

Anti-Discrimination Act Review

NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124
15 August 2025

Re: Anti-Discrimination Act Review: Consultation Paper on Unlawful Conduct

Thank you for the opportunity to provide feedback on the consultation paper. My comments related to the questions about whether or not the *Anti-Discrimination Act 1977* (NSW) (ADA) should include a positive duty.

(1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

The burden of addressing unlawful discrimination should not be borne entirely by the individual who has experienced it, not when eradicating discrimination and promoting equality is a societal concern. If anti-discrimination law is to be more effective in tackling entrenched inequality, it needs to move beyond the individualised, reactive model of addressing discrimination to be positive and proactive. Such a model would require employers and goods and service providers to identify policies and practices that impact on equality at the outset and do something to address them, rather than waiting until discrimination has already occurred before taking action.

The ADA should include a positive duty to take reasonable and proportionate measures to prevent or eliminate unlawful discrimination. Positive duties promote equality from the outset. They represent a shift in thinking. Although organisations should be taking action to detect and address discrimination to avoid being held vicariously liable, many do not. A positive duty places an obligation on duty-holders to take action.

(2) If so: (a) What should duty holders be required to do to comply with the duty?

A positive duty requires an organisation to take action and consider the impact of policies and practices on equality before harm has occurred. So to comply with the duty, duty-holders should be required to review their existing policies and practices, identify potential problems in terms of how they impact upon equality, and take action to improve them before harm occurs.

As this is new approach to tackling discrimination in NSW (though linked to the idea of vicarious liability), duty-holders will require information and understanding of the duty's operation to aid compliance. It will be important for the government to give Anti-Discrimination NSW adequate resources so that it can prepare education materials and conduct training for duty-holders and their advisers. This will be necessary implementing the positive duty and socialising duty-holders on how it operates.

(2) (b) What types of unlawful conduct should the duty cover? (c) Who should the duty holders be? (d) What attributes and areas should the duty apply to?

There is no reason to limit the application of the duty to some organisations or persons, to defined attributes and areas, or to limit the conduct it covers. Doing so is likely to lead to confusion and complexity for duty-holders who will range from small to large organisations and be operating in both the employment and non-employment contexts, with varying degrees of understanding of the legal landscape.

The duty should apply to:

- discrimination, harassment and victimisation
- all organisations which bear an obligation under the ADA.
- all of the attributes and areas covered by the ADA

The Consultation Paper does not seek input at this stage about how the duty would be enforced but this will be an important consideration if a positive duty is proposed. In that context, it is worth bearing Victoria's experience in mind.

The Victorian government included a positive duty in the *Equal Opportunity Act 2010* (Vic) but the enforcement mechanisms were removed before the Act came into force following a change of government. Under the Act as it now stands duty holders are required to take "reasonable and proportionate measures to eliminate... discrimination, sexual harassment or victimisation as far as possible" (s 15). I interviewed lawyers and staff at the Victorian Equal Opportunity and Human Rights Commission about the impact of this provision and my research showed that it was being used by the Commission as an educative tool and to 'set the tone' for the Act (which takes a substantive approach to equality) including in conciliation conferences to suggest that respondents bear an obligation to promote equality. However, it is difficult for the Commission to do more and use the duty effectively because the duty is not enforceable. Respondents, therefore, place no weight on it.¹

Subsequent duties in the Northern Territory, the ACT and Queensland have given the equality agencies enforcement powers and no doubt their experience will inform the Review's consideration and development of a positive duty if that is proposed.

Please be in touch if I can provide any further information.

Kind regards,

Dominique

¹ Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459-501.