



# **HUMAN RIGHTS FOR ALL**

Submission to the NSW Law Reform Commission  
review of the NSW Anti-Discrimination Act 1977

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## About Human Rights For All

Human Rights For All (HR4A) is an Australian charitable human rights law firm which provides pro bono representation to refugees, stateless people and Indigenous people in Australia's immigration detention prisons. It was founded by Alison Battisson, who is the Director Principal.

Alison and her team focus on long term detained and complex-case refugees and stateless people to test the principals of liberty in Australia. In 2023, the Australian High Court ruled that indefinite immigration detention is unlawful, due in considerable part to the work done by the firm, which has been part of HR4A's mission from its inception. Of particular interest to HR4A are vulnerable detained persons, including members of the LGBTIQ+ community, the disabled, and First Nations people whose complicated or unrecognised citizenship put them at risk of being deported.

In addition to the onshore work, HR4A also played a crucial role in assisting female athletes, their families and others escape Kabul, Afghanistan in August 2021. Over 110 people were airlifted to safety as a result. HR4A continues to work to bring Afghan women at risk to safety.

HR4A brings a collaborative and flexible approach, working in tandem with other law firms and human rights organisations. HR4A represent clients at all levels of the legal system, including the High Court, Federal Court and various Tribunals. HR4A regularly makes submissions to the UN Human Rights Council, the UN Committee Against Torture, the UN Working Group on Arbitrary Detention, various special rapporteurs and the Australian Human Rights Commission.

### **Contact:**

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*Human Rights For All acknowledges that we work on the lands of the Darramuragal and Gadigal people. Sovereignty was never ceded. We pay respect to Aboriginal Elders past and present. Always was, always will be Aboriginal land.*

## **Executive Summary**

As a nearly 50-year-old piece of legislation, the *Anti-Discrimination Act 1977* is long overdue for updating. Societal attitudes are extremely different in terms of awareness, injustice and inequality, and there are many aspects of the Act that need to be modernised.

While Human Rights For All acknowledges that the migration status and detention of asylum seekers, refugees and stateless persons is covered under Commonwealth law, other circumstances that they find themselves in (such as the criminal justice and employment systems) are covered under State laws. This group are also often intersectional in terms of discrimination (disability, gender, sexual orientation, gender identity). As many asylum seekers and refugees are living in the community (on visas or undocumented), they are exposed to potential discrimination in; work environments, education, in medical settings - all of these are state-based circumstances.

## Recommendations

- Remove the comparative disproportionate impact test
- Dispense with the distinction between direct and indirect discrimination
- Ensure intersectional discrimination is recognised and protected against
- Intended future discrimination should be captured in the tests for discrimination
- Change the protected attribute “homosexuality” to “sexual orientation”
- Change the protected attribute “marital status” to “relationship status”
- The term “gender” should be used in all instances in the Act when referring to “sex”
- Change the protected attribute “transgender grounds” to “gender identity”
- Include the following as protected attributes:
  - Sex work
  - Sex characteristics (to cover people with innate variations of sex characteristics)
  - Immigration status
  - Citizenship status
  - Political leaning
  - Trade or occupation
  - Irrelevant criminal record
  - Mental health condition
  - Trauma impact
  - Advocacy experience
  - Industrial action participation
- Voluntary work should be covered under the definition of employment in relation to discrimination
- Civil protections for vilification should be extended to all protected attributes
- “Areas of public life” in relation to sexual harassment should be extended to the criminal justice system (specifically covering transgender, non-binary and people with other gender experience), and volunteers in a work environment
- The prohibition of victimisation in the ADA should be extended to situations where a person threatens to victimise someone, particularly to asylum seekers, refugees and stateless persons
- The ADA should include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct

## Responses to Consultation Paper questions

### 3. Tests for discrimination

#### **Question 3.2: The comparative disproportionate impact test**

Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

We believe it should be removed altogether as it is often extremely difficult to identify the comparator group. An example is in medical treatment, which often uses white, middle-aged men as the standard group. Indirect discrimination is about disadvantage to the person, rather than a hypothetical group. Comparators may not be an accurate representation of whether indirect discrimination has been inflicted.

#### **Question 3.5: Indirect discrimination based on a characteristic**

Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?

Yes, in recognition that discrimination is not siloed. Many, many people have more than one intersectional identity as part of their makeup, and there is no one person that is a perfect example of a protected attribute. There are structural issues with the Act which do not take the real-world existence of people into account.

#### **Question 3.7: Direct and indirect discrimination**

(1) How should the relationship between different types of discrimination be recognised?  
(2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

The definitions need to be examined to ensure that discrimination can be direct, indirect or both.

#### **Question 3.8: Intersectional discrimination**

(1) Should the ADA protect against intersectional discrimination? Why or why not?

Yes, it should. People who suffer multiple areas of discrimination are vulnerable in many ways, and this can be magnified when just one aspect is considered while examining possible discrimination.

(2) If so, how should this be achieved?

Amend the legislation to ensure that attributes are not siloed and recognise their intersectionality.

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#### **Question 3.9: Intended future discrimination**

Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

Yes. It is a control mechanism and it creates an uneven relationship of power and control. An example would be a refugee with work rights who could be exploited by the possibility

of job loss for non-compliance in an aspect of their employment if their immigration status could be put at risk in the future.

#### **4. Discrimination: protected attributes**

##### **Question 4.4: Discrimination based on homosexuality**

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "homosexuality"?

"Homosexuality" should be replaced by the descriptor "sexual orientation". This allows for the inclusion of bisexuality, pansexuality and other sexualities which are not homosexual.

##### **Question 4.5: Discrimination based on marital or domestic status**

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "marital or domestic status"?

"Marital or domestic status" should be replaced by the descriptor "relationship status". This covers many other now-accepted types of relationships that exist in society.

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##### **Question 4.7: Sex discrimination**

- (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "sex"?

"Sex" should be replaced by the descriptor "gender", as the current definition of "sex assigned at birth" does not accurately represent some people with variations of sex characteristics. "Sex" is implied as "sex assigned at birth" but so many factors impact on how people are perceived and treated in society, and "gender" more accurately covers the spectrum of factors including legal sex/legal gender, sex characteristics and chromosomes.

##### **Question 4.8: Discrimination on transgender grounds**

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "transgender grounds"?

"Transgender grounds" should be replaced by the descriptor "gender identity or experience" to include non-binary and gender-fluid people and other people with different gender identities or experience.

##### **Question 4.9: Extending existing protections**

- (1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future?

Yes. This may include immigration status, change of gender, change of relationship status, change of sexual orientation, mental health condition, trauma impact, trade or occupation (including sex work), irrelevant criminal record, industrial action participation, and advocacy experience.

- (2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

Yes. Relatives or associates who advocate for their family members or colleagues should not experience discrimination in any form for doing so.

## **5. Discrimination: potential new protected attributes**

### **Question 5.2: Potential new attributes**

(1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why?

Yes:

Sex characteristics

Sex work

Immigration status

Immigration arrival status

Citizenship status

Political leaning

Trade or occupation

Irrelevant criminal record

Mental health condition

Trauma impact (including experience in detention, incarceration, domestic and family violence, sexual abuse and any other trauma-related past experience)

Advocacy experience

Industrial action participation

(2) How should each of the new attributes that you have identified above be defined and expressed?

Sex characteristics:

People with innate variations of sex characteristics

Sex work:

Persons who work in the sex industry, including people who are trafficked into Australia for this purpose

Immigration status:

Persons who have arrived in Australia without a valid visa, including asylum seekers, refugees, stateless persons, and non-citizen First Nations people who have complex heritage and cultural situations

Immigration arrival status:

Asylum seekers, refugees and stateless persons who arrived by boat after July 19, 2013, who are prevented currently by Commonwealth law from legally remaining in Australia)

Citizenship status:

Persons with complicated citizenship status, including children who are born in Australia to non-citizens like asylum seekers, people who were born in Australia to legal immigrants but whose own citizenship was not finalised in the past and people who may have legal proceedings which may affect their acquired Australian citizenship

Political leaning:

People who potentially may be discriminated against due to their political views relating to either Australia or a foreign country, whether they are Australian or overseas born

Trade or occupation:

People whose trade or occupation may be discriminated against for any reason (an example would be sex work)

Irrelevant criminal record:

Minor criminal matters such as loss of driver's licence, first offences of minor crimes such as shoplifting, or other matters which may be used against someone to prevent entry to employment, education, health services or other areas.

Mental health condition:

People with mental health or neurodiverse diagnoses whose ongoing health conditions can cause discrimination of any type

Trauma impact:

People who have experienced traumatic conditions or events in detention or incarceration, domestic and family violence, sexual abuse and any other trauma-related past experience

Advocacy experience

People whose advocacy in a political, human rights, health or other area may result in any form of discrimination

Industrial action participation:

People whose participation in industrial action such as union meetings, stop works, strikes or other action see them subject to any form of discrimination

### **Question 5.3: An open-ended list**

Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

Yes. The Anti-Discrimination Act should be a working document that changes as society evolves.

## **6. Discrimination: Areas of public life**

### **Question 6.1: Discrimination at work – coverage**

(1) Should the definition of employment include voluntary workers? Why or why not?

Yes. People with certain immigration statuses are prevented from performing paid work, so may take on voluntary work for experience/integration to community etc. They may then be discriminated against in that work environment?

### **Question 6.6: The provision of goods and services – exceptions**

What changes, if any, should be made to the exceptions to sex, age and disability discrimination in relation to the provision of goods and services?

Human Rights For All believes that places of detention should fall within the definition of goods and services within the ADA. Asylum seekers, refugees and stateless are regularly discriminated against in the criminal justice system due to their vulnerability in relation to their immigration status, as well as intersectionalities such as their sexual orientation, gender, gender identity, race, religious faith and observance, medical and mental health conditions and trauma impact.

### **Question 6.12: Additional areas of public life**

- (1) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

Additional protected areas should include the NSW criminal justice system, which is where many asylum seekers and refugees find themselves due to minor crimes (often committed because of trauma responses or untreated mental health conditions). Factors such as having immigration status, insecure accommodation, not being in education or inability to work, and being a flight risk due to fewer ties in the community often see asylum seekers and refugees being incarcerated for matters which may not result in incarceration for other people

## **7. Wider exceptions**

### **Question 7.11: The statutory authorities exception**

Should the ADA provide an exception for acts done under statutory authority? If so, what should it cover and when should it apply?

The statutory authority exception is an example of State and Commonwealth law intersection, which is a fraught issue. The Commonwealth Migration Act is exempt under a statutory duty - so a state police officer must detain someone who is an unlawful non-citizen. In our human rights space, the bigger issue is that the Migration Act trumps the NSW ADA and the more nuanced impact of discrimination based on visa status is not considered.

## **8. Civil protections against vilification**

### **Question 8.1: Protected attributes**

- (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification?
- (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

Yes, see above for lists of suggested wider range of attributes.

## **9. Harassment**

### **Question 9.1: The definition of sexual harassment**

- (1) Should the reasonable person test be expanded to include the "possibility" of offence, intimidation or humiliation? Why or why not?

Yes. There are many examples of positions of power imbalance in relationships - at work, in custody, in educational institutions, where sexual harassment can be extremely subtle to begin with, and escalate if circumstances don't go the harasser's way.

- (2) Should the ADA expressly require consideration of an individual's attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not?

Yes. Each actual situation must be examined as attributes may be intersectional, rather than assume whether someone would be offended, humiliated or intimidated in a generic situation.

- (2) Should the ADA and workplace-related sexual harassment laws be more aligned?

### **Question 9.5: Expanding the areas of life where sexual harassment is prohibited**

- (1) Should the ADA continue to limit the areas of life where sexual harassment is unlawful? Why or why not?

No, behaviour that constitutes sexual harassment should be prohibited in all areas of life.

- (2) Should sexual harassment be unlawful in other areas of life? For example:

- (a) areas of life that are protected from discrimination
- (b) all areas of public life, or
- (c) any area of life, public or private?

Yes, see our response to question 9.5 (1). We also note that while it is exempt from discrimination due to the Commonwealth Migration Act, immigration detention in NSW is a setting where sexual harassment should be completely unacceptable in any way. A claim should be able to be made for discrimination in this setting.

### **Question 9.7: Attribute-based harassment**

If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

All of them - the better question to ask would be what attribute would be acceptable to harass someone about?

## **10. Other unlawful acts and liability**

### **Question 10.1: Victimisation**

- (1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not?

Yes - particularly for people with immigration status in limbo (something they can't control) - it creates a relationship of power over someone vulnerable. People can't speak up either when being victimised or when being threatened with victimisation in case their immigration status is jeopardised.

- (2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

Yes, it should. There are many instances of intersectional reasons that may see someone being victimised ie. First Nations women, disabled queer people, people with uncertain visa status who are engaged in sex work.

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### **Question 10.4: The exceptions for liability**

Should the ADA continue to provide two exceptions to vicarious liability (that is, the "reasonable steps" and "unauthorised acts" exceptions)? Or is a single "reasonable steps" exception sufficient?

"Reasonable steps" and "unauthorised acts" focuses on impact on the authorising or employing entity - it doesn't focus on the victim. If a police officer kills me unlawfully in the execution of their duties, the police are not liable but the impact is on my family. Vicarious liability needs to be examined from a victim approach, rather than the liability (or lack thereof through exceptions).

## **11. Promoting substantive equality**

### **Question 11.3: A positive duty to prevent or eliminate unlawful conduct**

- (1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

Both State and Federal governments should take all measures to ensure that unlawful conduct is prevented and eliminated in the criminal justice system as well as immigration detention – precisely because it is unlawful.

(2) If so:

- (a) What should duty holders be required to do to comply with the duty?
- (b) What types of unlawful conduct should the duty cover?
- (c) Who should the duty holders be?
- (d) What attributes and areas should the duty apply to?

As mentioned earlier, vulnerable refugees, asylum seekers and stateless people often find themselves in the criminal justice system. They can be targeted by those in the system as “easy marks”.

There is the question of duty holders who are private operators of public prisons who are running them for the government – who is responsible? It is the government’s responsibility to take these measures, regardless of whether they are the operator of the facility or if they have contracted out the actual service delivery.

At some point, there must be a reconciliation between State and Commonwealth acts – we have the situation of State protection not being extended because of someone’s visa status which is managed by the Commonwealth, even if such discrimination is unlawful under State law. A more nuanced approach is required at the Commonwealth level.