



04 October 2023

New South Wales Law Reform Commission

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

Anti-Discrimination Act 1977 (NSW) Review

Thank you for the opportunity to make this preliminary submission to the New South Wales Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) (the Act).

The Australian Human Rights Commission (the Commission) welcomes the NSW Government's initiative to review the Act, and supports its efforts to consider ways of modernising the Act to better promote the equal enjoyment of rights in NSW.

Since 2019, the Commission has undertaken work on a major project: *Free and Equal: An Australian conversation on human rights*.¹ The Free and Equal project seeks to identify what an effective system of human rights protection for 21st century Australia would look like, and what steps Australia needs to take to get there. The project outlines the actions necessary for Governments to meet their obligations to respect, protect and fulfil human rights, and sets out the Commission's proposed reform agenda for better protection of human rights at the national level.

As part of the Free and Equal project, the Commission has released two Position Papers on key reform priorities: federal discrimination laws, and a model Human Rights Act.

The Commission would like to first draw your attention to the position paper: [A Reform Agenda for Federal Discrimination Laws \(2021\)](#). In this position paper, the Commission provides recommendations for the reform of federal discrimination laws. Some of these reforms have already been implemented, as reflected in our [Table of Implementation](#). In this report, four overarching integrated sets of reform are recommended, and have been listed below.

1. building a preventative culture;
2. modernising the regulatory framework;
3. improving the practical operation of laws; and
4. enhancing access to justice.

Whilst these integrated sets of reforms are recommendations made for legal frameworks at the federal level, the principles outlined should be considered in the review of the NSW Act, to ensure a rights-based approach is achieved.

For example, the Commission recommends that the Act should shift its focus to prevention, through the inclusion of a positive duty in discrimination legislation which would establish an obligation to prevent discrimination from occurring. In considering this, the Commission would like to draw your attention to the [new Positive Duty](#) under the *Sex Discrimination Act 1984* (Cth), which imposes a legal obligation on organisations and businesses to take proactive and meaningful action to prevent relevant unlawful conduct² from occurring in the workplace or in connection to work.

The inclusion of a positive duty in anti-discrimination legislation is an effective means of ensuring substantive equality is achieved. This concept of including a positive duty in anti-discrimination legislation is also a recommendation made in the final report of the Disability Royal Commission. In this report, the Disability Royal Commission recommends that a positive duty be imposed on duty holders, requiring reasonable and proportionate measures be taken to eliminate disability discrimination, harassment and victimisation.³ The Commission encourages the Law Reform Commission to consider the recommendations made by the Disability Royal Commission when reviewing the Act, and to consider including a positive duty under all protected attributes of the Act.

In your revision of the Act, the Commission would like to draw your attention, in particular, to the protected attributes of sexual orientation, gender identity and intersex status, under the *Sex Discrimination Act 1984* (Cth). The Commission supports the Equality Legislation Amendment (LGBTIQ+) Bill 2023 (the Bill), introduced by Alex Greenwich MP, and endorses the contents of the Bill. We would encourage you to consider the Bill in your revision of the Act, and recommend you extend the protections currently outlined in the Bill to all gender identities. This would align with the *Sex Discrimination Act 1984* (Cth) and ensure that protections are afforded to all marginalised gender identities and expressions, including gender diverse and non-binary people.⁴

Finally, the Commission notes that NSW does not have a Human Rights Act. The Anti-Discrimination Act NSW, the subject to this review, is outdated and reflective of piecemeal changes, which have not kept up with community standards. As noted above, the Commission also released a Free and Equal position paper: [A Human Rights Act for Australia](#), which recommends the establishment of a Federal Human Rights Act. Similar to a Federal Human Rights Act, a human rights Act for NSW would embed a rights-based approach and ensure the comprehensive promotion and protection of human rights at the state level.

The Commission commends the NSW Government for taking steps towards improving the rights of people in NSW through this review and hopes a human rights-based approach is adopted when looking at changes to this legislation.

The Commission would be pleased to discuss this submission and our two position papers further or provide any additional information that may be helpful to the review.

Emeritus Professor Rosalind Croucher AM
President

¹ Australian Human Rights Commission, Free and Equal: An Australian conversation on human rights (Web Page) <<https://humanrights.gov.au/free-and-equal>>.

² Under the *Sex Discrimination Act 1984* (Cth), organisations and businesses now have a positive duty to eliminate, as far as possible, the following unlawful behaviour from occurring:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex
- related acts of victimisation.

The Commission refers to this conduct as 'relevant unlawful conduct'.

³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, (Final Report - Executive Summary, Our vision for an Inclusive Australia and Recommendations, 29 September 2023) 205.

⁴ Which includes genders that sit within or outside of the spectrum of the male and female binary. A person might identify solely as non-binary or relate to non-binary as an umbrella term and consider themselves genderfluid, genderqueer, trans masculine, trans feminine, agender, bigender, or something else.