



15 August 2025

NSW Aboriginal Women's Advisory Network's submission to the NSW Law Reform Commission Review into the NSW Anti-Discrimination Act

The NSW Aboriginal Women's Advisory Network ('AWAN' or 'the Network') thanks the NSW Law Reform Commission for the opportunity to comment on the review into the NSW Anti-Discrimination Act.

AWAN strongly supports the timely review of the Act. It presents an opportunity to ensure that the legislation aligns with contemporary standards of discrimination and reassess the legal avenues to redress both systemic and individual cases.

The [NSW Aboriginal Women's Advisory Network](#) was established in 2022 and operates as a mechanism to drive Aboriginal-led policy solutions to the NSW Government Closing the Gap Target 13 initiative to reduce the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children by at least 50% by 2031 as progress towards zero.¹

AWAN's Executive Council is led by Co-Chairs from Wirringa Baiya Aboriginal Women's Legal Centre ('Wirringa Baiya') and the Aboriginal Legal Service (NSW/ACT) ('ALS'). ALS is the Coalition of Aboriginal Peak Organisations (CAPO) lead on Target 13. Wirringa Baiya is the organisation that auspices the AWAN secretariat. Both Wirringa Baiya and AWAN are gender-specific and sensitive to the culturally diverse needs of Aboriginal and Torres Strait Islander women and children victim-survivors of domestic, family and sexual violence.

AWAN works to reduce violence against Aboriginal women and children through the following multi-pronged approach:

- *Educating community* around issues of domestic, family and sexual violence against Aboriginal and Torres Strait Islander women and children.
- *Empowering Aboriginal and Torres Strait Islander women* across New South Wales with opportunities to provide their insights on issues that impact themselves, their families, and their communities.
- *Representing the voices of Aboriginal and Torres Strait Islander women to government* at the NSW State and Australian Federal levels.
- *Representing the voices of Aboriginal and Torres Strait Islander women to frontline services*.
- *Advocating for better protections and support* in community for Aboriginal and Torres Strait Islander women and children.

¹ NSW Government, 2022-2024 NSW Implementation Plan for Closing the Gap, 109.

AWAN has over 500 members and we invite members to inform to all submissions. We engage with Aboriginal & Torres Strait Islander women across urban, regional and remote communities to ensure our feedback to policy and law reform processes is informed by the insights, expertise and experiences shared directly with us to amplify the voices of Aboriginal and Torres Strait Islander Women.

List of recommendations

Recommendation 1: The Anti-Discrimination Act should be in plain English to ensure that it can be understood by Aboriginal and Torres Strait Islander people and improve accessibility of protections. Advocacy support should be funded for Aboriginal Community Controlled Organisations to provide individuals with support to make complaints under the Act, particularly to address the under-reporting of complaint made by Aboriginal and Torres Strait Islander complainants.

Recommendation 2: Complaints should be easy to access, and a triage system should be introduced to ensure complaints are sent to the appropriate services, rather than placing the onus on the individual who has experienced discrimination.

Recommendation 3: The definitions and language surrounding each of the 'attributes' should be revised to align with community expectations. The definitions that should be revised by:

3A - We support a 'cultural model of inclusion', which acknowledges the cultural determinants of health and wellbeing, the importance of kinship systems, and the diversity of languages, knowledge systems, and beliefs. This model complements the social and human rights models, ensuring services and supports are culturally safe and inclusive. It is the only model that actively seeks to improve the human condition by building on strengths rather than simply mitigating disadvantage. This model should be adopted by all Government and non-Government Organisations to ensure accessibility.

3B - Widening the definition of carers to include kinship care arrangements and extend protection from discrimination outside employment.

3C - Including protections for new attributes including:

- i. Experiences of Domestic and Family Violence;
- ii. Irrelevant criminal records;
- iii. Accommodation status

3D - Specific reference should include Aboriginal and Torres Strait Islander peoples to express an important statement of community standards to affirm the right to be free from racial discrimination and set out the need to respect cultural kinship caring responsibilities. This is particularly relevant in the aftermath of the Voice referendum defeat and the well documented rise in racism which has followed.

3E - Provide protections for intersectional discrimination.

Recommendation 4: The comparative test for discrimination should be replaced with the unfair treatment test by asking if the complainant was treated unfavourably because they have one or more characteristics protected from discrimination. This allows the effect or consequences of the treatment to be taken into account.

Recommendation 5: The Act should exempt discrimination from happening in all public areas including sporting at all levels, and there should be a greater level of accountability by social media platforms and media outlets.

- a. The Act should be amended to provide clear coverage to discrimination in all work situations, including to unpaid workers, volunteers and those who are employed in the gig economy. The current definition of “employment” of “work under a contract for services”.
- b. Protections provided to discrimination experienced by carers ought to be extended to all areas of public life and should not be limited to employment

Recommendation 6: Sexual harassment under the Act ought to be amended to include protection from experiences of sexual harassment in public areas and include daycares, provide protections to individuals sleeping rough, health providers, aged care services, consumers in National Disability Insurance Services (NDIS) spaces, individuals in custody (inclusive of other inmates and Correctional Services NSW employees/officers) and Police.

Recommendation 7: The Anti-Discrimination Act should introduce a positive duty against discrimination to drive cultural change within organisations. A new proactive requirement to provide adjustments for experiences of discrimination.

Recommendation 8: Given the overlap with the Anti-Discrimination Act NSW and other federal laws which operate concurrently with the Anti-Discrimination Act, there should be a level of unification when undertaking complaint processes across different jurisdictions. Amendments should be made to federal legislation to enable concurrent complaints to be made to Anti-Discrimination NSW. Complaints should be easy to access, and a triage system should be introduced to ensure complaints are sent to the appropriate services, rather than placing the onus on the individual to access the complaints system.

Review into NSW Law Reform Commission review into Anti-Discrimination Act

The reform to the Anti-Discrimination is overdue and is a key priority for AWAN. It is clear that there is a lack of accessibility of the complaint system in its current form. It is evident that the complaint system is not accessible as the percentage of Aboriginal and Torres Strait Islander people who make complaints is much lower than the statistics being reported about experiences of discrimination.

The recently released Call it Out report commissioned by the Jumbunna Institute for Education and Research (Jumbunna Research) is an independent, Indigenous-controlled reporting mechanism which is distinct from traditional complaints and legal processes. The report notes that reports of racist issues and incidents to complaints bodies may be restricted or limited to specific forms of racism and responding to racism through anti-discrimination and other laws and complaints mechanisms can be difficult to initiate and navigate, with often fairly prescribed remedies available².

The disproportionate impact of the increased experience of discrimination affecting Aboriginal and Torres Strait Islander women is evident by the statistics. The 2024 Call it Out report noted an increase in reports by witnesses (up 14 percentage points) and friends or relatives (up 5 percentage points) compared with 2022-23. The relatively higher rates of witness reports in 2023-24 perhaps reflects the impact of the Voice Referendum 'debate' and the related increase in reported instances of online and media related racism.³

In 2021, 50% of Aboriginal and/or Torres Strait Islander respondents reported experiencing discrimination and/or harassment at work. In 2023, it has increased to almost 6 in 10, with 59% reporting experiencing discrimination and/or harassment at work. The survey found the percentage of Aboriginal and Torres Strait Islander people who reported experiencing at least one form of major discrimination increased dramatically in 2019 from 28.6% to 52.1%, and remains very high at 49.7%.⁴

Under the Priority Reform area of improving mainstream Institutions on the National Agreement on Closing the Gap, Governments, their organisations and their institutions are accountable for Closing the Gap and are culturally safe and responsive to the needs of Aboriginal and Torres Strait Islander people, including through the services they fund.

² <https://callitout.com.au/wp-content/uploads/2025/02/Jumbunna-Call-It-Out-Annual-Report-2023-2024-Final.pdf>, page 7

³ <https://callitout.com.au/wp-content/uploads/2025/02/Jumbunna-Call-It-Out-Annual-Report-2023-2024-Final.pdf>, P11

⁴ <https://www.theguardian.com/australia-news/2021/may/24/discrimination-against-indigenous-australians-has-risen-dramatically-survey-finds>

Governments have committed challenging unconscious biases that result in decisions based on stereotypes and engaging with Aboriginal and Torres Strait Islander people to listen and to respond to concerns about mainstream institutions and agencies. This is with a view to achieve the target of decreasing the proportion of Aboriginal and Torres Strait Islander people who have experiences of racism.

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

In determining how the Anti-Discrimination Act 'could be modernised and simplified to better promote the equal enjoyment of rights', the appropriateness of language used in the Act must be considered. The Act should be in plain English to ensure that it can be understood by Aboriginal and Torres Strait Islander people and improve accessibility of protections.

Recommendation 1: The Anti-Discrimination Act should be in plain English to ensure that it can be understood by Aboriginal and Torres Strait Islander people and improve accessibility of protections.

Recommendation 2: Complaints should be easy to access, and a triage system should be introduced to ensure complaints are sent to the appropriate services, rather than placing the onus on the individual who has experienced discrimination.

To better promote the equal enjoyment of rights, advocacy support should be provided to individuals making complaints under the Act, particularly to address the under-reporting of complaint made by Aboriginal and Torres Strait Islander complainants.

Whether the range of attributes protected against discrimination requires reform

Recommendation 3: The definitions and language surrounding each of the 'attributes' should be revised to align with community expectations. The definitions that should be revised by:

- b. Broadening the definition of disability to reflect a social model of disability and to mirror the Convention on Rights of People with a disability.
- c. Widening the definition of carers to include kinship care arrangements and extend protection from discrimination outside employment.
- d. Including protections for new attributes including:
 - i. Experiences of Domestic and Family Violence;
 - ii. Irrelevant criminal records;
 - iii. Accommodation status
- e. Specific reference should include Aboriginal and Torres Strait Islander peoples to express an important statement of community standards to affirm the right to be free from racial discrimination and set out the need to respect cultural kinship caring responsibilities. This is particularly relevant in the aftermath of the Voice referendum defeat and the well documented rise in racism which has followed.

f. Provide protections for intersectional discrimination.

Disability

AWAN advocates for a broader definition of disability as the current definition of disability under the Act is largely deficit-focused and inconsistent with the People with Disability Australia's language guide to comply with the Convention on Rights of People with a disability. As this Act has the capacity to dictate the language used by Anti-Discrimination NSW and tribunal members and the media, it plays a significant role in determining the narrative surrounding many vulnerable groups and their stories of discrimination.

The definition of disability under the *Anti-Discrimination Act 1977* reflects a “medical model” of disability, which views disability as a deficit, abnormality or medical problem requiring a cure. It does not account for external factors that may cause, worsen or alleviate disability.

We support a ‘cultural model of inclusion’, which acknowledges the cultural determinants of health and wellbeing, the importance of kinship systems, and the diversity of languages, knowledge systems, and beliefs. This model complements the social and human rights models, ensuring services and supports are culturally safe and inclusive. It is the only model that actively seeks to improve the human condition by building on strengths rather than simply mitigating disadvantage. This model should be adopted by all Government and non-Government Organisations to ensure accessibility.

Carers

The definition of carers should be widened to ensure that kinship care arrangements are protected. We support adopting the Victorian discrimination law which defines a “carer” as a person on whom someone is wholly or substantially dependent for ongoing care and attention, generally excluding commercial arrangements.⁵

We draw attention to discrimination law in the Australian Capital Territory (ACT) recognises the attribute of “parent, family, carer or kinship responsibilities” which could encompass a variety of family, caring and kinship relationships, including kinship connections among Aboriginal and Torres Strait Islander communities. It could also include kinship responsibilities of other Indigenous peoples and cultural groups.

Protected attributes should be widened to include:

Experiences of domestic and family violence

The Anti-Discrimination Act should provide protection to victim-survivors of domestic and family violence and mirror legislative provisions in South Australia, the ACT and the Northern Territory providing protection against discrimination based on domestic or family violence.

⁵ Equal Opportunity Act 2010 (Vic) s 6(i), s 4 definition of “carer”. See also Discrimination Act 1991 (ACT) s 7(l) dictionary definition of “carer”

Women, in particular Aboriginal and Torres Strait Islander women as such may face discrimination on the ground of subjection to domestic or family violence. The prevalence of domestic, family and sexual violence against women and children in Australia is extremely high with one in four women having experienced violence by an intimate partner or family member since the age of 15⁶. Evidence and research shows that the prevalence of violence is aggravated against Aboriginal and Torres Strait Islander women and girls who face the intersecting oppressions of sexism, racism and the ongoing impacts of colonisation.⁷ We refer to the 2017 report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia. A focus of the Special Rapporteur's report was violence against Aboriginal and Torres Strait Islander women in Australia, in particular the discrimination faced on the grounds of gender, race and class being "structurally and institutionally entrenched." The Special Rapporteur recognised that "this discrimination, coupled with the lack of culturally appropriate measures to address the issue, fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women."

In line with the comments of the Special Rapporteur, statistics reflect that Aboriginal and Torres Strait Islander women are 5.7 times more likely to be killed from family violence, and 33 times more likely to be hospitalised due to family violence than non-Aboriginal and Torres Strait Islander women.⁸ These statistics are harrowing and do not capture the many cases of violence that go unreported due to factors such as system distrust, and the lack of resources provided to Aboriginal family violence prevention legal services.

Irrelevant criminal records

We note that Aboriginal and Torres Strait Islander women are the fastest growing prison population in Australia, being incarcerated at more than 20 times the rate than non-Aboriginal and Torres Strait Islander women. A significant reason for this statistic is that Aboriginal and Torres Strait Islander women are misidentified as perpetrators of domestic and family violence when they are in fact the persons most in need of protection. This is another ground upon which Aboriginal and Torres Strait Islander women may face discrimination.

Accommodation status

Our members shared their concerns with us about experiences of discrimination due to socio-economic status and accommodation status. Aboriginal and Torres Strait Islander women have been the worst affected by the housing crisis. In March 2023, the number of Aboriginal and Torres Strait Islander women and girls seeking help

⁶ Australian Bureau of Statistics, Personal Safety Australia (Released 15 March 2023) (available online at: <https://www.abs.gov.au/>, last accessed 7 July 2024).

⁷ Our Watch, Changing the picture – A national resource to support the prevention of violence against Aboriginal and Torres Strait Islander women and their children (2018, Melbourne) pp 13 – 14 (available online at: <https://action.ourwatch.org.au/resource/changing-the-picture/>)

⁸ UN General Assembly, 36th session, 11-29 September 2017, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, A/HRC/36/46/Add.2, 16 at 'O. Violence against women.'

reached 16,535 per month – up 29 per cent from 12,808 in March 2018, according to the latest data from the Australian Institute of Health and Welfare.⁹

We note that discrimination based on “accommodation status” is unlawful in the ACT and the NT. Broadly speaking, this covers:

- tenants, boarders, lodgers or licensees
- people experiencing homelessness or transient forms of accommodation, and
- residents in aged care facilities, or in disability or supported care accommodation

Recommendation 4: Specific reference should include Aboriginal and Torres Strait Islander peoples to express an important statement of community standards to affirm the right to be free from racial discrimination and set out the need to respect cultural kinship caring responsibilities. This is particularly relevant in the aftermath of the Voice referendum defeat and the well documented rise in racism which has followed.

Intersectional discrimination

In its current form, the Anti-Discrimination Act does not provide for discrimination based on more than one attribute, which fails to reflect how discrimination occurs in real life. Protected attributes should protect against discrimination that is based on more than one attribute (intersectional discrimination). AWAN members shared their experiences of facing discrimination for race and other protected attributes.

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

Tests for discrimination

The existing tests for discrimination are not sufficiently clear or inclusive to reflect modern understandings of discrimination. There are many fault lines with the existing tests for discrimination. The Anti-Discrimination Act 1977 (NSW) adopts the traditional tests for assessing discrimination.

An individual must establish whether they have experienced either direct discrimination or indirect discrimination. That discriminatory treatment must have occurred in the past, as there is no protection in situations where a person indicates that they will act in a discriminatory manner in the future. To establish direct discrimination the treatment must be assessed against a comparator. That comparator is often a hypothetical person. To establish discrimination, complainants must also establish that the treatment was because of a specific attribute that is protected under the Act.

These requirements have the cumulative effect of excluding people in NSW who experience intersectional discrimination from protection under the Act. The existing tests for discrimination do not reflect contemporary community standards or

⁹ Homelessness Australia, Latest News, First nations women worst affected by the housing crisis, 7 August 2023 (available online at: <https://homelessnessaustralia.org.au/first-nations-women-worst-affected-by-the-housing-crisis/>) last accessed 25 September 2023

understandings. Under the current test, a complainant may fail to bring a successful complaint of discrimination because they are unable to:

- Identify the correct ground of discrimination (direct or indirect),
- Describe an appropriate hypothetical comparator,
- Artificially compartmentalise the discrimination experienced into one protected attribute when they in fact have experienced discrimination based on intersectional grounds. For example, mistreatment by an employer because the employee was an Aboriginal woman and that mistreatment was because of both race and sex.
- Prevent and protect themselves from the threat of future mistreatment.

Recommendation 5: The comparative test for discrimination should be replaced with the unfair treatment test by asking if the complainant was treated unfavourably because they have one or more characteristics protected from discrimination. This allows the effect or consequences of the treatment to be taken into account.

By way of example, we draw attention to part of the Australian Capital Territory's discrimination definition in the *Discrimination Act 1991* (ACT). This is one approach to be contemplated in the modernising of the NSW Act. We note that this legislation recognises that both direct and indirect discrimination can occur on the grounds of one or more (intersectional) protected attributes. For the case of direct discrimination, there is no comparator test. Instead, the legislation focuses on unfavourable treatment.

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

The Act should exempt discrimination from happening in all public areas including sporting at all levels. There should also be a greater level of accountability by social media platforms and media outlets. Social media platforms can amplify racism through hate speech, misinformation, and biased content moderation, impacting individuals and communities. This can lead to increased anxiety, depression, and even offline violence, while also affecting people's sense of belonging and safety online. At present, platforms may remove the content, suspend or ban the user, or take other appropriate action.

Under the current Act, the definition of employment of "work under a contract for services", it is unclear if protection is provided from discrimination in all work situations and there may be gaps in the coverage.

The Act should be amended to provide clear coverage to discrimination in all work situations, including to unpaid workers, volunteers and those who are employed in the gig economy. The current definition of "employment" of "work under a contract for services".

Protections provided to discrimination experienced by carers ought to be extended to all areas of public life and should not be limited to employment.

Recommendation 6: The Act should exempt discrimination from happening in all public areas including sporting at all levels, and there should be a greater level of accountability by social media platforms and media outlets.

- c. The Act should be amended to provide clear coverage to discrimination in all work situations, including to unpaid workers, volunteers and those who are employed in the gig economy. The current definition of “employment” of “work under a contract for services”.
- d. Protections provided to discrimination experienced by carers ought to be extended to all areas of public life and should not be limited to employment

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

Sexual harassment under the Act ought to be amended to include protection from experiences of sexual harassment in public areas and include daycares, provide protections to individuals sleeping rough, health providers, aged care services, consumers in National Disability Insurance Services (NDIS) spaces, individuals in custody (inclusive of other inmates and Correctional Services NSW employees/officers) and Police.

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

Positive duties

The Anti-Discrimination Act should introduce a positive duty against discrimination to drive cultural change within organisations. It is important for the review to consider the disproportionate impact of discrimination upon First Nations women, and how processes can be improved to better protect them.

It is well-documented in the experiences of First Nations and culturally and linguistically diverse groups that legal processes can often be inaccessible, re-traumatising and lead to further distrust in the process. It is therefore fundamental to this review to ensure that culturally-safe processes are available to vulnerable groups, which includes:

- (i) Developing cultural awareness, cultural respect and anti-racism strategies in Board and Tribunal members and staff;
- (ii) Appreciating and remedying the barriers in evidence gathering, information-seeking, self-advocacy and understanding of legal process;
- (iii) Focusing on community partnerships to develop trust and communication through diverse recruitment and outreach;
- (iv) Reassessing the assigned credibility of documentary evidence compared to oral evidence, particularly where cultural and language barriers exist; and
- (v) Placing a positive obligation on Board and Tribunal members to assist vulnerable complainants to obtain documents from organisations and to

assist them in other procedural matters critical to the presentation of their case

For example, corporations can introduce mechanisms that encourage a culture of a genuine level of accountability by engaging community members to become secret shoppers. There is also a need to implement policies across the board that have clear processes, implementation and black governance. Policies should include a comprehensive level of providing complainants with updates throughout a complaint process.

Recommendation 7: The Anti-Discrimination Act should introduce a positive duty against discrimination to drive cultural change within organisations. A new proactive requirement to provide adjustments for experiences of discrimination.

The interaction between the Act and Commonwealth anti-discrimination laws

Recommendation 8: Given the overlap with the Anti-Discrimination Act NSW and other federal laws which operate concurrently with the Anti-Discrimination Act, there should be a level of unification when undertaking complaint processes across different jurisdictions. Amendments should be made to federal legislation to enable concurrent complaints to be made to the Anti-Discrimination NSW. Complaints should be easy to access, and a triage system should be introduced to ensure complaints are sent to the appropriate services, rather than placing the onus on the individual to access the complaints system.

It can be extremely difficult to determine which laws, protections and processes apply in different situations. Where there are similarities or overlaps, it can be challenging to choose the most appropriate forum for bringing a complaint.

The four federal discrimination laws operate concurrently with the Anti-Discrimination Act ought to be simplified to mirror the reforms being made to the Anti-Discrimination Act:

1. Age Discrimination Act 2004 (Cth)
2. Disability Discrimination Act 1992 (Cth)
3. Racial Discrimination Act 1975 (Cth), and
4. Sex Discrimination Act 1984 (Cth)

Amendments should be made to federal legislation to enable concurrent complaints to be made to the Anti-Discrimination New South Wales. Complaints should be easy to access, and a triage system should be introduced to ensure complaints are sent to the appropriate services, rather than placing the onus on the individual to access the complaints system. Navigating federal and state laws should be seamless with support provided regardless of which jurisdiction the complaint involves.

Conclusion

The NSW Aboriginal Women's Advisory Network again thanks the NSW Law Reform Commission for the opportunity to provide our feedback.

If the NSW Law Reform Commission has any questions about this feedback, or wishes to speak to us further, please contact the NSW Aboriginal Women's Advisory Network's Program Co-ordinator, Shaquille Robinson by email:

s.robinson@awan.org.au or phone 0429 807 521 and the Network's Policy and Advocacy Officer on Yusra Metwally 0429 807 521 or by email:
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Yours Sincerely,

Shaquille Robinson

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