



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

15 August 2025

NSW Law Reform Commission

ADAreview@dcj.nsw.gov.au

Dear NSW Law Reform Commission,

Review of the Anti-Discrimination Act 1977 (NSW)

We thank the NSW Law Reform Commission for the opportunity to make a submission on the *Anti-Discrimination Act 1977 (NSW)* (ADA).

Wurringa Baiya Aboriginal Women's Legal Centre

Wurringa Baiya is a not-for-profit, state-wide community legal centre for Aboriginal and Torres Strait Islander women, children and young people across New South Wales. The Centre's focus is assisting victims of violence, particularly those who have experience domestic and family violence, sexual violence, and child sexual assault. We regularly provide legal advice to Aboriginal and Torres Strait Islander women who have experienced such violence, as well as violence perpetrated by various state bodies including NSW Police, Department of Communities and Justice and Corrective Services NSW. We have also provided clients with advice on discrimination and support them with referrals to specialist organisations.

Our service is managed by Aboriginal women. Our Governing Committee is made up entirely of Aboriginal women. Our CEO is an Aboriginal woman, and we have several Aboriginal and Torres Strait identified positions, including an Aboriginal Specialist Caseworker and Torres Strait Islander Specialist Caseworker.

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Wurringa Baiya is a non-profit organisation managed by Aboriginal women.

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We are a gender-specific service sensitive to the culturally diverse needs of Aboriginal and Torres Strait Islander women who have been victim-survivors of violence. This submission offers Wirringa Baiya's contributions to ways in which the *Anti-Discrimination Act 1977 (NSW)* ('ADA') can be improved to better address existing gaps in the legislation, be brought into line with other state legislation, and be more accessible by those most vulnerable.

Anti-Discrimination Act 1977 (NSW)

The ADA was a pivotal piece of legislation when it was introduced in 1977, designed to afford protections for some of the most vulnerable in our society. However, in those near-five decades since, the Act has only been subject to proper review once – and of the 161 recommendations made then, most are still yet to be implemented. What began as a pioneering legislation now falls significantly behind its counterparts across the country, and around the world.

While our submission will focus on the ADA as it pertains to Aboriginal and Torres Strait Islander women, we acknowledge that there are significant gaps in the Act for many – including, but certainly not limited to, LGBTQIA+ communities, migrants and refugees, people with disabilities, and culturally and linguistically diverse communities. We refer the Commission to the submissions of key organisations working in these spaces, as experts in their respective fields for additional recommendations to reform the ADA to better serve the NSW community as a whole.

In referring to women in this submission, we are inclusive of all people who have experienced oppression as women, including cisgender, transgender, non-binary and gender diverse people.

Discrimination

The ADA currently prohibits 'direct' and 'indirect' discrimination. 'Direct' discrimination occurs when a person was or would have been treated differently to someone without their specific protected attribute (the 'comparator' test), and that 'less favourable' treatment was because of their protected attribute or characteristic that people with

that attribute have or are presumed to have.¹ ‘Indirect’ discrimination occurs when a requirement is imposed on a person with a protected attribute, they are unable to comply, a substantially higher proportion of people who do not have the attribute can comply with it, and the requirement is not reasonable having regard to the circumstances of the case.²

An artificial separation is created between these two terms whereby a complainant in NSW can only bring a claim on *either* direct or indirect discrimination. This fails to recognise that discrimination may occur on either of these grounds, or both.³ It also fails to recognise the existence of intersectional discrimination – as a claim can only be brought on *one* protected attribute. All of our clients exist at intersections. Many have shared their experience of intersectional discrimination by individuals and the state, most commonly but not limited to race, sex, gender and disability discrimination. It is imperative that the ADA be updated to reflect the multi-layered, deep-rooted and harmful nature of discrimination against marginalised communities in our society.

‘Direct’ discrimination

The current ‘comparator’ test for assessing ‘direct’ discrimination is unclear and requires reform. This often compares an individual’s experience against a hypothetical person – based on a single protected attribute. Such a test fails to apply a lens that reflects the socio, economic, political and historical contexts necessary to understand the roots of the discrimination faced by the individual. Comparing the experiences of, for example, an Aboriginal woman with non-Aboriginal persons or non-Aboriginal women, omits an understanding of history and contextual considerations where such a comparison may not be appropriate. Instead, we favour the ‘unfavourable treatment’ test as in Victoria and ACT, whereby the assessment focuses on ‘an analysis of the impact of the treatment on the person complaining of it’.⁴ Treatment afforded to others may be considered, but it is not required to be.

¹ *Anti-Discrimination Act 1977* (NSW) s 7(1)(a), s 7(2), s 24(1)(a), s 24(1A), s 38B(1)(a), s 38B(2), s 39(1)(a), s 39(1A), s 49B(1)(a), s 49B(2), s 49T(1)(a), s 49T(2), s 49ZG(1)(a), s 49ZG(2), s 49ZYA(1)(a), s 49ZYA(2).

² *Ibid* s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b).

³ *Discrimination Act 1991* (ACT) s 8(1).

⁴ *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 VCAT [53].

The current approach to the ‘causation’ test also requires some clarification. Currently, a complainant who may genuinely believe the ‘less favourable’ treatment was due to their protected attribute, must answer the central question of why they (the person with the attribute) were treated as they were.⁵ Complainants do not always have evidence of this treatment, and respondents are not always overtly aware of their subconscious biases. This is not a subjective test, but an objective one. Such a test is difficult and confusing test for a complainant to address – and the ADA does not clarify whether a respondent must have made a conscious decision to treat the complainant less favourably. As such, we support adopting the approach to causation as in Victorian legislation, where it is irrelevant whether the respondent was aware of the discrimination or if they considered the treatment to be unfavourable.⁶

We also support ‘direct’ discrimination as encompassing intended future discrimination.⁷

Recommendation 1:

1. The ‘comparator’ test for direct discrimination be replaced with the ‘unfavourable treatment’ test.
2. The ‘causation’ test explicitly does not require the respondent to be aware of the discrimination or treatment being unfavourable.
3. That the definition of ‘direct’ discrimination includes intended future discrimination.

‘Indirect’ discrimination

Similar issues exist with the test for ‘indirect’ discrimination, imposing a high evidentiary burden on the complainant. The complexity of the ‘disproportionate impact’ test and the difficulties of identifying an appropriate comparator group has been rightfully criticised and requires reform. We propose that a ‘disadvantage’-based test as in

⁵ *Purvis v NSW* [2003] HCA 62.

⁶ *Austin Health v Tsikos* [2023] VSCA 82, 324 IR 1 [71], [84]–[85].

⁷ *Discrimination Act 1991* (ACT) s 8(2)–(3); *Equal Opportunity Act 2010* (Vic) s 8(1), s 9(1); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1), s 11(1); *Age Discrimination Act 2004* (Cth) s 14, s 15(1).

Victorian and ACT counterpart legislation, recommended by WA and Qld law reform commissions, and the federal Disability Discrimination Act (“DDA”), Age Discrimination Act, and Sex Discrimination Act (“SDA”) be adopted. This would mean that the complainant needs to establish that the requirement, condition or practice causes, or is likely to cause, 'disadvantage' to people with the particular attribute – without drawing comparison between people with and without the specific attribute.⁸

Another element to be proven for establishing ‘indirect’ discrimination is the ‘reasonableness’ standard – where the complainant must also show that the requirement is “not reasonable having regard to the circumstances of the case”.⁹ We recommend that the onus for establishing this test should shift to the respondent to prove that the requirement imposed was reasonable.

Recommendation 2:

4. The ‘disproportionate impact’ test be replaced with the ‘disadvantage’ test;
5. That the onus of proof for the ‘reasonableness’ standard be placed on the respondent to prove that the requirement imposed was ‘reasonable’.

Protected Attributes

Currently protected attributes

The ADA currently prescribes age, carer’s responsibilities, disability, homosexuality, marital/domestic status, race, sex (including pregnancy and breastfeeding), transgender grounds as protected attributes against discrimination. As it stands, this list is too narrow and fails to afford protections to many, particularly those existing at intersections. While we focus on certain attributes below, as they relate most to our clients and experience, we note that there are other attributes discussed by other organisations as experts in their fields that should be considered.

⁸ The Victorian Equal Opportunity and Human Rights Commission, *‘Explaining the types of discrimination’*, Victorian Discrimination Law Resource, <https://austlii.community/foswiki/VicDiscrimLRes/WebHome>.

⁹ *Anti-Discrimination Act 1977* (NSW) s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b).

The language and scope of some currently protected attributes must be amended. We support the extensive calls for the attribute of ‘homosexuality’ to be replaced with ‘sexual orientation’¹⁰ or ‘sexuality’¹¹ as is in counterpart legislation – affording protection to persons of other sexualities such as bisexuals, asexuals, pansexuals and heterosexuals. ‘Transgender’ grounds should also be replaced with ‘gender identity’ and ‘sex characteristics’ be additionally included, in recognition of gender as a spectrum and protecting people who identify as non-binary, intersex or gender diverse.

Categorising ‘pregnancy’ and ‘breastfeeding’ as a ‘characteristic’ under the protected attribute of ‘sex’ also fails to recognise that people who become pregnant and can breastfeed may not identify as ‘female’. We support the recognition of pregnancy and breastfeeding as separate protected attributes, independent of ‘sex’, in line with every other Australian state or territory.¹²

Carer’s responsibilities as currently prescribed by the ADA only extend to responsibilities to care for a child, stepchild, immediate family member or child or adult one has responsibility for under legislation. Such a framing of carer responsibilities adopts a western-centric lens to familial and community relationships, and does not adequately reflect Aboriginal and Torres Strait Islander communities. While we support the definition of ‘carer responsibilities’ being reformed in line with ACT legislation – as ‘parent, family, carer or kinship responsibilities’ – we recognise that caring responsibilities often go beyond kin as well, extending to community. We recommend that the Commission consult with Aboriginal and Torres Strait Islander peoples more broadly in extending the scope of such caring responsibilities, to reflect its true nature.

We support the recommendations of key disability advocacy groups and people with disabilities in amending the terminology used in relation to disability throughout the Act, so the ADA better reflects a contemporary understanding of disability.

¹⁰ *Equal Opportunity Act 2010* (Vic) s 6(p).

¹¹ *Discrimination Act 1991* (ACT) s 7(1)(w).

¹² *Discrimination Act 1991* (ACT) s 7(1)(o); *Equal Opportunity Act 2010* (Vic) s 6(b); *Anti-Discrimination Act 1991* (Qld) s 7(c); *Equal Opportunity Act 1984* (WA) s 10; *Anti-Discrimination Act 1998* (Tas) s 16(g); *Anti-Discrimination Act 1992* (NT) s 19(f); *Equal Opportunity Act 1984* (SA) s 85T(4).

Additional protected attributes for consideration

Subjection to domestic and family violence

Domestic and family violence in Australia is a national emergency, with one woman killed at least every eight days.¹³ Aboriginal and Torres Strait Islander women are disproportionately represented as victims of violence, being around 33 times more likely to be hospitalised,¹⁴ and 6 times more likely to die from domestic violence than non-Aboriginal and Torres Strait Islander women.¹⁵ In 2023–24, the age-standardised rate of family violence hospitalisations for Aboriginal and Torres Strait Islander people was 26 times the rate for non-Aboriginal and Torres Strait Islander people.¹⁶ Amongst all this, a large number of cases go unreported due to the numerous barriers to reporting for Aboriginal women, the ongoing impacts of colonisation and systemic racism, and distrust of state authorities.

This violence results in significant social, cultural, spiritual, physical and economic impacts in communities, particularly for Aboriginal and Torres Strait Islander women and children. Discrimination on the basis of an individual's subjection to domestic and family violence may occur in any area of public life. In our experience, clients have been threatened with eviction from public housing due to being in arrears when unable to stay in their house for fear of the perpetrator. This can also manifest itself in difficulties maintaining employment and threats of termination if an abusive partner frequently attends a workplace, or requests for leave being denied for reasons relating to the violence.¹⁷ The significant impacts of domestic and family violence are often further

¹³ Australian Institute of Health and Welfare (2025) *Family, domestic and sexual violence*, <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide>.

¹⁴ Australian Institute of Health and Welfare (2018) *Family, domestic and sexual violence in Australia*, 2018, AIHW, Australian Government.

¹⁵ Bricknell, S. (2023) *Homicide in Australia 2020–21*, Statistical Report no. 42, Canberra: Australian Institute of Criminology.

¹⁶ Australian Institute of Health and Welfare (2025) *Family, domestic and sexual violence*, <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide>.

¹⁷ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law – domestic and family violence* (2012) <https://humanrights.gov.au/our-work/legal/consolidation-commonwealth-discrimination-law-domestic-and-family-violence#Heading88>.

exacerbated when victim-survivors face discrimination from these various areas of public life – most notably in accommodation and employment. Ways in which to mitigate the impacts of violence on Aboriginal and Torres Strait Islander women – who face the intersecting oppressions of sexism, racism and the ongoing impacts of colonisation – are necessary.¹⁸

It is important that adequate protections are codified to minimise the impact of already traumatic and difficult circumstances on the victim-survivor. Adopting a new protected attribute of subjection to domestic and family violence not only strengthens protections for victim-survivors of violence, but serves an educative function, decreases the social and economic costs of violence against women, and complements existing state and federal strategies to combat such violence.¹⁹

We recommend that domestic and family violence be added as a protected attribute, to bring the ADA in line with SA, ACT, NT, and as is to commence in Qld.

Gender-based violence

It is additionally important to recognise other forms of gender-based violence, including but not limited to sexual violence and online abuse. CEDAW recognised that “gender-based violence” is a “more precise term that makes explicit the gendered causes and impacts of such violence.... The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.”

We also acknowledge the impacts of child sexual assault on male children.

¹⁸ Our Watch, *Changing the picture – A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children* (2018, Melbourne) pp 13–14, <https://action.ourwatch.org.au/resource/changing-the-picture/>.

¹⁹ Australian Human Rights Commission, *Fact sheet: Domestic and family violence - a workplace issue, a discrimination issue* (2013), https://humanrights.gov.au/sites/default/files/13_10_31_DV_as_a_workplace_issue_factsheet_FINAL6.pdf.

We recommend that the Commission undertake further consultation with people with lived experience and key organisations working with victim-survivors of violence on the scope of this protected attribute.

Irrelevant criminal record

Wirringa Baiya works with women in custody through the Legal Education and Advice in Prison (LEAP) for Women program, alongside Women's Legal Services NSW and Western Sydney Community Legal Centre. We also acknowledge the significant work and advocacy of organisations such as Community Restorative Centre, providing vital services for people in custody throughout and post the process of incarceration. We refer the Commission to their submissions.

Statistics show staggering correlations between women in custody and having histories of being victim-survivors of violence, including:

- 70-79% of women in prison have been victims of violence,²⁰
- 71% of women in prison have reported being in an abusive relationship,
- 60% of women in custody have experienced childhood sexual abuse,
- And women in custody who have been to prison are 16x more likely to die from violence.^{21,22}

In our experience working with Aboriginal and Torres Strait Islander women in custody, all have experienced some form of violence prior to incarceration. Most have experienced multiple forms of violence. Such women face discrimination from several fronts.

Criminal records have a significant impact on an individual's capacity to seek employment, accommodation, or access goods and services such as bank loans or

²⁰ Australia's National Research Organisation for Women's Safety, *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (2020) Sydney, Australia: ANROWS.

²¹ Australian Institute of Health and Welfare (2025) *Family, domestic and sexual violence*, <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide> <https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/domestic-homicide>.

²² Willoughby M, Spittal MJ, Borschmann R, Tibble H, Kinner SA, *Violence-related deaths among people released from prison: a data linkage study*, Journal of interpersonal violence. 2020:0886260520905546.

insurance. This is exacerbated for Aboriginal and Torres Strait Islander communities who are significantly overrepresented in the criminal legal system. Systemic racism and racial profiling coupled with the over policing of Aboriginal and Torres Strait Islander communities results in a disproportionate number of charges and convictions against these communities. Targets 7 and 8 of the National Agreement on Closing the Gap seek to increase the number of Aboriginal and Torres Strait Islander people in employment. Currently, these targets are unable to be achieved due to the significant barriers in place, including over-incarceration.

Aboriginal and Torres Strait Islander women are the fastest growing population in custody. Alongside systemic barriers that incarcerate women, misidentification as perpetrators of violence rather than the victims is something we have seen occur time and time again with our clients, and more broadly with the community. Legislating irrelevant criminal record as a protected attribute would go some way to protecting communities from discriminatory treatment on such a basis. We note that this protection already exists in several Australian jurisdictions.²³

Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander peoples are disproportionately marginalised and experience disadvantage in society. This happens in all areas of life – including health, education, employment, housing, and more – meaning there are also disproportionate levels of discrimination and vilification.

While Aboriginal and Torres Strait Islander peoples are recognised under the protected attribute of ‘race’, we note that discrimination and vilification can occur on grounds, such as cultural heritage and spiritual practices, that are not covered by the ADA. There are no protections for language and knowledge, kinship ties, or recognition of connection with the land and waters – largely due to the absence of a Human Rights Act in NSW. Some jurisdictions have recognised the cultural heritage and spiritual practices

²³ *Anti-Discrimination Act 1991 (ACT)* s 7; *Anti-Discrimination Act 1992 (NT)* s 19; *Anti-Discrimination Act 1998 (Tas)* s 16.

of Aboriginal and Torres Strait Islander peoples under the attribute associated with ‘religion’.²⁴

The continued impacts of colonisation and systemic racism continue to cause significant detriment to communities. As such, we would like to see further – and genuine – consultation with Aboriginal and Torres Strait Islander peoples happen to discuss whether such protections should fall under broader protected attributes such as ‘race’ or ‘religion’, or there should be standalone protections for Aboriginal and Torres Strait Islander peoples. Such consultation should inform protections specific to the ways in which Aboriginal and Torres Strait Islander peoples may be discriminated against.

Sex work and sex workers

Despite the decriminalisation of sex work in NSW, a lack of adequate anti-discrimination protections for sex workers has meant that sex workers continue to regularly experience discrimination across several areas of public life. These are particularly notable in the public areas of employment, education, housing, financial services, health and essential services, and actions by government agencies.²⁵

We echo the concerns raised by SWOP in their preliminary submissions and recommend ‘sex work and sex worker’ be included as a protected attribute.

Social origin or status

We note that social origin has been adopted in some international jurisdictions and in international human rights law. This has not been adopted in other Australian jurisdictions - and we note concerns that the language may be broad. This may include circumstances such as geographical location, or lack of access to opportunities based on an individual’s schooling or privilege in society. We note that discrimination occurs in such ways and refer the Commission to discrimination experts on narrowing the scope of such protected attributes.

²⁴ *Anti-Discrimination Act 1991 (ACT)* s 7.

²⁵ Sex Worker Outreach Project, *SWOP NSW Preliminary Submission on the Review of the Anti-Discrimination Act (NSW) (2023)*, https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD77.pdf.

Socio-economic status

We note that there has been implementation of certain aspects of socio-economic status in other jurisdictions. This may extend to circumstances such as homelessness, or dependence on government benefits. We note that discrimination occurs on such grounds, and that these significant concerns should be afforded protection. We recommend the Commission undertake further consultation with people with lived experience, key stakeholders and specialist organisations in defining or narrowing the scope of such protected attributes.

Immigration/migration status

We note that discrimination based on immigrant and migrant status occurs and refer the Commission to people with lived experience and organisations experts in the field.

Recommendation 3:

The following attributes are added as protected attributes to the ADA:

1. Subjection to domestic and family violence;
2. Irrelevant criminal record; and
3. Sex work and sex worker.

Recommendation 4:

The following attributes are consulted on as protected attributes to the ADA:

1. Gender-based violence;
2. Aboriginal and Torres Strait Islander peoples;
3. Social origin or status;
4. Socio-economic status;
5. Immigration/migrant status.

Past and future protected attributes

The ADA currently only protects against discrimination against the past or future disability or carer's responsibilities an individual may have. We support adopting a model in line with NT, ACT, Queensland and Victoria which protects broadly against discrimination based on a protected attribute someone had in the past and in the future.

Recommendation 5:

That an individual's past and known future protected attributes also be protected from discrimination.

Areas of public life

The ADA currently protects certain protected attributes from certain areas of public life – being work, education, the provision of goods and services, accommodation and certain activities of registered clubs. This is inconsistently applied, whereby the scope of protection offered differs depending on the protected attribute. Such application is confusing and fails to appropriately or evenly protect marginalised groups. We recommend that all protected attributes be protected across all areas of public life that are covered by the ADA.

As it stands, the areas of public life covered by the ADA are insufficient. We are particularly concerned about the lack of coverage of the ADA pertaining to the exercise of government functions, as it relates to police powers and the exercise of authority by other state agencies including DCJ and NSW Corrective Services. In all of these state departments and areas – since their inception – we have seen our clients, and Aboriginal and Torres Strait Islander peoples more broadly, subject to discriminatory behaviours. There has been difficulty in categorising state functions in this way as a 'provision of a service', and this warrants clarity in the legislation.

We note that in other states and jurisdictions, counterpart legislation account for varying and generally broader areas of public life than the ADA. We support the broadening of the areas of public life covered by the ADA to include, at a minimum, the exercise of government functions – including the functions, laws and programs managed by government.

Recommendation 6:

That the areas of public life covered by the ADA extend to cover the exercise of local and state government functions, laws and programs managed by government.

Exceptions

Anti-discrimination legislation exists to protect people from discrimination, vilification and harassment. The carving out of specific exceptions to allow for lawful discrimination, in our view, undermines the purpose of such Acts and reduces its power. While we recognise that some exceptions may at times be necessary, we are opposed to any blanket exception to the rule. We instead propose that all individuals, groups or organisations be required to seek approval from the Anti-Discrimination Board in order to discriminate.

If this is to be implemented, we note that the primary criteria for assessing such applications for exceptions should be substantive equality and the upholding of human rights principles.

Vilification

Vilification is covered by the ADA, yet applies only in limited circumstances - on the grounds of race, transgender status, homosexuality and HIV/AIDs status, and religious belief, affiliation or activity – including not having a religious belief or affiliation or not engaging in religious activity. All protected attributes covered by the ADA should extend to protection from vilification, bringing NSW legislation in line with ACT legislation.

Recommendation 7:

That all protected attributes covered by the Act are also protected from vilification.

The current test for vilification sets a high evidentiary burden, requiring the respondent to “incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons” on the ground of the protected attribute of the complainant. Such a test places a higher standard than its equivalent in the federal RDA for racial vilification, where s 18C prohibits ‘an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’.²⁶

We echo concerns that the current test of ‘incitement’ sets the bar too high, imposing undue hardship on the complainant to prove that the conduct caused a particular response in a third party. We support amendment to the test to devise a ‘harms-based’ test based on the standard of reasonableness – and whether the conduct is ‘reasonably likely’ to “incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons” on the ground of the protected attribute of the complainant.

We recommend further consultation with discrimination experts as to whether a harms-based test should operate instead of an incitement-based test as in the NT and RDA, or in addition to this test as in Victoria and Queensland.

Recommendation 8:

1. That a ‘harms-based’ test for vilification is adopted; and
2. Further consultation occurs as to whether an ‘incitement-based’ test and ‘harms-based’ test should co-exist, or the test should only be the ‘harms-based’ test.

²⁶ *Racial Discrimination Act 1975* (Cth) s 18C.

Religious vilification

While we are broadly supportive of protection from vilification on the grounds of religion, we share concerns expressed by various organisations that this Bill, when introduced in 2023, reflected a piecemeal approach to reform that appeared to prioritise and place greater value on protection on the grounds of religion, than affording protections to LGBTQIA+ people, people with disabilities, and many other vulnerable groups. We are not supportive of the ability for organisations to bring a claim under religious vilification and recommend that this be removed so that it may claims may only be brought by individuals.

Recommendation 9:

That organisations be prohibited from bringing religious vilification claims.

Harassment

The introduction of an attribute-based approach for harassment

Harassment in the ADA is currently only available for sexual harassment. We submit that harassment should not be limited to sexual harassment however should be broadened to an attribute-based approach. Individuals who are subject to offensive, intimidating and humiliating treatment based on any of their protected attributes, should be able to make a complaint of harassment. This approach would recognise that not all attribute-based harassment would be eligible for discrimination or vilification. Such an approach would also unify any claim made by an individual. Currently, if an individual has been a victim of racial and sexual harassment, they must make two separate claims under the Act. We recommend that the ADA prohibit attribute-based harassment to allow an individual to make a single claim.

We support the NSW Aboriginal Women’s Advisory Network (AWAN)’s submission from September 2023.²⁷ AWAN recommends for the ADA to prohibit attribute-based harassment in particular, race-based harassment.²⁸ The synopsis report prepared by Jumbunna Institute for Indigenous Education and Research, found that cultural safety in a workplace was important to decreasing racist behaviour.²⁹ Those in a culturally unsafe workplace were 4 times more likely to hear racial or ethnic slurs or jokes at work than in a culturally safe workplace.³⁰ They were also 3 times more likely to be treated unfairly at work because of their background.³¹ These statistics demonstrate the need for the ADA to protect against race-based harassment. Additionally, we submit that the ADA should introduce a provision which prohibits harassment on the ground of sex in line with section 28AA(1) of the SDA.³² This provision would provide protection against harassment based on their sex. We submit that the prohibition of harassment should be extended to provide protection against harassment based on race, sex and all other protected attributes.

Recommendation 10:

The harassment provision in the ADA should be broadened to an attribute-based approach and prohibit harassment based on all protected attributes.

²⁷ NSW Aboriginal Women’s Advisory Network, ‘NSW Aboriginal Women’s Advisory Network’s submission to the NSW Law Reform Commission on the *Anti-Discrimination Act 1977 (NSW)*’, 28 September 2023

²⁸ Ibid 8.

²⁹ Jumbunna Institute (Brown, C., D’Almada-Remedios, R., Gilbert, J. O’Leary, J. and Young, N.) / Diversity Council Australia, Gari Yala (Speak the Truth): Centring the Work Experiences of Aboriginal and/or Torres Strait Islander Australians – Synopsis report, Sydney, Diversity Council Australia/Jumbunna Institute, 2020, 11.

³⁰ Ibid.

³¹ Ibid.

³² *Sex Discrimination Act 1984 (NSW)* S28AA(1).

Sexual harassment in the ADA

Sexual harassment in the ADA must be updated to make it more accessible for victim-survivors. The current test for sexual harassment requires a reasonable person, with knowledge of all the circumstances, would anticipate that the complainant would be offended, humiliated or intimidated by the unwelcome sexual conduct.³³

We submit that the ADA should be amended to conform with the lower threshold for sexual harassment as in the *Sex Discrimination Act 1984* (NSW) ('SDA'). The SDA only requires that a reasonable person anticipate 'the possibility' that the person would be offended, humiliated or intimidated.³⁴ This does not require anticipation of actual offense, humiliation or intimidation. We submit that the test in the ADA should mirror the test in the SDA.

Recommendation 11:

The test for sexual harassment in the ADA should conform with the test for sexual harassment in the SDA by adding "the possibility".

The current test in the ADA for sexual harassment, requires an assessment of 'all the circumstances'.³⁵ We submit that in consideration of 'all the circumstances', the deciding body must expressly consider a person's protected attributes. The consideration of these attributes is necessary as their presence can influence the risk they are subjected to sexual harassment and how an individual experiences sexual harassment. The requirement also mandates the consideration any intersectionality between the sexual harassment and any other protected attributes that the individual holds. We submit these protected attributes are important considerations in the assessment of sexual harassment.

³³ *Anti-Discrimination Act 1977* (NSW) s22A.

³⁴ *Sex Discrimination Act 1984* (NSW) s 28A(1).

³⁵ *Sex Discrimination Act 1984* (NSW) s 22A.

Recommendation 12:

The ADA should expressly require the consideration of all an individual's protected attributes when making an assessment of 'all the circumstances'.

We recommend that the ADA should define 'conduct of a sexual nature' to align with the SDA. Furthermore, the definition should include whether or not the conduct is in the presence of the person in subject. An expansive definition would prohibit a person from making a statement or action of a sexual nature about a person who is not present. This would prohibit sexual harassment of a person without their knowledge. Such a prohibition would protect the person from being offended, humiliated or intimidated if they were to gain knowledge of the conduct in the future. It would also promote the elimination of an environment where sexual harassment is acceptable. Such a provision should also be available for anyone who experiences harassment based on any of their protected attributes, including harassment on the basis of race.

Recommendation 13:

The ADA should include an expansive definition of 'conduct of sexual nature' such as "includes making a statement of a sexual nature to a person, or in the presence of a person or about a person **whether or not in the person's presence**, whether the statement is made orally or in writing."

We support the elimination of hostile environments where sexual harassment is accepted. We submit that the ADA should introduce a provision mirroring section 28M in the SDA.³⁶ This provision places an obligation on a person to not subject another person to a workplace environment that is hostile on the grounds of sex. The introduction of such a provision would place a positive duty on employers from allowing hostile workplace environments to exist and cause harm to employees. Such an approach would have further reaching effects than singular claims of sexual

³⁶ *Sex Discrimination Act 1984* (NSW) s 28M.

harassment. A provision of this effect should also be introduced for harassment on the basis of any protected attribute.

Recommendation 14:

The ADA should introduce a provision which prohibits a person from subjecting another person to a workplace environment that is hostile on the ground of sex or another protected attribute.

Positive duty

As it stands, it is apparent that discrimination is rife in our society. Despite some level of protection, there remains significant barriers for marginalised and vulnerable groups in society from being able to address the discrimination they face – and often, it is swept under the rug. To rectify this, in addition to updating the ADA to reflect modern society, NSW must introduce a ‘positive duty’ on duty holders to take steps to address discrimination, vilification and harassment. A ‘positive duty’ on duty holders aims to address systemic issues and eliminate unlawful discrimination prior to its occurrence.³⁷ By enforcing a positive duty on duty holders, there could be a reduction of the number of individuals who are subjected to discrimination, vilification and harassment. People with Disability Australia recognise that a positive duty on duty holders would prevent individual claims and thus provide a benefit to businesses.³⁸ A positive duty would also remove the reliance on the victim-survivor to lodge a complaint and prove that the discrimination or harassment occurred. The obligation should be on the duty holder to ensure that the individual is not victimised in the first place. By introducing a positive duty on the duty holder, the burden is shifted to the duty holder to prove that they have taken all reasonable steps to prevent the incident from occurring. A positive duty encourages all individuals and organisations who are duty holders to proactively

³⁷ Australian Lawyers for Human Rights, ‘Submission in Response to the Australian Law Reform Commission’s Review of the *Anti-Discrimination Act 1977* (NSW)’, 7.

³⁸ People with Disability Australia, ‘Making NSW discrimination laws work for people with disability: Submission to the NSW Law Reform Commission’s Review of the *Anti-Discrimination Act 1977* (NSW), September 2023, 20.

consider the adequacy of their policies, procedures and approach in protecting against discrimination, vilification and harassment.³⁹ The focus of a positive duty is on instituting change and addressing systemic discrimination, rather than determining fault.⁴⁰ We submit that there should be a positive duty on duty holders to prevent discrimination, vilification and harassment.

Recommendation 15:

The ADA should introduce a ‘positive duty’ on duty holders to take all reasonable steps to prevent discrimination, vilification and harassment.

Substantive equality

Reasonable adjustments

We submit that the ADA must promote substantive equality and eliminate systemic discrimination. We recognise that ‘formal equality’ does not produce equality outcomes.⁴¹ Substantive equality recognises that people come from different starting positions and therefore may require reasonable adjustments to access equality outcomes and opportunities.⁴² Aboriginal and Torres Strait Islander women often face compounding barriers, challenges and disadvantage. They must overcome these barriers to be able to access the same opportunities and achieve equality. It is therefore essential that they are provided with reasonable adjustments to ensure that they have the same access and opportunity as other members of the community. Substantive equality measures aim to address structural and indirect discrimination.⁴³ The promotion of provisions to address substantive equality can assist in eliminating

³⁹ Legal Aid NSW, ‘Review of the *Anti-Discrimination Act 1977 (NSW)*’, October 2023, 35.

⁴⁰ People with Disability Australia, ‘Making NSW discrimination laws work for people with disability: Submission to the NSW Law Reform Commission’s Review of the *Anti-Discrimination Act 1977 (NSW)*’, September 2023, 20.

⁴¹ People with Disability Australia, ‘Making NSW discrimination laws work for people with disability: Submission to the NSW Law Reform Commission’s Review of the *Anti-Discrimination Act 1977 (NSW)*’, September 2023, 17.

⁴² *Ibid.*

⁴³ *Ibid.*

systematic or indirect discrimination. The mandating of a positive duty to provide reasonable adjustments can address these forms of discrimination.

NSW must impose a duty to make reasonable adjustments to promote substantive equality. The ADA should introduce a provision for a duty holder to provide reasonable adjustments to prevent indirect discrimination based on a protected attribute. We submit that a ‘reasonable adjustment’ should be imposed as any adjustment which would not impose unjustifiable hardship on the person who would need to make it, such as the employer. An example of a reasonable adjustment would be allowing an Aboriginal or Torres Strait Islander employee to take time off work for Sorry Business. Reasonable adjustment should be made for any individual who would suffer a detriment based on their protected attribute if the adjustment is not provided if it does not impose unjustifiable hardship on the person required to make it. We note that adjustments are already in place under the Act for disability⁴⁴ and carer responsibilities in employment,⁴⁵ however we propose a standalone separate duty to provide adjustments on the basis of all protected attributes.

Recommendation 17:

The ADA should introduce a positive duty to make ‘reasonable adjustment’ to prevent indirect discrimination based on a protected attribute, if it would not impose unjustifiable hardship on the person required to make it.

A NSW Human Rights Act

While a strong ADA is necessary to afford protections for society, this should be accompanied by a legal framework that protects and articulates the human rights for people in NSW.⁴⁶ ADA protections alone are not enough, and do not acknowledge the intersectional nature of human rights as they should.

⁴⁴ *Anti-Discrimination Act 1977* (NSW) s 49D(4)(b), s 49E(3)(b), s 49F(2)(b), s 49G(3)(b), s 49L(4).

⁴⁵ *Anti-Discrimination Act 1977* (NSW) s 49V(4)(b), s 49W(3)(b), s 49X(2)(b), s 49Y(3)(b).

⁴⁶ *Australian Lawyers for Human Rights*, Submission in response to the Australian Law Reform Commission’s Review of the Anti-Discrimination Act 1977 (NSW) (2023) https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD62.pdf.

A NSW Human Rights Act acts as a mechanism to uphold Australia’s international human rights obligations in NSW laws, and ensures that laws and policies in NSW are developed in line with fundamental human rights principles. It additionally offers protection more far-reaching than the ADA is able to, including fundamental rights such as the right to vote and the right to equality before the law.

We note that there is building momentum for a NSW Human Rights Act and are strongly supportive of such an introduction. We recommend that a NSW Human Rights Act also be introduced in NSW, as is in Victoria, ACT and Queensland, and we refer the Commission to the work of key human rights organisations including but not limited to the Australian Human Rights Commission and Australian Lawyers for Human Rights in advocating for a NSW Human Rights Act.

Recommendation 18:

That a NSW Human Rights Act be adopted.

We would welcome the opportunity to discuss our submission and have any further discussions about the options for reform.

If you would like to discuss our submission, please contact Rachael Martin, principal solicitor or Christine Robinson, CEO

Yours faithfully,

Wirringa Baiya Aboriginal Women’s Legal Centre

Per: Rachael Martin
Principal Solicitor