

NSW Women's Advisory Council

Re: Submission to the NSW Law Reform Commission regarding the *Anti-Discrimination Act 1977* (NSW) Review

The NSW Women's Advisory Council (the Council) was established to provide policy advice to the NSW Government and represent diverse voices, experiences and priorities of women across NSW. The Council works with the Minister for Women and Women NSW to advise on the issues affecting women and girls across the state and promotes equitable policy outcomes across the work of government.

The Council's membership includes expertise in gender equality, workplace diversity and inclusion, and community services delivery. Members reflect the focus communities within NSW and ensure that the perspectives of these community groups are considered in policy discussions relevant to them. Information on member backgrounds is available [here](#).

The Council values the opportunity to provide input and recommendations as part of the review of the *Anti-Discrimination Act 1977* (ADA). The review considers how the ADA '*can be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards*'. The Council emphasises the central need to provide protections with regards to *intersectional gendered* discrimination, vilification, sexual harassment and victimisation.

In making this submission, the Council's key priority is to ensure that any amendments to the ADA resulting from the LRC's Review only strengthen or enhance anti-discrimination protections for minority or disadvantaged community groups. Protections must be additive, so that any changes to modernise and accurately reflect the diversity and dignity of the lived experiences of women and girls across NSW do not inadvertently limit the existing protections and support afforded to them.

The Council recognises there are evidentiary issues that particularly affect women and intersectional community groups, with complainants bearing the burden of proof. This burden can be intensified through intersectionality considerations, where individuals may experience overlapping and intersectional forms of discrimination.

The Council notes that, in its current form, the ADA is difficult to interpret and apply in practice, requiring individuals to undergo a lengthy legislative and outcome process, which should be simplified. The Council also recommends that the language of the ADA be simple and clear, enabling individuals to use the ADA when appropriate. The Council also notes that this should include consideration for how girls and young people might use the ADA separately from women. Furthermore, the Council notes that consideration should be given to ensure that the ADA is sufficiently promoted and understood so that it can be utilised by all, following the LRC review.

The Council recognises the importance of ensuring that the bodies responsible for applying and enforcing the ADA are adequately resourced to carry out their statutory functions. As such, in the context of the recommendations in this submission, the Council also recommends a resource uplift of Anti-Discrimination NSW to carry out additional responsibilities that may arise from changes to the ADA.

This submission will be structured according to the groupings provided within the consultation paper, Community Summary and Easy Read consultation paper.

Tests for discrimination

Intersectional Discrimination

- The ADA should protect against intersectional discrimination, recognising that individuals aren't necessarily experiencing discrimination because of their sex but because of their experiences of intersectionality. This would reflect that individuals do not live in a one-dimensional way, where it is often impossible to identify which single attribute is the basis of discrimination.

- The ADA should be amended to protect against discrimination that is based on more than one attribute. Many women may face intersectional, adjacent or compounding discrimination. This change would let individuals who experience discrimination on more than one ground file a single, all-in-one complaint, instead of having to submit separate claims for each reason.

Discrimination and protected attributes

- The ADA should be amended to prohibit discrimination based on the list of protected attributes, which should include those recognised under the *Fair Work Act 2009* (Cth), such as being subjected to family and domestic violence, political opinion, and social origin. Expanding the list of protected attributes by introducing broader or more open grounds for discrimination would provide flexibility and ensure that the legislation will still be protective against emerging grounds for discrimination. Though a matter for the LRC, achieving this purpose could come from changing the operation of the ADA entirely so that it provides that a person may not be discriminated against on any ground, including a non-exhaustive, open-ended list of attributes.

Sex and Gender

- The current definition of “sex” in the ADA is limited by its binary framing of ‘male’ and ‘female’. This does not reflect the lived experiences of many individuals whose identities may fall outside traditional male or female categories. The Act should be amended to include “sex” and “gender” as distinct attributes, while also expanding on definitions of gender, gender identity and gender expression, in recognition that gender encompasses a broader and more fluid spectrum. The LRC may determine that the way to ensure appropriate consideration of the gender spectrum is for “gender identity” and “gender expression” to be included as protected attributes, alongside “sex” and “gender”,

Transgender Grounds & Non-Binary

- The ADA should be amended to eliminate the phrase “transgender grounds”, which is outdated and insufficiently inclusive. That phrase should be replaced with “gender identity”, which would provide clearer and more comprehensive protections for gender-diverse individuals. This change would align the ADA with the *Commonwealth Sex Discrimination Act 1984* and reflect current understandings of gender diversity, ensuring that all individuals are protected from discrimination regardless of how they identify or express their gender.
- ‘Non-binary’ should be included and defined as a protected attribute as distinct from ‘transgender’ as the safest form of inclusion.

Sexual Orientation

- The ADA’s current reference to “homosexuality” is narrow and exclusionary. The Council support broadening this attribute to “sexual orientation” to include bisexual, pansexual, asexual, and other identities. This change would ensure that the legislation reflects the diversity of sexual orientations and provides equal protection to all individuals, consistent with federal law.
- This change could be accomplished by amending the ADA to frame ‘heterosexuality’ as the assumed norm, and for the ADA to prohibit discrimination based on any sexual orientation that deviates from heterosexuality.

Intersex Status

- The absence of explicit protection for individuals with intersex variations is a significant gap in the ADA. The ADA should be amended to prohibit discrimination based on “sex characteristics” to affirm the rights and dignity of individuals with intersex variations to ensure they are not subject to discrimination based on their biological characteristics.

Carer’s Responsibilities

- The ADA should be amended to expand the current definition of “responsibilities as a carer” to also recognise diverse family structures and caregiving relationships.
- Amendments to the ADA that would affect that change include:

- Introducing a separate ground of discrimination based on parental status, i.e. being or not being a parent
- Recognising family structures outside a nuclear family relationship, where the law may not recognise a caregiver, kinship relationship or ‘chosen family’ as a parent
- The ADA be amended to recognise long-term partners with the same legal protections as afforded under marriage as ‘carers’ for purposes of protection under the act.

Pregnancy and Breastfeeding

- The ADA should be amended to prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination. These experiences are unique and often give rise to specific forms of disadvantage that are not adequately addressed under the broader category of sex discrimination.
- The change could be affected by amending the ADA to remove references to pregnancy and breastfeeding from the Act’s prohibition of discrimination based on sex, and to specifically prohibit discrimination based on breastfeeding and/or pregnancy.

Tests for Discrimination

- The tests for discrimination are onerous and complicated, with an unfair burden on complainants. The comparator test is troublesome and will be even more burdensome once the additional intersectional attributes are protected.

Civil protections against vilification

Protected attributes for vilification

- The ADA should be amended to prohibit vilification for all the attributes for which it prohibits discrimination, noting that it currently only prohibits vilification on some of the grounds for which discrimination is prohibited. The omission of certain attributes from vilification increases complexity, causing inconsistencies.

Definition of Public Act

- Hostility and hatred aren’t confined to public spaces or traditional media, they surface in whispers among neighbours, in social-media groups, even in ostensibly “private” community gatherings. If the Act only names certain attributes and only prohibits public incitement, it leaves people exposed to more subtle, yet deeply harmful, attacks. By recognising that vilification can occur through online harassment, workplace banter or community rumour-mongering, we ensure the law captures the real-world experiences of those we serve.

Harassment

- The ADA should be amended to provide protections against harassment that are at least as comprehensive as the Commonwealth *Sex Discrimination Act 1984*, in response to each of the current differences between the two Acts that are discussed in the LRC’s consultation paper, including to cover conduct the consultation paper describes as ‘other sex-based conduct’.
- The ADA should be amended to expand the prohibited categories of harassment beyond sexual harassment to cover gender-based harassment (e.g. misogynistic bullying) and harassment in digital spaces (e.g. online abuse) to reflect the modern contexts where women and girls and other individuals are targeted.

Promoting substantive equality

Positive Duty

- The ADA does not currently include a positive duty to prevent and/or eliminate unlawful conduct. The current mechanism is reactive and complaint-based, with narrow definitions of conduct. There is weak compliance and enforcement with additional burden placed on the victim.

- The ADA should be amended to include a positive duty to prevent discrimination and unlawful conduct. The positive duty should include the requirement to take reasonable and proportionate measures to prevent discrimination, harassment, and victimisation would shift the burden from individuals to organisations and promote systemic change. There is support for the adoption of a model aligned with the Commonwealth *Sex Discrimination Act 1984* and the recommendations made by the Australian Human Rights Commission in its *Respect@Work: Sexual Harassment National Inquiry Report*.
- Amendments should also grant power to Anti-Discrimination NSW to monitor compliance, conduct inquiries, and undertake systemic investigations of whether employers are complying with those obligations, as well as enforcement powers. This could be modelled off the recently introduced powers for the Australian Human Rights Commission at the Commonwealth level. (See the AHRC [Letter of Intent](#)).
- This positive duty should be the same as that recently introduced (October 2022) by the Australian Human Rights Commission under the *Sex Discrimination Act 1984*. Under the positive duty, organisations and businesses now have a legal obligation to take to take proactive and meaningful action to prevent relevant unlawful conduct from occurring in the workplace or in connection to work. This positive duty is to eliminate, as far as possible, the following unlawful behaviour from occurring:
 - discrimination on the grounds of sex in a work context
 - sexual harassment in connection with work
 - sex-based harassment in connection with work
 - conduct creating a workplace environment that is hostile on the grounds of sex
 - related acts of victimisation.
- Issues that require further consideration include:
 - How the mechanisms for referral and reporting under positive duty are supportive for increasing accountability and promoting victim safety when disclosing.
 - Consideration of which spheres will have a positive duty, and who holds responsibility, i.e. workplaces, communities, the night-time sector?
 - How will these be monitored and regulated?
- Employers and managers must be held accountable for creating safe and respectful workplaces. A positive duty in law would make it clear that bosses can't simply wait for complaints; they need to actively prevent harm. That means:
 - Implementing clear policies on discrimination, vilification and sexual harassment, and ensuring everyone knows them.
 - Regular training so leaders and teams recognise unacceptable behaviour and know how to intervene.
 - Risk assessments to identify where problems are most likely to occur, whether in recruitment, promotion processes, or everyday interactions, and addressing them before they escalate.
 - Safe reporting channels, staffed by individuals/specialists trained in trauma-informed practice, so anyone can speak up without fear of reprisal.
 - Ongoing monitoring and review, using surveys and audits, to check whether policies are working and to adjust promptly if they aren't.
- By embedding these requirements into an employer's legal obligations, we shift from a reactive system whereby individuals and organisations are punished only after something goes wrong, to a proactive culture where respect and inclusion are built in.

On behalf of the Council, I invite you to review our proposal and consider the diverse voices, experiences, and priorities of women in NSW. If you wish to discuss this further, please contact the Council at WAC@tco.nsw.gov.au.

Sincerely,

Associate Professor Jill Duncan OAM, Chair
The NSW Women's Advisory Council