

29 September 2023

NSW Law Reform Commission

Locked Bag 5000
PARRAMATTA NSW 2124

By email: nsw-lrc@justice.nsw.gov.au

Dear Sir/Madam,

ANTI-DISCRIMINATION ACT REVIEW – PRELIMINARY SUBMISSIONS

We refer to the review and report on the *Anti-Discrimination Act 1977* (NSW) (the 'Act') pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW).

We also note the Terms of Reference outlining the scope of this review.

The National Justice Project ('**NJP**') strongly supports the timely review of the Act. It presents an opportunity to ensure that the legislation aligns with contemporary standards of discrimination and reassess the legal avenues to redress both systemic and individual cases.

About the National Justice Project

NJP is a not-for-profit human rights legal and civil rights organisation. We fight for justice, fairness and inclusivity by tackling systemic discrimination through the power of strategic legal action, education, partnerships and advocacy.

We represent individuals and families of loved ones who have been harmed or have died due to discrimination and government failures. We facilitate legal action and complaints against government, health and custodial institutions that have failed in their duty to eradicate systemic bias in the health and justice systems and in their duty to provide quality and respectful health care and equality before the law.

We are motivated and informed by the strength and experiences of our clients, their families and communities and it is from this perspective that we present this preliminary submission.

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Submissions of proposed Terms of Reference

NJP lends its strong support for all of the Terms of Reference as stipulated by the NSW Law Reform Commission ('NSW LRC').

In addition, we urge the NSW LRC to consider the following issues:

1. Recognition of systemic discrimination within the Act and the provision for individual claims, proper assessment and fair remedies;
2. Recognition of discrimination by organisations in the provision of goods and services, and accommodation;
3. Positive obligations to ensure complaint processes and enforcement mechanisms are culturally-safe;
4. Considering the appropriateness of the language of the Act including the use of plain English; and
5. Raising the limit on compensation that can be awarded by the NSW Civil and Administrative Tribunal.

1. Systemic Discrimination

We recognise and commend the review of 'potential mechanisms to address systemic discrimination' within the Terms of Reference.

Through the work of the NJP, we have witnessed a number of cases where individuals have fallen victim to discriminatory practises and procedures. The response of the Anti-Discrimination Board (the Board) or NSW Civil and Administrative Tribunal (Tribunal) should not be limited to each individual case when it is clear on the evidence that a systemic issue exists. Failure to respond to such evidence only allows perpetrators to continue discriminatory practises against other individuals.

In properly addressing systemic discrimination, we urge the review to consider four key areas:

- (i) Systemic discrimination should be clearly defined and include both direct and indirect systemic discrimination. This also requires a clear definition of direct and indirect discrimination, much like, the *Disability Discrimination Act 1992* (Cth);
- (ii) The Act must provide recourse for an individual to take legal action for unlawful systemic discrimination to the Board or Tribunal;
- (iii) Whether the legal test requiring evidence of the applicant's less favourable treatment compared to another person or persons who do not have the protected characteristic, is still appropriate and in line with modern-thinking. Case law has already demonstrated the inherent difficulties in using a 'comparator'.

One prominent difficulty is that a comparator does not always exist, and it requires the Tribunal to consider a hypothetical individual who is otherwise the same as the applicant, but for, the protected characteristic. The practical difficulties in obtaining overt evidence of discrimination as against a hypothetical individual is unduly burdensome and sometimes an impossible task for applicants.

Contrarily, the evidence can sometimes be found at a systemic-level in the treatment of individuals of the protected characteristic. A legal test which allows the Tribunal to draw a logical inference would, in our view, 'better promote the equal enjoyment of rights and reflect contemporary community standards';

- (iv) NJP provides its strong support for the consideration of potential mechanisms to address systemic discrimination as already outlined in the Terms of Reference. This should be in conjunction with fair remedies that take into account the specific harms experienced by victims of systemic discrimination.

2. *Discrimination by Organisations*

At present, section 19 and 20 of the Act does not provide any recourse for unlawful discrimination by organisations providing goods and services, and/or accommodation.

To adequately address systemic discrimination, the Act must consistently recognise discriminatory decision-making at an organisational level and allow for mechanisms that allow for accountability at that same level. This is already enforced in the provisions for workplaces, educational authorities and registered clubs. It is equally important for organisations providing goods and services, and accommodation to be liable for wrongdoing. This must apply to both government and non-government goods, services and accommodation.

This is natural step towards recognising and addressing systemic discrimination and maintaining internal consistency within the Act.

3. *Culturally-Safe Practises*

Again, we recognise and commend the review of ‘the adequacy and accessibility of complaints’ procedures and remedies in the Terms of Reference. As part of this consideration, it is important for the review to consider the disproportionate impact of discrimination upon First Nations and culturally and linguistically diverse persons, and how processes can be improved to better protect these groups.

It is well-documented in the experiences of First Nations and culturally and linguistically diverse groups that legal processes can often be inaccessible, re-traumatising and lead to further distrust in the process. It is therefore fundamental to this review to ensure that culturally-safe processes are available to vulnerable groups.

Culturally-safe processes include, but are not limited to:

- (i) Developing cultural awareness, cultural respect and anti-racism strategies in Board and Tribunal members and staff;
- (ii) Appreciating and remedying the cultural and language barriers that are present in evidence gathering, information-seeking, self-advocacy and understanding of legal process;
- (iii) Focusing on community partnership to develop trust and communication through diverse recruitment and outreach;
- (iv) Reassessing the assigned credibility of documentary evidence compared to oral evidence, particularly where cultural and language barriers exist; and
- (v) Placing a positive obligation on Board and Tribunal members to assist vulnerable complainants to obtain documents from the State or its actors and to assist them in other procedural matters critical to the presentation of their case, particularly where they are confronting the State or State actors or employees.

Consideration should also be given to broadening the powers of Tribunal members to uphold the positive obligation stated at (e) to ensure that vulnerable court-users have the ability to meaningfully and equally engage in the process and are not precluded as a direct result of their vulnerability.

4. *Appropriateness of Language*

In contemplation of how the Act 'could be modernised and simplified to better promote the equal enjoyment of rights', the appropriateness of language used in the Act must be considered. The Act should be in plain English such that it can be understood by everyday Australians and easily translated and represents best-practice in not further dehumanising the very community groups that it is designed to protect.

Additionally, the language surrounding each of the 'attributes' should be revised to align with community expectations. For example, the definition of disability is largely deficit-focused and inconsistent with the People with Disability Australia's language guide.

As this Act has the capacity to dictate the language used by Board and tribunal members and the media, it plays a significant role in determining the narrative surrounding many vulnerable groups and their stories of discrimination.

It is, therefore, important for the Review to properly consult with these diverse groups to ensure the language does not cause further disadvantage or barriers to justice.

5. *Limit on Compensation*

We further acknowledge the Review's consideration of the adequacy of remedies.

In deliberating this issue, we invite the Review to reassess the current limit that may be awarded by the Tribunal in discrimination matters. It is our strong view, that the Tribunal should be given the discretion to determine the appropriate order for each individual case. An arbitrary limit will not necessarily result in just outcomes, however, if one must be imposed, a limit commensurate with the NSW District Court may be more suitable.

Conclusion

As stated above, NJP strongly supports the NSW LRC's review and its broad direction as indicated by the proposed Terms of Reference. With further consideration of the aforementioned issues, we are hopeful of a comprehensive review that aligns with community expectations and delivers meaningful outcomes.

We look forward to providing detailed submissions in due course.

Yours sincerely,

Sheeza Naz | Solicitor

George Newhouse | Principal Solicitor