



UNIONS NSW SUBMISSION

Review of the *Anti-Discrimination Act 1977*: Unlawful conduct

August 2025

Introduction

Unions NSW welcomes the opportunity to make a submission to the NSW Law Reform Commission (NSWLRC) to assist with its review of the *Anti-Discrimination Act 1977* (NSW) (the **ADA**).

Unions NSW provided an earlier submission to this review in October 2023, which we continue to rely on. We take this opportunity to build on that submission while responding to the consultation paper.

As per the consultation paper, this submission makes recommendations regarding 'unlawful conduct' but leaves our procedural recommendations for the next stage of consultation.

As the NSW peak industrial organisation for employees and unions, our submission focusses on reforms required to strengthen anti-discrimination protections in the workplace. Since our initial submission, we have expanded our recommendations to include protections against discrimination for visa holders, workers who have made a workers compensation claim, and gender-diverse persons.

Our overall view is that the ADA must be amended to keep pace with modern understandings of anti-discrimination and be consistent with stronger protections in other Australian jurisdictions. We provide in these submissions 20 recommendations addressing 5 out the 12 terms of reference for this review.

Summary of recommendations

Part 1: Range of attributes protected and simplification (ToR 1)

Recommendation 1: Add protected attribute: Trade union or industrial activity.

Recommendation 2: Add protected attribute: Being subjected to family and domestic violence.

Recommendation 3: Add protected attribute: 'Pregnancy', as a separate attribute to sex discrimination.

Recommendation 4: Add protected attribute: 'Political view or activity', that encompasses public and private expressions while excluding activities that incite violence, hatred or discrimination against protected groups.

Recommendation 5: Add protected attribute: 'Irrelevant criminal record', by adopting the ACT's model law in its *Discrimination Act 1991*.

Recommendation 6: Add protected attribute: 'Sexuality', by adopting an adapted version of the Victorian definition in the *Equal Opportunity Act 2010* that includes protections for asexuality.

Recommendation 7: Add protected attribute: 'Intersex status', and either (a) eliminate the comparator test or (b) adopt the attribute 'a variation of sex characteristics'.

Recommendation 8: Add protected attribute: 'Religion', which extends to appearance, dress, and Aboriginal spiritual belief or activity.

Recommendation 9: Recognise the intersectionality of protected attributes by adopting section 3.1 of the Canadian *Human Rights Act*, RSC 1985, cH-6.

Recommendation 10: Amend the definition of race in the ADA to expressly prohibit discrimination based on caste, immigrant status and language (including someone's accent).

Recommendation 11: Amend the ADA to prohibit discrimination against persons who make or intend to make a workers compensation claim, either by including it in the definition of industrial activity or by creating a new protected attribute.

Recommendation 12: Amend the protected attribute of 'transgender grounds' in the ADA to 'gender identity'.

Recommendation 13: Revise the structure of the ADA to accord with the *Fair Work Act 2010* (Cth) or *Equal Opportunity Act 2010* (Vic), where protected attributes are in a single section.

Part 2: Tests for discrimination (ToR 3)

Recommendation 14: Remove the requirement of a comparator and replace it with a requirement to demonstrate 'unfavourable treatment'.

Part 3: Positive obligations (ToR 6) and Protections against sexual harassment (ToR 5)

Recommendation 15: Add a positive obligation on employers to take 'reasonable and proportionate steps' to prevent discrimination and harassment.

Recommendation 16: Add a positive obligation on employers to make reasonable adjustments for workers with a disability.

Recommendation 17: Add a positive obligation on employers to redeploy or offer suitable duties to workers with a disability.

Part 4: Exceptions, exemptions and special measures (ToR 7)

Recommendation 18: Remove wide-ranging exceptions for private educational authorities to discriminate.

Recommendation 19: Remove exceptions for small employers to discriminate.

Recommendation 20: Strengthen the vicarious liability provision to reflect the provisions in section 106 of the *Sex Discrimination Act 1984* (Cth).

Part 1: Range of attributes protected and ADA simplification (ToR 1)

Unions NSW supports expanding the list of protected attributes and simplifying their presentation within the ADA.

Trade union or industrial activity

Discrimination laws in most other states now prohibit discrimination based on trade union or industrial activity, and NSW should offer the same protection.

While industrial laws currently provide limited protection, including industrial activity or trade union membership in the ADA would provide clearer, more accessible protections for workers against discrimination in the workplace. It would ensure a unified legal framework, simplifying enforcement and addressing gaps in non-employment workplace contexts, such as contractor or volunteer settings.

Recommendation 1: Add protected attribute: Trade union or industrial activity.

Family and domestic violence

South Australia, the ACT, and NT discrimination laws already protect against discrimination based on family and domestic violence (FDV), and NSW should offer the same protection.

The ability to discriminate against a person experiencing family and domestic violence (e.g. by terminating their employment) entrenches that person in violence. Therefore, the new right should be framed as contributing to reducing the incidence of FDV by empowering those who experience it

to escape violence. If workers were protected against discrimination on this basis, they will feel more supported to disclose their status without fearing negative consequences at work.

Recommendation 2: Add protected attribute: 'Being subjected to family and domestic violence.'

Pregnancy

By not having pregnancy as its own attribute, the ADA is out of step with the anti-discrimination laws of every other state.

Pregnancy should be a separate attribute to sex discrimination because pregnant persons can be discriminated against regardless of their sex. The treatment of pregnancy as a characteristic of sex (women) in the ADA may exclude people who are pregnant but are not women (e.g. transgender men or transmasculine people).

Recommendation 3: Add protected attribute: 'Pregnancy', as a separate attribute to sex discrimination.

Political view or activity

Political and social movements have fought for issues we consider part and parcel of Australian life such as women's right to vote and equal pay, indigenous land rights, marriage equality, and heritage protection. Nobody should be discriminated against for their political activity. Anti-discrimination law should play a part in protecting the equality of those who express their political views and participate in political activity.

Protection should encompass both public and private expressions, such as joining political organisations, protesting, or voicing opinions, to ensure individuals can engage in democratic processes without fear of discrimination. On the other hand, political activities that incite violence, hatred, or discrimination against protected groups (e.g., based on race, gender, or religion) could be excluded, consistent with existing laws like the *Racial and Religious Tolerance Act 2001* (Vic).

Recommendation 4: Add protected attribute: 'Political view or activity', that encompasses public and private expressions while excluding activities that incite violence, hatred, or discrimination against protected groups.

Irrelevant criminal record

Anti-discrimination law should play a part in protecting the equal participation of workers with a criminal record, where their criminal record is irrelevant to the job that they hold or are applying for.

Adopting the ACT's model law in its *Discrimination Act 1991* would resolve concerns that this could duplicate existing laws. The ACT law's definition of 'irrelevant criminal record' extends protections to cover records and contexts not fully covered by spent conviction legislation.

The ACT's definition also resolves concerns that adopting this protection could affect government decision-making on issues such as weapons licensing, police protection notices, or security provider licensing. This is solved by narrowly defining 'irrelevant criminal record' to exclude records that are directly relevant to specific decision-making contexts.

Recommendation 5: Add protected attribute: 'Irrelevant criminal record', by adopting the ACT's model law in its *Discrimination Act 1991*.

Sexuality

The ADA prohibits discrimination on the ground of 'homosexuality', which is defined to include a 'male or female homosexual'. This is an outdated and narrow term and should be replaced with 'sexuality', which is more encompassing.

To achieve this, an adapted version of the Victorian definition in the *Equal Opportunity Act 2010* should be adopted which includes protections for asexuality.

Recommendation 6: Add protected attribute: 'Sexuality', by adopting an adapted version of the Victorian definition in the *Equal Opportunity Act 2010* that includes protections for asexuality.

Intersex status

The ADA should protect this attribute by adopting the attribute of 'sex characteristics', which reflects advice from international human rights law experts and has been adopted in several other states. While this poses challenges for the comparator test, Unions NSW recommends removing this test as per our **recommendation 12**. Otherwise, the ADA should adopt the attribute 'a variation of sex characteristics'.

Recommendation 7: Add protected attribute: 'Intersex status', and either (a) eliminate the comparator test or (b) adopt the attribute 'a variation of sex characteristics'.

Religion

The ADA should protect against discrimination based on religion in workplaces. This should extend to appearance and dress. Our affiliate, the NSW Nurses and Midwives Association, has provided

Unions NSW with examples of members who have been discriminated against due to religious dress such as wearing headscarves.

Additionally, there is no reason why this attribute should not extend to 'Aboriginal spiritual belief or activity' like in the Northern Territory.

Recommendation 8: Add protected attribute: 'Religion', which extends to appearance, dress, and Aboriginal spiritual belief or activity.

The intersectionality of protected attributes

The range of protected attributes does not always reflect the realities of how discrimination is experienced.

The ADA should protect against intersectional discrimination by adopting section 3.1 of the Canadian *Human Rights Act*, RSC 1985, cH-6 which provides that:

'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'.

Recommendation 9: Recognise the intersectionality of protected attributes by adopting section 3.1 of the Canadian *Human Rights Act*, RSC 1985, cH-6.

Caste, immigrant status and language (including accent)

Workers in NSW are commonly discriminated against due to their visa status. Workers are often warned by their employer not to escalate disputes about workplace entitlements lest they lose their sponsorship or be reported for breaching visa conditions. This leads to the exploitation of migrants and regresses employment standards for everyone.

The 2024 Unions NSW report: *Disrespected, disregarded, and discarded*, exposed the prevalence of workplace sexual harassment among women on temporary visas in NSW. Across the industries surveyed, 60% of migrant women who experienced sexual harassment disclosed concerns related to their visa status if they reported their abuse (Unions NSW 2024, p. 10).

The ADA has an important role to empower migrant workers to speak out and help reduce the incidence of exploitation and sexual harassment within workplaces due to discrimination based on immigrant status.

Recommendation 10: Amend the definition of race in the ADA to expressly prohibit discrimination based on caste, immigrant status and language (including someone's accent).

[]

Workers compensation claims

Workers who make a workers compensation claim are often discriminated against by employers. An employer may not wish to employ a worker who has made a claim if it assumes that the worker is therefore more likely to claim again in the future. In addition to the impact on the worker, this has the adverse effect of increasing costs on the scheme by obstructing return-to-work.

While workers are protected to a degree by the Fair Work Act against adverse action from exercising workplace rights, it is unclear whether this covers workers compensation claims, leaving a gap in the legislation.

Recommendation 11: Amend the ADA to prohibit discrimination against persons who make or are in the process of making a workers compensation claim, either by including it in the definition of industrial activity or by creating a new protected attribute.

Gender identity

Unions NSW supports replacing the protected attribute of ‘transgender grounds’ in the ADA with the term ‘gender identity’. The Yogyakarta Principles can be used as a reference point to define this attribute.

The attribute of ‘gender identity’ is more inclusive of people who are not cisgender but who may not describe themselves as transgender: for example, nonbinary persons, or Brotherboys and Sistergirls, which are culturally specific terms for First Nations gender diverse people.

Recommendation 12: Amend the protected attribute of ‘transgender grounds’ in the ADA to ‘gender identity’.

ADA structure

The structure of the ADA is difficult for the community to navigate, undermining its benefits.

The current structure of the ADA places each protected attribute and exceptions to that attribute in their own parts, with between 10-20 sections dealing with each attribute. This is confusing, repetitive, and makes the legislation unnecessarily long. For example, various protected attributes have been added to the ADA since the first iteration of the legislation. Confusingly, between the consecutive numbers of sections 49 and 50, there are 80 sections named 49A to 49ZYY dealing with 6 protected attributes.

[]

Recommendation 13: Revise the structure of the ADA to accord with the *Fair Work Act 2010* (Cth) or *Equal Opportunity Act 2010* (Vic), where protected attributes are in a single section.

Part 2: Tests for discrimination (ToR 3)

Unions NSW supports eliminating the requirement for a comparator.

The comparator test

The comparator test is confusing, outdated, problematic to prove, and overly complex.

Instead, requiring the complainant to prove ‘unfavourable treatment’ is a more realistic way of analysing and describing discrimination while supporting an objective test.

While consistency across jurisdictions is important, adopting an ‘unfavourable treatment’ test would align NSW with modern discrimination law principles by simplifying legal standards, focusing on the real-world impact of discrimination rather than abstract hypotheticals, and better accommodating intersectional experiences, an approach already taken in jurisdictions like Victoria and the ACT.

Recommendation 14: Remove the requirement of a comparator and replace it with a requirement to demonstrate ‘unfavourable treatment’.

Part 3: Positive obligations (ToR 6) and Protections against sexual harassment (ToR 5)

Unions NSW supports introducing positive obligations for employers to prevent discrimination in the workplace.

Preventing discrimination and harassment

A positive duty to prevent unlawful conduct in general can reduce the burden on victims, address causes of discrimination, help change views, and help duty holders avoid costs arising from conduct. This duty should extend to all protected attributes.

Existing duties are insufficient because they are reactive rather than proactive. The *Respect@Work* report presented evidence that complaint-based systems fail to prevent harm and recommended positive duties as a key reform to address systemic discrimination and harassment (AHRC 2020, pp. 28, 477, 479). The Disability Royal Commission (2023, p. 205) also endorsed proactive obligations on employers to protect workers with disability.

The positive duty need not conflict with existing duties. The duty can be framed to require ‘reasonable and proportionate steps’, allowing flexibility and alignment with existing legal frameworks. This approach is already used in Victoria and federally. This framing also addresses concerns that the obligation is too onerous.

Recommendation 15: Add a positive obligation on employers to take ‘reasonable and proportionate steps’ to prevent discrimination and harassment.

Reasonable adjustments, suitable duties, and redeployment for workers with a disability

Most positive duties in Australian discrimination laws apply to all protected attributes. The following recommendations are especially relevant if our **recommendation 11** is not adopted.

Legislative options include section 20 of the *Equal Opportunity Act 2010* (Vic) and section 15(2) of the *Disability Discrimination Act 1992* (Cth), which create positive obligations for employers to provide reasonable adjustments for workers with a disability.

The NSW workers compensation scheme is relevant to the consideration of this reform. Rising costs within the scheme are largely driven by falling return-to-work rates. The reasons for this are multifaceted but include discrimination against injured workers.

Returning to work after an injury is in the interest of employers and workers. The barriers to a successful return-to-work process are often just as complex and difficult for an employer as they can be for an employee. In some cases, employers may wish to avoid having to accommodate the needs of an injured worker returning to the workplace.

A positive obligation within the ADA for employers to provide reasonable adjustments, suitable duties, and redeployment for workers with a disability will help protect against discrimination of injured workers and complement existing legislation to help improve return-to-work rates.

Recommendation 16: Add a positive obligation on employers to make reasonable adjustments for workers with a disability.

Recommendation 17: Add a positive obligation on employers to redeploy or offer suitable duties to workers with a disability.

Part 4: Exceptions, exemptions and special measures (ToR 7)

Unions NSW supports removing exceptions for private educational authorities and small employers to discriminate. We also support strengthening the vicarious liability provision.

Private educational authorities

Unions NSW supports removing exceptions for private educational authorities to discriminate. We have had the opportunity to review the submission of our affiliate, the Independent Education Union, which we refer the NSWLRC to for further details regarding this recommendation.

Recommendation 18: Remove wide-ranging exceptions for private educational authorities to discriminate.

Small employers

In 1999, the NSWLRC recommended removing the exception for small employers. Small business employment is significant and should be available to all. Furthermore, removing the exception would not intrude on personal relationships.

Since the LRC made its recommendation, there is now additional support available to small employers to meet their obligations such as the Fair Work Ombudsman and SafeWork NSW.

Recommendation 19: Remove exceptions for small employers to discriminate.

Vicarious liability

Unions NSW supports amending the vicarious liability provisions in the ADA to:

1. Attribute liability on the employer for all conduct which is done 'in connection with' the employment of an employee; and
2. Remove the ability for employers to avoid liability by post facto 'unauthorising' the discriminatory conduct.

This would reflect the provisions in section 106 of the *Sex Discrimination Act 1984* (Cth).

In its 1999 review of the ADA, the NSWLRC recommended that the 'unauthorised act' exception be removed. It said that the 'reasonable steps' exception was sufficient and 'achieved a practical approach' to the issue of attributed liability.

Recommendation 20: Strengthen the vicarious liability provision to reflect the provisions in section 106 of the *Sex Discrimination Act 1984* (Cth).

Conclusion

Unions NSW continues to rely on its preliminary submission to this review made in October 2023.

This submission helps chart a path forward for the NSWLRC by engaging with the questions and concerns raised in the consultation paper.

Supporting the most vulnerable workers helps improve workplace standards for all. Additionally, there is an opportunity for the ADA to improve injured workers' return-to-work rates.

Since our first submission, we have added recommendations to protect workers from discrimination, including those who hold visas, those who make a workers compensation claim, and gender-diverse persons.

We look forward to contributing to the next stage of consultation where we will provide further recommendations regarding procedural aspects of the ADA.

References

- AHRC (Australian Human Rights Commission) (2020), *Respect@Work*, accessed 31 July 2025, <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.
- Disability Royal Commission (2023), *Final report: executive summary, our vision for an inclusive Australia and recommendations*, Australian Government, accessed 31 July 2025, <https://disability.royalcommission.gov.au/publications/final-report-complete-volume-formats>.
- Unions NSW (2024), *Disrespected, disregarded, and discarded*, accessed 31 July 2025, <https://www.unionsnsw.org.au/publication/disrespected-disregarded-discarded-migrant-worker-sexual-harassment/>.