

ACON PRELIMINARY SUBMISSION TO

NSW Law Reform Commission

Anti-Discrimination Act Review

September 2023



About ACON



ACON is NSW's leading health organisation specialising in community health, inclusion, and HIV responses for people of diverse sexualities and genders. Established in 1985, ACON works to create opportunities for people in our communities to live their healthiest lives.

Our head office is in Sydney, and we also have offices in Lismore and Newcastle. We provide our services and programs locally, state-wide, and nationally. We are a fiercely proud community organisation, unique in our connection to our community and in our role as an authentic and respected voice.

Members of Australia's sexuality and gender diverse communities experience health disparities when compared to health and wellbeing outcomes experienced by the total population. They may also face significant barriers to accessing traditional healthcare pathways.

We recognise that members of our communities share their sexual and gender identity with other identities and experiences and work to ensure that these are reflected in our work. These can include people who are Aboriginal and Torres Strait Islander; people from culturally, linguistically, and ethnically diverse migrant and refugee backgrounds; people who use drugs; mature aged people; young adults; and people with disability.

Contact

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ACON acknowledges the Traditional Owners of the lands on which we work. We pay respect to Aboriginal Elders past and present.

Executive Summary

Reform to the NSW *Anti-Discrimination Act* is long overdue. The Act was hailed as ground-breaking when it was introduced, but now, almost 50 years later, it is piecemeal, confusing, disjointed, and inadequately protects our communities from the harms of discrimination, harassment, and vilification.

The Act must be repealed and replaced with a modern, simplified, Act that expands the scope to better include harassment and vilification, that provides for investigative functions and representative complaints, that allows for a less onerous complaints process, and better protects all in our communities.

Recommendations

ACON recommends that the NSW Government:

1. Repeal the *Anti-Discrimination Act 1977* and replace it with an Act that reflects contemporary standards. This modernised Act should:
 - a. Expand the protected attributes so that it covers all people of diverse sexualities and genders, people with variations of sex characteristics, and sex workers, their families, and associates
 - b. Remove the 'recognised transgender person' definition and instead protect all trans and gender diverse people
 - c. Ensure the definitions and tests for discrimination reflect contemporary standards, including the understanding that discrimination can be experienced on the basis of multiple, intersecting attributes.
 - d. Harmonise the vilification protections so they are consistent with criminal law and protect all in our communities adequately
 - e. Update definitions around HIV/AIDS so they are person-centred and non-stigmatising
 - f. Expand the definition of sexual harassment in line with the *Respect@Work* inquiry, and protects against broader experiences of harassment
 - g. Contain positive obligations to work to prevent discrimination before it occurs
 - h. Remove all exemptions that allow for discrimination in faith-based services, especially schools, health and social services
 - i. Ensure that trans people have fair access to sport and superannuation
 - j. Introduce special measures provisions to address disadvantage, for example in employment
 - k. Simplify the complaints process, shift the burden of proof, and allow for representative complaints to address systemic discrimination
 - l. Expand the scope and function of the Anti-Discrimination Board to better reflect its role, including allowing for it to act as an investigative body
 - m. Be harmonised with Commonwealth legislation, and not out of step with the legislation in other jurisdictions

Introduction



As a health organisation, ACON’s work aligns with models of social determinants of health, accordingly, we recognise that access to education, employment and income, stable housing, social inclusion, and non-discrimination are all factors that can positively or negatively influence a person’s health.¹

It is critical that people in our communities are protected from discrimination in their lives, including in their access to education, healthcare, and employment. As such, reform to our discrimination protections is urgently required.

57% of LGBTQ+ people report they had been treated unfairly in the last 12 months as a result of their sexual orientation, and 77.5% of trans and gender diverse people report unfair treatment on the basis of their gender over the same period.² It is critical that our discrimination protections are reformed to better address these concerning statistics.

Reforming the ADA is critical to ensure that all people are protected equally, and able to participate in all areas of public life without fear of stigma or discrimination.

Stigma and discrimination, including perceived stigma and discrimination, present significant barriers to healthcare. Many providers in some areas of healthcare are faith-based, not-for-profit providers, for example in the aged care, alcohol and other drugs, disability, and housing sectors. Making it harder to access non-judgemental health care, such as sexual health, family planning, mental health, and trans-affirming health services, especially in regional and outer metropolitan areas with limited services, will only exacerbate these barriers, and the poorer health and wellbeing outcomes observed in LGBTQ populations.

Just 11% of LGBTIQ adults feel accepted at faith-based events or services, and 43% feel accepted accessing a health or social service.³ In addition, 60% of secondary school LGBTQA students feel unsafe or uncomfortable in their educational setting because of their sexuality or gender.⁴ These statistics demonstrate widespread feelings of stigma and discrimination, even outside of faith-based institutions, suggesting we have some way to go to improving safety and access in all areas of public life.

While improvements to anti-discrimination legislation are not the sole key to ensuring LGBTQ people are safe at school, work, accessing services and in public life more broadly, reform is a critical action to ensure that LGBTQ people are protected from discrimination, harassment, and vilification, and empowered to reduce health disparities.

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

ACON holds the view promoted by the Public Interest Advocacy Centre, that is, *“the Anti-Discrimination Act 1977 (NSW) needs comprehensive reform, so that it effectively protects people against discrimination on the basis of who they are, and promotes equality of opportunity and participation in our society for all people.”*⁵

Our concerns with the Anti-Discrimination Act (ADA) cannot be wholly solved by more piecemeal amendments, which only serve to make the Act more complex and confusing for the layperson seeking to make a complaint. The provisions under the ADA are also inconsistent with those contained in the *Crimes Act*, causing further confusion and complexity around civil and criminal processes.⁶

It is our firm belief, alongside our partners Equality Australia, that the Act must be repealed and replaced with a new Act to better reflect contemporary standards and the experiences of discrimination – including discrimination on multiple simultaneous grounds – within our society, and to simplify the process of reporting and complaints handling so that the provisions of the Act are genuinely accessible.

ACON endorses the submissions of Equality Australia, HALC and PIAC with regard to the approach and wording of specific legislative reform.

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

NSW currently affords protections on the basis of ‘homosexuality’ which effectively means that bisexual+ people and people of other sexual minorities are not protected from discrimination. This must be updated to ensure people of all diverse sexualities are protected.

People with variations of sex characteristics, sometimes known as intersex, are also not protected, which sets NSW behind the Commonwealth, Tasmania, the ACT, and South Australia.⁷

The ADA’s definition of ‘transgender status’ is also limited. The Act refers to a transgender person as someone who identifies as a member of the ‘opposite sex’, which presumes a male/female binary, and therefore does not protect non-binary people.⁸ The Act also defines ‘homosexual’ as ‘male or female homosexual’, further excluding non-binary people.⁹ It is essential that all people of diverse sexualities and genders are protected from discrimination.

In addition, the Act includes protections for pregnancy and ‘breastfeeding’ only under the provisions of sex discrimination, implying or assuming that only people of the ‘female sex’ get pregnant or lactate, therefore excluding the trans people that need this protection.

Furthermore, according to the Act, a ‘recognised transgender person’ is a person who has been sterilised in order to legally affirmed their gender under Part 5A of *the Births, Deaths and Marriages Registration Act 1995 (NSW)*.¹⁰ Under the current legislation, this therefore means that a ‘recognised transgender person’ is someone who has undergone a ‘sex affirmation procedure’.

While Independent MP Alex Greenwich is currently seeking to remove this requirement from the *Births, Deaths and Marriages Act 1995 (NSW)* as one of the provisions of his omnibus Equality Legislation Amendment (LGBTIQA+) Bill 2023, this definition must be removed from the ADA regardless.

Not all trans people affirm their gender through surgery, and indeed not all trans people seek to affirm their gender through legal recognition. Therefore, even if the provisions of the *Births, Deaths and Marriages Registration Act* are amended to remove the surgical requirement, a person may still be trans even if they have not legally affirmed their gender.

The definition of a ‘recognised transgender person’ must therefore be removed, and any definitions related to the trans experience updated to ‘trans person’, which includes all people whose gender differs from that which was presumed for them at birth, including trans women, trans men and non-binary people.

Anti-discrimination protections must be explicitly extended to sex workers, their families, and associates. The NSW ADA does not afford any protections on the grounds of employment status or type of employment. While these must be considered alongside other potential protected attributes outlined by the Public Interest Advocacy Centre,¹¹ ACON endorses the view of the Sex Worker Outreach Project (SWOP) and the Scarlet Alliance that ‘sex work’ must be explicitly included as a protected attribute.¹²

It is also important that discrimination protection based on protected attributes be extended to the personal associates of any person with a protected attribute or any person perceived to have characteristics that pertain to a protected attribute.

Further clarification is required regarding the protections for people who are discriminated against on the basis of multiple grounds, for example, their race and their sexuality. The current Act separates these characteristics into a series of ‘mini-Acts’ added in by progressive amendments, producing a piecemeal and complicated document that does not capture the complexity and intersectionality of the lives of our communities.¹³

Many in our communities are affected by multiple and intersecting forms of discrimination. While this submission focuses on sexuality and gender protections, the protections offered under grounds such as race, age and disability are also currently inadequate. We would be supportive of increased protections under a range of grounds, such as disability, health status, profession, immigration status, family responsibilities, irrelevant criminal record, and physical features.

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

ACON supports the approach of the Commonwealth *Racial Discrimination Act 1975* that renders discrimination that occurs “in the political, economic, social, cultural or any other field of public life” unlawful.¹⁴ This approach is broader than the areas stipulated in the NSW Act, and in our view better protects our communities from discrimination in all areas of public life.

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

The definitions of direct and indirect discrimination in the Act are complex and outdated. They make it difficult for those experiencing discrimination to make a complaint, especially if that discrimination is experienced on multiple, intersecting grounds.

The ‘comparator’ test is also outdated and largely relies on hypothetical assumptions that are difficult to ascertain. ACON supports the simpler “because of” test in the ACT and Victoria, and the clarification in the ACT that discrimination can occur because of a combination of protected attributes.¹⁵

ACON also supports the view that the inability to comply and higher proportion tests for indirect discrimination are out of step with contemporary perspectives, and, like Equality Australia, advocate for the ‘disadvantaging’ test that applies in the ACT, Victoria, Tasmania, and Commonwealth *Age Discrimination Act* and *Sex Discrimination Act*.¹⁶

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

Currently, the vilification protections are inconsistent with criminal law, require a higher bar than federal law, and inadequately protect bisexual+ people, non-binary people, and sex workers from vilification.^{17,18} It is our view that these should be harmonised with criminal law, to improve simplicity for those seeking to make a complaint, and to increase the protection for all LGBTIQ+ people.

While it is pleasing that the Act protects against vilification on the basis of HIV/AIDS, the language used to describe this protection is out of date and stigmatising, as it places emphasis on the illness rather than the person. The *NSW HIV Strategy 2021-2025* is committed to ending the experience of HIV-related stigma, but this is not possible when our legislation is itself stigmatising. We strongly support that the wording should be revised from ‘HIV/AIDS infected’ to ‘person living with HIV/AIDS’ with a supporting definition that covers people living with HIV and people at risk of HIV.

We echo the concerns of PIAC that the recently introduced protections from vilification on the basis of religious belief is too broad, as the scope of religious belief, affiliation and activity is not clearly defined, can extend protection to organisations as well as individuals, and does not strike the appropriate balance between protection of religious belief and freedom of expression.

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

The sexual harassment sections of the Act do not adequately capture all types of sexual harassment, and is not prohibited in all areas of public life.¹⁹ The NSW Law Reform Commission should consider implementing appropriate recommendations from the Respect@Work inquiry.²⁰

ACON strongly supports the view that harassment based on protected attributes should be covered in the Act. Experiences of violence and harassment on the basis of sexuality and/or gender are common in our communities. For example, 35% of LGBTQ+ people report experiencing verbal abuse in the last 12 months, and 24% report harassment such as being spat at and offensive gestures.²¹

The drivers of such forms of violence and harassment are broadly similar to the drivers of discrimination, sexual harassment, and other forms of interpersonal violence.²² Addressing broader forms of harassment, especially through primary prevention interventions, but also via our legislation, can help to reduce systemic experiences of harassment and discrimination, while also working to prevent other forms of sexual harassment and interpersonal violence.

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

Positive obligations minimise the burden on complainants, by seeking to prevent harassment, discrimination and vilification before it occurs. Much of ACON's work is in prevention – of HIV and STIs, of experiences of violence, of suicide, cancer, and harms from alcohol and other drug use. ACON therefore strongly supports the introduction of positive obligations that form a preventative framework for discrimination, harassment and vilification.

ACON strongly supports the view of HALC that positive obligations to promote wider understanding of HIV, including transmission risks, should be incorporated into the Act, especially for private and public healthcare settings including aged care. This would significantly help to improve the experiences of PLHIV accessing these services by preventing stigma and discrimination and promoting equitable access.

8. exceptions, special measures and exemption processes

Religious exceptions

There are currently a number of loopholes in the Act which allow religious organisations to discriminate in a wide variety of circumstances, against people accessing their services, employees, and staff and students at educational institutions. The exemptions for faith-based organisations in NSW are the broadest in the country, not in line with community standards, and have substantive health impacts.

Nationally, figures suggest that over 133,000 people are employed by religious charities, making it a sector larger than the nation's Utilities sector.²³ Larger faith-based charities often undertake work in the human services sectors, which attracts significant amounts of public funding. This includes health care, aged care, adoptive services, homelessness services, and domestic and family violence services.

In order to meet the targets of the *NSW LGBTIQ+ Health Strategy 2022-2027*, it is critical that faith-based health services are not able to discriminate against people in our communities. All health services in NSW must deliver high quality, safe, inclusive and responsive health care to people in our communities.

Faith-based health and social services attract public funding because they provide a public service – all people should be able to access the services in their local area. That organisations which attract significant government funding can discriminate against its employees and those accessing their services compromise the 'public' nature of these services and represent significant barriers to access for those vulnerable to discrimination, including LGBTQ people.

These exemptions create an unsafe and exclusionary environment for anyone whose identity, life experience, or beliefs are in conflict with the tenets of that particular faith.

This is also the situation in religious schools, who may refuse a young person's admission, attach conditions to their admission, deny them benefits as a student, or expel them, for who they are. This applies equally to staff at religious schools.

This issue has generated significant public interest in recent years. In 2022, a majority of the federal parliament supported changes to these exemptions under the *Sex Discrimination Act 1984 (Cth)*, leaving NSW out of step with other jurisdictions, and community standards.²⁴

Not all discrimination against LGBTQ students and staff in schools is framed as discrimination based on a protected attribute like sexuality or gender. In instances that have garnered [media attention](#), staff at religious schools have claimed to have lost their jobs on the basis of their belief in marriage equality.

From November, NSW's ADA will protect people from vilification based on religious belief (or lack thereof).²⁵ However, this does not extend to discrimination protections, meaning that religious schools are free to discriminate against staff or students on the basis of their religious belief (or lack thereof).

ACON supports any move to ensure that staff and students at religious schools are not discriminated against for believing, for example, that marriage is not solely between a man and a woman, or that there's nothing wrong or sinful about being LGBTQ+.

While the equal right of sexuality diverse couples to adopt was recognised in NSW law in 2010, section 59A of the *Anti-Discrimination Act 1977 (NSW)* (the “ADA”) allows faith-based organisations to deny a child the best possible adoptive parents solely because they might be lesbian, gay, bi+ or trans. This exemption must be removed.

Other exceptions

In addition to religious exemptions, there are also two exemptions that apply solely to transgender people, allowing discrimination against trans people who wish to play the sport with people of their gender, and allowing discrimination in the administration of superannuation funds.²⁶

There is no consistent research that suggests trans women, trans men or non-binary people have any athletic advantage at any stage of gender affirmation.²⁷ Even so, the Commonwealth Sex Discrimination Act allows sport organisations to exclude trans athletes on a case-by-case basis on matters of strength, stamina and physique.²⁸

The Commonwealth provision is already too broad, because it does not require sporting codes to balance considerations of strength, stamina or physique against other considerations, such as the benefit of allowing participation or ways that any advantages could be mitigated without completely excluding the player.

The NSW Act allows discrimination for any reason, and therefore goes beyond the provisions of the Commonwealth Act. This blanket ban is wholly unfair, and extremely damaging to the health and wellbeing of trans people, for no apparent reason.

Trans inclusion is important in sport, not only because trans people shoulder some of the heaviest burdens of prejudice-driven poor mental health,²⁹ but because sport should be for everyone.

ACON is concerned that blanket exemptions such those in sections 38P and 38Q contribute to a highly stigmatising environment, where harmful debates such as those that we’ve seen with regard to trans inclusion in sport are propagated. These harmful debates contribute to poorer health outcomes for trans people.

ACON also shares the concerns of HALC with regard to insurance and superannuation for PLHIV, and people with disability or long-term health condition, including mental health. PLHIV and others in our communities experience stigma discrimination from insurers, who are then not required to provide the data that allows them to make exceptions, under s49Q(a), unless the matter progresses to NCAT.³⁰

We support the recommendation of HALC, that *“the Act be amended to include a provision to allow people seeking cover to obtain a copy of the actuarial or statistical data upon which the insurer is relying upon. Given that the onus is on insurers to demonstrate reliance upon the exceptions, we also recommend that Anti-Discrimination NSW be provided powers to compel insurers to provide the data for conciliation purposes.”*

It is critical that we create safe, welcoming, and inclusive environments so that everyone in our communities has the best chance to thrive. Legislation that protects, rather than stigmatises, our communities is one component of such an environment.

Special measures

The *Anti-Discrimination Act 1977* (NSW) does not include a clear ‘special measures’ type provision. In NSW employers need to apply for an exemption from that Act to conduct targeted recruitment, such as recruitment of Aboriginal and Torres Strait Islander people.

In all states and territories excluding NSW, special measure provisions are built into discrimination laws for the specific purpose of protecting actions which confer benefits on disadvantaged racial groups. In these jurisdictions, the granting of an exemption is not a legal prerequisite for conducting a targeted recruitment strategy, as long as the recruitment program meets the requirements of a special measure.³¹

In 2018, the Indigenous employment rate was around 49 per cent compared to around 75 per cent for non-Indigenous Australians.³² NSW should recognise that some racial groups have suffered historical disadvantage and do not have equal access to opportunities to others in the community. The NSW ADA should contain special measures that solely seek to promote equal opportunity to rectify these disadvantages.

9. the adequacy and accessibility of complaints procedures and remedies

Due to the piecemeal nature of the Act, the complaints process can be confusing, convoluted, and not easily accessible to the layperson. An essential component of the Act’s modernisation should be a simplification of the complaints processes.

Currently, the burden of proof rests with the person who has been discriminated against. The ACT Law Reform Advisory Council proposes an alternative, where the complainant must prove they have been treated unfairly, but then the burden of proof shifts to the respondent, who must then prove that the person was not treated unfavourably because of a protected attribute.³³ ADNSW should also provide complainants with sufficient information to assist them to make a well-supported complaint.

ACON also supports the view of Equality Australia that not-for-profit representative organisations should be able to lodge representative complaints on behalf of a community, in order to better address systematic discrimination.

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

It is our understanding that the Anti-Discrimination Board is being considered as a possible mechanism to address complaints regarding conversion practices, as drafting of the legislation to prohibit conversion practices is under way.

As conversion practices are not discrimination, but harmful practices in and of themselves, it is our view that should this be the outcome, the Anti-Discrimination Board must be expanded, in scope and in name, to better reflect its role and functions. This must also occur alongside workforce capacity building so the Board is equipped to respond to its expanded functions sensitively.

Furthermore, this expansion is necessary should the ADA incorporate positive obligations, and systematic complaints. Systemic discrimination can be addressed by collective complaints, as outlined in point 9, but the Anti-Discrimination Board should also be expanded to have investigative powers, in order to proactively investigate instances of systemic discrimination.

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

This submission has, when appropriate, referred to protections that exist in other Australian state and federal jurisdictions, including protections in Victoria, Tasmania, ACT, and Commonwealth Acts.

Broadly, we believe that Victoria's Equal Opportunity Act and Equal Opportunity and Human Rights Commission provide a framework for NSW in order to modernise and simplify its own Anti-Discrimination protections, as well expand the scope and function of the Anti-Discrimination Board.

We endorse Equality Australia's submission regarding the applicability of other jurisdictional protections in NSW.

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

The NSW Anti-Discrimination Act currently contradicts mechanisms in the Commonwealth *Sex Discrimination Act (1984)*, such as the lack of protections for bisexual+ and non-binary people, which adds to the confusion felt by people in our communities who are seeking to make a complaint when they experience discrimination.



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

We support HALC’s view that the Act should prohibit discriminatory requests for information, such as pre-employment medical checks that require a person to disclose their HIV status, or patient registration forms where this information is irrelevant.

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