only ground expressly prohibited in the administration of State laws and programs under the Act.<sup>16</sup> The protection from discrimination in the administration of State laws and programs should be extended to other protected attributes in addition to sexual harassment, such as race. Otherwise, and unless the administration of State laws and programs can be defined as a provision of a service, people are not protected. We are particularly concerned around this gap in protection as it applies to the exercise of police powers in NSW.

This gap in the NSW Act is in conflict with the approach of all Federal anti-discrimination laws which do prohibit discrimination in the administration of Federal laws and programs. It is also in conflict with the approach of other Australian jurisdictions; Tasmania, the Northern Territory and Queensland, which prohibit

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<sup>13</sup> Ibid 10.

<sup>14</sup> Ibid 11.

<sup>15</sup> Ibid.

<sup>16</sup> *Anti-Discrimination Act 1977* (NSW) s 22J.

discrimination in the administration of powers or functions under their State and Territory laws.<sup>17</sup>

### Positive obligations to prevent harassment, discrimination and vilification

The *Anti-Discrimination Act 1977* (NSW) should include positive obligations to prevent harassment, discrimination and vilification. We note by way of example recent amendments to the Federal *Sex Discrimination Act 1984* (Cth). In December 2022, the legislation was amended by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) to introduce a positive obligation on employers and persons conducting a business or undertaking (PCBUs) to eliminate workplace sexual harassment, sex discrimination and sex-based harassment. The obligation further extends to a positive duty to eliminate conduct that amounts to subjecting a person to a hostile workplace environment on the ground of sex, and certain acts of victimisation.<sup>18</sup> This positive duty was a key recommendation of the Australian Human Rights Commission's *Respect@Work* report.<sup>19</sup> The obligation creates a social culture where employers and PCBUs take appropriate responsibility to prevent discrimination.

When considering changes to the *Anti-Discrimination Act 1977* (NSW), positive duties should cover the protected attribute of sex as well as other protected attributes, such as race. This is essential to ensure that the shifts in responsibilities and cultural attitudes around responsibilities for anti-discrimination are comprehensive. As previously mentioned, there is a strong link between the level of cultural safety in an organisation and the experiences of racism against Aboriginal and Torres Strait Islander workers. The NSW Anti-Discrimination Act can play an important role in encouraging the improvement of cultural safety as a means to prevent harassment, discrimination and vilification across NSW.

We further rely upon the research of the Jumbunna Institute and Diversity Council Australia's which confirms that Aboriginal and Torres Strait Islander employees face significant workplace racism and exclusion. One of the most common manifestations of racism was appearance racism. 59% reported receiving comments about the way they look or 'should' look as an Aboriginal or Torres Strait Islander person.<sup>20</sup> The research also showed that current workplace supports are ineffective, with only a third of respondents agreeing or strongly agreeing that they had the workplace support required when they experienced racism.<sup>21</sup>

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<sup>17</sup> *Sex Discrimination Act 1984* (Cth) ss 26, 28L; *Disability Discrimination Act 1992* (Cth) s 29; *Racial Discrimination Act 1975* (Cth) s 10(1); *Age Discrimination Act 2004* (Cth) s 31; *Anti-Discrimination Act 1998* (Tas) s 22(1)(f); *Anti-Discrimination 1992* (NT) s 28(g); *Anti-Discrimination Act 1991* (Qld) s 101. See further the discussion in the Equality Australia preliminary submission to the NSWLRC's review of the *Anti-Discrimination Act 1977* (NSW) (2023) 19.

<sup>18</sup> *Respect@Work, New positive duty on employers to prevent workplace sexual harassment, sex discrimination and victimisation* (available online at: <https://www.respectatwork.gov.au/>) last accessed 25 September 2023.

<sup>19</sup> Australian Human Rights Commission, *Respect@Work: A National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 44: Recommendation 17.

<sup>20</sup> Above n 12, *Gari Yala report*, 14.

<sup>21</sup> *Ibid.*

The Gari Yala report also confirms that anti-discrimination compliance training and formal racism complaint procedures are key to addressing racism. Aboriginal and Torres Strait Islander peoples working in workplaces which had implemented these measures were half as likely to experience unfair treatment at work because of their Aboriginal and/or Torres Strait Islander identity, and far less likely to hear racial or ethnic slurs or jokes at work.<sup>22</sup> The issue, however, is that these proactive workplace measures to prevent harassment, discrimination and vilification are not common. Only a fifth of respondents worked in organisations with both a racism complaint procedure and anti-discrimination compliance training that included reference to Aboriginal and Torres Strait Islander discrimination and harassment.<sup>23</sup>

Ultimately, there is a strong case for the need to introduce positive obligations to prevent harassment, discrimination and vilification. We have drawn attention to the particular importance around the prevention based on the grounds of sex and race, namely within the context of the workplace. It is important, however, that proper consideration is given to the spheres of obligation in public life which are both within and beyond the workplace.

#### Positive obligations to make reasonable adjustments to promote full and equal participation in public life

The *Anti-Discrimination Act 1977* (NSW) should also include positive obligations to make reasonable adjustments to promote full and equal participation in public life. Positive obligations should cover employers, as well as but not limited to, other people operating in public life such as educators and providers of goods and services. This would again create structural change to prevent discrimination against many groups of people in NSW society.

Consideration must be had to the creation of a positive obligation to make reasonable adjustments on the ground of disability.<sup>24</sup> Consideration must also be had to the creation of a positive obligation to make reasonable adjustments on the grounds of other current protected attributes, such as persons with carer responsibilities, or prospective protected attributes, such as persons with kinship responsibilities or persons subjected to domestic or family violence.

### 8. Exceptions, special measures and exemption processes

#### Exceptions

The structure of the *Anti-Discrimination Act 1977* (NSW) is complex and confusing. The exceptions across the Act lack clarity, consistency and alignment with contemporary standards. Without proper legal guidance and representation, the Act is not accessible to people who have been discriminated against. By the same token, the Act is not easily accessible for organisations and employers seeking to understand and uphold their obligations and duties under the Act.

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<sup>22</sup> Ibid, 15.

<sup>23</sup> Ibid.

<sup>24</sup> See for example, Victorian anti-discrimination legislation: *Equal Opportunity Act 2010* (Vic), s 20 “Employer must make reasonable adjustments for person offered employment or employee with a disability”.

Some exceptions under the Act are exceedingly broad for private schools, colleges, universities or other education or training institutions. There are exceptions for private educational authorities to the protections for a wide range of attributes including transgender status, marital or domestic status, disability, homosexuality, and age.<sup>25</sup> Although no authority appears to be prescribed at the time of writing, there is also an exception to the protection against discrimination on the ground of race available for a prescribed educational authority.<sup>26</sup> There are also broad exceptions provided for religious bodies.<sup>27</sup>

### Special measures and exemptions

We note that special measures and genuine occupational requirements can be used positively, for example to facilitate the targeted recruitment of Aboriginal and Torres Strait Islander peoples. The *Anti-Discrimination Act 1977* (NSW) is at odds with the approach of other Australian States and Territories. Although the Act has an exception based on genuine occupational requirements,<sup>28</sup> it does not have an exception for special measures which include recruitment. As explained by the Australian Human Rights Commission, the exception for “special needs programs and activities” in section 21 of the NSW Act is currently interpreted by the NSW Anti-Discrimination Board as not including special measures for employment. Employers wanting to conduct targeted recruitment for Aboriginal and Torres Strait Islander peoples in NSW therefore should be applying for an exemption from the Act.<sup>29</sup>

We note that employers are required to comply with the federal *Racial Discrimination Act* (Cth) in addition to the Anti-Discrimination Act of their State or Territory – for example, the *Anti-Discrimination Act 1977* (NSW). Converse to the NSW Act, the Commonwealth Act provides an exception for special measures but not an exception for genuine occupational requirements.<sup>30</sup> The Australian Human Rights Commission explains that “[t]his means that even if being Aboriginal or Torres Strait Islander is a genuine occupational requirement for a position, an employer will still need to satisfy him or herself, and be prepared to demonstrate, that recruitment for this position also meets the criteria for a special measure in order to comply with that Act.”<sup>31</sup>

There should be consideration to harmonising the NSW *Anti-Discrimination Act* with all other State and Territory Acts. Specifically, to ensure that special measures taken to address the disadvantage experienced by a particular racial group is not unlawful discrimination and therefore does not require an application for an exemption. For example, in situations where a program targets Aboriginal and Torres Strait Islander

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<sup>25</sup> *Anti-Discrimination Act 1977* (NSW) s 4 Definitions - “*educational authority*”; see ss 38K exception to discrimination on transgender grounds, s 46A exception to discrimination on marital or domestic status, s 49L exception to discrimination on the ground of disability, s 49ZO exception to discrimination of homosexuality, s 49ZYL exception to age discrimination.

<sup>26</sup> *Anti-Discrimination Act 1977* (NSW) s 17.

<sup>27</sup> *Anti-Discrimination Act 1977* (NSW) s 56.

<sup>28</sup> *Anti-Discrimination Act 1977* (NSW) s 14.

<sup>29</sup> Australian Human Rights Commission, *1. Application of discrimination laws*, available online at: <https://humanrights.gov.au/> (last accessed 25 September 2023).

<sup>30</sup> *Racial Discrimination Act 1975* (Cth) s 8.

<sup>31</sup> Australian Human Rights Commission, *1. Application of discrimination laws*, available online at: <https://humanrights.gov.au/> (last accessed 25 September 2023).

people for employment opportunities to redress their under-representation in a workplace.<sup>32</sup>

One only needs to review the Anti-Discrimination NSW online current exemptions list to see the significant number of exemptions that have been requested for matters related to designating, advertising and recruiting Aboriginal and Torres Strait Islander positions. The applying organisations are both mainstream organisations and Aboriginal community-controlled organisations. Harmonising the legislation in NSW to permit special measures in these situations would facilitate steps taken by organisations to achieve genuine and substantive equality.

#### 9. The adequacy and accessibility of complaints procedures and remedies

A significant issue with the *Anti-Discrimination Act 1977* (NSW) is the inadequacy and barriers to access of complaints procedures and remedies. Overall, complaints procedures needs to become more streamlined and accessible for Aboriginal and Torres Strait Islander peoples who have been discriminated against.

Steps to improve complaints procedures and remedies should first and foremost have the interests of persons who have been discriminated against in mind. We agree with the position of the Public Interest Advocacy Centre that consideration should be given to amending the burden of proof for discrimination complaints. Specifically, complainants should only need to demonstrate that they were treated unfavourably. The burden of proof and onus should then shift to the respondent to prove that the person was not treated unfavourably because of a protected attribute. This reform would begin to address the power imbalance and barriers experienced by individual complainants who struggle to prove the intent and actions of employers, companies and other persons/entities that discriminate against them. This reform would benefit Aboriginal and Torres Strait Islander persons who have been discriminated against, as well as other persons who have been discriminated against on the basis of one or more protected attributes.

Another reform to improve the adequacy and accessibility of complaints procedures for Aboriginal and Torres Strait Islander peoples is to make it easier for representative organisations to act on behalf of complainants. The restrictions, particularly around the representative organisation needing to satisfy the President of the Anti-Discrimination Board that the body has sufficient interest in the complaint, should be relaxed.<sup>33</sup> This would increase accessibility for Aboriginal and Torres Strait Islander complainants to have their complaints by representative organisations. An example of a relevant organisation would be Wirringa Baiya Aboriginal Women's Legal Centre which is an NSW state-wide community legal centre for Aboriginal and Torres Strait Islander women, children and youth. Wirringa Baiya is an Aboriginal community-controlled and gender specific legal service which specialises in providing advice and casework in discrimination and sexual harassment matters. A practical consequence of this reform, will be the need for increased funding to facilitate this increased work for representative bodies which are preferred by complainants.

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<sup>32</sup> Ibid.

<sup>33</sup> *Anti-Discrimination Act 1977* (NSW) s 87C.

We note another barrier in the complaints process is costs – the need for successful complainants to cover their own costs. Moreover, if a complainant's matter is appealed from the NSW Civil and Administrative Tribunal to a District or Supreme Court and the complainant is unsuccessful, they may be liable for an adverse costs order. To address these barriers to access and justice, we note the suggestion of Equality Australia in their submission to this review. Specifically, the notion of introducing costs protection similar to that in the *Federal Corporations Act 2001* (Cth), s 1317AH. This regime acknowledges the power imbalance between complainants and respondents. It would allow successful complainants to recover reasonable legal costs and unsuccessful complainants to be protected from adverse costs orders unless they have brought proceedings vexatiously or unreasonably.<sup>34</sup>

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

The powers and functions of the Anti-Discrimination Board of NSW and its President should be broadened as a means to better address systemic discrimination. Specifically, the *Anti-Discrimination Act 1977* (NSW) should be reformed to broaden the grounds that the Anti-Discrimination Board can carry out investigations, research and inquiries relating to discrimination. Currently the primary power to carry out such inquiries is limited to an ad hoc list relating to age, religious or political conviction, mental disability, and membership of an industrial organisation.<sup>35</sup>

The grounds available for inquiry by the Anti-Discrimination Board should be broadened to cover further protected attributes, including race and sex. Currently the power to carry out inquiries related to racial vilification is only mentioned in the context of a referral of a matter to the Board by Multicultural NSW.<sup>36</sup> The powers of the Anti-Discrimination Board to make inquiries around racial discrimination should not be limited to this context.

Expanding the regulatory powers of the Anti-Discrimination Board is essential, especially if the Act is modernised to include a positive duty to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life.<sup>37</sup> The powers should be expanded in line with other regulatory bodies such as the Victorian Human Rights and Equal Opportunity Commission. For example, the power to undertake investigations, enter enforceable undertakings, issue low-level fines, and seek larger civil penalties from a court for failure to comply with the Act or an enforceable undertaking.<sup>38</sup>

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<sup>34</sup> See further Equality Australia preliminary submission to the NSWLRC's review of the *Anti-Discrimination Act 1977* (NSW) (2023) 21.

<sup>35</sup> *Anti-Discrimination Act 1977* (NSW) s 119 (1)(a).

<sup>36</sup> *Anti-Discrimination Act 1977* (NSW) s 119(1)(a1).

<sup>37</sup> Also relevant will be any expansion to protect against discrimination in the administration of state laws and programs, such as in the exercise of police powers.

<sup>38</sup> See further Equality Australia preliminary submission to the NSWLRC's review of the *Anti-Discrimination Act 1977* (NSW) (2023) 21.

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

It has been noted that other Australian jurisdictions have and are undertaking reforms to modernise and strengthen the protections, processes and enforcement mechanisms around anti-discrimination. These jurisdictions include for example Victoria and the ACT. NSW similarly needs to take significant measures to make its Anti-Discrimination provisions fit for purpose and in line with contemporary community standards. It has also been noted that consideration should be had to the direction of more modern NSW laws and overall modern NSW contemporary standards.

In modernising anti-discrimination legislation in NSW, consideration should also be had to international anti-discrimination and human rights laws. This is particularly important given the absence of a Human Rights Act in NSW. Particular attention should be had to the human rights protections in the seven-core international human rights treaties that Australia is a party to, as well as the *United Nations Declaration on the Rights of Indigenous Peoples* which Australia has endorsed. Particular attention must be paid to Article 22 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides:

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. (Emphasis added)

12. The interaction between the Act and Commonwealth anti-discrimination laws

It has been noted that NSW needs to take measures to better harmonise its legislation with Commonwealth anti-discrimination laws. For example, in considering new legislation that addresses special measures in line with the Federal *Racial Discrimination Act 1975* (Cth) and the anti-discrimination legislation of other Australian jurisdictions.

13. Any other matters the Commission considers relevant to these Terms of Reference.

We note that Anti-Discrimination NSW has an Aboriginal and Torres Strait Islander Service. In addition to reforming the Act, the Aboriginal and Torres Strait Islander Service should be expanded to ensure there are sufficient Aboriginal and Torres Strait Islander staff available to provide culturally appropriate services to Aboriginal and Torres Strait Islander peoples experiencing discrimination. There should be more resources available within the outreach program to improve both accessibility

and supports of complaints procedures for Aboriginal and Torres Strait Islander peoples.

We note the overall importance of cultural safety for Aboriginal and Torres Strait Islander peoples engaging with Anti-Discrimination NSW. Cultural safety requires Anti-Discrimination NSW and the professionals involved to provide services in a manner that acknowledges the history of Aboriginal and Torres Strait Islander peoples and their treatment in Australia, that is respectful of their culture and beliefs and that is free from discrimination. Being free from discrimination requires conscious efforts to identify and address direct discrimination, as well as indirect discrimination born from unconscious biases within the system and its professionals against Aboriginal and Torres Strait Islander peoples. Affirmative action and committed efforts must be undertaken to ensure that Aboriginal and Torres Strait Islander peoples and the services that represent them are genuinely listened to and heard.

### Conclusion

The NSW Aboriginal Women's Advisory Network again thanks the NSW Law Reform Commission for the opportunity to provide preliminary submissions to the review of the *Anti-Discrimination Act 1977* (NSW).

If the NSW Law Reform Commission has any questions about this submission, or wishes to speak to us further, please contact

Yours Sincerely,

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