23 April 2024

Policy Officer
NSW Law Reform Commission
By email: nsw-lrc@dcj.nsw.gov.au

Dear Madam/Sir,

Review of section 93Z of the *Crimes Act 1900* (NSW)

Kingsford Legal Centre (KLC) welcomes the opportunity to make this short submission to the Commission's review on the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW. We consent to this submission being published.

About Kingsford Legal Centre
KLC is a community legal centre providing free legal advice, casework, and community legal education to people in south-east Sydney across a wide range of legal areas. We have been providing specialist discrimination law advice to people across NSW since 1981. KLC continues to specialise in discrimination law and runs a state-wide Sexual Harassment & Discrimination Legal Service. In 2023 our Sexual Harassment & Discrimination Legal Service gave 407 advices and represented clients in 43 discrimination matters. We provide advice and representation in all discrimination jurisdictions, including Anti-Discrimination NSW, the Australian Human Rights Commission, Fair Work Commission, Federal Court, Federal Circuit Court, and the NSW Civil and Administrative Tribunal. We also provide discrimination advice in the context of employment through the statewide Employment Rights Legal Service- a collaboration between KLC, Redfern Legal Centre and Inner City Legal Centre.

KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education to over 500 UNSW law students every year. We provide students with an experiential learning opportunity across all KLC's work, including in discrimination matters.

Summary
KLC recognises the need for protections against hate speech in NSW and acknowledges that s93Z of the *Crimes Act NSW* (1900) ('the *Crimes Act'*) can play an important role in preventing hate speech based on race, religion, sexual orientation, gender identity, intersex status and HIV/AIDS status. We support the recent removal of the requirement that the Director of Public Prosecutions (DPP) approve all prosecutions under s93Z. Our submissions and recommendations, as outlined below, are not restricted to the application of s93Z to racial and religious vilification. While we agree that racial and religious vilification has a deleterious impact on a significant proportion of our community, we believe that s93Z can be further improved by expanding its existing protections to also include protection against vilification based on disability. We further argue that the protections offered by the civil vilification provisions in the

Anti-Discrimination Act 1977 (NSW) ('the ADA') should be expanded, clarified, and made consistent with s93Z of the *Crimes Act*. As part of the concurrent review of the *ADA,* that Act should be amended to include a protection against discrimination based on religious belief or affiliation, to remove the current inconsistency in NSW laws that makes vilification based on religion unlawful, while discrimination on that basis by employers, education and service providers is not.

Recommendations

1. The removal of the requirement that the DPP approve prosecutions under s93Z of the *Crimes Act* should remain and the consideration and application of this provision by law enforcement agencies should be closely monitored.
2. The definition of "public act" in s93Z of the *Crimes Act* should be amended to make it clear that comments threatening or inciting violence that can be heard by general members of the public should be considered public acts, even if they were not intended to be made *to the public*.
3. "Disability" should be added as a protected attribute in s93Z of the *Crimes Act.*
4. The civil vilification provisions in the *ADA* should be reviewed in the context of a holistic review of that Act. As a minimum, the *ADA* should be amended to include (among other protections):
    a. Protections against discrimination based on religious belief or affiliation;
    b. Protections against discrimination and vilification for people who are bisexual, as they are not currently protected in the *ADA;*
    c. Vilification on the grounds of a person's disability should be made unlawful under the *ADA.*

History and purpose of section 93Z

Section 93Z was added to the *Crimes Act* in August 2018, replacing four serious vilification offences previously outlined in the *ADA*. Before its introduction, the NSW Government held a Vilification Consultation process led by Dr Stepan Kerkyasharian. On 8 February 2017 KLC made a submission to that consultation- this submission is ***attached***.

Racial and religious vilification continues to be a serious problem in Australia. One in five Australians say they have experienced racist speech, including verbal abuse, racial slurs and name calling and about 5% say they have been attacked because of their race.[1] In 2017, Western Sydney University's 'Challenging Racism Report" found that almost 70% of Muslim people, 65.1% of Hindu people and 34.1% of Jewish people surveyed had experienced discrimination based on their cultural or religious background on public transport or on the street.[2] The statistics were broadly similar for

[1] Australian Human Rights Commission, "Who experiences racism?", https://humanrights.gov.au/our-work/education/who-experiences-racism, accessed 23 April 2024.
[2] Kathleen Blair, Kevin Dunn, Alanna Kamp & Oishee Alam, *Challenging Racism Project- 2015-16 National Survey Report,* (Sydney: Western Sydney University) (2017), 13. (https://www.westernsydney.edu.au/challengingracism/challenging_racism_project/our_research/face_up_to_racism_2015-16_national_survey)

these groups when asked about discrimination in online and social media[3]. Due to the prevalence of racism in Australia[4], we submit that ensuring the effectiveness of racial and religious vilification laws through criminal laws is integral to achieve the eradication of reckless and intentional hate speech and the harm that it causes to our community.

KLC believes that the formulation of s93Z strikes a balance between the competing rights of freedom of speech and protection from vilification under human rights laws by focussing on the recklessness and/or intentions of the potential defendant. This is appropriate for a provision that carries significant penalties and a criminal record. Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* requires that state parties declare an offence punishable by law "*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as acts of violence or incitement to such acts against any race or group of persons or another colour or ethnic origin….".* Article 20(2) of the *International Covenant on Civil and Political Rights* also provides that any *"advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."* While freedom of speech is a fundamental human right, KLC acknowledges that it is not absolute and may be limited to protect competing rights such as protections against racial and religious hate speech.[5]

We do not propose any amendments to the general construction of this section, other than to the definition of "public act." This definition should be amended to make it clear that comments threatening or inciting violence that can be heard by general members of the public should be considered public acts, even if they were not intended to be made *to the public*. Conduct that is within the hearing of a public place or general members of the public should be captured by s93Z, as well as conduct that is *observable* by the public, as is already covered by the definition of "public act".

In our 2017 submission we noted that there had been no prosecutions under the old *ADA* offences, before the enactment of s93Z of the *Crimes Act*. However, statistics from the Judicial Commission for the four-year period October 2019- September 2023 show that there have only been 2 convictions for the offence of vilification on the ground of race under s93Z(1)(a), both resulting in community corrections orders.[6] This suggests that s93Z may be under-utilised. We are not aware of any publicly available data in relation to how many complaints of racial or religious vilification were made to law enforcement agencies since the provision was enacted, and how many of these have been investigated. This data would be critical in understanding how law enforcement agencies are trained to respond to these complaints and how they are in fact handled. It remains to be seen whether the recent 2023 amendments removing

[3] *Ibid.*
[4] Amnesty International, 'Does Australia Have a Racism Problem?', https://www.amnesty.org.au/does-australia-have-a-racism-problem-in-2021/ , accessed 23 April 2024.
[5] *International Covenant on Civil and Political Rights,* Art 19(3).
[6] Judicial Commission of New South Wales, Sentencing Statistics NSW Local Court as at February 2024 (Judicial Information Research System- https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/)

the need for the DPP to instigate prosecutions will result in an increase in these statistics.

KLC is by no means advocating for an immediate increase in prosecutions under s93Z. We believe that priority should be given to stopping vilification occurring in the first place, and that campaigns such as public awareness education, early inter-faith education and increased representation of marginalised groups in the media can play an important role in combatting vilification[7]. However, we are aware that many members of our community who experience racial and religious vilification choose not to report these events to the police for many understandable reasons[8]. Our community should be able to access appropriate and accessible information, support, and legal assistance so that they can make more informed choices about both reporting their experiences to the police and to make complaints to discrimination complaints-handling bodies.

Section 93Z plays an important role in signifying to targeted communities that the government has drawn a line in the sand distinguishing between acceptable and unacceptable public behaviour.[9] We submit that its use by law enforcement agencies be closely monitored, and that police officers be appropriately trained to recognise potential vilification offences and act on them when appropriate to do so. Its under-utilisation compared to the prevalence of religious and racial discrimination in the community clearly needs further investigation. While individuals still have the right to make individual vilification complaints under the *ADA,* it cannot be left solely to marginalised communities to act against threats to their safety based on the attributes that makes them marginalised and vulnerable in the first place, and law enforcement agencies have a role to play in the protection of these communities.

Recommendation 1

The removal of the requirement that the Director of Public Prosecutions approve prosecutions under s93Z of the *Crimes Act* should remain, and the consideration and application of this provision by law enforcement agencies be closely monitored.

Recommendation 2

The definition of "public act" in s93Z of the *Crimes Act* should be amended to make it clear that comments threatening or inciting violence that can be heard by general members of the public should be considered public acts, even if they were not intended to be made *to the public*.

[7] For example, Australian Human Rights Commission, 'Sharing the Stories of Australian Muslims', (2021), https://humanrights.gov.au/our-work/race-discrimination/publications/sharing-stories-australian-muslims-2021, accessed 23 April 2024.
[8] Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided" (2016) *UNSW Law Journal* 39(2) 488.
[9] *Ibid,* 511.

Section 93Z and disability vilification

Section 93Z of the *Crimes Act* does not make it an offence for a person to threaten or incite violence towards another person on the ground of their disability. Vilification and harassment on the ground of disability is not covered under civil vilification provisions in the *ADA*. The prevalence of disability discrimination in the community is widely known and has been confirmed by the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability[10]. The omission of disability as a protected attribute in s93Z is inexplicable and needs to be addressed in this review- we urge the NSW Government to protect people with disability against harassment, abuse and hate speech.

Recommendation 3
"Disability" should be added as a protected attribute in s93Z of the *Crimes Act*.

Amendment of *ADA* civil vilification provisions

KLC acknowledges that the Commission is currently reviewing the *ADA* at the same time as reviewing s93Z of the *Crimes Act.* KLC has previously made submissions relating to the review of the *ADA* (**attached**). We submit that the consideration of civil vilification provisions is best undertaken in the context of the wider review of the *ADA.* The current consideration of s93Z of the *Crimes Act* highlights the importance of systematically reviewing the ADA as a whole, rather than in a piecemeal way. A brief consideration of s93Z together with the civil vilification provisions highlights the following inconsistencies:

1. Taken together, s93Z of the *Crimes Act* and s49ZE of the *ADA* offer piecemeal and ineffective protection to NSW residents against discrimination based on religious belief or affiliation. There is no effective protection for religious discrimination under the *ADA*. Only applicants who are discriminated against on "ethno-religious grounds" can bring race discrimination complaints with a religious component against their employers, schools, or services under the *ADA*[11], and even then, they may be precluded by a myriad of exemptions. The *ADA* must be reformed to recognise religious discrimination to protect both those who hold religious beliefs and affiliations, and those who do not. The *ADA* is confusing, ineffective and sends mixed messages to the community by legislating against religious vilification without protecting against religious discrimination. We refer to our 2023 submissions on the review of the *ADA.*
2. The definition of sexual orientation in section 93Z of the *Crimes Act* brings to light the inadequacy of the *ADA's* protection on this basis. The definition of "sexual orientation" in the *Crimes Act* provision includes a person's sexual orientation towards persons of the same sex, a different sex, or persons of the same sex *and* different sex. The *ADA* makes homosexual vilification unlawful in s49ZT but does not make vilification or discrimination based on bisexuality

[10] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Final Report- Volume 4: Realising the human rights of people with disability', (2023), 93 https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Volume%204%2C%20Realising%20the%20human%20rights%20of%20people%20with%20disability.pdf

[11] *Anti-Discrimination Act 1977* (NSW), section 4 defines "race" as including "colour, nationality, descent and ethic, ethno-religious or national origin."

unlawful. The *ADA* definitions should be brought into line with s93Z of the *Crimes Act.*

3. As mentioned above, there is currently no vilification provision in either the *Crimes Act* or the *ADA* protecting people living with disability. Vilification on the grounds of a person's disability should be made unlawful under the *ADA.*

Recommendation 4
The civil vilification provisions in the *ADA* should be reviewed in the context of a holistic review of that Act. As a minimum, they should be amended to include (among other protections):

a. Protections against discrimination based on religious belief or affiliation;
b. Protections for people who are bisexual, as they are not currently protected from discrimination based on sexual orientation in the *ADA;*
c. Vilification on the grounds of a person's disability should be made unlawful under the *ADA.*

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au

Yours faithfully,
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UNSW
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8 February 2017

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By email: vilificationconsultation@justice.nsw.gov.au

Dear Dr Kerkyasharian,

Review of serious racial vilification offence

Kingsford Legal Centre (KLC) welcomes the review of the NSW offence of serious racial vilification (s 20D, *Anti-Discrimination Act 1977* (NSW) (**ADA**)). We are concerned that without significant amendments, the offence of serious racial vilification will continue to be difficult to prosecute, as has been the experience to date in NSW. Racial vilification is a serious problem in Australia. One in five Australians say they have experienced racist speech, including verbal abuse, racial slurs and name calling.[1] One in twenty Australians have been attacked due to their race.[2] Due to the prevalence of racism, KLC submits ensuring the effectiveness of racial vilification laws is integral to provide access to effective remedies and to send a clear message that such behavior is unacceptable in modern Australian society.

[1] Australian Human Rights Commission campaign, 'Racism. It stops with me.' <itstopswithme.humanrights.gov.au/why-racism> (at 27 January 2017).
[2] Australian Human Rights Commission campaign, 'Racism. It stops with me.' <itstopswithme.humanrights.gov.au/why-racism> (at 27 January 2017).

About Kingsford Legal Centre

Kingsford Legal Centre is a community legal centre that has been providing advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. We provide general advice on a wide range of legal issues. We also have a specialist discrimination law service (NSW wide), a specialist employment law service and an Aboriginal Access program. In addition to this work, we undertake law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Recommendations

KLC recommends that:

1. The threshold in s 20D(1) of 'severe' or 'serious' hatred, contempt or ridicule be removed and replaced with "expresses hostility against, or brings into contempt or ridicule";
2. Section 20D be extended to apply to conduct constituting serious racial vilification without requiring that the conduct be a public act. Alternatively, the definition of 'public act' in section 20B be amended to include any conduct that is within the hearing of people in a public place;
3. The requirement of having 'knowledge' in section 20B(c) be removed;
4. The means element in sections 20D(a) and 20D(b) be removed;
5. Division 3A of the ADA be amended to provide coverage for persons of presumed or imputed race;
6. Section 20D be amended to provide coverage where a person is subject to serious racial vilification based on their associates;
7. The time limit for commencing prosecution for the offence of serious racial vilification be extended to 12 months from when the offence was alleged to have been committed.
8. The reliance on intent in section 20D be removed. Alternatively, if the intent requirement is retained, the section should be amended to state that recklessness is sufficient to establish intention in section 20D;
9. The requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification be removed;
10. The President of the ADB be given the power to refer matters to the DPP without receipt of a formal complaint if they believe the matter falls within section 20D;

11. The term 'incite' in sections 20C and 20D be replaced with 'promote';
12. The offence of serious racial vilification be extended to include extreme speech that promotes racial hatred;
13. The maximum punishment for imprisonment be increased to 3 years;
14. The maximum penalty units for an individual be increased to 100;
15. The maximum penalty units for a corporation be increased to 200.
16. Protection against discrimination on the basis of religion be introduced into the ADA;
17. Protection against religion vilification and serious religious vilification be introduced into the ADA;
18. The Government make similar amendments to all serious vilification provisions contained in the ADA;
19. If these amendments are accepted, all serious vilification offences in the ADA be moved to the *Crimes Act 1900.*

KLC's experience advising on section 20D of the ADA

In 2016 KLC gave 214 advices and opened 33 cases in discrimination law. 19% of these advices and 26% of the cases were for race discrimination matters. While we have advised a large number of clients on racial discrimination and vilification, we have had little exposure to the NSW offence in section 20D of the ADA. This is not surprising given that there have been no successful prosecutions of this offence. Where we have given advice on racial vilification, prosecution under section 20D has not been possible because of the high threshold requirements of the offence, even in cases where other criminal offences have been committed.

Case study: Mae

Mae sought advice from us about her options for addressing racial abuse and threats of violence. She was followed by three people and sought refuge in a nearby medical centre. They followed her into the centre, shouted racial abuse and made threats of extreme violence. Mae feared for her safety and was very distressed by the incident. The President of the Anti-Discrimination Board did not refer the case for prosecution as he did not feel that the threshold requirements for serious vilification were met. At least one of the offenders was subsequently convicted of other criminal offences.

In our experience, there are various reasons why clients may not wish to lodge a complaint with the Anti-Discrimination Board NSW, engage in conciliation, or commence civil proceedings. Complaints and proceedings can cause further stress for clients and may not provide the remedies that they seek. Prosecution by the state for racial vilification sends an important message that serious racial vilification is not acceptable in our society and that victims are equal members of the community whose rights will be protected by the state.

Freedom of speech and freedom from racial vilification

KLC acknowledges the importance of freedom of speech as a fundamental human right. However, this right is not absolute and may be limited to protect competing rights. We believe that the suggestions made below do not unduly limit freedom of speech, and create an appropriate balance between maintaining freedom of speech and freedom from racial discrimination and vilification.

Australia is obliged under the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**) to ensure that no one is subjected to racial hatred.[3]

Article 20(2) of the ICCPR provides:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Article 4(a) of ICERD requires that states parties:

> *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...*[4]

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[3] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signatures 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1 & 4.

[4] ICERD, art 4(a).

As provided in Article 19 of the *International Covenant on Civil and Political Rights*, freedom of expression carries with it special duties and responsibilities[5]. Freedom of expression is not an absolute right and may be restricted where necessary to respect others' rights.[6] Article 19(3) of the ICCPR requires any restrictions on freedom of expression to be provided by law, be necessary, and to pursue a legitimate aim (for the protection of national security or public order, or public health or morals).[7] As such, restrictions on freedom of expression are permissible if 'they are necessary in order for the State to fulfil an obligation to prohibit expressions on the grounds that they cause serious injury to the human rights of others'.[8] The UN Human Rights Committee has found that laws offering protection against racial vilification meet these criteria[9]. KLC submits that strengthening section 20D protections strikes the appropriate balance between freedom of speech and freedom from racial vilification.

Whether the threshold for prosecuting the offence of serious racial vilification in the ADA should be amended

Section 20D of the ADA provides:

(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

> (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

KLC submits that the threshold for prosecuting the offence of serious racial vilification should be amended. Our arguments are detailed below.

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[5] ICCPR, art 19(3).
[6] ICCPR, art 19(3).
[7] ICCPR, art 19(3).
[8] Frank La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23 (20 April 2010) [79(h)].
[9] For example, *JRT and WG Party v Canada*, UN Human Rights Committee, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 (1984).

Section 20D sets a high threshold for prosecution

Section 20D the ADA sets a high threshold for prosecution which inhibits its efficacy. Despite the offence being introduced almost 30 years ago, it has never been successfully prosecuted. KLC understands that referrals have been made to the NSW Director of Public Prosecutions (DPP), but they have not decided to prosecute. We believe this is because the threshold for prosecuting has been set too high.

KLC submits that the threshold for prosecution under section 20D should be lowered. Section 20D requires that the acts complained of must incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race for a case to be successful. This requires the prosecutors to present evidence to prove that the conduct has incited a third party, setting a high onus of proof which is difficult to discharge.

We note this high standard is not required by similar provisions in New Zealand legislation. Under New Zealand's racial harassment laws, it is enough that a person 'expresses hostility against, or brings into contempt or ridicule', not that it need to be severe or serious.[10] KLC submits the current test for serious racial vilification should be made easier to satisfy in order to be in line with community expectations and to deter individuals from engaging in such conduct.

Recommendation

1. The threshold in s 20D(1) of 'severe' or 'serious' hatred, contempt or ridicule be removed and replaced with "expresses hostility against, or brings into contempt or ridicule".

[10] *Human Rights Act 1993* (NZ) s 63(1).

Public act requirement

Case study – Ravi and Madhu

Ravi and Madhu an older couple, recently moved to a new home. They were born in India and lived in Australia for more than 30 years. They came to KLC for help about their neighbour. The man next door would verbally abuse them over the back fence calling them 'monkeys' and telling them to 'go back to the jungle'. The racist abuse was constant was seriously affecting their mental health and their enjoyment of their new home. Unfortunately these comments weren't made in 'public' and weren't overheard by anyone else so they could not make a racial vilification complaint.

KLC recommends that section 20D be amended to apply to all serious racial vilification, without limiting the location to a public act. This would be consistent with the international human rights obligations contained in Article 4(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination.[11] It is also consistent with other offences involving threatened violence, which do not require violence to be threatened in public.[12] Alternatively, the scope of 'public act' could be expanded. Section 20B currently defines public act to include, amongst other aspects, conduct observable by the public. This could be amended to include any conduct that is within hearing of people in a public place.

Recommendation

2. Section 20D be extended to apply to conduct constituting serious racial vilification without requiring that the conduct be a public act. Alternatively, the definition of 'public act' in section 20B be amended to include any conduct that is within the hearing of people in a public place.

[11] We note that Australia has made a reservation to this article, however in doing so, it also indicated its intention to ask Parliament to legislate provisions implementing this article. The Committee on the Elimination of Racial Discrimination has also indicated that this article is mandatory (General Recommendation VII) and repeatedly requested Australia to remove its reservation and implement article 4 in legislation.

[12] For example, offences of stalking or intimidation with intent to cause fear of physical or mental harm (s 13, *Crimes (Domestic and Personal) Violence Act 2007*); violent disorder (s 11A, *Summary Offences Act 1988*); documents containing threats (s31, *Crimes Act 1900*); affray (s 90, *Crimes Act 1900*); threatening to destroy or damage property (s 199, *Crimes Act 1900*).

Knowledge requirement

Section 20B imposes further barriers to prosecution with its requirement of knowledge. Section 20B(c) requires that for the distribution or dissemination of matters to be a public act the person must have 'knowledge' that the material will 'promote or express' hatred, serious contempt or severe ridicule. This 'knowledge' is both almost impossible to prove, but also irrelevant to determining whether the matter was distributed or disseminated to the public. KLC disagrees with the current reliance on intention in section 20D. KLC recommends that the section is amended to expressly state that proof or knowledge of intent is not required to establish the offence, as per the NSW Law Reform Commission's recommendations.[13] Alternatively, if the intent requirement is retained, we suggest clarifying that recklessness is sufficient to establish intention in section 20D. We note that this is consistent with general principles of criminal law.

Recommendation

3. The requirement of having 'knowledge' in section 20B(c) be removed.
4. The reliance on intent in section 20D be removed. Alternatively, if the intent requirement is retained, the section should be amended to state that recklessness is sufficient to establish intention in section 20D.

Means element

20D(1)(a) and (b) include a 'means' element, requiring that the offending conduct be by means of threatening physical harm towards, or towards any property of, the person or group of persons; or by inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

KLC believes the means element unnecessarily restricts successful prosecution of this offence, as in effect, it would have to be proved that the conduct fell within the means listed above. KLC notes that conduct that does not fall within these means, such as an implied threat, would be almost impossible to prosecute. We recommend that the means element be removed.

Recommendation

5. The means element in sections 20D(a) and 20D(b) be removed.

[13] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 [93].

Protection for conduct based on imputed race

Case study - Sally

Sally was on a bus on her way home from work one evening. When she got on the bus, a passenger yelled at her, saying "get off the bus, or I'll make you go back to Japan, you fucking Jap". Sally is Chinese, not Japanese.

KLC submits that Division 3A of the ADA should include protection against vilification for persons of presumed or imputed race. Racial vilification is just as harmful to individuals, communities and society in cases where the offender is mistaken as to the race of the victim(s), and an offender should not escape prosecution on this basis. Currently, the ADA is only arguably applicable to where the person committing the relevant public act has accurately identified the race of the person or group of persons that the incitement is directed towards. Extending the ADA to cover presumed or imputed race would provide protection even where the person committing the public act is misguided about the actual race of the victim.

Recommendation

6. Division 3A of the ADA be amended to provide coverage for persons of presumed or imputed race.

Coverage of associates

Currently, section 20D covers situations where a person is targeted because of their race, not the race of their associates. KLC recommends that section 20D be extended to cover incitement directed at persons or a group of persons on the grounds of the race of the person or the race of their associates. This will cover persons who are targeted not on the grounds of their race, but because of their association with another person or persons whose race is the subject of serious racial vilification. Section 7 of the ADA already provides coverage for the associates of race discrimination, and amending section 20D would provide consistency with this. Section 20C should also be amended to ensure uniformity throughout the Division.

Recommendation

7. Section 20D be amended to provide cover situations where a person is subject to serious racial vilification based on their associates.

Time limit

Case Study – Brian

Brian was working as a builder. A colleague consistently referred to him as a 'faggot' and made derogatory comments about his homosexuality including suggestions that he was sex offender because he was gay. Brian was very distressed about this conduct but was reluctant to formally complain. Eventually, he sought advice on his options in relation to this serious vilification, however, a referral for consideration for criminal prosecution could not occur as the conduct occurred outside the statutory referral period of 6 months.

Currently, a person has 12 months to lodge a complaint to the Anti-Discrimination Board (ADB) under s89B of the ADA. However, proceedings for the serious racial vilification offence must be commenced no later than 6 months from when the offence was alleged to have been committed under section 179 of the *Criminal Procedure Act 1986* (NSW). KLC recommends extending the time limit for commencing prosecutions for the offence of serious racial vilification to 12 months to be consistent with the time limit for lodging complaints under the ADA. This is particularly important as the time taken by the ADB to assess, investigate and refer complaints combined with the time take for the Attorney-General to consider and consent to prosecution effectively shortens the time available for the commencement of proceedings.

Recommendation

8. The time limit for commencing prosecution for the offence of serious racial vilification be extended to 12 months from when the offence was alleged to have been committed.

Attorney-General's consent requirement

We believe that the requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification should be removed. The consent requirement unnecessarily politicises serious vilification matters and removing it will send the message that serious vilification is considered to be in the same category as other criminal offences. We note that since 1990, the Attorney-General has delegated this power to the DPP. We recommend that the ADA be amended to make clear that the DPP holds the discretion to prosecute offences of serious racial vilification without requiring the consent of the Attorney-General.

Recommendation

9. The requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification be removed.

ADB President's power to refer matters

KLC notes that victims of serious racial vilification are likely to be traumatized by the experience, and may be unable or unwilling to initiate a complaint. We submit that the powers of the President of the ADB should be extended for serious racial vilification offences. KLC recommends that the President of the ADB be given the power to refer a matter to the DPP without needing to receive a formal complaint if they believe the matter falls within section 20D. This would act to relieve pressure on individuals to initiate action where serious racial vilification occurs.

Recommendation

10. The President of the ADB be given the power to refer matters to the DPP without receipt of a formal complaint if they believe the matter falls within section 20D.

Whether the element of the offence of serious racial vilification of 'inciting others to threaten' in the ADA should be amended

KLC submits that the requirement to 'incite' hatred or contempt in others is too high and should be removed. We suggest replacing it with a term such as 'promoting'. This would bring the offence in line with international human rights law which prohibits acts that have significant potential to promote racism.[14] We submit this amendment should be extended to the use of 'incite' and 'inciting' in sections 20C and 20D of the ADA.

We also recommend that the offence be extended to include extreme speech that promotes racial hatred in the absence of explicit threats of physical harm. Harassment or intimidation based on race can be a form of serious and substantial abuse. It can make people fear for their safety and limit the extent to which they participate in society. It also creates a broader culture within which race based discrimination and physical harm becomes more acceptable.

[14] See for example, *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 4; *Vejdeland and ors v Sweden*, ECHR Application no. 1813/07, 57.

Recommendations

11. The term 'incite' in sections 20C and 20D be amended to 'promote'.
12. The offence of serious racial vilification be extended to include extreme speech that promotes racial hatred.

The appropriate penalty for the offence of serious racial vilification

KLC submits that the current maximum punishment of 6 months imprisonment is relatively lenient and does not reflect the impact such conduct has on the community.[15] Comparable offences in the *Crimes Act 1900* (NSW) have higher penalties and are more likely to be pursued by prosecutors. For example, common assault, as a threat that has the possibility of being immediately carried out, holds a maximum penalty of 2 years.[16] A threat to property of a person holds a maximum penalty of 5 years in NSW.[17] Due to the similarities with these offences, and the impact of serious racial vilification, we suggest that the maximum punishment be amended to 3 years imprisonment. We also recommend amending the maximum penalty units for the offence. Currently, the maximum penalty units are 50 for an individual and 100 for a corporation.[18] We recommend increasing the maximum penalty units to 100 for an individual and 200 for a corporation to reflect community values that engaging in serious racial vilification is unacceptable in modern Australian society.

Recommendations

13. The maximum punishment for imprisonment be increased to 3 years;
14. The maximum penalty units for an individual be increased to 100;
15. The maximum penalty units for a corporation be increased to 200.

Whether the ADA should be extended to cover serious vilification specifically on the grounds of 'religious belief or affiliation'

Case study: Zeinab

[15] *Anti-Discrimination Act 1977* (NSW) s 20D(1).
[16] *Crimes Act 1900* (NSW) s 61.
[17] *Crimes Act 1900* (NSW) s 199(1).
[18] *Anti-Discrimination Act 1977* (NSW) s 20D(1).

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer starting yelling at her. The customer said "go back to your country terrorist". When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying "If you love Islam...I'll fucking show you", calling Zeinab a "fucking murderer", saying "maybe you have a knife to kill me because Muslims kill people", and telling Zeinab to "fuck off". Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under discrimination law, as it doesn't protect Muslims against religious vilification.

KLC notes that the ADA does not provide protection against religious discrimination and religious vilification. Religious discrimination and religious vilification occur frequently, and vulnerable clients cannot access remedies for such conduct under discrimination law in NSW.

KLC recommends that the serious racial vilification offence be extended to cover serious vilification on the grounds of 'religious belief or affiliation'. This would ensure that inciting religious hatred would be covered by the offence. In particular, Muslims in Australia have suffered significant vilification and harassment in recent times, with little legal remedy available. It would also bring the vilification offence in line with international human rights obligations in Article 20(2) of the International Covenant on Civil and Political Rights, which requires that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[19]

Case study: Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

[19] We note that Australia has made a reservation to this article. However, the United Nations Human Rights Committee has recommended that Australia withdraw this reservation: *Concluding Observations on Australia*, CCPR/C/AUS/CO/5, 2 April 2009.

Case study: Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law in NSW.

In the last five years, we have advised 12 clients about religious discrimination, vilification and harassment. We have had to tell these clients that it can be difficult to seek remedy under NSW anti-discrimination law because there is no protection against religious discrimination, vilification or harassment, and it can be difficult to establish ethno-religious discrimination, vilification or harassment. KLC recommends that protection against discrimination on the basis of religion be introduced into the ADA.

Recommendations

16. Protection against discrimination on the basis of religion be introduced into the ADA.
17. Protection against religious vilification and serious religious vilification be introduced into the ADA.

Whether any changes to the elements or process for the investigation and prosecution of the offence of serious racial vilification should be mirrored in the ADA offences of serious transgender vilification, serious homosexual vilification or serious HIV/AIDS vilification

KLC recommends that the Government make similar amendments to the other vilification laws contained in the ADA: that is, homosexuality, transgender status and HIV/AIDS in sections 49ZTA, 38T, and 49ZXC. The problems that exist for section 20D exist for the other serious vilification offences in the ADA, and amending these offences would ensure increased protections against serious vilification as well as consistency in NSW discrimination law.

Recommendation

18. The Government make similar amendments to all serious vilification provisions contained in the ADA.

Whether all serious vilification offences should be moved from the ADA to the *Crimes Act 1900*

KLC submits that all serious vilification offences should be relocated to the *Crimes Act 1900* to address the perception that investigating racial vilification is a matter for the Anti-Discrimination Board, and not the police. We believe relocating the offence to the *Crimes Act 1900* will cause the offence to be successfully prosecuted more frequently. We recommend providing training to the NSW Police and DPP about serious vilification offences, a belief shared by the former DPP, Nicholas Cowdery AM QC.[20] A sound understanding of the nature of racial vilification and the serious impact that it can have on individuals, communities and society is essential to ensuring appropriate investigation and subsequent prosecution of this conduct.

Moving the serious vilification offences to the *Crimes Act 1900* would also utilize the investigative powers of the NSW Police and DPP. The ADB does not have investigative powers, nor the resources to prepare a prosecution brief for the DPP. No other agency or body is responsible for preparing an evidence brief for these matters. Cowdery identified the issue of evidence as a major problem in pursuing prosecution for these matters, stating:

> "The most common reason why prosecutions have not been commenced has been the inability of the prosecution to adduce evidence to prove to the necessary standard either incitement or incitement by the specific means described in the offence provisions."[21]

Moving the offence to the *Crimes Act 1900* would require the NSW Police to assume investigative responsibility for these matters and alleviate this barrier to prosecution.

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[20] Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects, Roundtable on Hate Crime and Vilification Law: Developments and Directions*, Law School, University of Sydney, August 2009, 7.

[21] Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects, Roundtable on Hate Crime and Vilification Law: Developments and Directions*, Law School, University of Sydney, August 2009, 4.

Recommendation

19. All serious vilification offences in the ADA be moved to the *Crimes Act 1900*.

Please don't hesitate to contact us on (02)9385 9566 or at legal@unsw.edu.au should you wish to discuss our submission.

Yours sincerely,
KINGSFORD LEGAL CENTRE

[redacted]

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29 September 2023

Proper Officer
Law Reform Commission
NSW Department of Communities and Justice
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Dear Officer,

Preliminary Submission on the Anti-Discrimination Act 1977 (NSW) Review 2023

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this preliminary submission on the NSW Law Reform Commission's review into the *Anti-Discrimination Act 1977* (NSW) (the **ADA**). We consent to this submission being published.

About Kingsford Legal Centre

KLC is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney. We have been providing specialist discrimination law advice to people since 1981.

We continue to specialise in discrimination law and run a state-wide Discrimination Law Clinic. In 2022, we gave 189 discrimination advices, and provided intensive assistance, including representation in 60 discrimination matters. We provide advice and representation in all discrimination jurisdictions, including the Fair Work Commission, Australian Human Rights Commission, Federal Court of Australia, Federal Circuit and Family Court of Australia, Anti-Discrimination NSW, and the NSW Civil and Administrative Tribunal.

KLC also has a specialist Employment Rights Legal Service (**ERLS**)[1] and Sexual Harassment and Discrimination Legal Service Clinic (**SHDLS**). These clinics provide free legal help and assistance to people experiencing social and economic disadvantage and barriers to justice. KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education.

Overview

We welcome this review as the ADA is long overdue for reform. The ADA needs comprehensive reform to ensure effective remedies for people in NSW. This must address gaps in protections for people experiencing discrimination and disadvantage across NSW and adopt a best practice approach to equality law.[2]

We have reviewed the proposed terms of reference for this review and broadly support these terms. This submission outlines select key areas for the Commission to consider under

[1] ERLS is a collaborative partnership between KLC, Inner City Legal Centre and Redfern Legal Centre.
[2] Kingsford Legal Centre, *Submission to the Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2020) 1.

these terms. We look forward to providing more detailed, substantive feedback on reforming the ADA under the review in due course.

1. Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

We recommend specific consultation on how the ADA could be modernised by:

- Consulting on how the Act can be simplified and made more accessible for groups particularly impacted by discrimination. We think there are ways in which we can make the language we use in this context more straightforward and accessible to the general public.
- Consultation with a focus on clear tests for discrimination and use of accessible and Plain English throughout the Act. The current law is confusing and not easy for lawyers to navigate, let alone people without legal training.
- Development of a uniform plain English definition of discrimination, when discrimination is prohibited, and general exceptions and exemptions for discrimination[3];
- Consultation on whether there should be one standard test for discrimination (which incorporates both direct and indirect discrimination) to increase accessibility and useability of the law.
- Removal of a comparator in the test for discrimination.
- Consultation on the development of an enforceable positive duty on all duty holders under the ADA to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and victimisation, and to make reasonable adjustments; and
- Providing specific examples in the legislation by way of notes to assist the community to understand what discrimination can involve.

2. Whether the range of attributes protected against discrimination requires reform

We endorse the work of Equality Australia in recommending consultation with people who have expertise in anti-discrimination law and their application to LGBTIQ+ populations to ensure attributes for LGBTIQ+ people are effectively defined.[4] In particular, we support the work of Equality Australia in encouraging reform of the ADA to include protections for the following attributes: sexual orientation, gender identity and expression, and sex characteristics or variations of sex characteristics.[5]

There is also a broader need to increase the range of attributes protected under the Act and we recommend widespread community consultation with key affected groups around this. Current gaps in attributes that should be considered as part of the review include:

- socio-economic disadvantage;

[3] E.g., see structure of the *Equal Opportunity Act 2010* (Vic).
[4] We have reviewed Equality Australia's draft submission into this Review and refer to this.
[5] Ibid.

- language (including signed language);
- employment activity;
- industrial activity;
- lawful sexual activity;
- genetic characteristics;
- physical features;
- political belief or activity;
- profession, trade, or occupation;
- religious belief or activity (including lack of religious belief or activity),
- irrelevant criminal record;
- irrelevant medical history;
- sex work;
- personal association;
- subjection to family and domestic violence, or other forms of gender-based violence; and
- accommodation status.

However, we note that this list is non-exhaustive. We provide this list by way of select examples only to encourage further consultation on this issue in the review.

We also recommend consultation on the ADA clearly providing attribute extensions for all protected attributes. This should include both relationship extensions (such as a person being discriminated against on the basis of being an associate of a person with an attribute), as well as characteristic extensions (such as something being done on the ground of 'a characteristic that appertains generally' to persons with the characteristic or is 'generally imputed' to persons with that attribute).

We also urge this review to consider how to address intersectional discrimination to allow for more effective remedies for intersectional discrimination, such as a provision that recognises discrimination on the basis of a combination of attributes. [6]

3. Whether the areas of public life in which discrimination is unlawful should be reformed

The current approach of the ADA in terms of areas of life is not adequate and creates gaps and uncertainties in the application of discrimination law in certain areas. This is undesirable for human rights legislation and creates unnecessary complexity in terms of applicability of the law.

[6] Examples include section 14 (combined discrimination; dual characteristics) of the *Equality Act 2010* (UK), and section 3.1 (multiple grounds of discrimination) the *Canadian Human Rights Act R.S.C 1985*, c. H-6.

We recommend broad consideration of whether the ADA should have a "public life" approach to discrimination. For example, we note that the *Race Discrimination Act 1975* (Cth), provides a broad definition of "race discrimination" across a wider range of areas of public life.[7] We recommend consultation on whether this approach should be adopted under the ADA.

4. Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

We recommend consultation on reforming the ADA to include:

- Consultation on whether there should be one standard test for discrimination (which incorporates both direct and indirect discrimination) to increase accessibility and useability of the law.
- Consultation on standard tests for discrimination, such as used under sections 8 and 9 of the *Equal Opportunity Act 2010* (Vic).
- Removal of a comparator test.[8]
- A standard test for 'reasonable adjustments.' This must also be drafted in a way that does not require an applicant to prove that their protected attribute was the reason that the duty holder failed to make the reasonable adjustment.[9]
- A test for discrimination that includes threatened discrimination, and discrimination on the basis of past, future, or presumed attributes.
- Consultation with groups that experience high levels of intersectional discrimination to consider how best to capture discrimination on the basis of a combination of attributes;
- Consultation on how to address gaps in community knowledge of the ADA and how to increase accessibility of the legislation, such as notes providing examples of what unlawful discrimination can look like.
- Consultation on what an effective and uniform mechanism in the ADA to balance competing rights should entail, such as an overarching proportionality test. We note that in prior submissions we have recommended creating a single exception clause with a simple test – of "proportionate means of achieving a legitimate end.'[10] We believe this should be considered to reduce complexity and confusion in the law.
- Consultation on how the burden of proof can better reflect the realities of evidence in discrimination matters, such as a shifting burden that requires an applicant to demonstrate that they were treated unfavourably because of their attribute, and then shifts the burden to the respondent to show that it was not because of the protected attribute.[11] Too many matters fail simply because an applicant cannot meet the burden

[7] See *Race Discrimination Act 1975* (Cth) s9(1).
[8] See *Equal Opportunity Act 2010* (Vic), s8(1).
[9] KLC remains deeply concerned by the reasoning in *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128, where the court interpreted the DDA as requiring a person with a disability to prove their disability was the reason a person failed to provide a reasonable adjustment.
[10] See NACLC, *Submission to the Commonwealth Attorney General: Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation* (March 2011) 2.
[11] For example, consideration of including a provision like section 361 of the *Fair Work Act 2009* (Cth).

because they do not hold the requisite evidence – for example in employment matters (where employees can find it difficult to obtain access to relevant records).

5. The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

This review is a welcome opportunity to review the current vilification provisions which have not been effective in preventing or responding to vilification.

Our Centre supports the introduction of vilification protection across all protected attributes under the ADA. However, we recommend consultation on the appropriate scope of these to ensure that they are more readily available to people who experience vilification. The vilification provisions under the ADA have not been effective or widely utilised. This is despite vilification being a significant issue in the community.

There is a long and well-established commentary on the problematic element of 'incite' under the ADA's vilification provisions.[12] We are concerned that the use of the word 'incite' sets the bar too high for vilification laws, requiring proof that the conduct causes a particular response in a third party. We refer to our 2017 submission into the Review of the Offence of Serious Vilification in NSW, where we recommended the test being that the conduct "expresses hostility against or brings into contempt or ridicule" of the person with the attribute.[13]

Indeed, we are concerned that the tests for 'serious contempt' or 'serious ridicule' are also unclear and create significant discretion for decision-makers as to their interpretation. For example, NCAT has found that comments to a transgender person by a neighbour that she was a "drag queen" and "you are all gay before being in drag" did not have the capacity to incite serious contempt for or severe ridicule of the applicant.[14] We strongly recommend consultation on whether the tests for 'serious contempt' and 'serious ridicule' are too restrictive.

6. The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

Sexual harassment is endemic in Australian society.[15] Our Centre frequently advises clients who have been profoundly negatively impacted by sexual harassment and other forms of sex discrimination. In recent years we have supported reforms to the SDA to strengthen protections against sexual harassment and other forms of sex discrimination (including the creation of standalone actions for sex-based harassment and hostile workplace environment on the basis of sex).[16] However, our Centre encourages consultation on whether similar reforms should also be expanded to other attributes.

We recommend the following issues are consulted on as part of this review:

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[12] See, e.g., Stepan Kerkyasharian, *Report on Consultation: Serious Vilification Laws in NSW* (May 2017) 9.
[13] Kingsford Legal Centre, *Submission to the Review of the Offence of Serious Vilification in NSW* (8 February 2017) 6.
[14] See, e.g., *Stevens v Hancock* [2015] NSWCATAD 126 (22 June 2015) [51].
[15] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 69.
[16] For example, see Kingsford Legal Centre, *Submission on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (17 October 2022); *Submission to the Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (13 July 2021).

- whether to make sexual harassment in all environments unlawful;
- how the ADA can reflect the SDA's expansive sex discrimination provisions, including by strengthening the test for sexual harassment by including an equivalent for s28A(1A) (to look at intersectional experiences of sexual harassment), creating a provision for harassment on the ground of sex (like SDA, s28AA), and a provision for hostile workplace environment on the basis of sex (like SDA, s28M);
- how the ADA can include a provision like SDA, s28B(6), which provides that it is unlawful for a person to sexually harass a worker in connection with them being a worker (there is no equivalent provision as broad under the ADA);
- how the ADA can include the above kinds of provisions for all protected attributes, e.g., harassment on the basis of disability, and creating a hostile workplace environment on the basis of disability; and
- Consultation on the creation of an enforceable positive duty on employers and other duty holders to take reasonable and proportionate measures to eliminate forms of sex discrimination (including sexual harassment), and other forms of discrimination.

7. Whether the Act should include positive obligations to prevent harassment, discrimination, and vilification, and to make reasonable adjustments to promote full and equal participation in public life

Our Centre strongly supports consultation on including a positive duty under the ADA for duty holders to prevent harassment, discrimination, vilification, and victimisation, as well as to make reasonable adjustments. This reform is long overdue and vital to ensure that complainants do not alone bear the burden of taking steps to prevent discrimination and redress breaches of discrimination law.

We particularly support consultation on;

- How this duty can extend to all duty holders (not just employers) under the ADA;
- How the duty will be enforced, including the need for ADNSW to be given increased and sustained funding and support to enable it to properly enforce this duty;
- How persons can safely report potential breaches of the positive duty, and what this process will look like; and
- How this positive duty should overlap with the AHRC's ability to investigate breaches of the positive duty to prevent forms of sex discrimination under the SDA.

8. Exceptions, special measures and exemption processes

The ADA currently has complex and numerous exceptions. We remain concerned that this framework is inaccessible to many complainants and undermines the strength of discrimination provisions. We recommend greater simplicity in how the exceptions are drafted and consideration of whether all the current exceptions continue to be needed.

However, we recommend specific consultation on the following:

- whether the ADA should be reformed to create a single exception clause with a simple test – for example – a "proportionate means of achieving a legitimate end.'[17]
- the need to repeal exceptions which allow educational institutions to discriminate against applicants, employees, and students on the basis of their transgender status and homosexuality.[18] We note we have made a similar recommendation in our recent submission on the ALRC Inquiry into Religious Education Institutions and Discrimination Law.[19]
- whether superannuation exceptions[20] are too narrow, and in practice are appropriately balancing the rights of individuals with public policy considerations.
- the need to further tailor the general exceptions under section 56 of the ADA (for religious bodies);
- the need to change the definition of "educational authority"[21] to include all educational authorities, so that private schools/institutions can be complained about to ADNSW.

We also support consultation on the ADA having a standard special measures provision that applies for all protected attributes under the Act. We recommend consultation on this clearly relating to 'special measures' and not 'special needs' (as is currently drafted).[22] We are concerned that the language of 'special needs' focuses the issue on the individual, instead of the need for programs or activities as special measures to ensure greater equity for impacted individuals and communities.

In terms of the exemption process, we support greater consultation on the need to include more guidelines on this under the ADA or related policies. We note that the ADA website provides some detail on factors to consider in granting an exemption.[23] However, we support consideration of whether these should be more clearly embedded in the legislative scheme.

9. The adequacy and accessibility of complaints procedures and remedies

With over 40 years of experience, KLC knows well that discrimination laws are only as effective as the adequacy and accessibility of complaint procedures and outcomes. We support community consultation on the following issues relating to the process of making discrimination complaints under the ADA and possible outcomes:

- the need to extend the timeframe to lodge a complaint for all unlawful discrimination matters to at least 24 months (to be consistent with the new AHRC time limit to bring complaints).

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[17] See NACLC, *Submission to the Commonwealth Attorney General: Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation* (March 2011) 2.
[18] See ADA, ss38C(3)(c), 38K(3), 49ZH(3)(c) and 49ZO(3).
[19] Kingsford Legal Centre, *Submission on the ALRC Inquiry into Religious Education Institutions and Anti-Discrimination Law* (24 February 2023).
[20] See ADA, ss 8, 36, 38Q, 49, 49Q, 49ZYS.
[21] ADA, s4.
[22] See e.g., ADA s49ZYR.
[23] ADNSW, 'Exemptions and Certifications', https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/organisations-and-community-groups/exemptions-and-certifications.html/ (accessed 20 September 2023).

- the need for increased and sustained funding for ADNSW, including the need for more conciliators and information services to enable ADNSW to run as efficiently as possible in a trauma informed way.
- the need to increase the cap on the amount of compensation that NCAT can order.[24]
- the need for examples in the ADA of what reasonable actions NCAT can order to rectify discrimination under s108(2)(c) of the ADA. Consideration should be had to whether this should include the ability to make orders about changes to policies and practices of organisations, or for staff to receive appropriate discrimination training.
- the need to include in the ADA a provision that provides that any confidentiality agreement must be at the express preference of the complainant. We recognise the extensive work that is currently being undertaken on NDA reform in Victoria.[25]

We also refer the Commission to our *'Having My Voice Heard'* Report[26], where we have outlined ten key areas of reform for better conciliation practices for discrimination matters. We recommend conciliation practices at ADNSW be reformed according to these recommendations, which focus on ensuring that vulnerable applicants in NSW are assisted as quickly as possible through conciliations in a flexible and trauma-informed manner.

10. The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

As above, we support consultation on the ability of ADNSW to be able to take steps with respect to enforcing a positive duty on all duty holders under the ADA to prevent discrimination. This would be a key mechanism for ADNSW to be able to take steps to prevent systemic discrimination.

However, other potential mechanisms for consultation should include:

- the ability for ADNSW to report to the NSW Parliament on trends in discrimination law and key areas of concern.
- the need for more funding for ADNSW for targeted support services for potential and actual complainants, including cultural safety officer roles, and gender-based violence support roles.
- increased funding for training for conciliators at the ADNSW. This is vital to ensure that members of the public are appropriately supported when talking to and working with ADNSW.
- more funding for research into how ADNSW handles complaints and how parties experience the process, both during and after.
- an ADNSW conciliator register, like the AHRC conciliation register, which enables the public to understand what kinds of complaints have been made and resolved at ADNSW, and examples of the outcomes obtained.

[24] See *Anti-Discrimination Act 1977* (NSW), s108(2)(a).
[25] See e.g., Ministerial Taskforce on Workplace Sexual Harassment, 'Recommendations' (July 2022) <https://www.vic.gov.au/ministerial-taskforce-workplace-sexual-harassment>.
[26] Kingsford Legal Centre, *Having my Voice Heard: Fair Practices in Discrimination Conciliation* (UNSW, 2018).

- providing ADNSW with a new function (and appropriate funding) to inquire into, and report on, issues of systemic unlawful discrimination, or suspected unlawful systemic discrimination.[27]

11. The protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

We support this term of reference for its ability to provide helpful insight into best practice approaches to protections, processes, and enforcement mechanisms in discrimination law.

Key areas that we encourage particular consultation on are:

- whether the ADA should be reformed to enable complainants to apply directly to NCAT.[28] This could provide a quicker mechanism for some complainants to have their matters resolved and could be particularly useful where respondents are unwilling to conciliate.
- broadening the ability for representative complaints under the ADA, including through enabling organisations to bring representative complaints about systemic discrimination on behalf of groups (without needing the complaint to be about fixed individuals who have all consented to the complaint being made).[29]

12. The interaction between the Act and Commonwealth anti-discrimination laws

Australian discrimination law is jurisdictionally complex. It includes 13 pieces of legislation – some at the federal level and some at the State and Territory level. There are both significant overlaps and differences, raising difficult questions as to the most appropriate jurisdiction in which to make a discrimination complaint.

Due to the complexity of discrimination law, complainants often need specialist legal advice at an early stage in their case to make sure that they make a discrimination complaint in the most appropriate jurisdiction. The complexity of discrimination law and underfunding of the legal assistance sector are significant factors in discrimination complaints being made in less appropriate jurisdictions. This is especially the case for vulnerable people who often face greater barriers when accessing the complaints process.

In KLC's experience, many complaints are made in the "wrong" or multiple jurisdictions because the complainant has been unable to access legal help and does not understand the system. This is exacerbated by the existence of Commonwealth and NSW jurisdictions. It has also been historically impacted by short time limits in discrimination law, and complainants may take a scatter gun approach for fear they may lose a right. These issues go to both the inaccessibility of the law in this area and the limited access to legal services for people who want discrimination law advice.

As a result, KLC recommends further consultation and research on:

[27] For example, see the *Australian Human Rights Commission Act 1986* (Cth), Part 2, Division 4B (functions relating to systemic discrimination).
[28] We note that this process is currently available in Victoria. See section 122 of the *Equal Opportunity Act 2010* (Vic).
[29] See *Anti-Discrimination Act 1977* (NSW), s87C.

- Establishing a clear pathway for people to easily withdraw complaints and lodge in other complaint jurisdictions without penalty.

- The ADA providing more guidance on when a complaint may be found to have been "dealt with" in another jurisdiction.[30]

- Removal of the provision that provides that parties have no right to representation. However, where respondent(s) are represented, ADNSW should be better funded to assist complainants with accessing legal advice and representation.

- Accessibility of legal information and advice about jurisdictional choice in discrimination matters.

- Creating an appeal pathway for applicants to NCAT who do not have their matters accepted for investigation at ADNSW. At present, complainants can only require the President to refer their matter to NCAT in limited circumstances, such as when the President declined the complaint during an investigation.[31]

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,

KINGSFORD LEGAL CENTRE

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[30] See *Anti-Discrimination Act 1977* (NSW), s92.
[31] Ibid ss92 and 93A.