public interest
ADVOCACY CENTRE

Leader to Laggard:

The case for modernising the NSW Anti-Discrimination Act

Contents

Acknowledgements

Corrs Chambers Westgarth - Graphic Design Studio

Introduction

The *Anti-Discrimination Act 1977* (NSW) ('the ADA') was ground-breaking legislation when it was originally introduced. Coming just two years after the *Racial Discrimination Act 1975* (Cth), the ADA prohibited racial discrimination as well as becoming the first State or Territory to cover sex and marital status.

In 1982, NSW became the first jurisdiction in Australia to include homosexuality as a protected attribute, and was also the first to prohibit racial vilification in 1989.

However, in the decades since, the ADA has fallen behind best practice when compared to Commonwealth and other State and Territory anti-discrimination laws. It is now out of step with community standards and expectations.

Serious limitations include a narrow range of groups offered protection, out-dated tests for what constitutes discrimination, and excessively broad exceptions allowing discrimination by organisations like private educational authorities.

The Act is long, complex and idiosyncratic, with structural issues compounded by the addition of each new attribute. This has made it very difficult for people affected by discrimination to understand and use the ADA to protect their rights. It also makes it difficult for organisations such as small businesses to know their obligations and ensure they are complying with them.

The last comprehensive review of the ADA was conducted by the NSW Law Reform Commission more than 20 years ago. The majority of the Commission's recommendations were never implemented. In 2021, the ADA requires a new independent review and a commitment to broad modernisation, rather than more piecemeal changes which will simply add to the complexity of the Act.

Only comprehensive reform can finally bring the *Anti-Discrimination Act* into the 21st Century.

This short report sets out issues that need to be addressed to ensure the rights of people of NSW to live free from discrimination are adequately protected.

Protecting more of our community

NSW prohibits discrimination on the basis of a limited range of attributes compared to other States and Territories. The ADA includes the following 'protected attributes':

Race (section 7)	Sex (section 24), including: • Pregnancy (section 24(1B)), and • Breastfeeding (section 24(1C))	Transgender status (section 38B)	Marital or domestic status (section 39)
Disability (section 49B)	Responsibilities as a carer (section 49T)	Homosexuality (section 49ZG)	Age (section 49ZYA)

A notable omission from this list is religious belief and activity which, in these or similar terms, is protected in all Australian jurisdictions except NSW, South Australia and the Commonwealth. The appropriate way to remedy this omission is through a comprehensive reform package rather than a piecemeal add-on.

The outdated use of the term 'homosexuality' in NSW means that we are the only Australian jurisdiction that fails to protect bisexual people (and, indeed, heterosexual people) from discrimination. Updating our law to cover 'sexual orientation' would remedy this.

People with innate variations of sex characteristics (intersex people) are also not protected under the ADA, which compares poorly to the *Sex Discrimination Act 1984* (Cth), and anti-discrimination laws in Tasmania, the ACT and South Australia, all of which cover this group. The protected attribute of 'sex characteristics' should therefore also be included in the ADA.

Other terminology in the Act should also be amended to reflect community standards and attitudes. 'Transgender status' only covers people who identify 'as a member of the opposite sex', and therefore does not protect people with non-binary identities from discrimination. Using the term 'gender identity', with an updated, inclusive definition, would ensure our law is inclusionary.

Any independent review of the ADA should also consult with organisations representing people with disability about modernising of the definition of 'disability' in the Act. This would include reviewing use of terminology such as 'malfunction, malformation or disfigurement' and reflect the evolving understanding of disability.

Other possible changes to existing attributes involve making pregnancy and breastfeeding standalone protected attributes, thus strengthening prohibitions against discrimination on those grounds, and updating marital or domestic status to relationship status.

Finally, there are a wide range of additional protected attributes covered in other Australian jurisdictions, and which warrant consideration for inclusion in NSW:

- Subjection to domestic or family violence
- Employment activity and status
- Immigration status
- Irrelevant criminal record
- Political conviction/opinion
- Socio-economic status
- Industrial activity/trade union activity
- Profession, trade or occupation
- Lawful sexual activity
- Accommodation status
- Physical features
- Genetic information
- Medical record

Modernising the test for discrimination

The ADA adopts what is considered a 'traditional' approach to defining discrimination. This includes establishing two types of discrimination commonly seen as distinct: direct and indirect discrimination. An example of this can be seen in section 24, which creates tests for direct (section 24(1)(a)) and indirect (section 24(1)(b)) discrimination on the basis of sex.

While other jurisdictions adopt similar tests, there are limitations to this approach – for example, people not understanding the different types of discrimination and not correctly identifying which type applies to their particular case. This can cause confusion and interferes with the efficient and effective functioning of the ADA.

Another limitation of the existing test is that it requires a 'comparator'. For example, to establish whether conduct or treatment is discriminatory against a woman, it must be assessed against how a man was, or would be, treated in the same situation. This exercise is often hypothetical and is well-recognised as creating significant practical difficulties.

The ADA also requires complainants to establish that their mistreatment was because of a specific protected attribute. However, mistreatment in the real world does not align neatly with a particular attribute. Discrimination may, instead, be based on multiple attributes, or a combination of attributes (referred to as intersectional discrimination). A modern law should recognise and accommodate this.

The ADA also does not include intended future discrimination within the definition of discrimination. This means that even where a person has indicated they will act in a discriminatory manner, the potential victim cannot make a complaint until the discrimination has occurred, precluding any intervention to prevent discrimination.

An alternative test for discrimination can be found in the *Discrimination Act 1991* (ACT). That Act makes it clear that discrimination can be direct, indirect *or both*. It avoids the requirement for a 'comparator' and recognises that discrimination can be on the basis of multiple attributes, by defining discrimination as treating another person 'unfavourably because the other person has 1 or more protected attributes'.

Any comprehensive review of the ADA should therefore consider:

Combining direct and indirect discrimination into one definition.

Removing the comparator test for direct discrimination and instead focusing on unfavourable treatment.

Recognising that discrimination may take place because of multiple protected attributes.

Including 'intended future conduct' within the definition of discrimination.

A positive obligation to make reasonable adjustments

Unlike some other jurisdictions, the ADA does not impose a positive obligation on employers, educators, providers of goods and services and others to make 'reasonable adjustments' to support the full and equal participation of people with disability in all areas of public life.

Instead, the Act contains standard definitions of direct and indirect disability discrimination, while providing for a defence of 'unjustifiable hardship' to a claim of discrimination.[1] For example, section 49M(2) makes unjustifiable hardship a defence for providers of goods and services.[2]

This approach fails to properly address the structural barriers (including physical, environmental and attitudinal) that are the cause of much discrimination against people with disability.

One way to tackle these barriers is through an obligation to make reasonable adjustments. The *Equal Opportunity Act 2010* (Vic) provides a useful model.[3] In relation to employment, for example, section 20 provides:

1 This section applies to a person who:

(a) is offered employment or is an employee; and

(b) requires adjustments in order to perform the genuine and reasonable requirements of the employment.

2 The employer must make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.

Introducing similar, positive obligations on employers, educators, providers of goods and services and others would have a significant positive impact on the ability of people with disability to fully participate in public life in NSW. A comprehensive review of the ADA should therefore consider this issue.

A comprehensive review of the ADA could also consider whether such a positive obligation to make reasonable adjustments should apply for other protected attributes – such as for people with family responsibilities or in relation to pregnancy.

1 In determining what constitutes unjustifiable hardship for the purposes of this Part, all relevant circumstances of the particular case are to be taken into account including:
(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and
(b) the effect of the disability of a person concerned, and
(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

2 Nothing in this section renders it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services would impose unjustifiable hardship on the person who providers the goods or services.

3 See also sections 5(2) and 6(2) of the *Disability Discrimination Act 1992* (Cth).

Improved coverage of public life

The ADA does not prohibit discrimination in all areas of public life. Instead, it only covers discrimination which occurs in specified areas. For example, discrimination on the basis of race is only prohibited in relation to:

Work (Part 2, Division 2)	Education (section 17)	Provision of goods and services (section 19)
Accommodation (section 20)	Registered clubs (section 20A)	

This leaves areas of public life where there may be no protection, incomplete protection, or where coverage must be found indirectly through the listed areas, such as in

- the exercise of government functions
- access to premises and facilities, and
- requests for information.

One option to address this is to extend the listed areas to address gaps. A more comprehensive response would be to amend the ADA to apply to discrimination in all areas of public life, while providing an exception for 'private conduct'. This would be similar to the approach taken under the *Racial Discrimination Act 1975* (Cth) which has discrimination provisions of general application (see s 9) as well as racial vilification provisions that apply to acts done 'otherwise than in private'.

Such reform would ensure the ADA more fully reflects the areas of public life in which discrimination may occur.

Harmonising and modernising vilification protections

The ad hoc development of anti-discrimination laws over the past four decades has left NSW with inconsistent and inadequate vilification protections.

The ADA prohibits civil vilification, making it 'unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons' on the limited grounds of:

Race	Transgender status	Homosexuality	HIV/AIDS status
(section 20C)	(section 38S)	(section 49ZT)	(section 49ZXB)

In 2018, amendments to the *Crimes Act 1900* (NSW) created an 'offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status', with a maximum penalty of 3 years imprisonment (section 93(7)).

The provisions of the ADA and *Crimes Act* are accordingly inconsistent: people of faith (or no faith), bisexuals, non-binary people and people with variations of sex characteristics are protected by the criminal law against public threats of violence, but have no access to a civil remedy under the ADA.

Modernisation of the ADA could address this inconsistency by seeking to ensure that *all* attributes covered by criminal provisions prohibiting threats or incitement of violence are also covered by civil vilification provisions. A review of the ADA should also consider updating vilification provisions to cover all protected attributes, particularly disability, and ensuring consistency in the *Crimes Act* offence (for example, by replacing 'intersex status' in that offence with 'sex characteristics').

Reviewing the ADA's civil vilification provisions might also consider whether the current test – 'incite hatred towards, serious contempt for, or severe ridicule of' – remains appropriate. This is a higher standard than the equivalent test for racial vilification in the *Racial Discrimination Act 1975* (Cth), with section 18C prohibiting 'an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'.

Bringing sexual harassment laws into the 21st Century

Part 2A of the ADA, prohibiting sexual harassment, was added to the Act in 1997. Despite significant changes in Australian workplaces and society over the past 24 years, none of the provisions in this Part have been amended during this time. The consequence is that NSW's sexual harassment laws are no longer fit for purpose. They are lacking in at least three key ways:

First, the definition of sexual harassment adopted in the ADA,[4] which focuses on conduct 'of a sexual nature', may not adequately capture different types of 'sex-based harassment' and may not ensure all workplaces are safe, especially for women.

This issue was specifically identified by the Australian Human Rights Commission in the *Respect@Work* inquiry. The Inquiry recommended reform to the sexual harassment provisions of the *Sex Discrimination Act 1984* (Cth) (which are similar to the ADA), to ensure:

Sex-based harassment is expressly prohibited.

Creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.[5]

Second, as with the ADA's discrimination protections, sexual harassment is not prohibited in all areas of public life. For example, it may not cover all people in a workplace, such as unpaid workers or people who are self-employed, with limitations when workers may fall within different categorises (such as worker and contractor) as well as what may be considered the place of work. The ADA's sexual harassment provisions also do not apply in relation to registered clubs or the provision of facilities.[6]

One reform option that should be considered is prohibiting sexual harassment in all areas of public life, as is the case the *Anti-Discrimination Act 1991* (Qld).[7] Alternatively, Part 2A could be amended to extend its coverage to fill existing gaps.

Third, prevention of sexual harassment, and change to cultures which tolerate and enable it, requires more than just reactive measures. Pro-active approaches are essential.

Recommendation 17 of *Respect@Work* called for the introduction of 'a positive duty on all employers to take reasonable and proportionate measure to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.' Factors in determining whether a measure is 'reasonable and proportionate' would include: the size of the person's business or operations; the nature and circumstances of the person's business or operations; the person's resources; the person's business and operational priorities; and the practicability and the cost of the measures.

A review of the ADA would provide an opportunity to NSW to bring its sexual harassment laws into the 21st century. A review could also consider whether harassment provisions are also appropriate for other protected attributes – for example disability.

4 Section 22A provides that: 'a person sexually harasses another person if – (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or (b) the other person engages in other unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.'

5 Recommendation 16. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020.

6 See recommendation 16(d) of *Respect@Work,* which proposed that the *Sex Discrimination Act* be amended to ensure 'the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed.'

7 Section 118: 'A person must not sexually harass another person.' *Anti-Discrimination Act 1991* (Qld).

Modernising exceptions for private schools

The ADA has the broadest exceptions in Australia for non-government educational institutions.

The ADA is the only anti-discrimination law in the country which allows 'private educational authorities' to discriminate on a wide range of grounds, even where that school, college or university is not established for a religious purpose.

Under the ADA, private educational institutions are allowed to discriminate against students, lecturers, teachers and other staff on the basis of:

Sex (sections 25(3)(c) and 31A(3)(a))	Transgender status (sections 38C(3)(c) and 38K(3))	Marital or domestic status (sections 40(3)(c) and 46A(3))
Disability (sections 49D(3)(c) and 49K(3)(a))	Homosexuality (sections 49ZH(3)(c) and 49ZO(3))	

Recent public debate has focused specifically on discrimination against LGBT students and teachers in religious schools. In late 2018, the Commonwealth Government's *Religious Freedom Review* led to significant concern about the ability of religious schools to discriminate against LGBT students. The public debate highlighted that discriminating against vulnerable children, including by allowing their expulsion, falls well short of community standards.

Despite a commitment to reform by the Commonwealth Government in 2018, this has not yet been acted upon. LGBT students in NSW therefore remain unprotected from discrimination under either the ADA or *Sex Discrimination Act 1984* (Cth). By contrast, LGBT students in religious schools *are* protected against discrimination in Queensland, Tasmania, the ACT and Northern Territory.[8]

Reform on this issue would not prevent religious schools from preferencing people from their own faith. For example, in all jurisdictions which protect LGBT students against discrimination, religious schools are permitted to discriminate on the basis of religious belief at the point of enrolment.[9] Religious schools are also generally permitted to discriminate against employees on the ground of religion. They are not, however, permitted to discriminate on other grounds such as disability, marital status, sexual orientation or gender identity in Tasmania or the ACT.

Allowing religious schools to discriminate only on the basis of religious belief, and not on other grounds, would better reflect contemporary community standards. Other private educational institutions should also be required to comply with the ADA on the same terms as other businesses and organisations.

8 Section 109(2), *Anti-Discrimination Act 1991* (Qld); Section 51A, *Anti-Discrimination Act 1998* (Tas); Section 32(2), *Discrimination Act 1991* (ACT).
9 Although not post-enrolment, to respect the ability of students to develop and explore their own religious beliefs.

Clarifying religious exceptions

The ADA contains a broad exemption for religious organisations to discriminate, both against people accessing their services and against employees. Section 56(d) provides that

> Nothing in this Act affects any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

This exception applies to all protected attributes in the Act. It has been interpreted broadly so as to apply to a wide range of organisations – not just those bodies established for the purposes of religious worship.[10] It will apply to religious educational institutions, as well as healthcare, accommodation and housing, disability and other social services.

This extensive special power to discriminate, applying across a wide range of services, and to both people accessing those services and their employees, falls short of community standards. The community is right to generally expect organisations providing public services, particularly where they receive Commonwealth, State and/or local government funding, to do so equally for all members of our community.

Reforming the ADA would provide an opportunity to review these exemptions and ensure they are no broader than necessary and appropriate to allow religious organisations to operate consistently with their religious purpose.

10 See, for example, *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155, in which the exemption was held to apply to an organisation established to provide foster care.

Making anti-discrimination protections more accessible and effective

One of the long-standing criticisms of anti-discrimination law in Australia is that it places a significant burden on the people who have experienced discrimination to make complaints to obtain a remedy. This can compound existing disadvantage, given the power imbalance that often exists between victims and perpetrators of discrimination, including access to financial and legal resources.

This is an area ripe for review and reform. For example, consideration should be given to amending the 'burden of proof' for discrimination complaints if they reach court. As the ACT Law Reform Advisory Council recommended in 2015:[11]

> [C]omplainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the complainant at the time of the unfavourable treatment.

A second way to lessen the burden on individual complainants is to ensure the ADA has an accessible representative complaint process. Currently, section 87C adopts a restrictive approach to representative complaints. Even if an organisation is acting on behalf of a particular demographic group, it must satisfy the President:

(a) that each person on whose behalf the complaint is made consents to the complaint being made by the body on his or her behalf, and

(b) that the body has a sufficient interest in the complaint, that is, that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect:

  (i) the interests of the body, or

  (ii) the interests or welfare of the group of people it represents or purports to represent.

A simpler alternative proposed by the Commonwealth Exposure Draft Human Rights and Anti-Discrimination Bill 2012 required only that:

(1) A representative complaint must describe or otherwise identify the affected parties.

(2) In describing or otherwise identifying the affected parties, it is not necessary to name them or specify how many there are.

A review of the ADA should also consider modernising Anti-Discrimination NSW's ability to undertake inquiries and conduct research to identify and address systemic discrimination (rather than largely relying on individual complaints). While section 119 of the ADA provides some powers of this kind, it has evolved gradually and in an ad hoc manner, resulting in only some attributes being included in 119(1)(a): existing grounds such as race, sex, physical disability, homosexuality and transgender grounds are excluded.

This power should be modernised, and brought into line with equivalent organisations, including the Victorian Equal Opportunity and Human Rights Commission and Australian Human Rights Commission.

11 ACT Law Reform Commission Advisory Council, *Review of the Discrimination Act 1991 (ACT): Final Report*, 2015, p143.

Modernising the structure and language of the Act

The structure of the ADA can be confusing – even for legal practitioners who use it frequently. Unlike the more modern anti-discrimination laws in Victoria, Queensland, Tasmania, the ACT and Northern Territory, NSW does not establish one list of protected attributes, and then outline the areas where discrimination is prohibited and any exceptions that may apply across those attributes.

Instead, the ADA establishes separate Parts for different attributes (for example, Part 2 – Racial Discrimination, Part 3 – Sex Discrimination, Part 3A – Discrimination on Transgender Grounds, and so on).[12] Each Part sets out its own areas where discrimination is prohibited, and its own exceptions. These are often repetitive across Parts, and many provisions are similar, but can also be subtly different, with each inconsistency[13] making it more difficult to apply the ADA in practice.

The addition of each new Part over time has added to the complexity of its structure, its inconsistencies and idiosyncrasies, including its numbering.

This is a particular problem for a law like the ADA that is supposed to be accessible: allowing people to make complaints to Anti-Discrimination NSW, and have those complaints conciliated, without legal representation. This is not possible when the ADA is almost impenetrable for anyone who is not legally qualified and experienced in the Act and its interpretation.

The outdated language used in the ADA, also discussed above, is another way in which the Act is 'user unfriendly'. A review of the Act would allow it to use clearer, plainer and more contemporary and appropriate language.

12 In this way, it is similar to the older anti-discrimination laws across the country (the *Equal Opportunity Act 1984* (WA) and *Equal Opportunity Act 1984* (SA)), as well as the Commonwealth, which has separate Acts for racial, sex, disability and age discrimination.

13 For example, prohibiting sex discrimination in registered clubs, but not sexual harassment.

Conclusion

The *Anti-Discrimination Act 1977* (NSW) was once a leader in its field – but in the 44 years since it has fallen behind equivalent legislation in other Australian states and territories.

It fails to provide adequate coverage for groups experiencing discrimination across relevant areas of public life.

The test for what constitutes discrimination is no longer best practice. The failure to require reasonable adjustments for people with disability also represents a significant gap.

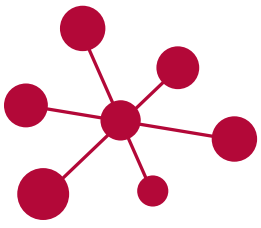
Allowing all private schools, colleges and universities to discriminate on a wide range of attributes falls well short of community standards in 2021. As does the broad exception for religious organisations providing services to the community.

NSW's haphazard prohibitions on vilification – across the ADA and *Crimes Act 1900* (NSW) – create confusion, while provisions around sexual harassment have not been amended since the 20th century.

Meanwhile, there are significant opportunities for procedural reforms to reduce the burden on complainants, as well as to modernise the structure and language of the Act so that it is easier for everyone – complainants, respondents, practitioners and the general public – to understand.

The problems with the ADA cannot be solved with piecemeal changes. Recent proposals to Parliament that seek to address issues in complaint-handling and protection against religious discrimination would exacerbate rather than alleviate the ADA's inherent problems, including inconsistencies and inequality between attributes.

The *Anti-Discrimination Act 1977* (NSW) needs comprehensive reform, so that it effectively protects people against discrimination on the basis of who they are, and promotes equality of opportunity and participation in our society for all people.



public interest
ADVOCACY CENTRE

Level 5, 175 Liverpool St
Sydney NSW 2000
Australia
Phone: 61 2 8898 6500
www.piac.asn.au
https://www.facebook.com/PIACnews
https://twitter.com/PIACnews