

**From:** [Ghassan Kassisieh](#)  
**To:** [ADAreview](#)  
**Subject:** Submission - Review of the Anti-Discrimination Act 1977 (NSW)  
**Date:** Friday, 15 August 2025 9:59:14 PM

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Dear Commissioners

I would like to provide some brief comments in respect of the NSWLRC's Consultation Paper on the Review of the Anti-Discrimination Act 1977. I am content for my submission to be published, save for my personal contact details below.

I make this submission in my personal capacity.

### **About me**

I am a barrister, called to the Bar in 2024. I was previously a solicitor (since 2011). I have legal experience in a range of areas, including discrimination law. My particular area of expertise is in the area of LGBTIQ+ human rights and anti-discrimination law. I was previously the Legal Director at Equality Australia from 2019 to 2024. I have been involved in both law reform advocacy on anti-discrimination laws, as well as a lawyer in anti-discrimination case work. My bio and CV are available via my profile [here](#).

### **Overarching comments**

In my view, the complexity of anti-discrimination law, exemptions in the law and the difficulties of proof are three significant challenges facing people who experience discrimination. My comments are focused on these three areas. I would be happy to assist the Commission with further information upon request.

### **Addressing key complexity in anti-discrimination law**

What feels like discrimination to people who experience it does not always correspond with what amounts to legal discrimination. There are critical improvements that need to be made to the anti-discrimination framework for it to be easier for complainants and respondents to navigate. The NSW Act needs a wholesale re-write in my view, but federal, state and territory counterpart laws can provide inspiration for what works and does not work so well.

In the time I have, I wished to raise three things that would make a significant difference:

- 1. Remove the comparator test in direct discrimination (Q 3.1), and ensure it is not reintroduced under a new indirect discrimination test (Q 3.2).** Comparisons can

be useful to highlight less favourable or disparate treatment based on a protected attribute or combination of attributes. But comparisons are not always easy. Some protected attributes have unique manifestations and characteristics. Examples of this are pregnancy and (trans) gender identity. These are experiences that are unique to persons who have these attributes, and it is not easy to identify comparisons or the circumstances which should be ascribed to a comparator. Similarly, some attributes protect heterogeneous classes, such as people of different races, religions or disabilities. It becomes very difficult to construct a class for comparison, when different persons within the same protected attribute class might experience different forms of unfavourable treatment. For example, a requirement which impacts on both Muslims and Jews might need to be considered from the perspective of all persons with a religious belief that generally does not allow the eating of pork, rather than by way of comparison as between Muslims and non-Muslims, and Jews and non-Jews. Accordingly, two different identities might need to be brought together to make the comparison work in the real world. For this reason, whatever definitions of direct and indirect discrimination are adopted, it is important that they move away from requiring a comparison in every case. For that reason, to establish direct discrimination, in my view, it should be sufficient to establish that a person has experienced unfavourable treatment based on a protected attribute or combination of attributes. To establish indirect discrimination, it should be sufficient to establish a protected class is likely to experience some disadvantage based on a practice, requirement or condition which is not reasonable in all the circumstances. In defining the notion of 'disadvantage', it may be important to include statutory language that dispels the notion that a comparison is required for indirect discrimination, where as a matter of proportion, a protected class is more likely to be adversely impacted by a condition, requirement or condition than another group: see e.g. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [169]-[171].

**2. Broadly define each attribute and its characteristics, where appropriate.**

Generally, a protected attribute should be defined to include both the attribute and its manifestations or expression. The protected attribute should also include people who are perceived to have the attribute, or who may have had the attribute or will have it in the future. The protected attribute should include characteristics generally appertaining to or imputed to the protected attribute. It should also be possible to have a combination of protected attributes grouped together e.g. age + gender. By moving away from the comparator approach, it becomes easier to look at the circumstances of the individual who has brought the complaint, and what unique combination of differences might have come together to explain whether the act or omission of which they complain, amounts to discrimination based on a protected attribute or combination of attributes. By broadening the definition of an attribute, and also extending its core definition to perceptions, manifestations and expressions related to the attribute, the whole experience of an individual is brought into the frame. An example of how this has been done is s8 of the *Qld Anti-Discrimination Act 1991*.

However, when extending the definition of an attribute, it is necessary to think of down-stream effects. Sometimes the definition of an attribute should be more limited, or exemptions may become necessary to accommodate the rights of others. An example of this are attributes such as religion or political opinion, which may cover a very wide range of beliefs – some of which are inimical to the values underpinning anti-discrimination laws. In my view, anti-discrimination laws should not come to the aid of beliefs that are inherently opposed to the equality or dignity of others. Those who seek to rely on anti-discrimination laws for their protection, should not be permitted to use anti-discrimination laws as a shield against their own discrimination. An example would be a person who claims discrimination protections on the basis of political opinion after their employment is terminated because they have expressed political opinions promoting hate towards another group. To achieve this necessary protection of countervailing rights and interests, attributes such as “political opinion”, “religious belief”, “religious activity”, “criminal history” etc. might be limited by requirements for lawfulness (e.g. *lawful* religious activity), reasonableness (e.g. religious or political beliefs consistent with a free and democratic society) and/or irrelevance (e.g. *irrelevant* criminal record). Alternatively, exemptions might be necessary.

3. **Name the discrimination you are seeking to address.** There has been a shift away from specific attributes protecting historically disadvantaged groups to attributes that apply to everyone (e.g. from homosexuality to sexual orientation, transgender status to gender identity). By removing the comparator test, some of the challenges associated with a heterogenous attribute are resolved. However, I think there is still merit in protecting some specific attributes asymmetrically. An example of this is gender identity. While everyone has a gender identity, it is those whose gender identity or expression is discordant with a person’s designated gender at birth that are likely to experience discrimination based on their (trans) gender identity. I think there is merit in retaining a specific attribute that protects transgender people from discrimination, while also making the attribute of “sex” inclusive of non-binary people and recognises the sex of persons based on their lived gender at the relevant time. Sex discrimination should continue to extend to discrimination based on norms and stereotypes related to sex.

### **Other reform ideas**

Additional tweaks I would suggest include:

- Reverse the burden of proof such that a respondent bears the burden of proving:
  - that an act or omission was not infected with discrimination when a complainant has made out a *prima facie* case of direct discrimination,
  - a practice, condition or requirement is reasonable when a complainant has shown it likely disadvantages a protected class under indirect discrimination, and
  - any defence/exemption.

- Include specific provisions that make it clear that direct and indirect discrimination, and each attribute of discrimination, need not be mutually exclusive (see e.g. contra *Mount Isa Mines* (1993) 46 FCR 301 at 327-328 (Lockhart) discussing ss 5, 6 and 7 of the *Sex Discrimination Act*).
- Include specific provisions inviting judicial notice of commonly known facts without the need for further proof. Examples of this might include that women have historically borne the burden of caring responsibilities; or that First Nations people experience overcriminalisation, such that employment requirements regarding the checking of criminal records are more likely, on average, to disadvantage First Nations people. One way in which this could be achieved practically is to facilitate a legislative process which allows a complainant to serve a Notice to Admit as to such facts, or a notice similar to a Tendency Notice under the Evidence Act, which has the effect of shifting the burden of proof to the respondent to counter the proposition if they wish to disprove it or have the notice set aside. Such a notice might be served as part of the process for putting forward evidence, so that the scope of evidence can be narrowed early in the trial process. It could considerably lessen the cost and scope of expert evidence.
- Protect complainants from adverse costs orders if they are unsuccessful (including on appeal) where a claim is not otherwise vexatious.
- Reconsider the scope of exemptions, particularly blanket exemptions for private educational institutions and religious bodies. In my view, these exemptions are poorly calibrated to protect the countervailing rights and interests of others apart from these institutions. They tend to insulate private schools and religious bodies from discrimination laws too broadly, and without regard to the impact on persons with different religious beliefs or no beliefs. In this regard, I was one of the co-authors on Equality Australia's *Dismissed, Denied and Demeaned* report, and would refer you to that [report](#).
- Shift away from a solely complaints-based model towards a co-regulatory model where a regulatory body also has the ability to take enforcement action for breaches of anti-discrimination laws, in the way an ASIC or ACCC might take action against breaches of their legislation. The regulatory body should have the full suite of regulatory powers available to it, from voluntary undertakings for those who are willing to improve through to the ability to seek civil penalties for those who are recalcitrant or intentional in their breaches of the law. If such a regulatory body were established, it would need to have at least internal separation from the complaints and conciliation function to maintain the confidence of participants in the confidential process.

My apologies for not being in a position to make a more fulsome contribution, but please do let me know if there are any questions or assistance I can provide.

Regards

**Ghassan Kassisieh (he/him)**

**Barrister**