SUBMISSION BY THE
NSW NURSES AND MIDWIVES' ASSOCIATION

Anti-Discrimination Act 1977 (NSW): Unlawful conduct

AUGUST 2025

NSW NURSES AND MIDWIVES' ASSOCIATION
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NSW BRANCH

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This response is authorised by the Elected Officers of
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Introduction

1. The New South Wales Nurses and Midwives' Association (NSWNMA) is the industrial and professional body for nurses and midwives in New South Wales, representing approximately 82,000 members across health care services in NSW, including public and private hospitals, corrective services, aged care, disability, private practice and community settings.

2. The NSWNMA strives to be innovative in our advocacy to promote world class, well-funded, integrated health and aged care systems by being a professional advocate for the health system and our members. We are committed to improving the quality of all health and aged care services, whilst protecting and advancing the interests of nurses and midwives and their professions.

3. We work with our members to improve their ability to deliver safe and best practice care, fulfil their professional goals and achieve a healthy work/life balance.

4. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

5. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

6. The NSWNMA works to remove discrimination in all its forms and thanks the NSW Law Reform Commission for the opportunity to provide feedback on *Anti-Discrimination Act 1977*(NSW):Unlawful conduct.

Overview

7. Since the *Anti-Discrimination Act 1977* (NSW) (ADA) was introduced community expectations, societal norms, demographics and diversity within the NSW population have changed considerably. Our members reflect the communities they live and work in. We therefore support the modernisation of the ADA to reflect contemporary community standards with the aim of promotion and attainment of the equal enjoyment of rights.

8. Our members have both professional and moral obligations to care for their communities, and to advocate on their behalf. This public-facing work often exposes them to workplace hazards arising from discriminatory behaviours directed at them in the pursuance of their duties.

9. However, unlike community spaces, their workplaces constrain their ability to disengage from discriminatory actions and places them in situations where they not only lack control of their exposure to unwanted and unwarranted behaviours but are also reliant on the actions of their colleagues, and employer to keep them safe.

10. Additionally, our members are exposed to discriminatory practices by employers which creates not only psychological workplace hazards but can lead to physical and financial injury. The ADA must place a positive duty on employers to create environments which not only mitigate against exposure to discrimination from the public and other employees, but which require them to identify and mitigate against structural discrimination.

11. Intersectionality must be given greater attention in any revision of the ADA. Our members are a predominantly female workforce, with around a quarter also being culturally and linguistically diverse who already face intersectional gender and race-based discrimination, including pay and carer opportunity inequity. Additionally, those members may have other protected attributes including being a temporary visa holder, being part of the LGBTQI+ community, and/or disadvantaged because of colonisation.

12. We have examples where combined attributes have led to significant disadvantage and exploitation, particularly for migrant workers in their workplaces. These vulnerable workers often hold the least knowledge about their rights, but the most to lose from not knowing. The law must empower and protect them; raising the protections for these workers, raises the protections for all.

13. One of the key outcomes of the review should be to create legislation that is accessible to all, enhances public understanding, and widens accessibility to support. Those who are likely to experience discrimination, in any form, are also likely to experience barriers to both understanding and reporting incidents.

14. The scope of this response acknowledges there will be a further consultation paper on other related matters. Additionally, that whether NSW should have a Human Rights Act is beyond the scope of the review of the ADA.

Summary of Recommendations

15. The protected attributes embedded within the current ADA need to be broadened to reflect contemporary societal expectations, workforce diversity and worker mobility as outlined in this response.

16. The ADA should modernise protected characteristics consistent with the *Sex Discrimination Act 1984* (Cth).

17. The ADA should be amended to be brought into line with the commonwealth and most state and territory instruments by the inclusion of a protected attributes section which includes trade union member activity, amongst others detailed in this submission.

18. The ADA should require organisations and businesses to have a positive duty to prevent discrimination, sexual harassment, and victimisation through proactive measures, in line with federally mandated obligations and existing state-based positive duty regimes.

19. An extension of protections against harassment based on other protected characteristics will serve to harmonise anti-discrimination and WHS legislation. Specific and additional protections which broaden the scope of harassment, make harassment unlawful regardless of the grounds on which

it is based or the person committing the harassment, and strengthen remedies and penalties should be included in the ADA.

20. Positive duty measures should include penalties on the employer and compensation for workers where employers do not manage reports of discrimination appropriately, effectively and efficiently.

21. Positive duty must include parameters to determine appropriate responses to prevent risk of further harm.

22. The ADA should provide for inclusion of intersectionality and take a nuanced approach to how it is applied and weighted relative to discriminatory practices.

23. The comparator test should be modernised to account for cases involving systemic, intersectional, or institutional harm and reflect contemporary workplaces including worker demographics.

24. The ADA should further explore the concept of unconscious bias to reflect contemporary thinking when exploring causation.

25. Causation in the ADA should be modernised to recognise that causation is satisfied where a protected attribute is a substantial or contributing factor, even if not the sole reason.

26. Removal of the capped amount of $100,000 in the ADA to ensure that compensation can truly reflect the harm suffered, consistent with other Australian jurisdictions and federal law.

27. The ADA should provide for all workplace discrimination matters to be heard by the NSW Industrial Relations Commission (IRC) or the Industrial Courts (where appropriate).

28. The time limits for lodging complaints should be increased from 12 months to at least two years.

29. The ADA should include a mechanism for representative claims, including for a union to bring claims in their own name.

30. The resourcing of the Anti-Discrimination Board NSW (ADB) should be enhanced to reduce wait times for conciliations, enable statutory timeframes for having complaints dealt with to be mandated, and facilitate filing of replies by employers/respondents.

31. The powers and functions of the ADB should be enhanced, similar to those of the Australian Human Rights Commission,

32. The ADA should be revised to facilitate an 'Equal Access Model' as described in this submission.

33. The ADA should be amended to introduce a dedicated interim relief mechanism that applies to all forms of discrimination.

34. Regardless of the context in which they are employed, or self-employed, the ADA must provide a route to challenge discrimination against workers, occurring in the pursuance of their duties.

Protected Attributes

35. The protected attributes embedded within the current ADA need to be broadened to reflect contemporary societal expectations. For example, we concur that the current term homosexuality utilises a closed and narrow definition. Similarly, gender diversity requires a more nuanced approach.

36. The ADA should modernise and update the language used. Currently it prohibits discrimination/vilification against transgender people. This should be made consistent with the *Sex Discrimination Act 1984* (Cth) [1] which prohibits discrimination on the grounds of sex, gender identity and intersex status. Similarly, the ADA prohibits discrimination/vilification on grounds of homosexuality, this should be updated to 'sexual orientation'.

37. Additionally, the scope of the ADA should be broadened to recognise the impact of family and domestic violence. Wording should be bolstered to include 'being subjected to family and domestic violence' as a protected attribute to bring the ADA into line with other jurisdictions.

38. We support the widening of the existing attribute for parent, family, carer or kinship responsibilities. This recognises the importance of kinship for Aboriginal and Torres Strait Islander Peoples, as well as those from other backgrounds where kinship is embedded within their societal norms.

39. Discrimination is influenced by socio-economic and geographic factors. For example, our members may face discrimination through inequitable access to health services if they live in a regional area, compared to their metro counterparts. Housing affordability also means workers accessing health and aged care workplaces in Sydney and increasingly, regional towns, may have to travel long distances often at unsocial hours to access their workplaces. This is even more acutely felt in remote parts of NSW. The widening of protected attributes should reflect contemporary barriers to equitable access to employment, healthcare and housing.

40. Additionally, we have multiple examples of migrant workers on temporary visas being treated less favourably by employers or having their visa status weaponised against them. We believe migrant or visa status should be included in the protected attributes.

> *"I saw a Nurse Unit Manager threaten Korean nurses with visa withdrawals if they didn't do what she asked. Human Resources dismissed the incident as the manager denied it and the Korean nurses were too scared to speak up".*
>
> *NSWNMA member.*

[1] *Sex Discrimination Act 1984* (Cth) https://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/sda1984209/

"Pacific Australia Labour Mobility (PALM) scheme workers in aged care settings are unreasonably being asked to work extra shifts when the workplace is short staffed compared to local employees from Australia who do not get asked. Workers report they must work mornings and then are told they must work the night shift. They are too scared to say no for fear of losing their visas".

Reports from NSWNMA members (Skilled Migrant Visa Workers).

41. Furthermore, we concur that caste and language need to be included, either as attributes related to race, or separately identified. We have evidence to support accent discrimination is a feature of nursing and midwifery workplaces leading to harmful impacts on workers.

"Workers with foreign accents seem to be taken less seriously than others. It is harder for them to be valued by their colleagues".

NSWNMA member.

"I feel that because I speak excellent English with no 'accent' since I grew up in Australia. It helps with being accepted without prejudice".

NSWNMA member.

"I have experienced people saying they do not understand my accent before I even start speaking".

NSWNMA member.

42. The NSWNMA supports that trade union activity is considered in the ADA to bring it into line with the prevailing standard throughout Australia. The following commonwealth, state and territory instruments prohibit discrimination on the grounds of trade union activity or membership:

- *Fair Work Act 2009* (Cth);[2]
- *Equal Opportunity Act 2010* (VIC);[3]
- *Anti-Discrimination Act 1991* (QLD);[4]
- *Anti-Discrimination Act 1988* (TAS);[5]
- *Discrimination Act 1991* (ACT);[6] and
- *Anti-Discrimination Act 1992* (NT).[7]

43. The ADA does not prohibit discrimination on the grounds of trade union activity. The ADA should be amended to be brought into line with the commonwealth and most state and territory instruments by the inclusion of a protected attributes section which includes trade union member activity. We

[2] *Fair Work Act 2009* (Cth): https://www.legislation.gov.au/C2009A00028/2017-09-20/text.
[3] *Equal Opportunity Act 2010* (VIC), s 6(f): https://www.legislation.vic.gov.au/in-force/acts/equal-opportunity-act-2010/030
[4] *Anti-Discrimination Act 1991* (QLD), s7(k): https://www.legislation.qld.gov.au/view/html/inforce/current/act-1991-085#ch.2-pt.2
[5] *Anti-Discrimination Act 1988* (TAS), s16(l): https://www.legislation.tas.gov.au/view/whole/html/inforce/current/act-1998-046
[6] *Discrimination Act 1991* (ACT), s7(j): https://www.legislation.act.gov.au/View/a/1991-81/current/html/1991-81.html
[7] *Anti-Discrimination Act 1992* (NT), s19(k): https://legislation.nt.gov.au/Legislation/antidiscrimination-act-1992

also call for a positive duty on employers to take all reasonable and proportionate steps to prevent this type of discrimination.

44. It can be argued that an implied right to legal equality between people of different states can be incorporated into the Australian Constitution by implication.[8] Workers in NSW should be entitled to enjoy the same protections against discrimination in their workplaces as workers in other states and territories. It may also be argued that by allowing for advantageous conditions for businesses in NSW that are not enjoyed by businesses in other states and territories, the ADA may breach the general principle of section 92 of the Constitution, that prohibits discrimination in a protectionist sense.

45. We have multiple examples of employers using selective enforcement of disciplinary issues to target our members who are active in the union. For example, a cohort of workers all return from a tea break five minutes late. However, only the worker actively engaged in the union is subject to a warning. The warning may have been legitimately applied, giving employers plausible deniability, but there is clear unfair treatment of one worker compared to their colleagues.

"I have had a complaint made against me, although I can't prove it, I feel my manager is intentionally trying to get rid of me because of multiple factors, my age, my accent, my race as a culturally diverse member of staff and my role as a union delegate. My manager doesn't realise it, but he holds a lot of power as a white male in a senior position. I am being asked when I am retiring, and picked on for the smallest mistake, my manager has said I admitted to something that I didn't, I feel disempowered in the situation and unable to articulate my case clearly. Recently, my manager also drew attention to the fact I had requested union leave, which I am entitled to.

It took almost a month for management to even tell me what the concern was about even though I asked multiple times, it has caused me a great deal of anxiety, and I have lost my confidence, it still upsets me to talk about it. I am a skilled nurse with lots still to offer but I know they want me to retire because of my age, and they are finding any excuse to force me to leave. The impact is greater on my personal wellbeing because multiple attributes that are intrinsic to me are being targeted, it's an attack on who I am as a person not what I have done".

NSWNMA member

"Being part of the Union has increased my resilience, but it made me a bigger target when I reported my issue of discrimination. The attack on me for raising this issue has been significant but I can't prove it. The only difference with this, and previous matters is that I am now more active in my branch and therefore more visible".

NSWNMA member.

46. Having combined enhancements to the ADA of trade unionism as a protected attribute, an unfavourable treatment test, and positive duty measures would provide significantly more protections than commonwealth legislation currently provides.

[8] *Leeth v the Commonwealth* [1992] HCA 29; 174 CLR 455. https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/29.html

47. The NSWNMA supports that irrelevant criminal record, health status and medical history are considered in the ADA. The following commonwealth, state and territory instruments prohibit discrimination of the grounds of spent convictions and irrelevant criminal record:

- *Equal Opportunity Act 2010* (VIC);[9]
- *Anti-Discrimination Act 1988* (TAS);[10]
- *Spent Convictions Act 1988* (WA);[11]
- *Anti-Discrimination Act 1992* (NT);[12] and
- *Discrimination Act 1991* (ACT).[13]

48. We call for the inclusion of irrelevant criminal record and spent convictions as protected attributes in the ADA. The *Health Practitioner Regulation National Law Act 2009* (Cth)[14] requires disclosure of criminal history including convictions, charges, pleas and findings of guilt. Nurses and midwives who have faced criminal charges relating to their roles as health practitioners and subsequently had their registration revoked, face discrimination when rebuilding their lives and transitioning to new careers.[15] Such discrimination may be prohibited by the *Australian Human Rights Commission Act 1986* (Cth),[16] however, further protection for workers in NSW is needed to bring the NSW framework into line with the prevailing standards at commonwealth, state and territory level.

49. The NSWNMA supports that political belief be considered in the ADA. Freedom of political opinion and expression is a core human right. It is settled law in Australia that an implied right to free political communication can be incorporated into the Constitution.[17] In NSW, however, workers are not protected from discrimination based on political association, activity or belief. The state and territory instruments which establish political activity or belief as an attribute protected from discrimination are:

- *Equal Opportunity Act 1984* (WA);[18]
- *Equal Opportunity Act 2010* (VIC);[19]
- *Anti-Discrimination Act 1991* (QLD);[20]
- *Anti-Discrimination Act 1988* (TAS);[21]

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[9] Ibid (n 2), s6(pb).
[10] Ibid (n 4), s16(q).
[11] *Spent Convictions Act 1988* (WA), ss 17(2)-19, 22: https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_48363.pdf/$FILE/Spent%20Convictions%20Act%201988%20-%20%5B07-x0-00%5D.pdf?OpenElement
[12] Ibid (n 6), s19(q).
[13] Ibid (n 5), s 7(n).
[14] *Health Partitioner Regulation National Law Act 2009* (Cth): https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-86a
[15] On the Record, Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record, 2012: https://humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf.
[16] *Australian Human Rights Commission Act 1986* (Cth): https://www.legislation.gov.au/C2004A03366/2021-09-11/text.
[17] Australian Capital Television v Commonwealth [1992] 177 CLR 106; and Nationwide News Pty Ltd v Wills [1992] 177 CLR 1. https://classic.austlii.edu.au/au/journals/MelbULawRw/1992/27.pdf
[18] *Equal Opportunity Act 1984* (WA): https://www.wa.gov.au/government/publications/equal-opportunity-act-1984
[19] Ibid (n 2).
[20] Ibid (n 3).
[21] Ibid (n 4).

- *Discrimination Act 1991* (ACT);[22] and
- *Anti-Discrimination Act 1992* (NT).[23]

50. The NSWNMA supports that religious discrimination be considered in the ADA. Our membership is broad and diverse and includes a disproportionate number of members from culturally and linguistically diverse backgrounds compared to some other industries. Members of these groups are far more likely to be subject to discrimination. Our experience is that definitions of racial discrimination do not strictly apply to several discriminatory circumstances and that there should be a recognition of some form of protection from discrimination based on religion in the ADA. The breadth of a religious discrimination protection is a complex matter however any protections should include:

    - Protection from discrimination based on a subject's personal religious beliefs or religious group membership;

    - Protection from discrimination based on religious dress or appearance apart from where there are reasonable health and safety grounds for a restriction;

    - Some level of protection from discrimination from religious activity and religious expression where the activity or expression does not conflict with the inherent requirements of a job or reasonable health and safety requirements.

Positive Duty Clause

51. Organisations should proactively take reasonable and proportionate measures to eliminate discrimination. This shifts the legal framework from a strictly reactive stance to a preventive, forward-looking model grounded in substantive equality.

52. The ADA should require organisations and businesses to have a positive duty to prevent discrimination, sexual harassment, and victimisation through proactive measures, in line with federally mandated obligations and existing state-based positive duty regimes:

    - Section 47C of the *Sex Discrimination Act 1984* (Cth);
    - Section 15 of the *Equal Opportunity Act 2010* (VIC); and
    - Section 75 of the *Discrimination Act* 1991 (ACT).

53. The absence of a positive duty in the ADA has been widely criticised, including by Professor Simon Rice of the University of Sydney, who describes NSW as a laggard in anti-discrimination law reform.[24] It is a keystone reform which has the potential to positively impact and protect many workers.

[22] Ibid (n 5).
[23] Ibid (n 6).
[24] Simon Rice, 'Why is NSW a laggard on anti-discrimination law?' *The University of Sydney (*3 September 2021) https://www.sydney.edu.au/law/news-and-events/news/2021/09/03/why-is-nsw-a-laggard-on-anti-discrimination-law-.html

"When I was working at a hospital I was applying for a CNS position, I had a lot of experience (five years plus master's degree) and had also been an 'in charge' but a colleague who was White Australian with two years' experience and no master's degree got the position. I was so disappointed, but I didn't fight back. You feel a lack of confidence to fight back because you think you aren't good enough, I wanted to ask if it was because of my race that I didn't get the position, but I didn't have the courage, I didn't even question it. It's also not in my culture to question authority. It's such a regret now that I didn't follow it up because there is a points system attached to recruitment and on paper, I should have been the preferred candidate".

NSWNMA member.

54. Our members are often disadvantaged by the limited responsibility claimed by employers for discrimination, particularly harassment of members by patients/residents/clients. The current ADA provides protections from conduct by employers and agents only, compared to WHS legislation and regulation which provides broad protection in relation to employee's health and safety. Our members are often subject to sexual harassment from patients/clients/residents and when these issues are raised, management's approach is one based on the clinical needs of the patients/clients/residents rather than the safety of the worker.

55. Additionally, vicarious liability provisions need to be amended to bring them into line with the *Sex Discrimination Act 1984* (Cth) [25] and *Fair Work Act 2009* (Cth).[26] Specific and additional protections, making this type of behaviour unlawful regardless of the grounds on which the harassment is based or the person committing the harassment, will go some way towards combatting this.[27]

56. Harassment, including sexual harassment is identified by SafeWork NSW as a hazard when considering psychosocial health and safety.[28] Currently no protections beyond a duty to manage psychosocial hazards in the workplace under WHS legislation and regulation exist in relation to harassment other than sexual harassment.

57. An extension of protections against harassment based on other protected characteristics will serve to harmonise anti-discrimination and WHS legislation. Such an expansion will also provide options for workers who have been subject to discrimination to seek remedies.[29]

58. In relation to enforcement and options for remedies, under the current ADA employers or agents are liable for conduct in relation to employees. However, there is no legal obligation to act, other than under s19 of the *Work Health and Safety Act, 2011* (NSW)[30] (primary duty of care),

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[25] Ibid, (n1)
[26] *Fair Work Act 2009* (Cth) ss527D and 527E
[27] Noting that section 22(f) provides some protection from sexual harassment "in the course of receiving or seeking to receive, goods or services".
[28] NSW Government (2021) *Code of Practice: Managing Psychosocial Hazards at Work*. Safework NSW (May 2021) https://www.safework.nsw.gov.au/__data/assets/pdf_file/0004/983353/Code-of-Practice_Managing-psychosocial-hazards.pdf
[29] Recent case (Magar v Khan [2025] FCA 874) successfully tested the new sexual harassment protections under Part 2A of the *Sex Discrimination Act 1984* (Cth). https://www.wottonkearney.com/upward-damages-trend-continues-in-sexual-harassment-case/
[30] *Work Health and Safety Act 2011* (NSW): https://classic.austlii.edu.au/au/legis/nsw/consol_act/whasa2011218/s19.html

proactively or otherwise when an employer is made aware of the conduct by patients/clients/residents towards staff. Noting the positive duty which exists under the Sex Discrimination Act 1984 (Cth)[31] is not reflected in the ADA.

59. In this regard, amendments beneficial to workers can be made to section 52 (aiding and abetting), and section 53 (liability of principals and employers), to include actions by patients/residents/clients in a healthcare setting where an act has been brought to the attention of the employer and they have failed to take reasonable action. Currently, redress for workers is available through WHS legislation in relation to the provision of psychologically safe workplace. These protections are broad and can be limited for reasons outlined in point 54 above. The *Industrial Relations (Workplace Protections) Bill 2025* (NSW)[32] similarly only covers employer/agent and employee relationship.

60. Additionally, any positive duty measures should include penalties on the employer and compensation for workers where employers do not manage reports of discrimination appropriately, and effectively. Our members report many barriers to reporting, and poor responses from employers which place them more at risk, both in terms of workplace consequences and physical and psychological harm.

> *"Despite all my resilience, when you have been gaslit so many times I really questioned my sanity, and it gave me anxiety engaging with patients. I felt I had to be careful about what I did and at that stage there was a lot of fear, I started to want to be invisible, I didn't want to be seen. It's hard to express your vulnerabilities but I can't say anything because I'll be in trouble and lose my job. When I did report the issue I got no response whatsoever from my employer, if anything I felt watched and observed and if I made one mistake I would be in serious trouble. The perpetrators, my colleagues and managers were emboldened in their disrespect of me, empowered by my employer's lack of action and backing".*
>
> *NSWNMA member.*

61. Having a positive duty measure would also go some way toward addressing systemic bias which disadvantages marginalised workers. Our members frequently report obstacles to careers progression, inequitable decision-making and higher likelihood of professional complaints, all of which are attributable to poor employer practices.

62. Where a positive response is enacted by employers, often this is misguided or tokenistic. Therefore, positive duty must include parameters to determine appropriate response. This is particularly important to mitigate the risk of re-traumatisation or worsening of the impact owing to protracted or misguided responses from employers.

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[31] Ibid, n1

[32] Parliament of NSW (2025) *Industrial Relations and Other Legislation Amendment (Workplace Protections) Bill 2025* https://www.parliament.nsw.gov.au/bill/files/18748/XN%20Industrial%20Relations%20and%20Other%20Legislation%20Amendment%20(Workplace%20Protections)%20Bill%202025.pdf

"The only time it was made easy to raise a concern at the local health district level was when management wanted to be seen doing something about the Black Lives Matter Movement. Staff were encouraged to pursue matters related to discrimination at that time. What rather surprised management was the overwhelming response they got from the staff. As staff highlighted that discrimination was a big issue which needed to be addressed. Nothing changed as a result of this".

NSWNMA member

Intersectionality

63. In its current form, the ADA requires discrimination claims to be framed around single protected attributes, preventing any adequate response to disadvantage that arises at the intersection of multiple identities, such as colonialism, gender, race, and migrant status. This structure obscures various aspects of a person's identity and how it can create unique and overlapping experiences of discrimination for them which cannot be addressed in isolation.

64. An intersectionality structure can encourage individuals in the health care sector, particularly nurses, to effectively recognise and attend to issues that impact them, including, issues of power, privilege and oppression.[33]

65. Discourse surrounding whether individuals should be compartmentalised into broad categories when assessing if whether discrimination has occurred is a system that fails to recognise the unique experiences of the those who are subject to discrimination.

66. A 2025 study documented workplace racism faced by Aboriginal and Torres Strait Islander nurses in Queensland.[34] Participants described overt and covert racism, tokenism and "racism fatigue" amongst other things. These experiences did not stem from a single protected attribute but from the intersection of race, indigeneity, skin colour, and gender. In this instance, the Act would need to isolate elements of their identity that are not separable; the combined impact is greater than the sum of its parts, yet the Act only considers each part in isolation.

67. The growing body of international literature, including in nursing education, supports the application of intersectionality as a structural tool to identify, understand, and address layered inequalities faced by marginalised nursing students and professionals. This perspective recognises that an individual's experience cannot be understood without considering, inter alia, how gendered expectations, migrant status, and cultural background intersect to shape the nature and impact of discriminatory conduct.[35]

68. We assert the ADA should provide for inclusion of intersectionality and take a nuanced approach to how it is applied and weighted relative to discriminatory practices.

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[33] Younas, A. (2024) Applying intersectionality to address inequalities in nursing education (May 2024) *Nursing and Education in Practice,77. https://www.sciencedirect.com/science/article/abs/pii/S1471595324001112*

[34] Best, O. et al (2025) Aboriginal and Torres Strait Islander nurses' experiences of racism at work, *Collegian*, 32(**2**) 61-68. https://doi.org/10.1016/j.colegn.2024.12.004

[35] Aspinall, C. et Al (2022) Intersectionality and nursing leadership: An integrative review, *Journal of Clinical Nursing*, 32(**11-12**) pp 2466 -2480. https://pubmed.ncbi.nlm.nih.gov/35579183/

"One of the managers tried to touch my head because it was braided and its disrespectful in my culture to touch my head. When I stopped her, she gaslit me and asked what my problem was. Another manager confirmed the action wasn't right, but it was never followed up. Maybe I should have followed it up, but I didn't want to lose my job, and the manager had good friends in the system. This was exacerbated because I am an older woman, and I think some form of ageism was also at play because the manager also kept asking me when I was retiring in a negative way. Having multiple attributes targeted I felt unwanted in the profession on multiple levels, and it wasn't because of my skills".

NSWNMA member.

Comparator test

69. We concur with the view that the comparator test should be reconsidered in any new ADA. The current test is obstructive to many workers with protected attributes. Many commonplace unacceptable workplace behaviours such as bullying and harassment are so prevalent in nursing and midwifery contexts it is difficult to argue a case for this being motivated by discriminatory practices.

70. In smaller workplaces where a cohort of workers share the same protected attribute a comparator test may be difficult to identify since the entire workforce may be subject to discrimination, and this considered an acceptable culture for that workplace. For example, a residential aged care setting where a significant proportion of nurses and care workers are migrant workers from Nepal.

71. Current migratory trends in health and aged care settings means this trend is likely to continue, making the comparator test less relevant and helpful over time. We would support the replacement of this with an unfavourable treatment test.

72. The comparator test is the current framework for direct discrimination across numerous provisions under the ADA. Complainants are required to demonstrate that they were treated less favourably than another person "in the same or similar circumstances" but who does not possess the relevant protected attribute.

73. The comparator test should be modernised to account for cases involving systemic, intersectional, or institutional harm.

74. In practice, real comparators are rare, and the courts and tribunals rely on hypothetical comparators. This on its own can be problematic, as imagining a hypothetical person can obscure the reality of discrimination.[36] Further, it diverts attention away from context, effect, and intention, and often leads to results that do not reflect the lived realities of discrimination.

[36] Australian Human Rights Commission, '*Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*' (2016) https://humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination

75. The comparator test does not account for substantive equality, which recognises that treating people the same does not always result in equality. It factors in historical and systemic disadvantage, power imbalances and barriers.[37]

Causation

76. The need to prove intent is problematic since there may be multiple factors influencing why a person may display discriminatory behaviours, including a failure by employers to instil Cultural Safety measures or enforce inclusive values within the workplace culture more broadly. Often workers are expected to comply with workplace cultures, or risk being scapegoated even if some of the decisions and actions they are required to make go against their personal values. They may fear raising objections within this environment.

77. Causation under the ADA requires showing that discrimination occurred "because of" a protected characteristic. The High Court has interpreted this narrowly,[38] effectively demanding proof that the attribute was the real or dominant reason behind the treatment. This is problematic in modern workplaces, where discriminatory treatment often arises indirectly, through stereotyping, unconscious bias, or structural rules that disproportionately affect marginalised groups.

78. Additionally, the Association suggests the concept of unconscious bias be further explored. There is an emerging body of knowledge to counter that bias is unconscious and argues that all individuals in society are similarly exposed to discriminatory bias. Individuals are aware of their bias and make a conscious choice as to whether to apply this in their interactions with others and having the skills to unlearn and control bias.[39,40] We recommend this concept is explored relative to its implications for proving causation.

79. Causation in the ADA could be modernised to recognise that causation is satisfied where a protected attribute is a substantial or contributing factor, even if not the sole reason.

Adequacy and accessibility of complaints procedures and remedies

80. Section 108(2)(a) of the ADA imposes a ceiling on monetary compensation regardless of the seriousness or duration of the harm suffered. This contrasts with the federal anti-discriminatory regime, where no such cap exists

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[37] Smith, B. (2008) From Wardley to Purvis - How Far Has Australian Anti-discrimination Law Come in 30 Years? *Australian Journal of Labour Law*, 21(**3**): *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005528*

[38] *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92: https://classic.austlii.edu.au/au/journals/FedLawRw/2007/4.html

[39] Dr CI (2024) Breaking down the myths of unconscious bias: A deeper look into Whiteness and institutional racism. https://cheryl-80279.medium.com/breaking-down-the-myths-of-unconscious-bias-a-deeper-look-into-whiteliness-and-institutional-f58855cc83aa

[40]Edgoose, J. et al (2019) How to Identify, Understand, and Unlearn Implicit Bias in Patient Care. *Family Practice Management*, 26(**4**) pp 29-33. https://www.aafp.org/pubs/fpm/issues/2019/0700/p29.html#fpm20190700p29-b7

"except in respect of a matter referred to the Tribunal under section 95 (2), order the respondent to pay the complainant damages not exceeding $100,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct."[41]

81. The cap on damages in the ADA:

- is arbitrary and not linked to actual loss;
- can result in under-compensation for complainants with substantial economic losses; and
- fails to account for non-economic harm.

82. The capped amount compounds existing barriers faced by Aboriginal and Torres Strait Islander complainants in pursuing discrimination claims. Research shows that many Indigenous people perceive that lodging a complaint may not result in meaningful change. Matters are often settled for small amounts of compensation during conciliation, and pursuing a case to a full hearing can take years, with no guarantee of a favourable result.[42] This reality means the statutory cap is not simply a procedural limitation, it is part of a broader structural barrier that discourages Indigenous complainants from engaging with the system and undermines the legislation's capacity to deliver substantive equality.

83. The ADA is out of step with the way in which such claims are valued in other contexts. For example, the contemporary focus on mental health has changed the understanding of the harm of sexual harassment; there has been a shift from a focus on physical acts to a recognition of psychiatric injury and trauma. Additionally, we have seen real legislative improvement federally following the Respect@Work report of 2020.[43]

84. Gender equity reform in NSW, through the ADA, ought to mirror improvements in this area.This would strengthen the objectives outlined in the Women's Opportunity Statement.[44]

85. The Association proposes the removal of the capped amount of $100,000 to ensure that compensation can truly reflect the harm suffered, consistent with other Australian jurisdictions and federal law.

Jurisdiction

86. Under the current framework, most complaints under the ADA in NSW, including those arising in the workplace, are referred to the NSW Civil and Administrative Tribunal (NCAT). NCAT is not a specialist industrial forum. Workplace discrimination claims are often intertwined with issues of

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[41] *Anti-Discrimination Act* 1977 (NSW) s 108(2)(a): https://classic.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/s108.html
[42] Allison, F. (2014) A Limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens, *Australian Indigenous Law Review 3* 17(**2**): *https://classic.austlii.edu.au/au/journals/AUIndigLawRw/2014/2.html*
[43] Australian Human Rights Commission (2020) Respect@Work:Sexual Harassment National Inquiry Report. https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020
[44] NSW Government (2022) *NSW Budget 2022-23: Women's Opportunity Statement*. https://www.nsw.gov.au/departments-and-agencies/nsw-treasury/gender-equality-budget-statements/womens-opportunity-statement

dismissal, performance management, rostering, workplace safety, and ongoing employment relationships: areas in which the IRC has specialist jurisdiction and practical expertise.

87. The Association proposes that all workplace discrimination matters be heard by the Industrial Relations Commission, or the Industrial Courts (where appropriate).

Procedural enhancements

88. The time limits for lodging complaints should be increased from 12 months to at least two years.

89. The Act should include a mechanism for representative claims, including for a union to bring claims in their own name.

90. The resourcing of the ADB should be enhanced to reduce wait times for conciliations, enable statutory timeframes for having complaints dealt with to be mandated, and facilitate filing of replies by employers/respondents.

91. Additionally, the powers and functions of the ADB should be enhanced, similar to those of the Australian Human Rights Commission, For example, the ability to inquire into systemic discrimination, issue compliance notices and enter into enforceable undertakings.

Equal Access Model

92. We also call for the introduction, through revisions to the ADA to accommodate an Equal Access Model.

93. The essence of the Equal Access Model should ensure that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

94. In late 2024, the Equal Access Costs model was successfully implemented federally under the *Australian Human Rights Commission Amendment (Costs Protection) Bill, 2023* (Cth).[45]

95. During consultation of the *Respect at Work Bill 2022*, (Cth) [46] advocacy emerged for adopting the 'equal access' cost protection, rather than the 'cost neutral' approach. That is,

> *the default position will be that applicants do not pay respondent's costs (exceptions apply);*
>
> *if an applicant is successful and the court has found that a respondent has engaged in discriminatory conduct, the respondent will be liable to pay the applicant's costs;*
>
> *if an applicant is unsuccessful, each party will bear its own costs*.

96. In addition to the above, the enacted Bill introduced a modified version of the 'equal access' model. In addition to the default position, there are exceptions where an applicant may be ordered to pay the costs incurred by the other party if:

[45] Commonwealth of Australia (2023) *Australian Human Rights Commission Amendment (Costs Protection) Bill 2023* (Cth). https://classic.austlii.edu.au/au/legis/cth/bill/ahrcapb2023659/
[46] Ibid, n40

The applicant has found to have acted vexatiously or without reasonable cause;

The applicant's unreasonable act or omission cause the respondent to incur the costs; or

The other party is a respondent who is wholly successful, does not possess significant power over the applicant, and lacks substantial financial or other resources compared to the applicant.

97. An equal access costs model would enable applicants to bring an application for sexual harassment with the knowledge that should it be successful on one or more grounds, that their legal costs would be recoverable (subject to limited exceptions), and for the cases of members with union representation, those unions would be able to recover some of their legal costs.

Interim Relief

98. The ADA should be amended to introduce a dedicated interim relief mechanism that applies to all forms of discrimination. Currently, there is no explicit mechanism for urgent orders under the ADA, and while NCAT has general procedural powers under section 62 of the *Civil and Administrative Tribunal Act, 2013* (NSW), these are not specifically designed for the urgent intervention often needed to stop ongoing discrimination.

99. An interim relief provision should empower the decision-maker to make urgent orders at any stage of proceedings to prevent or reduce the risk of further discriminatory conduct.

> *"I suffered from racial discrimination and sexual harassment. My employer declined to engage in conciliation, as it is not mandatory. Eventually, when we did attend conciliation, the matter was referred to NCAT. The delays caused were not in my best interests".*
>
> *NSWNMA member.*

Existing gaps in coverage

100. A more nuanced and contemporary approach to the coverage of the ADA is required to reflect changing work patterns exacerbated by the COVID-19 pandemic. Many nurses and midwives work as volunteers or are required to work in an unpaid capacity if seeking supervised practice opportunities to comply with conditions of registration imposed by their professional regulatory body. Additionally, many workers are opting for the more flexible working patterns afforded through platform care agencies.

101. Regardless of the context in which they are employed, or self-employed. The ADA must provide a route to challenge discrimination occurring in the pursuance of their duties. For example, a care worker who is subject to a discrimination-based attack by a client they are providing services to through a platform agency can opt not to take further bookings to support the client but is still harmed by the care agencies lack of due diligence in assessing the client before advertising them to workers. Or knowingly facilitating an introduction.

Conclusion

102. In summary, we welcome recognition that the ADA in its current form requires modernisation. This consultation demonstrates that a listening approach is being taken and that previous suggestions are being carefully considered in this consultation.

103. The recommendations made in this response provide practical and workable solutions which will need to be considered relative to how they interact with existing legislation and processes. It is hoped that where collaboration with other regulation and regulatory agencies is required, this is maximised to avoid over-complicating complaints and the process for achieving swift resolution.

104. Finally, we would be pleased to contribute directly, or through further written responses as the ADA review progresses. The NSWNMA is uniquely placed to provide real case scenarios and solutions through our experienced work on behalf of our diverse membership.