Redfern Legal Centre

Submission
NSW Law Reform Commission
Anti-Discrimination Act Review

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Redfern Legal Centre

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We acknowledge that Redfern Legal Centre is located on the land of the Gadigal people of the Eora Nation and that sovereignty was never ceded. We pay our respects to Elders past and present, and to all the First Nations people, organisations and communities that we work in solidarity with. Always was, always will be.

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Introduction

Redfern Legal Centre (**RLC**) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs - to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, police accountability, and we provide outreach services including through our health justice partnership.

RLC welcomes the opportunity to contribute to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW) (**ADA**).

New South Wales currently lags behind most other Australian jurisdictions in the scope and effectiveness of its anti-discrimination laws. This review presents a critical opportunity to harmonise the ADA with contemporary legislative standards across Australia, and to position NSW as a national leader in advancing human rights. By adopting best-practice reforms aligned with international human rights principles, NSW can strengthen protection for those most vulnerable to discrimination and foster a legal and cultural framework that actively promotes inclusion and the elimination of discriminatory practices in all areas of public life.

RLC urges the NSW Law Reform Commission to consider Australia's international human rights obligations in its review of the ADA. While robust anti-discrimination laws are essential to protecting rights and promoting equality, they are only part of the solution. We strongly advocate for the introduction of a NSW Human Rights Act to ensure that all laws are consistent with these obligations. We recommend that the NSW Parliament establish an inquiry into the development of a Human Rights Act.

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List of Recommendations

1. That the comparator test be removed and replaced with a simpler "unfavorable treatment" test modelled on the *Discrimination Act 1991* (ACT).

2. That the reasonableness standard be removed from the indirect discrimination test.

3. That once a complainant demonstrates that they were treated unfavourably, the burden of proof should shift to the respondent to demonstrate that the complainant was not treated unfavourably because of a protected attribute.

4. That the ADA be amended to include the following definition of discrimination, which is taken from the ACT Act: "For this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else."

5. That ADA be amended to include the following definitions of direct and indirect discrimination:

> A person ***directly*** discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.
>
> A person ***indirectly*** discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.

6. That the ADA be amended to include prospective discrimination.

7. That all references in Part 4C of the ADA to "homosexuality" be replaced with "sexual orientation".

8. That all referenced in Part 4 of the ADA to "marital or domestic status" be replaced with "relationship status".

9. That all references in Part 3A of the ADA to "transgender" be replaced with "gender identity".

10. That the ADA be amended to include the following definition of "gender identity":

Gender identity means:

- the aggrieved person's gender identity or gender expression; or

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- a characteristic that appertains generally to persons who have the same gender identity or gender expression as the aggrieved person; or
- a characteristic that is generally imputed to persons who have the same gender identity or gender expression as the aggrieved person, with or without regard to the aggrieved person's designated sex at birth.

11. That ADA be amended to include 'sex work activity' as a protected attribute.

12. That ADA be amended to include 'irrelevant criminal record' as a protected attribute.

13. That the ADA be amended to prohibit unlawful discrimination:
    a) in all areas of public life;
    b) by public authorities.

14. That the ADA be amended to remove special exceptions for religious bodies, except for an exception regarding the appointment of priests or ministers to the extent there is a genuine occupational requirement.

15. That the reasonable person test under the ADA be amended to include the 'possibility' of offence, humiliation or intimidation.

16. That the ADA be amended to provide that the circumstances, including the attributes of the person harassed and the relationship of the parties, be taken into consideration in determining whether a reasonable person would anticipate the harassment causing offence, humiliation and harassment.

17. That the ADA be amended to include that "conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing."

18. That the ADA be amended to include the following offences:
    a) Harassment on the basis of sex; and
    b) Subjecting a person to a hostile workplace environment.

19. That the ADA be amended to protect people who are sexually harassed in the course of or connected to their work (which includes employment, contracting, and volunteering), regardless of whether the perpetrator is a fellow employee.

20. That the ADA be amended to protect people who are sexually harassed in any area of public life.

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21. That the ADA be amended to expressly provide that victimisation includes threatened or proposed victimisation.

22. That the ADA be amended to remove the “unauthorised act” exception.

23. That the ADA be amended to include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct.

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RLC's Response to Questions in the Consultation Paper

Question 3.1 Direct Discrimination

Could the test for direct discrimination be improved or simplified? If so, how?

The current test for direct discrimination under the ADA should be simplified. In particular, the use of the "comparator" test is legally complex, inaccessible, and imposes an unnecessary evidentiary burden on complainants.

Under the comparator framework, the complainant must establish that they were, or would have been, treated less favourably than a person without the protected attribute in similar circumstances. In our experience, there is often no real comparator, leading to the reliance on hypothetical comparators. In cases where it is clear on the facts that the operative or substantial reason for the less favourable treatment was the person's protected attribute, it is unnecessary and a waste of resources to require a complainant to also prove that a person without their protected attribute would not have been treated less favourably. Instead of assessing the reason particular action is taken on its whole, the current test requires unnecessary inferences about a hypothetical comparator to be considered.

Case Study: Zoe*

We are assisting a transgender music tutor who transitioned mid-way through her employment and requested her employer to update her name and pronouns in its system. After this request, she was not provided any shifts. In this situation, there is no clear or logical comparator; a cisgender person would not request their employer to change their pronouns. The current legal framework requires the formulation of complex legal arguments in scenarios where certain conduct is taken 'because' of a person's protected attribute.

Many people experiencing persistent and intersecting disadvantage self-represent in their discrimination matters. Identifying a relevant comparator, especially in cases where there is no real comparator, is a burdensome task for lawyers, let alone vulnerable people with no legal representation.

The complexity of the comparator test was clearly demonstrated in the High Court decision of *Purvis v State of New South Wales* [2023] HCA 62, which highlighted the ambiguities and limitations of identifying a valid comparator, particularly where behaviours associated with the protected attribute

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(such as disability) are factored into the comparison.

In our experience advising marginalised and vulnerable clients, the comparator requirement creates a barrier to justice. The legal test is difficult to understand and explain. Complainants often face respondents with significant resources—employers, education providers, government agencies—who are better positioned to argue technical interpretations of the law.

We recommend adopting the simpler 'unfavourable treatment' test as used in the *Discrimination Act 1991* (ACT) (**ACT Act**) and the *Equal Opportunity Act 2010* (VIC), and as is similar in adverse action claims under the *Fair Work Act 2009* (Cth) (**FW Act**). This test removes the requirement for a comparator and instead focuses on whether the person was treated unfavourably because of a protected attribute. Where possible, the law should be simplified so that all people in Australia can enjoy anti-discrimination protections.

Recommendation

1. That the comparator test be removed and replaced with a simpler "unfavorable treatment" test modelled on the *Discrimination Act 1991* (ACT).

Question 3.4: Indirect discrimination and the reasonableness standard

(1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it?

(2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

The ADA should be amended to remove the reasonableness standard when assessing discrimination. The ADA should embed a positive duty on duty holders, including employers and service providers, to ensure their policies, procedures, services, and requirements do not disproportionately affect people with a particular attribute.

We do appreciate however, that not all organisations are equipped or resourced to accommodate all people, and that in some circumstances it will be reasonable (within the ordinary meaning of the word) to discriminate. To remedy this, we recommend retaining a confined exception to indirect discrimination; being whether the implementation of such an adjustment would cause the discriminator an unjustifiable hardship. This reflects the current position under federal disability discrimination legislation and

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effectively swaps the burden of proof from a person who is subjected to discrimination to prove the adjustment is reasonable, onto the respondent to prove the implementation of such an adjustment would have caused it an unjustifiable hardship.

Case Study: Gregory*

We assisted Gregory, and elderly man with Parkinson's Disease, whose employer refused to implement an adjustment to his shift times. Gregory previously worked from 9am-5pm, however requested to instead work from 12pm-8pm, to accommodate his morning appointments. The employer operated a 24-hour cleaning business. The employer refused to implement the adjustment, citing that our client had not established it was a reasonable and necessary adjustment. Our client had medical evidence which identified that the adjustment would assist him to attend his medical appointments but did not state he was medically unfit to perform his 9am-5pm shift. Due to the limitations under the ADA, Gregory's prospects of success were significantly lower under the ADA than the *Disability Discrimination Act 1992* (Cth), which provides that an adjustment is only unreasonable if its implementation would cause the employer unjustifiable hardship.

Recommendation

2. That the reasonableness standard be removed from the indirect discrimination test.

Question 3.6: Proving direct and indirect discrimination

(1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects?
(2) Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

RLC supports amending the ADA to introduce a reversed onus of proof.

In our experience, many people who experience discrimination are deterred from pursuing a complaint because there is no documentary evidence supporting their case or they cannot access such evidence. Additionally, complainants are often structurally disadvantaged individuals, such as people with

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disability, First Nations people or migrants. Removing barriers or hurdles for complainants will ensure addressing discrimination is more accessible.

In circumstances where respondents to discrimination claims are often better resourced than complainants and in possession of documentary evidence (if there is any), we recommend that the onus of proof lie with respondents. Mirroring general protections claims under the FW Act, this would require the complainant to prove that unfavourable treatment was taken against them and respondents to disprove that the unfavourable treatment was taken because of the person's protected attribute.

We support the recommendation by the ACT Law Reform Advisory Council in 2015 which proposed that "complainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the…[discriminator] at the time of the unfavourable treatment.

This approach would:

1. make the law more accessible and effective for people who experience discrimination;

2. reflect best practice in other Australian jurisdictions—for example, under the FW Act; and

3. encourage potential respondents such as employers and government agencies to:

    a) take a proactive approach in preventing discriminatory conduct, including in relation to addressing unconscious bias in decision-making; and
    b) keep proper records.

Without this reform, discrimination laws will continue to be underused and ineffective, particularly for the most vulnerable members of our community.

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Case Study: Marie*

Redfern Legal Centre assisted Marie, a young woman working in a restaurant who was dismissed after she made a verbal complaint about sexual harassment from a male colleague to her manager. Our client was dismissed and subsequently, with the assistance of Redfern Legal Centre, wrote a letter alerting the employer to her causes of action, including a sex discrimination claim. The employer responded by intimidating our client and threatening to seek costs against her if she pursued a claim. The respondent told our client that she was lying about the harassment and had no evidence to support her claim, and in those circumstances would not be able to establish she was sexually harassed or dismissed as a result of her complaint. In circumstances where the harassment was verbal, and there was no paper trail substantiating the reason for dismissal, other than our client's purported poor performance, our client was too afraid to pursue the matter further under the ADA or other discrimination legislation.

Had there been a reverse onus of proof, our client could have pursued the claim with confidence that without any evidence demonstrating that she had performed poorly in her work, the employer would be unlikely to overcome the burden of proof and disprove her claim.

Recommendation:

3. That once a complainant demonstrates that they were treated unfavourably, the burden of proof should shift to the respondent to demonstrate that the complainant was not treated unfavourably because of a protected attribute.

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Question 3.7: Relationship Between Direct and Indirect Discrimination

Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

The formal distinction between direct and indirect discrimination should be removed or, at a minimum, redefined to clarify that discrimination may be direct, indirect, or both. In practice, acts of discrimination frequently contain overlapping elements, and it is often artificial to separate them into these rigid categories.

This artificial distinction can create confusion for complainants. Our clients, many of whom are subject to complex, structural forms of discrimination, often cannot categorise their experiences as fitting neatly into "direct" or "indirect" discrimination.

We support a unified definition of discrimination, as used in the ACT. A single, inclusive definition would reduce complexity, improve accessibility and more closely align NSW with international human rights standards.

Such an approach would also reduce regulatory burden, enhance compliance and better reflect the real-world experiences of discrimination faced by our clients.

Recommendation:

4. That the ADA be amended to include the following definition of discrimination, which is taken from the ACT Act: "For this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else."

Question 3.8: Intersectional Discrimination

Should the ADA protect against intersectional discrimination? If so, how?

RLC supports the inclusion of explicit protections against intersectional discrimination in the ADA. Under the current legislative framework, complainants must isolate a single protected attribute as the

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basis of their claim. This requirement does not reflect the lived experience of many people who experience discrimination at the intersection of multiple identities such as sex and race.

Requiring complainants to choose between alleging race, sex, or disability discrimination ignores how these attributes operate in combination to produce distinct harms.

To better protect people facing compounding forms of marginalisation, we recommend amending the ADA to:

- include a definition of discrimination that recognises it can occur because of one or more protected attributes; and
- provide that discrimination based on a combination of attributes is unlawful.

The ACT Act provides a useful model for implementing these changes, with its inclusive and flexible drafting.

Recommendation:

5. That ADA be amended to include the following definitions of direct and indirect discrimination:
   - A person ***directly*** discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.
   - A person ***indirectly*** discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has 1 or more protected attributes.

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?

We recommend that discrimination under the ADA be amended to include prospective unlawful discrimination. This would enable people who are threatened with, or for whom discrimination is likely, to obtain recourse.

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For example, an employer may propose to implement a policy prohibiting all animals from attending the workplace. Such a policy would disproportionately affect vision impaired employees. It is reasonable to anticipate that the suggestion of implementing the policy, even if it is not ultimately implemented, could cause harm to a vision impaired employee who has a service dog. Additionally, allowing an employee to lodge a claim prior to the implementation of the policy may result in the employer changing course and not implementing the policy, without the need for injunctions or complex litigation.

Allowing people to bring claims as soon as discrimination becomes a possibility will enable early intervention and may prevent the substantive discrimination from occurring. Additionally, such a change would recognise the harm suffered by and stress caused by threats or proposals of discrimination.

Recommendation:

6. That the ADA be amended to include prospective discrimination.

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"?

RLC recommends replacing the current term "homosexuality" with "sexual orientation".

The term "homosexuality" is outdated and insufficiently inclusive. The current definition refers to "male or female homosexual" which fails to reflect the diversity of gender and sexual orientation. By amending the ADA to replace "homosexuality" with "sexual orientation", people who are targeted for discrimination and not currently protected by the ADA will be protected. Those people include those who are bisexual, pansexual, asexual, and heterosexual, and importantly would allow for other sexualities which may become recognised in society in the future to also be protected. Modernising the language to refer to "sexual orientation" would bring the ADA into alignment with contemporary understanding of LGBTQIA+ communities and with legislative standards in other jurisdictions. Updating this terminology will also affirm the rights and dignity of people with diverse sexual orientations, and future-proof the ADA to ensure it always reflects and respects the full spectrum of human identity.

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Recommendation:

7. That all references in Part 4C of the ADA to "homosexuality" be replaced with "sexual orientation".

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"?

We recommend references to "marital or domestic status" be replaced with "relationship status". This change will modernise the ADA and make the protection more intelligible to non-lawyers. Currently, the wording is confusing and easily understood as being a narrower protection than intended. For example, it is foreseeable that a person may think the protection only extends to people who are married or who live with a partner. However, the protection extends to people who are discriminated against on the basis of their relationship status, which non-exhaustively includes people who are married, single, in de facto relationships, in polyamorous relationships and widows. Amending the protection to refer to relationship status will also future proof the protection, as society's understanding of relationships evolves.

Recommendation:

8. That all referenced in Part 4 of the ADA to "marital or domestic status" be replaced with "relationship status".

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"?

RLC recommends replacing the current protected attribute of "transgender grounds" with "gender identity". The current definition takes a binary approach to gender identity which does not reflect current experiences of our gender diverse clients. The current act leaves clear gaps in relation to people who identify as non-binary or gender diverse. "Gender identity" is defined under the ACT Act as "the gender expression or gender-related identity, appearance or mannerisms or other gender-related

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characteristics of a person, with or without regard to the person's designated sex at birth." RLC proposes that a similar definition be adopted.

Case Study: Casey*

We assisted Casey, a non-binary retail worker who was consistently misgendered and bullied by colleagues at work. This client had no recourse under the ADA.

Recommendations:

9. That all references in Part 3A of the ADA to "transgender" be replaced with "gender identity".
10. That the ADA be amended to include the following definition of "gender identity":

Gender identity means:

- the aggrieved person's gender identity or gender expression; or
- a characteristic that appertains generally to persons who have the same gender identity or gender expression as the aggrieved person; or
- a characteristic that is generally imputed to persons who have the same gender identity or gender expression as the aggrieved person, with or without regard to the aggrieved person's designated sex at birth.

Question 5.2: Potential new attributes

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

RLC recommends the inclusion of two additional protected attributes:

- Sex work; and
- Irrelevant criminal record.

Sex workers in NSW continue to experience stigma and discrimination. The absence of explicit protections under the ADA perpetuates stigma and undermines the safety and wellbeing of sex workers. RLC recommends the inclusion of sex work as a protected attribute under the ADA and endorse the definition proposed by the Sex Workers Outreach Project (**SWOP**):

"Sex worker means a person who performs sex work. Sex work means the provision by a person of

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services that involve participating in sexual activity, including erotic entertainment, in return for payment or reward."

Recognising sex work as a protected attribute would affirm the rights of sex workers to live and work free from discrimination and would align NSW with international human rights standards and best practice in anti-discrimination law.

Recommendation:

11. That ADA be amended to include 'sex work activity' as a protected attribute.

RLC supports the inclusion of irrelevant criminal record as a protected attribute in the ADA. People with criminal records that are unrelated to the role or context in question should not face ongoing discrimination that impedes their access to employment, education, or services. Discrimination based on irrelevant criminal record undermines rehabilitation, perpetuates disadvantage and negatively impacts marginalised communities, in particular First Nations people, who are disproportionately targeted by police and over-represented in the criminal justice system. Recognising irrelevant criminal record as a protected attribute would bring NSW into closer alignment with jurisdictions such as Tasmania, which already provide such protections.

In the context of employment law, an employee who is dismissed due to irrelevant criminal charges may have recourse through an unfair dismissal claim. However, there are no protections for employees with criminal records in any other facet of employment law. This means that while it would be unlawful to dismiss a chef because of unrelated criminal activity such as drink driving, it is not unlawful to rescind a job offer because upon conducting a criminal record check, a prospective employer sees that five years ago the person was convicted of drink driving.

Employment has been associated with many benefits including the ability to support oneself financially without resorting to offending and the development of prosocial relationship,[1] whereas unemployment has been identified as a key contributor to recidivism.[2] Research from Corrective Services NSW provides the following:

[1] McCreary, P.G., & McCreary, J.M. (1975). *Job training and placement for offenders and exoffenders*. U.S. Government Printing Office: Washington, DC.

[2] Lindeman, K., Howard, M., & de Almeida Neto, A. (2017). *Evaluation of vocational training in custody: Relationships between training, post-release employment and recidivism* (Research Publication No. 57). Corrective Services NSW. ISSN 0813-5800.

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"For someone who has relatively good lawful options of employment, the perceived cost of arrest and punishment is high. However, for someone whose employment prospects are poor due to lack of work experience, education and a serious criminal record, the high recidivism rate is unsurprising given their meagre licit options"[3]

Prohibition of discrimination against a person on the basis of an irrelevant criminal record will have beneficial impacts on rehabilitation and employment for many people, increasing safety in the community as a whole. Distinguishing from relevant and irrelevant criminal record is key – if the crime relates to a person's employment and would either inhibit the person's ability to competently perform the role, or the safety of the community based on the context or requirements of the role, then discrimination should be permitted, but if not, it should not.

Currently there is no protection under federal discrimination legislation for people who are discriminated against on the basis of irrelevant criminal record discrimination. NSW has a unique opportunity to be a national leader in this regard, creating important statutory change which will improve lives and community safety.

Recommendation:

12. That ADA be amended to include 'irrelevant criminal record' as a protected attribute.

Question 6.12: Additional areas of public life

(1) Should the ADA apply generally "in any area of public life"? Why or why not?

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

The ADA should apply to all areas of public life. This reform is necessary to ensure the ADA reflects contemporary understandings of how discrimination occurs, and to close significant gaps in legal protection.

RLC's Police Accountability practice provides free legal advice and assistance to people across NSW. We regularly assist clients who have experienced discrimination during interactions with police. Many of our clients are vulnerable and systemically disadvantaged, including people with disability, First Nations people, people from culturally and linguistically diverse backgrounds, and members of the

[3] Lindeman, K., Howard, M., & de Almeida Neto, A. (2017). *Evaluation of vocational training in custody: Relationships between training, post-release employment and recidivism* (Research Publication No. 57). Corrective Services NSW. ISSN 0813-5800; Cook, P.J. (1980). Research in criminal deterrence: Laying the groundwork for the second decade. In M Norval & M Tonry (eds). *Crime and Justice: An Annual Review of Research*, vol 2. University of Chicago Press: Chicago.

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LGBTQIA+ community. Despite this, the ADA often fails to provide them with an effective legal remedy.

By only prohibiting discrimination in a limited number of defined areas of public life, being; work, education, accommodation, and the provision of goods and services, the ADA enables continued discrimination in other areas of public life. Informed by our work assisting people who have been subject to discriminatory and unfair conduct by police, we are primarily concerned about the limited scope of the ADA in relation to police conduct. In our experience, some of the most serious and harmful instances of police discrimination are not clearly captured by the ADA.

There is jurisprudence that police conduct may constitute the provision of a "service" in certain contexts. For example, it has been held that responding to a call for assistance or initial investigation of a complaint can, in some circumstances, be the provision of a service to the person who contacted police seeking assistance.[4] However, it has also been held that core policing functions, such as investigatory decisions, arrests, the decision to charge and bail decisions are not "services"[5] within the meaning of the ADA. This patchwork of protection in relation to police conduct is difficult for complainants to navigate and places an unfair evidentiary burden on people to establish that police provided a 'service', before pursuing their substantive claim.

Case Study: Cindy*

Our client Cindy, a person with both physical and psychological disabilities, was unlawfully prevented from boarding a bus with her accredited assistance animal. The bus driver called police, who attended the scene. The police officers dismissed Cindy's legal rights, publicly shamed her and questioned the legitimacy of her disability and need for an assistance animal. Despite the police conduct being central to this discriminatory experience, it is unlikely that Cindy can seek recourse against the police under the ADA because the interaction does not clearly fall into the type of police conduct that has previously been recognised as the provision of a service.

In our experience, discriminatory practices by police not only target people with a disability. RLC has also assisted clients who experienced racial profiling, gender-based mistreatment, and failure by police to appropriately investigate their complaints. As the conduct did not occur in the provision of "services", these clients had no recourse under the ADA.

Data published on RLC's Police Accountability Dashboard[6] on the use of police powers in NSW reveals

[4] *Commissioner of Police v Mohamed* [2009] NSWCA 432; *Weldon-Bowen v Commissioner of Police, NSW Police Force* [2024] NSWCATAD 7; *Quilty v Commissioner of Police [2025] NSWCATAD 56.*
[5] *Commissioner of Police, NSW Police Force v Estate of Edward John Russell* [2001] NSWSC 745; *Weldon-Bowen v Commissioner of Police, NSW Police Force* [2024] NSWCATAD 71.
[6] https://rlc.org.au/policeaccountabilitydashboard

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that police powers are exercised against First Nations people and other communities experiencing disadvantage such as young people at significantly higher rates. These statistics provide compelling evidence of systemic and potentially discriminatory treatment that is not adequately addressed under the current ADA.

The figures strongly suggest the presence of bias and structural discrimination in policing practices. The consistent overrepresentation of First Nations people and children across multiple categories of police powers cannot be explained by population demographics alone.

We submit that the ADA should be amended to ensure all people in NSW are protected from discrimination in public or by police.

The ADA should apply broadly to all areas of public life, as is already the case under the *Racial Discrimination Act 1975 (Cth)* (**RDA**). The RDA prohibits discriminatory acts done "otherwise than in private". A similar approach in NSW would remove the current legal ambiguity and better reflect the reality of how discrimination can and does occur outside of the provision of services, employment or education.

While retaining the existing protected areas (work, education, goods and services, accommodation, and registered clubs), the ADA should be expanded to all areas of public life and should also explicitly include discrimination by public authorities in the exercise of government functions and the administration of laws.

Recommendation:

13. That the ADA be amended to prohibit unlawful discrimination:
    a) in all areas of public life;
    b) By public authorities.

Question 7.1: Religious personnel exceptions

(1) Should the ADA provide exceptions for:
(a) the training and appointment of members of religious orders?
(b) "the appointment of any other person in any capacity by a body established to propagate religion"?
(2) If so, what should these exceptions cover and when should they apply?

We recommend amending the ADA to ensure that religious bodies cannot engage in unlawful discrimination. Permitting religious bodies to discriminate on the basis of protected attributes is inconsistent with the objectives of the ADA. It elevates religion above other protected attributes, such as sexuality. The prohibition on discrimination by religious bodies should apply in particular when

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religious bodies provide government funded services.

However, Redfern Legal Centre supports retaining a narrow exception to allow religious bodies to discriminate in their appointment of priests or ministers to the extent that there is a genuine occupational requirement. This will ensure religious bodies are able to both maintain doctrinal integrity and engage equally and fairly in modern society.

Case Study: Zoe*

We are assisting a transgender client who was a music tutor at a religious school. When she advised her managers that she was transitioning and requested her pronouns to be updated in the school's system, she was effectively stood down for a year, until her fixed term contract ceased. She has no recourse under the ADA and is pursuing a claim under the SD Act.

Recommendation:

14. That the ADA be amended to remove special exceptions for religious bodies, except for an exception regarding the appointment of priests or ministers to the extent there is a genuine occupational requirement.

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?
(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?
(3) Does the ADA need to define "conduct of a sexual nature"? Why or why not?

The ADA should be amended to bring it into line with the *Sex Discrimination Act 1984* (Cth) (**SD Act**). The SD Act reflects best practice and is the result of research and advocacy from stakeholders including the Australian Human Rights Commission.

The ADA should amend the definition of sexual harassment to include the 'possibility' a person would be offended, intimidated or humiliated. Implementing the lower bar which is seen in the SD Act would increase access to justice for victim-survivors of sexual harassment. By requiring a person to establish that a reasonable person would anticipate that the person harassed would in fact be offended,

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humiliated, or intimidated, the ADA preferences the views of the 'reasonable person', as opposed to the victim, who by virtue of bringing the claim, is alleging they were in fact humiliated, offended or intimidated. The higher threshold leaves open the option for harassers to argue that if the victim-survivor was simply more robust or less sensitive, they wouldn't have been harassed, and that any 'reasonable' person wouldn't have been offended. This may lead to proceedings that are unnecessarily retraumatising.

Redfern Legal Centre supports amending the ADA to include specific reference to circumstances that should be considered in determining whether a person was sexual harassed. As highlighted in *Magar v Khan [2025] FCA 874* (**Magar**), a victim-survivor's specific circumstances and the relationship between the victim-survivor and perpetrator, such as age, power imbalance, disability, sex and visa status, are particularly relevant when considering the seriousness of, and harm caused by, sexual harassment.

The ADA should adopt the SD Act definition of "conduct of a sexual nature". This will assist complainants and respondents in clarifying that conduct such as a written statement can amount to sexual harassment. This will help combat outdated views about sexual harassment being only physical and violent, when, sexual harassment is increasingly occurring electronically.

Case Study: Jennifer*

We assisted Jennifer, an international student who did a trial shift at a bar. During the trial shift, Jennifer's boss touched her waist and commented on her attractiveness. Jennifer told him to stop and he responded by firing her. Later that day, he sent her a barrage of text messages regarding her past sexual activities and her appearance. Jennifer came to Redfern Legal Centre for advice about the sexual harassment she had been subjected to during her trial shift. It wasn't until we provided her advice about the meaning of sexual harassment that she became aware that the text messages she was sent later that day also amounted to sexual harassment.

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Recommendations:

15. That the reasonable person test under the ADA be amended to include the 'possibility' of offence, humiliation or intimidation.
16. That the ADA be amended to provide that the circumstances, including the attributes of the person harassed and the relationship of the parties, be taken into consideration in determining whether a reasonable person would anticipate the harassment causing offence, humiliation and harassment.
17. That the ADA be amended to include that "conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing."

Question 9.2: Other sex-based conduct

(1) Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not?

(2) Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not?

(3) Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?

Redfern Legal Centre recommends the ADA is amended to brought in line with the SD Act. The SD Act reflects best practice and is the result of research and advocacy from a range of relevant stakeholders, including the Australian Human Rights Commission.

Harassment on the basis of sex and hostile workplace environment were introduced to the SD Act to ensure a holistic and proactive approach to sex discrimination. As found in Magar, workplaces that tolerate a sexist workplace culture are fertile ground for more serious sexual harassment to occur. By prohibiting workplaces from harassing people on the ground of sex, for example by making demeaning sexist jokes about women, and maintaining workplaces that are hostile to people of a particular sex, for example by requiring women to do all of the cleaning tasks, workplaces in NSW will be safer. Prohibition of such conduct will encourage employers to implement proactive, workplace-wide initiatives aimed at maintaining a safe and equal workplace. This in turn will result of lower incidents of workplace sexual harassment.

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Recommendation:

18. That the ADA be amended to include the following offences:
    a) Harassment on the basis of sex; and
    b) Subjecting a person to a hostile workplace environment.

Question 9.3: Sexual harassment in the workplace

Should the ADA adopt the Sex Discrimination Act's approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking? Why or why not?

The ADA should be amended to adopt the SD Act's approach of prohibiting sexual harassment in connection with someone's status as a worker or person conducting a business or undertaking. The SD Act provides vital protection for people who are not employees, such as volunteers and contractors, who are susceptible to sexual harassment, however, often have little recourse. The SD Act also provides protection to workers who are sexually harassed by clients or customers. This wide protection requires employers to take steps to ensure workplaces are safe for everyone.

The protection under the SD Act clearly sets out that employers must not permit or allow workers to be sexually harassed in the course of their work, including by customers or clients. This will necessarily lead to the implementation of strict guidelines and protocols for dealing with customers or clients that ensures everyone has a safe workplace.

Case Study: Daiyu*

We recently assisted Daiyu who worked at an aged care facility. She was repeatedly sexually harassed by an elderly resident with dementia. She reported each incident to her employer, however no steps were taken, and she was consistently rostered to provide the same resident care. We assisted Daiyu to bring a claim under the SD Act, alleging that the sexual harassment was connected to her work, and that her employer was accessorily liable for the conduct. Daiyu had no available cause of action under the ADA Act.

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Recommendation:

19. That the ADA be amended to protect people who are sexually harassed in the course of or connected to their work (which includes employment, contracting, and volunteering), regardless of whether the perpetrator is a fellow employee.

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?

(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?

We repeat our comments and recommendations above at Question 6.12 and recommend that sexual harassment be unlawful in all areas of public life.

Victim-survivors of sexual harassment should be enabled by the legal system to seek recourse for unwanted sexual conduct that is directed towards them and causes them harm, regardless of whether it occurs at work, or elsewhere. Sexual harassment can have profound and lasting impacts on victim-survivors and the criminal justice system often does not offer a trauma-informed and victim-focussed process or outcome.

In criminal cases, 'justice' is often only purportedly achieved by the perpetrator being incarcerated. Guilty findings often proceed lengthy police investigations, trials which are retraumatising for victim-survivors, and a process over which the victim-survivor has little, if any, control. Research from the Australian Institute of Criminology has found:[7]

"Victim-survivors often report negative encounters with police and the criminal justice system, which some scholars describe as a 'secondary victimisation' (Murphy-Oikonen et al. 2020; Taylor & Gassner 2010) or a 'second rape' (Spencer et al. 2018)"

Civil sexual harassment claims, in contrast, offer a victim-focused outcome; outcomes are led by the needs of, and harm caused to, the complainant.

[7] Heydon, G., Henry, N., Loney-Howes, R., & Hindes, S. (2023). *Alternative reporting options for sexual assault: Perspectives of victim-survivors* (Trends & Issues in Crime and Criminal Justice No. 678). Australian Institute of Criminology. https://doi.org/10.52922/ti77123

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Conduct which amounts to civil sexual harassment often does not rise to the level of being criminal conduct. Additionally, in many cases there is no documentary or physical evidence of the sexual harassment, rendering the likelihood of criminal prosecution very low. The civil burden of proof offers victim-survivors a lower evidentiary burden to obtaining justice.

Case Study: Bridgette*

We assisted Bridgette, a young woman who was raped by an older colleague after a work event. Bridgette reported it to police. However, Bridgette found the police process to be disempowering and confusing. Bridgette had no control over the police's decision to pursue the case and was often required to speak with male police officers about the offence. Bridgette was incredibly nervous about not being believed, about her character being tarnished, and about how she would be portrayed if there was any media coverage. Bridgette had no 'hard' evidence of the sexual assault and felt overwhelmed at the reality that should the case continue, her credibility would be picked apart by the defence.

Redfern Legal Centre acted for Bridgette in a civil sexual harassment claim under the SD Act. Through the civil process we were able to assist Bridgette to obtain financial compensation, have the harm caused to her acknowledged and achieve systemic change in her old workplace. Despite the obvious difficulties in the process, Bridgette felt empowered by it.

Had the harassment been perpetrated outside of her employment, Bridgette would have had no recourse outside of the criminal justice system.

Introducing a civil cause of action for people who are targeted for sexual harassment in all areas of public life, such as on public transport, when purchasing goods or accessing services or when accessing entertainment would lead to society-wide cultural shifts in attitudes and behaviours. Sexual harassment will no longer be normalised, and in turn, society will be safer for everyone.

Recommendation:

20. That the ADA be amended to protect people who are sexually harassed in any area of public life.

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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?

(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?

We recommend that the ADA be amended to specifically prohibit threats of victimisation. It is often the threat of victimisation which is itself victimising. In Magar, it was held that threats to commence defamation proceedings amounted to unlawful victimisation under the SD Act and resulted in the award of $10,000 general damages.

Recommendation:

21. That the ADA be amended to expressly provide that victimisation includes threatened or proposed victimisation.

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?

Consistent with other federal discrimination legislation, we recommend the single exception of "reasonable steps" be retained in the ADA and that the "unauthorised acts" exception be removed.

Employers rarely 'authorise' unlawful conduct from occurring, and it is not the authorisation of such conduct that the ADA should focus on prohibiting. The ADA should instead focus on ensuring that duty holders take all reasonable steps to prevent discrimination from occurring. The unauthorised act exceptions allow duty holders to escape liability through passive action, which is antithetical to the proactive approach which must be taken to eliminate discrimination.

Recommendation:

22. That the ADA be amended to remove the "unauthorised act" exception.

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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?

(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?

Redfern Legal Centre supports the introduction of a positive duty into the ADA. Duty holders must be required to take reasonable and proportionate measures to prevent and eliminate unlawful conduct. This reform is essential to modernising NSW's anti-discrimination framework and ensuring it reflects contemporary human rights standards and best practice legislative models.

Currently, the ADA operates as a reactive, complaint-based system that places the burden on individuals who are often already experiencing structural disadvantage, to identify, report and prove discrimination after harm has occurred. In our experience, this model fails to address systemic inequality and is inaccessible to many of our clients, particularly First Nations people, people with disability and those from culturally and linguistically diverse backgrounds.

A positive duty (among other reforms proposed in this submission) would help to shift the focus from redress to prevention, requiring organisations to proactively identify and address risks of discrimination, harassment, vilification and victimisation before they occur. This approach is already embedded in the SD Act following the Respect@Work report and has been endorsed by the Australian Human Rights Commission.

The duty should apply to all forms of unlawful conduct under the ADA, including:

- discrimination;
- vilification;
- victimisation; and
- sexual harassment.

We propose that the following organisations/persons be included as duty holders:

- employers and persons conducting a business or undertaking;
- education providers;
- providers of goods and services;

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- government departments; and
- statutory bodies and authorities.

As outlined in our answer to Question 6.12, the limited application of the ADA in respect of police conduct has left many of our clients, particularly First Nations people, without effective legal remedies for discriminatory treatment by police. Embedding a positive duty that applies to government departments and statutory bodies, including the NSW Police Force, would be a critical step toward addressing this gap.

We recommend that the ADA adopts a positive duty model that takes into account the specific circumstances of the duty holder, similar to the positive duty models under the ACT Act and the SD Act. The circumstances to be taken into account when assessing compliance should include:

- the size, nature and circumstances of the organisation;
- the duty holder's resources; and
- the practicability and cost of the measures.

These factors would ensure the duty is adaptable and fair, allowing organisations to tailor their compliance strategies to their capacity while maintaining accountability.

Recommendation:

23. That the ADA be amended to include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct.

**Names have been changed to protect clients' privacy*

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