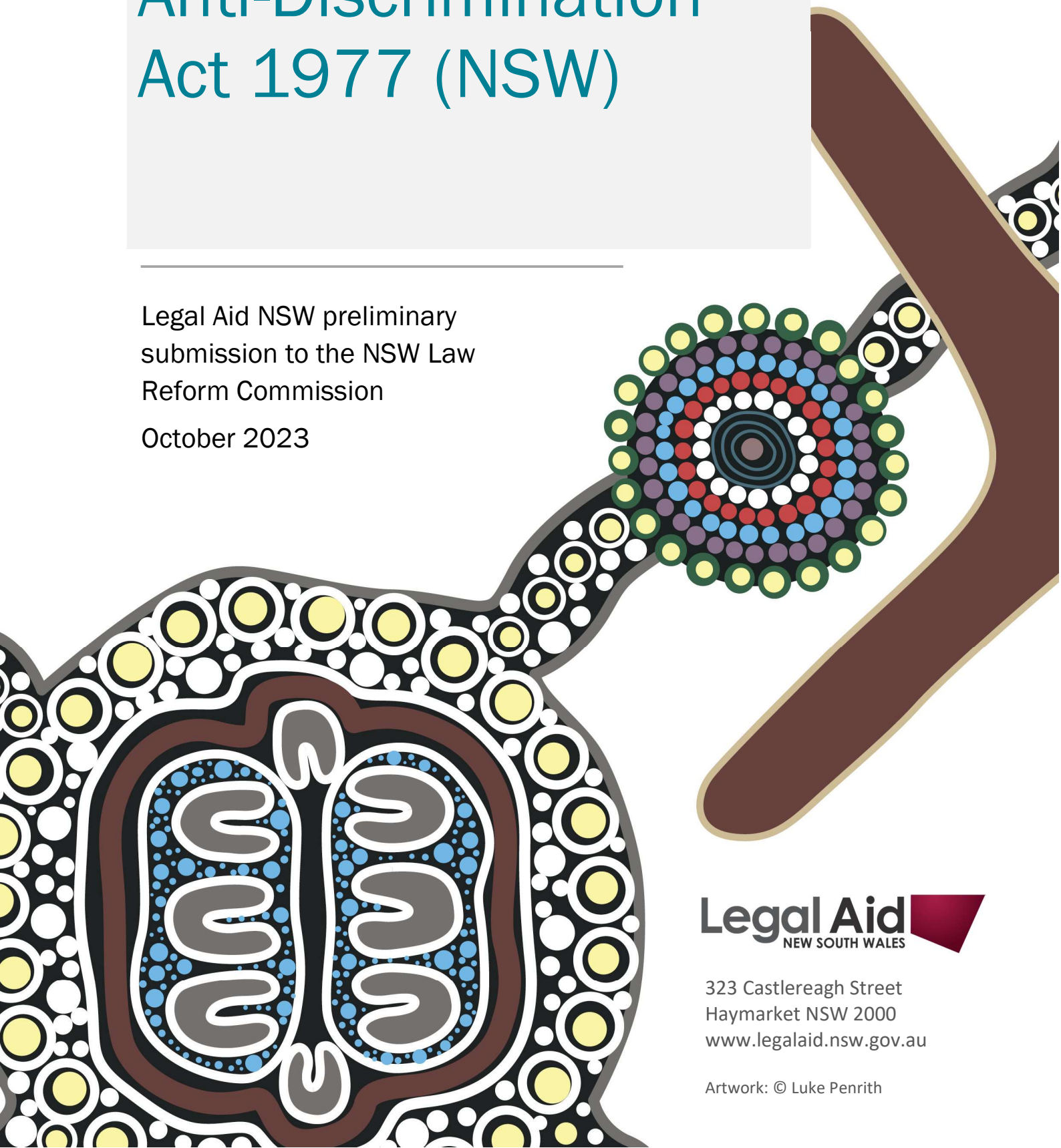


# Review of the Anti-Discrimination Act 1977 (NSW)

Legal Aid NSW preliminary  
submission to the NSW Law  
Reform Commission  
October 2023



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Acknowledgement .....	5
1. About Legal Aid NSW .....	6
2. Introduction .....	7
3. Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards (ToR 1) .....	8
4. Whether the range of attributes protected against discrimination requires reform (ToR 2) .....	10
4.1 Shortcomings in existing protected attributes .....	10
4.1.1 Narrow definition of sexual orientation and gender identity .....	10
4.1.2 Kinship responsibilities.....	10
4.1.3 Definition of disability .....	11
4.2 Additional attributes .....	11
4.2.1 Religion .....	11
4.2.2 Criminal record .....	13
4.2.3 Experience of domestic and family violence.....	15
4.2.4 Social origin.....	17
4.2.5 Profession, trade or occupation .....	20
5. Whether the areas of public life in which discrimination is unlawful should be reformed (ToR 3).....	21
5.1 Lack of protection from discrimination for unpaid workers including volunteers and interns.....	21
5.2 Exception for small businesses .....	22
5.3 Protection from sexual harassment linked to workplace .....	22
5.4 Registered clubs .....	23
5.5 Sporting activities.....	24
5.6 State laws and State programs .....	24

6. Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination (ToR 4) .....	26
7. The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law (ToR 5) .....	30
7.1 Religious vilification.....	30
8. The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes (ToR 6) .....	32
8.1 Harmonising protection against sexual harassment with the <i>Sex Discrimination Act 1984</i> (Cth).....	32
8.2 Damages .....	33
8.3 Costs .....	33
8.4 Harassment based on other protected attributes.....	33
9. 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 (ToR 7).....	35
9.1 Positive duty to prevent harassment, discrimination and vilification.....	35
9.2 Obligation to make reasonable adjustments.....	37
10. Exceptions, special measures and exemption processes (ToR 8) ....	39
10.1 Exceptions for private educational authorities .....	39
10.2 Insurance exceptions .....	40
11. The adequacy and accessibility of complaints procedures and remedies (ToR 9) .....	41
11.1 Faster resolution process.....	41
11.2 Telephone conciliation process.....	41
11.3 Required reporting of settlement outcomes.....	42
11.4 Feedback mechanisms .....	42

12. The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination (ToR 10).....	43
12.1 Own motion powers to conduct investigations.....	43
12.2 Monitoring and compliance powers for positive duty .....	43
13. The interaction between the Act and Commonwealth anti-discrimination laws (ToR 12).....	44
14. Any other matters the Commission considers relevant to these Terms of Reference (ToR 13) .....	45
14.1 Costs .....	45
14.2 Time limit .....	45

## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

## 2. Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Law Reform Commission's (**NSW LRC**) review of the *Anti-Discrimination Act 1977* (NSW) (the **AD Act**).

Legal Aid NSW provide advice and representation in discrimination and harassment matters to clients throughout NSW via our specialist employment law, human rights, and newly established Respect at Work Legal Service (**RAWLS**) teams, as well as lawyers in most regional offices. In the 2022/23 financial year, we provided over 840 legal services on discrimination matters.<sup>1</sup> We expect this number to rise for the 2023/24 financial year, as our RAWLS began operating in January 2023.

Our lawyers also contribute to inquiries and law reform submissions relating to discrimination and employment law and we publish self-help education resources for those experiencing discrimination and harassment such as the *Discrimination Toolkit: Your Guide to Making a Discrimination Complaint*. Our specialist employment and RAWLS lawyers also provide regular community legal education on discrimination law to groups including new migrants, people with a disability, young people, Aboriginal and Torres Strait Islander peoples and people of culturally and linguistically diverse backgrounds.

The AD Act and the NSW discrimination jurisdiction it creates is an important option for many of our clients who perceive it as more accessible and less intimidating than the federal discrimination jurisdiction and the possibility of pursuing a claim in the Federal Court.

We consider that there is considerable scope to improve and refresh the AD Act to reflect contemporary best practice, better respond to discrimination and promote equality in NSW.

We respond to the Terms of Reference (**ToR**) below.

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<sup>1</sup> This includes services of advice, minor assistance, extended legal assistance and grants of aid.

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

Legal Aid NSW considers that the AD Act requires extensive amendment and redrafting to reflect contemporary best practice and promote equality more effectively in NSW.

The drafting and structure of the AD Act including the definitions of discrimination are complex and repetitive, making it difficult for people and organisations to know and understand the law. Various exemptions and exceptions also narrow the scope of protections, reducing the effectiveness of the jurisdiction.

The reactive focus of the AD Act and lack of mechanisms to promote substantive equality and address systemic discrimination also limits its effectiveness. The current complaints-based model only deals with discrimination after the fact and does not require employers, schools and service providers to anticipate the discriminatory effect of their behaviour and take preventative steps to address this.

The NSW Law Reform Commission's review of the AD Act in 1999 included many useful recommendations that were not implemented. We welcome the NSW LRC's current review and the opportunity it provides to refresh the AD Act to reflect current best practice.

Other Australian jurisdictions have reviewed the operation of their discrimination legislation and modernised their framework for protection against discrimination. For example, Victoria overhauled its discrimination legislation in 2010 following extensive community consultation and inquiry, and enacted new anti-discrimination legislation in the form of the *Equal Opportunity Act 2010* (Vic). The Northern Territory's *Anti-Discrimination Act 1992* (NT) underwent a comprehensive review in 2017-18, followed by extensive consultation which ultimately resulted in significant amendments to the Act in 2022. The ACT has recently reviewed its *Discrimination Act 1991* (ACT) and, following rounds of community consultation, amendments have passed the ACT Parliament, but have not yet commenced.<sup>2</sup> Queensland reviewed and updated its discrimination legislation in 2022 and the Western Australian Law Reform Commission released its report on WA's discrimination legislation in 2022. We consider this

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<sup>2</sup> Discrimination Amendment Bill 2022 (ACT).



process is overdue in NSW and that the inquiries in other jurisdictions provide useful recommendations that should be considered in the NSW context.

We consider that key areas of reform needed to modernise the AD Act include:

- Adopting a simplified definition of discrimination that applies to all protected attributes, uses a 'disadvantage test' instead of a 'comparator test' and recognises intersectionality.
- Imposing a positive duty to prevent discrimination on all individuals and organisations that currently have obligations under discrimination laws, along with associated monitoring and compliance powers for Anti-Discrimination NSW.
- Conferring a new inquiry power on Anti-Discrimination NSW to allow it to inquire into, and report on, issues of systemic unlawful discrimination.
- Including an express obligation to make reasonable adjustments for people with disability in work, education and the provision of goods and services, similar to the Victorian model, as well as for pregnancy, breast feeding and carer responsibilities in work and employment.
- Simplifying the drafting and structure of the AD Act. For example, the *Equal Opportunity Act 2010* (Vic) has a more straightforward structure, with one definition of direct and indirect discrimination, followed by the protected attributes, the areas of life covered, and the exceptions.
- Reducing complexity by harmonising the AD Act with federal discrimination laws, without reducing protections.
- Addressing gaps in protection arising from limitations in existing protected attributes and coverage of public life.
- Including new protected attributes of religion, irrelevant criminal record, experience of domestic violence, social origin and profession, trade or occupation, and considering other additional attributes protected in other Australian jurisdictions.
- Reviewing and scrutinising all current exceptions, special measures and exemption processes, to bring them in line with the expectations of the community.
- Including an objects clause within the AD Act to guide interpretation and clarify its underlying purpose, similar to section 3 of the *Equal Opportunity Act 2010* (Vic), or section 4 of the *Discrimination Act 1991* (ACT)
- Adopting the equal access costs model.
- Improving the conciliation process and publicly reporting deidentified settlement outcomes.

## 4. Whether the range of attributes protected against discrimination requires reform (ToR 2)

Reform is required to address limitations in the existing protection against discrimination on the basis of sexuality and gender identity; disability; and carer responsibilities, and to provide protection against discrimination for additional attributes of religion, irrelevant criminal record, experience of domestic violence, social origin and profession, trade or occupation. Further detail on these attributes is set out below.

Additional attributes are protected in other Australian jurisdictions such as the ACT and Victoria. Legal Aid NSW supports the NSWLRC considering whether additional attributes should be protected in NSW, such as ‘physical appearance’, and ‘employment status’, among others.

### 4.1 Shortcomings in existing protected attributes

#### 4.1.1 Narrow definition of sexual orientation and gender identity

The protection from discrimination on the basis of sexuality and gender identity in the AD Act is narrower than the protection under the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and requires reform.

The AD Act prohibits discrimination and vilification because of ‘transgender status’<sup>3</sup> and ‘homosexuality’<sup>4</sup>. This leaves gaps in protection for some sexualities and gender identities. We support the AD Act adopting the terms and definitions of the SD Act of ‘sexual orientation’<sup>5</sup>, ‘gender identity’<sup>6</sup> and ‘intersex status’<sup>7</sup>.

#### 4.1.2 Kinship responsibilities

We consider that protection from discrimination because of carer responsibilities should be extended to include kinship responsibilities, as it is in the ACT<sup>8</sup>. The lack of protection from discrimination because of ‘kinship responsibilities’ can severely disadvantage Aboriginal people.

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<sup>3</sup> *Anti-Discrimination Act 1977* (NSW), Part 3A.

<sup>4</sup> *Anti-Discrimination Act 1977* (NSW), Part 4C

<sup>5</sup> *Sex Discrimination Act 1984* (Cth), section 5A

<sup>6</sup> *Sex Discrimination Act 1984* (Cth), section 5B

<sup>7</sup> *Sex Discrimination Act 1984* (Cth), section 5C

<sup>8</sup> *Discrimination Act 1991* (ACT), section 7(1)(l).

### 4.1.3 Definition of disability

Legal Aid NSW considers that the definition of disability under the AD Act should be harmonised with the definition in the *Disability Discrimination Act 1992* (Cth) (**DD Act**), which expressly recognises that disability includes behaviour that is a symptom or manifestation of the disability.<sup>9</sup>

## 4.2 Additional attributes

### 4.2.1 Religion

Clients seek advice from Legal Aid NSW regarding religious discrimination, primarily in employment. However, currently in NSW and federally, protection from religious discrimination is inadequate. All other state and territory discrimination laws, except South Australia<sup>10</sup>, contain a prohibition against discrimination on the ground of religious belief.<sup>11</sup> Legal Aid NSW supports in-principle legal protection from religious discrimination in the AD Act.

Religion is not, of itself, currently a ground of unlawful discrimination federally or under the AD Act, however the definition of race in the AD Act includes ethno-religious or national origin. The extent of 'ethno-religious origin' and the groups it protects remains unclear. While it has been accepted that Jewish people have 'ethno-religious origins',<sup>12</sup> it is not clear the extent to which this protection applies to other groups such as Muslims<sup>13</sup> and Sikhs.

The intersection between protection from religious discrimination and protection from other forms of discrimination such as discrimination based on sex and sexuality, and with freedom of expression, needs careful consideration. We consider the current exemptions in the AD Act for religious bodies<sup>14</sup> and for private educational authorities, which include faith-based schools, are too broad. For example, these exceptions allow

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<sup>9</sup> *Disability Discrimination Act 1992* (Cth), section 4.

<sup>10</sup> Under Part 5B of the *Equal Opportunity Act 1984* (SA) it is unlawful to treat a person unfavourably in their work or their education because they wear dress or adornments that are required by or symbolic of their religion

<sup>11</sup> *Discrimination Act 1991* (ACT) section 7(1)(u); *Anti-Discrimination Act* (NT) section 19(1)(m); *Anti-Discrimination Act 1991* (Qld) section 7(i); *Anti-Discrimination Act 1998* (Tas) section 16(o) and (p); *Equal Opportunity Act 2010* (Vic) section 6(n); *Equal Opportunity Act 1984* (WA) section 53.

<sup>12</sup> *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [51] *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 at [47]; *Droga v Birch* [2017] NSWCATAD 22 at [35];

<sup>13</sup> *Anti-Discrimination Act 1977* (NSW), section 56.

<sup>14</sup> In *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 the NSW Civil and Administrative Tribunal found that the evidence presented in that matter did not support a finding that Muslims living in Australia are a 'race' by reason of a common ethnic or ethno-religious origin. However NCAT noted that the result might have been different had there been different or additional, objective evidence.

<sup>15</sup> *Anti-Discrimination Act 1977* (NSW), section 56.

private educational authorities to discriminate against students, potential students, job applicants and existing employees on the grounds of sex, transgender status, marital or domestic status, disability, age (exception only applies to education, not to employment) and homosexuality.<sup>15</sup>

We consider that exceptions that allow religious organisations (including religious charities, schools, hospitals, aged care facilities and accommodation providers) to discriminate on the basis of religion in connection to employment should be limited to instances where religion is an inherent requirement of the role. We also consider that religious bodies should not be able to discriminate on the basis of religion in connection with the provision of services that are funded by federal, state and territory governments.

### Case Study: lack of legal remedy for discrimination on the ground of religion in education

Our client was an Australian citizen and a devout Muslim. He was in custody but had a security clearance that allowed him to attend TAFE.

Our client's religion required him to pray five times per day and our client wished to pray while he was at TAFE. Our client and other Muslim students started praying in a public area of the TAFE. Security guards told our client that he was not permitted to pray in this area. The TAFE permitted students of other religions to pray in the public area.

Our client made a complaint to TAFE. Shortly thereafter his permission to attend TAFE was revoked.

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<sup>15</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49ZYL(3)(b)

### Case Study: lack of legal remedy for discrimination on the ground of religion in work

Our client is an Australian Citizen and a devout Muslim. At the time he came to Legal Aid, he was working as a security guard for a security company.

During Ramadan, our client requested from his employer to be able to take longer breaks so he could pray offsite. His employer did not allow him to take longer breaks, even though our client agreed to work longer to make up for the loss of time. While Legal Aid NSW advised him that he could make a complaint to the Australian Human Rights Commission about this issue, we also advised him the current legislation in Australia and New South Wales does not give employees protection from being treated unfairly due to their religion. Had there been legislation which clearly protected employees from unfair treatment due to religion, this may have not been an issue for our client in the first place. Fortunately, after Legal Aid advised the client, he spoke to his employer and our client was able to come to a resolution with his employer without the need to make a formal complaint.

#### 4.2.2 Criminal record

Many clients seek assistance from Legal Aid NSW regarding discrimination in employment because of an irrelevant criminal record. We consider that existing protections from discrimination because of an irrelevant criminal record in employment under the Australian Human Rights Commission Act 1986 (Cth),<sup>16</sup> spent convictions,<sup>17</sup> and privacy legislation<sup>18</sup> are inadequate to address this problem.

This issue affects some of the most marginalised people in society and can be a major impediment to a person's ability to participate in the workforce, support themselves and their families, and reintegrate into the community after release from prison or the youth justice system.

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<sup>16</sup> Irrelevant criminal record is defined as discrimination under *Australian Human Rights Commission Act 1986* (Cth), however it is not a ground of unlawful discrimination. The Australian Human Rights Commission (AHRC) can investigate complaints of discrimination in employment on the basis of irrelevant criminal record and, where appropriate, try to resolve them by conciliation. If the AHRC is satisfied that discrimination has occurred, it can report to the Minister. However, there is no enforceable remedy and an applicant cannot go to court because of discrimination on the basis of irrelevant criminal record.

<sup>17</sup> *Criminal Records Act 1992* (NSW).

<sup>18</sup> *Privacy and Personal Information Protection Act 1998* (NSW).

It especially affects Aboriginal and Torres Strait Islander people, both adults and youth, who are overrepresented in the criminal justice system.<sup>19</sup> It can affect entire communities which are subject to over policing, characterised by frequent, unnecessary interactions with police, that then escalate and lead to charges or convictions. A conviction can impact on a person's ability to gain employment for decades, and without the opportunity to explain the circumstances of the charge or conviction to potential employers, it often contributes to a cycle of poverty and disadvantage. We note that this is particularly significant for roles which require a National Police Check such as support workers in aged care facilities. These consequences may not be known or considered at the time the person decides whether to plead guilty to offences.

Young people with a juvenile criminal record are not immune from discrimination based on an irrelevant criminal record. It is a common misconception that a person's criminal record is 'wiped' when they turn 18. In NSW, convictions and non-convictions for offences committed when a person is under 18 may still be disclosed on a criminal history check until they are spent. As many stakeholders submitted to the NSW Parliamentary Committee inquiry into Youth Diversion, this can have significant consequences on a young person's opportunity for rehabilitation and reintegration.<sup>20</sup>

Discrimination on the basis of an irrelevant criminal record is counterproductive to achieving Targets 7 and 8 of the *National Agreement on Closing the Gap*, which seek to increase the proportion of Aboriginal and Torres Strait Islander adults and youth in employment. Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would go some way to achieving these targets.

Presently employees do not have to be given any opportunity to explain the circumstances of the offence, nor are the employers required to consider whether it is relevant. Legal Aid NSW considers that this issue should be addressed by introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment under the AD Act, and reforming the law regarding children's criminal records and spent convictions.

Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would be balanced by the existing inherent requirements defence, which would permit employers to discriminate against employees and potential

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<sup>19</sup> See NSW Bureau of Crime Statistics and Research, *Aboriginal over-representation in the NSW Criminal Justice System quarterly update June 2023* (Report, September 2023).

<sup>20</sup> Legislative Assembly of New South Wales Law and Safety Committee, *The Adequacy of Youth Diversion Programs in New South Wales* (Report, September 2018), 36-37.

employees, where their criminal record prevents them from being able to fulfil the inherent requirements of the role.

Irrelevant criminal record is a protected attribute in ACT<sup>21</sup> and Tasmania.<sup>22</sup> The WA Law Reform Commission recently recommended that a new protected attribute of irrelevant criminal record be included in the WA Act, with criminal record defined broadly to include a record relating to arrest, a criminal investigation or criminal proceedings.<sup>23</sup>

#### 4.2.3 Experience of domestic and family violence

Legal Aid NSW supports experience of family and domestic violence being added as a protected attribute in the AD Act.

In our casework experience, victims and survivors of domestic and family violence experience prejudice and exclusion in many areas of public life, which compounds the harm they have experienced. For example, discrimination can occur in employment through employers declining requests to take time off to attend court proceedings or relocate housing or schools. Discrimination in the housing context can include refusing to offer someone a tenancy because they have terminated a previous tenancy under domestic violence provisions of the *Residential Tenancies Act 2010* (NSW).<sup>24</sup>

Employment, and the financial independence that it can provide, as well as access to alternative accommodation, are key enablers of escaping violent relationships.

We consider that existing laws are inadequate to address both direct and indirect discrimination experienced by victims and survivors of domestic and family violence. While the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) provide some protections for victims and survivors of domestic and family violence, we consider that certain gaps remain. For example, under the Fair Work Act employees are entitled to ten days of unpaid domestic and family violence leave per year.<sup>25</sup> Employees who have completed at least 12 months of service with their employer, or who are long term casuals, and who have experienced violence from a member of their family, may also request flexible working arrangements.<sup>26</sup> However, in our casework experience, many victims of domestic and family violence start new jobs as a step towards getting their life back together and often do not qualify to request flexible

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<sup>21</sup> *Discrimination Act 1991* (ACT), section 7(1)(k).

<sup>22</sup> *Anti-Discrimination Act 1998* (Tas), section 16(q).

<sup>23</sup> Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984 (WA)*, (Final Report, August 2022), recommendation 34 and 35, page 91.

<sup>24</sup> *Residential Tenancies Act 2010* (NSW), ss 105A and 105I.

<sup>25</sup> *Fair Work Act 2009* (Cth), section 106A.

<sup>26</sup> *Fair Work Act 2009* (Cth), section 65.

working arrangements. Protection from discrimination on the ground of experience of domestic and family violence would also strengthen the domestic violence termination provisions in the NSW *Residential Tenancies Act*, which assist tenants to end their tenancies early if they are experience domestic and family violence.

We consider that providing for this additional protection from discrimination would result in better outcomes for the victim beyond their experience in accessing employment and housing. For example, research by the Law and Justice Foundation of New South Wales has found that experiencing domestic and family violence is highly correlated with experiencing a broad range of other legal problems. Respondents to the Legal Australia-Wide (LAW) Survey who had experienced domestic and family violence in the previous 12 months were 10 times more likely than others to experience legal problems, including a wide range of family, civil and criminal law issues. The research found that the risk of experiencing family law problems was a massive 16 times higher for those who had experienced domestic and family violence.<sup>27</sup> They were also at least three times more likely to experience problems related to employment, financial rights, government payments, health, housing, personal injury and rights issues.<sup>28</sup>

While this research did not examine the role that discrimination based on experience of domestic and family violence may play in creating other legal problems, it demonstrates the significant and compounding disadvantage that victims and survivors of domestic and family violence often experience.

Creating an additional protected attribute of experience of domestic and family violence in the areas of public life that are currently covered by other discrimination laws would address some of this disadvantage, signal that domestic and family violence is unacceptable, provide legal protection from this form of discrimination and acknowledge the harm it causes to victims.<sup>29</sup>

Providing protection from discrimination based on experience of domestic and family violence is also consistent with Australia's obligations under the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, which requires governments to take appropriate measures to eliminate discrimination against

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<sup>27</sup> Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019), 24.

<sup>28</sup> Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019), 1 and 10.

<sup>29</sup> Yashina Orchiston and Belinda Smith, 'Empowering victims of family violence: Could anti-discrimination laws play a role?' (2012), *Australian Review of Public Affairs*.



women in all areas of life including in employment, and to ensure that women have access to safe and healthy working conditions.<sup>30</sup>

It is also consistent with the *International Labour Organisation Violence and Harassment Convention, 2019 (No. 190)*,<sup>31</sup> which Australia has not yet ratified.

#### **Case Study: Discrimination against victim of domestic and family violence in employment**

Our client was a victim of domestic violence perpetrated by her former partner and father of her young child. After separating from her partner, our client obtained employment in an office administration role. About three months after our client commenced employment, her former partner commenced Family Court proceedings in relation to custody of our client's child.

Around this time our client also began assisting police in relation to criminal charges against her former partner resulting from the domestic violence.

Because of the potential criminal law proceedings, the need to care for her young daughter and the pressure of university study, our client asked her employer for flexible work arrangements. Given that our client had not been employed for one year, she was not entitled to the right to request flexible working conditions in the National Employment Standards.

The employer told our client that she may need to resign, unless some agreement could be reached about her working hours. A week later, our client was made redundant, despite staff being advised only a fortnight earlier that no job losses would occur in the near future.

#### **4.2.4 Social origin**

Legal Aid NSW supports enforceable remedies for discrimination on the basis of all attributes in the *International Labour Organisation Convention (No 111) concerning*

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<sup>30</sup> Article 11, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981).

<sup>31</sup> Articles 6 and 10(f).

*Discrimination in respect of Employment and Occupation (ILO 111)*, including social origin.

The focus of Legal Aid NSW's work is to assist socially and economically disadvantaged people. Although not often framed in such terms, discrimination and disadvantage because of social origin underpins many of our clients' experiences.

Discrimination on the basis of social origin is not unlawful under NSW or federal discrimination law and there is no enforceable remedy.<sup>32</sup> The Fair Work Act includes some protection from discrimination based on social origin, however for many employees this is limited to protection from dismissal. The general protection provisions of the Fair Work Act prohibit discrimination on the basis of social origin. However, this protection is limited to actions which would be unlawful under any anti-discrimination law in force in the place where the action is taken.<sup>33</sup>

Discrimination on the basis of social origin is not unlawful under anti-discrimination laws in force in NSW, so employees in NSW cannot use these provisions. Employees that are not eligible to make a general protections claim about their dismissal under the Fair Work Act can make an unlawful termination claim, which includes protection from dismissal because of social origin.<sup>34</sup> The unlawful termination provisions are intended to give effect to Australia's obligations under a number of treaties including ILO 111.<sup>35</sup>

Elements of social origin that are most relevant in Australia include class and geographic origin or locality. The ILO Committee of Experts has clarified that these factors are relevant to social origin, although it has not defined class. Academic commentary has described class to include economic capital (income, savings, property), social capital (relationships with others and networks of contacts) and cultural capital (including education, skills, knowledge accents, habits, tastes, interests, manners, lifestyle).<sup>36</sup>

Discrimination based on class or locality is common and can be a high barrier to social mobility and equality. It also remains to some extent socially acceptable. This is demonstrated by the widespread use of derogative terms to describe people appearing

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<sup>32</sup> Any distinction, exclusion or preference made on the basis of social origin is defined as discrimination under section 3(1) *Australian Human Rights Commission Act 1986* (Cth) and reg 6(a)(iii) *Australian Human Rights Commission Regulation 2019* (Cth), however it is not a ground of unlawful discrimination under section 3(1) AHRC Act. As a result, there is no enforceable remedy for discrimination on the basis of social origin under the *Australian Human Rights Commission Act 1986* (Cth).

<sup>33</sup> *Fair Work Act 2009* (Cth), section 351.

<sup>34</sup> *Fair Work Act 2009* (Cth), section 772.

<sup>35</sup> *Fair Work Act 2009* (Cth), section 771.

<sup>36</sup> Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context" (2016), 39(1) *University of New South Wales Law Journal*, 84.

to exhibit characteristics consistent with lower class identity including 'bogan', 'houso', 'bum', 'dero', 'povo', 'pov', 'dole bludger', 'westie', and 'feral'.<sup>37</sup>

Examples of social origin discrimination include hiring practices that prefer applicants from particular areas or who have attended particular schools, or exclude from consideration applicants from other areas or other schools. This can be the result of deliberate discrimination, or unconscious bias or assumptions.

For example, the Victorian Government Recruit Smarter initiative found that CV de-identification leads to better outcomes for applicants from lower socioeconomic suburbs. The Victorian Department of Premier and Cabinet trial found that applicants from lower ranked socioeconomic suburbs were 9.4 per cent more likely to progress through the selection process and receive a job offer after their CV had been de-identified to remove their home address.<sup>38</sup>

Other examples of social origin discrimination include private tenancy applications that ask if the applicant has made any application for social housing and discrimination against homeless people (homelessness can be considered relevant to social origin).

We support an enforceable remedy for discrimination on the basis of social origin in employment, and consideration for protection from discrimination based on social origin in other areas of public life. This would acknowledge, and go some way to addressing, the wide-ranging disadvantage experienced by many people because of their socio-economic background or status.

### **Case Study: Social origin discrimination in employment**

Our client was 23 years old and had lived in out of home care provided by the State from the age of three until she turned eighteen. Our client obtained casual employment with a non-government organisation as a support worker. Our client's job involved supervising children living in out of home care, taking children out for activities, preparing meals, cleaning, staying overnight and other house duties.

After a few months of employment, our client was required to undertake a probity check. Our client, despite having no criminal record and a working with

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<sup>37</sup> Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context" (2016), 39(1) *University of New South Wales Law Journal*, 85, 121 - 122

<sup>38</sup> Department of Premier and Cabinet Victoria and the Centre for Ethical Leadership University of Melbourne, *Recruit Smarter* (Report Findings December 2018), 11.

children check, failed the probity check.

The State considered that our client's history of having grown up in out of home care would mean that she would find it difficult to perform her job as it may trigger distressing memories from her past. This issue was not discussed with our client as a work health and safety concern. The State and the employer also did not discuss possible steps to mitigate the impact that the role may have had on our client.

The State instructed the non-government organisation to dismiss our client. Because our client had not been employed for six months, she was unable to lodge an unfair dismissal claim.

#### 4.2.5 Profession, trade or occupation

Legal Aid NSW recognises that sex workers can face discrimination and stigma because of their job. We support consideration of NSW adopting a similar approach to Victoria, where discrimination because of profession, trade or occupation<sup>39</sup> is unlawful in areas of public life including work, education, goods and services, sporting clubs, and accommodation services, or the Northern Territory, where “employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work” is a protected attribute.<sup>40</sup>

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<sup>39</sup> *Equal Opportunity Act 2010* (Vic), section 6(la).

<sup>40</sup> *Anti-Discrimination Act 1992* (NT), section 19(ec).

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

The areas of public life in which discrimination is unlawful should be reformed to provide greater consistency with federal legislation and address gaps which undermine the effectiveness of the AD Act, including for:

- unpaid workers
- employees of small businesses with less than 6 employees
- sexual harassment that occurs outside of the physical workplace, such as sexual harassment involving the use of technology or social media
- conduct by clubs
- formal sporting activities
- State laws and State programs

### 5.1 Lack of protection from discrimination for unpaid workers including volunteers and interns.

Unpaid workers are not included in the definition of employment under the AD Act and are not protected from discrimination on the grounds of race, sex, transgender status, marital or domestic status, disability, carer's responsibilities, homosexuality or age. However, unpaid trainees and volunteers are included in the definition of 'workplace participant' and are covered by the protections against sexual harassment in the workplace.<sup>41</sup>

This is a significant gap that leaves many people vulnerable to discrimination without recourse. The most recent General Social Survey conducted by the Australian Bureau of Statistics found that one quarter of Australians aged 15 years and over participated in unpaid voluntary work through an organisation in 2020.<sup>42</sup> There are high rates of volunteering among people aged 40-54 (31 per cent) and people aged 15-24 (19 per cent). This figure does not include people who did unpaid work under some form of

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<sup>41</sup> *Anti-Discrimination Act 1977* (NSW), section 22B(9).

<sup>42</sup> The rate in 2020 was lower than in 2019 when it was 30 per cent. As the General Social Survey was carried out over four months from June to September 2020 during the COVID-19 pandemic and restrictions, it is likely that volunteer numbers have increased since 2019.

compulsion because of unemployment (for example, work for the dole) or as part of study commitments.<sup>43</sup>

Unpaid interns can be particularly vulnerable to mistreatment in the workplace. Many are young people with limited workplace experience. Interns, regardless of their age, may feel that they must tolerate mistreatment in order to get experience, paid work or positive references. The lack of legal protection for this group can reinforce this perception.

## 5.2 Exception for small businesses

Protection from discrimination in employment because of sex<sup>44</sup>, carer's responsibilities<sup>45</sup>, homosexuality<sup>46</sup>, transgender status,<sup>47</sup> marital or domestic status<sup>48</sup> and disability<sup>49</sup> under the AD Act do not apply to employers with less than 6 employees, however the protection from racial discrimination<sup>50</sup> and age discrimination<sup>51</sup> is not limited in this way. This leaves many employees vulnerable to common forms of discrimination without recourse under the AD Act, especially workers in regional areas where the number of small businesses is generally greater, and employment options are less. The small business exception also adds complexity and limits the usefulness of this jurisdiction.

We consider that the exception for employers “where the number of persons employed by the employer, disregarding any persons employed within the employer’s private household, does not exceed 5” should be removed.

## 5.3 Protection from sexual harassment linked to workplace

Protection from sexual harassment by one workplace participant towards another workplace participant is limited to conduct that occurs “in a place that is a workplace of

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<sup>43</sup> General Social Survey: Summary Results, Australia methodology, Latest release 2020 available at <  
<https://www.abs.gov.au/methodologies/general-social-survey-summary-results-australia-methodology/2020>>

<sup>44</sup> *Anti-Discrimination Act 1977* (NSW), section 25(3)(b).

<sup>45</sup> *Anti-Discrimination Act 1977* (NSW), section 49V(3)(b).

<sup>46</sup> *Anti-Discrimination Act 1977* (NSW), section 49ZH(3)(b).

<sup>47</sup> *Anti-Discrimination Act 1977* (NSW), section 38C(3)(b).

<sup>48</sup> *Anti-Discrimination Act 1977* (NSW), section 40(3)(b).

<sup>49</sup> *Anti-Discrimination Act 1977* (NSW), section 49D(3)(b).

<sup>50</sup> *Anti-Discrimination Act 1977* (NSW), section 8.

<sup>51</sup> *Anti-Discrimination Act 1977* (NSW) Section 49ZYB.

both those persons.”<sup>52</sup> The prohibition of sexual harassment by an employer towards an employee or by an employee to another employee is not limited this way, adding complexity to the AD Act and limiting the protection from sexual harassment depending on the employment status of the people involved. For example, sexual harassment by an employee towards an unpaid trainee, or by an independent contractor towards an employee engaged by the same organisation, is limited to ‘a place that is a workplace of both those persons.’

“Workplace” is defined as “a place at which a workplace participant works or otherwise attends in connection with being a workplace participant.”<sup>53</sup> This concept of workplace is too narrow and may exclude behaviour such as online sexual harassment that occurs beyond the physical parameters of the workplace or outside of workhours.

In our experience workplace sexual harassment often involves the use of technology and social media. We agree with comments in the Respect@Work Report “that workers, especially women in industries for whom online spaces constitute a workplace, are experiencing increasingly high levels of technology-facilitated sexual and sex-based harassment... The proliferation of technology in the workplace [i]s causing an increase in online sexual harassment of women generally, but also specifically and acutely to women with a disability, younger women and women in rural, regional and remote areas, who may lack access to adequate support and referral pathways.”<sup>54</sup>

Technology facilitated sexual harassment can have equally significant and detrimental impacts as other forms of sexually harassment on victims’ lives, mental health, reputation and careers.

We suggest this is addressed by harmonising the protection from sexual harassment under the AD Act with the *SD Act*.

## 5.4 Registered clubs

The AD Act makes discrimination unlawful by registered clubs towards both members and non-members.<sup>55</sup> A registered club is defined as a club that holds a club licence granted under the *Liquor Act 2007 (NSW)*.<sup>56</sup>

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<sup>52</sup> *Anti-Discrimination Act 1977 (NSW)*, section 22B(6)

<sup>53</sup> *Anti-Discrimination Act 1977 (NSW)*, section 22B(9).

<sup>54</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 130

<sup>55</sup> *Anti-Discrimination Act 1977 (NSW)*, sections 20A, 38O, 48A, 49O, 49ZR, 49ZYP.

<sup>56</sup> This permits the club to sell alcohol and requires the club to meet certain conditions in the *Registered Clubs Act 1976 (NSW)*.

Legal Aid NSW does not consider that protection from discrimination should be confined to clubs with a liquor licence. We support a broader definition of clubs such as that used in section 4 of the DD Act:

**club** means an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association.

## 5.5 Sporting activities

We support protection from discrimination extending to formally organised sporting activities, similar to the approach that will be taken in the ACT from April 2024.<sup>57</sup> This would capture sporting activities which are subject to a degree of formal organisational structure. For example, a weekly netball competition that is governed by written rules and overseen by a sporting association may be considered to be a formally organised sporting activity; whereas a weekly social football match between friends would be considered informal and not subject to the AD Act.

## 5.6 State laws and State programs

Legal Aid NSW has assisted clients who have experienced discriminatory treatment by State-funded agencies, such as derogative racial taunts by NSW Police, or differential treatment in response to reports of crimes. However, the extent to which the performance of public functions and duties by government bodies such as police are considered a 'service' under the AD Act is limited and unclear.<sup>58</sup>

Legal Aid NSW supports an additional area of public life in the AD Act, of the administration of state laws and programs, similar to section 101 of the Queensland Act<sup>59</sup> which provides:

Discrimination in administration of State laws and programs area

A person who—

(a) performs any function or exercises any power under State law or for the purposes of a State Government program; or

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<sup>57</sup> Discrimination Amendment Act 2023 (ACT), section 5 which will insert new section 23A into the *Discrimination Act 1991* (ACT).

<sup>58</sup> Sexual Harassment is unlawful in the area of State laws and programs. *Anti-Discrimination Act 1977* (NSW), section 22J.

<sup>59</sup> *Anti-Discrimination Act 1991* (Qld)



- (b) has any other responsibility for the administration of State law or the conduct of a State Government program; must not discriminate in—
- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility.

A similar approach is taken in the DD Act<sup>60</sup>, and was also recommended by the WA Law Reform Commission.<sup>61</sup>

Alternatively, we support ‘service’ being defined to expressly include statutory functions that a State government agency is bound to carry out.

### ***Case Study: “Steve & Mary”— less favourable treatment of Aboriginal family***

Steve and his wife Mary were driving home when their car was hit in the rear by a car behind them. A third vehicle was also involved in the collision.

NSWPF and NSW Ambulance officers attended the collision scene.

Steve and Mary feel they were provided with lesser care and attention including:

- Having a blanket taken from their car and given to another woman despite he and his wife being visibly cold and upset.
- A delay in ambulance officers checking on them.
- Steve simply being advised to “see your GP in the morning” upon advising the ambulance officer he had a sore shoulder and neck.
- Steve having to pressure the ambulance officer to put Mary in the ambulance vehicle when she was in the rain trembling and nauseous.
- Mary being directed to exit the ambulance vehicle into the rain, so a non-Aboriginal male could take her place.
- Leaving their car at the collision site but removing the others.

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<sup>60</sup> *Disability Discrimination Act* (Cth), section 29.

<sup>61</sup> Western Australian Law Reform Commission, *Review of the Equal Opportunity Act 1984 (WA)*, (Final Report, August 2022), 135.

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

Legal Aid NSW considers that the operation of the AD Act would be improved by amending the existing tests for discrimination by:

- Including one definition of discrimination that applies to all protected attributes
- Including a detriment test in place of the comparator test
- Clarifying that direct and indirect discrimination may overlap
- Recognising intersectionality
- Shifting the burden of proof
- Including an express requirement to make reasonable adjustments

### *One test for discrimination applying to all protected attributes*

Currently there is no overarching definition of discrimination in the AD Act. Instead, direct and indirect discrimination on each prohibited ground is set out progressively through the Act.

Legal Aid NSW prefers the approach taken in the Victorian, ACT and Queensland legislation, where one definition of discrimination applies to all protected attributes.

### *The detriment test for discrimination and shortcomings of the comparator model*

Legal Aid NSW supports a detriment test in place of a comparator test in the definition of discrimination. The detriment test approach is based on the simpler premise that discrimination occurs where a person is treated unfavourably on the ground of one or more protected attributes, and is the approach taken in Victoria<sup>62</sup> and the ACT.<sup>63</sup>

This would overcome the difficulty and complexity created by the comparator test currently used in the AD Act, which establishes discrimination by comparing the treatment of the complainant to the treatment of others who lack their protected attribute.<sup>64</sup> This requires a comparison between the treatment of a person because of a prohibited attribute, and treatment that is or would be afforded to a real or hypothetical person – the ‘comparator’, in the same or similar circumstances. While there

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<sup>62</sup> *Equal Opportunity Act 2010* (Vic), sections 8 and 9,

<sup>63</sup> *Discrimination Act 1991* (ACT), section 8

<sup>64</sup> *Anti-Discrimination Act 1977* (NS), sections 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA

sometimes is an actual comparator, in many instances the comparator is entirely hypothetical.

Constructing a hypothetical comparator can be a difficult process that moves the focus away from the impact on the affected person and requires courts and tribunals to:

engage in the artificial exercise of deciding how the respondent would have treated a hypothetical person without the complainant’s relevant attribute had such a person been in the same circumstances.<sup>65</sup>

Discrimination because of cumulative or intersectional disadvantage is also difficult to establish where a comparative approach is required. The detriment test approach makes it easier for individuals to bring overlapping complaints and is also more compatible with intersectional theory which recognises the compounding, rather than ‘additive’, effect of characteristics. Intersectionality is discussed further below.

Removing the comparator test was also recommended by the Disability Royal Commission.<sup>66</sup>

#### *Clarifying that direct or indirect discrimination may overlap*

Legal Aid NSW supports an express statement in the AD Act that direct and indirect discrimination are not mutually exclusive and a person may experience conduct amounting to both.

For example, section 8(1) of the Discrimination Act 1991 (ACT) provides that “discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else.” This is recognised in a similar way in section 7 of the Victorian legislation.<sup>67</sup>

#### *Recognising intersectionality*

Many of Legal Aid NSW’s clients experience more than one category of disadvantage and discrimination. Intersectionality recognises that this does not merely add one form of discrimination to another, but that different forms of discrimination can arise at the intersections of traditional grounds of discrimination.

Legal Aid NSW considers that the definition of discrimination in the AD Act should be amended to ensure that multiple and overlapping grounds of discrimination are recognised, and to expressly acknowledge that complaints involving a number of grounds can be made in one complaint. This aligns with the AHRC’s recommendation

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<sup>65</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 95.

<sup>66</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023), vol 4, Recommendation 4.23

<sup>67</sup> *Equal Opportunity Act 2010* (Vic), section 7.

regarding federal discrimination law in its 2021 report on 'A reform agenda for federal discrimination laws'.<sup>68</sup>

As Professor Beth Gaze and Associate Professor Belinda Smith observe:

Taking account of multiple or intersectional attributes has the potential to greatly improve Australian law. Since most individuals can be characterised by multiple or intersectional attributes of disadvantage, the work of anti-discrimination agencies in relation to the multiple attributes would be unified by a focus on a broad range of attributes and their combined effects.<sup>69</sup>

### *Burden of proof too onerous*

#### *Direct discrimination*

In our view, the current burden of proof in the AD Act is too onerous for complainants who are required to establish that a respondent has treated them less favourably on the basis of a protected attribute. In our experience, it is difficult and rare for applicants to have access to direct evidence of the reasons for the respondent's actions. We agree with Associate Professor Simon Rice's comments to the 2008 review of the SD Act:

A complainant must... prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as a fact, on the balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.<sup>70</sup>

We submit that a better approach would be one similar to the onus provisions in the general protections provision of the *Fair Work Act 2009* (Cth) (**Fair Work Act**).<sup>71</sup> Once an applicant has established that they have been subjected to unfavourable treatment and possess a protected attribute, the onus should rest on the respondent to prove on

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<sup>68</sup> Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws*, (Report, December 2021), 301-303.

<sup>69</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 85 quoted in AHRC, *A reform agenda for federal discrimination laws*, 303...

<sup>70</sup> The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, (December 2008) paragraph 6.47.

<sup>71</sup> *Fair Work Act 2009* (Cth) s 361.

the balance of probabilities that the reason for the treatment was not the protected attribute.

This is aligned with the Disability Royal Commission's recommendation 4.23.<sup>72</sup>

#### *Indirect discrimination*

We also consider that the AD Act should provide that the person who imposes, or proposes to impose, a requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable. This approach is taken in section 9(2) of the *Equal Opportunity Act 2010* (Vic).

#### *Express requirement to make reasonable adjustments*

We support the AD Act including an express requirement to make reasonable adjustments for people with disability in work, education and the provision of goods and services and for pregnancy, breast feeding and carer responsibilities in work and employment. This is discussed further in response to ToR 7 under point 9 below.

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<sup>72</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023), vol 4, 302.

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

Legal Aid NSW supports civil prohibitions on vilification in the AD Act. Currently the AD Act only prohibits racial<sup>73</sup>, transgender<sup>74</sup>, HIV Aids<sup>75</sup> and homosexual<sup>76</sup> vilification. New provisions prohibiting religious vilification will commence in November.<sup>77</sup> We consider that disability vilification should also be added to the AD Act and that the existing prohibitions on homosexual and transgender vilification should be broadened to apply to sexual orientation and gender identity, as discussed in response to ToR 2 above.

We also suggest that the NSWLRC consider the broader definition of ‘offensive behaviour because of race, colour or national or ethnic origin’ in section 18C of the *Racial Discrimination Act 1975* (Cth).

Legal Aid NSW considers it is appropriate for civil prohibitions on vilification to be broader than criminal law.<sup>78</sup>

### 7.1 Religious vilification

Legal Aid NSW supports a prohibition on religious vilification in the AD Act, however we are concerned that the protection from religious vilification in the Anti-Discrimination Amendment (Religious Vilification) Bill 2023 is too broad and is not limited to lawful religious activities.

Legal Aid NSW considers that the protection from religious vilification should contain appropriate and clear limits. We consider it should:

- Protect individuals and groups of people, not organisations
- Apply to religious belief or affiliation consistent with section 93Z of the Crimes Act.

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<sup>73</sup> *Anti-Discrimination Act 1977* (NSW), section 20C

<sup>74</sup> *Anti-Discrimination Act 1977* (NSW), section 38S

<sup>75</sup> *Anti-Discrimination Act 1977* (NSW), section 49ZXB

<sup>76</sup> *Anti-Discrimination Act 1977* (NSW), section 49ZT

<sup>77</sup> Anti-Discrimination Amendment (Religious Vilification) Bill 2023.

<sup>78</sup> The criminal offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status is in section 93Z *Crimes Act 1900* (NSW).

***Case study: lack of legal remedy for religious vilification in public life***

Legal Aid NSW assisted a client of Muslim faith to send a communication to the United Nations Human Rights Committee alleging violations of the International Covenant on Civil and Political Rights regarding several derogatory statements about Muslim migration made during radio and television broadcasts in Australia.

While the client pursued legal proceedings under the AD Act, the NSW Civil and Administrative Tribunal found that ‘Muslims living in Australia’ did not fall within the definition of ‘race’ on the evidence presented in that matter. Legal Aid NSW did not represent the client in those proceedings.

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

### 8.1 Harmonising protection against sexual harassment with the *Sex Discrimination Act 1984* (Cth)

Legal Aid NSW considers that the protection from sex discrimination and sexual harassment under the AD Act should be harmonised with the SD Act without limiting or reducing protections. This should incorporate changes recommended in the Respect@Work Report including:

- Expressly prohibiting sex-based harassment (section 28AA SD Act)
- Expressly prohibiting creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex (section 28M SD Act).
- Including a positive duty requiring employers and or a person conducting a business or undertaking to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation (as in section 47C SD Act). A positive duty to prevent discrimination and harassment is discussed further in response to ToR 7, under part 9 below.
- conferring functions and powers on Anti-Discrimination NSW to monitor and assess compliance with the positive duty, similar to inquiry the powers of the Australian Human Rights Commission<sup>79</sup> which will commence in December 2023. This is discussed further in response to ToR 7, under part 9 below.
- conferring a new inquiry power on Anti-Discrimination NSW to allow it to inquire into, and report on, issues of systemic unlawful discrimination or suspected systemic unlawful discrimination, similar to the powers conferred on the Australian Human Rights Commission.<sup>80</sup>

We also note our earlier comment regarding the need for greater protection from sexual harassment that occurs outside of the physical workplace (as discussed under part 5, in response to ToR 3 above). This would be addressed through harmonising protection from sexual harassment with the SD Act.

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<sup>79</sup> *Australian Human Rights Commission Act 1986* (Cth), section 35B

<sup>80</sup> *Australian Human Rights Commission Act 1986* (Cth), section 35L.



## 8.2 Damages

Low awards of damages also undermine the effectiveness of the protection from sexual harassment in the AD Act. The recent study, 'Damages and Costs in Sexual Harassment Litigation' found that New South Wales had a lower average award of general damages in sexual harassment matters compared to the federal jurisdiction (\$12,385 compared to \$14,268.89). The average award of general damages in Victoria was significantly higher at \$52,944.<sup>81</sup>

## 8.3 Costs

Legal Aid NSW supports the Equal Access costs model in discrimination matters.

This would allow people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law. Adopting this model would mean that people do not face a lifetime of debt simply for enforcing their rights.

The recent study, 'Damages and Costs in Sexual Harassment Litigation' found that in NSW, the applicant was ordered to pay costs in 4 per cent of cases, while the respondent was ordered to pay costs in 15 per cent of cases.<sup>82</sup>

## 8.4 Harassment based on other protected attributes

Legal Aid NSW considers that prohibition against harassment should cover all protected attributes. This will explicitly recognise the development of case law that indicates that harassment will be discrimination where it is based on a protected attribute.

Legal Aid NSW refers to the comments of the Disability Royal Commission that provisions in the DD Act prohibiting harassment because of disability in the areas of work; the provision of goods, services and facilities; and education have been ineffective in addressing public harassment experienced by people with disability.<sup>83</sup> We support the Disability Royal Commission's recommendation 4.29, regarding a

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<sup>81</sup> Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation A Doctrinal, Qualitative and Quantitative Study* (Report, 2<sup>nd</sup> revision October 2022), 28.

<sup>82</sup> Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation A Doctrinal, Qualitative and Quantitative Study* (Report, 2<sup>nd</sup> revision October 2022), 41.

<sup>83</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023), vol 4 ,318.

standalone prohibition of offensive behaviour because of disability or perceived disability in a public place.<sup>84</sup> We support a similar provision in the AD Act.

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<sup>84</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023), vol 4, 324.

## 9. 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 (ToR 7)

### 9.1 Positive duty to prevent harassment, discrimination and vilification

Legal Aid NSW considers that one of the key weaknesses in discrimination law is the complaint-based model and supports positive obligations to prevent harassment, discrimination and vilification.

Relationships in which discrimination and harassment occur often involve power imbalances, such as the relationship between employer and employee, landlord and tenant, or insurance company and consumer. Clients to whom Legal Aid NSW provides advice about discrimination are often at a further disadvantage because of their youth, cultural and linguistic background or economic circumstances. Our clients often decide not to lodge a discrimination complaint because they fear the consequences of doing so, or because they perceive the process to be too burdensome. There is scope to strengthen protection from discrimination through relieving the burden on applicants to bring complaints.

Legal Aid NSW supports the introduction of a positive duty on all individuals and organisations that currently have obligations under discrimination laws to take positive measures to eliminate discrimination. We consider the Victorian and SDA models to provide a good example of how this could operate. A positive duty would encourage individuals and organisations to proactively consider the adequacy and impact of their services, policies and procedures and take steps to address shortcomings. It would also reduce the burden on individuals to bring complaints to address discriminatory conduct.

A positive duty should also involve additional powers and resources for Anti-Discrimination NSW. Similar to the Victorian and SDA model, Anti-Discrimination NSW should be properly funded to have a compliance and monitoring function. This should involve the power to investigate serious breaches of the positive duty, enter into compliance agreements with organisations, and refer matters to the court, Attorney-General or Parliament.

For example, in the area of employment, a positive duty would not greatly increase the legislative burden on individuals and organisations. Employers can already be held vicariously liable for the discriminatory actions of their employees when they fail to take

all reasonable steps to prevent discrimination.<sup>85</sup> Employers can also be held liable under ancillary liability provisions if they aid or permit discrimination.<sup>86</sup> The courts have established that an employer will need to have taken significant action in order to satisfy the court that it took all reasonable steps to prevent discrimination.<sup>87</sup>

Other legislative schemes also impose positive duties on employers. For example, the national work health and safety laws, which require employers to ensure, so far as reasonably practicable, the health and safety of their workers. Given the significant impact that discrimination often has on employee wellbeing, it is arguable that existing work health and safety laws already impose a positive duty on employers to prevent discrimination.

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<sup>85</sup> *Anti-Discrimination Act 1977* (NSW), section 53.

<sup>86</sup> *Anti-Discrimination Act 1977* (NSW), section 52.

<sup>87</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

### ***Case study: Barriers to making a discrimination and harassment complaint***

Emma is a young female student who experienced sexual harassment and discrimination as an unpaid intern at a firm.

Emma and a senior employee of the firm commenced a consensual romantic relationship quickly following her interview for the position. During the course of the internship, Emma set clear boundaries that the personal nature of the relationship was only to occur outside of the workplace.

Despite this, the senior employee is alleged to have sexually assaulted Emma in the offices of the law firm. The senior employee also made repeated requests for Emma to provide him with sexually explicit photographs of herself and when she did not, he excluded her from workplace meetings.

After Emma raised her discomfort and distress caused by the senior employee's unwelcome conduct toward her, he responded by threatening to share private information about her. Based on his communications, Emma held the belief that the senior employee could and would take steps to negatively influence her professional prospects and affect her employability.

As a result, Emma suffered from significant physiological and psychological harm. Specifically, she experienced severe disturbances in her sleep, appetite, motivation, impairments in concentration and negative symptoms of depression and intrusive memories and emotions.

Emma felt she could not cease the internship given both the scarcity of internships available and, their importance to securing paid employment upon graduation. She also felt that she could not lodge a contemporaneous complaint for fear that the senior employee would damage her reputation in the industry.

Emma's story illustrates the vulnerability of some employees and barriers they perceive to making a complaint.

A positive duty to prevent discrimination and harassment may go some way to addressing these problems.

## **9.2 Obligation to make reasonable adjustments**

Legal Aid NSW supports the AD Act including an express obligation to make reasonable adjustments for people with disability in work, education and the provision of goods and services, similar to the Victorian model. We support a similar obligation

for pregnancy, breast feeding and carer responsibilities in work and employment, as recommended by the previous NSWLRC review in 1999.<sup>88</sup>

Legal Aid NSW supports the AD Act using a similar approach to that outlined in the Disability Royal Commission's recommendation 4.26.<sup>89</sup> This would involve including a standalone obligation, referring to 'adjustments' as opposed to 'reasonable adjustments' and including the following qualification only: "unless making the adjustment would impose an unjustifiable hardship on the person".

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<sup>88</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, (Report 92, 1999), recommendation 5

<sup>89</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (Final Report, September 2023), vol 4, 309.

## 10. Exceptions, special measures and exemption processes (ToR 8)

The AD Act contains many exceptions to what would otherwise be unlawful discrimination. We note that the NSW Law Reform Commission's review of the AD Act in 1999 found that many exceptions lacked justification in a modern society (as it was then), or were unnecessary, and recommended that most of them should be repealed or amended in a way that narrowed their scope.<sup>90</sup> Given the passage of time since that review, and the significant changes which have taken place in our social fabric, Legal Aid NSW supports all current exceptions, special measures and exemption processes being closely scrutinised, to bring them in line with the expectations of the modern community.

### 10.1 Exceptions for private educational authorities

Legal Aid NSW is especially concerned about the breadth of exceptions afforded to private educational authorities under the AD Act. As noted above, these exceptions are not limited to faith-based schools and allow private educational authorities to discriminate against students, potential students, job applicants and existing employees on the grounds of sex (including pregnancy), transgender status, marital or domestic status, disability, age (exception only applies to education, not to employment) and homosexuality.<sup>91</sup> Legal Aid NSW submits that such sweeping exceptions from unlawful discrimination by private educational authorities fall short of modern community expectations.

The protections afforded to private educational authorities in NSW go far beyond those in place in other states and territories. For example, under the *Discrimination Act 1991* (ACT) it is not unlawful for educational institutions (private or public) to discriminate on the grounds of sex (but only if the institution is conducted solely for students of the opposite sex), religious conviction, or disability.<sup>92</sup> In Victoria, an educational authority that operates an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular disability, may exclude from that institution or program people who do not possess that particular characteristic.<sup>93</sup>

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<sup>90</sup> See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, (Report 92, 1999), Chapter 6.

<sup>91</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49ZYL(3)(b)

<sup>92</sup> *Discrimination Act 1991* (ACT) ss 36, 46 and 51.

<sup>93</sup> *Equal Opportunity Act 2010* (Vic) s39, 43 and 61.

As illustrated by the case study below, the broad exceptions currently afforded to private educational authorities in NSW allow for the kind of discrimination that have no place in the modern society.

### **Case study: Discrimination in employment by a religious school**

Our client was employed at a religious school as an English teacher and had been employed by the school on a series of fixed term 12-month contracts.

Our client became pregnant to her de facto partner. Our client told the school that she was pregnant.

The school informed our client that her contract would be terminated because she was pregnant and unmarried.

## 10.2 Insurance exceptions

Legal Aid NSW also invites a close review of the exception afforded to insurance providers to discriminate against individuals with a disability. Legal Aid NSW's experience and research report, "*What's the Risk? Access to insurance for people living with health conditions*",<sup>94</sup> found that some insurance companies may be inappropriately using this exception to deny cover, provide cover only with exclusions, or premium load (potentially to the extent that the person is priced out of the market).

Finally, as noted above, the structure of the AD Act should be amended to make it easier to navigate the exceptions to the Act. Whilst general exceptions to the AD Act are contained together in Part 6, exceptions to discrimination on individual attributes or in some areas are scattered throughout the AD Act. This makes finding exceptions to the Act unnecessarily complex and, at times, repetitive. Consideration should be given to restructuring the AD Act and grouping the exceptions in a similar fashion to how they are set out in the *Discrimination Act 1991* (ACT), namely under one Part.

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<sup>94</sup> Legal Aid NSW, *What's the Risk? Access to insurance for people living with health conditions* (July 2019).



## 11. The adequacy and accessibility of complaints procedures and remedies (ToR 9)

Legal Aid NSW supports a complaints procedure that is flexible, trauma informed, and responsive to the needs of complainants. Adequate funding for Anti-Discrimination NSW is necessary to provide this.

We also support ongoing professional training in discrimination law, alternative dispute resolution theory, trauma-informed practises, cultural competencies and conciliation techniques for conciliators.

### 11.1 Faster resolution process

The average time taken to finalise a complaint in the ADB in 2021/2022 was just over four months.<sup>95</sup>

While waiting for an investigation to begin or for a conciliation conference to be scheduled, our clients have been dismissed, have decided to resign, have been evicted and/or have experienced a deterioration in their mental health. All of our clients, regardless of their gender, age or life circumstances, find it stressful to make a complaint of discrimination. Delays in the process heighten the stress that our clients feel. It is also our practice experience that the longer a dispute is left unresolved, the more difficult it is to ultimately settle.

To ease the distress to vulnerable victims of discrimination, and to increase the likelihood of a mutually agreeable settlement, where appropriate the bulk of all discrimination complaints should be finalised within three months.

We also suggest that Anti-Discrimination NSW have the ability to provide expedited conciliations on application of a party and make publicly available the criteria for granting this.

Anti-Discrimination NSW should be properly resourced to handle complaints more efficiently.

### 11.2 Telephone conciliation process

In our experience face to face conciliation, is often preferred to, and more beneficial than, telephone conciliations. This is particularly so for complainants with some

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<sup>95</sup> Anti-Discrimination NSW 2021/2022 Annual Report, 23 < <https://antidiscrimination.nsw.gov.au/documents/annual-reports/anti-discrimination-annual-report-2021-22.pdf> >

disabilities, who are Aboriginal or where English is a second language. However, the current practice of Anti-Discrimination is to provide online conciliation. We suggest that complainants have the option of electing face to face conciliation.

While we understand that travelling to regional areas can be resource intensive, we also suggest that Anti-Discrimination NSW also offer face to face conciliation outside of Sydney metropolitan areas.

### 11.3 Required reporting of settlement outcomes

There is little public information available about the settlement of discrimination complaints. Consistent, up to date, de-identified reporting of settlement data by Anti-Discrimination NSW would assist our clients, both applicants and respondents, to better evaluate their position and make more informed choices during negotiations. Outcomes data may also act as a deterrent for would-be discriminators and harassers.<sup>96</sup> Production of uniform data about settled discrimination complaints would also facilitate broader academic evaluation of the financial and non-financial outcomes achieved in all Australian jurisdictions over time.

### 11.4 Feedback mechanisms

We consider that Anti-Discrimination NSW should provide feedback mechanisms to parties and their representatives. For example, this could be in the form of a survey sent to the parties and their representatives after a conciliation, similar to that used by the Australian Human Rights Commission. This would allow Anti-Discrimination NSW to acquire feedback, identify trends and reflect on strengths and areas of improvement.

We would also value regular meetings of 'user groups' for practitioners in the field to discuss what is working well and areas of concern in the conciliation process, facilitated and hosted by Anti-Discrimination NSW.

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<sup>96</sup> Unions NSW, *Discussion Paper: Reforms to Sexual Harassment laws* (2018), 19.

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

### 12.1 Own motion powers to conduct investigations

We consider that the President of Anti-Discrimination NSW should be empowered to conduct own motion investigations into breaches of the AD Act, without requiring an individual complaint. For example, an investigation could arise because of information received through an anonymous report, or through information provided to Anti-Discrimination NSW highlighting systemic discrimination in a particular sector. This could be modelled on the existing powers of the Victorian Equal Opportunity<sup>97</sup> and Human Rights Commission.

We note that the Board of Anti-Discrimination NSW may by resolution, carry out investigations, research and inquiries relating to discrimination under section 119. We are not aware of instances where these investigative powers have been used.

### 12.2 Monitoring and compliance powers for positive duty

As noted previously, we consider that a positive duty to prevent discrimination should also involve additional powers and resources for Anti-Discrimination NSW. Similar to the Victorian and SD Act model, Anti-Discrimination NSW should be properly funded to have a compliance and monitoring function. This should involve the power to investigate serious breaches of the positive duty, enter into compliance agreements with organisations, and refer matters to the court, Attorney-General or Parliament.

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<sup>97</sup> *Equal Opportunity Act 2010* (Vic) s 127.

## 13. The interaction between the Act and Commonwealth anti-discrimination laws (ToR 12)

Legal Aid NSW supports improved consistency between the AD Act and the federal discrimination laws to provide greater clarity and simplicity for the community.

In Legal Aid NSW's experience, the complexity of discrimination law makes it difficult for people to know and understand their rights and comply with the law. This is particularly problematic for our clients seeking discrimination advice on one or more ground, or where there is a choice of forum. Clients are often confused and overwhelmed by the broadly similar but not identical concepts and definitions. In some instances, this can be a deterrent to our clients making complaints. Complexity also adds to the cost, duration and uncertainty of legal claims.

Any way in which discrimination law can be harmonised makes the discrimination legal framework less complex and easier to navigate. A simpler legal framework is beneficial not just to applicants but also to respondents, large and small. Individual respondents or small businesses are often as confused by the discrimination law framework as applicants. These respondents spend time away from their lives and businesses trying to grapple with the complexity of the law. Respondents who engage lawyers go to considerable expense obtaining advice on the many different claims in different jurisdictions that may be brought against them.

However, it is essential that where laws are harmonised, that they are harmonised in a manner which provides for the greatest protection of rights, and that applicants do not lose rights in the effort to create a uniform legislative framework. Where definitions differ between Acts, the legislation should be amended to reflect the greatest level of protection.

## 14. Any other matters the Commission considers relevant to these Terms of Reference (ToR 13)

### 14.1 Costs

As mentioned in response to ToR 6 above, Legal Aid NSW supports the Equal Access costs model in discrimination matters. This would allow people who experience discrimination and sexual harassment to recover their legal costs if successful. If unsuccessful, they would not be required to pay the other side's costs, with some limited exceptions such as for vexatious litigation. This model is similar to costs protections already available in whistleblowing law. Adopting this model would mean that people do not face a lifetime of debt simply for enforcing their rights.

### 14.2 Time limit

Legal Aid NSW considers that the time limit for the President to decline a complaint should be extended from 12 months<sup>98</sup> to two years in line with federal discrimination laws.<sup>99</sup> This would recognise that many people may delay exploring their legal options or making a complaint immediately after an incident for many complex reasons. For people who experience discrimination or harassment at work, many wait until they leave the workplace to lodge a complaint.

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<sup>98</sup> *Anti-Discrimination Act 1977* (NSW), section 89B(2)(b).

<sup>99</sup> *Australian Human Rights Commission Act 1986* (Cth), section 46PH(1)(b).