

Submission to the NSW Law Reform Commission on its review of the *Anti-Discrimination Act 1977* (NSW)

Discrimination based on carer's responsibilities and domestic status

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Introduction

I am a legal academic working on comparative and international equality rights and discrimination law, including with particular expertise in the South African equality right and equality legislation. I am a member of the Australian Discrimination Law Experts Group (ADLEG) (<https://sites.google.com/site/ausdleg/home>) and convene the Climate Equality working group of the Berkeley Centre for Comparative Equality & Anti-Discrimination Law (<https://www.law.berkeley.edu/research/berkeley-center-on-comparative-equality-anti-discrimination-law/our-working-groups/climate-equality/>), a large international network of equality law experts. I am also a member of the Work+Family Policy Roundtable (<https://workandfamilypolicyroundtable.org/>). My areas of work include a long-standing focus on the equality dimensions of gendered care responsibilities.

The views in this submission are my own and do not represent the views of any of the groups with which I am associated.

This brief submissions concerns three sections of the Consultation Paper and their associated questions identified by the Commission for consideration. I am willing to provide further literature and related resources and answer any questions in relation to this submission as the Commission proceeds to the next stage of its review of the Act

4.2: Discrimination based on carer's responsibilities

Consultation paper question:

(1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of "responsibilities as a carer"?

I support retaining the attribute of 'responsibilities as a carer' but recommend repealing the current definition which is quite narrowly tied to Western ideas of family and care. I recommend keeping the protection against discrimination based on past and/or future carer's responsibilities, including responsibilities that someone is thought to have currently, has had previously, or will have in future. I see merit in the Queensland Human Rights Commission (2022) approach to leave the attribute undefined so as to allow for evolution of its meaning over time to respond to changing understandings of care. For example, some workplaces are starting to recognise 'caring for Country' leave¹ implying that certain obligations to land and the environment entail care responsibilities that go beyond traditional ideas of inter-human care. Carer's responsibilities might also include providing care to a sick animal, whether a pet, assistance animal or farm animal. In addition, wider ideas of community-based care such as caring for the elderly who are not necessarily kin could also form part of an expanded understanding of what it means to protect people with carer's responsibilities.

Should the lack of definition of carer's responsibilities be seen as too vague, a wide definition could be provided to offer some guidance as suggested in the Consultation Paper. Neither the Victorian discrimination legislation nor the *Carer's Recognition Act* offer optimal wording given the above discussion about expanded meanings of care. I suggest defining 'responsibilities as carer' as 'responsibilities to care for or support family, kin, community members, and 'Country' or the environment including non-human animals'.

Consultation paper question:

(2) Should the ADA separately protect against discrimination based on someone's status of being, or not being, a parent?

I recommend inclusion of 'family, parent and relationship status' as a new attribute replacing 'marital or domestic status'. See below at 4.5. This would address the discrimination faced by people due to the type of family they are in, for example, sole parent family or extended family. The attribute of 'family status' is used elsewhere in the world, for example, in the *Human Rights Code of Ontario* (1990) and the *South African Promotion of Equality and Prevention of Unfair Discrimination Act* (2000).

¹ For example, the University of New South Wales Faculty of Arts, Design & Architecture provides staff with four days of leave for this purpose.

It would also address discrimination against people based on whether or not they are parents.

The reason for use of the term ‘relationship status’ is discussed below at 4.5.

4.5: Discrimination based on marital or domestic status

Consultation paper question:

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “marital or domestic status”?

I propose a change to the protected attribute of ‘marital or domestic status’ to instead protect ‘family, parent and relationship status’. The inclusion of family status and parent status is discussed above at 4.2. ‘Relationship status’ should replace ‘marital or domestic status’ as the preferred term to describe various types and configurations of intimate partnerships. As noted in the Consultation Paper, this is the more inclusive and modern term.

The definition of ‘relationship status’ should be a wide one to include *‘being or having been in a personal or intimate relationship or partnership whether living together or separately’*. This would include marriage, de facto partnerships, civil partnerships, and intimate relationships that are not necessarily partnerships, as well as relationships and partnerships where the parties do not live together. The scope would include relationships regardless of the sex, sexuality and gender identity of the parties.

6.11: Discrimination based on carer’s responsibilities

Consultation paper question:

(1) Should discrimination based on carer’s responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why?

Discrimination based on carers’ responsibilities should be prohibited in all protected areas of public life, not just in the workplace (noting my response to 4.2 above about broadly defining this attribute). Carers are discriminated against in a range of settings including, for example, as students, on public transport, in shops or by landlords. It is unfair to extend protection to workers facing such discrimination but not to people encountering it elsewhere in society.

Such recognition would bring consistency to the Act both in terms of its overall purpose to address discrimination across society; and in aligning the treatment of this attribute with that of other attributes within the Act that are not limited in this way. As noted in the Consultation Paper, while the *Sex Discrimination Act* may treat carer responsibilities in the workplace differently from others areas of life, a number of the state and territory laws do not make this distinction. As ADLEG noted in its submission to the WA EOA Review in relation to family responsibilities and status, limiting the scope

of the prohibition on this basis can give the impression that discrimination (against carers) is less serious and less harmful than other forms of discrimination.

I recommend that a modern drafting approach would ensure that there is consistency in protection for all attributes in all areas. This also accords with the recommendations of the AHRC and LRCWA, as noted in the discussion paper at 6.162.

Consultation paper question:

(2) In general, should discrimination be prohibited in all protected areas for all protected attributes?

Why or why not?

As noted in 6.11(1) above, the prohibition against discrimination should be consistently applicable to all attributes and across all protected areas. Creating distinctions between attributes in terms of their scope can create hierarchies of protection and send a negative message about the lesser worth of these forms of discrimination. A carer should feel equally secure in the knowledge that their responsibilities cannot lead to unfair treatment whether on a bus, at a public pool, or at work. This consistency reinforces the message that no discrimination will be tolerated, in line with the purpose of the legislation.