

**Submission to the
NSW Law Reform Commission's review
of the Anti-Discrimination Act**

Date: 23 October 2023.

Table of Contents

1	EXECUTIVE SUMMARY	4
2	RECOMMENDATIONS	4
3	PROTECTED ATTRIBUTES	7
	Recommendations.....	8
4	PROTECTED AREAS OF PUBLIC LIFE (DISCRIMINATION)	13
	Recommendations.....	15
5	PROTECTED AREAS OF PUBLIC LIFE (SEXUAL HARASSMENT)	22
	Recommendations.....	22
6	DEFINITION OF DISCRIMINATION	22
	Recommendations.....	23
7	AMENDING THE EXCEPTIONS UNDER THE NSW ACT	25
	Recommendations.....	25
8	VILIFICATION	31
	Recommendations.....	32
9	HARASSMENT	33
	Recommendations.....	34
10	THE IMPLEMENTATION OF A POSITIVE DUTY	35
	Recommendations.....	36
11	REPRESENTATIVE COMPLAINTS	37
	Recommendations.....	37
12	ACCESSIBILITY OF COMPLAINTS PROCESS	38
	Recommendations.....	38
13	IMPLEMENTING A HUMAN RIGHTS FRAMEWORK	40

1 EXECUTIVE SUMMARY

The Commonwealth government and each state and territory government have legislative frameworks to protect people from discrimination, harassment, and vilification. Whilst NSW was the first state to enact anti-discrimination legislation, the NSW *Anti-Discrimination Act 1977 (NSW Act)* it is now significantly out of date and in need of reform to bring it in line with current community standards and the legislative frameworks across the rest of Australia.

In our submission, we prioritise reforms that:

1. increase protections for vulnerable community members;
2. decrease the current burdens associated with the complaints processes for those who experience discrimination, harassment, and vilification;
3. ensure greater consistency with other state, territory, and Commonwealth legislation; and
4. ensure the NSW Act is more accessible and easier to understand.

2 RECOMMENDATIONS

Please find below a list of all our recommendations for proposed amendments to the NSW Act. More details in relation to each recommendation can be found below.

PROTECTED ATTRIBUTES	
Recommendation 1	Substitute Part 4C of the NSW Act with 'discrimination on the ground of homosexuality' with 'discrimination on the ground of sexual orientation'.
Recommendation 2	The inclusion of 'religious belief and religious activity' as a protected attribute under the NSW Act.
Recommendation 3	The substitution of Part 3A of the NSW Act 'discrimination on transgender grounds' for two separate provisions, being 'discrimination on the ground of gender identity' and 'discrimination on the ground of sex characteristics'.
Recommendation 4	Expand the definition of 'disability' under the NSW Act.
Recommendation 5	The inclusion of 'political belief and activity' as a protected attribute under the NSW Act.
Recommendation 6	The expansion of the definition of 'responsibilities as a carer' under the NSW Act to include a broader range of family members and kinship responsibilities.
Recommendation 7	The inclusion of 'lawful sexual activity' as a protected attribute under the NSW Act.
Recommendation 8	The inclusion of 'Domestic and Family Violence (DFV)' as a protected attribute under the NSW Act.
Recommendation 9	The inclusion of 'accommodation status' as a protected attribute under the NSW Act.

PROTECTED AREAS OF PUBLIC LIFE (DISCRIMINATION)	
Recommendation 10	The inclusion of a general protection against discrimination, sexual harassment and/or vilification in all aspects of public life in the NSW Act.
Recommendation 11	Broaden the application of the protections in the NSW Act in relation to work.
Recommendation 12	Broaden the application of the protections in the NSW Act in relation to goods and services.
Recommendation 13	The introduction of 'disposal of land' as a protected area of public life in the NSW Act.
Recommendation 14	Broaden the application of the protections in the NSW Act in relation to registered clubs.
Recommendation 15	The inclusion of 'sport' as a protected area of public life in the NSW Act.
Recommendation 16	The inclusion of 'competitions' as a protected area of public life in the NSW Act.
Recommendation 17	The inclusion of 'administration of State laws and programs' as a protected area of public life in the NSW Act.
Recommendation 18	The inclusion of requesting information for a discriminatory reason as an unlawful act under the NSW Act.
Recommendation 19	The expansion of applicable areas of public life to discrimination on the ground of 'responsibilities as a carer'.
PROTECTED AREAS OF PUBLIC LIFE (SEXUAL HARASSMENT)	
Recommendation 20	The implementation of a broad prohibition on sexual harassment in the NSW Act.
DEFINITION OF DISCRIMINATION	
Recommendation 21	The introduction of a clear definition of direct and indirect discrimination in the NSW Act.
Recommendation 22	The inclusion of reasonable adjustments in the definition of direct discrimination for the purposes of disability discrimination under the NSW Act.
AMENDING THE EXCEPTIONS UNDER THE NSW ACT	
Recommendation 23	The removal of the broad exception for private educational authorities and the inclusion of appropriate exceptions for religious educational institutions in the NSW Act.
Recommendation 24	Narrowing the exceptions in the NSW Act that currently apply to religious bodies.

AMENDING THE EXCEPTIONS UNDER THE NSW ACT	
Recommendation 25	The removal of the exception in the NSW Act that currently applies to adoption services.
Recommendation 26	The removal of the exception in the NSW Act that currently applies to voluntary bodies.
Recommendation 27	Amending the exception in the NSW Act that applies to a club or body established to benefit a class of people sharing a protected attribute.
Recommendation 28	The removal of the exception in the NSW Act for employers who employ 5 or less people.
Recommendation 29	The removal of the exception in the NSW Act that applies to discrimination based on addiction to a prohibited drug.
Recommendation 30	Limiting the current exceptions in the NSW Act that apply to discrimination in sport.
Recommendation 31	Inserting exceptions into the NSW Act for any new provision regarding discrimination in the disposal of land.
VILIFICATION	
Recommendation 32	Expanding the grounds to which protection against vilification applies in the NSW Act.
Recommendation 33	The introduction of an offence of vilification into the NSW Act.
HARASSMENT	
Recommendation 34	The expansion of the definition of “sexual harassment” under the NSW Act.
Recommendation 35	The inclusion of circumstances to be taken into account for the purposes of s22A of the NSW Act.
Recommendation 36	The inclusion of ‘harassment on the basis of sex’ in the NSW Act.
THE IMPLEMENTATION OF A POSITIVE DUTY	
Recommendation 37	The inclusion of a positive duty on organisations to prevent discrimination, sexual harassment, and vilification in the NSW Act.
REPRESENTATIVE COMPLAINTS	
Recommendation 38	Amending the rules in the NSW Act that apply to representative complaints.
ACCESSIBILITY OF COMPLAINTS PROCESS	
Recommendation 39	Amending the circumstances under the NSW Act whereby the Anti-Discrimination Board NSW (ADB) may refer a complaint to NCAT.

ACCESSIBILITY OF COMPLAINTS PROCESS	
Recommendation 40	Granting the ADB broader investigative and regulatory functions under the NSW Act.
Recommendation 41	Embedding a process for pro bono referrals within the ADB system.
IMPLEMENTING A HUMAN RIGHTS FRAMEWORK	
Recommendation 42	The implementation of a human rights framework in NSW.

3 PROTECTED ATTRIBUTES

The NSW Act arguably offers the least protection, and narrowest range of protected attributes, of all Australian states and territories and is also lacking when compared to international jurisdictions. Currently, the following are the only attributes which are protected under the NSW Act:

1. race¹;
2. sex, including pregnancy and breastfeeding²;
3. transgender status³;
4. marital or domestic status⁴;
5. disability⁵;
6. responsibilities as a carer⁶;
7. homosexuality⁷; and
8. age⁸.

The NSW Act also prohibits discrimination on the ground of being a relative or associate of a person with a protected attribute (except the attribute of responsibilities as a carer).

The below table provides a non-exhaustive list of attributes for which the NSW Act lacks protection.

PROTECTED ATTRIBUTE	HOW THE NSW ACT COMPARES
Gender identity	The NSW Act does not offer clear protection for discrimination on the grounds of gender identity (protection is limited to discrimination on the grounds of transgender status). By comparison, all other states and territories in Australia provide protection, as does the <i>Sex Discrimination Act 1984</i> (Cth) (SDA) and many international jurisdictions (such as Canada, Sweden, and Norway).
Sex characteristics/ intersex status	The NSW Act is one of only three states (including WA and QLD) that do not protect sex characteristics and intersex status. These attributes are also protected under the SDA.

¹ Part 2, NSW Act.

² Part 3, NSW Act.

³ Part 3A, NSW Act.

⁴ Part 4, NSW Act.

⁵ Part 4A, NSW Act.

⁶ Part 4B, NSW Act.

⁷ Part 4C, NSW Act.

⁸ Part 4G, NSW Act.

Sexual orientation	The NSW Act does not offer broad protection for discrimination on the grounds of sexual orientation – only homosexuality. By comparison, all other states and territories in Australia provide protection that extends to sexual orientation, as does the SDA and many international jurisdictions (such as Canada, Sweden, Norway, and New Zealand).
Religious belief	The NSW Act is one of only two states (SA is the other ⁹) that does not protect religious beliefs. The NSW Act currently only prohibits discrimination on the ground of ethno-religious status. Many international jurisdictions such as New Zealand, Canada, Sweden, and Norway also have protections against discrimination on the grounds of religion/religious beliefs.
Political belief	The NSW Act is one of only two states (SA is the other) that does not protect political beliefs.
Lawful sexual activity	The NSW Act does not provide protection against discrimination on the ground of lawful sexual activity. By comparison, this ground is protected under QLD, TAS and VIC discrimination frameworks and similarly ‘sex work’ is a protected ground under the <i>Anti-Discrimination Act 1992</i> (NT) (NT Act).
Domestic or Family Violence (DVF)	The NSW Act does not provide protection from discrimination for those experiencing DVF. This is a protected attribute under the <i>Discrimination Act 1991</i> (ACT) (ACT Act), the <i>Equal Opportunity Act 1984</i> (SA) (SA Act) and the NT Act.
Accommodation status	The NSW Act does not provide protection from discrimination on the basis of accommodation status. This is a protected attribute under the NT Act and ACT Act.

Recommendations

We recommend the following additions and amendments to the protected attributes in the NSW Act.

Recommendation 1: *substitute Part 4C of the NSW Act with ‘discrimination on the ground of homosexuality’ with ‘discrimination on the ground of sexual orientation’.*

The prohibition of discrimination on the ground of homosexuality does not protect people of sexual orientations outside the narrow definition of “*male or female homosexual*”¹⁰ under the NSW Act. This means, for example, that people who are bisexual are not protected from discrimination on the ground of their sexual orientation under the NSW Act: an arbitrary distinction and not in line with the intention of the legislation. We recommend that an open-ended definition of “sexual orientation” be included in the NSW Act to ensure the LGBTIQ+ community are *all* properly represented and provided with equal protections against discrimination on the ground of their sexual orientation.

⁹ Although it provides a more limited protection for religious appearance or dress.

¹⁰ Section 4, NSW Act.

We recommend the NSW Act be amended to follow the definition of sexual orientation in the NT Act, based on the Yogyakarta Principles¹¹, which states:

“sexual orientation means each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender identity, a different gender identity or more than one gender identity” ...¹²

“For the purposes of this Act, sexual orientation is to be construed to include the absence of profound emotional, affectional and sexual attraction to others.”¹³

If considered necessary, this definition can be expanded to expressly say that it includes, but is not limited to, heterosexuality, homosexuality, bisexuality, and asexuality. This addition ensures there is certainty around what is protected but does not limit the definition to an exhaustive list.

Recommendation 2: the inclusion of ‘religious belief and religious activity’ as a protected attribute under the NSW Act.

Whilst a person can make a complaint to the Australian Human Rights Commission (**AHRC**) in relation to an allegation of religious discrimination, they have no options for pursuing court action if the matter does not resolve. This means people in NSW currently have no adequate state or federal options for pursuing such a claim. We recommend that ‘religious belief or religious activity’ be included as a protected attribute to bring the NSW Act into line with other jurisdictions as well as to give effect to Articles 18 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*.

We recommend that these attributes be defined in similar terms to the *Anti-Discrimination Act 1991 (QLD) (QLD Act)* which states:

“religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity.

religious belief means holding or not holding a religious belief.”¹⁴

Recommendation 3: the substitution of Part 3A of the NSW Act, ‘discrimination on transgender grounds’, for two separate provisions, being ‘discrimination on the ground of gender identity’ and ‘discrimination on the ground of sex characteristics’.

The definition of a transgender person under the NSW Act results in a failure to protect non-binary and intersex people from discrimination. We recommend that these new provisions be drafted in a similar manner to the NT Act, which provides as follows:

“gender identity means a person's gender-related identity, which may or may not correspond with the person's designated sex at birth, and includes:

- (a) the personal sense of the body (whether this involves medical intervention or not); and*
- (b) other expressions of gender, such as dress, speech, mannerisms, names and personal references.”¹⁵*

¹¹ <https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf>

¹² Section 4, NT Act.

¹³ Section 4 (5A), NT Act.

¹⁴ Schedule 1, QLD Act.

¹⁵ Section 4, NT Act.

“sex characteristics means a person's physical features and development relating to sex, including the following:

- (a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy;
- (b) chromosomes, genes and hormones related to sex;
- (c) secondary physical features emerging as a result of puberty.”¹⁶

The above proposed provisions will bring NSW in line with all other states and territories in Australia and are also in line with the standard set by various international jurisdictions. For example, the Canadian Human Rights Act protects “gender identity or expression”.¹⁷

We otherwise support the recommendations made by Equality Australia on 30 August 2023 with respect to sexual orientation, gender identity and sex characteristics.¹⁸

Recommendation 4: expand the definition of ‘disability’ under the NSW Act

Disability is currently defined in the NSW Act as:

“disability means-

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body; or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness; or
- (c) the malfunction, malformation or disfigurement of a part of a person's body; or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment that results in disturbed behaviour.”¹⁹

The current definition does not cover all persons living with a disability and in particular, requires those living with mental illness to have ‘disturbed behaviour’ to be protected. We recommend expanding the definition to be more in line with the NT Act, which states that:

“disability includes the following:

- (a) the total or partial loss of a bodily function;
- (b) the presence in the body of:
 - (i) an organism that has caused or is capable of causing disease; or
 - (ii) organisms impeding, capable of impeding or that may impede the capacity of the body to combat disease;
- (c) total or partial loss of a part of a body;
- (d) the malfunction or dysfunction of a part of the body;
- (e) the malformation or disfigurement of a part of the body;
- (f) reliance on any of the following:
 - (i) a support person;
 - (ii) a disability aid;
 - (iii) an assistance animal;
- (g) psychiatric or psychological disease or disorder, whether permanent or temporary;
- (h) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction;
- (i) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.”²⁰

¹⁶ Ibid.

¹⁷ Part 1, section 3(1), RSC, 1985, c. H-6.

¹⁸ An Equality Act for NSW, Preliminary submissions to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW) dated 30 August 2023 (Equality Australia).

¹⁹ Section 4, NSW Act.

We further recommend that the definition also include, as set out in the *Disability Discrimination Act 1992 (Cth) (DDA)*,

“...a disability that:

[...]

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.”²¹

The above provides a more expansive definition of disability that, in our experience, is more in line with the practical realities of those who experience disability discrimination in various aspects of public life.

Recommendation 5: the inclusion of ‘political belief and activity’ as a protected attribute under the NSW Act.

Like religious discrimination, whilst a person can make a complaint to the AHRC in relation to an allegation of discrimination on the ground of political belief, they have no options for pursuing court action if the matter does not resolve. This means people in NSW currently have no adequate state or federal options for pursuing such a claim. We recommend that this be included as a protected attribute to bring the NSW Act into line with other jurisdictions as well as to give effect to Article 26 of the ICCPR.

Recommendation 6: the expansion of the definition of ‘responsibilities as a carer’ under the NSW Act to include a broader range of family members and kinship responsibilities.

The current definition of “responsibilities as a carer” under the NSW Act is unnecessarily complex and restrictive. It fails to provide protection for kinship responsibilities, which is of particular significance to First Nations communities, as well as the different family structures and responsibilities in a variety of cultures across Australia. The NSW Act relevantly states:

“49S Meaning of “responsibilities as a carer”

- (1) A reference in this Part to a person’s **responsibilities as a carer** is a reference to the person’s responsibilities to care for or support-
 - (a) any child or step-child of the person (whether or not under the age of 18 years) who is-
 - (i) wholly or substantially dependant on the person, or
 - (ii) in need of care or support, or
 - (b) any child or adult who is in need of care or support and-
 - (i) of whom the person is guardian, or
 - (ii) for whom the person has parental responsibility under a law of the Commonwealth or this State, or
 - (iii) in relation to whom the person is an authorised carer within the meaning of the Children and Young Persons (Care and Protection) Act 1998, or
 - (c) any immediate family member of the person who is in need of care or support, being one of the following-

²⁰ Section 4, NT Act.

²¹ Section 4, DDA.

- (i) a spouse or former spouse of the person or of a spouse or former spouse of the person,
- (ii) a grandchild or step-grandchild of the person or of a spouse or former spouse of the person,
- (iii) a parent or step-parent of the person or of a spouse or former spouse of the person,
- (iv) a grandparent or step-grandparent of the person or of a spouse or former spouse of the person,
- (v) a brother or sister, or step-brother or sister, of the person or of a spouse or former spouse of the person.

[...]²²

We recommend that NSW adopt a definition that is less restrictive and less complex. For example, under the NT Act “**carer responsibilities** means whether or not the person is a parent or has responsibility to care for a family member or near relative through kinship or otherwise”.²³ Family member is not defined, and therefore not limited to immediate family as in NSW.

Similarly, under the ACT Act, “parent, family, carer or kinship responsibilities”²⁴ are a protected attribute. There are no further definitions limiting the scope or application of this protection to just immediate family members. The only limits applied are for the purposes of who is considered a “carer”, with the ACT Act stating:

“**carer**—a person is a **carer** of someone else (the **dependant**) if—

- (a) the dependant is dependent on the person for ongoing care and assistance; and
- (b) the person cares for the dependant otherwise than because of—
 - (i) a commercial arrangement; or
 - (ii) an arrangement that is substantially commercial.”²⁵

Amending the definition to be more in line with the NT Act and/or the ACT Act will allow the NSW Act to better reflect, and protect, family structures and responsibilities across Australia.

Recommendation 7: the inclusion of ‘lawful sexual activity’ as a protected attribute under the NSW Act.

People in NSW currently have no state or federal options for pursuing a discrimination claim if they have been treated unfavourably, or denied the same opportunities as others, because of their involvement in lawful sexual activity or because someone believes they are engaged in lawful sexual activity and, for whatever reason, do not approve of it.

We recommend a broad definition be implemented to include, but not limit the protection, to those who are discriminated against on the ground they are a lawfully employed sex worker.²⁶ For example, the *Equal Opportunity Act 2010* (VIC) (**VIC Act**) provides the following definition:

²² Section 49S, NSW Act.

²³ Section 4, NT Act.

²⁴ Section 7, ACT Act.

²⁵ Ibid.

²⁶ We do not recommend the QLD approach which limits the definition to only those lawfully employed as a sex worker (and therefore would not include, for example, consensual sex in other contexts).

“lawful sexual activity means engaging in, not engaging in or refusing to engage in a lawful sexual activity;”²⁷

Introducing this attribute would not allow for protection from discrimination because a person has engaged in sexual activity that is criminal (or unlawful). For example, those who perpetrate sexual abuse, or have been accused of perpetrating sexual abuse, are not protected regardless of their gender, sexual orientation, or any other attribute.

Recommendation 8: *the inclusion of DFV as a protected attribute under the NSW Act.*

People in NSW currently have no state or federal options for pursuing a discrimination claim if they have been treated unfavourably, or denied the same opportunities as others, because they are a victim/survivor of DFV. Discrimination can compound the harm caused to victim/survivors of DFV. For example, they may be unfairly punished for drops in performance and attendance at work or school, be prevented access to housing or otherwise refused access to services. Amending the NSW Act to include protection from discrimination on the ground of DFV would allow victim/survivors to disclose their circumstances without fear of repercussion and will also complement existing government strategies to reduce DFV and the harm it causes. For example, in his second reading speech for the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill, Tony Burke MP, Minister for Employment and Workplace Relations said:

“More than 68 per cent of people experiencing family and domestic violence are in paid work. However, many can’t leave violent situations without risking joblessness, financial stress, homelessness and poverty, leaving workers having to choose between their safety and their livelihood. ...This bill sends a clear message that family and domestic violence is not just a criminal justice or social issue, but an economic and a workplace issue.”²⁸

Recommendation 9: *the inclusion of ‘accommodation status’ as a protected attribute under the NSW Act.*

People in NSW currently have no state or federal options for pursuing a discrimination claim if they have been treated unfavourably, or denied the same opportunities as others, because of their accommodation status (for example, because they are homeless). This kind of discrimination can have a profound impact on a person’s life and access to basic services. For example, if a person is rejected from a job (or many jobs) because they are homeless this then impacts their ability to access stable housing, health care, food security and other basic needs. Amending the NSW Act to include protection from discrimination on the ground of accommodation status would help reduce the compounding impacts of homelessness and will also complement existing government strategies to reduce homelessness.

4 PROTECTED AREAS OF PUBLIC LIFE (DISCRIMINATION)

The NSW Act also provides protection from discrimination in a limited number of areas of life compared to other jurisdictions.²⁹ Currently, the following areas of life are the only ones which are protected under the NSW Act, and in some circumstances even those protections are inadequate:

²⁷ Section 4, VIC Act.

²⁸ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd006#_ftn8

²⁹ Note the provisions relating to sexual harassment provide protection in a broader range of areas of life.

1. work³⁰;
2. education³¹;
3. provision of goods and services³²;
4. accommodation³³; and
5. registered clubs³⁴.

We note that this limited protection is inconsistent with the intention of the NSW Act, which is to provide protection in all areas of life aside from private conduct.

The below table provides a non-exhaustive list of areas in which the NSW Act lacks protection.

AREA OF LIFE	HOW THE NSW ACT COMPARES
Requesting or requiring information	The ACT, VIC and WA all include requests for information as a protected area of life. The federal SDA, DDA and <i>Age Discrimination Act 2004</i> (Cth) (ADA) all contain broadly similar provisions regarding discriminatory requests for information. ³⁵ The NSW Act does not provide protection in this area of life.
Superannuation	NSW is one of only two states (along with VIC) which does not provide protection in relation to superannuation. Such protection is also provided in the DDA and SDA.
Disposal of land	The NSW Act (other than in relation to sexual harassment ³⁶) provides no protection in relation to disposal of land. However, QLD, VIC and WA as well as the Commonwealth (SDA, DDA, ADA and <i>Racial Discrimination Act 1975</i> (Cth) (RDA) do provide such protection. New Zealand also provides a similar protection.
Sport	The NSW Act (other than in relation to sexual harassment ³⁷) does not identify sport as a protected area of public life. However, such protection is provided in VIC, WA and the recently passed ACT <i>Discrimination Amendment Bill 2022</i> (ACT Amendment Bill).
Administration of state laws and programs	The NSW Act (other than in relation to sexual harassment ³⁸) does not identify the administration of state laws and programs as a protected area of public life. By contrast, this is covered in QLD, the NT and in the SDA, DDA and RDA.
Competitions	The ACT Amendment Bill provides it is unlawful to discriminate against another person in relation to participation in a competition, a protection not provided under the NSW Act nor elsewhere in Australia.

³⁰ Part 2 Division 2, Part 3 Division 2, Part 3A Division 2, Part 4 Division 2, Part 4A Division 2, Part 4B Division 2, Part 4C Division 2 and Part 4G Division 2, NSW Act.

³¹ *Ibid* ss 17, 31A, 38K, 46A, 49L, 49ZO and 49ZYL, NSW Act.

³² *Ibid* ss 19, 33, 38M, 47, 49M, 49ZP, and 49ZYN, NSW Act.

³³ *Ibid* ss 20, 34, 38N, 48, 49N, 49ZQ and 49ZYO, NSW Act.

³⁴ *Ibid* ss 20A, 34A, 38O, 48A, 49O, 49ZR and 49ZYP, NSW Act.

³⁵ *Sex Discrimination Act 1984* s 27, *Age Discrimination Act 2004* s 32, *Disability Discrimination Act 1992* s 30.

³⁶ S22H NSW Act.

³⁷ S22I NSW Act.

³⁸ S22I NSW Act.

Recommendations

We recommend the following additions and amendments to the areas of life covered under the NSW Act.

Recommendation 10: *the inclusion of a general protection against discrimination, sexual harassment and/or vilification in all aspects of public life in the NSW Act.*

The introduction of a general provision avoids oversights by the NSW Act and allows it to adapt to the complex and changing nature of modern public life. A list of specific areas can still be provided for clarity, helping to limit disputes, and to make the law more user friendly (these are discussed further on in these submissions).

An example of this is provided by s 9(1) of the RDA, which broadly establishes that racial discrimination is unlawful in any area of public life:

*“It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom **in the political, economic, social, cultural or any other field of public life.**”*

[emphasis added]

Subsequent provisions in the RDA identify areas where racial discrimination is unlawful,³⁹ without limiting the generality of s 9.⁴⁰

Recommendation 11: *broaden the application of the protections in the NSW Act in relation to work.*

The provisions of the NSW Act regarding unlawful discrimination in work address the following areas of work:

1. discrimination against applicants and employees;⁴¹
2. discrimination against commission agents;⁴²
3. discrimination against contract workers;⁴³
4. partnerships (or proposed partnerships) consisting of 6 or more partners;⁴⁴
5. discrimination by local government councillors (against another member of the council);⁴⁵

³⁹ Rights to equality before the law (s 10), access to places and facilities (s 11), land, housing, and other accommodation (s 12), provision of goods and services (s 13), right to join trade unions (s 14), employment (s 15).

⁴⁰ Section 9(4), RDA.

⁴¹ Sections 8 (race), 25 (sex), 38C (transgender grounds), 40 (marital or domestic status), 48D (disability), 49V (responsibilities as a carer), 49ZH (homosexuality), NSW Act.

⁴² Ibid ss 9 (race), 26 (sex), 38D (transgender grounds), 41 (marital or domestic status), 49E (disability), 49W (responsibilities as a carer), 49ZI (homosexuality).

⁴³ Ibid ss 10 (race), 27 (sex), 38E (transgender grounds), 42 (marital or domestic status), 49F (disability), 49X (responsibilities as a carer), 49ZJ (homosexuality).

⁴⁴ Ibid ss 10A (race), 27A (sex), 38F (transgender grounds), 42A (marital or domestic status), 49G (disability), 49Y (responsibilities as a carer), 49ZK (homosexuality).

⁴⁵ Ibid ss 10B (race), 27B (sex), 38G (transgender grounds), 42B (marital or domestic status), 49H (disability), 49Z (responsibilities as a carer), 49ZKA (homosexuality).

6. industrial organisations;⁴⁶
7. qualifying bodies;⁴⁷ and
8. employment agencies.⁴⁸

There are several concerning gaps in the coverage of these provisions, including a failure to provide protection to people undertaking work on an unpaid or voluntary basis. These workers experience comparable workplace environments to paid workers and are exposed to the same risk of discrimination. There is no clear policy rationale as to why they should not receive the same protection. For similar reasons, the legislation should also be expanded to cover work experience arrangements, vocational placements and occupational training or retraining programs.

We recommend that the NSW Act adopt the NT Act's definition of "work", which broadly covers "*work carried out in any capacity and at any place*", including work as:

1. an employee; or
2. a contractor or subcontractor; or
3. an employee of a contractor or subcontractor; or
4. an employee of a labour hire company; or
5. an outworker; or
6. an apprentice or trainee; or
7. a student or other person gaining work experience, whether formal or informal; or
8. a volunteer or on another unpaid basis; or
9. a statutory appointee; or
10. part of a vocational training program or other occupational training or retraining program; or
11. a person of a prescribed class.⁴⁹

As noted in the explanatory note to the Northern Territory amendments, this broader definition recognises that the modern work environment is "*no longer limited to the physical work place provided by the employer*" and discrimination may occur "*irrespective of who the person is employed by*".⁵⁰ It also addresses concerns about the protection of unpaid, volunteer and trainee workers, and ensures protection for statutory appointees generally (noting that the NSW Act currently protects "local government councillors" but no other statutory appointees).

Recommendation 12: broaden the application of the protections in the NSW Act in relation to goods and services.

Under the NSW Act, it is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against another person:

1. by refusing to provide goods or services, or
2. in the terms on which he or she provides the goods or services.

⁴⁶ Ibid ss 11 (race), 28 (sex), 38H (transgender grounds), 43 (marital or domestic status), 49I (disability), 49ZA (responsibilities as a carer), 49ZL (homosexuality).

⁴⁷ Ibid ss 12 (race), 29 (sex), 38I (transgender grounds), 44 (marital or domestic status), 49J (disability), 49ZB (responsibilities as a carer), 49ZM (homosexuality).

⁴⁸ Ibid ss 13 (race), 30 (sex), 38J (transgender grounds), 45 (marital or domestic status), 49K (disability), 49ZC (responsibilities as a carer), 49ZN (homosexuality).

⁴⁹ Section 4, NT Act.

⁵⁰ Explanatory memorandum, page 4.

This applies to any of the protected grounds, except responsibilities as a carer.⁵¹

“Services” are defined to include:

1. services relating to banking, insurance and the provision of grants, loans, credit or finance,
2. services relating to entertainment, recreation or refreshment,
3. services relating to transport or travel,
4. services of any profession or trade,
5. services provided by a council or public authority,
6. services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not.⁵²

We recommend that NSW adopt the same provision as the NT Act. This provides broader coverage of the goods and services area, establishing that a person who supplies or receives goods, services, or facilities (whether or not for reward or profit) must not discriminate against another person:

1. by failing or refusing to supply or receive the goods, services or facilities; or
2. in the terms and conditions on which the goods, services or facilities are supplied or received; or
3. in the way in which the goods, services or facilities are supplied or received; or
4. by treating the other person less favourably in any way in connection with the supply or receipt of the goods, services or facilities.⁵³

This provision addresses a broader range of conduct and prohibits discrimination by both suppliers and receivers (contrasted with the NSW provisions, which only prohibits attribute-based discrimination by suppliers).⁵⁴ This extends the protection to service-providers, such as taxi drivers and waiters.⁵⁵

Recommendation 13: *the introduction of ‘disposal of land’ as a protected area of public life in the NSW Act.*

The NSW Act does not specifically cover discrimination in the disposal of land.⁵⁶ This is inconsistent with Commonwealth legislation, which provides that it is unlawful for a person to discriminate against another person:

1. by refusing or failing to dispose of an estate or interest in land to the other person; or
2. in the terms or conditions on which an estate or interest in land is offered to the other person.⁵⁷

⁵¹ Sections 17 (race), 33 (sex), 38M (transgender grounds), 47 (marital or domestic status), 49M (disability), 49ZP (homosexuality), NSW Act.

⁵² *Ibid* s 4.

⁵³ Section 41, NT Act.

⁵⁴ Note the NSW Act prohibits sexual harassment by both suppliers and receivers of goods and services: s 22F, NSW Act.

⁵⁵ NT explanatory memorandum.

⁵⁶ Note that the NSW Act does cover this area in relation to sexual harassment.

⁵⁷ *Racial Discrimination Act* s 12; *Sex Discrimination Act 1984* s 24; *Age Discrimination Act 2004* s 30; *Disability Discrimination Act 1992* s 29.

To achieve consistency with the Commonwealth legislation (which can be cost prohibitive to access) and ensure more complete coverage of public life, recommends that the NSW Act be amended to address this area on the same terms.

Recommendation 14: *broaden the application of the protections in the NSW Act in relation to registered clubs.*

The NSW Act provides that it is unlawful for a “registered club” to discriminate:

1. against a person who is not a member of the registered club:
 - a. by refusing or failing to accept the person’s application for membership, or
 - b. in the terms on which it is prepared to admit the person to membership, or
2. against a person who is a member of the registered club:
 - a. by denying the person access, or limiting the person’s access, to any benefit provided by the registered club,
 - b. by depriving the person of membership or varying the terms of the person’s membership, or
 - c. by subjecting the person to any other detriment.

This protection applies to any of the protected grounds, except responsibilities as a carer.⁵⁸

A “registered club” is defined by the NSW Act as having the same meaning as in the *Registered Clubs Act 1976 (RCA)*.⁵⁹ Under the RCA, a “registered club” is a club that holds a “club licence” granted under the *Liquor Act 2007*.⁶⁰ Consequently, the question of whether or not a club’s activities are covered by the NSW Act hinges on whether or not the club has a liquor licence.

It is necessary to draw some distinction between clubs of a public nature that are covered by the NSW Act and clubs of a private nature (that are not). However, there is no clear justification for determining the public nature of a club solely by reference to whether it holds a liquor licence. The definition of “club” under the DDA provides a more effective method of drawing this distinction and defines a “club” as:

“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.”⁶¹

In its 2022 review of Queensland’s *Anti-Discrimination Act 1991 (QLD) (QLD Act)*, the Queensland Human Rights Commission (**QHRC**) recommended that Queensland adopt the same definition of “club”, noting that:

“Adopting this approach would include clubs that have public premises but do not hold liquor licences, such as smaller sporting clubs. However, a knitting club that meets at local cafes would not fall under the scope of a ‘club’, and not have duties under the Act to members or prospective members.”⁶²

We recommend that the NSW Act substitute the term “registered club” with “club” and adopt the definition of “club” provided in the DDA.

⁵⁸ Sections 20A, 34A, 38O, 48A, 49O, 49ZR, 49ZYP, NSW Act.

⁵⁹ Section 4, NSW Act.

⁶⁰ Section 4, RCA.

⁶¹ Section 4, DDA.

⁶² <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf>.

Recommendation 15: *the inclusion of ‘sport’ as a protected area of public life in the NSW Act.*

The NSW Act does not identify sport as a protected area of public life.⁶³ The exceptions identify circumstances in which it is not unlawful to exclude a person from participation in a sporting activity,⁶⁴ indicating that there may be circumstances where such exclusion would be unlawful. However, for clarity, it is recommended that the legislation explicitly address sport as a protected area.

The ACT Amendment Bill provides that it is unlawful for a person responsible for the organisation or administration of a “formally organised sporting activity” (including a coach or manager) to discriminate against another person in relation to participation in the activity. The distinction between formally and informally organised sporting activities is illustrated by reference to examples:

“Examples—formally organised sporting activity

- *basketball competition organised by a private school*
- *dodgeball league match*

Examples—informally organised sporting activity

- *backyard cricket match between friends*
- *game at a child’s birthday party*⁶⁵

This provision draws a clear and logical distinction between sporting activities in the public sphere, which are to be protected, and sporting activities in the private sphere, which will remain unaffected. We recommend that the NSW Act adopt the same provision.

Recommendation 16: *the inclusion of ‘competitions’ as a protected area of public life in the NSW Act.*

The ACT Amendment Bill provides that it is unlawful for a person responsible for the organisation or administration of a formally organised competition to discriminate against another person in relation to participation in the competition. The Bill provides the following examples of formally organised competitions:

1. singing competition organised by a commercial radio station;
2. weekend chess competition for individuals under 18 years old; and
3. short film festival run by a not-for-profit organisation.⁶⁶

This provision recognises a range of formally organised competitive activities, which are a part of public life and may entail discrimination, but which would not necessarily meet the criteria for a “sporting activity”. We recommend that the NSW Act adopt the same provisions, to provide more complete coverage of public life.

⁶³ Note that the NSW Act does cover this area in relation to sexual harassment.

⁶⁴ Sections 22, 38, 38P, 49R, 49ZYW, NSW Act.

⁶⁵ Section 23A, Discrimination Amendment Bill 2022 (ACT).

⁶⁶ *Ibid* s23B.

Recommendation 17: *the inclusion of ‘administration of State laws and program’s as a protected area of public life in the NSW Act.*

The administration of State laws and programs is a key component of public life, which is not explicitly addressed by the NSW Act.⁶⁷ By contrast, it is specifically covered in the QLD Act and NT Act,⁶⁸ and the ADA, SDA and DDA (regarding Commonwealth laws and programs).⁶⁹ The provisions all broadly provide:

1. a person who:
 - a. performs any function or exercises any power under a [State, Territory or Commonwealth] law or for the purposes of a [State, Territory or Commonwealth] Government program; or
 - b. has any other responsibility for the administration of [State, Territory or Commonwealth] law or the conduct of a [State, Territory or Commonwealth] Government program;
2. must not discriminate in—
 - a. the performance of the function; or
 - b. the exercise of the power; or
 - c. the carrying out of the responsibility.

We recommend that the NSW Act introduce a provision to address this area, in substantively the same terms. This would ensure complete coverage of this key area of public life and achieve consistency with the federal legislation.

The NSW Act currently defines state laws and programs in relation to its provision regarding sexual harassment in the administration of state laws and programs, providing:

“State law means—

(a) *an Act, a statutory rule, or a determination made under or pursuant to an Act, or*

(b) *an order or award made under or pursuant to such a law.*

State program means a program conducted by or on behalf of the State Government.”⁷⁰

We recommend that the NSW Act adopt the same definitions in relation to discrimination in the administration of state laws and programs.

Recommendation 18: *the inclusion of requesting information for a discriminatory reason as an unlawful act under the NSW Act.*

The NSW Act does not currently address discriminatory requests for information. In comparison, the SDA, ADA and DDA all contain broadly similar provisions regarding discriminatory requests for information.⁷¹ The provisions all provide that it is unlawful for a person (the **first person**) to request or require another person (the **other person**) to provide information (whether by way of completing a form or otherwise) if:

1. the information is requested or required in connection with, or for the purposes of, the first person doing a particular act; and

⁶⁷ Note that the NSW Act does cover this area in relation to sexual harassment.

⁶⁸ Section 101, QLD Act; s 49A, NT Act.

⁶⁹ Section 26, SDA; s 31, ADA; s 29, DDA.

⁷⁰ Section 22J(2), NSW Act.

⁷¹ Section 27, SDA; s32, ADA; s30, DDA.

2. it would be unlawful in particular circumstances for the first person, in doing that act, to discriminate against the other person on the ground of a protected attribute; and
3. persons who do not have the same protected attribute (e.g., persons of a different sex or age, or who do not have the disability) would not be requested or required to provide the information in circumstances that are the same or not materially different.⁷²

To illustrate how these provisions are intended to operate, the SDA provides the following example:

“Under section 14 of Division 1, it is unlawful to determine not to offer employment to a woman because she is pregnant or might become pregnant. Under this section, it is therefore also unlawful to ask a woman during a job interview whether she is pregnant or intends to become pregnant if that information is requested in connection with determining whether to offer her employment.”

The ACT Act addresses discriminatory requests for information in the following terms:

“It is unlawful for a person to discriminate against another person by requesting or requiring information (whether by way of completing a form or otherwise) in connection with, or for the purpose of performing, an act that is or would be unlawful under any other provision of this part or under part 5, 6 or 7.”⁷³

These criteria share similarities with the federal criteria, but do not include a requirement to establish that a person without the same protected attribute would not be required or requested to provide the information in the same (or not materially different) circumstances. We recommend the NSW Act adopt the ACT Act definition on the basis that if information is requested for a discriminatory purpose, then that should be sufficient to demonstrate a breach of the NSW Act.

Recommendation 19: *the expansion of applicable areas of public life to discrimination on the ground of ‘responsibilities as a carer’.*

The NSW Act currently only provides protection against discrimination on the ground of ‘responsibilities as a carer’ in the area of work. This does not adequately reflect the realities of those who experience discrimination because of their carer’s responsibilities in other aspects of public life. For example, it would not be unlawful under the NSW Act to reject a person’s application for a rental property because they had children or other carer responsibilities.

Carers provide a valuable social and economic contribution to society and should be afforded equal protections under the law and the same access to opportunity as others. We recommend that discrimination on the ground of responsibilities as a carer be extended to all areas of life covered by the NSW Act.

⁷² Note the DDA provides that this third criterion can alternatively be satisfied if the information “relates” to the disability.

⁷³ Section 23, ACT Act.

5 PROTECTED AREAS OF PUBLIC LIFE (SEXUAL HARASSMENT)

The NSW Act establishes particular areas of public life where sexual harassment is prohibited. These are:

1. work;⁷⁴
2. educational institutions;⁷⁵
3. provision of goods and services (including both suppliers and receivers);⁷⁶
4. provision of accommodation;⁷⁷
5. land;⁷⁸
6. sport;⁷⁹ and
7. State laws and programs.⁸⁰

These provisions cover various areas that are not currently addressed by the attribute-based discrimination provisions, including volunteer workers and unpaid trainees,⁸¹ land disposition, sport, the administration of state laws and programs, and sexual harassment by the recipients of goods and services.

Recommendations

Recommendation 20: *implement a broad prohibition on sexual harassment in the NSW Act.*

To provide more comprehensive protection, we recommend that the NSW Act be amended to omit references to particular areas of life, and instead broadly provide that “a person must not sexually harass another person”. This is the approach currently taken under the QLD, TAS and NT legislation.⁸²

In the alternative, we recommend that the protections in relation to sexual harassment be extended to “registered clubs” (which is not currently covered by Part 2A of the NSW Act) as well as any additional area of public life introduced to the NSW Act.

6 DEFINITION OF DISCRIMINATION

The NSW Act currently contains a fairly comprehensive test for discrimination for each protected attribute. By way of example, below is the test for discrimination on the ground of sex:

“24 What constitutes discrimination on the ground of sex

*(1) A person (**the perpetrator**) discriminates against another person (**the aggrieved person**) on the ground of sex if the perpetrator—*

⁷⁴ Sections 22B-22D, NSW Act.

⁷⁵ *Ibid* s 22E.

⁷⁶ *Ibid* s 22F.

⁷⁷ *Ibid* s 22G.

⁷⁸ *Ibid* s 22H.

⁷⁹ *Ibid* s 22I.

⁸⁰ *Ibid* s 22J.

⁸¹ Sections 22B(6) and (9) (see definition of “workplace participant”), NSW Act.

⁸² QLD Act s 118; *Anti-Discrimination Act 1998* (TAS) (**TAS Act**) s 17(2); NT Act s 22(1).

(a) on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.”⁸³

The test for discrimination for each protected attribute is essentially the same and repeated in each Part of the NSW Act, substituting in the relevant protected attribute and including further elements where necessary. For example, the test for discrimination on transgender grounds includes the following:

“(c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.”⁸⁴

The test for discrimination under the NSW Act also covers both direct and indirect discrimination, although does not explicitly state so. For example, s 24(1)(a) covers direct discrimination and s 24(1)(b) covers indirect discrimination.

Recommendations

Recommendation 21: *the introduction of a clear definition of direct and indirect discrimination into the NSW Act.*

Several Australian states and foreign countries include both direct and indirect discrimination in their tests for discrimination and define each of these concepts separately. This ensures that the tests and the obligations which they impose are clear. We recommend that the NSW Act follow suit.

For example, Section 9 of the QLD Act prohibits both direct and indirect discrimination which are then defined as follows:

*“**Direct discrimination** on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.”⁸⁵*

*“**Indirect discrimination** on the basis of an attribute happens if a person imposes, or proposes to impose, a term—*

(a) with which a person with an attribute does not or is not able to comply; and

(b) with which a higher proportion of people without the attribute comply or are able to comply; and

(c) that is not reasonable.”⁸⁶

⁸³ Section 24, NSW Act.

⁸⁴ Ibid s 38B(1).

⁸⁵ Section 10, QLD Act.

⁸⁶ Section 11, QLD Act.

Sweden's Discrimination Act is drafted in a similar way, with discrimination defined in section 4 and including:

***“Direct discrimination:** that someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.*

***Indirect discrimination:** that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.”*

Whilst there are several similarities between the test for discrimination under the current NSW Act and the examples above, we recommend that the NSW Act specifically incorporate direct and indirect discrimination into the test so that it is clear both are prohibited and to enable the concepts and tests to be more easily explained to those affected by discrimination.

We recommend that this definition be used in place of the definitions of discrimination provided under each protected attribute (unless a different test is required to give effect to parliament's intention). This recommendation is aimed at reducing repetitiveness in the NSW Act and streamlining the legislation, so it is more accessible.

Recommendation 22: *the inclusion of reasonable adjustments in the definition of direct discrimination for the purposes of disability discrimination under the NSW Act.*

The NSW Act, unlike the DDA, does not refer to reasonable adjustments nor is the failure to provide them for a person with a disability necessarily a basis for a discrimination complaint. All people with disabilities should be provided with reasonable adjustments where needed in order to access opportunities on the same basis as the rest of the community. We recommend that NSW Act includes the following definition from the DDA:

*“For the purposes of this Act, a person (the **discriminator**) also **discriminates** against another person (the **aggrieved person**) on the ground of a disability of the aggrieved person if:*

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and*
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.”⁸⁷*

Should this be adopted in the NSW Act, then similar exceptions (such as where the reasonable adjustment would cause unjustifiable hardship) will need to apply.

⁸⁷ Section 5(2), DDA.

7 AMENDING THE EXCEPTIONS UNDER THE NSW ACT

Many of the exceptions provided under the NSW Act are broader than those found in comparative legislation in other jurisdictions. This has the potential to weaken the protections against conduct that is otherwise unlawful under the NSW Act.

Recommendations

We recommend the following amendments to the exceptions provided under the NSW Act.

Recommendation 23: *removal of the broad exception for private educational authorities and the inclusion of appropriate exceptions for religious educational institutions in the NSW Act.*

Private educational institutions are part of public life. This is recognised by all other Australian jurisdictions, none of which draw a distinction between public and private education.⁸⁸ The current exceptions unjustifiably deprive students and staff of private educational institutions of the protection of the NSW Act, and should be removed.

The NSW Act is currently the only state that includes unqualified exceptions for private educational authorities to discriminate in the area of work on the grounds of sex, transgender status, marital or domestic status, disability and homosexuality,⁸⁹ and in the area of education on the grounds of sex, transgender status, marital or domestic status, disability, homosexuality and age.⁹⁰

By comparison, other Australian jurisdictions (including under federal law) provide more limited exceptions for religious educational institutions to discriminate on particular grounds. For example, the SDA currently allows religious educational institutions to discriminate against staff and students on the basis of sexual orientation, gender identity, marital or relationship status and pregnancy, where the discrimination is in “*good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*”.⁹¹ However, the Australian Law Reform Commission (**ALRC**) has proposed removing these exemptions, but allowing religious schools to maintain their religious character by permitting them to:

1. give preference to prospective staff on religious grounds where the teaching, observance, or practice of religion is a part of their role (and it is not discriminatory on other grounds); and
2. require all staff to respect the educational institution’s religious ethos.⁹²

The ALRC has sought submissions regarding this proposal, and will deliver its final report by 31 December 2023.⁹³ It seems appropriate that this review consider the recommendations of this report (which would consider religious discrimination in more detail).

State and territory legislation reflects a similar trend towards narrowing the exceptions available to religious educational institutions. The NT Act was recently amended to remove

⁸⁸ Though some provide exceptions for religious schools.

⁸⁹ Sections 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c), NSW Act.

⁹⁰ Sections 31A(3)(a), 38K(3), 46A(3), 49L(3)(a), 49ZO(3), 49ZYL(3)(b), NSW Act.

⁹¹ Section 38, SDA.

⁹² <<https://www.alrc.gov.au/publication/adl-cp-2023/>>

⁹³ <<https://www.alrc.gov.au/news/deadline-for-reporting-on-religious-educational-institutions-inquiry-extended/>>

all exceptions for discrimination by religious educational institutions.⁹⁴ The QLD, VIC, TAS and ACT Acts all permit discrimination by religious educational institutions only on the basis of religion (subject to certain qualifications) and not on the basis of any other protected attribute.⁹⁵ SA and WA provide broader exceptions,⁹⁶ but the SA⁹⁷ and WA⁹⁸ Law Reform Commissions have both recommended that these provisions be amended to only allow discrimination on the basis of religion.

The harm currently being caused by exceptions allowing educational institutions to discriminate is highlighted by the Advocate for Children and Young People's *Voices of LGBTQIA+ Young People in NSW Report (2022)*.⁹⁹ The report, which was based on consultations with 233 LGBTQIA+ identifying young people, identified widespread participant reports of bullying, homophobia, transphobia and harassment in schools, which was commonly exacerbated by teachers who either failed to appropriately intervene or were, themselves, the source of the discrimination. Participants who had attended religious schools reported struggling with being taught that LGBTQIA+ concepts were sinful and having to hide their sexual orientation or gender identity from their school, due to fear of expulsion. Discriminatory practices such as these can have severe detrimental effects on students' mental health, wellbeing, and ability to learn.¹⁰⁰ Similar concerns apply regarding discrimination against staff members, with religious educational institutions being a major source of employment in the education sector.

In a 2018 Fairfax-Ipsos poll 74% of respondents said they opposed laws allowing religious schools to select students and teachers on the grounds of their sexual orientation, gender identity or relationship status (only 21% of respondents expressed support).¹⁰¹

We recommend that any exceptions granted to educational institutions should be strictly limited to discrimination on the ground of religion, in particular circumstances. For example, if a faith-based school wishes to give preference to faith-based students in enrolment, then it may be reasonable to permit this specifically at the time of enrolment (with the qualification that, once enrolled, students cannot be discriminated against on any other basis). It may also be reasonable to allow educational institutions to discriminate in the employment of staff based on religion, where this is a genuine occupational requirement and reasonable and proportionate in the circumstances.

We recommend the TAS, VIC and ACT approaches as appropriate models for reform to the NSW Act.

⁹⁴ NT explanatory memorandum.

⁹⁵ Section 25, QLD Act; s 39, VIC Act; s 51A, TAS Act; s 46 ACT Act.

⁹⁶ Section 34(3) and 85ZE TAS Act; s 73 WA Act.

⁹⁷ <https://law.adelaide.edu.au/ua/media/236/eo_exemptions_final_report.pdf>

⁹⁸ <<https://www.wa.gov.au/government/publications/project-111-review-of-the-equal-opportunity-act-1984->

[wa#:~:text=The%20Law%20Reform%20Commission%20of,practices%20regarding%20equality%20and%20non%2D>](#)

⁹⁹ <https://522228.fs1.hubspotusercontent-na1.net/hubfs/522228/LGB%20Report%20Assets/ACYP%20The%20Voices%20of%20LGBTQIA+%20Young%20People%20in%20NSW%202022_Report.pdf>

¹⁰⁰

<<https://researchdirect.westernsydney.edu.au/islandora/object/uws%253A32727/datastream/PDF/view>> [this 2013 nationwide survey found teacher positivity and support for sexuality and gender diversity were significantly correlated with students' school wellbeing outcomes, which were in turn correlated with higher reported academic outcomes]

¹⁰¹ <<https://www.ipsos.com/en-au/voters-reject-proposed-changes-anti-discrimination-laws>>.

Recommendation 24: *narrowing the exceptions in the NSW Act that currently apply to religious bodies.*

Section 56 of the NSW Act provides a general exception for religious bodies, stating that:

“Nothing in this Act affects—

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other 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.”

In its 2022 review of the QLD Act, the QHRC recommended that the religious bodies exception should be amended to apply only to discrimination on the ground of religious belief or activity, where the conduct is:

1. to conform to the religious doctrines, tenets, or beliefs of the religious body; and
2. reasonable and proportionate in all the circumstances.

The QHRC further recommended that the Act include a non-exhaustive list of factors to guide what is “reasonable and proportionate”, including:

1. the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion;
2. whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct;
3. if the religious organisation operates in a commercial manner when engaging in the conduct;
4. the reasonable availability of alternative services;
5. whether the services are essential services; and
6. the rights and interests of the person receiving, or proposed to receive, goods and services or accommodation.

We recommend retaining section 56(a)-(b). However, section 56(c) should be amended to state “the selection or appointment of people to exercise functions for, or in relation to, any religious observance or practice by the body” (as opposed to “the appointment of any other person in any capacity”). Section 56(d) should be removed and replaced with a more limited exception that allows discrimination on religious grounds only where reasonable and proportionate. We recommend implementing the QHRC recommendations as well as the limitations proposed in the ACT Amendment Bill.¹⁰²

Recommendation 25: *the removal of the exception in the NSW Act that currently applies to adoption services.*

¹⁰² Specifically, s32(2)(c) which states that the exceptions do not apply to religious institutions that operate for a commercial purpose.

Section 59A of the NSW Act provides an exception for a faith-based organisations providing adoption services under the *Adoption Act 2000* (NSW) (**Adoption Act**) to discriminate on the grounds of homosexuality and “transgender grounds”. This exception applies to any policy or practice of the organisation, and anything done to give effect to such policy or practice but does not apply to discrimination against any child who is or may be adopted.

In practice, the s 59A exemption is enabling faith-based organisations to refuse to place children with same-sex couples. This prioritises the religious beliefs of the adoption provider over the best interests of the child, by allowing same-sex couples to be automatically excluded before any consideration of the child’s best interests can occur. This undermines one of the central objects of the Adoption Act (that the best interests of the child must be the paramount consideration).¹⁰³ It also undermines the goals of the NSW Act, by enabling the systemic discrimination in the public sphere on the ground of sexual orientation. We recommend that this provision be removed.

Recommendation 26: *the removal of the exception in the NSW Act that currently applies to voluntary bodies.*

The NSW Act currently provides that nothing in the Act affects:

1. any rule or practice of a volunteer body which restricts admission to membership of that body, or
2. the provision of benefits, facilities or services to members of that volunteer body.¹⁰⁴

This exception specifically affects members and prospective members of volunteer bodies. It does not apply to interactions between the volunteer body and the general public. Volunteering is a part of public life and is often the way people give back to their communities. People working in a volunteer capacity should not be excluded from protection on the basis they are not being paid. We recommend this exception be removed and we otherwise rely on our submissions regarding the extension of the definition of ‘work’ to include, and provide explicit protection to, volunteers.

Recommendation 27: *amending the exception in the NSW Act that applies to a club or body established to benefit a class of people sharing a protected attribute.*

The NSW Act currently provides that the provisions regarding discrimination by registered clubs do not apply to a registered club whose principal object is to provide benefits to persons of a specified race,¹⁰⁵ with a particular disability,¹⁰⁶ or of a particular age or age group.¹⁰⁷ Allowing clubs to restrict their membership in such a way can potentially be a valuable mechanism for achieving substantive equality (e.g., clubs to preserve minority cultures). However, we recommend that, to prevent this exception being misused, the legislation should be amended to specifically provide that the exception applies to discrimination that “occurs because the person does not have the protected attribute”, and is “reasonable, proportionate and justifiable in the circumstances”.¹⁰⁸

¹⁰³ Section 7, Adoption Act.

¹⁰⁴ Section 57(2), NSW Act.

¹⁰⁵ Ibid s 20A(3).

¹⁰⁶ Ibid s 49O(3).

¹⁰⁷ Ibid s 49ZYP(3)(a).

¹⁰⁸ This language is implemented by the ACT Bill, s 31.

We also recommend that the provision be amended to address both clubs (under the revised definition previously recommended) *and* volunteer bodies (subject to the general exception for volunteer bodies being removed) and be extended to cover all protected attributes.

Recommendation 28: *the removal of the exception in the NSW Act for employers who employ 5 or less people.*

Where the number of persons employed by an employer (disregarding any persons employed within the employer's private household) does not exceed 5, the NSW Act provides it is not unlawful to discriminate against applicants and employees on the basis of sex¹⁰⁹, transgender status,¹¹⁰ marital or domestic status,¹¹¹ disability,¹¹² carer responsibilities,¹¹³ or homosexuality.¹¹⁴ No other Australian jurisdiction identifies these circumstances as sufficient to permit discrimination on any of these grounds.¹¹⁵ There is no clear policy justification as to why workplaces with 6 or more employees should be subject to the Act while workplaces with 5 or less employees should not. We recommend that this exception be removed.

Recommendation 29: *the removal of the exception in the NSW Act that applies to discrimination based on addiction to a prohibited drug.*

Section 49PA of the NSW Act provides that it is not unlawful to discriminate against a person based on their actual addiction to a prohibited drug, in any of the areas of work prescribed in Part 4A, Division 2 (other than ss 49H, 49I and 49J, i.e., discrimination by local government councillors, industrial organisations and qualifying bodies). "Prohibited drug" is defined by s 49PA as a "*prohibited drug within the meaning of the Drug Misuse and Trafficking Act 1985*", excluding methadone, buprenorphine, or any other drug identified by the regulations. No equivalent provision exists in any other Australian jurisdiction.

If a person's addiction to a prohibited drug is interfering with their ability to work, then this can be addressed under the existing exceptions regarding the inability to carry out the inherent requirements of the position¹¹⁶ and unjustifiable hardship.¹¹⁷ The additional exception under section 49PA takes a punishment-based approach to drug addiction, resembling the US "war on drugs" approach (which is now widely recognised as ineffective and harmful).¹¹⁸ It undermines widespread understandings of drug addiction as a health issue and risks deterring people from seeking help. We recommend that section 49PA be removed.

¹⁰⁹ Section 25(3)(b), NSW Act.

¹¹⁰ *Ibid* s 38C(3)(b).

¹¹¹ *Ibid* s 40(3)(b).

¹¹² *Ibid* s 49D(3)(b).

¹¹³ *Ibid* s 49V(3)(b).

¹¹⁴ *Ibid* s 49ZH(3)(b).

¹¹⁵ The only similar provision is s 54(4)(b) of the WA Act, which permits discrimination against applicants and employees on the ground of religious or political conviction where the number of persons employed by the employer, disregarding any persons employed to perform domestic duties, does not exceed 5.

¹¹⁶ Sections 49D(4)(a), 49E(3)(a), 49F(2)(a), 49G(3)(a), 49J(2), 49K(2), NSW Act.

¹¹⁷ *Ibid* ss 49D(4)(b), 49E(3)(b), 49F(2)(b), 49G(3)(b).

¹¹⁸ Cohen A, Vakharia SP, Netherland J, Frederique K. How the war on drugs impacts social determinants of health beyond the criminal legal system. *Ann Med* 54(1): 2024-2038. doi: 10.1080/07853890.2022.2100926. PMID: 35852299; PMCID: PMC9302017.

Recommendation 30: *limiting the current exceptions in the NSW Act that apply to discrimination in sport.*

The NSW Act provides exceptions regarding discrimination in sport on the basis of sex¹¹⁹ and transgender status¹²⁰ that are significantly broader than other jurisdictions. In NSW, it is lawful to exclude persons of one sex from participating “in any sporting activity” and to exclude a transgender person from participating “in any sporting activity for members of the sex with which the transgender person identifies”.

By contrast, all other Australian jurisdictions limit the exceptions to “competitive” sporting activities.¹²¹ Most jurisdictions provide that the “strength, stamina or physique” of competitors must be relevant.¹²² The federal, NT, QLD, TAS and VIC Acts all provide that the exception does not apply to children under the age of 12.¹²³ Queensland and the NT additionally require that the restriction be “reasonable” with regard to these considerations¹²⁴ and the recently passed ACT Bill requires that the discrimination be “reasonable, proportionate and justifiable in the circumstances.”¹²⁵

The VIC Act provides an additional exception for sex-based discrimination, where excluding or restricting persons of a particular sex from participation in a competitive sporting activity is intended to facilitate participation by people of a particular sex and is reasonable having regard to:

1. the nature and purpose of the activity; and
2. the consequences of the exclusion or restriction for people of the excluded or restricted sex; and
3. whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.¹²⁶

Sporting activities are a key part of public life, and are associated with significant social, physical and mental health benefits for participants. Any exceptions that allow people to be excluded from participation should therefore be strictly limited, bearing in mind the detriment caused by exclusion. We recommend that the current NSW exception regarding sex-based discrimination in sport should be amended to provide that:

1. The exception only applies to competitive sporting activities. This ensures that people cannot be excluded from participation in social or recreational sporting activities.
2. The strength, stamina or physique of competitors must be relevant. This requirement is advantageous as it provides courts with flexibility to make determinations on a case-by-case basis.
3. The discrimination must be reasonable, proportionate, and justifiable in the circumstances. “Reasonableness” should be assessed by reference to the criteria

¹¹⁹ Section 38, NSW Act.

¹²⁰ *Ibid* s 38P.

¹²¹ SDA s 42; ACT Act s 41; NT Act s 56; QLD Act s 111; TAS Act s 29; VIC Act s 72; WA Act ss 3 and 35AP; SA Act s 48.

¹²² Tasmania does not include this requirement. WA includes this requirement in relation to sex, but not gender history (requiring instead that “the person would have a significant performance advantage as a result of his or her medical history”). All other jurisdictions provide the strength, stamina and physique of competitors must be relevant.

¹²³ Section 72(3), VIC Act; s 111 QLD Act; s 29 TAS Act; s 56(2) NT Act.

¹²⁴ Section 111, QLD Act; s 56, NT Act.

¹²⁵ Section 41, ACT Amendment Bill.

¹²⁶ Section 72(1B)(b)(iii), VIC Act.

provided by s 72(1B)(b) of the VIC Act. This ensures consideration of the detriment caused to the person excluded.

4. The exception does not apply to children under the age of 12.

Restricting the exceptions to sporting activities where “strength, stamina and physique” are relevant provides courts with the flexibility to make determinations on a case-by-case basis. For example, in *Taylor v Moorabbin Saints Junior Football League*,¹²⁷ the Tribunal found that the Victorian exception could be applied to exclude girls from participating in an under 15s AFL team but could not be used to exclude girls from participating in an under 14s AFL team, because the relative difference in strength and stamina between boys and girls under 14 years was not sufficiently significant to be considered relevant. In *South v Royal Victorian Bowls Association*,¹²⁸ the Tribunal found that lawn bowls was not a sporting activity in which strength, stamina or physique was relevant, and it was therefore not permissible to exclude a 19-year-old woman from participating on the ground of sex.

However, there are no strong policy grounds for including an exception that allows people to be excluded from sport on the basis of gender identity. Experts in transgender health have noted that there is currently no clear medical evidence to support the notion that transgender women have a systemic advantage in women’s sport.¹²⁹ The NT, SA, ACT and Tasmanian Acts do not include exemptions to allow discrimination in sport based on gender identity. We recommend that NSW follow the same approach and remove the gender identity exemption. If such an exemption is to be included, it should be limited in substantially the same terms as those recommended regarding sex-based discrimination.

Recommendation 31: *inserting exceptions into the NSW Act for any new provision regarding discrimination in the disposal of land.*

We have recommended introducing a provision to cover discrimination in the disposal of land. In association with this new provision, it is recommended that the legislation introduce an exception for the disposal of an estate or interest in land by way of will or gift. This is consistent with the approaches of the DDA, SDA and ADA.

8 VILIFICATION

The NSW Act currently covers vilification in relation to race, transgender status, homosexuality, and HIV/AIDS.¹³⁰ Under the NSW Act, it is currently unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule on these grounds.¹³¹

Most states across Australia have vilification provisions (or similar) with some also including corresponding offences within the discrimination legislation. For example, the QLD Act contains an offence of serious racial, religious, sexuality or gender identity vilification whereby penalties may apply.¹³²

The *Crimes Act 1900* (NSW) (**Crimes Act**) also contains the following criminal offence:

¹²⁷ [2004] VCAT 158.

¹²⁸ [2001] VCAT 207.

¹²⁹ < <https://www.smh.com.au/national/let-evidence-not-fear-drive-policies-on-trans-athletes-20220423-p5afm1.html> >

¹³⁰ Part 2, Div. 3A, Part 3A, Div. 5, Part 4C, Div.4, Part 4G, NSW Act.

¹³¹ Sections 20C, 38S, 49ZTA and 49ZXB, NSW Act.

¹³² Chapter 5A, s131A QLD ADA.

93Z Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status

- (1) 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—
- (a) the race of the other person or one or more of the members of the group,
 - (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation,
 - (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,
 - (f) that the other person has, or one or more of the members of the group have, HIV or AIDS.

Maximum penalty—

- (a) in the case of an individual—100 penalty units or imprisonment for 3 years (or both), or
- (b) in the case of a corporation—500 penalty units.

- (2) In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons referred to in subsection (1) (a)–(f) were correct or incorrect at the time that the offence is alleged to have been committed.
- (3) In determining whether an alleged offender has committed an offence against this section of intentionally or recklessly inciting violence, it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence.

[...]

Recommendations

Recommendation 32: expanding the grounds to which protection against vilification applies in the NSW Act.

The NSW Act was recently amended to make it to, “by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, because of their religious belief, affiliation or activity”.¹³³ We recommend that the current protections against vilification in the NSW Act also be expanded to cover the same protected grounds as in the Crimes Act, being:

1. sexual orientation;
2. gender identity¹³⁴;
3. intersex status (to be labelled sex characteristics in the NSW Act); and

We also consider this approach to be more consistent with other jurisdictions and brings the NSW Act in line with our proposed amendments (as set out above) to the protected attributes more generally.

¹³³ Anti-Discrimination Amendment (Religious Vilification) Bill 2023.

¹³⁴ We refer to this article for guidance on how gendered hate speech is unregulated in Australia and the harms it causes <<https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2018/09/DSouza-et-al.pdf>>.

Recommendation 33: *the introduction of an offence of vilification in the NSW Act.*

We also recommend the introduction of an offence of *serious* vilification. We recommend using the QLD Act as an example, which relevantly states:

131A Offence of serious racial, religious, sexuality or gender identity vilification

- (1) *A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes—*
- (a) *threatening physical harm towards, or towards any property of, the person or group of persons; or*
 - (b) *inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.*

Maximum penalty—

- (a) *for an individual—70 penalty units or 6 months imprisonment; or*
- (b) *for a corporation—350 penalty units.*

[...]

However, we recommend any penalties be limited to financial penalties only and that such penalties, if awarded be payable to the complainant(s) as can occur with offences under the *Fair Work Act 2009* (Cth) (**FWA**). More severe repercussions, such as terms of imprisonment, can be left within the domain of criminal law.

9 HARASSMENT

Part 2A of the NSW Act prohibits “*sexual harassment*”¹³⁵ in the areas of work¹³⁶, educational institutions¹³⁷, provision of goods and services¹³⁸, provision of accommodation¹³⁹, land¹⁴⁰, sport¹⁴¹ and State laws and programs¹⁴².

Sexual harassment is endemic in Australian society, across all areas of daily life. The AHRC reported when looking at the experience of an Australian over the course of a lifetime, 85% of women and 57% of men said that they had been sexually harassed on at least one occasion.¹⁴³ Laws prohibiting sexual harassment exist at the federal level and at each state and territory level in Australia.

The protections against sexual harassment in NSW is covered by the NSW Act and also at the federal level under the SDA. In addition, laws and regulations under the Fair Work System and work health and safety laws regulate workplace sexual harassment in Australia.

¹³⁵ Section 22A, NSW Act.

¹³⁶ *Ibid* ss 22B-22D.

¹³⁷ *Ibid* ss 22E.

¹³⁸ *Ibid* s 22F.

¹³⁹ *Ibid* s 22G.

¹⁴⁰ *Ibid* s 22H.

¹⁴¹ *Ibid* s 22I.

¹⁴² *Ibid* s 22J.

¹⁴³ AHRC, *Everyone’s Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 18.

Recommendations

Recommendation 34: *the expansion of the definition of “sexual harassment” under the NSW Act.*

The meaning of sexual harassment in the NSW Act is central to the protections offered. Section 22A of the NSW Act provides the meaning of sexual harassment for the purposes of Part 2A and relevantly states:

*“...a person sexually harasses another person if -
(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
(b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person,*

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.”

Although the definition above is similar to like legislation in other jurisdictions, we recommend that the definition is expanded to include the circumstances where a reasonable person would have anticipated “*the possibility*” that the other person would be offended, humiliated or intimidated. This would be consistent with the meaning of sexual harassment in the SDA (which is also applicable in the context of employment under the FWA). The QLD Act¹⁴⁴ also reflects this extension to “*the possibility*”.

We also recommend that a definition of “*conduct of a sexual nature*” be included in the NSW Act. For example, the SDA and ACT Act defines conduct of a sexual nature and includes the making of a statement of a sexual nature to, or in the presence of a person, whether the statement is made orally or in writing. Including a definition of “*conduct of a sexual nature*” in the NSW Act would provide greater clarity to a person seeking to make a complaint about what kind of unwelcome conduct is protected, and reflects the current environment where sexual harassment, particularly in the workplace, can occur online and not necessarily in-person.

Recommendation 35: *the inclusion of circumstances to be taken into account for the purposes of s22A of the NSW Act.*

We recommend a list of “*circumstances*” that may be considered for the purposes of s 22A be included in the NSW Act.¹⁴⁵ The circumstances that could be taken into consideration may include, the sex, age, race, disability and relationship between the other person and the person engaging in the conduct. Whilst the circumstances should not be an exhaustive list in the NSW Act, a list of relevant circumstances would provide assurance to complainants that particular attributes, for example their disability, is a relevant consideration in respect to determining whether a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated.

Recommendation 36: *the inclusion of ‘harassment on the basis of sex’ in the NSW Act.*

¹⁴⁴ Section 119, QLD Act.

¹⁴⁵ For example, s120 of the QLD Act and s 28A(1A) of the SDA both have such provisions.

We recommend that the NSW Act should expressly cover harassment based on the protected attribute of sex, similar to the recent reforms in the SDA.¹⁴⁶ This could be achieved by incorporating a prohibition on sex-based harassment into Part 2A (prohibition of sexual harassment) or Part 3 (Sex discrimination) of the NSW Act.

The AHRC's *Respect@Work: Sexual Harassment National Inquiry Report (2020)* recommended that the SDA be amended to expressly prohibit sex-based harassment. The report identified that conduct which falls short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment on the basis of sex, and that throughout its inquiry, the AHRC heard that sex-based harassment and sexual harassment often occurred together.¹⁴⁷

Case law supports that such complaints can be raised as a matter of sexual harassment, sex discrimination or both.¹⁴⁸ In *Hill v Water Resources Commission*,¹⁴⁹ the complainant complained of 'repeated acts of gender-based harassment at the workplace where she was part of a predominately male workforce'.¹⁵⁰ The NSW Equal Opportunity Tribunal commented that this was 'perhaps better described as "sexist" harassment, than sexual harassment'¹⁵¹, although it clearly involved both – the receipt of offensive, sex-oriented material over a long period of time as well as unwelcome comments and a range of conduct found to be calculated to make female employees feel uncomfortable and unwelcome. The Tribunal found the conduct amounted to less favourable treatment on the ground of sex because a comparable man would not have been severely harassed.¹⁵²

We recommend that the Act should cover harassment based on sex to clarify the protection of overlapping harassment/discrimination that may occur based on sex.

10 THE IMPLEMENTATION OF A POSITIVE DUTY

In December 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth) (SDA Amendment Act)* was introduced to amend the SDA. This amendment imposed a positive duty on employers to prevent and eliminate, rather than merely respond to, the following:

1. discrimination on the ground of sex;
2. sexual harassment or harassment on the ground of sex;
3. conduct which subjects another person to a hostile workplace environment on the ground of sex; and
4. acts of victimisation in relation to complaints, proceedings, assertions or allegations in relation to the above conduct.

In essence, the SDA Amendment Act introduces a proactive rather than a reactive approach to discrimination, sexual harassment, and vilification from employers, with a view to ultimately eliminating such conduct from the workplace.

The NSW Act does not currently include a positive obligation to prevent harassment, discrimination, or vilification. However, many states across Australia are implementing/considering such approaches, for example:

¹⁴⁶ Section 22AA, SDA.

¹⁴⁷ *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, p. 457.

¹⁴⁸ *Hill v Water Resources Commission* [1985] EOC 92-127, a case decided under the Act.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, 280.

¹⁵¹ *Ibid.*, 280.

¹⁵² *Ibid.*, 280.

1. Part 3 of the VIC Act imposes a duty to take positive action to eliminate discrimination, sexual harassment and victimisation on persons who have a duty not to engage in such behaviour. This includes employers, educational authorities, owners corporations and clubs; in essence, organisations. The VIC Act also stipulates that a person need only take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and victimisation.
2. Part 2A of the recently passed Anti-Discrimination Amendment Bill 2022 (NT) (**NT Amendment Bill**) has amended the NT Act to impose a positive duty in the NT. Under section 18B of the NT Amendment Bill, a person who is prohibited under Part 3 or 4 of the NT Act from engaging in discrimination, sexual harassment or victimisation must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation to the greatest extent possible. Under Parts 3 and 4 of the NT Act, persons such as educational authorities, employers and clubs are prohibited from engaging in such behaviour.
3. Both the Law Reform Commission of Western Australia (**LRCWA**) in its review of the *Equal Opportunity Act 1984* (WA) (**WA Act**) and the QHRC in its review of the QLD Act have recommended the implementation of a positive duty in their states. The LRCWA proposed that a positive duty to eliminate discrimination, harassment, victimisation and vilification be included in the WA Act. This duty would apply to all areas protected under the WA Act and be limited to taking reasonable and proportionate measures. On the other hand, the QHRC proposed that a positive duty to eliminate discrimination and sexual harassment be introduced into the QLD Act. It is proposed that anyone with a legal obligation under the QLD Act is required to take reasonable and proportionate measures to satisfy the positive duty.

Several countries around the world have also proposed or imposed a similar duty on employers and other organisations. For example, the UK has introduced the Worker Protection (Amendment of Equality Act 2010) Bill, which seeks to impose liability on employers for harassment of employees by third parties and implement a positive duty on employers to take all reasonable steps to prevent employees from being subjected to sexual harassment. In Norway, section 13 of Norway's Equality and Anti-Discrimination Act provides that "employers and managers of organisations and educational institutions shall preclude and seek to prevent harassment and sexual harassment in their area of responsibility".

Recommendations

Recommendation 37: *the inclusion of a positive duty on organisations to prevent discrimination, sexual harassment, and vilification into the NSW Act.*

We recommend that the Act be amended to include a positive duty on organisations to take reasonable measures to prevent all forms of discrimination, sexual harassment, and vilification. Following examples from around Australia and the world, we recommend this duty not be limited to just employers as is currently the case in the SDA.

Such a provision will ensure that NSW is working towards eliminating the kinds of behaviour prohibited under the NSW Act so that workplaces and other environments are safe for all. It is also a positive step towards a rights based, rather than solely complaints based, system which is likely to significantly decrease the burden on those experiencing discrimination, sexual harassment, or vilification (many of whom are already incredibly vulnerable).

11 REPRESENTATIVE COMPLAINTS

Representative complaints provide a valuable mechanism to reduce the burden on individual complainants and address systemic discrimination. The NSW Act currently provides that an individual or representative body may make a complaint “*on his, her or their own behalf as well as on behalf of another person or persons*” (a representative complaint).¹⁵³ A complaint can only be dealt with as a representative complaint if the Tribunal is satisfied that the complaint is made in “good faith” as a representative complaint.¹⁵⁴ This criterion will be met if the Tribunal is satisfied:

- (a) that—
 - (i) *the complainant is a member of a class of persons whose members have been affected, or may reasonably be likely to be affected, by the conduct of the respondent, and*
 - (ii) *the complainant has in fact been affected by the conduct of the respondent, and*
 - (iii) *the class is so numerous that joinder of all its members is impracticable, and*
 - (iv) *there are questions of law or fact common to all members of the class, and*
 - (v) *the claims of the complainant are typical of the claims of the class, and*
 - (vi) *multiple complaints would be likely to produce varying determinations which could have incomparable or inconsistent results for the individual members of the class, and*
 - (vii) *the respondent has acted on grounds apparently applying to the class as a whole, thereby making relief appropriate for the class as a whole, or*
- (b) *that, even though the requirements of paragraph (a) are not satisfied, the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint.*¹⁵⁵

Recommendations

Recommendation 38: *amending the rules in the NSW Act that apply to representative complaints.*

The criteria currently under the NSW Act is complex and potentially difficult for complainants to understand, creating barriers to accessibility. The *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) provides a more accessible model, which we recommend NSW adopt, providing that a representative complaint may be lodged if:

1. the class members have complaints against the same person; and
2. all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
3. all the complaints give rise to a substantial common issue of law or fact.¹⁵⁶

The AHRC Act provides that a representative complaint must describe or otherwise identify the class members,¹⁵⁷ but does not necessarily need to name them or specify how many there are.¹⁵⁸ A representative complaint may also be lodged without the consent of class members.¹⁵⁹ This approach is advantageous in situations where class members are seeking to preserve their privacy. It also enables preventative measures to be taken, for example, a

¹⁵³ Section 87, NSW Act.

¹⁵⁴ *Ibid* s 101(2).

¹⁵⁵ *Ibid* s 101(3).

¹⁵⁶ Section 46PB(1), AHRC Act.

¹⁵⁷ *Ibid* s 46PB(2).

¹⁵⁸ *Ibid* s 46PB(3).

¹⁵⁹ *Ibid* s 46PB(4).

complaint could be made regarding a discriminatory policy without the need to wait for specific victims to emerge.

In combination with these amendments, the criteria regarding complaints by representative bodies should also be amended, to remove the need for persons to be named¹⁶⁰ and for each person to consent.¹⁶¹ If this causes concerns, 'good faith' requirements can be implemented into the NSW Act preventing complaints being pursued against the wishes of the individuals concerned.

12 ACCESSIBILITY OF COMPLAINTS PROCESS

The NSW Act currently sets out processes by which allegations of unlawful discrimination, sexual harassment and vilification can be resolved. The dispute resolution process has two stages (a complaint to the Anti-Discrimination Board (**ADB**) and the referral of complaints to the NSW Civil and Administrative Tribunal (**NCAT**)). Complainants generally¹⁶² cannot bring a claim to NCAT directly: it must be referred by the ADB.

The main concerns we have in terms of the operation of the complaints processes are:

1. A lack of participation by respondents in the ADB process. We are aware of many complainants who report that the respondent in their matter failed to engage at all throughout the entirety of the ADB process. Despite this, the complainants often must wait a significant amount of time for the matter to be referred to NCAT.
2. A lack of understanding of how the federal and state complaints schemes compare and the risks/benefits of each. We regularly speak to complainants who may have been better proceeding under the NSW Act rather than the federal legislation (or vice versa) – but due to a lack of access to legal assistance at the early stages were unable to obtain such advice. This is of particular importance given the comparative difference in compensation available and costs risks across the state and federal schemes.
3. The significant burden and time commitment it places on complainants who often bear the full responsibility of policing compliance with discrimination frameworks. Many complainants do not necessarily seek an individual outcome but are rather interested in more systemic changes to prevent ongoing breaches. We consider representative complaints to go some way to addressing this issue (and rely on our above proposed amendments in this regard).

Recommendations

Recommendation 39: *amending the circumstances under the NSW Act whereby the ADB may refer the complaint to NCAT.*

The NSW Act currently allows a complainant to request their matter be referred to NCAT if their complaint has not been declined, terminated, or otherwise resolved within 18 months after the date which it was made. We recommend this be reduced to 12 months (if required an exception can be made for complainants who NCAT considers have been responsible for the delay).

The NSW Act also allows the ADB to refer the matter to NCAT if the President:

¹⁶⁰ Section 87A(1)(c), NSW Act.

¹⁶¹ Ibid s 87C(1)(a)

¹⁶² There are some exceptions under the NSW Act.

1. is of the opinion that a complaint cannot be resolved by conciliation;
2. has endeavoured to resolve a complaint by conciliation but has not been successful in his or her endeavours; or
3. is of the opinion that the nature of the complaint is such that it should be referred to NCAT; or
4. is satisfied that all parties wish the complaint to be referred to NCAT and that it is appropriate in the circumstances to do so.¹⁶³

We recommend this be expanded to include if the President:

1. is of the opinion that the Respondent has failed to properly engage with the complaints process; and
2. is satisfied there are other compelling reasons to do so.

This ensures the ADB has the power to refer a complaint directly to NCAT where appropriate to do so.

Recommendation 40: *granting the ADB broader investigative and regulatory functions under the NSW Act.*

Instead of complainants bearing the brunt of the burden with respect to policing compliance, we recommend the ADB be granted investigative and regulatory powers like those granted to bodies like the Victorian Human Rights and Equal Opportunity Commission (**VHREOC**) and the AHRC. This is likely to be particularly useful should a positive duty be implemented into the NSW Act and will also make the provisions regarding representative complaints more impactful.

We recommend that any additional powers granted to the ADB be enforceable with the ability to impose adequate penalties in circumstances where the ADB is satisfied there has been a serious breach of the NSW Act. The ADB may also make recommendations or utilise other less punitive measures where appropriate to do so.

Recommendation 41: *embedding a process for pro bono referrals within the ADB system.*

Our experience is that complainants do not usually seek advice until they have already been engaged with a complaints process for some time. Ensuring complainants have early access to legal advice would likely reduce the demand on the ADB, NCAT (and AHRC and federal courts). It would likely:

1. reduce the number of complainants who complain to both schemes because they are unable to determine which suits their circumstances best;
2. allow access to timely legal advice for complainants whose claims may be frivolous, vexatious or otherwise lacking in substance; and
3. ensure complainants receive early assistance to properly articulate their claim which is likely to reduce delay.

One option is to introduce a provision granting the ADB and NCAT the power to refer a complainant for legal assistance (this currently exists at the federal level). However, we appreciate this is unlikely to have any practical effect unless community legal services are properly funded to provide such assistance. As a minimum, all complainants should be encouraged to seek legal advice at the point they enquire about or make an initial complaint.

¹⁶³ Section 93C, NSW Act.

13 IMPLEMENTING A HUMAN RIGHTS FRAMEWORK

Statutory charters of human rights have been enacted in QLD, VIC and the ACT. Each of these laws require every proposed draft law to be accompanied by a statement that assesses the compatibility of the proposed law with human rights. The laws also allow the Supreme Court in each state to make a declaration that an existing law is unable to be interpreted consistently with a human right. A declaration is then provided to the relevant Minister for them to consider whether to amend the law.

Recommendation 42: *the implementation of a human rights framework in NSW.*

Whilst we appreciate this is not directly relevant to the reforms required to the NSW Act. A strong human rights framework is imperative to reducing discrimination, harassment, and vilification in Australian society. Similarly to the positive duties proposed (though it applies to lawmakers specifically rather than any person or entity who has a duty not to do an act that is unlawful under discrimination legislation), it has the effect of implementing a rights-based approach than waiting for impacted individuals to make a complaint. In our experience, complaints-based approaches currently cause significant burden to those impacted by discrimination, harassment, vilification and other human rights violations in our community and also contributes to the delays experienced in judicial and complaint bodies.