ONE LAW FOR ALL

For Education Without Discrimination

One Law For All exists to fight for the protection of young LGBTQ+ people in the NSW private education system. By pushing for vital changes to the Anti-Discrimination Act, we are defending the right to an education safe from discrimination. We are a collective of young LGBTQ+ people and allies with lived experience of discrimination, fighting for the legal protections we are not given. We are extremely grateful for this opportunity to make a submission to the Law Reform Commission's review of the ADA. It is vital that young people have the opportunity to make their voices heard on the laws that keep them safe from discrimination and unjust treatment- especially when it's so clear that the law is out of date and unfit for purpose.

Changing the Anti-Discrimination Act won't shift the entire culture of bigotry and exclusion overnight. But for as long as LGBTQ+ young people are at imminent risk of harm by institutions that are actively hostile to them, there can be no excuse for the government to sit on its hands and delay the vital protections that will keep them safe under the law. Below is a list of our policy priorities and their relevant consultation paper question, each with the details of how and why they need to be changed.

1. **Exemptions for religious institutions and "private educational authorities" (Q 7.1, 7.2, 7.3, 7.5, 7.6)**

   Under the current law, "private educational authorities" are granted exemptions to protections against discrimination on the grounds of sex, "homosexuality," "transgender," marital or domestic status, disability, and age. These exemptions effectively give any and all non-government schools free license to discriminate, with the students affected deprived of the option of going to the Anti-Discrimination Board. According to figures from the AISNSW, this means that 44.2% of NSW secondary school students are completely unprotected from discrimination for their orientation, identity, and other characteristics. Even if these are repealed, section 56(d) grants a blanket exemption to religious institutions that could still be used by religious schools to justify discrimination.

   These exemptions, described by Equality Australia as "the most regressive and extreme state laws" in the country, must be repealed to ensure that all young people in NSW have the right to an education free and safe from discrimination. If it is necessary to include exemptions to truly protect religious freedom, they must be as narrow and specific as possible, only applying where necessary and still ensuring the security of LGBTQ+ students.

2. **Updating definitions for sexuality and gender identity (Q4.4, 4.8, 4.9, 5.2)**

   The ADA as it stands provides protection from discrimination on the basis of "homosexuality" and "transgender," among others. The Act's definitions of these terms are outdated and exclusionary, referring only to "male or female homosexuals," and people who live or identify as a "member of the opposite sex" respectively. Among the people excluded by these definitions are those who identify as bisexual, pansexual, asexual, queer, heterosexual, nonbinary, or intersex, and no protections are given for gender *expression*. The solution to this is simple- update definitions to fall in line with other state and federal law, referring to "sexual orientation" and "gender identity" rather than the current, exclusionary terminology.

3. **Expanding protections (incl. vilification) to cover intersex people, recognise intersectional discrimination and that based on past or future characterisitics, and protect associates of LGBTQ+ people (Q 3.8, 4.9, 5.2)**

   Whereas many people are excluded from legal protections on account of narrow definitions, many more face forms of discrimination that are simply not covered by the Act. NSW is far behind the rest of the country that we provide no clear legal protection to intersex people- instead confusing gender identity and innate variations of sex characteristics under the "transgender" attribute. To ensure that intersex people are protected, these characteristics must be separated and new protections given to those with variations in sex characteristics. These protections must include those against vilification alongside direct and indirect discrimination.

   Equality Australia's submission to this review outlines three factors that must be recognised as making a person vulnerable to discrimination: past or future characteristics, association with LGBTQ+ people, and combinations of two or more characteristics. The law currently only protects against discrimination based on present factors, meaning that people are still vulnerable in NSW to being targeted for a protected characteristic in their past or future. Similarly, people can legally be discriminated against due to their association with a person with a protected attribute, leaving the friends, family, or partners of an LGBTQ+ person, for example, vulnerable. Extending protections to associates can also ensure that people are free to express their support for and solidarity with the LGBTQ+ community, during events such as Pride Month or generally, where they may otherwise feel unsafe to do so.

   In Queensland, the Respect at Work and Other Matters Amendment Act 2024 legally recognised intersectional discrimination- that based on two or more protected characteristics, while NSW law only focuses on one at a time. For example, this means that discrimination on the basis of misogynoir, a combination of misogyny and anti-Black racism, is not recognised for its combined effect.

The protections of the ADA are only as effective as the range of people they protect, and failing to broaden the inclusivity of the Act risks severely limiting the effectiveness of any other reforms.

4. **Updating tests for direct and indirect discrimination to best practice (Q 3.1, 3.2, 3.3, 3.5)**

   In terms of how we prove discrimination has occurred, NSW has fallen far behind the best practice in other state and federal law. For cases of direct discrimination, the ACT and Victoria have adopted the "because of" test, which recognising intersectional discrimination in a way that the unwieldy "comparator test," which requires a comparison between the discriminated party and another person without that characteristic, cannot.

   The ACT, Victoria, Tasmania and the Commonwealth have all adopted the disadvantage test for indirect discrimination, which "involves considering of whether an requirement, condition or practice has, or is likely to have the effect of disadvantaging people with the protected attribute." In contrast, NSW still requires complainants to prove that they are unable to comply with a law or requirement which a "higher proportion" of people without the attribute can. This places NSW out of step with contemporary definitions of indirect discrimination.

   As with the previously discussed protections, the ADA is only effective if the definitions of the discrimination it aims to protect from are consistent with best practice. This means removing the current respective tests for both, which often act as obstacles to justice, and aligning the state with its peers in adopting simpler and more effective tests.

5. **Enshrining a positive duty to prevent discrimination, and granting regulatory powers to the Anti-Discrimination Board (Q 11.3)**

   The positive duty to prevent discrimination has been implemented already by the Commonwealth, the ACT, the NT, and Victoria, and is being considered currently by QLD and WA. By enshrining a duty for entities to proactively prevent harassment, discrimination, vilification or victimisation, the function of the Act can shift to being a tool of post-fact penalisation to one of proactive prevention of discrimination, reducing the burden on individuals who may be vulnerable to or affected by it.

   To ensure that it is capable of investigating breaches of the act- removing the burden of policing from the discriminated individual- regulatory powers and funding should be given to the Anti-Discrimination Board. Where serious cases of discrimination have occurred, the Board should have powers similar to those of regulatory bodies in other states, such as Victoria's Human Rights and Equal Opportunity Commission.

The above reforms are of absolute priority if the Anti-Discrimination Act is to protect all students, regardless of their identity, from unjust treatment and discrimination. We at One Law For All strongly urge the Law Reform Commission to adopt these all as recommendations to the government, and enshrine in law the right to an education safe from discrimination.