

29 September 2023

Proper Officer
Law Reform Commission
NSW Department of Communities and Justice
Email only: nsw-lrc@justice.nsw.gov.au



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.

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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 discrimination³;
- 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.

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- 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.

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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 NAJLC, *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).

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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:

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).

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- 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:

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- 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 exceptions²⁰ 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).

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).

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- 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'* Report²⁶, 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).

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- 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.

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- 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,

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³⁰ See *Anti-Discrimination Act 1977* (NSW), s92.

³¹ *Ibid* ss92 and 93A.