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By email: nsw-lrc@justice.nsw.gov.au

NSW Government Anti-Discrimination Act review preliminary submission – Terms of Reference

Dear Chairperson of the NSW Law Reform Commission, the Hon Tom Bathurst

Diversity Council Australia (DCA) is the independent not-for-profit peak body leading diversity and inclusion in the workplace. We have over 1,300 member organisations, reaching more than 20% of the Australian labour market.

The review of the Anti-Discrimination Act 1977 is of great interest to DCA and our members, and we welcome the opportunity to comment on the draft Terms of Reference shared on the NSW Law Reform Commission website.

Our feedback supports the review of the Anti-Discrimination Act (the Review) to modernise the language and scope of protections to better reflect contemporary community standards and achieve improved protections for diverse and vulnerable communities in NSW. DCA notes that a number of its members have been concerned about aspects of NSW anti-discrimination law, particularly its language, coverage of vulnerable groups, the exemption process organisations must undertake in order to attract applicants for employment from vulnerable communities and the lack of alignment with other states and territories and federal legislation.

A note on language:

Australia has shown longstanding reluctance to focus on race;¹ preferring to use terms like ethnicity and culture,² evident in the use of terms such as non-English-speaking background (NESB), culturally and linguistically diverse (CALD), 'multicultural' and 'harmony'. As discussed in DCA's *Racism at Work*³ guide, Australia's reluctance to focus on race means we often struggle to talk in an informed, thoughtful, and transformative way about race, and to identify and respond to racism.

Our research⁴ tells us that language such as 'culturally and linguistically diverse' (CALD) and 'multicultural' are no longer useful terms to describe the experiences of people who experience cultural and racial marginalisation in Australia.

In our recent work, *Culturally and racially marginalised (CARM) women in leadership*, we have deliberately shifted away from these terms, offering the alternative language of 'culturally and racially marginalised' (CARM) in recognition of the significance of race and racism in people's lives, and encourages the Commission to consider language that more accurately reflects the present-day experiences of the communities impacted by anti-discrimination law.

DCA acknowledges the complexity of concepts and language used to accurately describe members of the LGBTIQ+ population. DCA notes and supports the views expressed in the Equality Australia submission published on the NSW Law Reform Commission website: *An Equality Act for NSW* Preliminary submission to the NSW Law Reform Commissions' review of the Anti-Discrimination Act 1977 (NSW).

DCA recommends that the Terms of Reference and the Review include language that more accurately reflects the experiences of culturally and racially marginalised people and those who identify as LGBTIQ+.

Alignment with other states/territories and federal legislation

DCA notes that the terms of reference will examine the interaction between the NSW Act and protections, processes and enforcement mechanisms in other Australian and international jurisdictions, as well as with other NSW laws and the interaction between the NSW Act and Commonwealth anti-discrimination laws. We particularly welcome this aspect of the Review as we believe that consistency and alignment of anti-discrimination legislation across Australia will maximise protections for vulnerable communities and reduce confusion for complainants.

DCA recommends that the Review considers the benefits of aligning NSW anti-discrimination law with protections offered in other states and territories and with Commonwealth anti-discrimination law.

Addressing exemption provisions

DCA notes and supports the Equality Australia submission (referenced above) recommendations in relation to removing unfair exemptions. These have been long standing concerns for those advocating for LGBTIQ+ rights and need to be addressed.

DCA also notes an area of concern for some of our members which relates to exemptions under the Act to grant permission to organisations wishing to conduct a targeted recruitment or employment initiative for a historically disadvantaged group within the community. Currently, organisations must apply for an exemption under the NSW Anti-Discrimination Act to grant them permission to favour a particular group of people for a specific job or program. Our members tell us that this can pose a barrier, especially for smaller organisations, to undertake such initiatives which may be key to their inclusion and diversity programs.

In contrast, a number of federal laws and those in other states and territories have provisions which allow organisations to conduct targeted recruitment campaigns without the need to apply for an exemption.

The benefits of aligning NSW laws with those in other states and territories and Commonwealth provisions is well illustrated by the employment of Aboriginal and Torres Strait Islander people in NSW. NSW has the largest number of Aboriginal and Torres Strait Islander people yet organisations must apply for an exemption under the Act to undertake targeted recruitment of Aboriginal and Torres Strait Islander people. In the current economic

and social climate, regardless of the results of the Voice referendum, and where only four Closing the Gap targets are on track, the economic prosperity of Aboriginal and Torres Strait Islander people is more important than ever. Some Aboriginal advocates suggest that economic prosperity is in fact critical to progressing towards 'closing the gap'. Removing the exemption barrier in the NSW Act will facilitate more targeted recruitment campaigns and contribute to economic prosperity for Aboriginal and Torres Strait Islander people in NSW.

DCA recommends that the Review considers the recommendations made in the Equality Australia submission regarding the removal of unfair exemptions.

DCA also recommends amending provisions relating to exemptions to undertake targeted recruitment campaigns to permit employers to conduct employment initiatives that promote substantive equality for marginalised groups.

Please feel free to contact myself or Jacqueline Braw, Senior Advocacy and Government Relations Manager, on jacqueline@dca.org.au should you require any further information about this matter.

Yours sincerely



Lisa Annese
Chief Executive Office

¹ Diversity Council Australia (Anderson, P., Mapedzahama, V., Kaabel, A. and O'Leary, J.) *Racism at Work: How Organisations Can Stand Up To and End Workplace Racism*, Sydney, Diversity Council Australia, 2022.

² P Mousaferiadis, "Beyond CALD: what lies behind the labels." Diversity Atlas, 13 July 2020, <https://www.diversityatlas.io/beyondcald-2/>.

³ Diversity Council Australia (Anderson, P., Mapedzahama, V., Kaabel, A. and O'Leary, J.) *Racism at Work: How Organisations Can Stand Up To and End Workplace Racism*, Sydney, Diversity Council Australia, 2022.

⁴ Diversity Council Australia (Anderson, P., Mapedzahama, V., Kaabel, A. and O'Leary, J.) *Racism at Work: How Organisations Can Stand Up To and End Workplace Racism*, Sydney, Diversity Council Australia, 2022; Diversity Council Australia (V. Mapedzahama, F. Laffemis, A. Barhoum, and J. O'Leary). *Culturally and Racially Marginalised Women in Leadership: A framework for (intersectional) organisational action*, Diversity Council Australia, 2023.

