NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 23/549

18 October 2023

The Honourable Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission

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

Dear Mr Bathurst,

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

1. The NSW Bar Association (the **Association**) thanks the NSW Law Reform Commission (the **Commission**) for the opportunity to provide preliminary submissions to its review of the *Anti-Discrimination Act 1977* (NSW) (the **Act**), as relevant to the Review's Terms of Reference.

2. The Act remains a foundation statute for the protection of the right to equality and freedom from discrimination in NSW. However, the Act has suffered from piecemeal amendments over four decades and is in need of a major overhaul. The understanding of discrimination has grown over those four decades, and language and perceptions of inequality have also developed over that time. Unlike the anti-discrimination legislation in other states and territories, the Act has not adapted to those generations of change.

3. Protections from discrimination now need to be seen as a subset of civil rights protected and enforceable through the NSW legal system. The system established under the Act has been exposed as wanting by the stress testing of four decades of litigation. Those wishing to protect their right to equality should be able to do so in whatever forum they choose, to protect those rights by injunctive relief where needed and to obtain damages for the full extent of their loss.

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

4. The Review presents a significant opportunity to modernise and simplify the Act to better promote the equal enjoyment of rights and reflect contemporary community standards.

5. Since its introduction in 1977 the Act has undergone piecemeal reform which, in the Association's view, has complicated the its framework, and has resulted in unnecessary repetition and incomplete and inadequate protections.

6. The Act has different Parts pertaining to discrimination of different attributes (e.g. Part 2 - Racial discrimination, Part 3 - Sex discrimination and Part 3A - Discrimination on transgender grounds).

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This makes navigating the Act particularly difficult for individuals who may have experienced discrimination on the ground of more than one protected attribute or intersectional discrimination. This structure has also resulted in significant duplication and makes it difficult to identify similarities and differences across the provisions.

7. It is important that the terminology and structure of the Act are accessible and user-friendly to enable individuals to understand their rights and responsibilities, and navigate the available complaints processes regardless of whether or not they have legal representation.[1] Accessible and clearly expressed anti-discrimination legislation is critical to eliminating discrimination and promoting equality and equal treatment of all people in NSW.

8. The Association recommends that the Commission consider options to simplify the overarching structure of the Act. For example, more modern anti-discrimination legislation in other Australian jurisdictions identifies protected attributes in one section,[2] followed by the areas where discrimination is prohibited,[3] and any exceptions which may apply.[4] The Association considers there is merit in replacing the Act's current structure to reflect the chronology of a 'standard' complaints process, akin to a step-by-step guide, to the greatest extent possible.

9. The Association also recommends that the Commission examine the appropriateness of the terminology in the Act, including by conducting targeted consultation with relevant representative organisations and groups, to ensure that the language used reflects contemporary community standards and, to the greatest extent possible, the language used by individuals who possess the relevant attributes. This is discussed further in relation to ToR 2.

ToR 2: Whether the range of attributes protected against discrimination requires reform

10. At present, the Act prohibits discrimination of a more limited range of attributes than anti-discrimination legislation in other Australian jurisdictions. The Association recommends that the Commission consider possible expansion of the attributes protected against discrimination. For example:

    a. the Victorian Act: employment activity (s 6(c)), industrial activity (s 6(f)), lawful sexual activity (s 6(g)), parental status or status as a carer (s 6(i)), physical features (s 6(j)), political belief or activity (s 6(k)), profession, trade or occupation (s 6(la)), religious belief or activity (s 6(n)), an expunged homosexual conviction (s 6(pa)) and a spent conviction (s 6(pb)); and

    b. the ACT Act: accommodation status (s 7(1)(a)), employment status (s 7(1)(f)), gender identity (s 7(1)(g)), genetic information (s 7(1)(h)), immigration status (s 7(1)(i)),

[1] In 2021-2022, Anti-Discrimination NSW received 1,626 discrimination complaints (page 43 2021-22 Annual Report). Many complaints do not proceed to the NSW Civil and Administrative Tribunal. In 2021-22, approximately only 11.3% of complaints finalised were referred to NCAT (page 23 of 2021-22 Annual Report).
[2] For example, see section 6 of the *Equal Opportunity Act 2010* (Vic) (the **Victorian Act**) and section 7 of the *Discrimination Act 1991* (ACT) (the **ACT Act**).
[3] For example, see Part 4 of the Victorian Act and Part 3 of the ACT Act.
[4] For example, see Part 5 of the Victorian Act and Part 4 of the ACT Act.

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industrial activity (s 7(1)(j)), irrelevant criminal record (s 7(1)(k)), parent, family, carer or kinship responsibilities (s 7(1)(l)), physical features (s 7(1)(m)), political conviction (s 7(1)(n)), profession, trade, occupation or calling (s 7(1)(p)), record of a person's sex having been altered under applicable legislation (s 7(1)(r)), religious conviction (s 7(1)(t)) and subjection to domestic or family violence (s 7(1)(x)).

11. In formulating protected attributes consideration should be given to the protections for equality and from non-discrimination found in the International Covenant on Civil and Political Rights (**ICCPR**), the International Convention on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities and the United Nations Declaration on the Rights of Indigenous Peoples.

12. In addition, the Association recommends that the Commission consider the terminology and definitions of the Act's protected attributes, some of which are currently limited in their coverage or not reflective of contemporary language. For instance:

    a. the Act prohibits discrimination on 'transgender grounds' (s 38B), whereas the protected attributes in the Victorian Act include 'gender identity' (s 6(d)) and 'sex characteristics' (s 6(oa)) and the ACT Act's protected attributes include 'gender identity' (s 7(1)(g)), 'sex' (s 7(1)(u)) and 'sex characteristics' (s 7(1)(v)). At present, the Act assumes that a person will identify as either male or female, and does not contemplate the fact that some individuals are intersex or identify as non-binary;

    b. the term 'homosexual' is also limited and does not adequately protect persons of other sexualities, including bisexuals, pansexuals, asexuals, heterosexuals, or people where one person in the relationship is non-binary. 'Sexual orientation' is a protected attribute in the Victorian Act (s 6(p)) and 'sexuality' is a protected attribute in the ACT Act (s 7(1)(w)). Both are more flexible than attempts at precise definition;

    c. 'marital status' is used in the present Act, as opposed to other alternatives such as 'relationship status'; and

    d. consideration should also be given to the definition of 'disability' in section 4 of the Act.

13. In respect of the attribute of 'disability', we recommend the Commission consider including definitions of the following terms:

    a. 'reasonable adjustment' (analogous to that in s 4 of the *Disability Discrimination Act 1992* (Cth) (**DDA**));

    b. 'assistance animal' (analogous to that in s 9 of the DDA); and

    c. 'disability aid' (analogous to that in s 9 of the DDA).

14. Such amendments to the Act's definitions section would be necessitated by further amendments to the Act, including discrete forms of disability discrimination:

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a. a form (or forms) of unlawful discrimination for not making (or proposing not to make) a reasonable adjustment for a person with disability (analogous to ss 5(2) and 6(2) of the DDA);

b. a provision protecting a person with disability who requires an assistance animal, where the ground of discrimination is that person's assistance animal (analogous to s 8 of the DDA); and

c. a provision protecting a person with disability who requires a disability aid, where the ground of discrimination is that person's disability aid (analogous to s 8 of the DDA).

ToR 3: Whether the areas of public life in which discrimination is unlawful should be reformed

15. The Act currently prohibits discrimination in specified areas of public life, with each area addressed in a separate section relating to the protected attribute.[5] This structure has resulted in significant duplication and confusion.

16. More fundamentally, the specified areas of public life are finite, resulting in gaps in protection. As the Commission will be aware, there has been considerable contest around the metes and bounds of the definitions of the relevant areas of public life (e.g. goods and services, employment etc).

17. One approach to reform could be to broaden the scope of the Act to apply to all areas of public life, rather than retaining and updating the various areas of coverage in the current Act. The reformed Act could define areas of public life to align with those areas (for example, see Part 4 of the Victorian Act) but in a non-exclusive way, allowing for greater application of anti-discrimination laws in public life. If necessary, specific exemptions could be retained.

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

18. There is considerable confusion in the community as to what constitutes unlawful discrimination, how it can be proved and the differences between the different types of discrimination addressed in the Act. While the notions of direct discrimination and indirect discrimination have been present in Australian law for many decades, complexities in their interpretation remain.[6]

19. Amendments to anti-discrimination legislation in the Australian Capital Territory and Victoria have grappled with issues of definitions and causation (particularly the use of a comparator) which may inform how the laws in NSW could be simplified and clarified. Any amendments should not diminish the existing protections which capture different types of conduct and behaviour.

20. The focus and purpose of the law should be on substantive equality, that is, the avoidance of detriment caused by unlawful discrimination. This requires a recognition that treating everybody equally may lead to discrimination against some members of the community.

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[5] For example, ss 20, 34, 38N, 48, 49N, 49ZQ and 49ZYO of the Act address discrimination in the provision of accommodation.

[6] *Australian & Iron Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 171, 184; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392-393, 400; *Purvis v New South Wales (Department of Education and Training)* (2013) 217 CLR 92; *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247.

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21. A comparator requires the NSW Civil and Administrative Tribunal (the **NCAT**) to focus on the respondent's processes, reasoning and treatment of other persons. It is a technical test which is often difficult to formulate and is open to legal confusion, deflection and obfuscation. As a result, insubstantial focus is given to the impact of the conduct. Although there will always be a need to consider why the conduct occurred,[7] many instances of discrimination do not lend themselves to a real or apt hypothetical comparator.

22. The Association considers that moving away from a strict comparator approach would assist in making the application of anti-discrimination legislation more practical and reflective of complainants' experiences, noting also that discrimination may occur on the basis of a combination of, or multiple, attributes. While section 4A of the Act recognises that unlawful discrimination can occur for more than one reason, explicitly recognising intersectional discrimination would facilitate greater access to the jurisdiction.

23. Consideration should also be given to shifting the onus from the applicant to the respondent where the applicant has been able to establish *prima facie* discrimination. This would avoid circumstances which currently occur in indirect discrimination matters where an applicant must prove a lack of reasonableness when they may not have ready access to evidence needed to establish the reasons for the discriminatory conduct. Related provisions have been introduced to the *Sex Discrimination Act 1984* (Cth) (the **SD Act**) and the DDA.

24. The Association recommends that the Commission also consider whether to include future discriminatory conduct in the definition of discrimination.

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

25. At present, there are inconsistencies in the Act's vilification provisions and those in the *Crimes Act 1900* (NSW) (the **Crimes Act**).

26. Notably, s 93Z(1) of the Crimes Act states *'a person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence:*

    (c) the sexual orientation of the other person or one or more of the members of the group

    (d) the gender identity of the other person or one or more of the members of the group

    (e) that the other person is, or one or more of the members of the group are, of intersex status'.

27. In contrast, the related vilification provisions in the Act are limited to inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, by a public act, on the ground of transgender status[8] and homosexuality.[9] The difference in terminology has resulted in a

[7] *Kaplan v Victoria (No 8)* [2023] FCA 1092 reiterates there is no requirement for a comparator under the *Racial Discrimination Act 1975* (Cth), but making comparisons is a useful exercise, see [48]; [70], [379], [608] [666].
[8] See section 38S of the Act.
[9] See section 49ZT of the Act.

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situation where vilification of bisexuals, non-binary and intersex people may be a criminal offence, but a victim has no civil remedies available to them. This is another example which highlights the need to reform the terminology in the Act, particularly in respect of LGBTQIA+ communities.

28. The Association recommends that the Commission consider reform options to harmonise the Act's vilification provisions with the criminal law in NSW, as well as the possibility of expanding the vilification provisions to other protected attributes. Empirical research identifying groups and communities most impacted and at risk of vilification should be considered, and protections for these groups should be prioritised.

29. The current vilification test in the Act imposes a higher standard than the test under section 18C(1)(a) of the *Racial Discrimination Act 1975* (Cth) (the **Racial Discrimination Act**) which states: *it is unlawful for a person to do an act, otherwise than in private, if the act is* ***reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate*** *another person or a group of people* (emphasis added).[10] Notably, the Racial Discrimination Act facilitates a regulatory response to the constitutive harms of vilification, whereas the Act's test does not respond to constitutive harms, but only certain consequential harms.

30. A possible option for reform could be an approach akin to the *Anti-Discrimination Act 1998* (Tas), wherein a near identical test to the federal standard was adopted for conduct which offends, humiliates, intimidates, insults or ridicules a person on the basis of a broader list of attributes, and the higher NSW threshold was adopted for inciting hatred towards, serious contempt for, or severe ridicule of a person on the ground of a more limited, prescribed list of attributes.[11]

31. Similar to our comments at paragraph 8 above, streamlining the vilification provisions into one section which sets out the test and the protected attributes may assist in reducing duplication and increasing the accessibility of the Act.

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

32. The Association encourages the Commission to consider adopting a similar and aligned approach to the changes brought about following the Sex Discrimination Commissioner's landmark *Respect at Work* report, including the consequent amendments to the SD Act.

33. The Association supports alignment of the Act with the SD Act, including changes of form (as well as substance) to improve community awareness and understanding of the provisions and their scope. In particular, we support alignment with the SD Act of:

    a. the definitions and prohibition of sexual harassment and sex-based harassment;

    b. provisions in relation to victimisation;

[10] Section 20C(1) of the Act states: *It is 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 ground of the race of the person or members of the group.*
[11] *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19.

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c. provisions in relation to vicarious and accessorial liability;

d. areas of public life in which sexual harassment and sex-based harassment are prohibited;

e. provisions prohibiting workplace environments hostile on the ground of sex to reflect section 28M of the SD Act; and

f. coverage of the Act by inserting definitions of 'worker', 'person conducting a business or undertaking' (**PCBU**) and 'workplace' drawn from the definitions in sections 5, 7 and 8 respectively of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**).

34. The Review should also consider reform which prohibits harassment and vilification in respect of all grounds of unlawful discrimination (i.e. so that unlawful harassment and vilification is not limited to sexual and sex-based harassment and/or vilification on the ground of race, transgender status, homosexuality and/or HIV/AIDS status).

ToR 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

35. The Review should consider amendments to the Act to introduce a positive duty on employers and PCBUs, similar to the recent amendments to Part IIA of the SD Act to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment and/or victimisation, as well as sex-based harassment and workplace environments hostile on the grounds of sex (the latter two being prohibitions that ought also be introduced into the Act, reflecting the prohibitions under s 28B and s 28M of the SD Act).

36. Consideration should also be given to extending the positive duty described above to all forms of unlawful discrimination and harassment (including racial discrimination/vilification, disability discrimination/vilification etc).

37. Relatedly, as described in relation to ToR 6, the Review should consider extending coverage of the Act to PCBUs, and workers of PCBUs, drawing on the definitions at sections 5 and 7 of the WHS Act.

Positive obligation to make reasonable adjustments

38. Consideration should be given to the introduction of a positive obligation on employers, educators, providers of goods and services and others to make 'reasonable adjustments' to support the full and effective participation of people with disabilities in all areas of public life. Section 20 of the Victorian Act and/or sections 5(2) and 6(2) of the DDA provide models for consideration. Regard should also be given to introducing an obligation to make reasonable adjustments in respect of other protected attributes, such as family responsibilities and pregnancy.

39. Further, consideration should be given to including, in the positive obligation to make reasonable adjustments, an obligation on respondents to undertake an assessment to identify the scope of and need for the reasonable adjustment as identified by Moshinsky J in *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770 at [50]-[52].

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ToR 8: Exceptions, special measures and exemption processes

40. The Association recommends that the Commission consider narrowing the blanket exception in section 56 of the Act for any '*act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion*'. One option for reform could be to reflect the analogous requirement in the Victorian Act that the discrimination be '*reasonable and proportionate in the circumstances'* (e.g. ss 82(2), 82A(1)(c), 82B(1)(e), 83((2) and 83(A(1)(c) of the Victorian Act).

41. Similarly, we recommend that consideration be given to amending the exceptions in the Act currently available to a 'private educational authority' which exempt it from prohibitions against sex discrimination (s 31A(3)(a)), transgender discrimination (s 38K(3)), marital or domestic status discrimination (s 46A(3)), disability discrimination (s 49L(3)(a)), homosexuality discrimination (s 49ZO(3)) and age discrimination (s 49ZYL(3)(b)). Consideration should similarly be given to removing the exception for a 'prescribed education authority' from the prohibitions against racial discrimination (s 17K).

42. The Association notes the Australian Law Reform Commission's report regarding its current inquiry into Religious Educational Institutions and Anti-discrimination Laws is due by 31 December 2023.

43. Consideration ought also be given to whether respondents should be able to plead both 'reasonableness' (in relation to a claim of indirect discrimination) and unjustifiable hardship. This will depend on whether the current categories of direct and indirect discrimination are maintained.

44. Examples of other exceptions and exemptions where reform should be considered include:

    a. employment of a married couple;[12]

    b. discrimination on the ground of marital or domestic status in the terms or conditions appertaining to a superannuation fund;[13]

    c. any rule or practice of a not-for-profit body which restricts admission to membership of that body;[14]

    d. any rule or practice of an establishment which provides housing accommodation for aged persons, whereby admission to the establishment is restricted to persons of a particular sex, marital or domestic status or race;[15] and

    e. the current exemption powers granted to the President of the Anti-Discrimination Board of NSW (the **ADB**).[16]

[12] See section 46 of the Act.
[13] See section 49 of the Act.
[14] See section 57 of the Act.
[15] See section 59 of the Act.
[16] See section 126 of the Act.

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ToR 9: The adequacy and accessibility of complaints procedures and remedies

45. This is an important part of the Commission's reference where structural change is necessary to overcome the narrow and confined manner in which anti-discrimination laws were brought into existence in NSW four decades ago.

46. The Association considers there is considerable merit in civil litigants being able to plead all causes of action arising from the same set of circumstances (e.g. statutory rights and common law rights) in the one proceeding.

47. At present, a litigant with a cause of action arising from a breach of contract and a contravention of the Act must commence two sets of proceedings. An example of this would be breach of an employment contract and a complaint of unlawful discrimination. One way to stop such duplication of proceedings is to provide victims with the ability to do either (e.g. complain to the ADB, with adjudication in NCAT, or to commence in a NSW Court).

48. NCAT provides a low or no cost jurisdiction which is (relatively) quick and should be an option open to a litigant to ensure access to justice. However, the current jurisdictional limit imposed on damages which may be awarded to an applicant effectively forces applicants seeking a substantial remedy to pursue such remedy in another jurisdiction (e.g. the Fair Work Commission, the Australian Human Rights Commission and the Federal Courts).

49. The Association also recommends that the Commission consider the following matters with a view to improving the adequacy and accessibility of complaints procedures:

    a. requirements imposed on respondents to make their defence clear at the time of mediation with the ADB, with a view to increasing settlement rates, of matters capable of settlement, at an earlier stage;

    b. efficiencies of mediation and conciliation by the ADB and NCAT, including by undertaking a comparative analysis of outcomes in other jurisdictions and the differences between the outcomes of mediation and conciliation;

    c. timeframes or limits of conciliation before the ADB, after which the parties can elect to proceed to NCAT; and

    d. the availability of representative complaints processes.

50. Accessible complaints procedures are critical to the effectiveness of the NSW anti-discrimination legislation. The ADB and NCAT's procedures should include flexible reasonable adjustment processes wherever possible to accommodate and promote accessibility for all parties, including people with disabilities, people with low literacy levels, people who have limited English proficiency and people living in remote areas.

51. For instance, the complaints procedures must recognise and accommodate the accessibility needs of people with disabilities. Consultation with disability advocacy organisations and compliance with the Web Content Accessibility Guidelines may be a useful starting point. Notably, the ADB

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and NCAT do not currently have electronic filing capabilities which is a significant accessibility issue that can and should be rectified by additional resourcing.

52. We recommend the Commission consider amendments which would empower NCAT to deal with urgent complaints without requiring the applicant to bring a prior application to the ADB, and amendments to provide for interlocutory orders, including injunctive relief to prevent ongoing breaches.

Remedies and costs

53. Damages for non-economic loss in discrimination matters have historically been low and concern has been expressed that, as a result, insufficient value has been given to the protection of human rights, including from discrimination. Without adopting a code approach to the calculation of non-economic loss, there is value in considering whether particular principles ought be specified to guide the determination and calculation of damages. For example, such principles should include that non-discrimination is a fundamental human right and that Australia is required, by Article 26 of the ICCPR, to prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.

54. The Association considers that the Act's current $100,000.00 cap on damages is arbitrary and, in some cases, unfairly limits the damages that may be awarded to a complainant. The cap on damages has also resulted in many claimants preferring to commence proceedings in the federal jurisdiction, where their likely damages will exceed the cap in NSW. However, some applicants prefer to bring proceedings under the Act, because it minimises the risk of costs exposure.

55. We recommend that the Commission consider providing complainants with an option to have their complaint dealt with in NCAT or transferred to a court. Were that option to exist, it may then be sound to retain the cap on damages that NCAT can award so litigants have an option to bring smaller claims in a more cost-effective tribunal. Consideration will also need to be given to differences in evidence law and the costs regimes of the respective jurisdictions. In particular, consideration ought to be given to what is the most appropriate costs model.

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

56. The Association would also welcome consideration of whether the ADB (or its replacement) should engage in a quasi-regulatory role similar to the Australian Securities and Investments Commission. This would involve a shift away from a largely compensatory model to a State regulatory agency responsible for policing discrimination (and enforcing discrimination protections) in NSW. Remedies available in other jurisdictions could be considered, such as the imposition of fines and the obtaining of 'enforceable undertakings'. Alternatively, a quasi-regulatory model could be adopted where the ADB (or its replacement) could be given additional powers to pursue matters of discrimination itself or intervene in privately brought proceedings.

57. The Association considers there is benefit in replacing the ADB with a Commission, bringing it in line with other States and Territories. Maintaining a Board may, in the Association's view,

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downplay the importance of equality laws and contrast with other standing Commissions (e.g. the NSW Law Reform Commission, the Independent Commission Against Corruption and the Law Enforcement and Conduct Commission, as well as the Victorian Equal Opportunity and Human Rights Commission and the ACT Human Rights Commission).

58. We also recommend that the Review examine the powers and functions of the ADB and its President, particularly with a view to modernising the ADB's ability to undertake inquiries and conduct research to identify and address systemic discrimination (rather than largely relying on individual complaints). In this respect, the Review could consider improvements and modifications to the ADB's powers in s 119 of the Act to bring them into line with investigative provisions in other jurisdictions, including s 11 of the *Australian Human Rights Commission Act 1986* (Cth) and s 127 of the Victorian Act. It would be worthwhile considering whether the functions contained in Part 11 Division 1 of the latter statute should be adopted, particularly with respect to education, intervention and *amicus curiae* roles (including in NCAT).

59. Additionally, the Review should consider modernising the ADB's powers to ensure it can conduct investigations into all forms of discrimination that are dealt with by the Act. In this respect, we note that the ADB's power to carry out investigations does not extend to some forms of discrimination covered by the Act (race, sex, physical disability, homosexuality and transgender): see s 119(1)(a).

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

60. A comparative analysis of the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws will greatly assist stakeholders to consider options for reform to the Act. The Association recommends that such analysis be included in any consultation papers developed by the Commission.

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

61. Amendments to the NSW Act should look to achieve coherence with other state regimes and the Commonwealth anti-discrimination law. As already identified, there are considerable differences between the Act and federal anti-discrimination legislation, particularly in relation to sex and disability discrimination. In our view, the Act is generally less effective at addressing discrimination. The differences also limit the application in NSW of a developing jurisprudence in other jurisdictions.

ToR 13: Other matters

62. The Association has identified one other matter that does not directly arise under the Review's Terms of Reference, but which we recommend be considered by the Commission during the Review.

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63. Section 89B(2)(b) of the Act permits the President of the ADB to decline a complaint if the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint. If the President declines a complaint, there is no possibility of bringing a complaint under the Act.[17]

64. Comparatively, the President of the Australian Human Rights Commission can decide not to investigate a complaint alleging unlawful discrimination where the complaint has been lodged more than 24 months after the alleged acts, omissions or practices took place.[18] If the President declines to investigate, the applicant may seek leave of the Court to commence a claim in respect of those matters.[19]

65. The Association recommends that the Commission consider the appropriateness of the 12-month time limitation under the Act, particularly noting that some applicants' circumstances may have changed significantly as a result of the alleged conduct, including, for example, loss of employment and/or psychiatric injury. The Association also recommends that consideration be given to any impacts that the time limitation has on the Act's effectiveness in responding to, and deterrence of, unlawful discrimination in the community.

Conclusion

66. Thank you for the opportunity to provide a preliminary submission to this Review. The Association welcomes the opportunity to provide further feedback as the Review progresses.

67. Should you have any questions in relation to this letter, please contact , at in the first instance.

Yours sincerely

Gabrielle Bashir SC

President

[17] See s 89B(4) of the Act. A decision under s 89B is not reviewable by NCAT.
[18] See section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth).
[19] See section 46PO of the *Australian Human Rights Commission Act 1986* (Cth).

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