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NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2125

Submitted via email: ADAreview@dcj.nsw.gov.au

To the NSW Law Reform Commission

Re: Second consultation paper on procedures and compliance in the review of the ADA

ACON welcomes the opportunity to provide a submission to the New South Wales Law Reform Commission (**the Commission**) in response to the second consultation paper on procedures and compliance in the Review of the *Anti-Discrimination Act 1977* (NSW) (**the ADA**). We endorse the submissions of Equality Australia, HALC and Positive Life NSW, regarding priority reforms in this area.

ACON is NSW's leading health organisation specialising in community health, inclusion and HIV responses for people of diverse sexualities and genders. Established in 1985, ACON works to create opportunities for people in our communities to live healthier, more connected lives. Our work is grounded in advancing the human rights of LGBTQ+ people and people living with and affected by HIV, including through law and policy reform to address discrimination, stigma and structural inequality. This is ACON's second submission to the Review.

In our preliminary submission, we outlined our priorities for reform to ensure NSW's anti-discrimination framework better protects LGBTQ+ people and other marginalised groups, recognises diverse sexualities, genders and intersecting forms of disadvantage, and strengthens protections against discrimination, harassment and vilification. We remain of the view that the current Act should be repealed and replaced with a new legislative framework that reflects contemporary standards and the lived experiences of discrimination in NSW.

ACON believes that effective discrimination complaint mechanisms are a health equity issue. LGBTQ+ people and People Living with HIV (PLHIV) who experience discrimination, or do not feel safe seeking redress, are at greater risk of poorer health and wellbeing outcomes, reduced engagement with health and social services, social exclusion and ongoing stigma, with high rates of unfair treatment and low levels of acceptance across key settings including healthcare, education and community services.

Therefore, in this submission, we will primarily focus on reforms that improve access to justice and make the ADA more accessible and effective for LGBTQ+ communities and PLHIV to promote positive health and wellbeing. Our priorities relate to the following questions in the ADA consultation paper:

- **Question 8:** requirements for making a complaint on behalf of others
- **Question 10**: the procedures for making a complaint
- **Question 13:** the time limit for complaints
- **Question 43**: considering breaches of a positive duty, and

- **Question 45:** measures to address systemic discrimination.

Access barriers to justice for LGBTQ+ people and PLHIV in NSW

Despite significant progress in LGBTQ+ and HIV-related law reform, discrimination and vilification remain persistent issues in NSW. In 2024-25, the Anti-Discrimination Board of NSW (ADBNSW) received 43 complaints of homosexual discrimination (up from 26 in 2023-24) and 22 complaints of transgender discrimination (down from 24 in 2023-24), as well as 20 complaints of homosexual vilification (up from 12 in 2023-24) and four complaints of transgender vilification (up from three in 2023-24). In the same time period, the ADBNSW recorded 2 complaints of HIV/AIDS vilification (up from 0 in 2023-24).[1] These figures are likely an underestimate, as stigma, fear of negative consequences and a lack of confidence in reporting processes can act as a barrier to making complaints.

We welcomed the launch of the ABDNSW's civil complaints scheme and new reporting pathways for victims of LGBTQA+ conversion practices in 2025, following the introduction of the *Conversion Practices Ban Act 2024* (NSW). However, significant access barriers to making and pursuing discrimination complaints remain. These include structural and legal gaps, such as the exclusion of identities and broad religious exemptions, as well as reporting hurdles, including compulsory data sharing, the burden of proof placed on complainants and conciliation exhaustion.

The right to be free from discrimination is only meaningful where LGBTQ+ people and PLHIV can safely report discrimination and regulatory bodies have the power to prevent and address systemic harms. Therefore, urgent reform regarding the procedural aspects of the ADA is critical to ensure that LGBTQ+ people and PLHIV feel safe accessing complaints procedures and remedies and are empowered to reduce health disparities and social isolation.

Question 8: Requirements for making a complaint on behalf of others

Representative and community-led complaints

Representative complaints can be a useful tool in a broader strategy to address recurring patterns of discrimination affecting a specific community, reduce the burden on affected individuals, and improve accountability. LGBTQ+ people and PLHIV who have experienced discrimination often fear retaliation, outing, stigma or loss of health and social services when pursuing a complaint.

We reiterate our support for community organisations being permitted to lodge representative discrimination complaints on behalf of an affected community, particularly where discrimination is systemic, affects multiple people, or where barriers prevent individuals from pursuing complaints themselves. Any such mechanism should be accompanied by dedicated funding to support evidence gathering, legal representation and strategic enforcement.

Under the current ADA, the requirements for representative bodies to make a complaint on behalf of individuals are onerous. Requiring named complainants, individual consent, and proof of 'sufficient

[1] Anti-Discrimination Board of NSW, *Annual Report 2024-25*. Available: ADNSW 24-25 Annual Report

interest' creates procedural barriers that make representative complaints difficult to bring and reduce community organisations' capacity to address systemic discrimination.

We support adopting a similar approach to Queensland, which addresses these barriers. The representative complaint provisions in sections 146-147 of the Queensland Anti-Discrimination Act allow class members to be described rather than named and permit complaints to proceed without their consent. The 'relevant entity' provisions in section 134 of the Queensland Act remove the need for community organisations to satisfy the complex NSW 'sufficient interest' test.[2]

Simplifying the requirement that an organisation show a 'sufficient interest' and adopting a more accessible representative complaint model, similar to the Queensland model, will better enable organisations to act effectively on behalf of affected communities and address systemic discrimination.

Recommendation 1: Amend the ADA to allow representative complaints to be made without requiring class members to be identified or named or to provide consent.

Recommendation 2: Simplify the 'sufficient interest' test for representative bodies by adopting a similar approach to the 'relevant entity' model in Queensland.

Question 10: The procedures for making a complaint

Accessible, safe and trauma-informed complaint pathways

An essential component of the NSW ADA's modernisation should be simplifying the complaints process. Due to the piecemeal nature of the ADA, the complaints process can be confusing, convoluted, and not easily accessible to the layperson. This can disproportionately affect LGBTQ+ people and PLHIV who already face barriers to making discrimination complaints because of a lack of specialist legal services in NSW and trust in legal institutions.

LGBTQ+ people and PLHIV may be less likely to engage with legal systems due to historical experiences of criminalisation and discrimination, fear of re-traumatisation, and a lack of confidence that complaints will be understood or lead to meaningful outcomes. This underscores the importance of accessible, safe, trauma-informed and culturally responsive complaint pathways.

Recommendation 3: The ADA should be modernised to ensure complaint mechanisms are accessible, trauma-informed and safe for all communities, particularly for LGBTQ+ people and PLHIV who experience significant barriers to reporting discrimination.

Protecting confidentiality and safety

The fear of disclosure of HIV status, sexuality and/or gender identity, and the risk of further harassment, remains a significant barrier to reporting discrimination. Therefore, confidentiality and safety protections are critical to ensuring that LGBTQ+ people and PLHIV can safely engage with the ADA complaints process.

[2] *Anti-Discrimination Act 1991* (Qld)

We support enabling the immediate suppression of the identity of the individual complainant, when necessary. This will reduce fears of victimisation, involuntary disclosure of sexual orientation, gender identity and/or HIV status, and other adverse consequences associated with making a complaint**.** This will enable procedural fairness for respondents to be maintained and ADNSW to effectively investigate and conciliate complaints.

Recommendation 4: Permit immediately suppressing the identity of the complainant, to support stronger confidentiality protections for LGBTQ+ people and PLHIV.

Burden of proof and evidentiary barriers

Currently, the complaints framework places a significant evidentiary burden on complainants. This can be particularly challenging for LGBTQ+ people and PLHIV, who often experience discrimination in workplace and healthcare settings where relevant information is held. We recommend considering a burden-shifting model, similar to the one proposed by the ACT Law Reform Advisory Council.

In this model, the complainant must prove they were treated unfairly, but the burden of proof then shifts to the respondent, who must prove the person was not treated unfavourably because of a protected attribute.[3] This would address the current difficulty complainants face in having to demonstrate what was in the respondent's mind at the time of the unfavourable treatment. ADNSW should also provide complainants with sufficient information to make a well-supported complaint.

Recommendation 5: Introduce a burden-shifting framework whereby complainants must establish a prima facie case of discrimination before the evidential burden shifts to the respondent to demonstrate that the conduct was not based on a protected attribute.

Positive duties and prevention

As an organisation grounded in health promotion and prevention initiatives, we firmly believe that preventing discrimination before it occurs is a critical component of promoting equality and social cohesion in NSW. The current framework is largely reactive, relying on individuals to initiate complaints before responding to instances of discrimination and harassment. This limits the ADA's capacity to drive systematic change. A positive obligation would shift responsibility towards duty holders and encourage proactive prevention of unlawful conduct.

Positive obligations minimise the burden on complainants by seeking to prevent harassment, discrimination and vilification before it occurs. Also, it would help drive proactive action by employers and service providers to prevent LGBTQ+ and HIV-related discrimination, and to promote wider understanding of HIV, including transmission risks.

Duty holders should be required to take reasonable and proportionate steps to prevent or eliminate unlawful conduct, which are tailored to their specific size, resources, nature of operations, and the context in which they operate. These steps could include implementing policies, providing training, and developing tailored education programs. These materials should be developed in consultation with community-

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

controlled organisations and affected communities to ensure they reflect lived experience. Encouraging duty holders to engage with ADNSW for guidance and support in fulfilling their obligations would significantly improve the experiences of LGBTQ+ people and PLHIV accessing services by preventing stigma and discrimination and promoting equitable access.

ACON's Pride Inclusion Programs work with employers across Australia to create workplaces free from discrimination and stigma for LGBTQ+ employees and to support compliance with existing anti-discrimination obligations. Our experience demonstrates the importance of shifting from a largely complaints-based approach to one that places a positive obligation on organisations to prevent discrimination before it occurs, building on the positive duty that already applies to sexual harassment and hostile workplace environments. We therefore strongly support introducing positive obligations that form a preventative framework for discrimination, harassment, and vilification.

Recommendation 6: Introduce a positive duty on duty holders to take reasonable and proportionate measures to prevent and eliminate unlawful conduct, including discrimination (direct and indirect), vilification, and harassment, modelled on the positive duty in the Commonwealth Sex Discrimination Act.

Recommendation 7: The positive duty should apply to all protected attributes under the ADA and all areas of public life, including employment, education, healthcare, aged care, accommodation, and the provision of goods and services.

Question 13: The time limit for complaints

Extending the time limitation period

Fear of stigma, discrimination, disclosure, and negative treatment can deter many LGBTQ+ people and PLHIV from immediately pursuing formal discrimination complaints or accessing formal justice pathways. The current 12-month time limit may compound the stress and sense of powerlessness that some victims experience and inhibit access to justice. Therefore, a longer time limit for complaints would encourage more people to come forward.

We believe extending the time limit from 12 months to 2 years, which is consistent with ACT and federal discrimination laws, far outweighs the arguments in favour of retaining the 12-month time limit and appropriately balances the needs of complainants and the possible prejudice of respondents.

Recommendation 8: Extend the time limitation period for discrimination complaints from 12 months to two years.

Question 43: Considering breaches of a positive duty

Regulator-led enforcement

If a positive duty power is introduced in the ADA, it should focus on systemic prevention and organisational compliance, rather than awarding individuals compensation for breaching the duty itself. Therefore, we believe a regulator-led enforcement approach to breaches of a positive duty is better suited to systemic issues. This would still enable individuals to lodge a complaint to ADNSW and access compensation and

other remedies. A standalone damages action for breach of the positive duty risks duplication and additional complexity.

As discussed under Question 10, the Commonwealth model provides a proven framework. Compliance notices, enforceable undertakings and own-motion investigations allow the regulator to address organisational failures affecting multiple people, rather than relying on a single complainant to drive reform. This will be discussed further in response to Question 45.

Recommendation 9: Ensure that any breach of a positive duty does not give rise to a standalone individual remedy, given the availability of existing complaint-based remedies under the ADA and the preventative purpose of the duty.

Question 45: Wider investigation and inquiry powers

Measures to address systemic discrimination

To address the costly and confusing nature of the complaints system, especially for people with limited access to specialist legal advice and representation, ACON supports conferring new powers on ADNSW to consider a positive duty when investigating or conciliating individual complaints of unlawful conduct under the ADA.

Furthermore, this expansion is necessary should the ADA incorporate positive obligations and systemic complaints. Systemic discrimination can be addressed by collective complaints, as outlined under Question 8, but ADBNSW should also be expanded to have investigative powers, in order to proactively investigate instances of systemic discrimination.

We also support inserting a new objects clause in the ADA that addresses the existence and impact of systemic and intersectional discrimination on particular groups. Intersectional discrimination can expose LGBTQ+ people and PLHIV to unique and compounding types of disadvantage.

Recommendation 10: Expand ADNSW's powers to identify, investigate and challenge systemic discrimination and non-compliance with a positive duty, particularly in health and community service settings.

Recommendation 11: Identify in the ADA's objects that systemic and intersectional discrimination operates as a significant barrier to the full and equal participation in society for LGBTQ+ people and PLHIV.

We would be more than happy to engage further with you on this submission. Please do not hesitate to get in touch with me, Michael Woodhouse at MWoodhouse@acon.org.au.

Regards



Michael Woodhouse
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