# Submission on the Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper

## Introduction

Thank you for the opportunity to make a submission in response to the Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper. We are academics at Macquarie Law School who research and teach in the field of anti-discrimination law, human rights, and other related areas. Our expertise is outlined briefly below:

**Professor Therese MacDermott** has worked in the equality law field for 30 years moving between academia, the legal profession, as a Tribunal member hearing discrimination cases, and as a consultant both regionally and locally. Her research focuses on employment law, anti-discrimination law and dispute resolution. It draws together both the theoretical underpinnings and the practical pursuit of workplace rights and their ultimate resolution. It critiques the intersection of equality discourse with legal regulation, and the access to justice available in these circumstances.

**Dr Mareike Riedel** is a sociolegal scholar whose research examines the intersections of religion and race in law. Her work is focussed on the rights of religious and cultural minority groups, religious and racial discrimination, and legal responses to antisemitism and Islamophobia.

**Dr Amira Aftab** is a feminist legal scholar whose research centres of the lived experiences of marginalised communities. Her research interest and expertise span human rights, the gendered nature of institutions, Islamophobia, and women's agency, with a particular focus on the intersection of gender, religion, and the law.

Based on our areas of expertise we are focusing our submission on the issues of religious discrimination, the definition of race, intersectional discrimination, and positive duties, and recommend reforms to the NSW *Anti-Discrimination Act 1977* ('ADA').

## Religious Discrimination

The population of NSW is increasingly diverse in terms of its religious make-up. With the 2021 Census data highlights approximately 12% of NSW respondents have a religious affiliation that was not Christianity or 'Secular Beliefs and Other Spiritual Beliefs and No Religious Affiliation', this was up from approximately 10% in 2016 (ABS 2021). Islam is the largest religious affiliation after Christianity and 'Secular Beliefs and Other Spiritual Beliefs and No Religious Affiliation' (ABS 2021). The lack of religion as protected attribute is therefore a glaring omission that leaves some members of the community insufficiently protected and signals to society that it is acceptable to treat someone less favourably because of their religion (or lack thereof). Members of religious minority

communities are particularly vulnerable to discrimination, including when they are publicly visible as members of their religion through religious dress, such as turbans or hijabs (Bhatti et al. 2023).

In all Australian states and territories, except for NSW and South Australia, religion is included as a protected attribute, though we note the specific language used varies slightly as illustrated in the table below:

| **Jurisdiction** | **Legislative Provision** | **Protected Attribute (term used)** |
|---|---|---|
| Australian Capital Territory | *Discrimination Act 1991* | Religious conviction (Section 7(t)) |
| Northern Territory | *Anti-Discrimination Act 1992* | Religious belief or activity (Section 19(m)) |
| Queensland | *Anti-Discrimination Act 1991* | Religious belief or religious activity (Section 7(i)) |
| Tasmania | *Anti-Discrimination Act 1998* | Religious belief or affiliation (Section 16(o)); and religious activity (Section 16(p)) |
| Victoria | *Equal Opportunity Act 2010* | Religious belief or activity (Section 6(n)) |
| Western Australia | *Equal Opportunity Act 1984* | Religious or political conviction (Section 3(a)) see also Part IV on 'Discrimination on the ground of religious or political conviction') |

In comparable international jurisdictions, we note that religion is recognised as a protected attribute in discrimination and human rights legislation. In the United Kingdom (UK) section 10 of the *Equality Act 2010* explicitly recognises 'religion or belief' as a 'protected characteristic'. Within this provision religion is defined as 'any religion and a reference to religion includes a reference to a lack of religion' (s.10(1)) while belief is defined as 'any religious or philosophical belief and a reference to belief includes a reference to a lack of belief' (s.10(2)). In Canada, prohibition of discrimination on the grounds of religion is included at a constitutional level within the *Canadian Charter of Rights and Freedoms* which specifically states that:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (section 15(1))

Additionally, the Canadian *Human Rights Act 1985* specifically states religion as a 'prohibited grounds of discrimination (section 3(1)).

As evidenced within other Australian state and territory jurisdictions, and through international jurisdictions, it is widely accepted to include religion as a protected attribute and is a considerable gap in the current NSW legislation.

We acknowledge that consideration of including religion as a protected attribute gives rise to questions around the scope of religious exemptions. Whilst we recognise the importance of this aspect, due to time constraints in preparing this submission, we will not be addressing this aspect in depth. However, we believe that solutions or responses to the matter of religious exemptions (and

religious discrimination) should take a human rights-based approach that takes seriously the needs of vulnerable populations, including religious minority communities and LGBTI+ communities.

## II. Race Discrimination and the Meaning of Race

A major gap in the current ADA is that Muslims are not protected under racial discrimination provisions. While including religion as a protected attributed would somewhat resolve this issue, there is also reason to reconsider the definition and interpretation of the term race and its allied concepts in the current ADA. Specifically, the term 'ethno-religious' has been confusing for Tribunals. In most tribunal decisions to date, Muslims have been found to not constitute an ethno-religious and therefore racial group for the purposes of the ADA despite the intent of Parliament when it included the term 'ethno-religious' into the ADA. This is because tribunals have employed a narrow approach to the term, such as in Khan, or aligned the term with the definition of 'ethnic' drawing on key cases on the meaning of 'ethnic' in *Mandla* and *King Ansell,* rather approaching 'race' as a social construction that changes and evolves over time. This approach to Islamophobia and the discrimination of Muslims is out of step with current research that shows that Muslims can experience racial discrimination qua their Muslim identity.

We recommend that a reformed ADA encourage a contextual and purposive 'living instrument' approach to the interpretation of race and its allied terms (see also Eastman 2015) that recognises the proximity of race, ethnicity, and religion and the evolving and malleable nature of racial categories in the interpretation of race and ethno-religious to account for contemporary developments.

Such an approach was already evident in a case concerning the vilification of Muslims in *Jones and Harbour Radio Pty Ltd v Trad* (No 2) (EOD), 25. Here, the Appeal Panel of the Administrative Decisions Tribunal stated that the category of 'ethno-religious origin' does not refer to an 'unchanging entity' but to 'a social construct or a set of social constructs that is to some degree changeable, chiefly depending on the attitudes of others, including vilifiers, to those enduring aspects of the group that can fairly be said to be related to its religion'. (para 248) The Appeals Tribunal further noted that to be considered an ethno-religious group, the group must have a shared religious origin, and it provided a list of matters ('in no particular order') that 'may be relevant to determining whether a particular group qualifies for the Act's protection'(para 36). These include perceptions of the group as outsiders or condemnation of the group as a whole, suggesting that Muslims could be seen as an ethno-religious group in contemporary Australia.[1]

We therefore also recommend that the ADA encourage an intersectional approach to race discrimination to recognise the intersectionality of religion and race. We expand on this recommendation in the next section. The importance of taking an intersectional approach was recently noted by Australian Race Discrimination Commissioner in applying for special leave to appear as *amicus curiae* in the *Hanson v Faruqi* appeal case. This case as noted by the Commissioner demonstrates the reality of discrimination, and that it is in fact intersectional (Australian Human Rights Commission 2025). We discuss intersectionality in the context of discrimination below.

[1] Unfortunately, a later decision in *Ekermawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 rejected this approach and returned to a narrow interpretation based on the definition of 'ethnic'.

## III. Intersectionality

Another recommendation proposed is that the ADA adopt an intersectional approach to discrimination. Discrimination is not always experienced on just one grounds alone. For example, an individual experiencing religious discrimination (i.e. Islamophobia) may also experience sexism in the same instance, and forcing the categorisation of the experience into a singular 'type' of discrimination is artificial and will not adequately reflect the experience of the individual.

The theory of intersectionality was first introduced by Kimberlé Crenshaw in the US context with a particular focus on race and sex (Crenshaw 1989). It has become a leading theory in understanding the intersections of oppression (and discrimination) experienced by individuals, with the understanding that there is a vast array of identities that may intersect (not just race and sex; or race and religion) and this is unique to each individual. It is a framework and approach that not only helps us understand the way that an individual's various social and political identities combine to shape their experiences of discrimination and privilege (Crenshaw 2021), but it also demonstrates the complex ways that oppressions (and discrimination) work together. Another definition of intersectionality comes from Ajele and McGill (2020) 'Intersectionality describes the unique forms of discrimination, oppression and marginalization that can result from the interplay of two or more identity-based grounds of discrimination.'

Important to note here is that adopting an intersectional approach does not simply mean adding, for example, racism and sexism, or ageism and ableism, together to describe someone's experience. Instead, an intersectional approach requires understanding that discrimination and equality is systemic and structural (European Network Against Racism 2022).

In the context of the Australian anti-discrimination laws, including the ADA, there is a clear need for intersectionality to be recognised and incorporated within the legal framework and approach to discrimination. Notably, this has been considered in Australian law reform discourse dating back to 1994, when the Australian Law Reform Commission's Equality Before the Law Inquiry recommended (in the federal context) that an intersectional approach be adopted through introduction of a provision that would cover a complainant who suffers discrimination on a number of grounds (Australian Law Reform Commission 1994). Whilst the ADA encompassed all grounds of discrimination in one legislative provision, compared to the separate federal discrimination laws covering distinct grounds, the current structure of the ADA does not allow for recognising intersectional discrimination as it is experienced by individuals.

An example of an intersectional approach discrimination, and one that we believe a better (although not perfect) attempt at reflecting the lived experiences of individuals facing discrimination, is the Section 14 of the *Equality Act 2010* (UK), which recognises 'combined discrimination':

**14 Combine discrimination: dual characteristics**

(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

(2)The relevant protected characteristics are—

(a) age;

(b) disability;

(c)gender reassignment;

(d)race

(e)religion or belief;

(f)sex;

(g)sexual orientation.

(3)For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

(4)But B cannot establish a contravention of this Act by virtue of subsection (1) if, in reliance on another provision of this Act or any other enactment, A shows that A's treatment of B is not direct discrimination because of either or both of the characteristics in the combination.

As illustrated in the excerpt above, the *Equality Act 2010* (UK) uses the language 'dual characteristics' and essentially designates that only two relevant protected characteristics may constitute combined discrimination. However, this is not reflective of the reality where it may be that the discrimination faced by an individual in on the grounds of multiple (not just two) protected characteristics. Whilst this provision is a good example and should be used as a guide, we propose that any such addition into the ADA use the term 'intersectional discrimination' and/or 'multiple characteristics' and recognise that discrimination can be an intersection of *any* of the protected attributes in the ADA.

**Imputed Characteristics**

We also recommend the introduction of imputed characteristics, that is, the acknowledgement that it does not matter whether the victim in fact possesses the necessary protected attribute on the grounds of which the victim was discriminated. It should suffice that the characteristic was imputed to the victim. The inclusion of imputed characteristics acknowledges that discrimination is not necessarily driven by the identity of the victim but depends chiefly on perceptions and attitudes of discriminators.

*Examples:*

- A Sikh man is mistaken as a Muslim and discriminated against because of an imputed Muslim identity.
- A straight person is perceived to be gay and discriminated against because of this perception.

That characteristics can be imputed is not foreign to Australian discrimination law. The *Disability Discrimination Act 1992* (Cth) already acknowledges in s 4 under the definition of disability that a disability can be imputed (definition of disability letter k), thereby recognising that the harm is animated by ableist stereotypes and perceptions and that it should not matter whether the person in fact has a disability. That a victim does not have to possess the protected attribute but that it is sufficient for the perpetrator to believe so is also recognised in the newly introduced provision on 'Public Incitement of Hatred on Ground of Race' in s 93AAZ *Crimes Act 1900* (NSW). Here, subsection 3 clarifies that:

> (3) In determining whether an alleged offender has committed an offence against this section, it is irrelevant—
>
> (a) whether the alleged offender's assumptions or beliefs about the race of

another person or a member of a group of persons were correct or incorrect when the offence is alleged to have been committed

The *Equality Act* in the UK also protects against discrimination for imputed characteristics for all attributes. The statutory text does not require that a person has a protected attribute as the language of the direct discrimination provision in s 13(1) makes clear by avoiding references to the identity of the discriminated person:

> Direct discrimination
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The explanatory note (note 63) to the section makes clear that this includes cases of imputed attributes by providing the following example which would constitute race discrimination:

> 'If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.'
> (Explanatory Note to s 13 of the *Equality Act 2010* (UK), note 63).

The ADA's current language is confusing, suggesting that a person must indeed have a protected attribute. For example, s 7(1) defines direct race discrimination as 'on the ground of the aggrieved person's race'. This unhelpful language creates the risk of identity adjudication (whether someone indeed has a certain attribute) and shifts the focus on the identity of a person rather than on perceptions and beliefs, whether conscious or not, that animated the discriminatory conduct.

The inclusion of imputed characteristics avoids the risk of identity adjudication and acknowledges that discrimination is not primarily driven by an aspect of the victim's identity but by the discriminator's conscious and unconscious beliefs and perceptions of certain aspects of identity.

We therefore recommend that the NSW ADA include imputed characteristics and removes language that requires a discriminated person to have a certain attribute.

**Positive Duty**

We also recommend that a positive duty be introduced into the ADA. There is growing adoption of positive duties in other Australian jurisdictions, including at the Commonwealth level. The federal *Sex Discrimination Act 1984* (*SDA*) introduced a positive duty in 2022, which means that organisations and businesses now have a legal duty to take 'reasonable and proportionate measures to eliminate' relevant unlawful conduct as far as possible (Section 47C). Similarly, in Victoria, the *Equal Opportunity Act 2010* includes a 'duty to eliminate discrimination, sexual harassment or victimisation' meaning that anyone with this duty 'must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible' (Section 15). In 2024, the Australian Capital Territory introduced Part 9 into the *Discrimination Act 1991* noting a positive duty to:

- Make reasonable adjustments to accommodate individuals needs that arise from a protected attribute (Section 74(1)); and
- Eliminate discrimination, sexual harassment and unlawful vilification – this applies to organisations, businesses, and any individual with organisational management responsibility, and requires them to 'take reasonable and proportionate steps to eliminate the discrimination, sexual harassment and unlawful vilification' (Section 75(1)-(2)).

The Northern Territory similarly introduced a positive duty in 2024. Part 2A of the *Anti-Discrimination Act 1992* outlines this 'duty to eliminate discrimination, sexual harassment and victimisation' noting that 'a person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation to the greatest extent possible' (Section 18B). More recently, reforms to the Queensland *Anti-Discrimination Act* were passed to introduce a positive due that requires entities to 'take reasonable steps to prevent, as far as possible, discrimination, sexual harassment, vilification, and other conduct' covered in the Act. Though we note that there has been a delay in the commencement of these reforms, as further amendments were made to the legislated reforms (Queensland Human Rights Commission 2025). Nonetheless, it is demonstrative of the fact that there is a move towards the positive duty approach in a number of jurisdictions, and NSW is lagging behind in this regard.

There are many benefits of amending the ADA to include positive duties. One such benefit is shifting away from the individual complaint model which research demonstrates not only places a significant burden on victims of discrimination but also creates a barrier to reporting (Australian Human Rights Commission 2020; Gaze 2004). With positive duties the enforcement model, as we see in relation to the *SDA* confers new functions and powers on the Australian Human Rights Commission to monitor and assess compliance. This approach means that there is a positive obligation on duty holders to act, and as seen in the *SDA* can apply to both public and private institutions and organisations (Australian Human Rights Commission 2023). From the Victorian law reform context, a key argument for introducing a positive duty was that it shifts towards prevention of discrimination rather than reacting to discrimination and thus can work to create healthier (and safer) workplace cultures (Gardner 2008). More importantly, a positive duty approach recognises the reality of how discrimination operates and is a practical step towards substantive change in addressing discrimination.

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