Review of the *Anti-Discrimination Act 1977* (NSW)

Procedures and compliance

25

CONSULTATION PAPER

July 2026

NSW Law Reform Commission

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About us

The NSW Law Reform Commission is an independent statutory body that provides law reform advice to the NSW Government.

The Commission consists of:

- The Hon Tom Bathurst AC KC (Chairperson)
- The Hon Justice Anna Mitchelmore (Deputy Chairperson and Commissioner), and
- Kate Eastman AM SC (Commissioner).

The Commission is supported by the NSW Law Reform Commission and Sentencing Council Secretariat, NSW Department of Communities and Justice.

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Acknowledgement of Country

The NSW Law Reform Commission acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that have contributed to this review.

Content warning

This consultation paper deals with content that some people may find distressing. This includes discrimination, sexual harassment, victimisation and vilification. We also refer to concepts and language used in the ADA that can be offensive or upsetting.

Our website lists some free services you can contact if you need support.

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the NSW Law Reform Commission is asked to review and report on the *Anti-Discrimination Act 1977* (NSW) (ADA).

In undertaking this review, the Commission is to consider matters including, but not limited to:

1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards
2. whether the range of attributes protected against discrimination requires reform
3. whether the areas of public life in which discrimination is unlawful should be reformed
4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination
5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law
6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes
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
8. exceptions, special measures and exemption processes
9. the adequacy and accessibility of complaints procedures and remedies
10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination
11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws
12. the interaction between the Act and Commonwealth anti-discrimination laws
13. any other matters the Commission considers relevant to these Terms of Reference.

Dated 19 June 2023

Questions

Chapter 2: Objectives and structure

Question 1: A statement of objectives, purposes and/or principles

Should the ADA include an express statement of objectives, purposes and/or principles? Why or why not?

Question 2: Contents of an objects, purposes or principles clause

If a new objects, purposes or principles clause is added to the ADA, what should it contain?

Question 3: International human rights instruments and principles

a. If a new objects, purposes or principles clause is added to the ADA, should it expressly recognise international human rights instruments and principles? Why or why not?
b. If so:
   i. what instruments or principles should be recognised, and
   ii. what effect should any such recognition have?

Question 4: Structure

Could the structure of the ADA be improved? If so, how?

Chapter 4: Making a complaint to ADNSW

Question 5: Complaint terminology

Should the ADA use the words “complaint” and “complainant”? If not, what should be used instead?

Question 6: Persons personally affected

a. Should the ADA restrict who can make a complaint to those personally affected by the conduct? Why or why not?
b. If so, what language should be used to describe who can make a complaint?

Question 7: ADNSW powers in complaints made on behalf of others

What, if any, changes should be made to ADNSW’s powers in relation to complaints made on behalf of others?

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

What, if any, changes should be made to the requirements under the ADA for making complaints on behalf of others?

Question 9: Vilification complaints

What, if any, changes should be made to the requirements for making a vilification complaint under the ADA?

Question 10: The procedures for making a complaint

What, if any, legislative changes should be made to the procedures for making a complaint to ADNSW?

Question 11: Complaints made in more than one jurisdiction

Should the ADA prevent a person from making a complaint to ADNSW if they have previously made a complaint about the same conduct in another Australian jurisdiction? Why or why not?

Question 12: The discretion to decline a complaint

a. Should the ADA require ADNSW to decline a complaint in specified circumstances? Why or why not?
b. If so, in what circumstances should ADNSW be required to decline a complaint?

Question 13: The time limit for complaints

a. What, if any, changes should be made to the 12-month time limit to lodge complaints with ADNSW?
b. Should the ADA expressly provide for situations involving a course of conduct that spans more than 12 months before a complaint is lodged?

Question 14: Frivolous, vexatious or misconceived complaints

a. What, if any, changes should be made to the powers of ADNSW to decline frivolous, vexatious or misconceived complaints?
b. Should ADNSW be empowered to refer a complainant to the Attorney General to consider applying for a vexatious proceedings order? Why or why not?

Question 15: Further potential grounds to decline complaints

Should any new grounds to decline complaints be added to the ADA? If so, what should these be?

Question 16: Reviewing a decision to decline a complaint

a. What, if any, changes should be made to the notification procedures that apply when ADNSW considers declining, or declines, a complaint at the pre-investigation stage?
b. When ADNSW declines a complaint before investigation, what, if any, rights should a complainant have to seek a review or have the substantive complaint heard and determined by a court or tribunal?
c. What, if any, changes should be made to a complainant's ability to seek referral to NCAT if ADNSW declines their complaint:
    i. during investigation, or
    ii. at any stage, in relation to complaints made on behalf of another person(s)?

Chapter 5: Dispute resolution

Question 17: Powers to compel information and responses

What, if any, changes should be made to ADNSW's powers to compel information or documents and require written responses to complaints?

Question 18: Conciliation at ADNSW

a. Should there be a right to legal representation in ADNSW complaint processes? Why or why not?
b. What, if any changes could be made to the ADA to promote attendance at ADNSW conciliation?
c. Should the ADA expressly empower ADNSW to prioritise or expedite complaints? If so:
    i. what criteria should guide ADNSW in deciding whether to use this power, and
    ii. should these criteria be expressed in the ADA?

Question 19: Flexible dispute resolution

a. Should NSW adopt a more flexible dispute resolution system, like the Victorian model? Why or why not?
b. If so, what should the key features of this system be?

Question 20: Terminating a complaint

What, if any, changes should be made to the reasons or procedures available to ADNSW to terminate a complaint?

Question 21: Timeframes for finalisation

Should the ADA include any timeframes for ADNSW complaint handling procedures? If so, what should those timeframes be?

Chapter 6: Complaints to NCAT

Question 22: Referral to NCAT

a. Should the grounds on which ADNSW may or must refer an unresolved complaint to NCAT change? If so, what should change?
b. Should the ADA allow parties to request that ADNSW refer an unresolved complaint to NCAT before 18 months has passed? If so, should the ADA specify a different timeframe (for instance, 12 months)?
c. Should the ADA expressly allow ADNSW to refer a complaint to NCAT at any stage of the complaints process? If so, under what circumstances should this be allowed?

Question 23: Direct access to NCAT

Should complainants have the option to make complaints to NCAT directly, that is, without first making a complaint to ADNSW? If so, in what circumstances should this be available?

Question 24: Representative proceedings

a. What criteria should apply for bringing representative proceedings under the ADA in NCAT?
b. Should the same criteria apply for bringing representative proceedings to ADNSW and NCAT under the ADA?

Question 25: Other potential pathways

a. Should the Local Court, District Court or Supreme Court of NSW be able to hear and determine complaints under the ADA? If so, in what circumstances?
b. If ADA cases were heard by these courts, which costs model should be applied?
c. Should the NSW Industrial Relations Commission and/or Industrial Relations Court of NSW be able to hear and determine work-related complaints under the ADA? If so, in what circumstances?

Chapter 7: Settlement agreements

Question 26: Confidentiality clauses in settlement agreements

a. Should the ADA include conditions that must be met before a confidentiality clause in a settlement agreement is enforceable? If so:
    i. what should those conditions be?
    ii. should they apply to all types of unlawful conduct under the ADA, or only some?
b. Should NSW adopt non-legislative best practice guidelines and/or model non-disclosure clauses for parties to use when drafting settlement agreements in ADA complaints?

Question 27: Enforcing settlement agreements

What, if any, changes should be made to the procedures for enforcing settlement agreements made during:

a. conciliation at ADNSW, or
b. NCAT proceedings?

Chapter 8: Remedies, enforcement and costs

Question 28: Compensation

a. Should the ADA cap the amount that can be awarded as compensation for loss or damage? If so, what should the cap be?
b. What, if any, changes should be made to NCAT's powers and procedures to award compensation under the ADA? If so, which reform options do you suggest and why?
c. Should the ADA be changed to allow persons in custody to receive a compensation award made by NCAT against the State of NSW and its agents?

Question 29: Mandatory orders

What, if any, changes should be made to the "mandatory orders" power in the ADA? For instance, should this power be available in representative complaints?

Question 30: Programs or policies

Should NCAT's power to order respondents to develop or implement programs or policies be extended to all forms of unlawful conduct under the ADA?

Question 31: Potential new remedies

a. Should NCAT's existing powers to order specific remedies in ADA matters be replaced with a broad power to make any orders "as it sees fit"?
b. Should the ADA be amended to expressly provide for:
    i. a power to make declarations
    ii. specific orders for training and employment
    iii. specific orders in sexual harassment cases
    iv. civil penalties, or
    v. any other orders currently not provided for?

Question 32: Orders with systemic effect

a. Should the ADA be amended to encourage NCAT to consider systemic issues when deciding appropriate remedies under its existing powers? If so, what changes do you support?
b. Does NCAT require clearer or more expansive powers to make orders with systemic effect? If so, what changes do you support?

Question 33: Enforcing NCAT orders

a. Should the penalty for failing to comply with a non-monetary order of NCAT be increased? If so, what should it be?
b. Should there be specific penalties for failing to comply with certain NCAT orders? If so, what should they be?
c. What, if any, changes should be made to the circumstances in which the ADNSW President can take steps to enforce an NCAT order?
d. Should any other changes be made to the process for enforcing an NCAT order made under the ADA?

Question 34: Costs

a. Should the existing circumstances in which NCAT may award costs under the ADA be expanded or clarified? If so, how?
b. In what circumstances, if any, should parties be required to provide security for costs in ADA proceedings in NCAT?
c. Should an equal access / asymmetrical costs model apply to ADA proceedings in NCAT? Why or why not?
d. If the ADA is amended to introduce an equal access / asymmetrical costs model, should this model apply when NCAT decisions are appealed in higher courts?

Chapter 9: Exemptions procedures

Question 35: Special measures and exemptions

a. If a special measures provision is introduced, should the ADA continue to provide a procedure for exemption applications? Why or why not?
b. If so, what purpose should exemptions serve?

Question 36: The exemptions process

a. What, if any, changes should be made to the process for seeking an exemption? For instance:
    i. Should there be greater transparency and/or options for public involvement in the process?
    ii. Who should be the decision-maker?
b. Should exemptions exclude certain protected attributes or unlawful conduct? If so, what should these be and why?
c. What, if any, other changes should be made to the exemptions process?

Question 37: Decision-making framework

a. Should the exemptions framework be:
   i. guided by legislative or non-legislative material?
   ii. mandatory or discretionary?
   iii. exhaustive or non-exhaustive?
b. Should ADNSW be required to consider whether the exemption would be consistent with the objects and purposes of the ADA? If so, should exemptions be:
   i. limited by the stated objects of the Act (if any), or
   ii. determined as a matter of discretion having regard to the objects, scope and purpose of the Act as a whole?

Question 38: The exemptions criteria

What, if any, changes should be made to the exemptions criteria?

Chapter 10: Other mechanisms

Question 39: Assisting parties

What, if any, changes should be made to ADNSW's power to assist parties to make complaints to NCAT?

Question 40: Initiating complaints

Should ADNSW be empowered to initiate complaints and/or commence a claim in NCAT? If so, under what circumstances should it be allowed to do so?

Question 41: Ministerial referrals for investigation

What, if any, changes should be made to ADNSW's power to investigate matters on referral from the Minister?

Question 42: Investigating withdrawn complaints

Should ADNSW be empowered to continue investigating withdrawn complaints? If so, under what circumstances should it be allowed to do so?

Question 43: Considering breaches of a positive duty

a. If a positive duty was implemented in NSW, should ADNSW be empowered to consider the positive duty during complaints processes? If so, under what circumstances should it be allowed to do so?
b. If a positive duty was implemented in NSW, should there be an individual remedy for failure to comply with the duty?

Question 44: Intervention and amicus curiae powers

a. What, if any, changes should be made to ADNSW's power to assist NCAT?
b. Should ADNSW be empowered to intervene in NCAT proceedings? If so, under what circumstances should it be allowed to do so?

Question 45: Wider investigation and inquiry powers

a. What, if any, changes should be made to ADNSW's existing power to carry out investigations, research and inquiries regarding discrimination?
b. Should ADNSW have wider powers to investigate and report on the conduct of duty holders, independently of the complaints process? If so:
    i. Under what circumstances should ADNSW be allowed to do so?
    ii. If the power to investigate relates to a breach of a positive duty, what criteria should be necessary to start an investigation?
    iii. What powers should ADNSW have to facilitate investigations?
    iv. What outcomes should be available to ADNSW after a finding of non-compliance?
c. Should ADNSW have the power to investigate systemic issues? If so, under what circumstances should it be allowed to do so?
d. What, if any, changes should be made to ADNSW's powers to hold public inquiries?

Question 46: Criminal prosecutions

Should ADNSW have the power to prosecute, or refer for prosecution, breaches of the ADA? Why or why not?

Question 47: Civil penalty orders

a. Should ADNSW be empowered to seek civil penalty orders for substantive breaches for the ADA?
b. If so, which forum/s would be most appropriate to impose a civil penalty, eg NCAT or a court?

Question 48: Education, research and guidance

a. What, if any, changes should be made to ADNSW's:
    i. Education and research powers?
    ii. Power to develop and promote codes of practice?
b. Should ADNSW be empowered to conduct voluntary audits of duty holders' internal policies and programs?

1 Introduction

In brief

This is the second consultation paper in our review of the *Anti-Discrimination Act 1977* (NSW) (ADA). In this paper, we invite you to share your views on the ADA's objectives, procedures and enforcement mechanisms. We also raise whether additional proactive and preventative measures should be introduced.

1.1 Overview

The NSW Attorney General has asked us to review the *Anti-Discrimination Act 1977* (NSW) (ADA). Among other things, we have been asked to consider whether the ADA "could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards".[1]

This is the second of two consultation papers released in this review. In the first consultation paper, we focused on the conduct that is (or should be) unlawful under the ADA.

In this consultation paper, we focus on key procedural aspects of the ADA. In summary, we seek your views on:

- whether the ADA should have a statement of objectives that could, among other things, inform the exercise of powers and functions under the ADA
- the ADA's structure
- the complaints process
- pathways to the NSW Civil and Administrative Tribunal (NCAT) to hear and determine complaints
- remedies, enforcement mechanisms and costs model
- the procedure for seeking exemptions to the ADA, and
- whether new proactive and/or preventative measures should be introduced.

1.2 Our process so far

We received the terms of reference for this review in June 2023. Since then, we have conducted significant research into the operation of the ADA and discrimination laws elsewhere.

We have benefited considerably from the consultations conducted and submissions received to date, which have provided valuable and diverse insights. We thank all individuals and organisations who have contributed to the process so far. Below is a summary of our process to date.

[1] The terms of reference for this review are set out at page vii of this consultation paper.

1.2.1 Preliminary consultations

We called for preliminary submissions on 20 July 2023. We received 98 preliminary submissions, many of which are available on our website.[2] Appendix A to this consultation paper lists the preliminary submissions we received.

We also conducted a round of preliminary consultations with agencies and academics to help identify issues and concerns about the operation of the ADA. Appendix B lists these preliminary consultations.

1.2.2 Serious racial and religious vilification review

From February to September 2024, we completed a separate review into the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing religious and racial vilification. Our report on this review was tabled in NSW Parliament and released on 21 November 2024.[3]

We received 69 submissions during that review, and we consulted with a wide range of individuals and groups. This included judicial officers, bodies that represent the legal profession, community legal centres, police and prosecutors, academic experts, groups representing Aboriginal peoples, religious groups, multicultural groups, and groups advocating on behalf of members of LGBTQIA+ communities and people living with HIV/AIDS.

While the section 93Z review was limited to examining serious racial and religious vilification, submissions and consultations raised many issues related to the ADA. These included concerns about the ADA's civil vilification protections and the effectiveness of complaint mechanisms. The views expressed in those submissions and consultations have also informed the development of our consultation papers.

1.2.3 Consultation paper on unlawful conduct

On 20 May 2025, we released the first consultation paper in this review. We received 215 submissions, many of which are available on our website.[4] Appendix C to this consultation paper lists the submissions we received.

The consultation paper was accompanied by a community summary, an Easy Read consultation paper and a community survey. We also received over 2,500 responses to our community survey.

We also conducted a further round of targeted consultations. These consultations focused largely on community organisations that represent or work with people who are either currently protected by the ADA or who seek such protections.

So far, we have conducted 42 consultation sessions. Many of these were roundtables involving multiple participants. Appendix D lists these consultations.

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[2] This included 96 preliminary submissions and two supplementary preliminary submissions.

[3] NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Report 151 (2024).

[4] This included 214 submissions and one supplementary submission.

We intend to undertake further targeted consultations in the next phase of this review, including with respondent groups, legal representatives and academic experts. This will ensure a wide range of perspectives are considered.

1.3 About this consultation paper

This paper seeks your view on the ADA, focusing on the procedural and enforcement aspects of the ADA. We set out some possible options for reform, drawn from both our research and the suggestions made in submissions.

Many of the options in this paper are informed by developments in discrimination law in other states, territories and at the federal level. These include reviews conducted by other law reform agencies. We also draw on the recommendations of our predecessors in the New South Wales Law Reform Commission's 1999 report into its review of the ADA.

The paper contains a range of consultation questions to promote discussion and help guide your responses. However, you do not have to answer each question. Nor are you limited to addressing the issues raised by the questions. We encourage you to raise other concerns, options and ideas that we have not covered in this consultation paper.

We emphasise that the options and issues in this consultation paper are presented for the purpose of discussion only. We have not yet formed a position or developed any recommendations in this review.

1.3.1 Chapter overview

In this consultation paper:

- **Chapter 2** examines whether the ADA should clearly state its objectives or guiding principles and whether the Act's structure could be improved
- **Chapter 3** provides an overview of complaint mechanisms in NSW and federal laws
- **Chapter 4** sets out how, and by whom, complaints can be made to ADNSW
- **Chapter 5** considers ADNSW's investigation and conciliation processes
- **Chapter 6** considers the circumstances in which NCAT, or other bodies, should be able to hear and determine ADA complaints
- **Chapter 7** looks at the processes to enforce settlement agreements and asks whether non-disclosure agreements should be regulated
- **Chapter 8** discusses remedies, enforcement mechanisms and the costs model available under the ADA
- **Chapter 9** focuses on the process for seeking an exemption, its relationship to special measures, and whether the procedure and criteria should be changed
- **Chapter 10** sets out a range of other possible mechanisms to promote compliance with the ADA and to achieve substantive equality.
- **Appendix A** lists the preliminary submissions received.
- **Appendix B** lists the preliminary consultations conducted.
- **Appendix C** lists the submissions relating to the first consultation paper.
- **Appendix D** lists the consultations conducted so far.

1.3.2 Accessible alternatives

On our ADA project page, we have published accessible alternatives to this consultation paper:

- a short community summary of this consultation paper, which outlines key issues in our review in simpler language, and
- an Easy Read consultation paper.

1.4 How to have your say

We invite you to share your thoughts on the issues raised in this consultation paper. The diverse views, experiences and perspectives of individuals and groups within our community are vital to this review.

If you would like to have your say, you can:

- make a submission
- complete our online survey, or
- answer the questions in our Easy Read consultation paper.

The due date is **2 October 2026**.

For further information, please visit our webpage on how to make a submission.

1.4.1 Make a submission or respond to our Easy Read paper

Submissions and Easy Read responses can be emailed to us at adareview@dcj.nsw.gov.au. When emailing your submission or response to us, please let us know if you would like your submission to be kept confidential or anonymous.

Our general policy is to publish submissions on our website unless they are confidential or unsuitable for publication. We may also refer to them in our final report.

You can find our privacy and information management policy on our website.

1.4.2 Complete our community survey

Instead of making a submission, you may prefer to complete our online survey. We have published a community summary of this consultation paper to help you complete the survey.

If you prefer, you can download the survey from our website and email your responses to adareview@dcj.nsw.gov.au. Please write "ADA Survey Response" as the subject. Please tell us if you want your responses to remain confidential or anonymous.

1.5 Next steps

We will use the information we gather in submissions and consultations, and through our research, to help develop recommendations.

We will present our recommendations to the NSW Attorney General in a final report. Your input and our research will inform our recommendations.

The Attorney General must table the report in both Houses of Parliament within 14 sitting days of Parliament. Once that happens, we will publish the report on our website.

After that, it is up to the NSW Government to decide how to respond.

Our website has more information on our process, including a short video that explains what we do.

2 Objectives and structure of the ADA

In brief

In this chapter, we ask if the *Anti-Discrimination Act 1977* (NSW) (ADA) should contain a clear statement of objects, purposes or principles. If so, we ask what this should include. We also ask if the ADA's structure could be improved.

2.1 Introduction

Throughout this review, many submissions have emphasised the need for clear, effective and accessible enforcement mechanisms in the *Anti-Discrimination Act 1977* (NSW) (ADA). We outline their perspectives, and possible options for improving these mechanisms, throughout this consultation paper.

Before doing so, we seek your views on two important foundational issues.

The first issue is whether the ADA should contain an express statement of objectives and/or principles. Unlike some other discrimination laws across Australia, the ADA does not have a specific clause setting out its objects, purposes or underlying principles.[1] Insights into the objectives of the ADA can be found in its "long title", which states that the ADA is:

> An Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons.

The long title has not changed since its enactment in 1977. It continues to reflect the ADA's early objectives.

As we detail in this chapter, many submissions have emphasised the need for a clear statement of the ADA's objectives.[2] It could have an important symbolic and educative effect as a statement of community standards. It could also influence statutory interpretation. Relevant to the topics discussed in this paper, it could shape the way in which decision-makers exercise their functions under the ADA. We set out some possible options for reform in this chapter.

The second issue is whether the ADA's structure and drafting style is a barrier to accessibility and effective implementation. Many submissions observed that the ADA is difficult to navigate, reflecting the piecemeal reforms that have been made over the years.[3]

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[1] See, eg, *Age Discrimination Act 2004* (Cth) s 3; *Disability Discrimination Act 1992* (Cth) s 3; *Sex Discrimination Act 1984* (Cth) s 3; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 3; *Anti-Discrimination Act 1991* (Qld) long title, preamble, s 6; *Equal Opportunity Act 2010* (Vic) s 3; *Equal Opportunity Act 1984* (WA) s 3.

[2] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1–2; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5; First Peoples Disability Network, *Submission AD108* [2.21]–[2.25]; Women's Legal Service NSW, *Submission AD209* [6]–[7].

[3] See, eg, NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 3; Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 3; NSW Bar Association, *Preliminary Submission PAD86* [2]; Unions NSW, *Submission AD116*, 7–8.

An overarching question is whether a clearer structure would help:

- people understand their rights and how to enforce them, and
- duty holders understand their obligations and how to comply with them.

Justice Lockhart observed:

> Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.[4]

This chapter will ask whether and, if so, how the structure of the ADA could be modernised or simplified to improve community understanding.

2.2 Objectives and principles of the ADA

When the Anti-Discrimination Bill 1976 (NSW) was introduced to Parliament, the then-Premier described it as "an attempt, as far as legislation can, to end intolerance, prejudice and discrimination in our community".[5] As noted above, the long title of the ADA reflects the Act's original scope and purpose. That is, to:

- prohibit discrimination based on race, sex and other attributes, in the circumstances set out in the Act, and
- promote equality of opportunity.

As the first broad discrimination Act in Australia, the ADA was considered groundbreaking. However, much has changed since 1977. There have been significant developments in the purpose and understanding of discrimination laws. As the NSW Attorney General recognised in announcing this review, "[t]here have been monumental shifts in society, demographics and attitudes since the Act came into force nearly half a century ago".[6]

This raises the question of whether it is time for the ADA to include a clear and modern statement of its objects, purpose and underlying principles.

In its 1999 review of the ADA, the NSW Law Reform Commission (NSWLRC) recommended that a new preamble and statement of objects be enacted.[7] This has not been implemented.

Over 25 years later, many submissions to our review also argued that the ADA needs a clear statement of objectives that, among other things, reflects current understandings of discrimination and equality. Their reasons included that this could provide a symbolic and educative statement of the ADA's purpose. It could also help guide statutory interpretation and inform the exercise of functions under the ADA.

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[4] *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301, 326.

[5] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 November 1976, 3337.

[6] NSW Government, "NSW Government Commissions Review of Anti-Discrimination Law" (Media Release, 20 July 2023).

[7] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 7–8.

2.2.1 Potential benefits of an objects clause

Submissions raised several arguments in favour of a new objects clause. These included that it could:

- guide statutory interpretation
- guide, or potentially direct, decision-makers in the exercise of their functions under the ADA, and
- provide a clear statement of community standards, which could have an educative effect.

While we have heard broad support for an objects clause, we also invite you to share different perspectives.

Interpretive guidance

Several submissions identified that a new objects clause could provide clear interpretive guidance to courts, tribunals, rights-holders and duty holders.[8]

The *Interpretation Act 1987* (NSW) provides that an interpretation that "would promote the purpose or object underlying" an Act "shall be preferred" to an interpretation that "would not promote the purpose or object".[9] An objects clause may assist courts and tribunals to interpret and apply an Act consistently with this requirement.

Previous reviews have emphasised the potential benefit of an objects clause. In its 1999 report on the ADA, the NSWLRC considered that a clear statement of objects could help courts and tribunals to interpret unclear or ambiguous sections of the ADA.[10] In its recent review of Queensland's discrimination law, the Queensland Human Rights Commission (QHRC) also noted that an objects clause can:

- help state the intention of the law simply and unambiguously
- be used to explain the law, and
- establish context and meaning.

This could reduce the time decision-makers spend determining the intention of the law.[11]

However, an objects clause should be treated with caution. It does not alone determine the intention of an Act. Statutory provisions must be read in the context of the Act as a whole.[12]

In other jurisdictions, objects clauses have played an important role in ensuring discrimination law is interpreted and applied consistently with its beneficial purpose. Discrimination law in the Australian Capital Territory (ACT) incorporates this interpretive

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[8] Law Society of NSW, *Preliminary Submission PAD31*, 1; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5; Legal Aid NSW, *Preliminary Submission PAD87*, 9; Disability Council of NSW, *Submission AD70* [3]; Women's Legal Service NSW, *Submission AD209* [6]–[7]; NSW Bar Association, *Submission AD211* [71].

[9] *Interpretation Act 1987* (NSW) s 33.

[10] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.111].

[11] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 77.

[12] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 [69], [78].

principle into legislation.[13] In Victoria, courts have considered the Act's objectives to be "emphatic" and have held legislation should be interpreted broadly and beneficially.[14]

Some submissions said that the ADA should expressly include this principle, which we will consider further below.[15]

Guidance or direction for decision-makers

Some submissions observed that an objects clause could guide decision-makers, such as statutory agencies and tribunals, in the exercise of their functions under the ADA.[16] For instance, an objects or principles clause could guide Anti-Discrimination NSW (ADNSW) as it exercises its functions and powers, including in relation to complaint handling and in determining exemptions.[17] We consider these functions further in chapters 4 and 9.

The *Equal Opportunity Act 2010* (Vic) provides an example. The objectives of the Victorian Act are:

> (a) to eliminate discrimination, sexual harassment, victimisation and vilification, to the greatest possible extent;
> (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
> (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment, victimisation and vilification;
> (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that –
> (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
> (ii) equal application of a rule to different groups can have unequal results or outcomes;
> (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;
> (da) in relation to anti-vilification, to promote the full and equal participation of every person in a society that values freedom of expression and is an open and diverse democracy;
> (e) to enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions;
> (f) to enable the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment, victimisation and vilification in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes.[18]

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[13] *Discrimination Act 1991* (ACT) s 4AA.

[14] *Owners Corporation OC1-POS539033E v Black* [2018] VSC 337, 56 VR 1 [61]; *Soo v Department of Justice and Community Safety (Corrections Victoria)* [2025] VSC 548 [102].

[15] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5; Legal Aid NSW, *Submission AD68*, 7, 23.

[16] Law Society of NSW, *Preliminary Submission PAD31*, 1; Women's Legal Service NSW, *Submission AD209* [6].

[17] *Anti-Discrimination Act 1977* (NSW) pt 9, s 126.

[18] *Equal Opportunity Act 2010* (Vic) s 3.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is required to promote and advance these objectives.[19] When setting out the functions of the VEOHRC, the Act refers to these objectives. For instance, the VEOHRC:

- must undertake programs to disseminate information and educate the public with respect to, among other things, these objectives, and
- may undertake research into anything arising from, or incidental to the Act, that it considers will advance the Act's objects.[20]

The objects clause also informs the exercise of the VEOHRC's functions relating to dispute resolution and investigation. For instance, the Victorian Act provides:

- the dispute resolution services offered by the VEOHRC should be consistent with the objectives of the Act, and
- the VEOHRC may investigate any matter relating to the Act's operation if certain criteria are met, including that the investigation would advance the objectives of the Act.[21]

An objects clause could also guide the NSW Civil and Administrative Tribunal (NCAT) in assessing damages and other relevant remedies. Because compensation is a statutory remedy, courts and tribunals must assess compensation by considering the purposes and objects of the ADA.[22]

An objects clause could guide decision-making about other remedies too. For instance, we ask below whether addressing and preventing systemic discrimination should be one of the ADA's stated objectives. This could help NCAT when deciding whether to order remedies, such as an apology or retraction. We consider NCAT's powers to order remedies further in chapter 8.

Another option could be to require ADNSW to consider the stated objects of the ADA when granting exemptions. Some jurisdictions require decision-makers to refer to the objects or purposes of the Act in determining whether to grant an exemption. We discuss this topic further in chapter 9.

Some have also suggested that the ADA should go further and direct decision-makers to exercise their functions in accordance with certain objects or principles.[23] We discuss this below in relation to the suggestion to expressly recognise international human rights law standards in the ADA.

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[19] *Equal Opportunity Act 2010* (Vic) s 155(1)(b).

[20] *Equal Opportunity Act 2010* (Vic) s 156(1)(a), s 157(1).

[21] *Equal Opportunity Act 2010* (Vic) s 112(e), s 127(c).

[22] *Wotton v Queensland (No 5)* [2016] FCA 1457 [1600]; *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, 233 FCR 334 [130]–[132]; *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75 [41]; *Yelda v Sydney Water Corporation* [2021] NSWCATAD 107 [263]–[264].

[23] See, eg, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1]; Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) finding 8, rec 2(c), [2.5]–[2.10], [2.37].

A clear policy statement and an educative tool

Other benefits, identified by submissions, include that an objects clause could:

- provide a clear, public statement on the purpose of the law and of community standards,[24] and
- educate the public.[25]

Previous reviews of discrimination laws have recognised these benefits. For instance, the ACT Law Reform Advisory Council (ACTLRAC) considered that an objects clause could:

- provide a public statement of the government's policy objectives, and
- set out the community values that underpin the law.[26]

In its 1999 report, the NSWLRC also considered that a statement of objects would provide an important educative tool. In its view, a "clear and succinct statement" of the rights and obligations under the ADA would be "extremely useful, particularly considering the importance of the ADA for various disadvantaged groups". The NSWLRC also thought it would be a useful aid to employers (and others) in formulating appropriate guidelines and codes of practice.[27]

Question 1: A statement of objectives, purposes and/or principles

Should the ADA include an express statement of objectives, purposes and/or principles? Why or why not?

2.2.2 Potential contents of an objects clause

If the ADA is amended to add a new objects clause, what should it include? Submissions suggested a range of objectives, purposes and/or principles that could be expressly recognised in the ADA. These included the objectives of:

- eliminating and preventing the conduct prohibited by the ADA
- promoting the realisation of equality
- recognising the relationship between discrimination and social disadvantage, and the harm discrimination causes to individuals, groups and society
- addressing systemic discrimination (recognising the disproportionate impact of systemic discrimination on certain groups)
- addressing intersectional discrimination
- promoting community education about equality
- providing enforcement mechanisms and conferring other functions on key agencies, and
- recognising the beneficial and remedial nature of the ADA.

Some suggested the objects clause in the ACT and Victorian Acts as possible models.[28]

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[24] See, eg, Shooting Industry Foundation Australia, *Preliminary Submission PAD20*, 2; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5; Legal Aid NSW, *Preliminary Submission PAD87*, 9; Women's Legal Service NSW, *Submission AD209* [6].

[25] Law Society of NSW, *Preliminary Submission PAD31*, 1; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5.

[26] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 22–24.

[27] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.110].

[28] See, eg, Legal Aid NSW, *Preliminary Submission PAD87*, 9; Kingsford Legal Centre, *Submission AD171*, 2.

A further, prominent suggestion was that the ADA should expressly recognise certain international human rights instruments and principles. We consider this in more detail later in this chapter.

Eliminating and preventing unlawful conduct

Many submissions considered the ADA should clearly express the objective of eliminating and preventing the conduct that it prohibits.[29] In summary, the ADA currently prohibits:

- discrimination based on race, sex, transgender grounds, marital or domestic status, disability, carer's responsibilities, homosexuality and age in certain areas of public life
- vilification based on race, transgender grounds, religion, homosexuality and HIV/AIDS status
- sexual harassment, and
- victimisation.

However, as noted above, the ADA's long title only refers to "unlawful racial, sex and other types of discrimination". This has not kept pace with changes to the ADA or, arguably, changes in community expectations and understandings of equality.

For instance, the ADA initially protected against direct discrimination based on race, sex and marital status. It has been amended over the years to protect against discrimination based on other attributes, to prohibit other forms of conduct, and to expand the protections to additional public areas.

One option, suggested by some submissions, is that the ADA should clearly express the objective of preventing or eliminating all forms of unlawful conduct to the "greatest extent possible".[30]

A range of other discrimination laws take this approach. Discrimination laws in the Northern Territory, Victoria and Western Australia express the objective of eliminating discrimination, harassment and/or victimisation on the grounds covered by those laws, to the greatest extent possible.[31] Amendments have recently commenced to include the elimination of vilification as an objective of the Victorian Act.[32]

The QHRC also recommended the Queensland Act should contain an objects clause that states one of the purposes of the Act is "to prevent and eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible".[33] This recommendation has not been implemented into the Queensland Act.

In 1999, the NSWLRC recommended recognising, as an object of the ADA, the elimination of discrimination based on "irrelevant characteristics". The NSWLRC prepared a draft Bill,

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[29] Law Society of NSW, *Preliminary Submission PAD31*, 1; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 2; Women's Legal Service NSW, *Preliminary Submission PAD55* [8]; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 12; Kingsford Legal Centre, *Submission AD171*, 2.

[30] Law Society of NSW, *Preliminary Submission PAD31*, 1; Kingsford Legal Centre, *Submission AD171*, 2.

[31] *Anti-Discrimination Act 1992* (NT) s 3; *Equal Opportunity Act 2010* (Vic) s 3; *Equal Opportunity Act 1984* (WA) s 3.

[32] *Equal Opportunity Act 2010* (Vic) s 3(a), s 3(c). This amendment is part of broader reforms to move civil anti-vilification laws from the *Racial and Religious Tolerance Act 2001* (Vic) to the *Equal Opportunity Act 2010* (Vic).

[33] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3.

which also referred to the elimination of sexual harassment and vilification as an object of the ADA. The draft Bill proposed the following language:

> The objects of this Act are as follows:
>
> ...
>
> (b) to eliminate, as far as possible, discrimination based on irrelevant characteristics in areas of, or affecting, the public sphere of social activity,
>
> (c) to eliminate, as far as possible, sexual harassment and certain forms of vilification.[34]

Another approach could be to focus on the aim of eliminating discrimination, and not refer to other forms of conduct. For instance, one object of the *Discrimination Act 1991* (ACT) is "to eliminate discrimination to the greatest extent possible".[35] However, it does not specifically refer to the elimination of sexual harassment, victimisation or vilification as an object.

Before it was amended in 2016, the ACT discrimination legislation also expressed the objects of:

- eliminating, so far as possible, sexual harassment in certain protected areas, and
- promoting recognition and acceptance within the community of the equality of men and women.[36]

In the ACTLRAC's view, these objects reflected the central policy concerns at the time the Act was passed. It observed that new areas of inequality had been identified since then, and others may emerge in the future. As such, the ACTLRAC concluded that it was inappropriate to refer, in the objects, to specific inequalities and to promoting equality between specific groups. It thought that this approach risked excluding people who were entitled to have their aspirations to equality recognised.[37]

The ACTLRAC recommended including an objects clause that, among other things:

- does not refer to particular inequalities
- refers to promoting the right to non-discrimination, and
- refers to achieving substantive equality.[38]

This recommendation was implemented in 2016.[39]

Promoting the realisation of equality

Many submissions observed that the ADA's purpose is to promote equality. They suggested this should be recognised in a new objects clause.[40] However, this could be expressed in a range of ways.

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[34] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 8, appendix A: Draft Anti-Discrimination Bill 1999, cl 3(b)–(c).

[35] *Discrimination Act 1991* (ACT) s 4(a).

[36] *Discrimination Act 1991* (ACT) s 4(b)–(c), as at 23 August 2016. Later amended by *Discrimination Amendment Act 2016* (ACT) s 4.

[37] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 25–26.

[38] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 1.

[39] *Discrimination Amendment Act 2016* (ACT) s 4.

[40] See, eg, First Peoples Disability Network, *Submission AD108* [2.23]; Kingsford Legal Centre, *Submission AD171*, 2; Women's Legal Service NSW, *Submission AD209* [7].

Some considered that a new objects clause should include a commitment to upholding Australia's international human rights obligations to promote equality and eliminate discrimination. This could be achieved, for instance, by incorporating relevant non-discrimination clauses found in key international human rights instruments.[41]

Many submissions argued that the ADA should recognise the purpose of promoting "substantive equality". [42] However, one submission argued that legal changes to promote substantive equality should not occur because it conflicts with Australia's long history of "formal equality".[43]

As the NSWLRC observed in its 1999 report, formal equality is based on comparing and treating people similarly in similar conditions. This approach does not recognise differences in people.[44]

However, discrimination laws in Australia and around the world increasingly focus on what can be done to achieve "substantive equality". This recognises that some people need to be treated differently to promote an equal outcome or equal access to opportunities.[45] This requires an approach which extends beyond comparing the treatment of individuals and addresses the adverse impacts of broader practices, cultural norms, customs and attitudes, and unconscious biases.

Addressing these wider barriers to equality means treating people or groups in a way that achieves equal outcomes or access to equal opportunities. In 1999, the NSWLRC noted that substantive equality "has the potential to reverse historical disadvantage, whereas formal equality may only achieve the removal of formal barriers".[46]

As originally enacted, the ADA promoted formal equality. This is still given effect in the ADA's test for "direct discrimination".[47] In 1981, the ADA was amended to also prohibit indirect discrimination.[48] This represented a move towards addressing substantive equality, as the test now focuses on the adverse outcome of a seemingly neutral requirement or condition for people with different attributes.[49]

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[41] Community Legal Centres NSW, *Preliminary Submission PAD73* [2]; First Peoples Disability Network, *Submission AD108* [2.23]; Women's Legal Service NSW, *Submission AD209* [7].

[42] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5, 12; Kingsford Legal Centre, *Submission AD171*, 2; People with Disability Australia, *Submission AD115*, 7, 11, 14; Women's Legal Service NSW, *Submission AD209* [7].

[43] Institute of Public Affairs, *Submission AD122*, 3–4.

[44] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.14]–[3.15].

[45] S Fredman, "Substantive Equality Revisited" (2016) 14 *International Journal of Constitutional Law* 712, 718–20.

[46] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.14]–[3.15].

[47] See, eg, *Anti-Discrimination Act 1977* (NSW) s 7(1)(a)–(b), s 24(1)(a), s 38B(1)(a), s 49B(1)(a), s 49ZG(1)(a), s 49ZYA(1)(a). For a discussion of the "direct discrimination" test, see NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [3.7]–[3.12].

[48] *Anti-Discrimination (Amendment) Act 1981* (NSW) sch 5 cl 4.

[49] See, eg, *Anti-Discrimination Act 1977* (NSW) s 7(1)(c), s 24(1)(b), s 38B(1)(b), s 39(1)(b), s 49B(1)(b), s 49T(1)(b), s 49ZG(1)(b), s 49ZYA(1)(b); NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [3.34]–[3.37].

In the first consultation paper for this review, we asked whether the ADA should include further mechanisms to promote substantive equality such as:

- requiring duty holders to provide adjustments for people with certain protected attributes, and
- enabling duty holders to adopt "special measures" for groups who have experienced disadvantage, which allow them to be treated differently to best promote their rights.[50]

Other discrimination laws already include specific measures that promote substantive equality and recognise the realisation of equality as an objective of the law. One stated objective of the ACT legislation is:

> to promote and facilitate the progressive realisation of equality as far as reasonably practicable, by recognising that –
> (i) discrimination can cause social and economic disadvantage and that access opportunities are not equitably distributed throughout society; and
> (ii) equal application of a rule to different groups can have unequal results or outcomes; and
> (iii) the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures.[51]

The QHRC and the Law Reform Commission of Western Australia (LRCWA) recommended the adoption of objects expressed in similar terms.[52] In doing so, the LRCWA noted that recognising the object of promoting substantive equality "would accurately reflect the modern aims of anti-discrimination law".[53]

In 1999, the NSWLRC recommended the ADA include a preamble that refers to a right to substantive, as distinct from formal, equality.[54] It also recommended the following objectives be recognised in a statement of objects:

> (a) to promote recognition and acceptance of the rights of equal treatment and equality of opportunity for all people,
> ...
> (d) to provide that equal treatment includes the recognition of relevant differences between people and excludes irrelevant differences,
> (e) to permit and promote activities which recognise relevant disadvantage and which provide special measures for those who require such measures to enjoy equality of opportunity.[55]

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[50] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [11.5]–[11.62].

[51] *Discrimination Act 1991* (ACT) s 4(d). See also *Equal Opportunity Act 2010* (Vic) s 3(d).

[52] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 2; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3.

[53] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [3.5], [3.9].

[54] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 7.

[55] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 3.

Recognising the relationship between discrimination, disadvantage and harm

Some submissions argued that the ADA should expressly recognise the relationship between discrimination and disadvantage.[56] As the QHRC observed, many consider there is "a two-way causal relationship … that discrimination can be a factor that contributes to disadvantage, and that disadvantage exposes a person to higher risk of experiencing discrimination". In the QHRC's view, recognising this link is a "first step to determining the mechanisms that are required to eliminate discrimination".[57]

As set out above, an objective of the ACT and Victorian discrimination laws is to promote and facilitate the progressive realisation of equality. In expressing this objective, the ACT and Victorian laws recognise that "discrimination can cause social and economic disadvantage".[58] The QHRC supported the inclusion of similar language.[59]

A related option could be to recognise the detrimental impact of discrimination, and other unlawful conduct, on individuals and society. The QHRC recommended that another object of the Queensland Act should be "to recognise that discrimination and other objectionable conduct can cause serious personal, social, and economic harm".[60]

For instance, such conduct can:

- affect a person's mental health and wellbeing, which may lead to long-term trauma and change how a person sees themselves and their community
- cause social exclusion and isolation, and
- have a financial impact on individuals and their communities, including reduced economic security, loss of employment and few opportunities for career growth.[61]

Identifying and eliminating systemic discrimination and other unlawful conduct

A related suggestion is that one of the ADA's objectives should be to address systemic discrimination.[62]

Systemic discrimination concerns the structural aspects and causes of discrimination. It regards discrimination as a social, rather than an individual, issue to address.[63] The *Australian Human Rights Commission Act 1986* (Cth) defines systemic discrimination as unlawful discrimination that affects a class or group of people and is continuous, repetitive or forms a pattern.[64]

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[56] Women's Legal Service NSW, *Submission AD209* [7].

[57] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 56–57.

[58] *Discrimination Act 1991* (ACT) s 4(d)(i); *Equal Opportunity Act 2010* (Vic) s 3(d)(i).

[59] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3.

[60] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3.

[61] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 57–60.

[62] Law Society of NSW, *Preliminary Submission PAD31*, 1; People with Disability Australia, *Preliminary Submission PAD53*, 10, 17–19; People with Disability Australia, *Submission AD115*, 7; Kingsford Legal Centre, *Submission AD171*, 2.

[63] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 52.

[64] *Australian Human Rights Commission Act 1986* (Cth) s 35L(2).

The ADA does not include mechanisms to address systemic discrimination. Rather, as we describe in chapters 3 and 4, it provides for an individual complaints system. In chapter 10, we seek views on some potential new monitoring and enforcement mechanisms. This includes, for instance, whether ADNSW or a similar agency should have the power to inquire into, and act on, instances of systemic discrimination or suspected systemic discrimination.

Discrimination laws in the ACT, NT and Victoria include an express object focused on promoting or encouraging the identification and elimination of systemic causes of discrimination.[65] The Victorian Act also refers to the systemic causes of other unlawful conduct, including vilification.[66]

Previous reviews have considered the inclusion of systemic causes of discrimination in their objects clauses. While both the QHRC and LRCWA recommended an objects clause which encourages the identification and elimination of systemic causes of discrimination, the LRCWA recommended this should extend to systemic causes of harassment, vilification and victimisation.[67] The LRCWA observed that community attitudes had shifted towards recognising that the elimination of discrimination is a societal issue, rather than a private, individual dispute.[68]

A new objects clause could also recognise the disproportionate impact of systemic discrimination on particular groups. We were specifically encouraged to recognise Aboriginal people in a statement of the ADA's objects.[69] For instance, Victoria recently enacted changes to its vilification laws. One of the express purposes of the amendments was "to protect Aboriginal and Torres Strait Islander people and others experiencing systemic injustice and structural oppression".[70]

We received submissions in support of identifying, in the ADA's objects, that systemic discrimination operates as a significant barrier to economic and social inclusion for people with disability.[71]

Recognising and addressing intersectional discrimination

Another option is to address the existence and impact of intersectional discrimination in a new objects clause. One submission suggested that an object of the ADA should be "to eliminate discrimination as far as possible by providing comprehensive protections against unlawful discrimination, including intersectional forms of discrimination".[72]

The concept of intersectional discrimination recognises that people can face discrimination based on more than one attribute. For example, Aboriginal women may experience

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[65] *Discrimination Act 1991* (ACT) s 4(c); *Anti-Discrimination Act 1992* (NT) s 3(c); *Equal Opportunity Act 2010* (Vic) s 3(c).

[66] *Equal Opportunity Act 2010* (Vic) s 3(c).

[67] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 2 [3.4].

[68] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [3.9].

[69] NSW Aboriginal Land Council, *Submission AD154*, 2.

[70] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 1(ab).

[71] People with Disability Australia, *Preliminary Submission PAD53*, 10, 18–19; People with Disability Australia, *Submission AD115*, 7.

[72] Women's Legal Service NSW, *Submission AD209* [7]. See also Law Society of NSW, *Preliminary Submission PAD31*, 1.

discrimination based on both race and sex. Discrimination of this kind can expose individuals to unique and compounding types of disadvantage. In our first consultation paper, we asked if it should be possible to make a complaint about discrimination based on more than one attribute, or the combined effect of multiple attributes.[73]

Previous reviews of discrimination laws have recommended changes to protect against intersectional discrimination. Currently, the ACT is the only jurisdiction that prohibits discrimination because of "1 or more protected attributes", but the Act does not explicitly recognise intersectional discrimination in its objective.[74]

The QHRC recently considered this issue. It concluded that people who experience discrimination on combined grounds are not adequately recognised, and it is harder for them to bring and prove a claim.[75] The QHRC recommended the Queensland Act be amended to express the objective of recognising that "discrimination based on a combination of attributes can have a cumulative harmful effect".[76] The Queensland Parliament enacted reforms to this effect, although at the time of writing it is uncertain when they will commence.[77]

Promoting community education about equality

Another consideration is whether the ADA's objectives should include community education.

In its 1999 report, the NSWLRC highlighted the importance of education in shifting community attitudes.[78] It recommended that an objective of the ADA should be:

> to educate the community about the prohibitions against unlawful discrimination and to promote the social and economic benefits of applying non-discriminatory principles and practices.[79]

The LRCWA also identified community education as an important objective. It recommended that one of the objects of the Western Australian (WA) Act be "to promote community education about principles of equality and the elimination of discrimination, harassment, vilification and victimisation".[80]

Providing a mechanism for dispute resolution, redress and other functions

Another question is whether the ADA should recognise, expressly, that one of its objectives is to establish mechanisms to resolve disputes. As well as prohibiting certain conduct, the ADA establishes a two-stage complaint handling system. Complaints are first made to

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[73] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [3.92]–[3.100].

[74] *Discrimination Act 1991* (ACT) s 8(2)–(3).

[75] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 50.

[76] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.3.

[77] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 7A, inserting *Anti-Discrimination Act 1991* (Qld) s 8(2) (uncommenced). D Frecklington, "Crisafulli Government to Consult on Anti-Discrimination Laws" (Media Statement, Queensland Government, 14 March 2025) <https://statements.qld.gov.au/statements/102168> (retrieved 24 February 2026).

[78] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [1.6].

[79] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 8.

[80] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 2.

ADNSW, who can investigate and assist parties to resolve their dispute through conciliation. If this is unsuccessful, complainants can apply to NCAT for a determination.

In its 1999 review, the NSWLRC recommended the ADA's objects should include providing:

- a mechanism for conciliation of disputes involving discrimination, and
- redress for people who have been unlawfully discriminated against.[81]

Discrimination laws in Queensland and Victoria identify complaint and dispute resolution functions when articulating their statutory purpose.

For instance, an object of the Victorian Act is to:

- enable VEOHRC to resolve disputes "in a timely and effective manner", and
- provide direct access to Victorian Civil and Administrative Tribunal for resolution of such disputes.[82]

The Queensland Act states that one of its purposes is to "promote equality of opportunity for everyone by protecting them from unfair discrimination". This purpose is to be achieved by:

- prohibiting discrimination
- allowing a complaint to be made against the person who has unlawfully discriminated, and
- using the agencies and procedures established under the Act to deal with the complaint.[83]

The preamble to the Queensland Act also recognises that "the Parliament is satisfied that there is a need ... to ensure that determinations of unlawful conduct are enforceable in the courts of law". [84]

Some objects clauses also indicate certain features the dispute resolution process should have. For instance, to provide:

- "an independent, fair and accessible process for the resolution of discrimination complaints",[85] and
- "accessible and effective procedures to resolve grievances and disputes".[86]

In Victoria, the Act includes principles of dispute resolution to ensure the "process is fair to all parties".[87]

An objects clause could also be used to acknowledge other powers and functions of ADNSW. As discussed above, an express object of the Victorian Act is to enable VEOHRC to carry out functions relating to research, education and enforcement.[88]

In contrast, the LRCWA did not recommend inserting a similar object into the WA Act. The LRCWA considered whether to include an object that reinforces and confirms the

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[81] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 8.

[82] *Equal Opportunity Act 2010* (Vic) s 3(f).

[83] *Anti-Discrimination Act 1991* (Qld) s 6(2).

[84] *Anti-Discrimination Act 1991* (Qld) preamble 5.

[85] *Human Rights Commission Act 2005* (ACT) s 6(2)(k).

[86] *Fair Work Act 2009* (Cth) s 3(e).

[87] *Equal Opportunity Act 2010* (Vic) s 112(c).

[88] *Equal Opportunity Act 2010* (Vic) s 3(e).

enforcement and educative powers of the Equal Opportunity Commission of Western Australia. While recognising the value of these powers, the LRCWA considered they were a means through which the Act's objects were to be achieved rather than being the objects themselves.[89]

Recognising the ADA's beneficial and remedial nature

Some submissions said the ADA should expressly recognise that the ADA is remedial legislation with a beneficial purpose.[90]

The common law recognises discrimination law as beneficial or remedial in nature.[91] This means it provides benefits to individuals and the public and seeks to remedy injustice. Where a provision in beneficial law is uncertain or ambiguous, it should be interpreted in a way that favours those whom it is intended to benefit. However, this does not extend to interpretations that are unreasonable or unnatural.[92]

The ACT discrimination law includes a similar interpretive provision. This provides that the Act must be interpreted in a way that is beneficial to a person with a protected attribute, to the extent that it is possible to do so consistently with the objects of that Act and human rights under the *Human Rights Act 2004* (ACT).[93]

The QHRC recommended the Queensland Act incorporate a similar statutory interpretive principle of beneficial interpretation. The QHRC considered this would be consistent with the objects of the Act and the *Human Rights Act 2019* (Qld) and would remove any ambiguity.[94]

However, the LRCWA did not recommend the inclusion of an interpretive provision such as this. Instead, it concluded that the use of clear and effective legislative drafting, along with an objects clause informed by international human rights law, would be sufficient.[95]

Question 2: Contents of an objects, purposes or principles clause

If a new objects, purposes or principles clause is added to the ADA, what should it contain?

2.2.3 A human rights framework

A range of submissions argued that the ADA should embed a human rights framework in an objects, principles or interpretation clause.[96] However, there are different views about

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[89] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [3.6].

[90] Law Society of NSW, *Preliminary Submission PAD31*, 1–2; Legal Aid NSW, *Submission AD68*, 7.

[91] *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v City of Perth* (1997) 191 CLR 1, 12.

[92] *AB v Western Australia* [2011] HCA 42, 244 CLR 390 [24].

[93] *Discrimination Act 1991* (ACT) s 4.

[94] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.4, 80–81.

[95] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 42.

[96] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1–2; People with Disability Australia, *Preliminary Submission PAD53*, 10, 12–13; Women's Legal Service NSW, *Preliminary Submission PAD55* [9]; Hindu Council of Australia, *Preliminary Submission PAD58* [38]; Catholic Archdiocese of Sydney, *Submission AD134*, 11.

which instruments or principles should be recognised in the ADA and the purpose of doing so.

Recognising international human rights instruments

A range of submissions supported the express recognition of the international human rights instruments to which Australia is a party.[97]

Australia is party to seven core international human rights treaties.[98] It is also a party to certain optional protocols to these treaties.[99] Australia has also endorsed the *United Nations Declaration on the Rights of Indigenous Peoples*, which elaborates the minimum standards for the survival, dignity and wellbeing of Indigenous peoples.[100]

One option could be to list, in a preamble or an objects clause, certain relevant international human rights law instruments. In its 1999 report, the NSWLRC recommended a new preamble that identifies international human rights instruments adopted by Australia and provides a brief statement of the principles contained within them.[101]

The NSWLRC suggested the preamble could be drafted similarly to the *Anti-Discrimination Act 1991* (Qld).[102] The preamble to the Queensland Act sets out the Queensland Parliament's reasons for enacting the legislation. Among other things, the preamble:

- emphasises that the international community has long recognised the need to protect and preserve the principles of dignity and equality for everyone
- supports the Commonwealth's ratification of certain international human rights instruments, which the preamble lists, and
- expresses Parliament's intention is to provide for the promotion of equality of opportunity.[103]

Recently, the QHRC noted the list of human rights instruments in this preamble is outdated. It recommended the removal of references to international human rights instruments, with

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[97] Women's Legal Service NSW, *Preliminary Submission PAD55* [9]; Hindu Council of Australia, *Preliminary Submission PAD58* [38]; Community Legal Centres NSW, *Preliminary Submission PAD73* [2]; Legal Aid NSW, *Submission AD68,* 23; First Peoples Disability Network, *Submission AD108* [2.21]–[2.25].

[98] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

[99] See, eg, *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 UNTS 302 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 1642 UNTS 414 (entered into force 11 July 1991); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2518 UNTS 283 (entered into force 3 May 2008).

[100] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (adopted by UN General Assembly on 13 September 2007) art 43.

[101] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 7, [3.111].

[102] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [3.112].

[103] *Anti-Discrimination Act 1991* (Qld) preamble cl 1–2, cl 6(a).

an objects clause instead referring to the *Human Rights Act 2019* (Qld).[104] The former Queensland Government supported this recommendation in principle, but this recommendation has not been implemented.[105]

As NSW does not have a human rights Act, the approach of listing relevant instruments remains a potential model for the ADA.[106] However, this raises the question of what instruments and/or principles should be listed in any new objects or principles clause.

Identifying relevant instruments

The question of what instruments should be recognised in the ADA was considered in 2020. A private members Bill (the 2020 Amendment Bill) sought, among other things, to prohibit discrimination based on religious belief and to add a new "principles" clause to the ADA.[107]

The 2020 Amendment Bill proposed to list the following instruments in the new clause:

- International Covenant on Civil and Political Rights (ICCPR)
- UN Declaration on the Elimination of All Forms of Intolerance of Discrimination Based on Religion or Belief, and
- Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.[108]

The 2020 Amendment Bill proposed to require:

- all provisions of the ADA be interpreted in a way that is compatible with these instruments, and
- "the Minister, Board, President, Tribunal and Courts" to have "fundamental regard" to these instruments when "carrying out functions and making determinations under" the ADA.[109]

The 2020 Amendment Bill was reviewed by a parliamentary committee. The committee concluded the principles proposed in the Bill were suitable for a Government Bill, with certain recommended changes.[110]

These changes included expanding the list of instruments beyond the three identified in the Bill, noting concerns that the Bill only referenced selected instruments relating to religion and not other protected attributes.[111] It recommended referring "to relevant international instruments (to the extent ratified) that protect the rights and interests of individuals and

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[104] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 2.2. See, eg, Discrimination Act 1991 (ACT) s 4.

[105] *Final Queensland Government Response to the Queensland Human Rights Commission's Report, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (c2023) [2.2].

[106] See, eg, First Peoples Disability Network, *Submission AD108* [2.24]–[2.25].

[107] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1], negatived on 23 February 2022.

[108] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1].

[109] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1].

[110] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) rec 2 [2.37]. The then NSW Government committed to supporting the Committee's central recommendation to amend the ADA to prohibit discrimination based on religion. However, it deferred implementation of this commitment until the passage of a federal Bill that was under consideration at the time: M Speakman, *Government Response to the Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (2021) 1.

[111] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.30].

protected attributes".[112] The parliamentary committee considered that Australia's partial reservations to certain articles of the ICCPR would need to be acknowledged.[113]

Submissions to the parliamentary committee suggested that such additional instruments could include:

- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disability (CRPD)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[114]

Other suggested additions, drawn from the current Queensland preamble, included two International Labour Organisation Conventions.[115]

Submissions to our review emphasised that the ADA should specifically refer to the UNDRIP and the CRPD, including the social or human rights model of disability it endorses.[116] One submission suggested the ADA's objects clause should also recognise national agreements, such as the National Agreement on Closing the Gap and *Australia's Disability Strategy 2021–2031*.[117]

Recognising the equal status and indivisibility of human rights

Some have further argued that a new objects, principles or interpretation clause should recognise the fundamental principle that all human rights are of equal status and indivisible.[118] This issue has emerged in NSW in relation to proposals to amend the ADA to protect the freedom of religion.

The ADA prohibits vilification based on religious belief, affiliation or activity.[119] However, as we observed in our first consultation paper, the ADA does not specifically protect against

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[112] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) rec 2, [2.37].

[113] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.6], [2.37(a)]. See *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 10, art 14, art 20.

[114] NSW Jewish Board of Deputies Ltd, Submission No 23 to the Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (19 August 2020) 4; Anglican Church Diocese of Sydney, Submission No 120 to the Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (21 August 2020) 11–12.

[115] Australian Discrimination Law Experts Group, Submission No 34 to the Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (20 August 2020) 25.

[116] Disability Council of NSW, *Submission AD70* [3]; People with Disability Australia, *Submission AD115*, 6; NSW Bar Association, *Submission AD211* [71]. See also *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4 "Realising the Human Rights of People with Disability", rec 4.22, rec 4.33, rec 4.34.

[117] First Peoples Disability Network, *Submission AD108* [2.21].

[118] *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (adopted by the World Conference on Human Rights in Vienna on 25 June 1993) [5].

[119] *Anti-Discrimination Act 1977* (NSW) pt 4BA.

discrimination based on religious belief or activity. Instead, the ADA provides a range of exceptions for religious bodies and private educational authorities.[120]

Some submissions argued that, as well as prohibiting religious discrimination and vilification, the ADA should recognise the right to freedom of religion in a new objects or principles clause.[121]

This could build on the work of the Expert Panel on Religious Freedom (Expert Panel). The Australian Government appointed this panel in 2017 to examine whether Australian law adequately protects the human right to freedom of religion.[122]

In its 2018 report, the Expert Panel observed that many discrimination laws refer to the promotion of the right to equality or equality of opportunity. However, discrimination laws "make no express reference to other human rights, such as the right to freedom of religion".[123] The Expert Panel recommended that:

> Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.[124]

The Expert Panel stated that, when drafting laws that affect rights such as the freedom of religion, governments should consider requiring the law to be interpreted "consistently with those rights so far as it is possible to do so in a way that gives effect" to the law's purpose.[125] Objects clauses and/or interpretation clauses that ensure the law is interpreted "in a manner consistent with the equal status of all human rights" could achieve this.[126]

Submissions to our review also argued that an objects clause should refer to the equal status and indivisibility of human rights.[127] It was said that the current emphasis on the right to non-discrimination, without recognising that all human rights are of equal status, contributes to an imbalance in Australian law.[128]

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[120] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [5.68]–[5.86], [7.5]–[7.66].

[121] Australian Christian Lobby, *Preliminary Submission PAD12*, 3, 14–19; Anglican Church Diocese of Sydney, *Submission AD76* [25]–[26]; Australian Muslim Advocacy Network Ltd and others, *Submission AD77*, 7; Freedom for Faith and others, *Submission AD90* [49]–[51]; Australian Association of Christian Schools, *Submission AD130,* 3–4; Catholic Archdiocese of Sydney, *Submission AD134*, 11.

[122] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) iii.

[123] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) [1.151].

[124] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 3.

[125] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) [1.150].

[126] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) [1.152].

[127] Australian Christian Lobby, *Preliminary Submission PAD12*, 3, 15–19; Anglican Church Diocese of Sydney, *Submission AD76* [25]–[26]; Australian Muslim Advocacy Network Ltd and others, *Submission AD77*, 7; Freedom for Faith and others, *Submission AD90* [48]–[51]; Australian Association of Christian Schools, *Submission AD130,* 3; Catholic Archdiocese of Sydney, *Submission AD134*, 11. See *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (adopted by the World Conference on Human Rights in Vienna on 25 June 1993).

[128] Australian Christian Lobby, *Preliminary Submission PAD12*, 15–16.

For instance, the *Australian Human Rights Commission Act 1986* (Cth) provides that:

> (1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:
> (a) with regard for:
> (i) the indivisibility and universality of human rights; and
> (ii) the principle that every person is free and equal in dignity and rights; and
> (b) efficiently and with the greatest possible benefit to the people of Australia.
> (2) Nothing in this section imposes a duty on the Commission that is enforceable by proceedings in a court.[129]

The NSW parliamentary committee recommended that a new principles clause should give equal weight to all protected attributes, while recognising "the special characteristics and protection requirements of religion".[130]

Providing a framework for assessing limitations to rights

A related suggestion is that the ADA should give effect to internationally recognised principles for assessing when human rights may be limited.

Previous reviews, and a range of submissions to our review, supported incorporating the *Siracusa Principles* into discrimination law.[131] The *Siracusa Principles* were developed by international legal experts in 1984.[132] They elaborate the circumstances in which the rights recognised in the ICCPR may be limited. Article 18(3) of the ICCPR provides, for example, that the:

> [f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Among other things, the *Siracusa Principles* clarify when limitations can be regarded as "necessary". This includes, but is not limited to, considerations of proportionality.[133]

The Expert Panel recommended that government should have regard to the *Siracusa Principles* when drafting laws that would limit the right to freedom of religion.[134] The 2020 Amendment Bill sought to give effect to this recommendation by proposing to insert a "principles" clause in the ADA. The intention was to limit any incursion upon religious freedom to that which is necessary and proportionate.[135]

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[129] *Australian Human Rights Commission Act 1986* (Cth) s 10A.

[130] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) rec 2.

[131] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, annex (1985). See P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) [1.149]; Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) rec 2; Freedom for Faith and others, *Submission AD90* [49]–[51]; Australian Association of Christian Schools, *Submission AD130*, 2–3; Catholic Archdiocese of Sydney, *Submission AD134*, 11.

[132] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, annex (1985) 3.

[133] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, annex (1985) cl 10.

[134] P Ruddock and others, *Religious Freedom Review: Report of the Expert Panel* (2018) rec 2, [1.149].

[135] NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 13 May 2020, 2139.

If enacted, this would have recognised that, in interpreting article 18(3) of the ICCPR, the *Siracusa Principles*:

> … provide that limitations must, amongst other matters —
> (a) be prescribed by law,
> (b) respond to a pressing public or social need,
> (c) pursue a legitimate aim and be proportionate to that aim, and
> (d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.[136]

Some submissions to the NSW parliamentary committee expressed concerns about the 2020 Amendment Bill's focus on article 18(3) of the ICCPR. Arguments included that the Bill would elevate the right to freedom of religion, and the Bill diverged from the traditional focus of discrimination law – "freedom from discrimination".[137]

The parliamentary committee agreed the *Siracusa Principles* provided a framework to moderate between competing rights. However, it supported the inclusion of wider principles in the ADA. That is:

> To ensure equal treatment of the attributes protected under all Parts of the Act, the Siracusa Principles shall be used whenever limitations on the rights protected by those Principles are imposed under the [ADA].[138]

Directing decision-makers to act in accordance with human rights law

A further issue is whether the ADA should do more than provide interpretive guidance. The 2020 Amendment Bill proposed a further principle that, if passed, would have directed decision-makers on the exercise of their functions. The Bill proposed that "[i]n carrying out functions and making determinations under this Act, the Minister, Board, President, Tribunal and Courts shall have fundamental regard" to the three international instruments listed in the Bill.[139]

The parliamentary committee heard concerns about the proposal, including that:

- the consideration of relevant international human rights instruments should take place in the drafting of legislation, rather than in the daily exercise of ADNSW's functions, and
- ADNSW would need a significant increase in funding and resources to carry out this function.[140]

The parliamentary committee noted that the directive may create grounds for the judicial review of decisions in carrying out functions and making determinations under the ADA.[141]

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[136] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1].

[137] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.17], [2.19], [2.31].

[138] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.37], finding 8, rec 2.

[139] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [1].

[140] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.18].

[141] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.5].

Question 3: International human rights instruments and principles

a. If a new objects, purposes or principles clause is added to the ADA, should it expressly recognise international human rights instruments and principles? Why or why not?
b. If so:
   i. what instruments or principles should be recognised, and
   ii. what effect should any such recognition have?

2.3 The structure of the ADA

In this review, we have been asked to consider whether the ADA could be "simplified and modernised". While this encompasses the substantive protections and procedural mechanisms in the ADA, a message from our consultations so far is that we must also consider the ADA's structure.

Throughout this review, many people have told us that the style, structure and language of the ADA is complex and difficult to navigate. We have heard that this can make it hard for individual complainants, who are often without legal representation, to understand their rights and enforce them.[142] It can also be hard for duty holders to understand their obligations, develop appropriate policies and systems to comply with the law, and respond to any complaints.[143]

For instance, the ADA is divided into separate parts for each protected attribute. These parts each include:

- the tests for discrimination
- the area in which it is prohibited for that attribute (eg, employment, education, accommodation), and
- any exceptions that apply to that attribute or area.

Some argued that this structure is confusing and repetitive.[144] In addition, the coverage is not always consistent across the attributes and the protected areas. One submission said that minor inconsistencies between each part make it difficult to determine how the ADA applies.[145]

Protections against vilification also apply for some attributes. Another part prohibits sexual harassment.

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[142] See, eg, NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 3; Law Society of NSW, *Preliminary Submission PAD31*, 1; M Thornton, *Preliminary Submission PAD59*, 1; Anti-Discrimination NSW, *Preliminary Submission PAD83*, 5; Legal Aid NSW, *Preliminary Submission PAD87*, 8; Unions NSW, *Submission AD116*, 7–8.

[143] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 5; Legal Aid NSW, *Preliminary Submission PAD87*, 8; Mental Health Carers, *Submission AD71*, 6.

[144] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54*, 2; Unions NSW, *Preliminary Submission PAD90* [72]; Mental Health Carers, *Submission AD71*, 6.

[145] Australian Lawyers for Human Rights, *Preliminary Submission PAD62*, 3–4.

The ADA's basic structure has not changed much since 1977. Submissions observed that amendments to the ADA over the years have involved piecemeal reforms.[146] As new protected attributes have been added, a new part has been inserted. For example, part 4B was inserted in 2000 when the ADA was amended to prohibit discrimination based on carer's responsibilities.[147]

Some submissions argued for a comprehensive redraft of the ADA.[148] We heard that:

- a clearer structure or framework would make it easier for people to understand their rights, responsibilities and complaint options,[149] and
- simpler language would make the ADA more accessible to people who disproportionately experience discrimination and other forms of unlawful conduct, including Aboriginal and Torres Strait Islander peoples, and people from culturally and linguistically diverse backgrounds.[150]

In our first consultation paper, we asked people to suggest improvements to the way the ADA expresses core concepts. For instance, the tests for discrimination and the expressions used to define the protected attributes.[151]

Below, we set out some options for simplifying the structure of the ADA that we received in submissions. We seek your views on these options and invite you to suggest further ideas.

2.3.1 A consolidated list of protected attributes and tests

To simplify the structure, one option could be to replace the multiple attribute-specific parts with:

- a consolidated list of protected attributes
- a section that sets out the test(s) for discrimination that applies across all attributes, and
- other sections that set out the areas of coverage and any exceptions.

In 1999, the NSWLRC adopted this approach in its Draft Anti-Discrimination Bill. This change was aimed at aligning the ADA with more recent discrimination laws in other Australian states and territories.[152]

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[146] NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 3; NSW Bar Association, *Preliminary Submission PAD86* [2].

[147] *Anti-Discrimination Act 1977* (NSW) pt 4B, as amended by *Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000* (NSW) sch 1 [1].

[148] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 1; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 5, 12; NSW Bar Association, *Preliminary Submission PAD86* [7]–[9].

[149] See, eg, Anti-Discrimination NSW, *Preliminary Submission PAD83*, 5; NSW Bar Association, *Preliminary Submission PAD86* [7]–[8]; Legal Aid NSW, *Preliminary Submission PAD87*, 8; Mental Health Carers, *Submission AD71*, 6; NSW Anti-Racism Working Group, *Submission AD102*, 2; Unions NSW, *Submission AD116*, 7–8; Women's Legal Service NSW, *Submission AD209* [1]–[5].

[150] Periyar Ambedkar Thoughts Circle of Australia, *Submission AD01*, 50; NSW Anti-Racism Working Group, *Submission AD102*, 2.

[151] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) ch 3, ch 4.

[152] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [1.19].

Discrimination laws in several Australian states and territories apply a similar structure.[153] For example, the Victorian Act lists protected attributes in one section, then separately sets out the protected areas and any exceptions.[154]

This format allows new attributes and areas to be added over time, without repeating the tests in a new part. For instance, Victoria added "an expunged homosexual conviction" to the list of protected attributes in 2014.[155]

Some submissions to our review supported this approach.[156] It was argued this would reduce repetition and make it easier for individuals to understand their rights.[157]

Others suggested changing the ADA's structure to reflect the chronology of a complaints process, to make it like a "step-by-step" guide.[158]

2.3.2 Examples or scenarios

Another option could be to include examples or hypothetical scenarios to explain the law. Some argued this could help the community understand what constitutes discrimination and other forms of unlawful conduct and make the ADA more user-friendly.[159]

Discrimination laws in some other states and territories do this.[160] For instance, the ACT discrimination law provides it is not unlawful to discriminate in employment if:

- it is a genuine occupational qualification of the position that it be filled by a person with a particular protected attribute, and
- the discrimination is reasonable, proportionate and justifiable in the circumstances.

The Act provides the examples of a genuine occupational qualification, including:

- employing a female carer to provide personal care services for a woman based on privacy or modesty
- selecting a person of a particular race for a role in a theatrical performance based on authenticity, aesthetics or tradition, and
- preferencing people with lived experience of family and domestic violence for peer support positions in a women's crisis centre.[161]

Question 4: Structure

Could the structure of the ADA be improved? If so, how?

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[153] *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic).

[154] *Equal Opportunity Act 2010* (Vic) s 6, pt 4.

[155] *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic) s 7, inserting *Equal Opportunity Act 2010* (Vic) s 6(pa).

[156] See, eg, Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 4–5; Scarlet Alliance and Sex Workers Outreach Project, *Submission AD125,* 7.

[157] See, eg, Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [4]; M Thornton, *Preliminary Submission PAD59*, 1.

[158] NSW Bar Association, *Preliminary Submission PAD86* [8].

[159] Kingsford Legal Centre, *Preliminary Submission PAD35*, 2; M Thornton, *Preliminary Submission PAD59*, 1.

[160] See, eg, *Discrimination Act 1991* (ACT) s 33B(1); *Anti-Discrimination Act 1991* (Qld) s 25(1), s 25(3)(a); *Equal Opportunity Act 2010* (Vic) s 12(1), s 12(5).

[161] *Discrimination Act 1991* (ACT) s 33B(1).

3 Overview of complaint pathways

In brief

This chapter provides an overview of the *Anti-Discrimination Act 1977* (NSW) (ADA) complaint mechanisms and their relationship to other laws. Across Australia, many laws provide mechanisms to address discrimination, harassment, vilification and victimisation. People in NSW can bring a complaint under the process established by the ADA or consider different pathways under other NSW and federal laws, as applicable.

3.1 Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) operates in a complex, intersecting system of state and federal laws. These laws deal with discrimination, harassment, vilification and victimisation, and provide mechanisms for redress. There are many gaps, overlaps and unresolved issues across this system.

Complainants may face a range of choices when it comes to making a complaint. The complaint mechanisms under the ADA may be one of several available options – and sometimes it may not be the preferred option.

As we acknowledged in our first consultation paper, it can be extremely difficult to determine which laws, protections and processes apply in different situations – particularly for complainants without legal representation. Where there are similarities or overlaps, it can be challenging to choose the most appropriate forum for bringing a complaint.[1] And where there are differences, it can be hard for duty holders to understand the extent of their obligations.

This chapter introduces the ADA's complaint process and outlines the wider legal context in which it operates. This includes federal discrimination law. We also illustrate the system's complexity, and available options, by highlighting the various forums in which a complainant can make a workplace complaint.

In doing so, we note some procedural considerations that can influence the choice of complaint pathway. While the substantive coverage of the law is an important consideration, other factors can include the time limits for bringing a complaint, the expected time for resolution, the legal costs model, and the availability of remedies (including whether there is a cap on compensation). The formality, or informality, of the proceedings can also be important for victims. For instance, those without legal representation may not be able to easily access a judicial model.

The choice of complaint pathway can be important. Some federal and state laws expressly prevent "double dipping" — that is, making complaints in more than one jurisdiction.[2] The

[1] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [2.44].

[2] See, eg, *Racial Discrimination Act 1975* (Cth) s 6A; *Sex Discrimination Act 1984* (Cth) s 10(4); *Disability Discrimination Act 1992* (Cth) s 13; *Age Discrimination Act 2004* (Cth) s 12; *Fair Work Act 2009* (Cth) s 734. See also *Viskauskas v Niland* (1983) 153 CLR 280, 292.

common law principle of "issue estoppel" may also prevent an individual from taking legal action under the ADA when they have made a complaint under federal discrimination or employment law.[3]

Throughout this consultation paper, we compare the ADA's procedures to other complaint handling pathways, including those outlined below. We ask if these comparative laws provide useful models for changing aspects of the ADA.

In doing so, we acknowledge there may be different views on whether there should be greater harmonisation between the ADA and related regimes. While there can be benefits in streamlining and aligning complaint mechanisms, there may also be benefits in preserving choice (where available). We encourage you to reflect on these issues as you answer the questions throughout this consultation paper.

3.2 Complaints under the ADA

The ADA establishes a "compulsory two-stage enforcement model".[4] Complaints must first be lodged with Anti-Discrimination NSW (ADNSW), which may investigate and conciliate the complaint to help the parties resolve their dispute.

Complaints under the ADA cannot be lodged directly with the NSW Civil and Administrative Tribunal (NCAT). ADNSW may only refer a complaint to NCAT after it has been finalised. Under this model, ADNSW acts as a "gatekeeper" for complaints under the ADA.[5]

3.2.1 Making a complaint to ADNSW

About ADNSW

The ADA establishes the Anti-Discrimination Board (ADB).[6] The ADA provides that the ADB is to consist of five members, including a President, appointed by the Governor of NSW.[7] The agency, including its staff, is now commonly known as ADNSW.

The ADA confers numerous functions and discretions on the ADB President. Day-to-day, ADNSW staff undertake many of these functions as authorised delegates of the President. Throughout this consultation paper, for simplicity we refer to ADNSW as the body exercising the President's functions.

[3] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.1]–[15.2.2].

[4] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.1.8], [2.12.5].

[5] D Allen, "Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions" (2010) 36 *Monash University Law Review* 103, 105.

[6] *Anti-Discrimination Act 1977* (NSW) s 71.

[7] *Anti-Discrimination Act 1977* (NSW) s 72.

ADNSW works to eliminate discrimination in NSW by:

- responding to enquiries about discrimination and other unlawful conduct
- investigating and assisting to resolve complaints through conciliation
- providing education and public engagement
- granting exemptions, and
- advising the government about discrimination issues.[8]

One of ADNSW's key functions is to administer the complaints scheme under both the ADA and the *Conversion Practices Ban Act 2024* (NSW).

The ADNSW complaints process

Complaints can allege that one or more persons breached the ADA.[9] A complainant can allege that they have experienced more than one type of unlawful behaviour under the ADA.[10]

Sometimes, a complaint can be made to ADNSW even if the complainant has already made a complaint under federal discrimination law or in other related areas, such as a workers compensation claim.[11]

After receiving a complaint, ADNSW must decide whether to accept or decline it in whole or in part. For instance, ADNSW can decline the complaint if the alleged discrimination happened more than 12 months earlier.[12] This is a "soft" time limit, however. ADNSW has the discretion to accept older complaints (see chapter 4).

If it accepts a complaint, ADNSW must investigate it.[13] The ADA does not specify what an investigation should involve. However, ADNSW may require a complainant or respondent to provide information or documents.[14] ADNSW may also require the parties to attend a conciliation, where the parties discuss the issues and try to resolve the complaint.[15]

If the parties resolve a complaint, they can enter into a settlement agreement to record the agreed outcomes.[16] NCAT can enforce this agreement if a party does not fulfil their obligations.[17]

We consider the features of the ADNSW complaints process in more detail in chapters 4, 5 and 7.

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[8] See *Anti-Discrimination Act 1977* (NSW) pt 9.

[9] *Anti-Discrimination Act 1977* (NSW) s 87A(1).

[10] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.12], [15.2.24].

[11] *Anti-Discrimination Act 1977* (NSW) s 88B(1); N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.3].

[12] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).

[13] *Anti-Discrimination Act 1977* (NSW) s 90.

[14] *Anti-Discrimination Act 1977* (NSW) s 90B.

[15] *Anti-Discrimination Act 1977* (NSW) s 91A.

[16] *Anti-Discrimination Act 1977* (NSW) s 91A(5).

[17] *Anti-Discrimination Act 1977* (NSW) s 91A(6)–(9).

3.2.2 The NCAT complaints process

ADNSW can refer the complaint to NCAT if the parties do not resolve the complaint at conciliation, or in certain other cases.[18] The Attorney General can also refer any matter to NCAT as a complaint.[19] However, this is rarely done and the ADA effectively relies on a private enforcement model.[20]

NCAT applies its own case management processes, including mediation, when it receives a complaint. If the parties do not reach an agreement, the complaint may proceed to a hearing.

In some cases, NCAT must grant leave before it can hear a complaint. This happens mainly where ADNSW declines a complaint after investigation, but the complainant asks ADNSW to refer the complaint to NCAT.[21] This has been described as an attempt to filter out unmeritorious complaints.[22]

Following the hearing, NCAT decides whether the respondent breached the ADA. If so, it makes orders about remedies. If NCAT substantiates the complaint, in whole or in part, it can order the respondent to:

- pay the applicant damages of up to $100,000 to compensate for any loss or damage they suffered "by reason of the respondent's conduct"
- stop any conduct that is unlawful under the ADA (an injunction)
- take reasonable action to redress any loss or damage suffered by the complainant (mandatory orders)
- publish an apology or retraction for the unlawful conduct
- void parts of a contract or agreement that breach the ADA, and/or
- for vilification complaints only, develop and implement a program or policy aimed at eliminating unlawful discrimination.[23]

The costs cap can be a significant consideration for complainants. Under the ADA, NCAT can order a maximum of $100,000 in damages per respondent.[24] In some cases, NCAT has awarded more than this amount due to the number of respondents.[25] However, most awards in discrimination cases at NCAT are below $100,000. We discuss this further in chapter 8.

There are limits to NCAT's jurisdiction in ADA matters. NCAT cannot hear complaints against Commonwealth agencies. Nor can it hear other ADA cases involving the exercise of federal jurisdiction. For instance, where the case has interstate aspects, raises issues of consistency with federal legislation, or raises other constitutional issues (such as the

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[18] *Anti-Discrimination Act 1977* (NSW) s 93C.

[19] *Anti-Discrimination Act 1977* (NSW) s 95(2).

[20] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.13].

[21] *Anti-Discrimination Act 1977* (NSW) s 96.

[22] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.5.6].

[23] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a)–(f).

[24] *Anti-Discrimination Act 1977* (NSW) s 108.

[25] See, eg, *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [6].

implied right of political communication).[26] This is because only courts can hear cases involving federal jurisdiction.[27]

Instead of NCAT, the Local Court of NSW or the District Court of NSW can hear such cases under the ADA.[28] The parties must first apply to NCAT and then apply for leave of the court to hear the application. If the court grants leave, it can exercise all the functions of NCAT in dealing with the case.[29]

We consider the NCAT complaints process in chapter 6 and remedies in chapter 8.

3.2.3 Some observations on this model

The NSW complaint resolution model was intended to provide parties with a quick, inexpensive and accessible avenue for justice. One of the objects of the *Civil and Administrative Tribunal Act 2013* (NSW) is to enable NCAT to "resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible".[30]

For example, lawyers can only represent parties with the leave of ADNSW or NCAT, and parties usually pay their own legal costs.

However, some submissions raised concerns with the limits and difficulties of this individual complaint-based model. Some argued it relies on individuals pursuing redress through procedures that may not be accessible to them.[31] We explore other measures for proactive enforcement in chapter 10 of this consultation paper.

3.3 Complaints under federal discrimination law

Several federal discrimination laws operate concurrently with the ADA. These are the:

- *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*)
- *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*)
- *Disability Discrimination Act 1992* (Cth) (*Disability Discrimination Act*), and
- *Age Discrimination Act 2004* (Cth) (*Age Discrimination Act*).

The *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) establishes the procedures for complaints alleging unlawful conduct under these Acts. It also empowers the Australian Human Rights Commission (AHRC) to receive other complaints in a broader range of circumstances, including complaints relating to equal opportunity in employment, systemic discrimination, and human rights breaches by the Commonwealth.

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[26] See, eg, *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16, 276 CLR 216.

[27] *Burns v Corbett* [2018] HCA 15, 265 CLR 304.

[28] *Civil and Administrative Tribunal Act 2013* (NSW) s 34B(2).

[29] *Civil and Administrative Tribunal Act 2013* (NSW) s 34B, s 34C.

[30] *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d).

[31] See, eg, Dementia Australia, *Preliminary Submission PAD17*, 6; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [117]; M Thornton, *Preliminary Submission PAD59*, 4; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 7.

3.3.1 Attributes and areas covered by federal discrimination law

In some cases, NSW and federal discrimination law may overlap. The alleged conduct may breach both federal discrimination law and the discrimination law of the state or territory in which the conduct occurred.

For example, a person may be able to make a racial discrimination complaint related to work to the AHRC under the *Racial Discrimination Act*, or to ADNSW under the ADA.[32] This can provide another complaints pathway, and potentially offer choice, for people in NSW.

However, there are some important differences in coverage between federal and state law. This can affect the choice of complaint pathway, as people may find that the ADA does not cover their experience.

For instance, the attributes protected by these laws are different. The ADA prohibits discrimination based on:

- race
- sex (including pregnancy and breastfeeding)
- transgender status (referred to as "transgender grounds")
- marital or domestic status
- responsibilities as a carer
- disability
- homosexuality, and
- age.[33]

Federal discrimination law protects against discrimination based on a broader range of attributes. Significantly, these include:

- sexual orientation, as opposed to homosexuality
- gender identity, as opposed to transgender identity, and
- intersex status, which the ADA does not protect.[34]

Other relevant differences include that:

- federal laws prohibit harassment in employment because of an individual's disability, but the ADA only prohibits sexual harassment[35]
- different tests for racial discrimination apply under federal law compared with state laws
- some protections under the *Racial Discrimination Act* are not restricted to designated areas of public life, unlike the ADA which applies to particular protected areas of public life, and[36]
- the *Sex Discrimination Act* holds employers liable for sexual harassment committed by more groups of people than the ADA does, such as customers of a business.[37]

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[32] *Racial Discrimination Act 1975* (Cth) s 9, s 15; *Anti-Discrimination Act 1977* (NSW) s 8–10.

[33] *Anti-Discrimination Act 1977* (NSW) s 8–10, s 25, s 35, s 38C, s 40, s 49V, s 49D, s 49ZH, s 49ZYB.

[34] *Sex Discrimination Act 1984* (Cth) s 5A–5C.

[35] *Disability Discrimination Act 1992* (Cth) s 35.

[36] *Racial Discrimination Act 1975* (Cth) s 9.

[37] *Sex Discrimination Act 1984* (Cth) s 106. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [9.47]–[9.56].

Another important difference is that the *Sex Discrimination Act* imposes a positive duty on employers to prevent sex discrimination, sexual harassment, and workplace environments that are hostile on the ground of sex.[38] Individuals can report a breach of this positive duty to the AHRC.[39] We consider this process in chapter 10.

All federal discrimination laws prohibit multiple complaints, or "double dipping", in relation to the same conduct.[40] This means it is not possible to lodge a complaint under federal law when the conduct in question has been the subject of a complaint under state or territory discrimination law.[41]

3.3.2 Federal complaint mechanisms

The complaints process under federal discrimination law also takes a two-step approach. Complaints can be made to the AHRC.[42] If the AHRC accepts the complaint, it is referred to the President of the AHRC. The AHRC President, through their delegates, can attempt to conciliate complaints of unlawful discrimination. If successful, parties can enter into a settlement agreement.

The AHRC President may also terminate a complaint at an early stage on certain grounds.[43]

If the President terminates a complaint, in some cases eligible complainants can seek a remedy in the Federal Court of Australia (Federal Court) or Federal Circuit and Family Court of Australia (Federal Circuit Court).[44]

If the court finds that unlawful discrimination has occurred, it may make any orders as it sees fit. This could include:

- declaring the respondent has committed unlawful discrimination, and directing them not to repeat or continue the conduct
- requiring the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant
- requiring the respondent to employ or re-employ the complainant, and
- requiring the respondent to pay damages to the complainant.[45]

We compare these remedies with the ADA in chapter 8.

Some features of the federal complaints process, such as the respective time limits, may influence a complainant's choice of pathway. The *AHRC Act* allows the AHRC President to terminate a complaint made more than 24 months after the alleged unlawful conduct.[46]

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[38] *Sex Discrimination Act 1984* (Cth) s 47C.

[39] *Sex Discrimination Act 1984* (Cth) s 48.

[40] See *Racial Discrimination Act* 1975 (Cth) s 6A(2); *Sex Discrimination Act 1984* (Cth) s 10(4), s 11(4); *Disability Discrimination Act 1992* (Cth) s 13(4); *Age Discrimination Act 2004* (Cth) s 12(4).

[41] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.2].

[42] *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

[43] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1).

[44] *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(aa), s 46PO.

[45] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

[46] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).

However, ADNSW may decline a complaint made more than 12 months after the alleged unlawful conduct.[47] We discuss this in chapter 4.

In addition, some complainants who pursued the federal discrimination law pathway have achieved far higher awards of damages before the Federal Court than they could have in NCAT. In August 2025, the Federal Court awarded a record $305,000 in damages for sexual harassment, victimisation and aggravated damages.[48] This surpassed the previous highest award of $268,000 for sexual harassment, victimisation and aggravated damages in 2023.[49]

The legal costs regime is another key difference. Currently, each party usually pays their own costs under the ADA. However, federal discrimination law applies an "equal access" costs model.[50]

Under this model, the respondent must pay the complainant's legal costs if the complainant succeeds on any ground of claimed unlawful conduct. If the complainant fails on all grounds, each party pays their own costs. The complainant will only need to pay a respondent's legal costs if:

- they started the court case vexatiously or without cause
- their unreasonable act or omission caused the respondent to incur costs, or
- the respondent is successful on all grounds, and does not have a significant power imbalance over, or significant financial resources relative to, the complainant.[51]

This model was introduced in 2024. The Federal Government considered this change was necessary to:

- reduce the costs risk barrier to complainants pursuing discrimination complaints in courts
- redress the power imbalances and resource disparities between complainants and respondents, and
- provide greater certainty about costs to all parties involved in discrimination cases.[52]

The difference in costs models between the various pathways may mean that individuals are more likely to find private legal representation in the federal discrimination pathway. This is due to the likelihood of an individual recovering costs if their complaint continues to a federal court. These factors may influence individuals to choose to make a complaint to the AHRC under the federal discrimination pathway.

In chapter 8, we ask if this approach to costs could provide a model for NSW.

Despite these differences, the relatively inexpensive and less legalistic nature of the ADA complaints model may still be more attractive to some complainants. For instance, those who are self-represented.

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[47] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).

[48] *Magar v Khan* [2025] FCA 874.

[49] *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313.

[50] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA, as inserted by *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) sch 1 pt 1 s 3.

[51] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA(6).

[52] Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) [2], [6].

3.3.3 Other complaints under the *AHRC Act*

The *AHRC Act* also provides for other complaint mechanisms, which do not involve a judicial process. The AHRC has powers to inquire into, and attempt to conciliate, complaints alleging:

- discrimination in employment and occupation, as part of its functions relating to equal opportunity in employment[53]
- systemic discrimination, meaning unlawful discrimination that affects a class or group of people, and is continuous, repetitive or forms a pattern, and
- acts or practices of the Commonwealth that breach particular human rights.[54]

These powers cover a wide range of attributes recognised in international human rights law and labour law instruments, many of which federal discrimination law and the ADA do not cover.[55] However, complainants may consider the absence of a judicial remedy as a significant limitation to pursuing this option.

3.4 Illustrating system complexity: workplace complaints

Sometimes, complainants may have further options outside of state and federal discrimination law. For example, the ADA operates alongside specific employment law protections against discrimination and sexual harassment at work.

The area of workplace complaints provides a key example of both the complexity of the wider complaints system and the choices that complainants can face. In this section, we outline other civil law options that complainants might pursue in relation to workplace complaints.

People alleging discrimination in other protected areas (such as education) may have other complaint pathways too. However, we have chosen to highlight the protected area of complaints "at work" as it is the highest source of complaints in NSW. For example, employment complaints made up approximately 35% to 40% of all complaints to ADNSW in 2024–2025.[56]

3.4.1 *Fair Work Act* options for people experiencing discrimination

The *Fair Work Act 2009* (Cth) (*Fair Work Act*) is part of the national workplace relations system. This system covers all employees in NSW who are employed by private enterprise, the Commonwealth or by a Commonwealth authority. It excludes most state public sector and local government employees in NSW, who are covered by the state workplace relations system under the *Industrial Relations Act 1996* (NSW).

The *Fair Work Act* provides several options for employees to make complaints under the national workplace relations system. These include various claims before the Fair Work Commission (which can proceed to the federal courts), as well as complaints to the Fair

[53] *Australian Human Rights Commission Act 1986* (Cth) s 31, s 35L.

[54] *Australian Human Rights Commission Act 1986* (Cth) s 31, s 35L, s 11(1)(f).

[55] *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of "discrimination", definition of "human rights"; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

[56] Anti-Discrimination NSW, *Annual Report 2023–24* (2024) 16.

Work Ombudsman. The *Fair Work Act* operates concurrently with the protections in state and federal discrimination laws.[57]

In addition to the National Employment Standards under the *Fair Work Act*, modern awards or enterprise agreements may provide further protections to employees in their particular industries, occupations or workplaces. Some breaches of an award attract civil penalties, which can be enforced in the Fair Work Commission and the Federal Court or Federal Circuit Court. Similar pathways to the Fair Work Commission exist for breaches of enterprise agreements. Individuals must choose between the available pathways and remedies at the start of their case.

"General protections", unlawful termination and flexible work claims

People may make complaints to the Fair Work Commission and the Federal Court or Federal Circuit Court under the *Fair Work Act's* "general protections" jurisdiction. This prohibits an employer from taking adverse action (including discrimination) against an employee, or prospective employee, because of any of the following attributes:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin, or
- experiencing family and domestic violence.[58]

Exceptions apply, including where:

- the individual is unable to carry out the inherent requirements of the particular position, or
- the respondent is a religious institution.[59]

The tests for general protections include both direct and indirect discrimination, similar to discrimination laws. However, there are some differences in the definition of "discrimination" within the *Fair Work Act*.[60]

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[57] *Fair Work Act 2009* (Cth) s 351, s 734.

[58] *Fair Work Act 2009* (Cth) s 351(1), s 789HD.

[59] *Fair Work Act 2009* (Cth) s 351(2)(b)–(c).

[60] See, eg, *Fair Work Act 2009* (Cth) s 342(1)(d), s 351. For a comparison of the scope of protection under discrimination law and the *Fair Work Act 2009* (Cth) see: A Chapman, B Gaze and K Love, "Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence" (Paper presented at

In some ways, the *Fair Work Act* provides greater protections in workplaces than state and federal discrimination law. For example, neither the ADA nor federal discrimination laws prohibit discrimination due to an individual's political opinion, religion, or experience of family and domestic violence.

However, the *Fair Work Act* protections against adverse action based on these attributes do not extend to people in NSW. This is because an exception in the *Fair Work Act* provides that these protections do not apply to conduct that is not unlawful under any discrimination law in force where the conduct occurs.[61] If neither the ADA nor federal discrimination law prohibits discrimination based on these attributes, people in NSW cannot use the *Fair Work Act* to complain about certain forms of adverse action in employment based on these attributes either.

This exception does not apply to some other protections under the *Fair Work Act*. In particular, in NSW it does not apply to protections against unlawful termination due to an employee's political opinion, religion, or experience of family and domestic violence, even though the ADA does not protect against discrimination based on these attributes.[62]

Nor does the exception apply to the prohibition on taking adverse action against someone because they:

- are or are not a member of an industrial association, or
- engage, propose to engage, or do not engage, in industrial activity.[63]

The *Fair Work Act* also recognises the right to request a change in working arrangements. Flexible work entitlements could be an important protection against discrimination for individuals with protected attributes such as carer's responsibilities, older people, people with disabilities, and people experiencing family violence.[64] Employees can also apply to the Fair Work Commission to deal with disputes relating to flexible working arrangement requests.[65]

Complaints to the Fair Work Commission

Individuals can make general protection or unlawful termination claims to the Fair Work Commission. Stricter time limits than in discrimination law can apply in some cases under the *Fair Work Act*. For example, general protections or unfair termination claims involving dismissal must be made to the Fair Work Commission within 21 days of dismissal. In other cases, a more generous time limit applies, such as general protections claims not involving dismissal. In these cases, complaints to the Fair Work Commission have no time limit but claims in the Federal Court and Federal Circuit Court must be made within six years.[66]

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the Australian Labour Law Association Annual Conference 2012) 4–6; D Allen, "Adverse Effects: Can the *Fair Work Act* Address Workplace Discrimination for Employees with a Disability?" (2018) 41 *UNSW Law Journal* 846, 848.

[61] *Fair Work Act 2009* (Cth) s 351(2)(a), s 723. See *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768; *Krcho v University of NSW* [2021] FWCFB 350.

[62] *Fair Work Act 2009* (Cth) s 772(1)(f).

[63] *Fair Work Act 2009* (Cth) s 346.

[64] *Fair Work Act 2009* (Cth) s 65, s 65A.

[65] *Fair Work Act 2009* (Cth) s 65B, s 65C.

[66] *Fair Work Act 2009* (Cth) s 773–774, s 366(1), s 394(2).

The Fair Work Commission deals with claims involving dismissal through mediation, conciliation, by making a recommendation, or by expressing an opinion.[67] If the parties cannot reach a resolution, the complainant has the option of going to the Federal Court or the Federal Circuit Court.[68]

Civil penalties can apply to breaches of the general protections and unlawful termination. The Federal Court and Federal Circuit Court have a broad power to make any order that the court considers appropriate if it finds that a civil penalty provision has been breached. This includes ordering:

- a penalty of up to 60 penalty units ($21,840) for individuals and 300 penalty units ($109,200) for body corporates[69]
- an injunction or interim injunction to prevent, stop or remedy the breach
- compensation, and
- that the employee be reinstated.[70]

Costs in general protections and unlawful termination claims in the federal courts are dealt with through a "hard cost neutrality" model. Each party pays their own legal costs, unless they behave unreasonably or vexatiously.[71] This differs from both the "no costs" model under the ADA and the "equal costs" model under federal discrimination law.

Similar to federal discrimination laws, the *Fair Work Act* prevents people from "double dipping" under both employment and discrimination laws. Complainants cannot bring a general protections or unlawful termination claim under the *Fair Work Act* if a claim has been made under either a federal or state discrimination law in relation to that conduct, and vice versa.[72]

The burden of proof in *Fair Work Act* claims is one feature that may lead some complainants to prefer this jurisdiction. As we discussed in our first consultation paper, complainants have the burden of proving each element in an ADA complaint.[73] In general protections and unlawful termination claims under the *Fair Work Act*, complainants must prove that they:

- have a protected attribute, and
- were subjected to adverse action or unlawfully terminated.[74]

If they prove this, it is presumed that the adverse action or termination was done because of the protected attribute, unless the employer proves otherwise.

Complainants may also consider the expected wait times to conciliation and/or hearing at different complaint handling bodies or courts when deciding which pathway to pursue. For

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[67] *Fair Work Act 2009* (Cth) s 368(1), s 592(4), s 595(2).

[68] *Fair Work Act 2009* (Cth) s 369, s 773–774, s 776–779, s 370, s 778.

[69] *Fair Work Act 2009* (Cth) pt 4-1; *Crimes Act 1914* (Cth) s 4AA; Australian Taxation Office, "Penalty Unit Amount" (26 June 2026) <https://www.ato.gov.au/individuals-and-families/paying-the-ato/interest-and-penalties/penalties/penalty-units> (retrieved 29 June 2026).

[70] *Fair Work Act 2009* (Cth) s 545(1)–(2), s 546(5).

[71] *Fair Work Act 2009* (Cth) s 570.

[72] *Fair Work Act 2009* (Cth) s 725, s 732, s 734.

[73] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [3.71]–[3.77].

[74] *Fair Work Act 2009* (Cth) s 361, s 783.

example, the Fair Work Commission is typically able to arrange conferences for non-urgent complaints earlier than the discrimination complaint handling bodies.

Complaints to the Fair Work Ombudsman

The *Fair Work Act* also establishes the independent Fair Work Ombudsman. The Ombudsman can enforce compliance with the *Fair Work Act*, including the discrimination prohibitions, through investigating complaints and starting legal proceedings.[75]

National system employees can make a complaint about discrimination to the Fair Work Ombudsman. After the Fair Work Ombudsman receives a complaint, a Fair Work Inspector determines whether the complaint is within their jurisdiction and whether discrimination may have occurred.[76] To investigate a complaint, a Fair Work Inspector may enter a workplace to conduct interviews and require the production of records or documents.[77]

If the Fair Work Ombudsman reasonably believes that a person has breached a civil penalty provision in the *Fair Work Act*, it may accept enforceable undertakings from that person.[78] An enforceable undertaking is a legally binding, voluntary agreement between a regulator and an individual or organisation that has allegedly breached the law.

The Fair Work Ombudsman can initiate litigation in the federal courts against a national system employer for contravening the *Fair Work Act*.[79] It can ask the court to impose a civil penalty on an employer that has breached the general protections and/or unlawful termination protections.[80]

Generally, the Fair Work Ombudsman reserves enforcement action for matters of serious non-compliance, the exploitation of vulnerable workers, blatant disregard for the law, or where there is a need to send a strong message of deterrence.[81]

3.4.2 Options for people experiencing harassment at work

People experiencing workplace harassment, including sexual harassment, have several potential complaint pathways in addition to the ADA and the *Sex Discrimination Act*. These include:

- complaint mechanisms in the *Fair Work Act* for national system employees, and
- a new bullying and harassment jurisdiction in NSW for state system employees.

Sexual harassment claims under the *Fair Work Act*

The *Fair Work Act* prohibits sexual harassment in connection with work.[82] Interestingly, this part of the *Fair Work Act* extends beyond employer-employee relationships to cover, for

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[75] *Fair Work Act 2009* (Cth) s 682.

[76] Australia, Fair Work Ombudsman, *Annual Report 2010–11* (2011) 65.

[77] *Fair Work Act 2009* (Cth) s 708–709, s 712, s 714.

[78] *Fair Work Act 2009* (Cth) s 715.

[79] *Fair Work Act 2009* (Cth) s 682.

[80] *Fair Work Act 2009* (Cth) s 546.

[81] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [17.6.3].

[82] *Fair Work Act 2009* (Cth) s 527D.

example, sexual harassment of a worker by a customer.[83] It was enacted in 2023 to give effect to international human rights and labour conventions.[84]

The Fair Work Commission can deal with sexual harassment disputes through conciliation, mediation and arbitration.[85]

If the Fair Work Commission is satisfied that sexual harassment has occurred, it can:

- make a stop sexual harassment order if the individual is still at risk of sexual harassment, and/or
- otherwise deal with the dispute.[86]

Individuals must generally apply to the Fair Work Commission within 24 months of when the sexual harassment occurred. The Fair Work Commission can dismiss applications made after this time.[87]

The Fair Work Commission must start to deal with an application for a stop sexual harassment order within 14 days of receiving it.[88]

The Fair Work Commission can deal with a dispute by arbitration where it cannot be resolved through conciliation or mediation, and the parties agree. The Fair Work Commission can make orders for compensation and/or express an opinion that the complainant was sexually harassed.[89] An opinion has the effect of a declaration that the law has been breached.

Harassment claims in the Industrial Relations Commission of NSW

In November 2023, the NSW Parliament passed legislation to re-establish the Industrial Court of NSW (Industrial Court) as part of the Industrial Relations Commission of NSW (Industrial Relations Commission).[90] The Industrial Court is a higher-level court with the same status as the Supreme Court of NSW.

Since 1 July 2024, the Industrial Court has heard all industrial relations matters about NSW state government and local government employees, including, for example, unfair dismissal and work health and safety matters.

In June 2025, the NSW Parliament passed legislation to empower the Industrial Relations Commission to address workplace bullying and sexual harassment.[91] These reforms fill a gap for state system employees, whom the *Fair Work Act* does not protect.

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[83] *Fair Work Act 2009* (Cth) s 527D(1).

[84] *Fair Work Act 2009* (Cth) s 527C.

[85] *Fair Work Act 2009* (Cth) s 527F.

[86] *Fair Work Act 2009* (Cth) s 527F, s 527J.

[87] *Fair Work Act 2009* (Cth) s 527G.

[88] *Fair Work Act 2009* (Cth) s 527J(2).

[89] *Fair Work Act 2009* (Cth) s 527S.

[90] *Industrial Relations Act 1996* (NSW) s 151A–152, as inserted by *Industrial Relations Amendment Act 2023* (NSW) sch 1.2 [15].

[91] *Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025* (NSW) sch 1 [9], inserting *Industrial Relations Act 1996* (NSW) ch 3A.

Individuals must apply for a sexual harassment order within 24 months of the alleged sexual harassment, as opposed to 12 months under the ADA.[92]

The Industrial Relations Commission can handle workplace sexual harassment and workplace rights claims in a single forum. The Industrial Relations Commission must attempt conciliation first, followed by arbitration if required.[93]

The Industrial Relations Commission can make orders to prevent, apologise for, or remedy, harassment. This includes general damages up to $100,000 and civil penalties of up to $18,870 for individuals or $93,900 for body corporates.[94] As we explain in chapter 8, only a limited range of civil penalties are available under the ADA and those mostly deal with procedural breaches.

Eligible employees can also apply to the Industrial Relations Commission for a stop bullying order. "Bullying" means repeated unreasonable behaviour that creates a risk to health and safety and excludes reasonable management action.[95] The Industrial Relations Commission can order general damages up to $100,000, civil penalties and/or behavioural changes.[96]

This goes beyond the Fair Work Commission in some ways. While the Fair Work Commission can also make a stop bullying order and stop sexual harassment order, it cannot order compensation for complainants experiencing workplace bullying and harassment.[97]

The NSW industrial system also prevents people from "double dipping" under employment and discrimination laws. Complainants cannot make a claim to the Industrial Relations Commission if they have already made a claim under federal or state discrimination law in relation to the same conduct.[98] However, they are not prevented from making applications for a stop bullying order and workers compensation about the same conduct.[99]

In chapter 6, we ask whether there is scope to unify workplace discrimination claims in this jurisdiction.

3.4.3 Other potential complaint options

Depending on the circumstances, a range of other options may also be available to people who experience conduct in the workplace that the ADA prohibits. These include:

- work health and safety claims
- workers compensation claims
- complaints to the NSW Ombudsman
- common law claims, and
- criminal prosecution and victim compensation claims.

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[92] *Industrial Relations Act 1996* (NSW) s 144L definition of "sexual harassment"; *Anti-Discrimination Act 1977* (NSW) s 22A definition of "sexual harassment"; *Sex Discrimination Act 1984* (Cth) s 28A definition of "sexual harassment".

[93] *Industrial Relations Act 1996* (NSW) s 144N, s 144Q.

[94] *Industrial Relations Act 1996* (NSW) s 144N, s 144T.

[95] *Industrial Relations Act 1996* (NSW) s 144C definition of "bullied at work"; *Fair Work Act 2009* (Cth) s 789FD.

[96] *Industrial Relations Act 1996* (NSW) s 144G–144H.

[97] *Fair Work Act 2009* (Cth) s 789FF.

[98] *Industrial Relations Act 1996* (NSW) s 144I, s 144V.

[99] *Industrial Relations Act 1996* (NSW) s 144J; *Work Health and Safety Act 2011* (NSW) s 115.

Work health and safety

Work health and safety law may provide options for complainants to pursue in some cases.

The *Work Health and Safety Act 2011* (Cth) forms part of a nationally consistent framework to protect the health and safety of workers and workplaces. Every state and territory has equivalent legislation that places consistent obligations on employers around Australia.

The law requires employers to ensure, as far as is reasonably practicable, that workers and others at the workplace are not exposed to risks to their psychological or physical health and safety.[100] Bullying, harassment and discrimination are commonly recognised as reasonably foreseeable psychosocial hazards in the workplace.[101]

If an individual is unable to resolve a complaint about an unsafe workplace with their employer, they can complain to a regulator under the relevant state or federal *Work Health and Safety Act* that applies to their employer.

Comcare is the Commonwealth workplace health and safety regulator. SafeWork NSW is the NSW regulator. They can respond to complaints involving serious injury by inspecting the workplace to:

- find out what happened
- try to prevent it from happening again, and
- determine whether any non-compliance with work, health and safety legislation has occurred.[102]

After conducting an inspection, Comcare or SafeWork NSW will decide if enforcement action against an employer is necessary. Actions could include:

- providing information and advice on the requirements of work health and safety or workers compensation law
- issuing enforcement notices or other instructions to ensure compliance with legislation
- accepting an undertaking, or
- recommending prosecution.[103]

Workers compensation

Workers who develop a psychological or physical injury because of discrimination or harassment in the workplace may be entitled to make an insurance claim for workers compensation.

Federal and state laws establish separate Commonwealth and NSW workers compensation rehabilitation schemes.[104] Individuals can make a claim for workers compensation to the relevant statutory authority within six months of the date of an injury.[105]

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[100] *Work Health and Safety Act 2011* (Cth) s 19; *Work Health and Safety Regulations 2011* (Cth) pt 3.1; *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Regulation 2025* (NSW) pt 3.1.

[101] *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* (Cth) [3.1]; *Work Health and Safety Act 2011* (NSW) s 19.

[102] Safe Work Australia, *National Compliance and Enforcement Policy* (2024) 7.

[103] Safe Work Australia, *National Compliance and Enforcement Policy* (2024) 9. See, eg, *Work Health and Safety Act 2011* (NSW) s 160.

[104] See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Workers Compensation Act 1987* (NSW).

[105] *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 65(7).

Support and assistance under the workers compensation scheme may be provided in the form of:

- compensation for lost wages
- medical, hospital and rehabilitation treatment
- return to work assistance, and
- in certain cases, compensation for non-economic loss.[106]

Individuals can often make a workers compensation claim in addition to making a discrimination, harassment and/or vilification complaint to another body (such as ADNSW, the AHRC, the Fair Work Commission or the Industrial Relations Commission). This is because the law treats these as two separate legal processes that address different harm or damage, even if they arise from the same workplace incident.

Complaints to the NSW Ombudsman

The NSW Ombudsman is an independent statutory agency that ensures fairness, accountability, and transparency in the NSW public sector. The NSW Ombudsman can receive complaints about unfair treatment or discrimination by NSW Government agencies, local councils and government-funded service providers.[107]

The NSW Ombudsman can investigate conduct in response to a complaint or on its own motion. During an investigation, it can attempt to conciliate the complaint and enter or inspect any premises or documents of a public authority.[108] The NSW Ombudsman can also make or hold inquiries and compel witnesses to attend hearings, answer questions under oath, and produce documents.[109]

The NSW Ombudsman may refer a complaint to ADNSW, with the person's consent, where it considers the ADA "squarely applies" and ADNSW appears to be the "most appropriate avenue".[110]

Following an investigation, the NSW Ombudsman can make a report directly to the NSW Parliament about matters of public interest, serious maladministration, or systemic failures. The agency does not have the power to overturn government decisions. But it can make formal recommendations to agencies to change unfair policies, fix administrative errors or improve systemic practices.[111]

Common law claims

A common law claim may be brought in NSW courts where unlawful conduct in the workplace involves a breach of contract or infringes an individual's right to their own body.

Someone experiencing sexual harassment may, for example, be able to bring a claim in assault and/or battery. Similarly, a severe case of workplace bullying may be appropriately dealt with through a negligence claim.

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[106] See, eg, *Safety, Rehabilitation and Compensation Act 1988* (Cth) pt 2; *Workers Compensation Act 1987* (NSW) pt 3.

[107] *Ombudsman Act 1974* (NSW) s 12.

[108] *Ombudsman Act 1974* (NSW) s 13A, s 20.

[109] *Ombudsman Act 1974* (NSW) s 18, s 19.

[110] NSW Ombudsman, *Preliminary Submission PAD41*, 3.

[111] *Ombudsman Act 1974* (NSW) s 26.

In some cases, an individual may be able to claim compensation for psychiatric injury flowing from breach of an employment contract.[112] Individuals must bring common law claims involving personal injury within three years of the date of the injury.[113]

Criminal prosecution and victims compensation

While criminal law is not the focus of this review, complaints may also be made to the NSW Police or Australian Federal Police for criminal investigation in some situations. For instance, in cases involving sexual harassment in the workplace that rise to the level of assault.[114]

Victims of violent crime may be eligible to apply to NSW Victims Services for financial and counselling support.[115] In the workplace context, victims of sexual harassment that involves a crime like sexual assault may be able to apply for compensation. Individuals can make a victims compensation claim in addition to the other pathways for addressing sexual harassment in the workplace outlined in this chapter.

3.5 Conclusion

In this chapter, we have introduced the complaint mechanism in the ADA and outlined other pathways that could be available to a complainant, using the example of workplace complaints to illustrate the complexity and choice within the system.

In the following chapters, we consider the features of the ADA complaint mechanisms in more detail. We ask what, if anything, should change.

[112] *Elisha v Vision Australia Ltd* [2024] HCA 50.

[113] *Limitation Act 1969* (NSW) s 50C.

[114] See, eg, *Crimes Act 1900* (NSW) s 61I.

[115] *Victims Rights and Support Act 2013* (NSW) div 3.

4 Making a complaint to ADNSW

In brief

In this chapter, we consider who can make a complaint under the *Anti-Discrimination Act 1977* (NSW) to Anti-Discrimination NSW (ADNSW). We also set out how complaints can be made and when ADNSW can decline a complaint. We ask if these aspects of the law meet the needs of complainants and respondents and, if not, what needs to change.

4.1 Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) establishes a two-stage individual complaints model. A person who seeks a remedy under the ADA must first make a complaint to the President of the Anti-Discrimination Board of NSW (ADNSW). Complaints may later be referred to the NSW Civil and Administrative Tribunal (NCAT) in certain circumstances (see chapter 6).

As mentioned in the previous chapter, the ADNSW President has numerous functions and powers. Day-to-day, many of these functions are performed by authorised delegates of the President, who are employees of ADNSW. For simplicity, in this chapter we refer to ADNSW as the body exercising the President's functions in relation to complaints.

Numerous submissions emphasised the importance of ensuring that complaint resolution under the ADA is timely, efficient and fair to both complainants and respondents. Many also encouraged consideration of whether complaints procedures are culturally safe, trauma-informed and accessible. This includes for Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, people from LGBTQIA+ communities, people with disability, children and young people, people with low literacy, and people from rural and regional NSW.[1]

Previous reviews have highlighted these considerations too. For instance, the Disability Royal Commission emphasised that complaints pathways must be clear, accessible, inclusive, efficient and responsive.[2]

To some extent, these issues raise non-legislative, operational issues for ADNSW or NCAT to consider as they exercise their functions. However, there may also be opportunities to amend the ADA to ensure complaints procedures reflect principles such as these.

[1] See, eg, National Justice Project, *Preliminary Submission PAD39*, 3–4; Australian Muslim Advocacy Network, *Preliminary Submission PAD47* [3.5]; Legal Aid NSW, *Preliminary Submission PAD87*, 41; Kingsford Legal Centre, *Preliminary Submission PAD35*, 8; Women's Legal Service NSW, *Preliminary Submission PAD55* [51]; NSW Bar Association, *Preliminary Submission PAD86* [50]; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 18–21; Dementia Australia, *Preliminary Submission PAD17*, 6.

[2] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 4, "Realising the Human Rights of People with Disability", box 4.3.8.

In this, and the following chapters, we consider the ADA's existing complaint handling system. This chapter focuses on:

- who can make a complaint to ADNSW
- the requirements for making a complaint
- when ADNSW can decline a complaint, and
- when a decision by ADNSW to decline a complaint can be reviewed.

Submissions expressed a range of views about the accessibility, flexibility and fairness of these aspects of the ADA. Some argued that the ADA places a heavy burden on complainants, which may discourage a person from pursuing a complaint. However, others argued that ADNSW should be able to address unmeritorious complaints and avoid an unfair burden on persons alleged to have breached the ADA. A key issue is how to balance these concerns in an efficient and effective dispute resolution model.

We acknowledge that many submissions supported new preventative and proactive measures, moving beyond the existing model, to address systemic discrimination and promote substantive equality. This could involve a wider, proactive and facilitative role for ADNSW (or a similar agency). We return to these issues in chapter 10.

4.2 Complaint terminology

A preliminary issue is whether the terminology "complaint" and "complainant" should be replaced in the ADA.

Throughout this consultation paper, we use these words in the same way they are used in the ADA. For simplicity, we have used "complainant" throughout this consultation paper.

The ADA describes someone who has made a complaint, or on whose behalf a complaint has been made, as a "complainant". The ADA uses the word "complaint" to describe an allegation, lodged with ADNSW (or referred to NCAT by the Minister), that the ADA has been breached.[3]

Some may prefer different expressions. For instance, one submission argued these expressions have negative connotations, and people making complaints may be unfairly labelled as troublemakers. This may deter people from using the ADA. The submission suggested that NSW instead use "application" and "applicant".[4]

Most Australian discrimination laws also use the terms "complainant" and "complaint".[5] Victoria, however, uses "person who brings a dispute" and "dispute" in relation to its broader dispute resolution model.[6] We describe this model in chapter 5.

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[3] *Anti-Discrimination Act 1977* (NSW) s 87 definition of "complainant", definition of "complaint".

[4] HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 3.

[5] *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of "complainant", definition of "complaint"; *Equal Opportunity Act 1984* (WA) s 4 definition of "complainant", definition of "complaint"; *Anti-Discrimination Act 1992* (NT) s 4 definition of "complainant", definition of "complaint"; *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1991* (Qld) sch 1 definition of "complainant"; *Human Rights Commission Act 2005* (ACT) dictionary definition of "complainant", definition of "complaint"; *Anti-Discrimination Act 1998* (Tas) s 3 definition of "complaint".

[6] *Equal Opportunity Act 2010* (Vic) s 4, pt 8.

This issue was considered by the Queensland Human Rights Commission (QHRC) in its recent review of Queensland's discrimination law. Some submissions to that review considered that the word "complaint":

- is legalistic
- may create a perception that the QHRC takes the complainant's side
- emphasises complaining and responding instead of resolution, and
- has negative connotations for complainants.

Most preferred the word "dispute". Others said this word made the complaints process seem "aggressive or argumentative" or the allegations "less serious". One argued that changing the terminology may not be enough to overcome barriers to making a complaint.[7]

The QHRC said the law should continue to use "complaint", noting the difficulties in finding language that accurately describes its processes and meets community expectations. However, the QHRC favoured using "dispute resolution" to describe the complaint resolution process. This aligned with its recommendation to adopt a Victorian-style dispute resolution model (discussed in chapter 5).[8]

Question 5: Complaint terminology

Should the ADA use the words "complaint" and "complainant"? If not, what should be used instead?

4.3 Who can make a complaint

Under the ADA, complaints can be made to ADNSW by:

- one or more persons on their own behalf
- one or more persons on their own behalf, as well as on behalf of another person
- a parent or guardian of "a person who lacks the legal capacity" to lodge a complaint (the ADA says this could be, for example, because of their age or disability), or
- a representative body, on behalf of one or more named persons.[9]

An agent, defined as including an "Australian legal practitioner", can also make a complaint on behalf of any of the people listed above.[10]

We discuss the criteria for making a complaint to NCAT in chapter 6.

Submissions expressed a range of views about the criteria for making a complaint to ADNSW. Some thought they should be expanded, while others thought they should be narrowed.

[7] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 148–149.

[8] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 149.

[9] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(a)–(c). The word "guardian" has the same meaning as it has in the *Guardianship Act 1987* (NSW) s 3: *Anti-Discrimination Act 1977* (NSW) s 87A(3).

[10] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(d), s 87 definition of "agent".

4.3.1 Expressly restricting complaints to people personally affected

A first issue is whether the ADA should only allow complaints by people who are personally affected by conduct or events that may be unlawful. The requirement for complainants to be personally affected by the respondent's conduct currently only applies in representative body complaints that proceed to NCAT (discussed below).[11] The language used to describe who can make an individual complaint is not limited in this way. As set out above, the ADA states that "one or more persons" can make a complaint.

One submission suggested that complainants should be required to show they are "directly affected by alleged conduct". It argued that "[c]urrently, virtually anyone can make a complaint ... no matter how remote they are from the respondent or how distant they are from actual threat or harm".[12]

In its 1999 review, the NSW Law Reform Commission (NSWLRC) thought it was unclear whether a complaint may only be lodged by, or on behalf of, someone personally affected by the alleged discriminatory conduct. The NSWLRC considered whether the ADA is capable of a wide reading as an "open standing" provision. That is, it may allow complaints by people (or organisations) who are not personally affected by the alleged discriminatory conduct. The NSWLRC noted the ADA does not confine the ability to make a complaint to an "aggrieved person" or someone who claims the ADA was breached "in relation to" them.[13]

Other Australian discrimination laws use this type of language, expressly limiting who can make a complaint.[14]

The NSWLRC considered it was unnecessary for the ADA to restrict making a complaint to those personally affected. This is because:

- the individual complaints system had proven inadequate in addressing public interest matters and systemic discrimination
- the existing possibility of open standing did not appear to have "open[ed] a floodgate to litigation or allow[ed] for officious intermeddling by third persons"
- people with no interest in a complaint were unlikely to go to the trouble and cost of inappropriately starting a legal process
- even if the floodgate fear was realised, "appropriate remedies" existed to prevent prejudice to other persons, including the screening requirement to lodge a complaint with ADNSW before starting tribunal proceedings
- providing private enforcement mechanisms was reasonable even where ADNSW had the power to institute proceedings, because their ability to do so was limited by the resources available, and
- a representative body's ability to make a complaint for others meant that "most elements of open standing" were already available.[15]

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[11] *Anti-Discrimination Act 1977* (NSW) s 101(3)(a)(ii).

[12] Australian Christian Lobby, *Preliminary Submission PAD12*, 20.

[13] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.12]. See *Anti-Discrimination Act 1977* (NSW) s 87A.

[14] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46P(2); *Anti-Discrimination Act 1992* (NT) s 60(a)–(b); *Equal Opportunity Act 1984* (SA) s 93(1); *Anti-Discrimination Act 1998* (Tas) s 60(1); *Equal Opportunity Act 2010* (Vic) s 113(1)(a).

[15] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.14]–[8.18].

The NSWLRC's view was mentioned in one NSW case, but it has never been argued or decided under the ADA.[16]

If it is considered desirable to reform the ADA to expressly limit who can make a complaint, the drafting will require careful consideration. For instance, the language "personally affected" could itself be open to interpretation. Examples of language used in other jurisdictions include "person aggrieved", "conduct in relation to that person", or "person who was subjected to the alleged contravention".[17]

Question 6: Persons personally affected

a. Should the ADA restrict who can make a complaint to those personally affected by the conduct? Why or why not?
b. If so, what language should be used to describe who can make a complaint?

4.3.2 Complaints made on behalf of others

When a person makes a complaint on behalf of another person(s) ("the other complainants"),[18] the complaint is treated as if it were made by the other complainants on their own behalf. The person who makes the complaint has the same rights, obligations and interests regarding investigation, conciliation and referral as the other complainants.[19]

Unless the complaint is made on behalf of "a person who lacks legal capacity", ADNSW may require:

- the other complainant(s) to show they consented to it being made on their behalf, and/or
- the person(s) making the complaint to prove they have the authority to always act in the complaint handling process.[20]

ADNSW can decline to accept a complaint made wholly or partly on behalf of another person, or to appoint another person to act. It may do this if not satisfied, at any time, that the person who made the complaint:

- is acting in the best interests of the person or persons on whose behalf the complaint was made, or
- retains the confidence of that person or those persons.[21]

This may be done in respect of any complaints made on behalf of another person, including a person "who lacks legal capacity".[22]

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[16] *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102 [44]. See also N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.16].

[17] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46P(2); *Equal Opportunity Act 1984* (SA) s 93(1); *Anti-Discrimination Act 1992* (NT) s 60(a)–(b); *Anti-Discrimination Act 1991* (Qld) s 134(1).

[18] Excluding complaints made by an agent or a representative body: *Anti-Discrimination Act 1977* (NSW) s 87B(5).

[19] *Anti-Discrimination Act 1977* (NSW) s 87B(1).

[20] *Anti-Discrimination Act 1977* (NSW) s 87B(2).

[21] *Anti-Discrimination Act 1977* (NSW) s 87B(3).

[22] *Anti-Discrimination Act 1977* (NSW) s 87B(3).

When introducing amendments to grant ADNSW this power in 2004, the Government said its overall concern was:

> [T]o ensure that the best interests of complainants and potential complainants are protected. They are often the most vulnerable in our community and this bill seeks to uphold and protect their interests.[23]

This raises the issue of whether these references to "legal capacity" require reform. A related issue is whether ADNSW should be empowered to enquire into issues of consent and authority regarding any complaint made on behalf of another person, including a person who (in the language of the ADA) "lacks legal capacity".

In the first consultation paper for this review, we considered whether the language in the ADA should reflect a social or human rights model of disability.[24] Key concepts in the social model include that:

- governments should recognise people with disability enjoy legal capacity (legal standing or agency) on an equal basis with others[25]
- "mental capacity" (or decision-making ability) must not be used to deny "legal capacity"[26]
- people with disability should be provided with the support they may require in exercising their legal capacity,[27] and
- a person's "will and preferences" should be respected and not overruled by "best interests".[28]

The language in the ADA about legal capacity, authority and consent also relates to wider policy discussions about decision-making frameworks in relation to guardianship. The *Guardianship Act 1987* (NSW) establishes an adult substitute decision-making framework for people determined to be "incapable of managing his or her affairs". Substitute decisions are made in the person's welfare and interests (the "best interests" model).[29]

Previous reviews, including by the NSWLRC, recommended comprehensive reform to guardianship law. This included recommendations to adopt a supported decision-making model, which focuses on providing people with the support they need to express and act according to their "will and preference".[30] This has not been implemented in NSW.

Question 7: ADNSW powers in complaints made on behalf of others

What, if any, changes should be made to ADNSW's powers in relation to complaints made on behalf of others?

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[23] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2004, 11040.

[24] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [4.34]–[4.45].

[25] *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).

[26] Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (19 May 2014) [13].

[27] *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12(3).

[28] Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12: Equal Recognition before the Law*, UN Doc CRPD/C/GC/1 (19 May 2014) [20]–[21].

[29] *Guardianship Act 1987* (NSW) s 3(1) definition of "person in need of a guardian", s 4, s 14.

[30] NSW Law Reform Commission, *Review of the Guardianship Act 1987*, Report 145 (2018) rec 5.4.

4.3.3 Complaints by representative bodies

The ADA allows a representative body to make a complaint on behalf of a named person or persons.[31] A "representative body":

- represents (or purports to represent) a group of people within NSW, whether or not the group authorises them to do so, and
- has, as its primary object, the promotion of the interests or welfare of the group.[32]

Representative bodies can make a complaint if they satisfy ADNSW that:

- each person on whose behalf they are making the complaint consents to the complaint being made on their behalf, and
- the body has a "sufficient interest" in the complaint.[33]

For the body to have a "sufficient interest", the conduct must be "of genuine concern" to the body because of how it could, or does, adversely impact:

- the body's interests, or
- the interests or welfare of the group of people the body represents.[34]

If a representative body complaint progresses to NCAT, the representative body must satisfy NCAT of different criteria before it can proceed.[35] We discuss these criteria in chapter 6.

Representative body complaints are uncommon in discrimination law across Australia.[36] In its 1999 review, the NSWLRC reported concerns that the criteria were unduly onerous.[37]

Several submissions to our review thought the criteria should be simplified. They argued this could:

- make it easier for organisations to make complaints on behalf of groups who suffer discrimination
- protect the identity of the individuals in the group
- reduce the burden on individual victims, and
- help address systemic discrimination.[38]

We set out their suggested reforms below.

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[31] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(c).

[32] *Anti-Discrimination Act 1977* (NSW) s 87 definition of "representative body".

[33] *Anti-Discrimination Act 1977* (NSW) s 87C(1).

[34] *Anti-Discrimination Act 1977* (NSW) s 87C(1)(b). See also *Equal Opportunity Act 2010* (Vic) s 114.

[35] *Anti-Discrimination Act 1977* (NSW) s 101(1)–(3).

[36] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.2.22].

[37] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.9].

[38] See, eg, Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 17; Equality Australia, *Preliminary Submission PAD07*, 20; M Thornton, *Preliminary Submission PAD59*, 3; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6; Anonymous, *Preliminary Submission PAD89*, 37–38; Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 6; National Justice Project, *Submission AD139*, 11.

Naming and obtaining the consent of group members

Some submissions supported removing the ADA's requirement that representative body complaints name and/or have the consent of individual group members. Their reasons included protecting the privacy of complainants and improving the ability to address systemic issues.[39]

One submission suggested that a "good faith" requirement could be implemented to address concerns about complaints being pursued against the wishes of the individuals concerned.[40]

Some other Australian discrimination laws do not require group members to be named or their consent obtained when making a complaint to a complaint handling agency. Under federal and Queensland discrimination laws, for example, a representative complaint (a complaint lodged on behalf of at least one person who is not a complainant) must describe or otherwise identify the class members. But it need not name them, specify how many there are, or have their consent.[41] We discuss consent requirements for bringing representative court proceedings in chapter 6.

In the Northern Territory (NT), organisations or bodies may make complaints about systemic discrimination. They are not required to name the individual members of the group of people affected by the conduct or identify the number of people affected by it. The complainant does not have to obtain the consent of the individuals allegedly affected by the conduct.[42] The only remedy is that the Commissioner can report whether they think systemic discrimination has occurred or will occur and make recommendations to address it.[43] We discuss other powers relating to systemic discrimination in chapter 10.

In Tasmania, the Anti-Discrimination Commissioner must be satisfied that a majority of the class members are likely to consent to a representative complaint made by a person, trade union or organisation.[44]

A representative body can bring a vilification dispute to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) on behalf of an unnamed person(s), if that person has consented.[45] A parliamentary inquiry recommended this to "ease concerns about potential victimisation or other negative consequences" for complainants or their community.[46] The naming (and consent) of group members is still required in all other representative disputes.[47]

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[39] Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6; Kingsford Legal Centre, *Preliminary Submission PAD35*, 9; Law Society of NSW, *Preliminary Submission PAD31*, 15; Anonymous, *Preliminary Submission PAD89*, 37–38.

[40] Anonymous, *Preliminary Submission PAD89*, 38.

[41] *Australian Human Rights Commission Act 1986* (Cth) s 46P, s 46PB(2)(a), s 46PB(3), s 46PB(4), s 3 definition of "representative complaint"; *Anti-Discrimination Act 1991* (Qld) s 146(3), s 147(1)(a), s 147(2).

[42] *Anti-Discrimination Act 1992* (NT) s 60(c), s 62A, s 4 definition of "representative complaint", definition of "systemic discrimination".

[43] *Anti-Discrimination Act 1992* (NT) s 89B.

[44] *Anti-Discrimination Act 1998* (Tas) s 60(1)(b)–(d).

[45] *Equal Opportunity Act 2010* (Vic) s 114A.

[46] Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) rec 29, 198–199; Explanatory Memorandum, Justice Legislation Amendment (Anti-vilification and Social Cohesion) Bill 2024 (Vic) 23.

[47] *Equal Opportunity Act 2010* (Vic) s 113(2)(a), s 114(1)(a).

The "sufficient interest" test

Other submissions suggested relaxing or removing the ADA's requirement that a representative body have a "sufficient interest" in the conduct complained of.[48]

Federal and Queensland discrimination laws offer alternative approaches. A representative complaint can be made if:

- the class members have complaints against the same person
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances, and
- all the complaints give rise to a substantial common issue of law or fact.[49]

One submission said this "provides a more accessible model" than the ADA.[50]

Queensland also allows complaints by representative bodies whose primary purpose is to promote the interests or welfare of people in certain groups. For example, racial or religious groups. The Commissioner may accept the complaint only if satisfied:

- the complaint is made in good faith
- the conduct complained about has affected, or is likely to affect, the persons whose interests or welfare the body primarily promotes, and
- it is in the interests of justice to accept the complaint.[51]

Some submissions supported this "simplified" Queensland criteria for organisations to bring representative complaints.[52]

Ability for individuals to lodge additional complaints

Another question is whether an individual should be allowed to lodge a separate and additional complaint about the same conduct. Under the ADA, a person can still make an individual complaint even if the conduct is already the subject of a representative complaint.[53]

Similarly, in the NT, individuals allegedly affected by systemic discrimination can make an individual complaint even if a representative complaint is made under the model described above.[54]

In contrast, federal and Queensland discrimination laws prevent individuals from making their own complaint about the subject matter of the group complaint, unless they withdraw from it.[55]

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[48] NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 13; Hindu Council of Australia, *Preliminary Submission PAD58* [29].

[49] *Australian Human Rights Commission Act 1986* (Cth) s 46P, s 46PB(1), s 3 definition of "representative complaint"; *Anti-Discrimination Act 1991* (Qld) s 134(1)(a), s 146(1). See also *Human Rights Commission Act 2005* (ACT) s 71.

[50] Anonymous, *Preliminary Submission PAD89*, 37.

[51] *Anti-Discrimination Act 1991* (Qld) s 124A, s 134(3)–(5).

[52] Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6. See also Australian Muslim Advocacy Network Ltd and others, *Submission AD77*, 8; Equality Australia, *Submission AD185*, 43–44.

[53] *Anti-Discrimination Act 1977* (NSW) s 87A(2). See also *Equal Opportunity Act 1984* (WA) s 117.

[54] *Anti-Discrimination Act 1992* (NT) s 62A(4).

[55] *Australian Human Rights Commission Act 1986* (Cth) s 46P(3), s 46POB(1); *Anti-Discrimination Act 1991* (Qld) s 148(1).

4.3.4 Complaints by other representatives

As noted above, the ADA permits complaints by an "agent" of a person or body who meets the criteria for making a complaint. For this purpose, the ADA says only that an "agent" includes an "Australian legal practitioner".[56]

One submission suggested that the ADA should allow an individual to nominate a representative to make a complaint for them.[57] For instance, a non-legal advocate or support worker.

Some other Australian discrimination laws allow a person (not just an organisation) to make a complaint on behalf of the person against whom the alleged conduct was directed.[58] For example, the Australian Capital Territory (ACT) allows any person with a "sufficient interest" in a discrimination complaint to make a complaint (with the aggrieved person's consent).[59] This means the conduct complained of is of genuine concern to them because of the way conduct of that kind adversely affects, or has the potential to adversely affect:

- their interests, or
- the interests or welfare of anyone they represent.[60]

This is like the "sufficient interest" test for representative bodies in the ADA.

4.3.5 Trade union complaints

Under the ADA, trade unions can only make a complaint for named individual trade union members if they satisfy the "representative body" complaint criteria.[61]

Some consider that the ADA should expressly allow trade unions to make a complaint on behalf of its members.[62] Unions can expressly do so in Western Australia (WA), Tasmania and federally.[63] In Queensland, "registered employee organisations" can make a complaint for their members about work-related breaches.[64]

However, another submission argued that trade unions and other advocacy groups should not be empowered to bring "test cases" under the ADA. This is because they have alternative workplace and industrial laws they can use to do this.[65]

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[56] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(d), s 87 definition of "agent".

[57] NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21.

[58] See, eg, *Anti-Discrimination Act 1998* (Tas) s 60(1)(f); *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c); *Human Rights Commission Act 2005* (ACT) s 43(1)(f); *Anti-Discrimination Act 1991* (Qld) s 134(1)(b).

[59] *Human Rights Commission Act 2005* (ACT) s 43(1)(f), s 43(7). This is in addition to the ability of an agent to make a complaint: *Human Rights Commission Act 2005* (ACT) s 43(1)(b), s 43(6).

[60] *Human Rights Commission Act 2005* (ACT) s 43(3).

[61] *Anti-Discrimination Act 1977* (NSW) s 87A(1)(b)–(c), s 87C.

[62] M Thornton, *Preliminary Submission PAD59*, 3; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 17.

[63] *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c); *Equal Opportunity Act 1984* (WA) s 83(1)(c); *Anti-Discrimination Act 1998* (Tas) s 60(1)(c).

[64] *Anti-Discrimination Act 1991* (Qld) s 146(2)–(3).

[65] Family First Party Australia, *Preliminary Submission PAD65* [6.5].

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

What, if any, changes should be made to requirements under the ADA for making complaints on behalf of others?

4.3.6 Vilification complaints

Another issue is whether the law about who can make a vilification complaint should be changed. Under the ADA, vilification complaints can only be made if each person on whose behalf the complaint is made:

- has the relevant protected attribute (race, for example), or
- claims to have that protected attribute, and there is no sufficient reason to doubt their claim.[66]

One submission argued that the ADA should require complainants to provide evidence that the conduct of the respondent had a direct effect on them, either individually or as a member of a defined group (and not only as people who have a particular attribute).[67]

Currently, the ADA requires proof that each complainant "has in fact been affected" by the respondent's conduct only when NCAT decides whether a representative complaint is made "in good faith" and should progress.[68] We discuss this in chapter 6.

Questions about standing for vilification complaints may be particularly relevant if NSW introduces a harm-based test for vilification in place of, or alongside, the ADA's existing incitement-based test. In summary:

- an incitement-based test focuses on whether a public act incites, or is capable of inciting, particular emotions or responses in others, and
- a harm-based test focuses on the impact of the conduct on the individuals and groups targeted by a public act.[69]

In our first consultation paper in this review, we asked if NSW should introduce a harm-based test.[70] A further consideration is who should be able to make a vilification complaint if a harm-based test is introduced.

Recent reforms in Victoria provide one option for consideration. The reforms introduced a new harm-based test in addition to the existing incitement-based test.[71] Specific criteria govern who can bring a dispute to VEOHRC (and the Victorian Civil and Administrative Tribunal) under the new test.

A person can bring a dispute to VEOHRC if they claim someone contravened the Victorian Act "in relation to" them.[72] This applies where a contravention of the incitement-based test is claimed.

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[66] *Anti-Discrimination Act 1977* (NSW) s 88.

[67] Australian Christian Lobby, *Preliminary Submission PAD12*, 20–21.

[68] *Anti-Discrimination Act 1977* (NSW) s 101(3)(a)(ii).

[69] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [8.78]–[8.96].

[70] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [8.82], question 8.2(1).

[71] *Equal Opportunity Act 2010* (Vic) s 102D–102E.

[72] *Equal Opportunity Act 2010* (Vic) s 113(1)(a); *Racial and Religious Tolerance Act 2001* (Vic) s 19(1)(a).

However, conduct claimed to be unlawful vilification under the new harm-based test is only considered to be "in relation to" a person if they:

- have the relevant protected attribute, and
- are part of the audience for the alleged conduct.[73]

This is intended to limit the people who can bring a dispute under the harm-based test to those who:

- have the relevant attribute, and
- hear or see the conduct.[74]

Question 9: Vilification complaints

What, if any, changes should be made to the requirements for making a vilification complaint under the ADA?

4.4 Lodging a complaint with ADNSW

The ADA also sets out how complaints can be made. The requirements are not onerous. As Justice Stern observed, "the scheme of the *Anti-Discrimination Act* is to facilitate complaints being made with little or no formality".[75]

A complaint to ADNSW:

- must be in writing, but does not have to take any particular form
- does not have to demonstrate a prima facie case,[76] and
- can be amended after it is made.[77]

Some submissions suggested changes to either improve the process for complainants or to provide greater certainty for respondents. We outline those ideas, and seek your views on them, below.

4.4.1 A fee for making complaints

There is no fee for making a complaint to ADNSW. Arguably, this ensures that more people can seek to enforce their rights.

However, some said this encourages people to abuse the system and to make multiple, vexatious complaints. To prevent this, one submission suggested introducing a lodgement fee but allowing waivers where suitable. Under this approach, ADNSW would refund the fee later if it decided the complaint was not "lacking in substance".[78]

[73] *Equal Opportunity Act 2010* (Vic) s 113(1B), s 123(1B).

[74] Explanatory Memorandum, Justice Legislation Amendment (Anti-vilification and Social Cohesion) Bill 2024 (Vic) 23–24.

[75] *Whippy v University of Sydney* [2023] NSWSC 1607 [67].

[76] *Anti-Discrimination Act 1977* (NSW) s 89.

[77] *Anti-Discrimination Act 1977* (NSW) s 91C.

[78] Australian Christian Lobby, *Preliminary Submission PAD12*, 21.

4.4.2 The form of complaints

A complaint must be in writing but does not have to be in any particular form. Complaints can be lodged by post, hand, fax or email.[79] Most discrimination laws across Australia also require complaints to be in writing.[80]

The ADNSW website advises that people can fill out a complaint form or write a letter. The form is available online, in Word format, in large print and in 26 community languages.[81] Some submissions suggested other options to make the process more accessible. For example, one submission said a "chat service" would be especially helpful for young people.[82]

However, a broader question is whether the requirement for written complaints should be relaxed to allow complaints in other forms, to facilitate access to the complaints process.

Perspectives on the written complaint requirement

In its 1999 report, the NSWLRC supported the requirement that complaints be made in writing. It observed that principles of procedural fairness require the content "be specified with a reasonable degree of precision".[83]

However, ADNSW observed that, in its experience

> this requirement may act as a potential barrier and exclude some people from proceeding with a complaint, raising an access to justice issue. For example, a complainant with a mental or cognitive disability may find writing a complaint challenging. A person may seek a representative to make a complaint on their behalf, however, accessing a support person or representative may be difficult and present a further barrier.[84]

Another submission argued that the requirement for written complaints creates similar barriers for people from refugee and asylum-seeking backgrounds.[85]

ADNSW can assist by transcribing complaints made over the phone or received as videos or voice recordings. People can write their complaint in a language other than in English, or record it in Australian Sign Language (Auslan) and ADNSW will have it translated without charge.[86] However, these methods may still create technological barriers for complainants.

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[79] *Anti-Discrimination Act 1977* (NSW) s 89(1), s 89A(2); Anti-Discrimination Regulation 2019 (NSW) cl 5.

[80] *Equal Opportunity Act 1984* (WA) s 83(1); *Anti-Discrimination Act 1992* (NT) s 64(1)(a); *Equal Opportunity Act 1984* (SA) s 93(1c)(a); *Anti-Discrimination Act 1991* (Qld) s 136(a); *Anti-Discrimination Act 1998* (Tas) s 62(1)(a).

[81] See Anti-Discrimination NSW, "How to Make a Complaint" (16 December 2025) <https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/complaints/how-to-make-a-complaint.html> (retrieved 18 February 2026).

[82] NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21.

[83] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.40]–[8.41].

[84] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17.

[85] NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, *Submission AD155*, 8–9.

[86] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17.

Alternative methods for making a complaint

An issue is whether reforms are required to address the procedural barriers to making a complaint. For instance, one option could be to amend the ADA to expressly allow for voice recorded or oral complaints.[87]

Some Australian complaint handling agencies can receive complaints orally. The ACT allows them in "exceptional circumstances", for example, where waiting for a written complaint would make responsive action impossible or impractical.[88]

In Victoria, the dispute resolution process begins when a person "informs" VEOHRC that they wish to bring a dispute. The Victorian Act does not say how this must be done.[89] In practice, a person can start a dispute by lodging it in writing (via email, post or online complaint form) or by telephoning VEOHRC.[90]

The QHRC recommended that it be allowed to accept complaints orally in exceptional circumstances, then transcribe them in writing.[91] The NSW Ombudsman can also accept an oral complaint if considered appropriate — but must put it into writing as soon as possible.[92]

ADNSW noted that the legal restrictions on the recording of private conversations in NSW would require consideration. In NSW, it is an offence to record a private conversation or provide a record of a private conversation to another person, without the consent of the people involved.[93] Arguably, this concern may be overcome by ADNSW obtaining a complainant's consent.

4.4.3 The detail required in a complaint

The ADA provides that a written complaint does not need to show a prima facie case.[94] This was introduced in 2004, following a recommendation of the NSWLRC.[95] The then-Attorney General explained:

> This ensures that there is no prescriptive form required for a person to lodge a complaint and that the lodgment of the complaint in its original form is a sufficient trigger for further investigation and refinement of the issues raised by the complaint.[96]

This can be important for complainants who may not be aware of the requirements or the operation of the ADA, or the information to be provided.

However, some have argued that the ADA should require complainants to disclose a greater level of detail in their complaints. This could prevent complaints that are "ambiguous, poorly

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[87] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17; Mental Health Carers NSW Inc, *Submission AD71*, 15.

[88] *Human Rights Commission Act 2005* (ACT) s 44(4).

[89] *Equal Opportunity Act 2010* (Vic) s 115(1).

[90] Victorian Equal Opportunity and Human Rights Commission, "Make a Complaint", <www.humanrights.vic.gov.au/complaints/make-a-complaint/> (retrieved 18 February 2026).

[91] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 7.2.

[92] *Ombudsman Act 1974* (NSW) s 12(4A).

[93] *Surveillance Devices Act 2007* (NSW) s 7(1)(b), s 7(3)(a), s 11(1), s 11(2)(a)(ii).

[94] *Anti-Discrimination Act 1977* (NSW) s 89(2).

[95] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 106.

[96] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2004, 11040.

constructed, vague and unclear and containing little detail of who is being complained about, the details of the alleged conduct and reasons why that conduct breaches the Act".[97]

In 2020, a NSW parliamentary committee recommended that the NSW Government consider an amendment to require complaints to "set out reasonable details of the alleged acts, omissions or practices". The committee said that "any unmeritorious or ill-conceived complaints" could then be dismissed earlier, and it would help ADNSW decide whether to decline a complaint as "frivolous, vexatious or misconceived".[98]

The then-NSW Government supported consideration of this recommendation. But it also noted that, in practice, ADNSW asks complainants for more information if there are insufficient details to decide whether to accept a complaint for investigation.[99]

4.4.4 Allowing anonymous complaints

Some submissions suggested that the ADA should expressly allow people to make anonymous complaints or use pseudonyms. This would ensure the complainant's identity remained confidential throughout the process. They argued this is necessary to prevent complainants from being victimised or harmed. In their view, some groups of people (such as sex workers) may be unlikely to use the ADA without this measure.[100]

As mentioned above, Victoria now allows a representative body to bring a dispute alleging vilification to the VEOHRC on behalf of unnamed persons.[101] Some complaint handling agencies allow anonymous reports of unlawful conduct. For example, someone can anonymously report:

- a conversion practice to ADNSW[102]
- discrimination to VEOHRC, the Tasmanian Anti-Discrimination Commissioner or the Northern Territory Anti-Discrimination Commission[103]
- an organisation's breach of the positive duty in the *Sex Discrimination Act 1984* (Cth), to the Australian Human Rights Commission (AHRC)[104]

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[97] Australian Christian Lobby, *Preliminary Submission PAD12*, 21.

[98] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.106], rec 4; *Anti-Discrimination Act 1977* (NSW) s 89B, s 92.

[99] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [4].

[100] Shooters Union NSW, *Preliminary Submission PAD05*, 2; Respect Inc, *Preliminary Submission PAD57*, 7; Community Legal Centres NSW, *Preliminary Submission PAD73* [35]; Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 6; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 5–6; Mental Health Carers NSW Inc, *Submission AD71*, 15; Scarlet Alliance and Sex Workers Outreach Project, *Submission AD125*, 26.

[101] *Equal Opportunity Act 2010* (Vic) s 114A.

[102] Anti-Discrimination NSW, "Frequently Asked Questions" (11 November 2025) <https://antidiscrimination.nsw.gov.au/discrimination/conversion-practices/frequently-asked-questions.html#Who10> (retrieved 20 July 2026).

[103] Victorian Equal Opportunity and Human Rights Commission, "Make a Complaint" <www.humanrights.vic.gov.au/complaints/make-a-complaint/> (retrieved 18 February 2026); Northern Territory Anti-Discrimination Commission, "Discrimination" (2026) <https://adc.nt.gov.au/discrimination> (retrieved 18 February 2026); Tasmania, Office of the Anti-Discrimination Commissioner, "Complaints" <www.antidiscrimination.tas.gov.au/complaints> (retrieved 19 February 2026).

[104] *Sex Discrimination Act 1984* (Cth) s 47B–47C; Australian Human Rights Commission, "Complete the Positive Duty Form" <https://humanrights.gov.au/know-your-rights/rights-of-individuals/workplace-rights/positive-duty-sex-discrimination-act/positive-duty-form> (retrieved 19 February 2026).

- an unsafe work environment in NSW to SafeWork NSW,[105] or
- unlawful workplace practices to the Fair Work Ombudsman.[106]

These are not, however, complaints. The agencies may use the reported information to undertake their educative, monitoring, compliance or enforcement functions.

The NT and Queensland offer another approach. Under their discrimination laws, Commissioners can prohibit the disclosure of the identity of a person involved in a complaint, including the complainant and respondent. A Commissioner can do this where necessary to protect the person's work security, privacy or any human right. It is an offence to fail to comply with such an order.[107] A similar power could be granted to ADNSW.

Allowing anonymous complaints under the ADA could encourage more people to take action against alleged unlawful conduct. It could also help avoid the risk of victimisation of complainants. However, procedural fairness for respondents also needs to be considered in any such reform, as does the question of whether this would make it more difficult for ADNSW to investigate and conciliate complaints.

4.4.5 Supporting people to make and respond to complaints

The ADA is a complex law which, as we described in chapter 3, intersects and overlaps with many other NSW and federal laws. People seeking to make a complaint often do not have a high level of legal literacy and may be dealing with ongoing issues (including trauma) relating to the alleged conduct.

The ADA allows ADNSW to assist a person to make a complaint.[108] This was added in response to a recommendation made by the NSWLRC in 1999.[109] The reform was intended to help people who may find it hard to make a complaint independently for any reason, including due to disability, language proficiency or cultural background.[110]

We discuss options for expanding ADNSW's power to assist parties to prepare for, and present, their case to NCAT in chapter 10.

Assistance to complainants

The ADA does not specify the type or extent of the assistance that may be provided to complainants. This may be beneficial, as it allows flexibility to provide appropriate support and adjustments.

Some submissions expressed the ADA should recognise the social model of disability, and embed support to help people with disability through the ADA process.[111] Some specifically

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[105] SafeWork NSW, "Speak up to Report a Work Health and Safety Concern" <www.safework.nsw.gov.au/resource-library/blogs/blogs-accordions/speak-up-to-report-unsafe-work> (retrieved 19 February 2026).

[106] See, eg, Australia, Fair Work Ombudsman, "Anonymous Reporting" <www.fairwork.gov.au/workplace-problems/send-us-an-anonymous-tip-off> (retrieved 19 February 2026).

[107] *Anti-Discrimination Act 1992* (NT) s 100; *Anti-Discrimination Act 1991* (Qld) s 145. See, eg, *Dovedeen Pty Ltd v GK* [2013] QCA 116 [43].

[108] *Anti-Discrimination Act 1977* (NSW) s 88A.

[109] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 105.

[110] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2004, 11040.

[111] See, eg, People with Disability Australia, *Preliminary Submission PAD53*, 25–26; Council for Intellectual Disability, *Submission AD120*, 14.

argued that ADNSW should provide tailored support to complainants in making a complaint.[112] This may include, for example:

- providing assistance (such as a support person or other self-identified supports) to young people, people with disability, and people from culturally and linguistically diverse backgrounds to help them make a complaint or to review a response to their complaint[113]
- making explanatory materials on the complaint process available in a variety of accessible formats and languages to accommodate the diversity of disability,[114] and
- developing accessible information for young people, with examples and case studies on how to make a complaint, the complaints process and their rights under the ADA.[115]

Implementing some of these suggestions may not require changing the ADA. Instead, they may be operational issues for ADNSW to address within its resources.

Others thought there should be limits to the assistance that ADNSW provides in some circumstances. One submission stated that ADNSW should not be allowed to help a "serial complainant", but saw some value in assisting complainants with "single complaints about substantive wrongs".[116]

Assistance for respondents

Another option could be to provide complainants and respondents with equal access to assistance. One submission argued that the system is one-sided and noted that vexatious complaints negatively impact respondents.[117]

In 2020, a NSW parliamentary committee recommended consideration of amendments to ensure that both complainants and respondents were provided with assistance to make or respond to a complaint.[118] The Government supported consideration of this potential amendment.[119]

Question 10: The procedures for making a complaint

What, if any, legislative changes should be made to the procedures for making a complaint to ADNSW?

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[112] See, eg, Kingsford Legal Centre, *Preliminary Submission PAD35*, 8; National Justice Project, *Preliminary Submission PAD39*, 3–4; Australian Muslim Advocacy Network, *Preliminary Submission PAD47* [3.8]; People with Disability Australia, *Preliminary Submission PAD53*, rec 7, rec 9, 11, 25–26; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21.

[113] NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21; National Justice Project, *Preliminary Submission PAD39*, 3; People with Disability Australia, *Preliminary Submission PAD53*, rec 7, rec 9, 25–26.

[114] People with Disability Australia, *Preliminary Submission PAD53*, rec 7.

[115] NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21.

[116] Australian Christian Lobby, *Preliminary Submission PAD12*, 21–22.

[117] Australian Christian Lobby, *Preliminary Submission PAD12*, 22.

[118] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 6.

[119] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [6].

4.5 Complaints made in more than one jurisdiction

Another issue is whether the ADA should take a stricter approach to complaints made in more than one jurisdiction.

As described in chapter 3, a range of complaint pathways may be available in addition to the ADA process. Depending on the circumstances, this could include a complaint under federal discrimination law to the AHRC. In relation to workplace complaints, other options could include the Fair Work Commission or the NSW workers compensation scheme. Several considerations, including coverage, timing and remedies, might influence the choice of forum.

The ADA does not prevent a person from making a complaint to ADNSW just because they have made a complaint in relation to the same circumstances in another NSW or Australian jurisdiction. In contrast, the AHRC is not permitted to accept a complaint in relation to the same facts complained of in another Australian jurisdiction.[120]

If a complaint made to ADNSW progresses to NCAT, the tribunal must consider any complaint made in another jurisdiction and its outcome.[121]

In 2020, a private member's Bill (the 2020 Amendment Bill) proposed removing this aspect of the ADA.[122] When a parliamentary committee reviewed the Bill, it received arguments that ADNSW was "over-reaching its responsibilities by dealing with cross-jurisdictional complaints".[123] Issues were also raised about "forum shopping" and the differences in discrimination law across jurisdictions.[124] Some submissions to our review also supported this reform.[125]

Others, however, argued that the proposed repeal would affect rights, protections, and the ability to make a complaint. They argued that people may face difficulties when deciding where to lodge a complaint, given the complexity of discrimination and related laws. This may be compounded where the person is unable to access legal advice.[126]

For instance, a complainant might first make a discrimination complaint to the AHRC, then withdraw it and instead lodge with ADNSW. They may, for example, think their complaint will be processed faster in NSW or become aware of other issues after receiving legal advice.

The parliamentary committee did not support this proposed reform. The committee considered it could have negative consequences for complainants and the discrimination

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[120] *Racial Discrimination Act 1975* (Cth) s 6A; *Sex Discrimination Act 1984* (Cth) s 10; *Disability Discrimination Act 1992* (Cth) s 13; *Age Discrimination Act 2004* (Cth) s 12. See *Viskauskas v Niland* (1983) 153 CLR 280.

[121] *Anti-Discrimination Act 1977* (NSW) s 88B. Leave is required before issues that are the subject of proceedings before the Industrial Relations Commission, can be the subject of proceedings before NCAT: *Anti-Discrimination Act 1977* (NSW) s 96(2).

[122] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [2].

[123] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.19].

[124] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.21]–[3.22].

[125] Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 7; Family First Party Australia, *Preliminary Submission PAD65* [6.3].

[126] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.23]–[3.31].

jurisdiction broadly. For example, an employee may make both a workers compensation claim and a discrimination complaint. Some of the conduct in the two complaints may be the same, but the remedies available are very different. The committee said the ADA should not make the existing legal picture more complex for such employees by making some remedies unavailable without reason.[127]

Question 11: Complaints made in more than one jurisdiction

Should the ADA prevent a person from making a complaint to ADNSW if they have previously made a complaint about the same conduct in another Australian jurisdiction? Why or why not?

4.6 The power to decline a complaint

ADNSW can decline complaints for various reasons (known as "grounds") at different stages of the complaint handling processes. This is a discretionary power. ADNSW decides whether to accept or decline a complaint. It is not required to decline the complaint on any of the listed grounds.

We received a range of submissions on this aspect of the ADA. Some suggested reforms to allow ADNSW to accept complaints in more circumstances. Others argued that the ADA does not have enough checks and balances to prevent frivolous, vexatious or unmeritorious complaints.

4.6.1 The existing grounds for declining a complaint

ADNSW may decline to accept a complaint for investigation early in the process or decline it later, during investigation. Earlier in the chapter, we noted that ADNSW can decline complaints made on behalf of other people in certain circumstances.[128]

Declining to investigate a complaint

When a complaint is made, ADNSW must decide whether to accept it for investigation or decline it (in whole or in part).[129] This has been described as "an initial sifting process".[130] In 2024–2025, ADNSW declined 627 complaints (31.8%) at this initial, pre-investigation stage.[131]

Under s 89B of the ADA, ADNSW may decline a complaint if:

- no part of the conduct complained of could amount to a breach of the ADA
- all (or some) of the conduct happened more than 12 months before the complaint was made
- the conduct could lead to the imposition of a penalty under the ADA
- in a vilification complaint, not every person on whose behalf the complaint is made has (or claims to have) the relevant protected attribute, or

[127] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.82].

[128] *Anti-Discrimination Act 1977* (NSW) s 87B(3)(b).

[129] *Anti-Discrimination Act 1977* (NSW) s 89B(1).

[130] *Gaynor v Burns* [2025] NSWSC 185 [106].

[131] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

- ADNSW is not satisfied the complaint was made by or on behalf of the named complainant.[132]

For the first ground to apply, it must be clear that the complainant could not possibly meet any criteria required by the ADA. However, ADNSW is not obliged to decide complex factual issues before accepting a complaint.[133]

Declining a complaint during investigation

Even if ADNSW initially accepts a complaint, they may decline it at any stage of the investigation process. In 2024–2025, ADNSW declined 186 (9.4%) complaints after investigation.[134]

Under s 92 of the ADA, the ADNSW may (not "must") decline a complaint, entirely or in part, during an investigation if satisfied that:

- all or part of the complaint is frivolous, vexatious, misconceived or lacking in substance
- the alleged conduct, or part of it, would not disclose a breach of the ADA even if proven
- further action is not warranted due to the nature of the alleged conduct
- the complainant has been, is, or should be pursuing another more appropriate remedy
- the subject matter of the complaint has, is, or should be dealt with by another person or body
- the respondent has taken appropriate steps to remedy or redress all or part of the conduct
- it is not in the public interest to take further action regarding the complaint or any part of it, or
- no further action should be taken regarding the complaint or part of it for any other reason.[135]

A complaint will be "lacking in substance" where it can be shown that there is "no factual basis for the allegations" or the complaint is "not reasonably arguable".[136]

4.6.2 The discretion to decline a complaint

Currently, ADNSW has the discretion to decline a complaint on the grounds set out above.[137] One question is whether the ADA should instead *require* ADNSW to decline a complaint on some (or all) of those grounds.

The 2020 Amendment Bill proposed to require ADNSW to decline complaints on the existing listed grounds.[138] One argument made in favour of the reform was that it would bring NSW "into line with interstate practice".[139]

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[132] *Anti-Discrimination Act 1977* (NSW) s 88, s 89B(2).

[133] *Gaynor v Burns* [2025] NSWSC 185 [106]–[107].

[134] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[135] *Anti-Discrimination Act 1977* (NSW) s 92(1).

[136] *Luscombe v Department of Communities and Justice* [2025] NSWCATAD 203 [13]; *Langley v Niland* [1981] 2 NSWLR 104, 107; *Chalker v Murrays Australia Pty Ltd* [2016] NSWCATAD 282 [22].

[137] *Anti-Discrimination Act 1977* (NSW) s 87B(3)(b), s 89B(2), s 92(1).

[138] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [3], [6]–[7].

[139] NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 27 February 2020, 1936.

Other discrimination laws across Australia provide anti-discrimination agencies with the discretion to decline a complaint.[140] However, the QHRC, the ACT Human Rights Commission and AHRC are required to "reject", "close" or "terminate" a complaint in certain circumstances. Although the terminology varies, this includes where they consider a complaint to be frivolous, trivial, vexatious, misconceived or lacking in substance (we consider this issue below).[141]

Other arguments presented for the proposed reform included that it would:

- be "unlikely" to prevent meritorious claims from proceeding, because ADNSW must decide whether a complaint is frivolous, lacking in merit or substance, and
- ensure that non-meritorious complaints are dismissed early and cannot proceed to conciliation or NCAT.[142]

After reviewing the 2020 Amendment Bill, the parliamentary committee concluded that the power to decline complaints should remain discretionary.[143]

Arguments presented against the reform included that:

- it could undermine the intentions of the ADA and prevent the investigation of legitimate claims
- it was unclear how ADNSW could be expected to form an opinion about most complaints upon lodgement, before any investigation had taken place
- decisions made under s 89B are not reviewable by NCAT and can only be challenged in judicial review proceedings in the Supreme Court of NSW (see further, below)
- other Australian jurisdictions allow some discretion when accepting or declining discrimination complaints, and
- ADNSW already exercises its power to decline complaints.[144]

Among other things, the proposed amendments would have removed ADNSW's discretion to accept complaints about conduct that occurred more than 12 months before the complaint was made.[145]

Question 12: The discretion to decline a complaint

a. Should the ADA require ADNSW to decline a complaint in specified circumstances? Why or why not?
b. If so, in what circumstances should ADNSW be required to decline a complaint?

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[140] See, eg, *Anti-Discrimination Act 1991* (Qld) s 140; *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1); *Equal Opportunity Act 1984* (WA) s 89; *Equal Opportunity Act 1984* (SA) s 95A(1); *Anti-Discrimination Act 1992* (NT) s 66E, s 67, s 68(1); *Anti-Discrimination Act 1998* (Tas) s 64(1); *Human Rights Commission Act 2005* (ACT) s 78(1).

[141] *Anti-Discrimination Act 1991* (Qld) s 139, s 141(1); *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a), s 46PH(1D); *Human Rights Commission Act 2005* (ACT) s 78(2)(c)(ii), s 78(2)(c)(iv).

[142] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.30]–[2.36].

[143] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.102], rec 1.

[144] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.7]–[2.29].

[145] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [3].

4.6.3 The time limit for complaints

ADNSW may decline a complaint (in whole or in part) if all or part of the alleged conduct occurred more than 12 months before the complaint was made.[146] However, ADNSW is not required to do so. In making this decision, ADNSW should consider all the relevant circumstances, including any delay, the reasons for the delay and any prejudice to the respondent flowing from the delay.[147]

In 2024–2025, ADNSW declined 80 complaints on this ground. This represented 4% of the total complaints finalised in that financial year.[148]

Increasing the time limit

One issue is whether the 12-month time limit should be increased. Some submissions argued that the current time limit:

- compounds the stress and sense of powerlessness that victims experience
- inhibits access to justice, and
- discourages complaints, while a longer time limit could encourage more people to come forward.[149]

We heard several reasons why someone might not make a complaint immediately. For example, they may:

- need time to explore their options, including getting legal advice and making internal complaints, for example in workplaces or schools
- fear they will not be believed, or will face retaliation or victimisation
- wait until after they leave a workplace to lodge a complaint, if the conduct happened at work
- experience embarrassment, humiliation and other physical and mental health effects from discrimination, or
- be in a less powerful position than the alleged perpetrator.[150]

Most other Australian discrimination laws provide a 12-month time limit, but complaint handling agencies can generally accept and/or investigate older complaints in some situations.[151] This includes in Queensland, where the Commissioner must accept an "out of time" complaint if satisfied that the complainant has shown good cause.[152]

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[146] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).

[147] *Shrayer v Anti-Discrimination Board of NSW* [2008] NSWSC 1036 [18].

[148] Information provided by Anti-Discrimination NSW (25 May 2026).

[149] Racial Justice Centre Ltd, *Preliminary Submission PAD63*, 4; Unions NSW, *Preliminary Submission PAD90* [62]–[64].

[150] Hindu Council of Australia, *Preliminary Submission PAD58* [30]; Racial Justice Centre Ltd, *Preliminary Submission PAD63*, 4–5; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 17, 18; Legal Aid NSW, *Preliminary Submission PAD87*, 45; Unions NSW, *Preliminary Submission PAD90* [64].

[151] *Equal Opportunity Act 1984* (WA) s 83(4)–(5); *Anti-Discrimination Act 1992* (NT) s 65; *Equal Opportunity Act 1984* (SA) s 93(2)–(2a); *Anti-Discrimination Act 1991* (Qld) s 138(1)–(2)(a); *Anti-Discrimination Act 1998* (Tas) s 63; *Equal Opportunity Act 2010* (Vic) s 116(a).

[152] *Anti-Discrimination Act 1991* (Qld) s 138(2)(a). Where some of the allegations are within time, this decision can be postponed until after conciliation: *Anti-Discrimination Act 1991* (Qld) s 141A.

However, some laws provide longer limits. In the ACT and federally, the time limit is two years.[153] In the NT, a representative complaint about systemic discrimination has a two-year time limit (for other complaints, 12 months is the limit).[154]

Recent reviews in Queensland and WA also supported a two-year time limit. The Law Reform Commission of Western Australia (LRCWA) concluded this would correctly balance the needs of complainants and the possible prejudice to respondents.[155] The Queensland Government has decided to defer the commencement of this and other amendments to Queensland discrimination law.[156]

Some submissions supported consideration of a two-year time limit, consistent with federal discrimination law.[157] One suggested extending it to six years, consistent with general civil law claims.[158]

However, there may be arguments in favour of keeping the 12-month time limit. In 1999, the NSWLRC recommended increasing the existing limit from 6 to 12 months, with a discretion to extend the time when good cause was shown.[159] The NSWLRC favoured a reasonably short time limit, including because:

- making complaints "promptly" is consistent with the ADA's emphasis on resolution by conciliation, and
- a large proportion of complaints give rise to relatively small compensation claims.[160]

Another consideration is that, currently, ADNSW's power to decline out of time complaints is discretionary. This allows complaints alleging older conduct to be accepted in appropriate circumstances.

Dealing with a course of conduct

A second issue is how a continuing course of conduct, spanning more than 12 months before a complaint is lodged, should be treated. The ADA does not expressly deal with this issue.

Some submissions raised concerns that relevant older conduct was not considered in their complaint due to the current time limit. One argued this could prevent people from getting acknowledgment and redress for "many years of discrimination".[161]

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[153] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b); *Human Rights Commission Act 2005* (ACT) s 78(1)(a).

[154] *Anti-Discrimination Act 1992* (NT) s 65.

[155] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 8.1, 161; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 133, 251–252.

[156] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 29, amending *Anti-Discrimination Act 1991* (Qld) s 138. See D Frecklington, "Media Statement: Crisafulli Government to Consult on Anti-Discrimination Laws" (14 March 2025) *Queensland Government* <https://statements.qld.gov.au/statements/102168> (retrieved 19 February 2026).

[157] Kingsford Legal Centre, *Preliminary Submission PAD35*, 7; Hindu Council of Australia, *Preliminary Submission PAD58* [30]; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 18; Legal Aid NSW, *Preliminary Submission PAD87*, 45.

[158] Unions NSW, *Preliminary Submission PAD90* [62]. See, eg, *Limitation Act 1969* (NSW) s 14.

[159] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 107.

[160] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.52].

[161] Racial Justice Centre Ltd, *Preliminary Submission PAD63*, 4–5.

In 1999, the NSWLRC recommended an amendment to provide that where there had been a course of conduct, the limitation period should start to run from the termination of the conduct.[162] This has not been adopted.

Question 13: The time limit for complaints

a. What, if any, changes should be made to the 12-month time limit to lodge complaints with ADNSW?
b. Should the ADA expressly provide for situations involving a course of conduct that spans more than 12 months before a complaint is lodged?

4.6.4 Frivolous, vexatious or misconceived complaints

ADNSW may decline a complaint during investigation if satisfied that it "is frivolous, vexatious, misconceived or lacking in substance".[163] Some have argued for stronger powers to decline complaints on this ground, including before a complaint is accepted for investigation.

A power to decline to investigate complaints on this ground

The 2020 Amendment Bill proposed to require ADNSW to decline to investigate a complaint when "of the opinion that the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance".[164] Supporters of the proposal argued that it would avoid respondent and government resources being directed to dealing with vexatious complaints.[165]

After reviewing the Bill, a parliamentary committee recommended that the Government consider amending s 89B to allow ADNSW to refuse to accept a complaint in this circumstance.[166] The Government supported enabling ADNSW to decline a complaint on this ground.[167]

Others opposed the proposal, including because:

- ADNSW could later decline a complaint on these grounds during investigation
- this decision was more appropriately made during or after investigation, when more information was available to form an opinion (noting that complainants may not receive legal advice or be able to properly articulate their claim)
- it risked meritorious complaints being declined, with no appeal or review of the decision available

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[162] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 107.

[163] *Anti-Discrimination Act 1977* (NSW) s 92(1)(a)(i).

[164] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1, cl 4(a).

[165] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.74]–[2.77].

[166] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 2, [2.102].

[167] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [2].

- it could deter people from reporting discrimination, and
- there was no evidence of an increased number of vexatious complaints being made to ADNSW and not many complaints were referred to NCAT.[168]

Some jurisdictions require or allow complaints to be declined on this ground before investigation.[169] Others require or allow such complaints to be declined at any time.[170]

Adding decision-making factors

Another reform proposed by the 2020 Amendment Bill was to require ADNSW to consider certain factors when deciding (at any stage) if a complaint was frivolous, vexatious, misconceived or lacking in substance. That is:

- the number of complaints a complainant had made about the same respondent and the same conduct
- if the complainant made more than one complaint about the same respondent, whether there was any similarity between conduct complained about in each complaint, and
- any evidence the complainant was not acting in "the interests of justice".[171]

On review, the parliamentary committee did not recommend adding these factors to the ADA.[172] In its submission to the committee, ADNSW observed that:

> multiple complaints about similar conduct may not of itself indicate that a complaint is frivolous, vexatious, misconceived or lacking in substance. It is possible that a respondent has engaged in a persistent and repeated pattern of discriminatory behaviour.[173]

A power to refer vexatious complainants

A further question is whether the ADA should allow ADNSW to deal with "vexatious complainants", beyond declining individual vexatious complaints.[174]

Judicial officers, members and registrars of courts or tribunals can recommend that the Attorney General consider applying to the Supreme Court for a "vexatious proceedings" order regarding a specified person. The Supreme Court may make an order staying existing NSW proceedings instituted by the person, prohibiting them from instituting proceedings, or any other order considered appropriate.[175]

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[168] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.63]–[2.73].

[169] *Human Rights Commission Act 2005* (ACT) s 45(4)(a)(i)–(ii); *Equal Opportunity Act 1984* (SA) s 95A(1)(a); *Anti-Discrimination Act 1998* (Tas) s 64(1)(a); *Anti-Discrimination Act 1991* (Qld) s 139.

[170] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a), s 46PH(1D), s 46PF(1)–(1A); *Human Rights Commission Act 2005* (ACT) s 78(2)(c)(ii), s 78(2)(c)(iv), div 4.4; *Equal Opportunity Act 1984* (WA) s 89(1); *Anti-Discrimination Act 1992* (NT) s 67.

[171] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [5], [9].

[172] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 1, [2.102].

[173] Anti-Discrimination NSW, Submission No 122 to Legislative Council Portfolio Committee No 5, *Inquiry into Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (1 May 2020) 6.

[174] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.87]–[2.88].

[175] *Vexatious Proceedings Act 2008* (NSW) s 8(6)–(7).

The parliamentary committee recommended ADNSW should also be empowered to refer a complainant to the NSW Attorney General.[176] The committee concluded this was a "well-established and balanced regime" for dealing with alleged vexatious litigants. However, it noted this is a serious matter that should be considered carefully to avoid barring a person from seeking justice for a genuine complaint. It also acknowledged the then-ADNSW President's preference against making these determinations.[177]

The then-Government supported this recommendation in principle but said it would consult on the implementation of this recommendation. This was because the proposal was not included in the 2020 Amendment Bill and submissions to the committee had not addressed this issue.[178]

Question 14: Frivolous, vexatious or misconceived complaints

a. What, if any, changes should be made to the powers of ADNSW to decline frivolous, vexatious or misconceived complaints?

b. Should ADNSW be empowered to refer a complainant to the Attorney General to consider applying for a vexatious proceedings order? Why or why not?

4.6.5 Further potential grounds to decline complaints

Some have proposed adding further grounds for declining a complaint, either pre-investigation, during investigation, or at both stages. We outline those suggestions below.

There is a more appropriate remedy or the complaint was dealt with elsewhere

The 2020 Amendment Bill proposed to require ADNSW to decline to investigate a complaint where:

- the subject matter had already been dealt with by ADNSW, or a State or Commonwealth authority
- they were of the opinion that the complaint's subject matter may more effectively or conveniently be dealt with by a State or Commonwealth authority, or
- they were of the opinion there was another more appropriate remedy that should be pursued in relation to any part of the complaint.[179]

The committee did not endorse these reforms.[180] It noted opposition to the proposed "more appropriate remedy" ground, including that:

- ADNSW should be required to make proper inquiries before forming an opinion on this
- particularly in employment law cases, the choice of which remedy to pursue (and in which jurisdiction), is complicated

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[176] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.101], [2.105], rec 3.

[177] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.103]–[2.105]. See also [2.87]–[2.97].

[178] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [3].

[179] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [3]–[4].

[180] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 1, [2.102].

- complainants should retain a choice between available remedies, including the ADA, and
- ADNSW can already decline a complaint for this reason during investigation.[181]

In contrast, one stakeholder argued the change would not require ADNSW to form an opinion or make inquiries, but to exercise this power where "clearly there is a more appropriate remedy". For example, where the complaint is being pursued in the courts.[182]

The respondent has a cognitive impairment

The 2020 Amendment Bill also proposed to require ADNSW to decline complaints before investigation where:

- the respondent had a cognitive impairment (defined as "an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia or a brain injury"), and
- it was reasonably expected that this contributed significantly to the conduct complained of.[183]

In support of this proposed change, it was argued that vexatious claims against people with a cognitive impairment wasted time and resources.[184] Others argued the proposal would:

- deny access to justice to complainants and respondents, including by forcing them to provide evidence of a respondent's cognitive function
- involve complex legal and factual questions which are inappropriate for ADNSW to decide pre-investigation and without seeking the necessary information
- be contrary to the ADA's purpose of protecting against discrimination and promoting equal opportunity, and
- be unnecessary because ADNSW already has broad discretionary power to decline a complaint during investigation.[185]

The parliamentary committee did not endorse this proposal.[186]

Duplicates of earlier complaints

One submission to this review suggested a power to decline duplicate complaints. It would require ADNSW to:

- "bundle" together multiple complaints from a complainant against the same respondent, and
- decline any duplicates of earlier complaints.

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[181] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.48]–[2.50]. See *Anti-Discrimination Act 1977* (NSW) s 92(1)(iv)–(v).

[182] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [2.53].

[183] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [3], [4(l)], [5].

[184] Human Rights Law Alliance, Submission No 123 to NSW Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (1 May 2020) [27].

[185] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.3]–[3.13].

[186] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 1, [2.102].

It was argued this would "stop unnecessary reproduction" and "undue pressure being placed on respondents by ambushing them with a huge volume of similar complaints".[187]

The ADA allows ADNSW to conduct a joint investigation into more than one complaint. It must notify the parties if a joint investigation is undertaken.[188] Similar discretionary powers exist in some other Australian discrimination laws.[189] If two or more complaints progress to NCAT, it can deal with them in the same proceedings if of the opinion they "arise out of substantially the same circumstances or subject matter".[190]

The complaint lacks reasonable prospects or inquiry is unwarranted

Other suggested grounds include requiring ADNSW to decline a complaint where:

- it has no reasonable prospects of success, or
- further inquiry into the matter is not warranted having regard to all circumstances of the case.

This was suggested as a ground to decline a complaint at both the pre-investigation and investigation stages. It was argued this would allow a complaint to be declined where there were "good reasons for the complaint not to be progressed", but the existing grounds did not apply.[191]

The parliamentary committee recommended powers to decline a complaint, pre-investigation or during investigation, if it:

- did not make out a legal ground for complaints under the ADA, or
- fell within an exception to unlawful discrimination or vilification.[192]

Arguably, some existing grounds allow ADNSW to decline unmeritorious complaints, including those with no reasonable prospects of success or that would not involve a breach of the ADA. For instance, ADNSW can decline a complaint before investigation, where no part of the conduct could amount to a breach of the ADA. It can decline a complaint during investigation if:

- the conduct, if proven, would not breach the ADA
- the nature of the conduct is such that further action is not warranted
- the complaint is misconceived or lacking in substance, or
- it is not in the public interest to take any further action.[193]

In response to the committee's recommendation, the Government noted that legislative reform was unnecessary because of these existing powers.[194]

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[187] Australian Christian Lobby, *Preliminary Submission PAD12*, 21.

[188] *Anti-Discrimination Act 1977* (NSW) s 90(2)–(3).

[189] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46PF(2); *Anti-Discrimination Act 1992* (NT) s 61; *Anti-Discrimination Act 1998* (Tas) s 62A.

[190] *Anti-Discrimination Act 1977* (NSW) s 100.

[191] Australian Christian Lobby, *Preliminary Submission PAD12*, 22.

[192] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 2.

[193] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(a), s 92(1)(a)(i)–(ii), s 92(1)(a)(vii).

[194] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [2]. See *Anti-Discrimination Act 1977* (NSW) s 89B(2)(a), s 92(1)(a)(i)–(ii).

However, some may prefer an express power or requirement to decline a complaint with no reasonable prospects of success. For instance, federal discrimination law requires the AHRC President to terminate a complaint (at any stage) if satisfied that there is no reasonable prospect the federal courts would be satisfied that the conduct complained of is unlawful discrimination.[195]

The respondent has taken steps to remedy the conduct

The parliamentary committee also recommended consideration of potential amendments to allow ADNSW to refuse to accept complaints where the respondent had taken appropriate steps to remedy or redress the conduct.[196]

The Government noted that legislative reform was unnecessary because the ADA already provides the power to decline a complaint on this ground during investigation.[197]

There is no material connection to NSW

The 2020 Amendment Bill proposed a further ground to apply at the stage of deciding whether to accept a complaint for investigation. The amendment would require ADNSW to decline a complaint that related to a public statement made by the respondent who, at the time of the statement, was both a resident of another state or territory and not in NSW. The onus would be on the complainant to prove the respondent was in NSW.[198]

The parliamentary committee did not endorse this proposal. However, while not expressly linking it to ADNSW's power to decline complaints, the committee recommended reforms to ensure that claims have a "material connection" to NSW.[199]

The Government observed that, under existing law, the conduct will not contravene the ADA if there is an insufficient connection between the conduct and NSW.[200]

In Victoria, the conduct alleged to be vilification can occur in or outside of Victoria.[201]

Question 15: Further potential grounds to decline complaints

Should any new grounds to decline complaints be added to the ADA? If so, what should these be?

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[195] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1C)–(1D).

[196] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 6.

[197] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [6]. See *Anti-Discrimination Act 1977* (NSW) s 92(1)(a)(vi).

[198] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [4].

[199] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 1, rec 6.

[200] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [6].

[201] *Racial and Religious Tolerance Act 2001* (Vic) s 8(2)(b), s 7(2)(b).

4.7 Reviewing a decision to decline a complaint

A decision to decline a complaint, in whole or in part, can have significant consequences. If the whole complaint is not accepted for investigation, the complaint goes no further. Decisions to decline a complaint at this stage cannot be reviewed by NCAT.[202]

Submissions raised two issues regarding the ability of complainants and respondents to dispute ADNSW decisions to accept or decline a complaint. One is whether ADNSW notification procedures are efficient and fair for all parties. A second issue concerns the rights a complainant should have to dispute or appeal an ADNSW decision to NCAT.

4.7.1 Notification processes at the pre-investigation stage

ADNSW must notify the complainant of its decision to accept or decline a complaint within 28 days, as far as reasonably practicable. Respondents are only notified of the decision if they have been given notice of the complaint.[203] This means that people can make a complaint and have it declined, without a respondent ever knowing about it or being asked to respond.

One submission suggested that ADNSW should have to notify a respondent about a complaint as soon as it is received, and before deciding whether to accept it for investigation. This would allow respondents to ask ADNSW to decline the complaint if it is malicious or vexatious or lacks substance. It was argued this would prevent vexatious complaints.[204]

Another option could be to require ADNSW to notify complainants of its intention to decline a complaint. The parliamentary committee inquiring into the 2020 Amendment Bill recommended consideration of this potential amendment. It considered this would allow complainants to make submissions about why their complaint should be accepted or amend their complaint.[205]

The then-President of ADNSW, Dr Annabelle Bennett AC SC, questioned if the change was necessary, as ADNSW already gave complainants the chance to amend their complaint if there was something wrong with it. Dr Bennett also questioned if such a change would mean that respondents should be notified, for procedural fairness.[206]

However, the Government supported consideration of this potential amendment.[207]

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[202] *Anti-Discrimination Act 1977* (NSW) s 89B(3)–(4).

[203] *Anti-Discrimination Act 1977* (NSW) s 89B(3).

[204] Australian Christian Lobby, *Preliminary Submission PAD12*, 21.

[205] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) rec 6.

[206] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.63]–[3.67].

[207] NSW, *Government Response to Report 55 of the Legislative Council Portfolio Committee No 5 on the Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (2021) [6].

4.7.2 Appealing pre-investigation decisions to decline complaints

In 2024–2025, ADNSW declined 627 complaints (31.8% of all complaints finalised that year) at the pre-investigation stage.[208]

If ADNSW does not accept a complaint (or part of it) for investigation, the complainant cannot ask NCAT to review that decision or to grant leave to progress the complaint.[209] Some submissions argued that this right should be available.[210]

A complainant can only seek judicial review in the NSW Supreme Court.[211] This is a costly and complex process.

In 1999, the NSWLRC recommended that a complainant should be able to have their complaint referred to NCAT if it was declined for any reason. It considered that allowing ADNSW to stop a complaint from being heard, without merits review, downgraded "the nature of the relief provided by the ADA" and the "symbolic importance placed upon upholding fundamental human rights and equality of opportunity".[212]

Most other Australian discrimination laws take a different approach. If a complaint is declined before investigation, a complainant may take their complaint to a court or tribunal to be heard and determined.[213] In Tasmania, complainants can seek merits review of a decision to decline a complaint. If successful, the tribunal must refer the complaint back to the Anti-Discrimination Commissioner for investigation.[214]

Queensland currently does not provide for merits review of a decision to decline a complaint. Complainants can ask the QHRC to review its decision before they consider seeking judicial review by the Queensland Supreme Court.[215]

The QHRC recommended allowing the Queensland Civil and Administrative Tribunal (QCAT) to review QHRC decisions to decline a complaint at any stage. Leave would be required, and QCAT could order complainants to pay costs if the application is "frivolous or vexatious".

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[208] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16; *Anti-Discrimination Act 1977* (NSW) s 89B.

[209] *Anti-Discrimination Act 1977* (NSW) s 89B(4). See also *Anti-Discrimination Act 1991* (Qld) s 142; *Anti-Discrimination Act 1992* (NT) s 66D.

[210] Kingsford Legal Centre, *Preliminary Submission PAD35*, 10; Older Women's Network, *Submission AD133*, 6.

[211] *Supreme Court Act 1970* (NSW) s 69. See, eg, *Whippy v University of Sydney* [2023] NSWSC 1607.

[212] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 112, [8.83].

[213] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1); *Equal Opportunity Act 1984* (SA) s 93(2b), s 95B(1)(c), s 96B; *Equal Opportunity Act 1984* (WA) s 90; *Human Rights Commission Act 2005* (ACT) s 78(1)(a), s 82(1), s 88, s 53A, s 45(3)(d); *Equal Opportunity Act 2010* (Vic) s 115(2), s 116, s 122.

[214] *Anti-Discrimination Act 1998* (Tas) s 65, s 72.

[215] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 162.

QHRC recommended this because:

- judicial review is generally not an accessible process, and
- tribunal reviews may guide the QHRC in factors to consider when deciding whether to accept a complaint.[216]

The Queensland Government supported these recommendations in principle.[217] However, they have not been implemented.

The LRCWA also recommended allowing complainants to seek merits review of decisions to decline complaints. The complainant would need to seek leave, but the LRCWA recommended that leave applications be decided "on the papers".[218]

4.7.3 Referral to NCAT if a complaint is declined during investigation

In 2024–2025, ADNSW declined 285 complaints (14.4% of all complaints finalised that year) after investigation. It referred 99 of these (5% of all finalised complaints) to NCAT.[219]

A complainant can seek referral to NCAT where ADNSW declines a complaint:

- during an investigation, or
- at any time, in certain circumstances involving complaints made on behalf of another person(s) (discussed above).[220]

ADNSW must provide reasons for declining the complaint and advise the complainant of their rights to request that the complaint be referred to NCAT. Complainants then have 21 days to require ADNSW to refer the complaint. ADNSW must do so, when requested. A complainant must still seek leave to progress their complaint before NCAT.[221]

Some submissions questioned this right to request a referral to NCAT.[222] The 2020 Amendment Bill proposed to remove it.[223] In support of the proposal, it was argued that the procedure used scarce resources and was inconsistent with the inability to seek a review of decisions to decline complaints for investigation.[224]

Without making a specific recommendation, the parliamentary committee noted that most participants in its review disagreed with the proposal. ADNSW said the proposal may limit procedural fairness, reduce the "protection of existing rights", and be inconsistent with administrative law principles.[225]

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[216] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 8.3, rec 8.4, rec 9.7, rec 9.8, 164, 205.

[217] *Final Queensland Government Response to the Queensland Human Rights Commission's Report, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (c2023) [8.3]–[8.4], [9.7]–[9.8].

[218] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 152.

[219] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[220] *Anti-Discrimination Act 1977* (NSW) s 92, s 87B(3)(b), s 87B(4), s 93A.

[221] *Anti-Discrimination Act 1977* (NSW) s 92(2), s 93A, s 96(1)–(2).

[222] See, eg, Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 2, 7; Church of Scientology Australia, *Preliminary Submission PAD67*, 12.

[223] Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW) sch 1 [1], [11]–[13].

[224] NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 27 February 2020, 1931–1932.

[225] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (2020) [3.34]–[3.36].

Question 16: Reviewing a decision to decline a complaint

a. What, if any, changes should be made to the notification procedures that apply when ADNSW considers declining, or declines, a complaint at the pre-investigation stage?
b. When ADNSW declines a complaint before investigation, what, if any, rights should a complainant have to seek a review or have the substantive complaint heard and determined by a court or tribunal?
c. What, if any, changes should be made to a complainant's ability to seek referral to NCAT if ADNSW declines their complaint:
    i. during investigation, or
    ii. at any stage, in relation to complaints made on behalf of another person(s)?

5 Dispute resolution

In brief

This chapter focuses on the powers of Anti-Discrimination NSW to investigate and conciliate complaints. We ask if the law regarding these processes could be improved, including whether a more flexible model of dispute resolution would be beneficial. The chapter also invites you to comment on when complaints may be terminated and timeframes for finalising the complaints process.

5.1 Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) establishes an "investigate and conciliate" model of dispute resolution. If a complaint is accepted, Anti-Discrimination NSW (ADNSW) must investigate it. If the complaint is not declined during investigation, ADNSW can help the parties to resolve it through conciliation.

If the parties reach an understanding, they may enter into a settlement agreement that sets out the terms on which they have agreed to resolve their dispute. If not, ADNSW may decide to terminate the complaint for other reasons. In certain circumstances, the complaint can then proceed to the NSW Civil and Administrative Tribunal (NCAT).

In the previous chapter, we considered who can make a complaint, how complaints are made, and when ADNSW may decline a complaint. We now seek your views on:

- ADNSW's powers relating to investigation and conciliation
- whether the ADA should adopt a broader dispute resolution model
- the circumstances in which ADNSW can, or must, terminate a complaint, and
- whether the ADA should set timeframes for finalising a complaint (or certain stages of the process).

5.2 Investigating a complaint

If ADNSW accepts a complaint for investigation, it does not mean the complainant has proven that the respondent breached the ADA. ADNSW has no power to decide whether the alleged unlawful conduct happened. Its role is to investigate and, if appropriate, to later help the parties to conciliate the complaint.

The ADA does not specify what an investigation process should involve. However, ADNSW must notify the parties of the steps taken for the purpose of the investigation. They must provide progress reports as frequently as is reasonably convenient, in periods not exceeding 90 days.[1] ADNSW can conduct a joint investigation into more than one complaint if it notifies the parties.[2]

[1] *Anti-Discrimination Act 1977* (NSW) s 90C.

[2] *Anti-Discrimination Act 1977* (NSW) s 90.

In practice, ADNSW generally provides a copy of the complaint to the respondent and asks them to respond. ADNSW provides any response to the complainant, who can comment on it if they wish.[3]

However, the respondent may choose not to respond to the complaint. Some submissions raised concerns about ADNSW's existing powers to compel the production of documents and information from complainants and respondents as part of the investigation process.

5.2.1 Existing powers to compel information or documents

The ADA empowers ADNSW to compel the production of information or documents. ADNSW can require a complainant, a respondent or another person to provide oral or written information, or documents, within 28 days or another specified period.[4]

If a person fails to provide the requested material without a reasonable excuse, ADNSW can refer the complaint to NCAT.[5] Failure to comply can also attract a maximum penalty of 50 penalty units ($5500) for a corporation and 10 penalty units ($1100) in any other case.[6]

ADNSW can also require any person to produce a copy or transcript of any broadcast that is the subject of a vilification complaint. A failure to comply attracts a maximum penalty of 50 penalty units ($5500) for a corporation and 10 penalty units ($1100) in any other case.[7]

Similar compulsion powers exist throughout Australia.[8] The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) can apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order requiring a person to provide information or a document to VEOHRC.[9] In other jurisdictions, failure to comply attracts maximum penalties ranging from $1000 to $18,900.[10] In the Northern Territory (NT), 6 months' imprisonment may also be imposed.[11]

Some submissions suggested that ADNSW should use these powers more often to compel respondents to provide a written response (or other documents). One said this would send a

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[3] Anti-Discrimination NSW, "How We Handle Complaints" (4 December 2024) <https://antidiscrimination.nsw.gov.au/complaints/how-we-handle-complaints.html> (retrieved 11 February 2026).

[4] *Anti-Discrimination Act 1977* (NSW) s 90B(1), s 90B(3).

[5] *Anti-Discrimination Act 1977* (NSW) s 90B(5).

[6] *Anti-Discrimination Act 1977* (NSW) s 90B(2), s 90B(4); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

[7] *Anti-Discrimination Act 1977* (NSW) s 90A; *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 17.

[8] *Australian Human Rights Commission Act 1986* (Cth) s 46PI, s 46PM; *Equal Opportunity Act 1984* (WA) s 86; *Anti-Discrimination Act 1992* (NT) s 107A; *Equal Opportunity Act 1984* (SA) s 94(2a), s 94(3); *Anti-Discrimination Act 1991* (Qld) s 156; *Human Rights Commission Act 2005* (ACT) s 73; *Anti-Discrimination Act 1998* (Tas) s 97.

[9] *Equal Opportunity Act 2010* (Vic) s 131.

[10] *Human Rights Commission Act 2005* (ACT) s 73(4), s 73(6); *Legislation Act 2001* (ACT) s 133(2); *Anti-Discrimination Act 1992* (NT) s 107A(4); *Penalty Units Act 2009* (NT) s 5, s 6(1); *Penalty Units Regulations 2010* (NT) reg 2; *Australian Human Rights Commission Act 1986* (Cth) s 46PM(1); *Crimes Act 1914* (Cth) s 4AA(1), s 4AA(3)–(4); *Equal Opportunity Act 1984* (WA) s 158; *Equal Opportunity Act 1984* (SA) s 94(3); *Anti-Discrimination Act 1998* (Tas) s 97(4); *Tasmanian Government Gazette*, No 22575, 27 May 2026, 357.

[11] *Anti-Discrimination Act 1992* (NT) s 107A(4).

message that the complaint process "is to be taken seriously".[12] Early disclosure of material from respondents could also promote the resolution of complaints.[13]

5.2.2 Options to promote written responses and disclosure

Some also suggested reforms to strengthen these powers. For instance, one option could be to make it mandatory for ADNSW to require respondents to provide a written response. This change could provide complainants with greater procedural fairness. It could also be done with a view to increasing settlement rates.[14]

Another suggested reform was to allow parties to request that ADNSW use its compulsion powers. It was further suggested that any decisions to decline such requests should be reviewable.[15]

A further suggestion was for a specific, additional power to compel insurers to provide actuarial or statistical data.[16] This is available under some discrimination laws in Australia.[17] Insurers could be required to do this when claiming an exception to the prohibition on disability discrimination.[18]

Question 17: Powers to compel information and responses

What, if any, changes should be made to ADNSW's powers to compel information or documents and require written responses to complaints?

5.3 Conciliation

At any stage after accepting a complaint, ADNSW can try to resolve a complaint by conciliation if they consider it may be resolved this way.[19]

Conciliation is a form of dispute resolution. It is a private process, in which an impartial conciliator helps the parties to discuss key issues in the complaint and try to resolve their dispute. The parties might have those discussions with each other and the conciliator together, or each party might meet separately with the conciliator.[20]

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[12] Women's Legal Service NSW, *Preliminary Submission PAD55* [53].

[13] HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 20–21.

[14] NSW Bar Association, *Preliminary Submission PAD86* [49].

[15] HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 21.

[16] HIV/AIDS Legal Centre, Positive Life NSW, *Preliminary Submission PAD60*, 19.

[17] *Anti-Discrimination Act 1991* (Qld) s 157; *Equal Opportunity Act 1984* (WA) s 156; *Anti-Discrimination Act 1992* (NT) s 98.

[18] *Anti-Discrimination Act 1977* (NSW) s 49Q. See NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [6.102]–[6.103].

[19] *Anti-Discrimination Act 1977* (NSW) s 91A(1).

[20] Australian Dispute Resolution Advisory Council, *Conciliation: Connecting the Dots*, Conciliation Report (2021) [2.33].

Conciliation can have many advantages for the parties, including that:

- they can express how they feel
- they have some control over the process
- they can mutually agree on how a complaint is resolved, including outcomes that a court or tribunal may not have the power to provide
- discussions are confidential, and
- the process is more informal, flexible and faster than in a court or tribunal.

These factors may encourage people who would not otherwise make complaints to do so, increasing access to justice.[21]

The ADA sets out certain procedural matters that govern the conduct of conciliations.[22] Several submissions suggested changes to the current approach to legal representation, powers of ADNSW to compel attendance at conciliation, and whether the ADA should provide for expedited conciliations.

5.3.1 Legal representation

One issue is whether parties should have a right to legal representation in a conciliation. Under the ADA, a party must ask and obtain permission (that is, "leave") from ADNSW to be represented by a lawyer or anyone else.[23]

There are, arguably, benefits to this approach. It was intended to make the process "as informal as possible" and to promote compromise.[24]

In 1999, the NSW Law Reform Commission (NSWLRC) recommended that the leave requirement should remain. In its view, the requirement gave the conciliator the chance to weigh up whether representation was appropriate in the circumstances.[25] The NSWLRC also noted concerns that having lawyers may:

- cause delay
- formalise the dispute resolution process
- lessen the parties' control
- increase the cost to parties
- lessen any power imbalance between the parties at "too great a cost", or
- aggravate power imbalances.[26]

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[21] M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) 8; A Blackham and D Allen, "Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom" (2019) 31 *Australian Journal of Labour Law* 253, 255–256.

[22] *Anti-Discrimination Act 1977* (NSW) s 91A, s 91B.

[23] *Anti-Discrimination Act 1977* (NSW) s 91B.

[24] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 November 1976, 3343.

[25] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.122]–[8.123].

[26] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.119]–[8.122].

In contrast, some have argued that the informality of the conciliation process can compound power imbalances.[27] Some submissions said that a complainant could find it difficult to participate without appropriate support and legal assistance. This could be especially important in complaints of workplace discrimination, where respondents may have greater authority and resources. Lawyers may also help by setting the parties' expectations and helping them to view the situation realistically.[28]

One submission encouraged us to consider whether the leave requirement should be removed.[29] It recommended that complainants who have secured free legal help should be able to presume that their lawyer will be allowed to represent them in conciliation.[30]

5.3.2 Compelling attendance at conciliation

A further issue is whether the ADA should include additional measures to promote participation in conciliation. Currently, ADNSW can issue a written notice requiring a respondent and/or a complainant to appear, either separately or together, to try to resolve the complaint by conciliation.[31] Failure to comply can attract a maximum penalty of 50 penalty units ($5500) for a corporation or 10 penalty units ($1100) in any other case.[32] Such compulsion powers are common across Australia.[33]

One submission said that ADNSW should use this power more often. It argued it would send a message that a complaint and resolution processes must be "taken seriously".[34] Arguably, it may also help to resolve complaints.

To encourage participation, one option could be to increase the penalty for not complying with a notice to attend. Penalty amounts payable in other Australian jurisdictions, vary. Maximum amounts for individuals currently range from $1000 in Western Australia (WA), to $19,400 in the NT. For "corporations", they are between $5000 in WA, and $40,500 in the Australian Capital Territory (ACT).[35]

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[27] A Blackham and D Allen, "Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom" (2019) 31 *Australian Journal of Labour Law* 253, 256; M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) 11–12; Disability Advocacy NSW, *Preliminary Submission PAD18*, 8.

[28] Kingsford Legal Centre, *Preliminary Submission PAD35* 9; M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) 11–12, 14.

[29] Kingsford Legal Centre, *Preliminary Submission PAD35*, 10.

[30] Kingsford Legal Centre, *Preliminary Submission PAD35*, 8, endorsing M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) rec 6.1.

[31] *Anti-Discrimination Act 1977* (NSW) s 91A(2).

[32] *Anti-Discrimination Act 1977* (NSW) s 91A(3).

[33] *Australian Human Rights Commission Act 1986* (Cth) s 46PJ(3), s 46PJ(5)–(6); *Equal Opportunity Act 1984* (WA) s 87(1)–(2), s 91(2), s 157; *Anti-Discrimination Act 1992* (NT) s 79(1), s 79(4)–(5); *Equal Opportunity Act 1984* (SA) s 95(3)–(4); *Anti-Discrimination Act 1991* (Qld) s 159; *Human Rights Commission Act 2005* (ACT) s 59; *Anti-Discrimination Act 1998* (Tas) s 75(1)–(2).

[34] Women's Legal Service NSW, *Preliminary Submission PAD55* [53].

[35] *Equal Opportunity Act 1984* (WA) s 157; *Anti-Discrimination Act 1992* (NT) s 79(4)(b); *Penalty Units Act 2009* (NT) s 5, s 6(1); *Penalty Units Regulations 2010* (NT) reg 2; *Human Rights Commission Act 2005* (ACT) s 59(3); *Legislation Act 2001* (ACT) s 133(1)–(2). See also *Equal Opportunity Act 1984* (SA) s 95(4); *Australian Human Rights Commission Act 1986* (Cth) s 46PJ(5); *Crimes Act 1914* (Cth) s 4AA(1), s 4AA(3)–(4); *Anti-Discrimination Act 1998* (Tas) s 75(2); *Tasmanian Government Gazette*, No 22575, 27 May 2026, 357.

Queensland law provides other options. Instead of issuing a penalty for failing to comply with a direction to participate in conciliation, the Queensland Human Rights Commissioner can take other steps:

- The Commissioner may file the direction with a court. The direction is then enforceable as if it were a court order.[36]
- Where a complainant or respondent does not participate as directed, without reasonable excuse, the Commissioner may direct that party to pay the other's costs. A copy of the costs direction can be filed in court, after which it is enforceable as a court order.[37]
- The Commissioner may dismiss a complaint where the complainant fails to participate as directed.[38]

A further option could be to expand ADNSW's powers so it can compel other relevant persons to attend. Some Australian discrimination complaint handling agencies can require someone other than the complainant or respondent to attend conciliation. The federal and WA commissions can require attendance from anyone who could give relevant information, or whose presence would be conducive to resolving the complaint.[39]

However, some may not support changes to the existing NSW arrangements. For instance, it could be argued that compelling parties to attend is inconsistent with the spirit of conciliation.

5.3.3 Expedited conciliations

ADNSW observed that it gives priority to "complaints where someone's current employment or housing may be at risk, and these are generally finalised more quickly".[40] One issue is whether the ability to prioritise or expedite conciliations in certain situations should be formalised.

One submission argued the ADA should expressly empower ADNSW to expedite a conciliation on the application of a party. It also said the criteria for granting such requests should be available publicly.[41]

A further question is whether any such right should be available to other parties too. For instance, in Queensland, respondents may ask for an early conciliation conference.[42]

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[36] *Anti-Discrimination Act 1991* (Qld) s 159.

[37] *Anti-Discrimination Act 1991* (Qld) s 160.

[38] *Anti-Discrimination Act 1991* (Qld) s 160(1).

[39] *Australian Human Rights Commission Act 1986* (Cth) s 46PJ(2)(b), s 46PJ(3); *Equal Opportunity Act 1984* (WA) s 87(2)(c).

[40] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[41] Legal Aid NSW, *Preliminary Submission PAD87*, 41.

[42] Anti-*Discrimination Act 1991* (Qld) s 143(2)(f).

Question 18: Conciliation at ADNSW

a. Should there be a right to legal representation in ADNSW complaint processes? Why or why not?
b. What, if any, changes could be made to the ADA to promote attendance at ADNSW conciliation?
c. Should the ADA expressly empower ADNSW to prioritise or expedite complaints? If so:
   i. what criteria should guide ADNSW in deciding whether to use this power, and
   ii. should these criteria be expressed in the ADA?

5.4 A more flexible dispute resolution model

Most Australian discrimination laws use a similar "investigation and conciliation" model to that described above. However, Victoria provides an alternative model for consideration.

In 2010, Victoria moved away from its previous "investigate and conciliate" model to adopt a more flexible dispute resolution model.[43] The Victorian model differs from the model established by the ADA in two key respects:

- VEOHRC offers a broader dispute resolution service, and
- dispute resolution is voluntary — complainants can apply to VCAT directly, even if they do not first bring their dispute to VEOHRC.[44]

The model was enacted in response to a review of Victoria's discrimination legislation. The review concluded that VEOHRC should focus on "complaint resolution and outcomes that are consistent with the Act", not on "complaint-handling or process related issues".[45]

The review recommended changes aimed to address:

- the burden that the complaints-based system places on vulnerable and disadvantaged individuals, and
- the need to improve the fairness, efficiency and effectiveness of dispute resolution processes.[46]

Recent reviews in Queensland and WA also recommended more flexible, responsive and tailored dispute resolution services.[47] Some submissions to our review supported this.[48]

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[43] *Equal Opportunity Act 2010* (Vic).

[44] *Equal Opportunity Act 2010* (Vic) s 122.

[45] Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [3.36].

[46] Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [3.32], [3.36].

[47] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.1; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 143, [10.1.2.1].

[48] Hindu Council of Australia, *Preliminary Submission PAD58* [31]; Equality Australia, *Preliminary Submission PAD07*, 20; Legal Aid NSW, *Preliminary Submission PAD87*, 41.

Below, we outline some key features of the Victorian dispute resolution service. We will raise the potential option of direct application to NCAT in chapter 6.

5.4.1 The commencement of dispute resolution

In Victoria, the dispute resolution process starts when the person bringing the dispute informs VEOHRC that they wish to proceed.[49]

Unlike NSW, there is no requirement to investigate a complaint before providing dispute resolution services. However, VEOHRC can decline to provide dispute resolution if:

- the alleged contravention occurred more than 12 months before the dispute was brought
- the matter has been adequately dealt with by a court or tribunal
- the matter involves subject matter that would be more appropriately dealt with by a court or tribunal
- a person has initiated proceedings in another forum, or
- having regard to all the circumstances, VEOHRC considers it is not appropriate to provide or to continue to provide dispute resolution.[50]

If there is no reason to decline the dispute resolution request, VEOHRC will usually:

- contact the complainant to discuss what outcome they want, and
- notify the respondent of the complaint, provide them with a copy (if it is in writing) and invite them to participate in the dispute resolution process.[51]

A potential benefit of this model is that it allows VEOHRC to try to resolve disputes earlier, without first having to investigate. Adopting this model may mean that disputes under the ADA are resolved more efficiently and effectively, for the benefit of everyone.

However, as discussed above, some supported amending the ADA to provide more formal steps in the investigation process, such as requiring respondents to provide a written response to a complaint. A 2019 Victorian study reported that some respondents did not provide a response to a complaint or attend conciliation. Solicitors interviewed in the study said that "respondents use the dispute resolution process strategically, and use the conciliation process to test how serious the complainant is about pursuing their claim".[52]

It could also be argued that the parties would not have enough information to effectively participate in conciliation without an investigation stage.

5.4.2 A tailored dispute resolution service

Other aspects of the Victorian model allow VEOHRC to flexibly tailor dispute resolution methods to the needs of the particular parties.

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[49] *Equal Opportunity Act 2010* (Vic) s 115(1).

[50] *Equal Opportunity Act 2010* (Vic) s 116.

[51] Victorian Equal Opportunity and Human Rights Commission, "What Happens when a Complaint is Accepted" <https://www.humanrights.vic.gov.au/complaints/what-happens-when-a-complaint-is-accepted/> (retrieved 11 February 2026).

[52] D Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (Monash University, 2019) 8.

Principles of dispute resolution

VEOHRC has two functions in relation to dispute resolution:

- to offer services designed to facilitate resolution of disputes, and
- to establish policies and issue procedures and directions on the manner in which dispute resolution should be conducted.[53]

The following principles apply to the services offered by VEOHRC:

- dispute resolution should be provided as early as possible
- the type of dispute resolution offered should be appropriate to the nature of the dispute
- the dispute resolution process is fair to all parties
- dispute resolution is voluntary, and
- dispute resolution should be consistent with the objectives of the Act.[54]

The Queensland Human Rights Commission (QHRC) recommended that its function of inquiring into complaints and conciliation be replaced with "a function to offer services designed to facilitate resolution of disputes".[55] The QHRC also recommended that the Queensland Act should include principles of dispute resolution, like those in the Victorian Act.[56]

Whether dispute resolution should be voluntary

One of the key Victorian principles is that dispute resolution is voluntary. VEOHRC has no power to compel parties to attend dispute resolution and either party can withdraw at any time.[57]

In contrast, the QHRC recommended that its complaints process remain compulsory (unlike the Victorian model), but that it "be reshaped into a more flexible and responsive dispute resolution process".[58] This was also recommended by the Law Reform Commission of Western Australia (LRCWA).[59]

Tailored methods of dispute resolution

The Victorian Act does not provide for conciliation as the sole form of dispute resolution offered by VEOHRC. The method of dispute resolution is intended to be flexible and tailored to the circumstances.

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[53] *Equal Opportunity Act 2010* (Vic) s 111.

[54] *Equal Opportunity Act 2010* (Vic) s 112.

[55] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.2.

[56] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.3, 169.

[57] *Equal Opportunity Act 2010* (Vic) s 112(d), s 118.

[58] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.1, 15.

[59] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 143, rec 145, [10.1.2.1].

If the respondent agrees to participate, VEOHRC will suggest the best type of dispute resolution.[60] This will depend on the type of complaint and the needs and wishes of the parties. For example, discussions and negotiations between parties may happen in writing, on the telephone or in person (including shuttle negotiations).[61]

The QHRC identified that:

> Increasing legislative discretion as to whether or not a conciliation conference is the best approach for resolving a dispute, means that, where the Commission has determined that there is benefit in offering dispute resolution, complaints can be resolved by a range of dispute resolution tools – including early dispute resolution, shuttle negotiations without any meeting of the parties, or conciliation conference.[62]

The QHRC noted this flexibility may be useful in disputes that are urgent, concern the public interest, involve systemic issues, or where dispute resolution has already occurred. However, the QHRC recommended the development of a guideline to help make decisions about which dispute resolution actions to take for certain complaints.[63]

Under its recommended model, the QHRC could take "reasonable and appropriate action" to try to resolve the dispute. This may include:

- asking the respondent for written submissions
- asking any party for relevant information
- making enquiries or discussing the complaint with the parties, or
- facilitating a conciliation conference.[64]

However, not all the QHRC recommendations were included in the final Queensland amendments. These provide that once the QHRC decides to investigate a complaint, it must notify the respondent in writing (if it is a particular person) and invite them to provide written submissions within a reasonable time. The QHRC could then conduct the investigation in the way it "considers appropriate".[65] The commencement of these, and other amendments, has been deferred.[66]

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[60] Victorian Equal Opportunity and Human Rights Commission, "What Happens when a Complaint is Accepted" <https://www.humanrights.vic.gov.au/complaints/what-happens-when-a-complaint-is-accepted/> (retrieved 11 February 2026).

[61] D Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (Monash University, 2019) 7.

[62] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 169.

[63] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.15.

[64] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.9.

[65] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 39 (uncommenced).

[66] *Crime and Corruption (Restoring Reporting Powers) and Other Legislation Amendment Act 2025* (Qld) s 53(1).

The LRCWA also recommended that WA discrimination legislation change its mandated "investigation and conciliation process" to:

- empower the Equal Opportunity Commissioner to tailor the dispute resolution process to the nature of the dispute, and
- permit the parties to a dispute to resolve a complaint by consent on the papers, without having to attend a conciliation conference.[67]

Question 19: Flexible dispute resolution

a. Should NSW adopt a more flexible dispute resolution system, like the Victorian model? Why or why not?

b. If so, what should the key features of this system be?

5.5 Terminating a complaint

The ADA also provides that ADNSW may – or must – terminate a complaint in certain circumstances.

ADNSW may terminate a complaint, or part of it, during an investigation if satisfied that it has been settled or resolved. If so, the complainant has no right to require ADNSW to refer the complaint, or part of it, to NCAT under s 93A.[68] In 2024–2025, 12.5% of complaints settled before, at, or after conciliation at ADNSW.[69]

ADNSW must terminate a complaint if the complainant (or all the complainants, if more than one) gives written and signed notice that they are withdrawing it. If some, but not all, of the complainants give such notice, they are removed from the complaint. ADNSW must give written notice of any such decision to the parties, but not to the respondent if they were not notified the complaint was made.[70]

The ADA also provides for termination where a complainant fails to:

- respond to a request for documents or information, or
- give notice of an address, or new address, where they may be contacted.

ADNSW first writes to the complainant using their last known address, explaining the complaint will be terminated if they do not respond within 28 days.[71] Such complaints can be "revived" if the complainant satisfies ADNSW, within 12 months of the deadline, that:

- they want to continue
- any failure to respond to a request for information or documents either did not take place or should reasonably be excused, and
- reviving the complaint would not unduly prejudice the respondent.[72]

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[67] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [10.1.2.1], rec 143, rec 144.

[68] *Anti-Discrimination Act 1977* (NSW) s 92A.

[69] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[70] *Anti-Discrimination Act 1977* (NSW) s 92B.

[71] *Anti-Discrimination Act 1977* (NSW) s 92C(1).

[72] *Anti-Discrimination Act 1977* (NSW) s 92C(2).

However, the death of a complainant or respondent does not terminate a complaint.[73]

In chapter 6, we discuss how and when ADNSW can refer complaints to NCAT.

Question 20: Terminating a complaint

What, if any, changes should be made to the reasons or procedures available to ADNSW to terminate a complaint?

5.6 Timeframes for finalisation

A range of submissions expressed concern about the timeframes for investigation and conciliation processes.[74]

In 2024–2025, ADNSW finalised 50.2% of complaints within three months of receiving them, 73.8% within six months, 92.8% within 12 months, and 99.6% within 18 months.[75] One submission said that most discrimination complaints should be finalised within three months. In its view, this would increase the likelihood of settlement and ease the distress experienced by victims.[76]

Many submissions acknowledged that timeframes for the finalisation of complaints may reflect resourcing issues within ADNSW.[77] However, we also received suggestions for amendments to the ADA that could promote the timely resolution of complaints.

Some other Australian discrimination laws include general statements about the timeliness of complaint handling. The ACT Human Rights Commission must deal with complaints "promptly and efficiently".[78] As described above, a principle of dispute resolution in Victoria is that it "should be provided as early as possible".[79]

Another approach is to provide statutory timeframes for complaints processes, either for finalisation overall, or for specific steps in the process. One submission argued that this could facilitate efficient resolution of complaints.[80]

The President of the Australian Human Rights Commission must act expeditiously in dealing with a complaint, having regard to the nature of the complaint, and the needs of the complainant(s) and respondent. ADNSW must also use its best endeavours to finish dealing

[73] *Anti-Discrimination Act 1977* (NSW) s 93.

[74] Legal Aid NSW, *Preliminary Submission PAD87*, 41; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [7]; Unions NSW, *Preliminary Submission PAD90* [50]–[51]; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 5; Women's Legal Service NSW, *Preliminary Submission PAD55* [52]; Family First Party Australia, *Preliminary Submission PAD65* [6.6].

[75] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[76] Legal Aid NSW, *Preliminary Submission PAD87*, 41.

[77] Legal Aid NSW, *Preliminary Submission PAD87*, 41; Unions NSW, *Preliminary Submission PAD90* [50]; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 5; Women's Legal Service NSW, *Preliminary Submission PAD55* [52].

[78] *Human Rights Commission Act 2005* (ACT) s 45(1).

[79] *Equal Opportunity Act 2010* (Vic) s 112(a).

[80] Fair Game Australia, *Preliminary Submission PAD45*, 21, 22.

with the complaint within 12 months of referral. This is not, however, a legally enforceable duty.[81]

The QHRC recommended that Queensland should adopt this approach, instead of requiring the QHRC to take certain steps in the dispute resolution process within specified timeframes. In its view, stipulating timeframes for interim steps does not improve flexibility overall.[82]

In its 1999 report, the NSWLRC did not support setting a strict statutory timeframe for processing complaints. The NSWLRC noted it was hard to predict how long an investigation and conciliation would take. It could depend on variables outside of ADNSW's control, such as the behaviour of the parties and resourcing issues. Also, parties should not be penalised for "bureaucratic inefficiency". Instead, the NSWLRC supported allowing the parties to request referral to the tribunal if a complaint was not resolved within 12 months.[83] We consider referral times in chapter 6.

Question 21: Timeframes for finalisation

Should the ADA include any timeframes for ADNSW complaint handling procedures? If so, what should those timeframes be?

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[81] *Australian Human Rights Commission Act 1986* (Cth) s 46PF(10)–(11).

[82] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.11, 170. See, eg, *Anti-Discrimination Act 1991* (Qld) s 141(1), s 143(1), s 143(2)(c)–(d), s 143(2)(f)–(g), s 143(3)–(5).

[83] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.144]–[8.146], rec 120.

6 Complaints to NCAT

In brief

In this chapter, we ask when complainants should be allowed to make complaints under the *Anti-Discrimination Act 1977* (NSW) to the NSW Civil and Administrative Tribunal (NCAT). This includes whether direct access to NCAT should be available. We also consider the criteria for making representative complaints to NCAT, including whether they should align with the criteria for making representative body complaints at Anti-Discrimination NSW. We also seek views on whether other complaint pathways should be available. For instance, to the NSW District or Supreme Court, or the NSW industrial relations system.

6.1 Introduction

In the previous chapters, we ask for your views on the dispute handling procedures in Anti-Discrimination NSW (ADNSW). This is the first of the two-stage complaints process established by the *Anti-Discrimination Act 1977* (NSW) (ADA). We now shift to the second stage, where unresolved complaints can be referred to the NSW Civil and Administrative Tribunal (NCAT) for hearing and a decision.

In 2024–2025, ADNSW finalised 1971 complaints. It referred 99 (5%) complaints to NCAT after investigating and declining them. It referred 209 (10.6%) complaints for other reasons. For example, because they did not resolve at conciliation.[1]

We seek your views on when complaints of unlawful conduct under the ADA (including representative complaints) should be referred to and/or allowed to be filed in NCAT. As part of this, we ask if complainants should be able to bypass ADNSW and lodge a complaint directly with NCAT.

We also ask if there are circumstances in which complainants should be allowed to pursue an ADA complaint in other commissions or courts. For instance, by allowing pathways to the NSW District Court or Supreme Court, or to the NSW industrial relations system for work-related complaints.

6.2 When complaints can be referred to NCAT

The ADA sets out the "grounds" or circumstances in which ADNSW can refer a complaint to NCAT. Some submissions argued that expanding these grounds may enable parties to resolve complaints faster.[2] Another view is that narrowing these grounds could prevent vexatious complaints from proceeding to NCAT.[3]

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[1] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[2] See, eg, Anonymous, *Preliminary Submission PAD89*, 38–39.

[3] See, eg, Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 2, 7; Church of Scientology Australia, *Preliminary Submission PAD67*, 12.

6.2.1 The grounds for referral under the ADA

In some circumstances, ADNSW must refer a complaint to NCAT if the complainant requests it. This includes where a complainant requests referral within 21 days of ADNSW declining their complaint for certain reasons.[4] This can apply where, for example, ADNSW declines a complaint because it is not satisfied that a person making a complaint on behalf of another person:

- is acting in that other person's best interests, or
- retains the confidence of that person.[5]

It also includes where ADNSW declines a complaint because it becomes satisfied of certain matters during investigation.[6] For instance, where it is satisfied that all or part of the complaint is frivolous, vexatious, misconceived or lacking in substance.[7] We cover this ground in chapter 4.

ADNSW must also refer a complaint to NCAT where:

- ADNSW considers the complaint cannot be resolved by conciliation
- ADNSW has tried unsuccessfully to resolve the complaint by conciliation
- ADNSW considers that the nature of the complaint is such that it should be referred
- ADNSW is satisfied that all parties want the complaint referred, and this is appropriate in the circumstances,[8] or
- the complaint remains unresolved after 18 months, a party requests a referral, and no other party objects.[9]

Other referral grounds are discretionary. ADNSW may refer a complaint to NCAT where a party has not provided it with requested information or documents.[10] That power is discussed in chapter 5. The Minister may also "refer any matter" to NCAT "as a complaint".[11]

6.2.2 Potential new grounds for referral

A question is whether the ADA should be amended to encourage or require ADNSW to refer complaints in other situations.

One submission suggested ADNSW should be allowed to refer complaints where it considers that a respondent has failed to properly engage with the complaints process, or there are other "compelling reasons". It argued this would prevent complainants from

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[4] *Anti-Discrimination Act 1977* (NSW) s 93A.

[5] *Anti-Discrimination Act 1977* (NSW) s 87B(3)(b), s 87B(4), s 93A, s 95(1).

[6] *Anti-Discrimination Act 1977* (NSW) s 92(1), s 93A, s 95(1).

[7] *Anti-Discrimination Act 1977* (NSW) s 92(1)(a)(i).

[8] *Anti-Discrimination Act 1977* (NSW) s 93C, s 95(1).

[9] *Anti-Discrimination Act 1977* (NSW) s 93B(1)–(3), s 95(1).

[10] *Anti-Discrimination Act 1977* (NSW) s 90B(5), s 95(1).

[11] *Anti-Discrimination Act 1977* (NSW) s 95(2).

unnecessarily waiting for a referral.[12] Another submission said referral should be allowed if it is "prima facie clear that a conciliation will not be reached".[13]

Arguably, the ADA may already cover these suggested grounds. For example, ADNSW may consider that a respondent's lack of engagement means a complaint "cannot be resolved by conciliation".[14] On the other hand, expressly setting out these grounds could provide greater clarity.

South Australia's (SA) discrimination law includes another referral ground to consider. Equal Opportunity South Australia must refer a complaint to the South Australian Civil and Administrative Tribunal (SACAT) if it believes that it "should be transferred", regardless of whether conciliation has been attempted.[15]

6.2.3 Complaints unresolved within 18 months

A further question is whether the ADA should allow parties to request that ADNSW refer unresolved complaints to NCAT before 18 months has passed.[16] As we outline in chapter 5, some submissions expressed concern that ADNSW investigation and conciliation timeframes are too long.

Where a party requests referral after 18 months, ADNSW must notify the other parties. If no party objects within 28 days, ADNSW must refer the complaint to NCAT. If a complainant objects to a respondent's request, and there is no reasonable prospect of a conciliated agreement, the President may terminate the complaint. If a respondent objects to a complainant's request, the President must refer the complaint to NCAT, unless satisfied that there are reasonable prospects of a conciliated agreement.[17]

One submission suggested reducing the referral timeframe to 12 months, with a potential exception where the complainant causes the delay.[18] Another broadly suggested "timeframes or limits of conciliation … after which the parties can elect to proceed to NCAT".[19]

In its 1999 report, the NSW Law Reform Commission (NSWLRC) recommended that either party be allowed to request referral to NCAT after 12 months. It also recommended that ADNSW be required to make that referral within 28 days, unless ADNSW believed the complaint could be conciliated. The NSWLRC considered that this may encourage parties to participate in conciliation and finalise a complaint within an acceptable time.[20]

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[12] Anonymous, *Preliminary Submission PAD89*, 38–39.

[13] National Justice Project, *Submission AD139*, 10.

[14] *Anti-Discrimination Act 1977* (NSW) s 93C(a).

[15] *Equal Opportunity Act 1984* (SA) s 95B(1)(ba).

[16] *Anti-Discrimination Act 1977* (NSW) s 93B(1).

[17] *Anti-Discrimination Act 1977* (NSW) s 93B(2)–(5).

[18] Anonymous, *Preliminary Submission PAD89*, 38.

[19] NSW Bar Association, *Preliminary Submission PAD86* [49].

[20] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.145]–[8.146], rec 120.

Arguably, however, reducing the timeframe to 12 months may not lead to quicker resolution of complaints. Most complaints to ADNSW are finalised within that time (92.8% in 2024–2025).[21]

A shorter referral timeframe is available in Queensland and Tasmania. In Queensland, either party can ask the Queensland Human Rights Commission (QHRC) to refer an unresolved complaint to the Queensland Civil and Administrative Tribunal (QCAT) or Queensland Industrial Relations Commission after six months. The QHRC can postpone the referral for 28 days if there is significant chance the complaint will resolve within that time.[22]

Tasmanian law requires referral of an unresolved complaint within six months of the respondent being notified of an accepted complaint. Additional time is allowed where a complainant agrees.[23]

In contrast, in Victoria a complainant can withdraw from the Victoria Equal Opportunity and Human Rights Commission (VEOHRC) processes and file proceedings with the Victorian Civil and Administrative Tribunal (VCAT) at any time.[24] There is no need to wait until a specified time period has elapsed.

6.2.4 Whether referral should be available at any time

Another question is whether ADNSW should be allowed to refer a complaint to NCAT at any stage in the complaints process and, if so, in what circumstances.

As noted above, ADNSW can refer a complaint to NCAT where "the nature of the complaint is such that it should be referred to the tribunal".[25] The NSWLRC considered this referral ground in its previous review of the ADA. The NSWLRC said the ADA's structure infers that this provision allows ADNSW to make a referral at any time, but it should be made explicit.[26]

The NSWLRC recommended that the President should:

- have the discretion to refer the complaint at any stage, whether or not investigation and conciliation have taken place
- be required to notify both parties of an intention to refer the complaint, and
- should not refer a complaint without the consent of the complainant except in exceptional circumstances.[27]

Under this proposal, "exceptional circumstances" would be limited. It would apply where a complainant repeatedly, or for a specified period, failed to comply with ADNSW's reasonable requests, but still wished to pursue their complaint. A respondent could object to referral. However, they would usually need to satisfy ADNSW that the complaint has

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[21] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16.

[22] *Anti-Discrimination Act 1991* (Qld) s 167(1)–(2).

[23] *Anti-Discrimination Act 1998* (Tas) s 78(2).

[24] *Equal Opportunity Act 2010* (Vic) s 118.

[25] *Anti-Discrimination Act 1977* (NSW) s 93C(c).

[26] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.154].

[27] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 121.

been settled. They would also need to show that they can and will fulfil their settlement obligations.[28]

Allowing ADNSW to refer complaints to NCAT at any time could apply in all circumstances, or only those previously suggested by the NSWLRC. This reform may mean that complaints involving systemic issues or repeat respondents could progress to NCAT earlier, with a complainant's consent.

Question 22: Referral to NCAT

a. Should the grounds on which ADNSW may or must refer an unresolved complaint to NCAT change? If so, what should change?

b. Should the ADA allow parties to request that ADNSW refer an unresolved complaint to NCAT before 18 months has passed? If so, should the ADA specify a different timeframe (for instance, 12 months)?

c. Should the ADA expressly allow ADNSW to refer a complaint to NCAT at any stage of the complaints process? If so, under what circumstances should this be allowed?

6.3 Direct access to NCAT

Another consideration is whether complainants should be able to bypass ADNSW and apply directly to NCAT. Victoria is the only Australian jurisdiction that allows complaints under its discrimination law to be made directly to the tribunal.[29]

Victoria's model was introduced after a review found that the VEOHRC's early intervention and dispute resolution processes were not always appropriate, effective or efficient. For instance, where a party was unwilling to engage or negotiate unless a complaint reached VCAT.[30]

The model is now well-established in Victoria. One Victorian study found that complainant solicitors considered the choice of direct access was beneficial to complainants in some circumstances. However, most complainants usually tried dispute resolution at the VEOHRC before VCAT. This gave them two opportunities to resolve a complaint.[31]

6.3.1 Support for direct access

Some other reviews of discrimination laws have supported Victoria's direct access model. The ACT Law Reform Advisory Council recommended that complainants should have a

[28] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.155]–[8.156].

[29] *Equal Opportunity Act 2010* (Vic) s 122.

[30] Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [3.67]–[3.68].

[31] D Allen, *Addressing Discrimination through Individual Enforcement: A Case Study of Victoria* (Monash University, 2019) 10.

choice between the "less costly option of conciliation" and a "forum of public accountability".[32] This recommendation has not been implemented.

In its previous review of the ADA, the NSWLRC also supported a direct access option.[33] Its reasons included that:

- conciliation should always be available, but not all complaints will benefit from it,[34] and
- complainants should be able to accept or reject the privacy offered by ADNSW processes, rather than being forced through them.[35]

The NSWLRC also stated that not all complaints are appropriate for the inexpensive, informal processes offered in ADNSW. In its view, these processes may suit a complaint involving:

- "straightforward" facts, clear legal principles and little investigation by ADNSW, or
- "relatively minor losses".

ADNSW processes and delays may unnecessarily frustrate a complainant in other cases. This may occur, for example, where they or their legal representative will do their own, more extensive investigations than ADNSW.[36]

Several submissions to our review supported allowing direct access to NCAT.[37] They argued it would:

- allow complaints to be resolved faster, especially where a respondent is unwilling to conciliate[38]
- encourage more people to use the ADA, who otherwise might not because of the long and "cumbersome" two-step process[39]
- offer more options and flexibility for people impacted by unlawful conduct, and
- create clearer pathways to meaningful remedies.[40]

Some of these concerns could potentially be addressed by other reforms to the dispute resolution procedures in ADNSW, as we outline in chapters 4 and 5.

However, allowing direct access to NCAT could be considered as an additional reform option. This access could be available in all circumstances. Alternatively, it could be limited.

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[32] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 139.

[33] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.185].

[34] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.173], [8.178].

[35] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.175], [8.181].

[36] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.174], [8.179].

[37] Equality Australia, *Preliminary Submission PAD07*, 20; NSW Bar Association, *Preliminary Submission PAD86* [52]; Kingsford Legal Centre, *Preliminary Submission PAD35*, 9; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [127]; Unions NSW, *Preliminary Submission PAD90* [57].

[38] Kingsford Legal Centre, *Preliminary Submission PAD35*, 9.

[39] Unions NSW, *Preliminary Submission PAD90* [59].

[40] NSW Council for Civil Liberties, *Preliminary Submission PAD21* [128].

For example, it might only apply where there is urgency to resolve a complaint (including via NCAT orders).[41]

6.3.2 Potential concerns with a direct access model

One argument against implementing a direct access model is that ADNSW plays an important role in filtering complaints. The QHRC considered this model in its review of Queensland's discrimination law but did not recommend it. Instead, the QHRC recommended retaining its role, provided other recommendations on dispute resolution processes and decision review options were implemented. The QHRC said this would ensure that resources were used only to progress complaints covered by the law.[42]

A related concern is that direct access may be open to abuse by allowing unmeritorious or vexatious complaints to reach NCAT without the "mandatory screening process" of the current procedure.[43] However, the NSWLRC was not persuaded by this view in its 1999 report. It said that there was no reason to treat discrimination laws "as particularly susceptible to abuse", or to assume that the role of the President is an effective means of preventing it.[44]

The NSWLRC observed that courts and tribunals should, and generally do, have appropriate powers to prevent abuse.[45] For example, NCAT has the power to dismiss a complaint it considers frivolous, vexatious, misconceived or lacking in substance.[46]

Another view is that the risks of unmeritorious or vexatious complaints could be addressed through tribunal case management procedures.[47] A Victorian review also considered early legal assistance to be a vital "safeguard" in a direct access model, ensuring that "some prospective complainants receive advice about the prospects of success of their claim and a realistic assessment of the potential remedies".[48]

However, this model could have resource implications. Any potential impacts on NCAT's resources and processes would need to be considered.

6.3.3 A potential hybrid model

One submission suggested a new model, featuring a combination of new and existing dispute resolution mechanisms. The submission proposed giving complainants a choice between two pathways in certain circumstances.[49]

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[41] NSW Bar Association, *Preliminary Submission PAD86* [52].

[42] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 164, 408, rec 9.14.

[43] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.172].

[44] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.177].

[45] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.177].

[46] *Civil and Administrative Tribunal Act 2013* (NSW) s 55(1)(b).

[47] Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [3.79]–[3.81].

[48] Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [3.74], [3.80].

[49] NSW Council for Civil Liberties, *Preliminary Submission PAD21* [127].

The first would be a complaint to ADNSW. ADNSW could offer the parties conciliation. It would also be empowered to "make determinations for the award of some relief". This may be, for example, monetary compensation up to a specified maximum, like $5000.

A complainant's second option would be to file an application directly with NCAT. This could be done where they:

- seek higher compensation than ADNSW could award
- seek injunctive relief
- do not want to participate in conciliation, or
- have already attempted a negotiated resolution.

Where a complainant chooses to make a complaint to ADNSW and it does not resolve, it could then be referred to NCAT in the same range of circumstances currently available under the ADA.[50]

The submission argued that allowing complainants to choose direct access to NCAT in some circumstances would:

- increase options and flexibility for persons impacted by unlawful conduct, and
- create clearer pathways to meaningful remedies.[51]

Arguably, this proposed model would significantly change the functions and powers of ADNSW. Any potential resourcing impacts on both ADNSW and NCAT would need to be considered.

Question 23: Direct access to NCAT

Should complainants have the option to make complaints to NCAT directly, that is, without first making a complaint to ADNSW? If so, in what circumstances should this be available?

6.4 The criteria for NCAT representative complaints

Many submissions said the requirements for making a representative complaint under the ADA should change to:

- make it easier for organisations to bring representative complaints for people impacted by discrimination
- reduce the burden on individuals
- protect the identity of individuals, and
- help to address systemic discrimination.

For instance, one submission observed that the criteria under the ADA for making representative complaints in NCAT is "complex and potentially difficult for complainants to understand, creating barriers to accessibility".[52]

In chapter 4, we consider when representative body complaints can be made to ADNSW. We now turn to the issue of when they can be lodged with NCAT.

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[50] NSW Council for Civil Liberties, *Preliminary Submission PAD21* [127].

[51] NSW Council for Civil Liberties, *Preliminary Submission PAD21* [128].

[52] Anonymous, *Preliminary Submission PAD89*, 37.

6.4.1 Aligning ADNSW and NCAT criteria

One question is whether the criteria for making a representative body complaint to ADNSW, and a representative complaint to NCAT, should be the same. Currently, different criteria apply to each of these complaint stages.

Representative bodies can make a complaint to ADNSW on behalf of others if they satisfy ADNSW that:

- each person on whose behalf they are making the complaint consents to the complaint being made on their behalf, and
- the body has a "sufficient interest" in the complaint.[53]

For the body to have a "sufficient interest", the conduct must be "of genuine concern" to the body because of how it could, or does, adversely impact:

- the body's interests, or
- the interests or welfare of the group of people the body represents.[54]

Different requirements apply when a complainant seeks to proceed with a representative complaint in NCAT. At this stage, NCAT must be satisfied that a representative complaint is made "in good faith". That is:

- the complainant is a member of a class that is affected, or may reasonably be likely to be affected, by the conduct
- the complainant has in fact been affected by the conduct
- the class is so numerous that joinder of all its members is impracticable
- there are questions of law or fact common to all members of the class
- the claims of the complainant are typical of the claims of the class
- multiple complaints would likely produce varying determinations that could have incomparable or inconsistent results for the individual members of the class, and
- the respondent has acted on grounds apparently applying to the class as a whole, making relief appropriate for the class as a whole.[55]

Even where these requirements are not satisfied, NCAT may determine that the justice of the case warrants treating the complaint as a representative complaint. In such cases, it can also grant a remedy on that basis.[56]

Arguably, making the criteria for ADNSW and NCAT identical could simplify procedures. Most Australian jurisdictions impose the same or similar criteria for making a complaint to the complaint handling agency, and for bringing court or tribunal proceedings.

6.4.2 Defining the NCAT criteria

A further question is whether other changes should be made to the criteria for bringing representative complaints in NCAT. One option could be to align the NCAT criteria with

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[53] *Anti-Discrimination Act 1977* (NSW) s 87C(1).

[54] *Anti-Discrimination Act 1977* (NSW) s 87C(1)(b). See also *Equal Opportunity Act 2010* (Vic) s 114.

[55] *Anti-Discrimination Act 1977* (NSW) s 101(2), s 101(3)(a).

[56] *Anti-Discrimination Act 1977* (NSW) s 101(3)(b).

federal models. If so, one question this raises is whether the consent of class members should be added as an express requirement for making representative complaints to NCAT.

Overview of the federal criteria

Representative proceedings can be brought in federal courts under the *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*) where:

- at least seven class members have complaints against the same person
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances, and
- all the complaints give rise to a substantial common issue of law or fact.[57]

As we discuss in chapter 4, these three criteria also apply under the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) for representative complaints made to the Australian Human Rights Commission (AHRC) under federal discrimination law. The *AHRC Act*, however, does not require there to be at least seven class members.[58]

In 1999, the NSWLRC recommended that the ADA adopt these federal criteria (except for requiring seven class members).[59] It considered that the ADA's requirements to proceed in NCAT, and the limited remedies available, may discourage class claims (see chapter 8).[60]

These criteria also apply to civil law class claims in the Supreme Court of NSW.[61] Adopting the federal criteria in the ADA would increase consistency with the Supreme Court jurisdiction.

Queensland recently adopted these criteria in its discrimination law, without the requirement for seven class members.[62] The QHRC noted the "proven effectiveness" of this approach. It also concluded there were benefits in aligning Queensland discrimination law with both state and federal civil law procedure. For instance, it would allow case law from those other jurisdictions to inform Queensland discrimination procedures.[63]

Consent requirement

A question is whether the consent of class members should be required to bring representative proceedings in NCAT. Consent at the NCAT stage is not an express requirement under the ADA.

Both the *Federal Court Act* and the *AHRC Act* require the class members to be described or otherwise identified. The number of members and their names do not, however, need to be

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[57] *Federal Court of Australia Act 1976* (Cth) s 33C(1).

[58] *Australian Human Rights Commission Act 1986* (Cth) s 46PB(1), s 46PO(2A).

[59] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 140.

[60] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.82].

[61] *Civil Procedure Act 2005* (NSW) s 157(1).

[62] *Anti-Discrimination Act 1991* (Qld) s 146, s 147, s 194, as inserted by *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 31, s 47.

[63] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 183, 184, 185, rec 11.1.

specified.[64] Under the *Federal Court Act*, the consent of class members is generally not required.[65]

A consent requirement was introduced into the *AHRC Act* in 2022.[66] Representative applications commenced in federal courts under this Act require the:

- written consent of each person on whose behalf the application is being made, and
- certification by the person making the application that such written consent has been given.[67]

This is an "opt-in approach", meaning complainants must confirm they agree to being part of the proceedings.

This requirement was introduced for court proceedings under the *AHRC Act* in light of the "nature and consequences of court, and the need to shield often vulnerable individuals from the emotional and mental toll associated with court proceedings".[68]

In contrast, consent is not required when a representative complaint is made to the AHRC.[69] The Explanatory Memorandum to the 2022 amendments justified the difference at this stage by noting that conciliation is "free, informal and confidential".[70]

The Explanatory Memorandum also explained the different consent requirements under the *AHRC Act* and the *Federal Court Act*. It stated that the number of persons who make a complaint under federal discrimination law to the AHRC cannot be increased once the complaint proceeds to the federal courts. In other types of federal class claims, however, the class number can be expanded.[71]

The consent requirement could be considered an important safeguard. However, as noted in chapter 4, some submissions expressed privacy and other concerns about existing requirements under the ADA to name and/or obtain consent of group members in complaints to ADNSW.[72]

6.4.3 Adding procedural provisions

Another issue is whether the ADA or another NSW law, should include additional procedural provisions for representative complaints in NCAT.

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[64] *Australian Human Rights Commission Act 1986* (Cth) s 46POA(2)(a); *Federal Court of Australia Act 1976* (Cth) s 33H(1)(a), s 33H(2).

[65] *Federal Court of Australia Act 1976* (Cth) s 33E.

[66] *Australian Human Rights Commission Act 1986* (Cth) s 46POA(1), as inserted by *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 4 cl 8.

[67] *Australian Human Rights Commission Act 1986* (Cth) s 46POA(1), s 46POA(2)(b).

[68] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) cl 308.

[69] *Australian Human Rights Commission Act 1986* (Cth) s 46PB(4).

[70] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) cl 308.

[71] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) cl 308.

[72] Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 5–6; Kingsford Legal Centre, *Preliminary Submission PAD35*, 9; Law Society of NSW, *Preliminary Submission PAD31*, 15; Anonymous, *Preliminary Submission PAD89*, 37–38.

The NSWLRC previously recommended

> a comprehensive set of procedural and machinery provisions to deal with the conduct of representative complaints (similar to the Federal Court model), including provisions in relation to:
>
> - notice requirements;
> - settlement by a representative complaint;
> - substitution of the representative complaint;
> - discontinuance of the action;
> - amendment of the class; and
> - the assessment and distribution of damages to class members.[73]

The ADA currently only deals with two of these matters and does so in a limited way. It allows NCAT to:

- amend a complaint to deal with it as a representative complaint, if satisfied this can be done by increasing, reducing or otherwise changing the class of persons for whom the complaint has been made, or
- amend a complaint wrongly made as a representative complaint, to deal with it as a non-representative complaint, by removing the class or the names of the persons for whom the complaint was made.[74]

The *Civil and Administrative Tribunal Act 2013* (NSW) does not address such procedural matters relating specifically to representative complaints. In contrast, NSW laws covering other types of civil law class proceedings include these types of procedural matters.[75]

Question 24: Representative proceedings

a. What criteria should apply for bringing representative proceedings under the ADA in NCAT?

b. Should the same criteria apply for bringing representative proceedings to ADNSW and NCAT under the ADA?

6.5 Other potential pathways for ADA complaints

In the above discussion, we have focused on the referral of ADA complaints to NCAT. However, some submissions suggested that other bodies could be empowered to hear and determine complaints under the ADA.[76] This could be instead of, or in addition to, NCAT.

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[73] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 141. See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46PC, s 46POB; *Federal Court of Australia Act 1976* (Cth) pt IVA; *Federal Court Rules 2011* (Cth) div 9.2.

[74] *Anti-Discrimination Act 1977* (NSW) s 101(4)–(5).

[75] *Civil Procedure Act 2005* (NSW); *Uniform Civil Procedure Rules 2005* (NSW).

[76] NSW Bar Association, *Preliminary Submission PAD86* [46]–[48], [55]; Unions NSW, *Preliminary Submission PAD90*, rec 17, [52]; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [7]; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 5.

Options might include:

- the Local Court of NSW, District Court of NSW or Supreme Court of NSW, or
- a special pathway to the Industrial Relations Commission/Industrial Court of NSW (NSWIRC) in relation to work-related complaints.

6.5.1 Referral to the NSW Local, District or Supreme Courts

In NSW, ADA complaints can only come before the courts in limited circumstances. For instance, the Local Court or the District Court can hear ADA complaints involving federal jurisdiction, which NCAT cannot hear.[77]

NSW courts can also consider ADA provisions when hearing other types of claims. For example, in a person's judicial review application of an administrative decision.[78] In addition, the Supreme Court can:

- provide an opinion on a question of law that arises in NCAT proceedings, at NCAT's request[79]
- hear applications for judicial review of ADNSW decisions (for example, a decision to decline a complaint pre-investigation),[80] and
- hear appeals of NCAT Appeal Panel decisions on questions of law, with the court's leave.[81]

A different approach could be to allow ADNSW to refer unresolved complaints to the courts, instead of NCAT, in certain circumstances.

Arguments for and against court referral powers

There may be a range of arguments in favour of such reform. For instance, it could avoid duplication.[82] NCAT cannot hear common law claims such as breach of contract or negligence, or statutory claims under other NSW laws. A complainant who wants to pursue an ADA complaint and other related claims against the same respondent(s) must bring separate proceedings in NCAT and a different court.[83]

The reform could also provide options for those seeking significant amounts of compensation. As we explain in chapter 8, the ADA caps damages at $100,000. Complainants seeking higher amounts may prefer to pursue their claim before a court with the power to award greater amounts. The NSW District Court, for example, can award up to $1,250,000 in general claims.[84]

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[77] *Civil and Administrative Tribunal Act 2013* (NSW) s 34B(2).

[78] *Anti-Discrimination Act 1977* (NSW) s 123. See, eg, *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 [48]–[55].

[79] *Civil and Administrative Tribunal Act 2013* (NSW) s 54(1).

[80] *Supreme Court Act 1970* (NSW) s 69.

[81] *Civil and Administrative Tribunal Act 2013* (NSW) s 83.

[82] NSW Bar Association, *Preliminary Submission PAD86* [46]–[47], [55].

[83] NSW Bar Association, *Preliminary Submission PAD86* [47].

[84] *District Court Act 1973* (NSW) s 4 definition of "jurisdictional limit".

However, there may also be arguments against such a change. In 1999, the NSWLRC recommended against referring complaints to NSW courts. Its reasons included that:

- there would be significantly less need for courts to hear ADA cases if the tribunal had power to award higher compensation than its cap allowed, and other remedies "needed in particular cases" (outlined in chapter 8), and
- because tribunal members hearing ADA complaints could be District Court (and now also, Supreme Court) judges,[85] it may be appropriate to allow those members to exercise the same jurisdiction and powers available in the District (or Supreme) Court.

The NSWLRC also considered that the law should not provide for alternative forums (for example, NCAT and NSW courts), with different rules of procedure, evidence and costs, unless there are strong reasons to do so.[86]

There are important differences between NCAT and the NSW courts. For instance, NCAT is not bound by the rules of evidence.[87] This means that NCAT proceedings can be more flexible, informal and faster than court proceedings.

Another relevant difference relates to appeal pathways. Parties in NCAT proceedings can appeal a decision to the NCAT Appeal Panel.[88] In contrast, parties must appeal NSW District Court decisions to the NSW Supreme Court, and Supreme Court decisions to the NSW Court of Appeal.[89]

We briefly discuss the issue of costs below. We discuss costs in more detail in chapter 8.

Potential referral procedures

If NSW courts were empowered to hear ADA complaints, the procedures for referral would need to be defined.

One option could be to allow complainants to choose whether ADNSW should refer their unresolved complaint to NCAT or a court. One submission argued this would improve access to justice. It could allow complainants to choose between:

- NCAT's "relatively quick", "low or no cost", compensation-capped jurisdiction, and
- a court that can hear all related claims and order higher compensation.[90]

QHRC recently recommended providing complainants in a representative complaint the choice of forum. That is, they could choose whether to have their unresolved complaint referred to:

- QCAT, a "no costs" jurisdiction, or
- the Queensland Supreme Court, a "costs" jurisdiction.[91]

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[85] *Civil and Administrative Tribunal Act 2013* (NSW) s 13(1), s 15(1)–(2).

[86] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.190].

[87] *Civil and Administrative Tribunal Act 2013* (NSW) s 38.

[88] *Civil and Administrative Tribunal Act 2013* (NSW) s 80.

[89] *District Court Act 1973* (NSW) s 127(1); *Supreme Court Act 1970* (NSW) s 101.

[90] NSW Bar Association, *Preliminary Submission PAD86* [46]–[48], [55].

[91] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 11.4.

In its view, allowing representative complaints to be heard in a court, where legal costs are recoverable, may improve complainants' chances of finding legal representation. This can be important because of the complexity of such claims.[92] The former Queensland Government supported this reform in principle.[93] However, it has not been enacted.

Another option is to give NCAT the power, after receiving an ADA complaint, to transfer it to NSW courts. The Australian Capital Territory (ACT), NT and Queensland allow such transfers in some circumstances. However, they have different rules about who can initiate the transfer, who is qualified to make the transfer order, and the criteria that applies.

The ACT legislation sets out mandatory and discretionary grounds for such a transfer. The ACT Civil and Administrative Tribunal (ACAT) must transfer proceedings to the ACT Supreme Court when parties jointly apply. It may order a transfer where only one party applies, if "appropriate" to do so.[94]

In contrast, legislation in the NT and Queensland only provide for a discretion to transfer. The President of the NTCAT, or a legally qualified QCAT member, may order a transfer of their own initiative or at a party's request.[95] The receiving jurisdiction is the Local or Supreme Court (in the NT), or "another tribunal, a court or another entity" (in Queensland), with the power to hear the proceedings.[96]

Statutory criteria apply to the decision to transfer proceedings. QCAT may transfer all or part of proceedings, where:

- the subject matter would be more appropriately dealt with elsewhere, or
- it does not have jurisdiction to hear all matters in the proceedings.[97]

The NTCAT President may transfer proceedings if the "circumstances of the case" mean the case would be more appropriately heard in the recipient court.

These circumstances could include:

- the complexity of the matter, or the proceeding
- the difficulty or novelty of the issues raised
- the unsuitability of the tribunal's powers and procedures for dealing with the matter, or
- that the matter is closely related to a cause of action between the same parties that is before the Local Court.[98]

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[92] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 11.4, 184.

[93] *Final Queensland Government Response to the Queensland Human Rights Commission's Report, Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (c2023) [11.4].

[94] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 83(1)–(2).

[95] *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 99A(1), s 99A(3); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 52(1)–(2), s 52(6)–(7).

[96] *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 99A(1), s 99A(4)(b); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 52(1)–(2).

[97] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 52(1)–(2).

[98] *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 99A(2)(b).

Even where the criteria are satisfied, the NTCAT President must not order a transfer unless it is in the "interests of justice".[99]

Costs considerations

A further policy issue is how costs should be dealt with if the ADA allowed for referrals to courts. As we discuss in chapter 8, parties typically pay their own costs in NCAT proceedings. This is different from courts where costs usually "follow the event". That is, the unsuccessful party pays the legal costs of the other party. A question is whether different rules should apply to costs if ADA proceedings are determined by courts.

The ACT provides a model for consideration. After proceedings under the ACT discrimination law are transferred to the ACT Supreme Court, the broad discretionary costs powers of the Supreme Court will apply. The limited costs powers of the ACT tribunal do not apply.[100] In deciding whether to make a costs order, the court may consider those limited tribunal powers but need not apply them.[101]

6.5.2 Alternative pathways for work-related complaints

Some submissions supported alternative pathways for work-related complaints under the ADA.[102] In 2024–2025, complaints in the protected area of "employment" made up 37% of total complaints to ADNSW, second only to complaints about "goods and services" (38%).[103]

Reform could involve conferring powers on the NSWIRC to hear such complaints, either in addition to or instead of NCAT. Queensland, SA and the ACT provide models that could be considered in NSW.

Options for a two-stage or a one-stage model

Queensland, SA and the ACT involve a two-stage process, in which complaints are first made to the relevant anti-discrimination or equal opportunity agency.

The QHRC and Equal Opportunity South Australia must refer unresolved work-related complaints to the Queensland Industrial Relations Commission or the South Australian Employment Tribunal (SAET), respectively.[104] The QHRC recently endorsed this "split jurisdiction" in its review of Queensland's discrimination law.[105]

In SA, allegations involving work-related and other conduct may be referred to either SAET or SACAT.[106]

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[99] *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 99A(5).

[100] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48; *Court Procedures Rules 2006* (ACT) pt 2.17. See especially r 1701, r 1707.

[101] *Jolley v Construction Occupations Registrar (No 2)* [2025] ACTSC 347 [93]–[94].

[102] Unions NSW, *Preliminary Submission PAD90*, rec 17, [52]; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [7]; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 5.

[103] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 14.

[104] *Anti-Discrimination Act 1991* (Qld) s 164A(2)(a), s 164A(3)(a), s 166(1)(a), s 167(1)(a), s 174B(a)(iv), sch 1 definition of "work-related matter"; *Equal Opportunity Act 1984* (SA) s 95B(2).

[105] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 206, 209.

[106] *Equal Opportunity Act 1984* (SA) s 95B(2a).

The ACT applies different procedures. The ACT Human Rights Commission must first refer an unresolved work-related complaint to ACAT. The law provides a process that applies if the complaint, or a response to the complaint, raises a "fair work claim". This means a claim relating to a civil remedy provision under the *Fair Work Act 2009* (Cth). If ACAT becomes aware of this, it must order that both the complaint and the fair work claim be removed to the ACT Magistrates Court. The tribunal can order these transfers on its own initiative, or after a party applies.[107]

Some submissions suggested giving ADA complainants direct access to the state industrial system. It was argued that this system, with both conciliation and decision-making powers, is a "one-stop shop". It is said to be faster and simpler than the "lengthy and complex" two-stage ADNSW and NCAT processes.[108] One submission said a direct pathway to the NSWIRC would require less resources for complainants. This is an important consideration for many workers, including those with insecure employment and low wages.[109]

Potential benefits and challenges of a new pathway

Submissions raised several arguments in favour of creating an alternative pathway for work-related ADA complaints. One was that an "expert and specialist" body in workplace disputes is better equipped to deal with them than a "generalist tribunal" like NCAT.[110] Similar arguments were made in SA when its alternative pathway was introduced.[111]

Creating a pathway to the state industrial system may also allow complainants to avoid bringing ADA and other related workplace claims in multiple forums.

It would also recognise the existing overlap between the discrimination and industrial law complaints processes, as noted in chapter 3. For instance, the ADA, *Sex Discrimination Act 1984* (Cth) and *Fair Work Act 2009* (Cth) provide mechanisms to address sexual harassment and discrimination at work. The *Industrial Relations Act 1996* (NSW) also prohibits workplace sexual harassment.[112] As we discuss in chapter 3, each of these laws also prevent "double dipping" to different extents.

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[107] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 82A; *Magistrates Court Act 1930* (ACT) s 266E definition of "fair work claim", definition of "civil remedy provision"; *Fair Work Act 2009* (Cth) s 539(1).

[108] Unions NSW, *Preliminary Submission PAD90* [54]–[55]; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [7].

[109] Unions NSW, *Preliminary Submission PAD90* [54].

[110] Unions NSW, *Preliminary Submission PAD90* [53].

[111] South Australia, *Parliamentary Debates*, House of Assembly, Second Reading Speech, 27 August 2024, 8651.

[112] See, eg, *Sex Discrimination Act 1984* (Cth) s 5–7A, s 28A; *Fair Work Act 2009* (Cth) s 342, s 351(1), s 527D, s 772(1); *Industrial Relations Act 1996* (NSW) s 144N.

In addition, the NSWIRC:

- must consider principles in the ADA when exercising its functions[113]
- must consider any issue of discrimination in an award, including pay equity, when reviewing[114]
- may vary an industrial instrument to remove any unlawful discrimination,[115] and
- may admit evidence given before, or findings made by NCAT, in ADA proceedings in NCAT.[116]

One potential argument against a "split system" is that different procedures may apply in NCAT and the industrial system. This could create further complexity and inconsistency. However, very few submissions to the QHRC review commented on any such procedural issues. Furthermore, "those that did noted the difficulty with achieving uniformity".[117]

An existing limitation of the NSWIRC is that it is generally a forum available only to public sector and local government employees. All other employees must take work-related disputes to the Fair Work Commission.[118] This means that unless the ADA was amended to empower the NSWIRC to hear work-related ADA disputes for all types of employees, it would not be a pathway available to some complainants. Any relevant interaction between NSW laws and federal industrial relations law would also need to be considered.

Question 25: Other potential pathways

a. Should the Local Court, District Court or Supreme Court of NSW be able to hear and determine complaints under the ADA? If so, in what circumstances?

b. If ADA cases were heard by these courts, which costs model should be applied?

c. Should the NSW Industrial Relations Commission and/or Industrial Relations Court of NSW be able to hear and determine work-related complaints under the ADA? If so, in what circumstances?

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[113] *Industrial Relations Act 1996* (NSW) s 169(1).

[114] *Industrial Relations Act 1996* (NSW) s 19(3)(e).

[115] *Industrial Relations Act 1996* (NSW) s 169(4).

[116] *Industrial Relations Act 1996* (NSW) s 169(3).

[117] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 209.

[118] *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW) s 6(c), s 6(f); Industrial Relations Commission of NSW, "Industrial Relations Commission or Fair Work Commission?" (21 January 2026) <https://irc.nsw.gov.au/about-us/industrial-relations-commission-or-fair-work-commission-.html> (retrieved 12 June 2026).

7 Settlement agreements

In brief

Parties to a complaint under the *Anti-Discrimination Act 1977* (NSW) may reach a settlement agreement to finalise their dispute. In this chapter, we ask if the processes for enforcing an agreement could be made simpler and more effective. We also consider non-disclosure and non-disparagement clauses (NDAs), which are common features. We ask if the use of NDAs should be regulated and, if so, how.

7.1 Introduction

In previous chapters, we outline the complaints process established by the *Anti-Discrimination Act 1977* (NSW) (ADA). Parties who resolve a complaint at conciliation at Anti-Discrimination NSW (ADNSW), or in mediation at the NSW Civil and Administrative Tribunal (NCAT), usually enter into a settlement agreement.[1]

Settlement agreements can include a range of obligations. For instance, the parties may agree that a respondent will pay compensation to the complainant. An agreement may also include non-monetary obligations. For example, an agreement could require a respondent to review its policies, undertake training, or comply with agreed-upon communication protocols.

In this chapter, we discuss another common feature of settlement agreements: confidentiality clauses, sometimes known as non-disclosure agreements (NDAs).[2] We ask if the ADA should restrict the use of NDAs and/or if NSW should adopt guidelines about the use of NDAs. Some other jurisdictions have taken steps to do this.

We also ask if the processes for enforcing settlement agreements could be simplified to reduce the burden on parties and facilitate greater compliance with agreement terms.

7.2 Confidentiality clauses in settlement agreements

Parties to a settlement agreement can require confidentiality regarding the terms or subject matter of the agreement, or even the existence of the agreement.[3] NDAs can also prevent a complainant from speaking badly to others about a respondent, using what is often known as a "non-disparagement" clause.

Confidentiality can have advantages for both complainants and respondents. For example, some complainants may want their complaint resolved privately without the stress and negative career impacts that publicity can bring.[4] Confidentiality may also give

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[1] *Anti-Discrimination Act 1977* (NSW) s 91A.

[2] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.4.12]; M Nawaz, A Cody and E Golledge, Having My Voice Heard: Fair Practices in Discrimination Conciliation (Kingsford Legal Centre, 2018) 37.

[3] C Ronalds and B Byrnes, *Discrimination Law and Practice* (Federation Press, 6th ed, 2024) 192.

[4] M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) 20–21; R Featherstone and S Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (2024) 17.

complainants bargaining power and incentivise respondents to settle, meaning complaints are resolved faster.[5]

Respondents may also want to avoid publicity or keep sensitive and commercial business information confidential.

On the other hand, some submissions noted that confidential settlements can also have disadvantages. We heard concerns that they may:

- reduce accountability for discrimination
- reduce public awareness and understanding of discrimination
- create a culture of silence and cover-up that enables repeat ADA breaches
- negatively affect the wellbeing of victims
- reinforce power imbalances between complainants and respondents, and
- limit the development of discrimination law.[6]

This raises the question of whether the use of confidentiality clauses in settlement agreements should be limited and, if so, how.

7.2.1 Amending the ADA to limit NDAs

To meet some of the above concerns, one option could be to amend the ADA to provide conditions that must be met before an NDA is enforceable.[7] Restrictions could apply in all types of ADA complaints or could be limited to certain forms of unlawful conduct.

A new Victorian law restricts NDAs in workplace sexual harassment claims.[8] When introducing the law, the Minister said the "culture of secrecy [around NDAs] hides serial offending and prioritises employer reputations over prevention of workplace sexual harassment and victim recovery". However, because some complainants may want one, the new law does not ban NDAs outright. Instead, it limits when NDAs may be used.[9]

The Victorian Act provides that NDAs must be written in plain language.[10] An NDA concerning workplace sexual harassment is unenforceable unless:

- the complainant requests to enter into it
- it is the complainant's express wish and preference to enter into it
- the complainant is given a copy of the "workplace non-disclosure agreement information statement" after requesting the NDA and before entering into it
- the complainant is given at least 21 days to review the NDA before entering into it, unless they ask for less time or waive the review period

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[5] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 557. See also NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.131]–[8.132].

[6] Inner City Legal Centre, *Preliminary Submission PAD40*, 4; Community Legal Centres NSW, *Preliminary Submission PAD73* [36], [45]; Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 6. See also Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 557–559, 561, 563–564.

[7] Kingsford Legal Centre, *Preliminary Submission PAD35*, 8.

[8] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic).

[9] Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 30 October 2025, 4442.

[10] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) s 9.

- each party to the NDA acknowledges in an approved form that the above preconditions have been met, and
- neither the complainant's employer, the respondent, or anyone acting on their behalf unduly influenced or pressured the complainant to request or enter into the NDA.[11]

Another key feature is that a complainant may terminate an NDA after 12 months to the extent that it prevents them from disclosing certain "material information". That is, the identity of the respondent and details about the conduct in question. They are still not able to disclose certain "protected information". That is:

- the amount of any financial compensation payable, and
- the identity of the respondent, if they were under 18 at the time of the conduct.[12]

NDAs must not prevent a complainant from disclosing certain information to specified persons and bodies, some government bodies, and financial persons and bodies.[13]

The Act also covers NDAs between a complainant's employer and a respondent (for example, an individual employee accused of sexual harassment). Such an NDA will not be enforceable to the extent it would prevent an employer from:

- investigating workplace sexual harassment, or
- disclosing certain information to a prospective employer of the respondent, if the employer determines the allegations are substantiated.[14]

The Victorian Act does not include several features found in some overseas laws that restrict the use of NDAs. For example, the law in Ireland requires a complainant to receive independent written legal advice, paid for by the employer respondent, before entering into an NDA.[15]

In a further example, restrictions on NDAs in Prince Edward Island (PEI) in Canada apply to all types of discrimination prohibited by its human rights legislation and to harassment.[16] NDAs must be for a set and limited time and not adversely affect the health or safety of a third party or the public interest.[17]

The people to whom a complainant is allowed to disclose information is broader in PEI than in Victoria. It includes, for example, community elders or spiritual counsellors.[18] Someone accused of sexual harassment who enters a non-compliant NDA is guilty of an offence and can be fined between Can$2000 and Can$10,000.[19]

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[11] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) s 8, s 14.

[12] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) s 19, s 3 definition of "material information", definition of "protected information".

[13] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) s 11, s 12, s 13, sch 1.

[14] *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) s 20.

[15] *Employment Equality Act 1998* (Ireland) s 14B(3)(b)–(4).

[16] *Non-Disclosure Agreements Act 2021* (PEI) s 1(a)–(b) definition of "discrimination", definition of "harassment", s 4.

[17] *Non-Disclosure Agreements Act 2021* (PEI) s 4(3)(b), s 4(3)(d).

[18] *Non-Disclosure Agreements Act 2021* (PEI) s 4(6)(c)(viii).

[19] *Non-Disclosure Agreements Act 2021* (PEI) s 6.

A benefit of a legislative response is that it can clearly set the terms on which an NDA will be enforceable. Many of the Victorian conditions for enforceability seek to address concerns about the imbalance of power in negotiations and conciliation. They may support complainants to make an informed choice about whether to enter into an NDA.

On the other hand, it could be argued that restrictions on confidentiality may discourage some parties to settle by removing a complainant's bargaining power. The parties may instead turn to litigation to resolve complaints.[20]

7.2.2 Model clauses and guidelines

An alternative could be to develop or adopt non-legislative best practice guidelines for parties. In 2022, the Australian Human Rights Commission (AHRC) launched national guidelines to inform the use of confidentiality clauses in workplace sexual harassment settlement agreements. Under these guidelines:

> ... the following approach should inform the use of confidentiality clauses in all workplace sexual harassment settlement agreements:
> 1. Consider the need for a confidentiality clause on a case-by-case basis.
> 2. The scope and duration of the confidentiality clause should be as limited as possible.
> 3. Confidentiality clauses should not prevent organisations from responding to systemic issues and providing a safer workplace.
> 4. All clauses in a settlement agreement should be clear, fair, in plain English and, where necessary, translated and/or interpreted.
> 5. The person who made the allegation should have access to independent support or advice to ensure they fully understand the meaning and impact of the settlement agreement, including any confidentiality clause.
> 6. Negotiations about the terms of a settlement agreement should ensure so far as possible the wellbeing and safety of the person who made the allegation, and be trauma-informed, culturally sensitive and intersectional.[21]

An early study evaluated the impact of the AHRC guidelines. It found that they may help to reduce the use of broad and exhaustive confidentiality clauses. It also concluded that whether a complainant can successfully negotiate a more limited confidentiality clause may depend on whether their lawyer advocates for it.[22]

Model confidentiality clauses could also help guide parties. The University of Sydney and Clayton Utz developed such clauses for use in workplace sexual harassment matters, alongside the AHRC guidelines.[23]

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[20] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 557, 560.

[21] Australian Human Rights Commission, *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (2022) 9.

[22] R Featherstone and S Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (2024) 3, 30.

[23] R Featherstone and S Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (2024) 84–92.

A potential limitation, however, is that guidelines are voluntary. There is no obligation to use the AHRC guidelines.[24] While this may retain flexibility, it may not have the same uptake as conditions mandated by legislation.

Question 26: Confidentiality clauses in settlement agreements

a. Should the ADA include conditions that must be met before a confidentiality clause in a settlement agreement is enforceable? If so:
   i. what should those conditions be?
   ii. should they apply to all types of unlawful conduct under the ADA, or only some?
b. Should NSW adopt non-legislative best practice guidelines and/or model non-disclosure clauses for parties to use when drafting settlement agreements in ADA complaints?

7.3 Enforcing settlement agreements

If a party does not act consistently with the agreed terms of a settlement agreement, it is up to the other party to enforce it. The President of ADNSW does not have any powers to enforce settlement agreements made at conciliation. Nor can NCAT enforce settlement agreements made as part of its mediation processes, unless NCAT agrees (at the parties' request) to make the agreement into consent orders.[25]

Some submissions said it can be difficult, complex and time-consuming to enforce a settlement. In their view, this could discourage people from making a complaint.[26] We set out their concerns and some potential reform options, below.

7.3.1 An overview of enforcement processes

The available enforcement options can depend upon whether the agreement was reached in ADNSW or NCAT, the nature of the agreement, and the type of obligations.

A party can ask NCAT to register an agreement reached after conciliation at ADNSW if they think that any other party has not complied with its terms. A party must ask for this within six months of the agreement.[27]

NCAT will register the agreement if it is satisfied that a party has not complied with the agreement terms. However, NCAT can only register those aspects of the agreement that it could have ordered if it had determined the complaint.[28]

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[24] R Featherstone and S Bargon, *Let's Talk about Confidentiality: NDA Use in Sexual Harassment Settlements since the Respect@Work Report* (2024) 9.

[25] *Civil and Administrative Tribunal Act 2013* (NSW) s 59.

[26] Disability Advocacy NSW, *Preliminary Submission PAD18*, 8, 9; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [118].

[27] *Anti-Discrimination Act 1977* (NSW) s 91A(6).

[28] *Anti-Discrimination Act 1977* (NSW) s 91A(8).

This means that complainants may not be able to register some terms of settlement agreements, if NCAT does not have the power to make them. For example, compensation payments over $100,000 (discussed below) or non-disparagement agreements.[29]

Parties can ask NCAT to make the terms of an agreement reached during NCAT proceedings (including NCAT mediation) into consent orders. NCAT can do this if:

- the agreement is in writing, signed and lodged with NCAT, and
- NCAT is satisfied that it would have had the power to make a decision in the terms of the agreed settlement, or in terms that are consistent with it.[30]

If NCAT makes such consent orders, or registers any part of a settlement agreement, they can be enforced as NCAT orders.[31] We consider the enforcement of NCAT orders in chapter 8.

If NCAT does not register a settlement agreement or make orders, parties can only enforce the agreement through the courts as a contract or a deed of release. A claim for liquidated damages may be possible where the settlement agreement requires a respondent to pay the complainant penalties for failing to meet their obligations.[32] Enforcement usually requires a party to start a new proceeding in the Local Court, District Court or Supreme Court of NSW. This can be costly, complex and require legal representation.

7.3.2 Reform options for agreements reached through conciliation

There may be ways to reduce the complexities faced in enforcing settlement agreements that are made following conciliation at ADNSW. Some options for consideration include:

- not requiring parties to register settlement agreements with NCAT
- changing the timeframe for registration
- empowering ADNSW to enforce settlement agreements, and/or
- if there is a fundamental breach of a settlement agreement, allowing the substantive complaint to be referred to NCAT as an "unconciliated complaint" for hearing and determination.

Removing the requirement for parties to register settlement agreements

As noted above, a party can ask NCAT to register a settlement agreement reached through a conciliation process at ADNSW. To reduce the burden on parties, one option could be to instead require ADNSW to register or file such agreements. Other Australian states and territories provide models for consideration.

In Queensland, for instance, the Human Rights Commissioner must record the terms of the agreement, have it signed by the complainant and the respondent, and provide a copy to each party. The Commissioner must file it with the Queensland Civil and Administrative Tribunal (QCAT). The agreement then becomes enforceable as if it is a QCAT order.[33]

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[29] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a); *Network Ten Pty Ltd v van Onselen* [2023] NSWSC 829.

[30] *Civil and Administrative Tribunal Act 2013* (NSW) s 59.

[31] *Anti-Discrimination Act 1977* (NSW) s 91A(9), s 114; *Civil and Administrative Tribunal Act 2013* (NSW) s 78(3)–(4).

[32] C Ronalds and B Byrnes, *Discrimination Law and Practice* (Federation Press, 6th ed, 2024) 192–193.

[33] *Anti-Discrimination Act 1991* (Qld) s 164.

The Law Reform Commission of Western Australia recommended adopting the Queensland approach. In its view, this would ensure that complainants do not need to "go through another curial process to obtain a common law remedy for enforcing the agreement".[34]

Other Australian states and territories take different approaches. The ACT Human Rights Commission must give an agreement reached in a discrimination complaint to the ACT Civil and Administrative Tribunal. The tribunal can make any order it considers appropriate to give effect to the agreement, but only on application by a party.[35]

In Tasmania, the Anti-Discrimination Commissioner must hold a signed settlement agreement on file. The agreement can be enforced in the Tasmanian Supreme Court as if it were an order of the Tasmanian Civil and Administrative Tribunal.[36] There is no requirement to first register it with the tribunal.

Removing or extending the time limit for registration applications

If the current registration requirement remains, a question is whether the time limit for registering them should be removed or extended. Applications to register a settlement agreement reached after conciliation must be made no later than six months after the date of the agreement.[37] NCAT may extend this time on application by a party or of its own motion.[38]

One submission observed that the option of NCAT registration is not always explained to complainants at ADNSW conciliation. It said the six-month registration deadline is too short because respondents may need more time to comply with the agreement.[39]

Arguably, this deadline could prevent any party from enforcing an obligation in an agreement that lasts beyond six months. This includes, for example, confidentiality and non-disparagement terms.

Victoria takes a different approach. The Victorian legislation does not require parties to register a settlement agreement with the Victorian Civil and Administrative Tribunal within a specified time.[40]

Empowering ADNSW to enforce an agreement

Another option could be to empower the ADNSW President to enforce settlement agreements made following conciliation.

In its 1999 review of the ADA, the NSW Law Reform Commission (NSWLRC) recommended that the President should have such a power. In recommending this, the NSWLRC

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[34] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 149, [10.1.2.4].

[35] *Human Rights Commission Act 2005* (ACT) s 62; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 55A.

[36] *Anti-Discrimination Act 1998* (Tas) s 76.

[37] *Anti-Discrimination Act 1977* (NSW) s 91A(6).

[38] *Civil and Administrative Tribunal Act 2013* (NSW) s 41.

[39] Women's Legal Service NSW, *Preliminary Submission PAD55* [54]–[55].

[40] *Equal Opportunity Act 2010* (Vic) s 120.

considered that parties should be able to take action for breach of the agreement. However, it accepted that complainants may not be able or willing to do so.[41]

The NSWLRC concluded that the President should have standing to enforce compliance in appropriate circumstances. In its view, the power should be used primarily to enforce agreements that may benefit third parties.

Where the person likely to benefit is a party, however, it considered the President should be able to take enforcement steps if that party:

- requests it, and
- is willing and able to comply with any obligations imposed on them by the agreement.[42]

In its draft Bill, the NSWLRC proposed:

> If the President is satisfied that:
> (a) a party to an agreement reached pursuant to conciliation is not fulfilling in good faith the party's obligations under the agreement, and
> (b) another party to the agreement wishes the President to take steps under this section,
> the President may take such steps as the President considers appropriate to enforce the agreement or any of its terms, including by way of instituting and prosecuting legal proceedings.[43]

An example of an enforcement process involving an anti-discrimination agency can be found in Tasmania. On request, the Tasmanian Anti-Discrimination Commissioner may enforce a settlement agreement that it holds on file. The Commissioner does this by filing in the Supreme Court a certified copy of the agreement, and an affidavit stating the extent to which it has not been complied with. The agreement is then enforceable as if it were an order of the Court.[44]

There may be arguments against conferring such a power on the ADNSW President. For instance, there could be a perceived conflict between this power and ADNSW's neutral role in complaint handling. In addition, decisions about enforcement could be the subject of judicial review. The criteria and process used to decide which agreements to enforce would need to be carefully considered in drafting any such amendment. The resource implications of exercising any new powers also require consideration.

However, this reform could take the burden away from individual complainants to enforce agreements — particularly agreements that may have a systemic impact beyond their individual situation. We consider other possible measures to address systemic discrimination in chapter 10.

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[41] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 117, [8.126]–[8.128].

[42] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 117, [8.128].

[43] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 115(4).

[44] *Anti-Discrimination Act 1998* (Tas) s 90(1)(b)–(c), s 90(2).

Referring complaints to NCAT if there is a "fundamental breach"

In 1999, the NSWLRC suggested an enforcement option for situations involving a fundamental breach of a settlement agreement. Under this approach, the party not in breach could treat a fundamental breach as "avoiding the settlement". The substantive complaint could then be referred to NCAT as an "unconciliated complaint" for hearing and determination. The NSWLRC said this could prevent complainants from having to enforce the agreement through the courts or having no right of redress.[45]

Arguably, this might give parties less certainty that their matter is finalised once they reach an agreement. On the other hand, it may provide greater incentive for a party to comply with their obligations.

7.3.3 Reform options for agreements made in NCAT proceedings

Parties may also reach a settlement agreement during NCAT proceedings, including at mediation. As outlined above, they can apply to NCAT to make the terms of the agreement into tribunal orders, which can then be enforced.

A further issue is whether this process could be simplified. Queensland and Tasmania provide options that could remove one or more steps in this process.

For instance, Queensland law requires the parties to record the terms of the agreement, sign it and file it with QCAT. The agreement is then enforceable as if it were a tribunal order.[46]

The Tasmanian Civil and Administrative Tribunal must record the terms of an agreement reached during a proceeding. The parties sign it and the agreement is then enforceable as if it were a tribunal order, without parties needing to apply for this specifically.[47]

There may be limits, however, to the assistance this reform could provide. Unless NSW law changes, NCAT could still only register the terms of an agreement which it had the power to order.[48] Also, a party would still have to take other steps to enforce those NCAT orders in courts if the other party did not comply. We consider these issues in chapter 8.

Question 27: Enforcing settlement agreements

What, if any, changes should be made to the procedures for enforcing settlement agreements made during:

a. conciliation at ADNSW, or
b. NCAT proceedings?

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[45] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.127].

[46] *Anti-Discrimination Act 1991* (Qld) s 189.

[47] *Anti-Discrimination Act 1998* (Tas) s 94.

[48] *Anti-Discrimination Act 1977* (NSW) s 91A(8).

8 Remedies, enforcement and costs

In brief

In this chapter, we ask if the remedies available under the *Anti-Discrimination Act 1977* (NSW) effectively address the harm experienced by complainants. We consider some potential new remedies and ask if reforms are needed to ensure remedies address broader systemic issues. We then consider the options for enforcing NSW Civil and Administrative Tribunal orders and whether a different costs model should apply.

8.1 Introduction

The right to an effective remedy for rights breaches is a foundational aspect of international human rights law.[1] Without effective and enforceable remedies, the objectives of discrimination law may not be realised.

The *Anti-Discrimination Act 1977* (NSW) (ADA) sets out the remedies that the NSW Civil and Administrative Tribunal (NCAT) may order in ADA proceedings.[2] In this chapter, we invite consideration of whether the ADA provides appropriate and effective remedies to individuals who have experienced discrimination and other unlawful conduct.

A related issue is whether complainants are able to enforce the remedies ordered by NCAT effectively. The current model places the burden of enforcing NCAT orders in courts, on complainants. Many argue that these enforcement processes can be difficult to pursue and may end in complainants failing to receive redress.

Some also consider that the ADA's cost model requires reform, particularly in light of recent changes to the costs model in federal discrimination law. Federal reforms have attempted to level the imbalance of power and financial resources that can exist between complainants and respondents. We ask what costs model would be appropriate for complaints under the ADA.

A further, overarching issue is whether the existing remedies, costs model and enforcement mechanisms in the ADA should be realigned to promote wider societal objectives. For example, to drive greater systemic change and promote substantive equality. We later consider a range of more proactive enforcement mechanisms in greater detail in chapter 10.

8.2 Remedies available at NCAT

A range of remedies are available if NCAT decides that a complaint is substantiated, in whole or in part. NCAT can order that the respondent(s):

- pay the complainant damages not exceeding $100,000 as "compensation for any loss or damage they suffered by reason of the respondent's conduct"
- stop any conduct that breaches the ADA (an injunction)
- take any reasonable action to redress any loss or damage the complainant has suffered (mandatory orders)

[1] *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2(3).

[2] *Anti-Discrimination Act 1977* (NSW) s 108.

- publish an apology or retraction
- void parts of a contract or agreement that breach the ADA, or
- for vilification complaints only, develop and implement a program or policy aimed at eliminating unlawful discrimination.[3]

Alternatively, NCAT can decline to take any further action.[4] NCAT can also order a respondent to pay damages of up to $100,000 if they do not comply with a non-monetary order.[5] NCAT has not used this power often. It is mostly used in relation to vilification complaints.[6]

When NCAT orders a respondent to pay damages, interest automatically accrues from the date the order takes effect, until they make payment. NCAT can order that the interest start to accrue from an earlier date.[7]

NCAT can also order a respondent to take, or stop taking, action that affects people other than the complainant.[8]

We seek your views on whether NCAT's powers to order remedies are appropriate and effective in redressing the harm caused by discrimination, sexual harassment, vilification and victimisation. On one hand, this question draws attention to whether individuals are receiving appropriate and effective remedies. However, it also invites consideration of the role of discrimination law remedies in achieving societal goals.

8.2.1 Compensation

Compensation is the most common remedy awarded by NCAT in ADA matters. Many submissions stated that the amounts awarded in successful ADA complaints are inadequate. In their view, the awards fail to properly compensate individual complainants for the harms suffered and do not deter people from breaching the ADA. It was also argued that low awards may deter people from making ADA complaints.[9]

The highest amount ever awarded by NCAT in any ADA case was $200,000. In this case, $100,000 was awarded against one respondent for sexual harassment and $100,000 against another respondent for sex discrimination. NCAT assessed the complainant's loss and damage as $318,280, around two thirds being for past economic loss. However, as we explain below, NCAT was bound by a statutory cap on compensation ($100,000) to award a lower amount.[10]

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[3] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a)–(f).

[4] *Anti-Discrimination Act 1977* (NSW) s 108(2)(g).

[5] *Anti-Discrimination Act 1977* (NSW) s 108(7). See also *Cohen v Harguos (No 2)* [2006] NSWADT 275 [12]; *Grass v McIntosh* [2024] NSWCATAD 224.

[6] See, eg, *Lamb v Campbell* [2021] NSWCATAD 103; *Malenha v Sullivan* [2017] NSWCATAD 222; *Cohen v Harguos (No 2)* [2006] NSWADT 275.

[7] *Anti-Discrimination Act 1977* (NSW) s 112(1)–(2).

[8] *Anti-Discrimination Act 1977* (NSW) s 108(3).

[9] See, eg, Inner City Legal Centre, *Preliminary Submission PAD40*, 4; B Arnold and W Bonython, *Preliminary Submission PAD46*, 4; Racial Justice Centre, *Preliminary Submission PAD63*, 18–20; Community Legal Centres NSW, *Preliminary Submission PAD73* [34]; Legal Aid NSW, *Preliminary Submission PAD87*, 33.

[10] *Yelda v Sydney Water Corporation* [2021] NSWCATAD 107 [301]–[302], [337]; *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147, 105 NSWLR 403 [6].

One study found that the average general damages awarded by NCAT in ADA sexual harassment cases between 1984 and 2022 was $12,385. In some jurisdictions without a compensation cap, the average was higher: $52,944 in Victoria, $17,124 in Queensland, and around $14,000 federally. Although compensation amounts have increased over time, especially in recent years, the increases in NSW are much lower than in Victoria, Queensland and federally.[11] In one more recent example, a complainant in a federal sexual harassment case was awarded $160,000 in general damages.[12]

In this section, we outline a range of potential reform options regarding NCAT's power to award damages. These include:

- increasing or removing the compensation cap
- including specific principles in the ADA for use by NCAT when calculating damages
- clarifying the harms covered by "loss and damage"
- allowing exemplary or vindicatory damages, and
- expanding the availability of damages in representative complaints.

In chapter 10, we raise whether Anti-Discrimination NSW (ADNSW) should be able to intervene and make submissions to NCAT on compensation awards and other remedies.

Increasing or removing the compensation cap

The ADA's compensation cap is one reason for the generally low compensation awards. The maximum compensation that NCAT can award a respondent to pay a complainant is $100,000.[13] The $100,000 cap also applies to multiple complaints of vilification. Where two or more complainants make a vilification complaint about the same public act of a respondent, NCAT can only order that respondent to pay a maximum total of $100,000 to all complainants combined.

Numerous submissions criticised this cap stating, for instance, that it:

- is arbitrary and unfair
- is out of touch with community expectations and contemporary understanding of the impacts of discrimination
- discourages people from making complaints under the ADA
- results in people making complaints in the federal jurisdiction if their likely damages will exceed the NSW cap
- is inconsistent with some other Australian jurisdictions without a cap, and
- makes it hard for complainants to find legal representation, because they must use the low amounts of NCAT compensation to pay their legal fees.[14]

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[11] M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 28, 31–32.

[12] *Magar v Khan* [2025] FCA 874 [203].

[13] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).

[14] See, eg, National Justice Project, *Preliminary Submission PAD39*, 4; NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 3; HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 20; Community Legal Centres NSW, *Preliminary Submission PAD73* [34]; NSW Bar Association, *Preliminary Submission PAD86* [54]; Unions NSW, *Preliminary Submission PAD90* [60]–[61]. See also Kingsford Legal Centre, *Preliminary Submission PAD35*, 8; M Thornton, *Preliminary Submission PAD59*, 4; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 18.

Other than NSW, only Western Australia (WA) and the Northern Territory (NT) have caps on damages in their discrimination laws. The caps are $40,000 and $60,000, respectively.[15]

There is no compensation cap for discriminatory conduct under the *Work Health and Safety Act 2011* (NSW).[16] Nor is there a limit on compensation in sexual harassment and general protections claims involving discrimination under the *Fair Work Act 2009* (Cth) (*Fair Work Act*).[17] However, the NSW Industrial Relations Commission and Industrial Court of NSW can order a maximum of $100,000 compensation to an "aggrieved person" in sexual harassment claims.[18]

Some submissions suggested that NSW should either remove the compensation cap or increase it.[19] One proposed a higher cap of over $500,000.[20] Another suggested linking it to the District Court jurisdictional limit, currently $1,125,000.[21]

The Law Reform Commission of Western Australia (LRCWA) recommended that the WA cap be removed. But if a cap remained, the LRCWA recommended it should be increased to:

- take inflation into account, and
- reflect the increasing significance of protecting people from discrimination and the need to deter discriminatory conduct.[22]

This recommendation has not been implemented.

There is precedent in NSW for increasing the cap. In 1982, the cap was increased from $20,000 to $40,000 due to "[c]hanging money values".[23] In 2008, the cap was again increased to $100,000. This was to "reflect the seriousness of the consequences of discrimination" and ensure that "discriminatory conduct will not be tolerated in public life in New South Wales".[24]

There may be concerns that removing or raising the cap would increase the number of complaints that go to NCAT. If so, this could have resource implications.

In its 1999 report, the NSW Law Reform Commission (NSWLRC) did not accept that removing the cap would result in "a flood of matters". This view was supported by the experience of other jurisdictions. The NSWLRC also referred to research suggesting that

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[15] *Equal Opportunity Act 1984* (WA) s 127(b)(i); *Anti-Discrimination Act 1992* (NT) s 88(1)(b); *Anti-Discrimination Regulations 1994* (NT) reg 2.

[16] *Work Health and Safety Act 2011* (NSW) s 111(a). See, eg, *SafeWork NSW v Qantas Ground Services Pty Ltd (No 4)* [2024] NSWDC 53.

[17] *Fair Work Act 2009* (Cth) s 545(2)(b).

[18] *Industrial Relations Act 1996* (NSW) s 144T(4).

[19] Unions NSW, *Preliminary Submission PAD90* [60]–[61]; Community Legal Centres NSW, *Preliminary Submission PAD73* [34].

[20] NSW Nurses and Midwives' Association, *Preliminary Submission PAD50*, 3.

[21] Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [6].

[22] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 157.

[23] *Anti-Discrimination (Amendment) Act 1982* (NSW) sch 4 (25); NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 11 November 1982, 2621.

[24] *Administrative Decisions Tribunal Amendment Act 2008* (NSW) sch 2 [3]; NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 24 September 2008, 9876.

complainants are rarely motivated by money. Instead, they want the respondent to be held accountable and for the conduct to stop.[25]

Despite this, the NSWLRC still concluded there should be a cap. This was because:

- tribunal panels will not necessarily be headed by a judge, and
- unlike a court, the tribunal is not bound by adversarial procedures or the rules of evidence.[26]

However, the NSWLRC considered that the cap (then $40,000) did not reflect the significance of discrimination laws and may have prevented complainants from receiving adequate compensation. In its view, the cap should generally have been increased to $150,000. However, it considered the cap should reflect the jurisdiction of the District Court when a District Court judge was the presidential member of a tribunal panel.[27] The District Court limit was $750,000 at the time.[28]

Clarifying the harms covered by "loss and damage"

A related consideration is whether the ADA should further define or clarify what is included in "loss and damage" for the purpose of assessing compensation. NCAT can already consider a range of harms when making this assessment. However, it could be argued that specific legislative references to certain types of loss or damage may help guide the determination of appropriate awards.

The ADA allows a complainant to receive compensation for both loss and damage suffered by reason of the respondent's conduct.[29]

"Loss" generally refers to the actual monetary loss already suffered by the complainant up to the NCAT decision that can be calculated with some precision.[30] For example, a reasonable estimate of loss of income and expenses they have incurred like the cost of counselling or related medical treatment. This is usually called "special damages".

"Damage" generally captures non-economic losses that cannot necessarily be calculated precisely. This includes ongoing injury or effects of unlawful conduct that will continue to be suffered in the future. For example, future economic loss, and any damage caused by the emotional and psychological impacts of the discrimination.[31] This is usually called "general damages".

A first issue is whether the ADA could expressly cover psychological damage. One submission suggested the ADA should state that "offence, embarrassment, humiliation, and intimidation and other psychological impacts" is a form of loss and damage that can be

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[25] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [10.28].

[26] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [10.27]–[10.33].

[27] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 148, [10.33]–[10.37].

[28] *District Court Act 1973* (NSW) s 44(1), as at 30 November 1999; NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [10.21].

[29] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).

[30] *Johnson v Commissioner of Police* (NSW) [2004] NSWADT 198 [24]–[27].

[31] *Johnson v Commissioner of Police (NSW)* [2004] NSWADT 198 [28]–[29].

compensated. It argued this would ensure that NCAT awards cover damage of any psychological nature, including anxiety and depression.[32]

Some other discrimination laws specify that certain emotional and psychological impacts are forms of loss and damage. For instance, the Australian Capital Territory Civil and Administrative Tribunal (ACAT) must consider "the impact of the discrimination on the person's dignity". The Act provides the following examples of impact: "distress, humiliation, loss of self-esteem, loss of enjoyment of life".[33] Discrimination laws in the NT and Queensland state that damage includes "offence, humiliation, embarrassment and intimidation".[34]

A further issue is whether the ADA should refer to NCAT's power to award "aggravated damages". Under common law, NCAT can award aggravated damages when the respondent's conduct increased the complainant's hurt or distress between the time the discrimination first happened and the end of the hearing.[35] Such conduct need not be "malicious", but must be "in some way unjustifiable, improper, or lacking in bona fides".[36]

NCAT does not often award separate aggravated damages in ADA cases. Examples include where a respondent:

- provided a "minimal" apology to a complainant employee who was sexually harassed at work[37]
- argued, as a defence to a race discrimination complaint, that the complainant was refused entry because he was intoxicated[38]
- did not respond to a race discrimination complaint,[39] and
- wrote an anonymous letter to the complainant's husband during NCAT proceedings, claiming the respondent and complainant were having an affair.[40]

Making exemplary or vindicatory damages available

Another consideration is whether the ADA should provide for exemplary damages (sometimes called punitive damages). These damages aim to punish a respondent for their behaviour, and to deter them or others from repeating it.[41]

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[32] HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 20.

[33] *Human Rights Commission Act 2005* (ACT) s 53E(3)(b).

[34] *Anti-Discrimination Act 1992* (NT) s 88(3); *Anti-Discrimination Act 1991* (Qld) s 209.

[35] *Johnson v Commissioner of Police (NSW)* [2004] NSWADT 198 [45]; *Tupou v Scruffy Murphy's Pty Ltd* [2007] NSWADT 192 [99]; *Reddy v International Cargo Express* [2004] NSWADT 218 [98]; *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75 [61].

[36] *Yelda v Sydney Water Corporation* [2021] NSWCATAD 107 [328].

[37] *Yelda v Sydney Water Corporation* [2021] NSWCATAD 107 [332]–[334].

[38] *Tupou v Scruffy Murphy's Pty Ltd* [2007] NSWADT 192 [106]–[107].

[39] *Tupou v Scruffy Murphy's Pty Ltd* [2007] NSWADT 192 [106]–[107].

[40] *UU v UW (No 2)* [2010] NSWADT 120 [33].

[41] *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75 [60]; *Johnson v Commissioner of Police (NSW)* [2004] NSWADT 198 [45].

Exemplary damages are not available under the ADA or under discrimination laws in other states or territories.[42] The ADA does not provide for exemplary damages because they are not designed to compensate a complainant for their loss or damage.[43]

In federal discrimination cases, courts can make any orders they see fit.[44] It is uncertain whether that includes exemplary damages.[45] Most case authorities indicate that it does not.[46] Others, however, leave the possibility open.[47]

The authors of one recent study encouraged the judiciary to consider the greater use of exemplary damages in cases involving very serious sexual harassment or ongoing failures to prevent it. The authors observed that exemplary damages could be an effective deterrent. However, they noted that "law reform may be required to enable more robust use" of such awards.[48]

One submission supported making exemplary damages available under the ADA, especially in discrimination complaints against government bodies and companies with high annual turnover.[49]

In 1999, the NSWLRC concluded that the ADA should not allow exemplary damages. It considered that any measure to punish offenders should be dealt with in criminal proceedings, where there are appropriate standards to safeguard civil liberties.[50]

Another question is whether "vindicatory damages" should be available under the ADA. In one federal racial discrimination case, Justice Mortimer raised the possibility of damages being awarded to compensate for the infringement of a right itself. For example, the right discussed in that case was a "community's right to have policing services following a death in custody provided to that community in an independent and impartial way".[51]

Expanding NCAT's powers to award damages for representative complaints

In chapter 6, we outline the criteria for making a representative complaint to NCAT.[52] We ask if any changes should be made to those criteria.

A related issue is whether NCAT's powers to make damages orders in representative complaints should be expanded. NCAT can award compensation to the people on whose

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[42] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [16.4.17].

[43] *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75 [60]; *Johnson v Commissioner of Police (NSW)* [2004] NSWADT 198 [45].

[44] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

[45] P Cashman, *Commonwealth Human Rights and Discrimination Legislation*, UNSW Law and Justice Research Series 23 (2024) 17 fn 99.

[46] See, eg, *Wotton v Queensland (No 5)* [2016] FCA 1457 [1784], [1753]–[1797]; *Hughes (formerly De Jager) v Car Buyers Pty Ltd* [2004] FMCA 526 [68], [74]; *Frith v The Exchange Hotel* [2005] FMCA 402 [99]; *Burns v Media Options Group Pty Ltd* [2013] FCCA 79 [1787]; *Hall v Sheiban Pty Ltd* (1989) 85 ALR 503, 524–525, 570–571.

[47] See, eg, *Friend v Comcare* [2021] FCA 837 [80]; *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 [166]; *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 [132]–[133]; *Ewin v Vergara (No 3)* (2013) FCA 1311 [681]–[684].

[48] M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 97–98.

[49] HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 20.

[50] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [10.45].

[51] *Wotton v Queensland (No 5)* [2016] FCA 1457 [1626]–[1629].

[52] See *Anti-Discrimination Act 1977* (NSW) s 101.

behalf the complaint is made, but not to the representative body.[53] For example, the Police Association of NSW was not entitled to any compensation when it made a discrimination complaint on behalf of one of its members. Only the member was.[54]

In 1999, the NSWLRC recommended that the remedies available in representative complaints under the ADA be broadened to mirror those in the *Federal Court of Australia Act 1976* (Cth).[55] The federal courts can award damages to the group, sub-group or individual members of the group. The court decides if the compensation amount is paid as a lump sum to the group, or as a specified amount to individual members.[56]

The NSWLRC also recommended that NCAT should have an additional power to make "cy-pres orders" in representative complaints. Cy-pres orders are available in some other areas of law. For example, where the original purpose of a charitable trust cannot be fulfilled for practical reasons, its purpose can be altered and trust funds redistributed in a way that aligns with the "spirit of the trust".[57]

In ADA complaints, the NSWLRC said that a respondent should have to pay all or some of the total group compensation amount to ADNSW where:

- that total had not been fully distributed to individuals, or
- the distribution costs would unreasonably have reduced how much individuals received.

Under this approach, ADNSW would be required to distribute the money to community organisations (including community legal centres and Legal Aid) for the purpose of "public education and enforcement of the ADA".[58] Community organisations could potentially then use compensation paid in representative complaints, which arguably may have little or no benefit to individual complainants, to prevent future breaches.

However, it could be challenging to develop criteria for the application of this power. Issues to consider include:

- the circumstances in which NCAT should be able to exercise the power
- whether individual complainants in the group would need to consent, and
- how ADNSW would make distribution decisions.

Requiring NCAT to consider certain principles when assessing damages

A further issue for consideration is whether the ADA should guide decision-makers on what they should take into account when assessing damages. One option, which we discuss in chapter 2, could be to insert an objects clause into the ADA.

Among other things, an objects clause could be used to help guide the assessment of damages and ensure other remedies properly reflect the statutory purpose. The ADA could require NCAT to consider the objects clause when determining a remedy. Alternatively,

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[53] *Anti-Discrimination Act 1977* (NSW) s 108(4).

[54] *Police Association of NSW v Commissioner of Police (NSW)* [2010] NSWADT 56.

[55] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 155.

[56] *Federal Court of Australia Act 1976* (Cth) s 33Z.

[57] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.91]. See *Charitable Trusts Act 1993* (NSW) s 9; *Green v A-G (NSW)* [2023] NSWSC 1229.

[58] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 142.

NCAT could take the objects clause into account as part of the statutory construction exercise.

This is already done, to some extent, in the absence of a specific objects clause. As compensation for discrimination is a statutory remedy, NCAT must assess compensation by considering the purpose and objects of the ADA, not common law principles.[59] However, an express objects clause could provide further guidance on the principles that should inform the assessment of damages.

Another approach, suggested in one submission, could be to require NCAT to specifically consider certain principles when determining and calculating damages. For example, such principles could recognise that:

- non-discrimination is a fundamental human right, and
- Australia is bound by international law to prohibit discrimination and to guarantee equal and effective protection against it.[60]

The Australian Capital Territory adopts this approach. When ACAT assesses damages, it must consider:

- the complainant's right to equality before the law and the impact of the discrimination on their enjoyment of that right
- the inherent dignity of all people and the impact of the discrimination on the complainant's dignity (for example, distress, humiliation, loss of self-esteem, loss of enjoyment of life)
- the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights (for example, freedom of expression)
- the nature of the discrimination (for example, whether it is serious, repeated, intentional, malicious, or based on two or more protected attributes), and
- any mitigating factors (for example, a public apology or systemic changes to protect against further discrimination).[61]

Regarding the last point, one submission suggested that NCAT should be allowed to consider an apology made by a respondent during earlier complaint processes as a mitigating factor when assessing damages.[62] NSW judges can do this in defamation cases.[63]

Arguably, this may result in complainants receiving lower compensation amounts where they had received an apology. In one federal sexual harassment case, for instance, the court reduced the general damages award by one third in recognition of a voluntary apology made by the respondent. The court observed that the "apology, although made very late in the proceedings, must have a beneficial effect on the applicant's feelings".[64]

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[59] *Wotton v Queensland (No 5)* [2016] FCA 1457 [1600]; *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 [130]–[132]; *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75 [41]; *Yelda v Sydney Water Corporation* [2021] NSWCATAD 107 [263]–[264].

[60] NSW Bar Association, *Preliminary Submission PAD86* [53].

[61] *Human Rights Commission Act 2005* (ACT) s 53E(3).

[62] M Seymour, *Preliminary Submission PAD04* [2].

[63] *Defamation Act 2005* (NSW) s 38(1)(a).

[64] See, eg, *Johanson v Michael Blackledge Meats* [2001] FMCA 6 [120].

Compensation awarded to offenders in custody

Another question is whether offenders in custody should be able to receive any part of a damages award made by NCAT for breaches of the ADA by the state and its agents.

Currently, the ADA prevents offenders in custody (as defined in the ADA) from receiving a compensation award for:

- breaches of the ADA by the state (and its agents) which occurred while they were in state custody, or
- failure by the state (and its agents) to comply with an NCAT order made in connection with a complaint about such breaches.[65]

Compensation must instead be paid into the NSW Victims Support Fund. This can be spent by the state as money forming part of that fund.[66]

This was added to the ADA in 2007. The then-Government explained it would ensure that prisoners do "not benefit from an award of financial compensation payable by the State for alleged discrimination" and that the redirection of compensation monies to the Victim Support Fund would

> assist in the task of compensating victims of crime ... consistent with the community's expectation that criminals should contribute to the rehabilitation of victims of crime.[67]

Others may argue, however, that this arrangement may discourage offenders from making complaints under the ADA and reduce state accountability for breaches.

If this arrangement is to remain in the ADA, there could be options to make it less restrictive. For instance, the ADA could provide for the payment of residual or surplus funds to the offender. The *Civil Liability Act 2002* (NSW) also restricts the payment of compensation for personal injury suffered while in custody, caused by the negligence of the state or its agents. However, it allows an offender to receive any surplus compensation remaining after any victim restitution order or eligible victim claim against them is paid.[68] The ADA does not allow this.

Corrective services laws in other Australian jurisdictions provide other models for consideration. In Victoria, for example, offenders can receive compensation payments of up to $10,000 in all successful claims made against the State of Victoria. Higher awards (excluding money for existing and future medical costs) must be paid into a trust fund that is held for 12 months. The fund must be used to pay any judgment debt the prisoner owes a creditor or any damages award owed to a victim of crime. Any money remaining in the fund after administration fees are deducted is paid to the offender.[69]

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[65] *Anti-Discrimination Act 1977* (NSW) s 111A.

[66] *Anti-Discrimination Act 1977* (NSW) s 111A(2); *Victims Rights and Support Act 2013* (NSW) s 14.

[67] NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 29 May 2007, 379.

[68] *Civil Liability Act 2002* (NSW) s 26J, s 26L, s 26M, s 26Q, s 26R, s 26S.

[69] *Corrections Act 1986* (Vic) s 104V, s 104W, s 104ZG, s 104ZH, s 104ZI, s 104ZJ. See also *Corrective Services Act 2006* (Qld) s 319I, pt 12B.

Question 28: Compensation

a. Should the ADA cap the amount that can be awarded as compensation for loss or damage? If so, what should the cap be?

b. What, if any, changes should be made to NCAT's powers and procedures to award compensation under the ADA? If so, which reform options do you suggest and why?

c. Should the ADA be changed to allow persons in custody to receive a compensation award made by NCAT against the State of NSW and its agents?

8.2.2 Mandatory orders

NCAT may also order a respondent to take any reasonable act or course of conduct to redress loss or damage the complainant has suffered. These are known as mandatory orders. The power does not apply to representative complaints or in relation to complaints referred by the Minister.[70]

For instance, NCAT has ordered a respondent to:

- provide anti-discrimination training to staff and review its ban on a complainant attending holiday parks under its control[71]
- display notices at future events explaining that the segregation of men from women and children is not compulsory, and instruct staff not to enforce segregation[72]
- extend the complainant's time to complete their medical degree,[73] and
- publish a corrective notice for racial vilification, via a media release.[74]

NCAT has also ordered respondents to re-employ or reinstate a complainant, reconsider a complainant's employment application, and promote a complainant.[75]

However, NCAT may not consider it reasonable to require a respondent to take actions for an unknown future time.[76] NCAT is also unlikely to order a respondent to take actions that punish them but do not actually redress the complainant's loss or damage.[77]

One question is whether the ADA should more clearly express how this power can be exercised. For instance, one submission suggested the ADA should include examples of the types of orders NCAT can make.[78]

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[70] *Anti-Discrimination Act 1977* (NSW) s 108(2)(c).

[71] *Ferguson v Shoalhaven City Council* [2023] NSWCATAD 276.

[72] *Bevege v Hizb ut-Tahrir Australia* [2016] NSWCATAD 44 [141].

[73] *BKY v University of Newcastle* [2014] NSWCATAD 39 [120].

[74] *Wolf v NSW Department of Education* [2023] NSWCATAD 202 [121].

[75] See, eg, *Allders International Pty Ltd v Anstee* (1986) 5 NSWLR 47; *Johnson v Commissioner of Police (NSW)* [2004] NSWADT 198; *NSW Department of Communities and Justice v James* [2023] NSWCATAP 64; *Coleman v Commissioner of Police (NSW)* [2001] NSWADT 34; *James v NSW Department of Communities and Justice* [2022] NSWCATAD 280.

[76] See, eg, *Lawson v Housing NSW* [2013] NSWADTAP 5 [94]–[95].

[77] See, eg, *NSW Police Service v Estate of Russell* [2001] NSWSC 745 [46]–[53].

[78] Kingsford Legal Centre, *Preliminary Submission PAD35*, 8.

Another issue is whether mandatory orders should be available in representative complaints.[79] Such orders are available in representative complaints in all other Australian jurisdictions, except WA.[80]

In 1999, the NSWLRC favoured further reform. It recommended that a respondent should have an automatic right to appeal the appropriateness of a mandatory order where:

- the order was not made by consent, and
- the costs in complying with a mandatory order would exceed the ADA's compensation cap.[81]

This recommendation would only be relevant if the ADA retains a compensation cap. If it does, the proposed change could arguably help balance the right of a respondent to dispute mandatory orders that may be unjustifiably costly.

The NSWLRC also recommended that the tribunal should have the power to appoint the President of the Anti-Discrimination Board to monitor compliance with a mandatory order.[82]

Question 29: Mandatory orders

What, if any, changes should any changes be made to the "mandatory orders" power in the ADA? For instance, should this power be available in representative complaints?

8.2.3 Programs or policies

NCAT may also order a respondent to develop or implement programs or policies aimed at eliminating certain unlawful conduct. This remedy is expressly available in vilification complaints, but not other types of ADA complaints.[83]

For example, NCAT ordered a respondent to review its policies, practices and staff training on preventing racial vilification with a view to improving them.[84] In another case, NCAT required a respondent to create an educational program on racial vilification for its staff.[85]

A question is whether the power should be clarified and/or expanded. The NSWLRC observed in 1999 that the ADA is "curiously worded".[86] While expressly limited to vilification complaints, it empowers NCAT to order respondents to develop programs or policies "aimed at eliminating unlawful discrimination".[87]

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[79] M Thornton, *Preliminary Submission PAD59*, 4.

[80] *Equal Opportunity Act 1984* (WA) s 127(b)(iii); *Equal Opportunity Act 2010* (Vic) s 125(a)(iii); *Anti-Discrimination Act 1998* (Tas) s 89(1)(b); *Equal Opportunity Act 1984* (SA) s 96(1)(c); *Anti-Discrimination Act 1991* (Qld) s 209(1)(c); *Anti-Discrimination Act 1992* (NT) s 88(1)(c); *Human Rights Commission Act 2005* (ACT) s 53E(2)(b); *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(b).

[81] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 150, [10.55].

[82] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 150, [10.57].

[83] *Anti-Discrimination Act 1977* (NSW) s 108(2)(e).

[84] *Trad v Jones (No 3)* [2009] NSWADT 318 [245].

[85] *Ekermawi v NSW Police Force* [2019] NSWCATAD 79 [125].

[86] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [10.66].

[87] *Anti-Discrimination Act 1977* (NSW) s 108(2)(e).

The NSWLRC recommended that, in vilification complaints, the tribunal should be empowered to order the implementation of a program or policy aimed at eliminating unlawful vilification. It considered a similar power should be available in relation to all forms of unlawful conduct.[88]

For example, the Queensland Civil and Administrative Tribunal can order this remedy in proven cases of unlawful discrimination, sexual harassment or certain other prohibited conduct.[89]

Question 30: Programs or policies

Should NCAT's power to order respondents to develop or implement programs or policies be extended to all forms of unlawful conduct under the ADA?

8.3 Potential new remedies

Another issue is whether NCAT should have further powers or obligations when determining remedies. We set out some potential reform options below and invite further suggestions.

8.3.1 A power to make declarations

The ADA does not include an express power to declare that a respondent has committed prohibited conduct. In jurisdictions that have this power, a declaration has been ordered to "serve to record the Court's disapproval of the contravening conduct, vindicate [the applicant's] claim, and act as a deterrent to others".[90]

Arguably, this can already be achieved by NCAT's power to find all or part of a complaint substantiated.[91] However, this might not have the same impact as a clear public statement that the conduct was unlawful.

Federal courts can order a declaration that the respondent has committed unlawful discrimination and direct the respondent not to repeat or continue it.[92] The Victorian and WA tribunals can make a declaration in any proceedings before them, including discrimination complaints. They can order this instead of, or as well as, other orders.[93]

However, other remedies may be considered sufficient in some cases. For instance, in one Victorian case, the tribunal considered that a declaration would not add anything to the orders already made.[94]

In 1999, the NSWLRC considered that NCAT should be empowered to make a declaration regardless of whether it ordered other remedies. The NSWLRC also said it was desirable, in

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[88] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 154, [10.66].

[89] *Anti-Discrimination Act 1991* (Qld) s 209(1)(f), sch 1 definition of "contravention".

[90] *Shizas v Federal Commissioner of Police* [2017] FCA 61 [191].

[91] *Anti-Discrimination Act 1977* (NSW) s 108(1)(b).

[92] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(a).

[93] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 124; *State Administrative Tribunal Act 2004* (WA) s 91.

[94] *Studart-Teles v Department of Education and Training* (Vic) [2023] VCAT 1226 [296]. See also *Commonwealth v Evans* [2004] FCA 654 [88]; *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136 [42].

some cases, for the unlawful conduct to be defined precisely. This may be important in representative complaints, where individual group members may wish to make their own complaint to obtain specific remedies.[95]

Some federal decisions endorse the approach of only making precise declarations that are linked with proven facts, rather than general declarations such as "the respondent has committed unlawful discrimination".[96]

8.3.2 A broad power to make orders as NCAT sees fit

Unlike the ADA, some discrimination laws do not have an exhaustive list of available remedies. Federal courts can make any orders they think fit.[97] The Tasmanian tribunal can make any order it thinks appropriate.[98] Some suggest this as an option for reform in NSW.[99]

This approach could arguably provide NCAT with greater flexibility to order appropriate remedies. It could allow NCAT to use its powers more expansively for greater systemic impact. On the other hand, it could be said that the current approach of listing powers provides greater certainty.

8.3.3 Specific orders for training and employment

Other options might include express powers to order a respondent to deliver education and training[100], or employ or re-employ a complainant.

For instance, courts have the express power to order employment or re-employment under federal discrimination laws.[101] The Fair Work Commission can also order a respondent to reinstate an employee in an unfair dismissal case.[102]

NCAT can already make orders such as these as part of its power to make mandatory orders.[103] However, an express power may keep the option in the minds of parties and NCAT members. Another option could be to expressly include examples of mandatory orders in the ADA, like the Queensland and the NT discrimination laws do.[104]

8.3.4 Specific orders in sexual harassment cases

Another issue is whether NCAT should be expressly empowered to make specific orders in sexual harassment cases. The Australian Law Reform Commission (ALRC) recommended

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[95] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 151, [10.58].

[96] See, eg, *Commonwealth v Evans* [2004] FCA 654 [57]–[61]; *Eatock v Bolt* [2011] FCA 1103 [458].

[97] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).

[98] *Anti-Discrimination Act 1998* (Tas) s 89(1)(h).

[99] Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [6]; M Thornton, *Preliminary Submission PAD59*, 4.

[100] Fair Game Australia, *Preliminary Submission PAD45*, 21.

[101] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(c).

[102] *Fair Work Act 2009* (Cth) s 391(1).

[103] *Anti-Discrimination Act 1977* (NSW) s 108(2)(c). See, eg, *James v NSW Department of Communities and Justice* [2022] NSWCATAD 280 [372]; *NSW Department of Communities and Justice v James* [2023] NSWCATAP 64 [154].

[104] See, eg, *Anti-Discrimination Act 1991* (Qld) s 209(4)(a); *Anti-Discrimination Act 1992* (NT) s 88(2)(a).

that the remedies available to federal courts in sexual harassment matters be clarified or extended to allow them to:

- restrain a respondent from engaging in particular conduct (such as approaching the complainant, or attending a particular place)
- require a respondent to participate in a program of counselling, training, mediation, rehabilitation or assessment
- require a respondent to take corrective action to prevent further sexual harassment if they are running a business or undertaking where sexual harassment occurred, and
- require a respondent to pay a civil penalty for breaching a sexual harassment provision in the *Sex Discrimination Act 1984* (Cth).[105]

As stated above, federal courts have existing powers to make "any orders they see fit". However, the ALRC considered these specific, express powers were needed to:

- prevent or deter future sexual harassment
- provide "practical relief" to complainants
- align with the existing federal positive duty to eliminate sexual harassment and the vicarious liability of employers, and
- clarify the types of orders that can be made.[106]

While it cannot impose a civil penalty (see below), NCAT may already be able to use its mandatory or injunctive powers to make these types of orders. However, expressly including these powers in the ADA could clarify their availability for both parties and NCAT.

8.3.5 Civil penalties

A related question is whether NCAT should be empowered to order penalties in addition to ordering other remedies. Some other jurisdictions provide for this.

In terms of discrimination law, the Tasmanian Civil and Administrative Tribunal can order a respondent to pay a specified fine not exceeding 20 penalty units ($4260) if a complaint is substantiated.[107]

Some industrial laws also provide this power. The NSW Industrial Relations Court, Industrial Magistrates Court of Western Australia and federal courts can order a penalty in workplace sexual harassment cases. The maximum penalties are between $18,000 and $21,840 for individuals, and between $93,000 and $109,200 for corporations.[108]

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[105] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 50, rec 54.

[106] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) [14.122]–[14.125], [14.130], [15.84]–[15.87].

[107] *Anti-Discrimination Act 1998* (Tas) s 89(1)(e). A Tasmanian penalty unit is currently $213: *Penalty Units and Other Penalties Act 1987* (Tas) s 4, s 4A(4); *Tasmanian Government Gazette*, No 22575, 27 May 2026, 357.

[108] *Industrial Relations Act 1996* (NSW) s 144N, s 400D(1)–(3); *Industrial Relations Act 1979* (WA) s 51BR(3), s 83E(1); *Fair Work Act 2009* (Cth) s 527D, s 539, s 546(1)–(2), s 546(5). A penalty unit under the *Fair Work Act 2009* (Cth) is currently $364: s 12 definition of "penalty unit"; *Crimes Act 1914* (Cth) s 4AA; Australian Taxation Office, "Penalty Unit Amount" (26 June 2026) <https://www.ato.gov.au/individuals-and-families/paying-the-ato/interest-and-penalties/penalties/penalty-units> (retrieved 30 June 2026).

In WA, the maximum penalty increases to $180,000 for individuals and $930,000 for corporations, for a "serious contravention". Failing to pay a penalty order can attract further penalties.[109]

A federal court recently used this power in a sexual harassment case under the *Fair Work Act* for the first time. It ordered an individual respondent to pay the applicant a $9,390 penalty, in addition to $50,000 for hurt, distress and humiliation. The court stated this penalty would "serve the objects of both specific and general deterrence" and "send a message that contraventions are serious matters and are unacceptable".[110]

Federal courts can also order respondents to pay penalties for breaching the *Fair Work Act* prohibition on discrimination-based general protections.[111] Courts have used this power to award significant penalty amounts to complainants. For example, $47,250 was awarded in one case and $45,000 in another.[112]

If the ADA was changed to allow NCAT to order penalties, it could include a list of factors to be considered. Courts have identified factors that may be considered in determining a penalty amount "of appropriate deterrent value" in cases under the *Fair Work Act* and the *Trade Practices Act 1974* (Cth). These include:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.[113]

We discuss whether ADNSW should be empowered to seek penalty orders in chapter 10.

Question 31: Potential new remedies

a. Should NCAT's existing powers to order specific remedies in ADA matters be replaced with a broad power to make any orders "as it sees fit"?
b. Should the ADA be amended to expressly provide for:

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[109] *Industrial Relations Act 1979* (WA) s 83E(1), s 83E(9), s 83EA(2)–(4) definition of "serious contravention".

[110] *Mejia v Capital City Café-Bar* [2026] FedCFamC2G 468 [42], [54]–[55], [64]–[65].

[111] *Fair Work Act 2009* (Cth) s 351(1), s 539, s 546(1)–(2), s 546(5).

[112] *Willis Bros Installations (Qld) Pty Ltd v Ruttley* [2023] FCA 1147 [59]; *Han v St Basil's Homes* [2025] FCA 448 [220]. Recently a global penalty of $100,000 was ordered for numerous breaches, including discrimination-based general protections: *Duarte v United Arab Emirates Ministry of Foreign Affairs* [2026] FedCFamC2G 175 [68].

[113] *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 [18]–[19], quoting *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR 41-076, 52,152–52,153.

i. a power to make declarations
ii. specific orders for training and employment
iii. specific orders in sexual harassment cases
iv. civil penalties, or
v. any other orders currently not provided for?

8.4 Orders with systemic effect

Several submissions questioned whether remedies under the ADA could better promote systemic outcomes.[114] For instance, the outcomes could address discriminatory rules, practices, patterns or systems that affect groups of people and not only the individual complainant. Examples of "systemic outcomes" could include:

- a public apology
- developing or reviewing a policy or practice
- providing or reviewing relevant training to individuals
- removing or amending publicly available material
- modifying goods, services or facilities, and
- providing access to premises or facilities.[115]

Some Australian discrimination laws expressly empower anti-discrimination agencies to investigate systemic discrimination.[116] We discuss this in chapter 10.

8.4.1 Principles to guide systemic outcomes

One option may be to insert specific principles into the ADA to require or encourage NCAT to consider systemic issues when determining remedies. This could be done regardless of whether new powers are added to the ADA.

NCAT may be able to use certain existing powers to order remedies that have systemic effect. These include the powers to make mandatory orders, injunctions and, in vilification complaints, order the development of programs and policies.[117] NCAT also has the power to order apologies or retractions. It can give directions concerning the time, form, extent and manner of publication.[118]

For example, in one case involving a mandatory order, NCAT required a respondent to publish a newspaper statement saying they had racially vilified someone. They were also required to explain, in the statement, what vilification is and that it is unlawful.[119]

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[114] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 22; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 11; National Justice Project, *Preliminary Submission PAD39*, 2–3; Women's Legal Service NSW, *Preliminary Submission PAD55* [6].

[115] R Poole, "Facilitating Systemic Outcomes through Anti-Discrimination Conciliation and the Role of the Conciliator in this Quest" (2016) 27 *Australasian Dispute Resolution Journal* 49, 54.

[116] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(db), s 31(b)(i), s 35L, s 35M; *Human Rights Commission Act 2005* (ACT) s 18(2)(c), s 18C(a)(v), s 48(3), s 83(1); *Anti-Discrimination Act 1992* (NT) s 89B(2); *Equal Opportunity Act 2010* (Vic) s 127.

[117] *Anti-Discrimination Act 1977* (NSW) s 108(2)(b)–(e).

[118] *Anti-Discrimination Act 1977* (NSW) s 108(2)(d). See, eg, *Ekermawi v Jones (No 3)* [2014] NSWCATAD 58 [85]–[86]; *Ekermawi v NSW Police Force* [2019] NSWCATAD 79 [121]–[122].

[119] *Lamb v Campbell* [2021] NSWCATAD 103 [57]–[59], [61].

NCAT has also granted injunctions that order respondents to:

- remove material on websites that constitutes vilification, and not to publish similar statements again[120]
- stop applying sporting competition rules that discriminate against people aged over 25[121]
- stop charging an annual fee to golf club members for using their own motorised golf cart, which they needed because of their disability,[122] and
- stop victimising a person who had complained about discrimination.[123]

However, NCAT may decide not to order an injunction if the respondent is unlikely to repeat the behaviour.[124]

Damages awards can also have a wider deterrent and educative effect beyond compensating an individual. It can also indicate that the obligations in the ADA must be taken seriously.[125] In particular, aggravated damages may deter actual or potential respondents from breaching the ADA, or encourage them to respond more appropriately to allegations.[126]

More specifically, NCAT can order a respondent to take, or stop taking, action that affects people other than the complainant. It can do this if the extension is appropriate, having regard to the circumstances of the case.[127] When this power was introduced in 2004, the then-Attorney General said it would allow NCAT to address systemic discrimination.[128]

There may be other ways to further encourage NCAT to address systemic discrimination when making orders under existing powers. For example, in chapter 2, we ask whether the ADA should contain an objects clause and, if so, if it should:

- recognise the objective of addressing and preventing systemic discrimination, and/or
- guide or direct decision-makers in their exercise of their functions.

This could be one way of promoting systemic remedies regardless of whether further powers are added to the ADA.

For example, it could inform decisions about whether to order an apology. Currently, the "critical question" considered by courts and tribunals is whether a court-ordered apology would redress the damage suffered. It is also relevant "[w]hether more appropriate methods of achieving that redress are available".[129]

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[120] *Sunol v Collier* [2006] NSWADTAP 51 [62]; *Burns v Sunol* [2014] NSWCATAD 2 [116]; *Burns v Sunol* [2014] NSWCATAD 61 [71]; *Burns v Sunol* [2014] NSWCATAD 62 [54]; *Burns v Sunol* [2015] NSWCATAD 131 [95].

[121] *Duggan v Belmont 16 Foot Sailing Club Ltd* [2015] NSWCATAD 226 [63].

[122] *Lyttle v Everglades Country Club Ltd* [2021] NSWCATAD 52 [104].

[123] *Grass v McIntosh* [2023] NSWCATAD 258 [56], [60].

[124] *Masters v Reserve Hotels Pty Ltd* [2020] NSWCATAD 115 [170].

[125] M Thornton, "Anti-Discrimination Remedies" (1983) 9 *Adelaide Law Review* 235, 235–236.

[126] M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 47–49, 97–98.

[127] *Anti-Discrimination Act 1977* (NSW) s 108(3).

[128] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2004, 11042.

[129] *Wotton v Queensland (No 5)* [2016] FCA 1457 [1553]–[1584], quoted in *Wolf v NSW Department of Education* [2023] NSWCATAD 202 [115].

In some cases, these considerations have led courts and tribunals to decide that other remedies are more appropriate. In one ADA case, for example, NCAT declined to order the Department of Education to apologise in writing, because it considered compensation was the more appropriate form of redress.[130] However, an objects clause could encourage decision-makers to look beyond individual redress to also consider the wider systemic value of an apology.

8.4.2 The Canadian model for orders with systemic effect

Another view is that NCAT needs clearer statutory powers or directions to more proactively consider whether discrimination is systemic in nature and to make orders with systemic effect. One submission suggested that Canada provides a model for consideration.[131]

Where a complaint is substantiated, the Canadian Human Rights Commission (CHRC) can order a respondent take measures to:

- stop a discriminatory practice, and
- prevent the same or similar discriminatory practices from happening in the future.

The respondent must consult with the CHRC on the general purposes of those measures.[132]

For instance, the CHRC may order that a respondent adopt a special program, plan or arrangement designed to address systemic discriminatory disadvantages suffered by certain groups of people. The programs should improve the opportunities of those groups for goods, services, facilities, accommodation or employment.[133]

The CHRC can make general recommendations to a respondent about the desired objectives of their proposed program. If a respondent asks, the CHRC can help and advise them to adopt or carry out the program.[134]

The CHRC can also require a respondent to ask for its approval to implement a plan for adapting services, facilities, premises, equipment or operations to meet the needs of persons with disability.[135]

However, the CHRC cannot make a respondent:

- implement a workforce program or plan to increase the number of employees representing designated groups,[136] or
- remove someone from their job, or from accommodation or premises they occupy, if those people accepted them in good faith.[137]

A model like that used in Canada could allow NCAT to take a more proactive approach to promoting systemic outcomes.

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[130] *FVN v Department of Education (NSW)* [2023] NSWCATAP 301 [182].

[131] Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 11.

[132] *Canadian Human Rights Act 1985* (Can) s 53(2)(a).

[133] *Canadian Human Rights Act 1985* (Can) s 53(2)(a)(i), s 16(1).

[134] *Canadian Human Rights Act 1985* (Can) s 16(2).

[135] *Canadian Human Rights Act 1985* (Can) s 53(2)(a)(ii), s 17.

[136] *Canadian Human Rights Act 1985* (Can) s 54.1(2).

[137] *Canadian Human Rights Act 1985* (Can) s 54.

Question 32: Orders with systemic effect

a. Should the ADA be amended to encourage NCAT to consider systemic issues when deciding appropriate remedies under its existing powers? If so, what changes do you support?
b. Does NCAT require clearer or more expansive powers to make orders with systemic effect? If so, what changes do you support?

8.5 Enforcing NCAT orders

Further issues can arise when it comes to enforcing a remedy ordered by NCAT. The complainant generally bears the burden of pursuing and enforcing NCAT orders in court. One submission argued that enforcement can be onerous. This can discourage complaints and impede the complainant's ability to receive redress.[138] It also arguably reduces compliance with the ADA.

The issue of enforcement highlights the wider concerns that we have heard about the individual complaints model. In chapter 10, we discuss potential alternatives to promote compliance with the ADA.

In this section, however, we seek your views on whether the existing enforcement mechanisms could be improved. This includes whether:

- the penalties for failing to comply with non-monetary orders of NCAT are sufficient, and
- changes should be made to the criteria that must be satisfied before ADNSW can take enforcement action on behalf of complainants.

8.5.1 Penalties for failing to comply with non-monetary orders

It is an offence to contravene a non-monetary order made by NCAT under the ADA. For a corporation, the maximum penalty is 100 penalty units ($11,000). In any other case, the maximum penalty is 50 penalty units ($5,500), 12 months' imprisonment, or both.[139] These penalties also apply to a person who contravenes NCAT orders made under certain other Acts.[140]

One question is whether the maximum penalties are adequate. In its 1999 report, the NSWLRC recommended the maximum should be 250 penalty units for corporations and 50 penalty units for individuals. It considered that "compliance with orders is more likely if defying the legislation is more costly".[141]

The maximum penalty for individuals was increased to 50 penalty units ($5,500) in 2013. This was consistent with the NSWLRC's recommendation. However, the maximum penalty was only raised to 100 penalty units ($11,000) for corporations.[142]

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[138] NSW Council for Civil Liberties, *Preliminary Submission PAD21* [117]–[118].

[139] *Civil and Administrative Tribunal Act 2013* (NSW) s 72(1), s 72(2)(a)–(b). A NSW penalty unit is currently $110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

[140] *Civil and Administrative Tribunal Act 2013* (NSW) s 72(2). See, eg, *Conversion Practices Ban Act 2024* (NSW); *Guardianship Act 1987* (NSW).

[141] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 161, [10.87].

[142] *Civil and Administrative Tribunal Act 2013* (NSW) s 72(1).

Higher maximum penalties apply under industrial law for failing to comply with orders for remedies in workplace sexual harassment cases. Non-compliance with NSW Industrial Relations Commission orders can attract penalties of $18,870 for individuals and $93,900 for corporations.[143] For non-compliance with Fair Work Commission orders, the maximum is 60 penalty units (currently $21,840) for individuals and 300 units ($109,200) for corporations.[144]

Another question is whether specific penalties should apply for failing to comply with particular types of orders. For instance, a fine not exceeding 10 penalty units ($2,130) applies in Tasmania if a person fails to comply with a tribunal requirement or direction to apologise or make a retraction.[145]

8.5.2 Court-based enforcement options and the role of ADNSW

If a respondent does not comply with an NCAT order, a complainant can try to enforce the order in a court. This can be a difficult and costly process.

To enforce a compensation order, for example, a complainant can apply to the NSW Local Court or District Court for an order that:

- a bank or employer take money out of the respondent's bank account, salary or wages (known as a garnishee order), or
- the sheriff takes and sells the respondent's property.[146]

This usually occurs in the Local Court because it has a jurisdictional limit of $100,000, the same as the ADA compensation cap.[147]

Non-monetary orders can be enforced in the Supreme Court of NSW.[148]

To enforce an NCAT order, a complainant must:

- first ask NCAT to certify the orders, and then
- file the NCAT certificate in the relevant court registry.[149]

Once the NCAT certificate is filed, the NCAT orders are treated as orders of the court.[150] The relevant court procedures must then be followed to seek enforcement of the court orders.

The ADNSW President can also "take steps" to enforce NCAT orders if they believe it is in the public interest to do so. If it is an individual complaint, the complainant's consent is required. However, the President can take enforcement steps on their own motion in relation to a representative complaint.[151]

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[143] *Industrial Relations Act 1996* (NSW) s 144U.

[144] *Fair Work Act 2009* (Cth) s 12 definition of "penalty unit", s 527K, s 527S(4), s 539, s 546(1)–(2), s 546(5); *Crimes Act 1914* (Cth) s 4AA.

[145] *Anti-Discrimination Act 1998* (Tas) s 92(4). A Tasmanian penalty unit is currently $213: *Penalty Units and Other Penalties Act 1987* (Tas) s 4, s 4A(4); *Tasmanian Government Gazette*, No 22575, 27 May 2026, 357.

[146] *Civil and Administrative Tribunal Act 2013* (NSW) s 78; *Civil Procedure Act 2005* (NSW) s 106(1)(a)–(b), s 106(2).

[147] *Local Court Act 2007* (NSW) s 29(1)(a).

[148] *Anti-Discrimination Act 1977* (NSW) s 114.

[149] *Civil and Administrative Tribunal Act 2013* (NSW) s 78; *Anti-Discrimination Act 1977* (NSW) s 114.

[150] *Civil and Administrative Tribunal Act 2013* (NSW) s 78(3); *Wojciechowska v NSW Department of Communities and Justice* [2023] NSWCA 191 [137].

[151] *Anti-Discrimination Act 1977* (NSW) s 113.

It intended that the powers might be used, for instance, where the complaint involved systemic discrimination and the complainant lacked the resources to initiate enforcement proceedings.[152]

Some other jurisdictions do not have a "public interest" requirement. For example, the Tasmanian Anti-Discrimination Commissioner may enforce a tribunal order "at the request of a person" by filing:

- a copy of the order certified by the relevant tribunal member, and
- an affidavit stating the extent to which the order has not been complied with.

The order is then enforceable as if it were an order of the Supreme Court of Tasmania.[153]

The Victorian Equal Opportunity and Human Rights Commission may enforce an order of the Victorian Civil and Administrative Tribunal (VCAT) in Victorian courts on behalf of an applicant, if the applicant consents. The applicant can then enforce the VCAT order as if it were a court order.[154]

Question 33: Enforcing NCAT orders

a. Should the penalty for failing to comply with a non-monetary order of NCAT be increased? If so, what should it be?
b. Should there be specific penalties for failing to comply with certain NCAT orders? If so, what should they be?
c. What, if any, changes should be made to the circumstances in which the ADNSW President can take steps to enforce an NCAT order?
d. Should any other changes be made to the process for enforcing an NCAT order made under the ADA?

8.6 Costs

NCAT is generally a "no costs" jurisdiction. Except in special circumstances, parties pay their own legal costs regardless of whether NCAT substantiates the complaint.[155]

In most cases, this model protects complainants from having to pay a respondent's costs if they lose in NCAT. On one view, this reduces the risks associated with pursuing a complaint. This could make it easier for complainants to seek redress.

However, some submissions questioned this model. From one perspective, some argued that the model encourages people to make complaints that may be frivolous, vexatious, misconceived or without substance. In their view, this places an unfair burden on respondents, who must pay their own costs even if a complainant is unsuccessful in NCAT.[156]

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[152] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 16 September 2004, 11042.

[153] *Anti-Discrimination Act 1998* (Tas) s 90(1)(a), s 90(1)(c), s 90(2).

[154] *Equal Opportunity Act 2010* (Vic) s 126(2).

[155] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1)–(2).

[156] Australian Christian Lobby, *Preliminary Submission PAD12,* 19; Catholic Schools NSW, *Preliminary Submission PAD80*, 8; Catholic Archdiocese of Sydney, *Preliminary Submission PAD37*, 7.

On the other hand, some argued the model can discourage people from making meritorious complaints.[157] It was observed that the model makes it "largely uneconomic" for people to make a complaint. This is because complainants generally pay their own costs, even when they succeed.[158] They considered that any costs model must recognise the power imbalance that often exists between parties and should not deter people from making a complaint.[159]

In its 1999 report, the NSWLRC observed that the costs model may compound the effect of the compensation cap and further discourage complaints. It noted that complainants may be unlikely to succeed without legal representation. But few complainants receive "real compensation" above their legal expenses and are likely to be "out-of-pocket" even if they succeed.[160]

This means some complainants may be unable to afford or find legal representation. This includes "no-win, no fee" arrangements and grants of legal aid.[161]

In light of these different perspectives, we seek your views on whether the NSW model is fit for purpose. This includes examining the circumstances in which NCAT can award costs. We also raise whether the federal "equal access" model should be introduced to NSW.

8.6.1 When NCAT can award costs

Currently, NCAT may order that one party pay the other party's costs in special circumstances.[162] The circumstances should be "out of the ordinary", but they do not have to be "extraordinary" or "exceptional".[163]

The party seeking costs must prove there are special circumstances.[164] NCAT may consider:

- whether a party conducted proceedings in a way that "unnecessarily disadvantaged" another party
- whether a party unreasonably prolonged the proceedings
- the relative strengths of the parties' claims
- the nature and complexity of the proceedings
- whether the proceedings were frivolous, vexatious, otherwise misconceived or lacking in substance
- whether a party refused or failed to cooperate with NCAT to facilitate the just, quick and cheap resolution of the real issues in the proceedings, and

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[157] Equality Australia, *Preliminary Submission PAD07*, 20–21; Racial Justice Centre, *Preliminary Submission PAD63,* 4, 21; Law Society of NSW, *Preliminary Submission PAD31*, 15; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Older Women's Network NSW, *Submission AD133*, 5.

[158] Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [10]; Equality Australia, *Preliminary Submission PAD07*, 20. See also M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 42.

[159] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 15; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 13–14.

[160] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.108].

[161] M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 42, 99–100. See also *Legal Aid Commission Act 1979* (NSW) s 36.

[162] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(2).

[163] *Houda v Seraphim* [2025] NSWCATAP 188 [8].

[164] *Riley v NSW Department of Education (No 2)* [2020] NSWCATAD 19 [14].

- any other matter NCAT considers relevant.[165]

One question is whether the circumstances NCAT may consider when making decisions on costs should be amended or clarified. Related to this is whether NCAT's power to award costs should be expanded to dissuade vexatious claimants.

Redefining the matters NCAT may consider

In 1999, the NSWLRC supported parties generally paying their own costs except where the tribunal decides the circumstances of the case justify a costs order. It recommended the tribunal consider a range of factors when making these decisions.[166]

Most of the factors proposed by the NSWLRC are not expressly included in the current list of matters NCAT may consider. Others are expressed differently. For example, the NSWLRC's list included whether the tribunal dismissed a claim because it was "frivolous or vexatious". This is more limited than the current provision, which also allows NCAT to consider whether proceedings are "otherwise misconceived or lacking in substance".[167]

The NSWLRC also recommended the tribunal be allowed to consider "the behaviour of the parties during the inquiry process". NCAT can currently consider whether parties unreasonably prolonged proceedings or failed to cooperate with NCAT to facilitate the just, quick and cheap resolution of the real issues.[168]

Arguably, however, the NSWLRC's proposed wording could encompass a broader range of behaviours, including conduct during ADNSW processes. The NSWLRC stated, for example, the tribunal should give weight to "the policy of settlement by conciliation" in assessing the unreasonableness of a respondent's behaviour.[169] It also recommended that "the filing of any written offers of settlement" be included as another factor the tribunal could consider in costs decisions.[170]

Additional factors recommended by the NSWLRC are currently only covered by NCAT's ability to consider "any other matter" it considers relevant.[171] These are whether:

- the complainant genuinely believed the complaint had merit
- the matter is brought to enforce a previous tribunal order
- the proceedings determine or clarify an important question of law, and
- any important public policy considerations were raised.[172]

In explaining its recommendation, the NSWLRC stated the tribunal should be able to award costs to complainants where they successfully pursued a case with a public interest element beyond their own private interests.[173]

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[165] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(3).

[166] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 143.

[167] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(3)(e).

[168] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(3)(b), s 60(3)(f), s 36(1).

[169] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.120].

[170] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 143.

[171] *Civil and Administrative Tribunal Act 2013* (NSW) s 60(3)(g).

[172] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 143.

[173] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.120].

Costs awards to deter unmeritorious claims

As we discuss in chapter 4, ADNSW can refer a complaint to NCAT at the complainant's request in certain circumstances. This includes if ADNSW declines a complaint during the investigation stage because, for example, it considers the claim is frivolous, vexatious, misconceived or lacking in substance.[174]

One submission suggested amendments to:

- allow a respondent to recover legal costs (on an indemnity basis) if NCAT confirms an ADNSW decision that a claim is vexatious, misconceived or lacking in substance, and
- require a complainant to provide security for costs to NCAT when requiring referral of such a claim.[175]

The submission stated that, if these changes are made, vexatious claimants would be cautious about referring claims without substance. Complainants who consider they have a legitimate claim could still request referral.[176]

8.6.2 Costs on appeal

Some submissions also raised concerns about the costs risk of an appeal. Where a party appeals an NCAT decision in the Supreme Court, the court has broad discretion to order a party to pay another party's legal costs. Costs generally "follow the event", meaning that the unsuccessful party must pay the successful party's appeal costs.[177]

Some submissions argued that the risk of having to pay a respondent's appeal costs may deter a complainant from pursuing an ADA complaint.[178] The NSWLRC also previously observed that this had dissuaded parties (usually unsuccessful complainants) from appealing tribunal decisions in the Supreme Court.[179]

The NSWLRC previously concluded that such concerns would be mitigated if the tribunal had the power to grant the President leave to intervene in tribunal proceedings on behalf of a complainant, where appropriate. We discuss this reform option in chapter 10.

The NSWLRC recommended that, where a breach of the ADA is litigated in a "court or other tribunal the costs rules generally applicable in that court or tribunal will apply".[180]

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[174] *Anti-Discrimination Act 1977* (NSW) s 92(1)(a)(i), s 93A.

[175] Australian Christian Lobby, *Preliminary Submission PAD12*, 20.

[176] Australian Christian Lobby, *Preliminary Submission PAD12*, 20.

[177] *Supreme Court Act 1970* (NSW) s 46(1)(d); *Civil Procedure Act 2005* (NSW) s 98(1), s 98(6)(b); *Uniform Civil Procedure Rules 2005* (NSW) reg 42.1.

[178] Equality Australia, *Preliminary Submission PAD07*, 20–21; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14.

[179] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.122].

[180] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 144.

8.6.3 An equal access / asymmetrical costs model

A wider issue is whether the ADA costs model requires more significant reform. Many submissions argued that an equal access / asymmetrical costs model should be introduced.[181]

Under such a model, the respondent must pay the complainant's costs (and their own) if a complainant succeeds on any ground of unlawful conduct claimed. Parties pay their own costs if a complainant fails on any ground. It is called an asymmetrical model because it "is weighted more in favour of applicants and overcoming barriers to them proceeding to court with discrimination matters".[182]

This model was recently introduced into federal discrimination law.[183] Before this reform, federal courts most commonly either:

- made no costs orders, so each party paid their own costs, or
- ordered an unsuccessful party to pay the successful parties' costs, as well as their own.[184]

Now, federal courts may only order an applicant pay another party's costs where:

- the applicant started the court proceedings vexatiously or without reasonable cause
- the applicant's unreasonable act or omission caused the respondent to incur costs, or
- the other party is a respondent who was successful, and the respondent has neither a significant power advantage over the applicant nor significant financial or other resources relative to the applicant.[185]

The model was introduced in federal discrimination law to:

- reduce the costs risk barrier to applicants pursuing discrimination complaints in courts
- redress the power imbalance and resource disparity between applicants and respondents, and
- provide greater certainty about costs to all parties involved in discrimination cases.[186]

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[181] See, eg, Equality Australia, *Preliminary Submission PAD07*, 21; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [11]; Women's Legal Service, *Preliminary Submission PAD55* [63]–[65]; Racial Justice Centre, *Preliminary Submission PAD63*, 21; Legal Aid NSW, *Preliminary Submission PAD87*, 33; National Justice Project, *Submission AD139*, 10.

[182] Australia, Attorney-General's Department, *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws*, Consultation Paper (2023) 28.

[183] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA, inserted by *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) sch 1 [3].

[184] Australia, Attorney-General's Department, *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws*, Consultation Paper (2023) 10; M Thornton, K Pender and M Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Australian National University, 2022) 13–14.

[185] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA(6).

[186] Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) [2], [6].

Several submissions supported introducing this model to NSW. Their reasons included that:

- redressing power and resource disparities is important because respondents are more likely to be insured, or may be government departments or private sector entities[187]
- when a complainant starts tribunal proceedings, they may not know the merits of their complaint because of information held by the respondent[188]
- this reform would allow more complainants to fund ADA complaints in NCAT, benefiting the community because many involve significant public interest issues,[189] and
- the model would encourage respondents to settle complaints and deter them from breaching the ADA.[190]

On the other hand, it could be argued that this model may disadvantage some respondents. They could face an increased risk of NCAT making a costs order against them. It may reduce their ability to obtain legal representation for tribunal proceedings and put pressure on them to settle complaints beforehand.[191]

However, the federal government's view was that the model balanced the interests of applicants and respondents. It stated that the model would provide sufficient protections for respondents, including those who are not well-resourced or at a significant power advantage.[192]

One argument against the model was that it could encourage unmeritorious complaints.[193] However, the federal government stated the model contained sufficient safeguards. This is because the model:

- allows courts to order applicants pay the respondent's costs in certain circumstances (outlined above), and
- operates alongside other safeguards in federal discrimination law against unmeritorious claims.[194]

Arguably, the ADA contains similar safeguards. In certain circumstances, for example, ADNSW can decline complaints and NCAT can order a party to pay costs. This includes where ADNSW or NCAT considers that complaints are frivolous, vexatious, misconceived, or lacking in substance.[195] Other safeguards could be incorporated under any costs model adopted.

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[187] Equality Australia, *Preliminary Submission PAD07*, 21; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [11].

[188] Equality Australia, *Preliminary Submission PAD07*, 21.

[189] Women's Legal Service, *Preliminary Submission PAD55* [65]; Jumbunna Institute for Indigenous Education and Research, *Preliminary Submission PAD54* [11].

[190] Women's Legal Service, *Preliminary Submission PAD55* [65].

[191] Australia, Attorney-General's Department, *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws*, Consultation Paper (2023) 29.

[192] Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) [4], [6].

[193] Australia, Attorney-General's Department, *Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws*, Consultation Paper (2023) 29.

[194] Explanatory Memorandum, Australian Human Rights Commission Amendment (Costs Protection) Bill 2023 (Cth) [5]–[7].

[195] *Anti-Discrimination Act 1977* (NSW) s 89B, s 92(1)(a)(i); *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

Adopting an equal access costs model for ADA proceedings in NCAT would make NSW consistent with federal discrimination law. However, this may require NCAT to apply different decision-making criteria when ordering costs in ADA cases than in cases decided under other NSW laws.

A further question is whether any new costs model under the ADA should also apply when NCAT decisions are appealed in higher courts. The federal equal access model applies in the federal courts and appeals to the High Court.[196]

Some submissions supported this approach.[197] One argued that this may protect a complainant from the risk of an adverse costs order where they did not initiate the appeal, or the respondent made them a "modest" settlement offer during the process.[198]

Question 34: Costs

a. Should the existing circumstances in which NCAT may award costs under the ADA be expanded or clarified? If so, how?

b. In what circumstances, if any, should parties be required to provide security for costs in ADA proceedings in NCAT?

c. Should an equal access / asymmetrical costs model apply to ADA proceedings in NCAT? Why or why not?

d. If the ADA is amended to introduce an equal access / asymmetrical costs model, should this model also apply when NCAT decisions are appealed in higher courts?

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[196] *Australian Human Rights Commission Act 1986* (Cth) s 46PSA(1).

[197] Equality Australia, *Preliminary Submission PAD07*, 20–21; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 21.

[198] Equality Australia, *Preliminary Submission PAD07*, 21.

9 Exemptions procedures

In brief

This chapter focuses on the exemptions procedures under the *Anti-Discrimination Act 1977* (NSW). We consider the role and purpose of exemptions and ask if an exemptions procedure would still be necessary if a special measures provision is introduced. We also ask if any changes should be made to the procedures or criteria for exemptions.

9.1 Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) allows organisations to apply to Anti-Discrimination NSW (ADNSW) to exempt them from complying with a part of the Act when carrying out a specific activity.[1] This acknowledges that it may be justifiable to treat a person differently in some circumstances.[2] Exemptions are provided on a temporary basis.[3]

When the ADA was enacted in 1977, exemptions were intended to be a transitional measure to give duty holders time to comply with the ADA.[4] However, this process remains in the ADA today.

In 2024–25, ADNSW received 73 applications for exemptions.[5] In NSW, exemptions are commonly granted to allow duty holders to:

- implement affirmative action (or special measures) for groups who have experienced disadvantage to achieve substantive equality, and
- depart from the ADA because a more important right or interest outweighs equal treatment.[6]

In the first category, "special measures" are benefits, programs or policies that support some or all members of a disadvantaged group. They are implemented for the sole purpose of promoting substantive equality and redressing historical disadvantage. Although special measures involve treating people differently, this is not considered discrimination.[7]

However, as we explore in this chapter, exemptions in the second category can be controversial. This is because they permit conduct that would otherwise be discriminatory.

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[1] *Anti-Discrimination Act 1977* (NSW) s 126.

[2] See, eg, N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.9.13].

[3] *Anti-Discrimination Act 1977* (NSW) s 126; *Anti-Discrimination Regulation 2019* (NSW) cl 6.

[4] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 November 1976, 3346.

[5] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 23.

[6] Anti-Discrimination NSW, "Current Exemptions" (26 June 2026) <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/current-exemptions.html> (retrieved 1 July 2026).

[7] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [11.32]–[11.62].

Questions have been raised about what the purpose of an exemptions process should be, including whether these exemptions should be permitted and, if so, in what circumstances.

A further key issue in this review is whether an exemptions process is still required if NSW enacts a provision that permits duty holders to take special measures without needing to apply for an exemption.

NSW is the only jurisdiction in Australia that does not have a special measures provision. In the first consultation paper in this review, we asked whether the ADA should generally allow for special measures.

Adding a special measures provision to the ADA could encourage duty holders to take action to promote substantive equality, without needing to apply for an exemption from the ADA. However, even if the ADA contained a special measures provision, there may still be a role for an exemptions process.

In this chapter, we seek your views on:

- the role and purpose of exemptions
- whether there is a role for an exemptions process if a special measures provision is introduced, and
- whether the current exemptions process and/or exemptions criteria should change.

9.2 Exemptions terminology

The terms "exemption" and "exception" are used in different ways across discrimination laws in Australia.

In this review, we use the term "exception" to refer to provisions in the ADA that permit what would otherwise amount to unlawful discrimination. Exceptions operate as a defence to a discrimination complaint, after the conduct happens.[8] The topic of exceptions was discussed in the previous consultation paper.[9]

We use the term "exemptions" to refer to applications to ADNSW to exempt a person or organisation from the ADA for a temporary period. The application is made before the conduct occurs so that an individual or organisation can be excused in advance. Exemptions operate as a complete defence to a complaint of unlawful discrimination if the activity is within the terms of the exemption.[10]

The ADA also provides for "certification", which allows an application to be made to the Attorney General to certify a special needs program or activity.[11] The topic of certifications

[8] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.9.2].

[9] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) ch 6–7.

[10] N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.12.3].

[11] *Anti-Discrimination Act 1977* (NSW) s 126A.

was also discussed in the previous consultation paper.[12] Like exemptions, certification must occur before the conduct occurs.

9.3 Relationship between special measures and exemptions

Many submissions to our first consultation paper argued that the ADA should generally allow for special measures.[13] They argued this could:

- remove the need for duty holders to seek an exemption each time they seek to advance substantive equality, and
- achieve greater consistency with other jurisdictions which provide for special measures.

These benefits may be particularly important for employers that wish to run affirmative action-style recruitment campaigns.[14]

This raises some foundational questions:

- should exemptions only be available for conduct that could be characterised as a special measure, and
- if a special measures provision is introduced into the ADA, is there still a role for an exemptions process?

9.3.1 The relationship with special measures in other jurisdictions

Across Australia, most discrimination laws provide for both a special measures provision and a temporary exemptions procedure.[15] Only the *Racial Discrimination Act 1975* (Cth) provides for special measures but does not allow for exemptions.[16]

The experience of other jurisdictions suggests that there may still be a role for an exemptions process if a special measures provision is introduced into the ADA. Formal recognition of a special measure is not required in jurisdictions with a special measures provision. However, decision-makers still receive applications for exemptions even when the conduct could be regarded as a special measure.[17]

There may be a range of reasons for this. For example, the Queensland Human Rights Commission (QHRC) noted that "applications are often made as a form of insurance against

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[12] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [11.44]–[11.47], [11.58]–[11.62].

[13] See, eg, Community Industry Housing Association NSW, *Submission AD123,* 2–4; Guide Dogs NSW/ACT, *Submission AD132*, 8, 11; Justice and Equity Centre, *Submission AD192,* 48–49.

[14] See, eg, Australian Retailers Association and National Retail Association, *Submission AD157,* 1–2; Australian Industry Group, *Submission AD206* [52]–[56].

[15] *Sex Discrimination Act 1984* (Cth) s 7D, s 44; *Age Discrimination Act 2004* (Cth) s 33, s 44; *Disability Discrimination Act 1992* (Cth) s 45, s 55; *Discrimination Act 1991* (ACT) s 27, s 109; *Equal Opportunity Act 2010* (Vic) s 12, s 89; *Anti-Discrimination Act 1991* (Qld) s 104–105, s 113; *Anti-Discrimination Act 1998* (Tas) s 25–26, s 56; *Anti-Discrimination Act 1992* (NT) s 57, s 59; *Equal Opportunity Act 1984* (SA) s 47, s 65, s 82, s 85P, s 92; *Equal Opportunity Act 1984* (WA) s 31, s 35K, s 35ZD, s 51, s 66R, s 66ZP, s 135.

[16] *Racial Discrimination Act 1975* (Cth) s 8.

[17] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 128–129; Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 113. See, eg, *Wallmans Lawyers* [2020] SACAT 1; *Metro Trains Melbourne Pty Ltd* [2024] VCAT 1049; *Switch Now Pty Ltd* [2007] WASAT 134.

a complaint".[18] While special measures may provide a complete defence to a discrimination claim, duty holders still need to go through the legal process to defend their case.[19] This concern may discourage organisations from adopting special measures to promote substantive equality and address discrimination.[20] It may also encourage them to seek exemptions.

There are also examples of cases where the proposed conduct may be characterised as a special measure. However, an exemption was granted because the evidence did not satisfy all the requirements of a special measure or exception.[21]

Some submissions to our review similarly observed that duty holders may continue to apply for a temporary exemption, even if the ADA has a special measures provision. They considered this could be a way to reduce potential liability or provide an option to seek formal confirmation.[22]

ADNSW has expressed concern about introducing a general special measures provision, while retaining the current processes. It stated this could:

- lead to more confusion and complexity
- create an administrative burden on ADNSW, if duty holders use the exemptions procedure as an insurance policy, and
- undermine the purpose of a special measures provision if some applicants are reluctant to rely on it or are under the misconception that they require an exemption of certification.[23]

One option could be to allow a decision-making body, such as the NSW Civil and Administrative Tribunal (NCAT), to make a declaration that the proposed conduct is a special measure when considering an exemption application. This could provide certainty to duty holders and to the broader community that the conduct is lawful.

Victoria provides an example of this. In several exemption applications, the Victorian Civil and Administrative Tribunal (VCAT) has used its broad power to instead declare the proposed conduct is a special measure.[24] However, VCAT has recognised:

> It is preferable that organisations intending to engage in conduct which may fall within [the special measures provision] makes their own assessment of that matter. If the organisation is satisfied that the proposed conduct is a special measure, it is also preferable that it simply gets on with engaging in that conduct. That not only saves

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[18] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 113.

[19] See, eg, *Moorilla Estate Pty Ltd v Lau* [2024] TASSC 49; *Lau v Moorilla Estate Pty Ltd* [2024] TASCAT 58.

[20] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 129.

[21] See, eg, *Whitehorse Community Health Centre* [2014] VCAT 1040 [25].

[22] Anti-Discrimination NSW, *Submission AD179*, 80–81; Australian Industry Group, *Submission AD206* [64]–[67].

[23] Anti-Discrimination NSW, *Submission AD179*, 80.

[24] See, eg, *Trafalgar High School* [2015] VCAT 1647; *NECA Education and Careers Ltd* [2015] VCAT 838; *Ian Potter Museum of Art* [2011] VCAT 2236 [53]. *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 124.

> the organisation time and resources but ensures that the [Equal Opportunity] Act's purposes are given effect to without first involving an unnecessary legal process.[25]

9.3.2 Other reasons for exemptions

Another issue is whether the exemptions procedure should do more than confirm conduct that may constitute a special measure. That is, should the exemptions procedure be used to permit conduct that would otherwise be discriminatory where this is justified on, for example, public interest grounds? If so, how should competing interests be balanced?

Across Australia, exemptions are often granted for conduct which, although discriminatory, is justified by reference to a range of other purposes or interests.[26]

For instance, in NSW, ADNSW has granted defence-related exemptions under the existing process, highlighting public interest considerations, which we discuss further below. Some have criticised defence-related exemptions for seeking "permission not to benefit people and overcome disadvantage, but to discriminate against them, causing disadvantage".[27]

A recent decision of the Federal Court confirmed that the Australian Human Rights Commission's power to grant exemptions under the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*) is not limited to cases involving so-called "positive discrimination". Instead, the Act permits exemptions to be granted that serve "other interests".[28] We consider this further, below.

One submission to our review argued that exemptions would not be necessary if the ADA provided for special measures. In their view, only conduct that advances substantive equality, or is subject to parliamentary oversight, should be permitted.[29]

However other submissions stated that exemptions may be appropriate where the conduct, although not a special measure, is justifiable.[30] An exemptions process could arguably be used to cover unforeseen or specialised programs that fall outside the scope of special measures.[31] For instance, VCAT has granted several exemptions allowing coeducational schools to structure their waitlists to maintain a balanced gender ratio.[32]

However, there are a range of views on what circumstances are justifiable and what criteria should be applied. We consider this issue below.

On the other hand, if the exemptions power was limited to only special measures, it is arguable that the exemptions process could be considered superfluous. It could also

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[25] *Waite Group* [2016] VCAT 1258 [28].

[26] See, eg, *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19; *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261; *BAE Systems Australia Ltd* [2020] SACAT 63; *Seeing Machines Ltd* [2022] VCAT 214; NSW, *Government Gazette*, No 81, 1 July 2005, 3495–3496.

[27] S Rice, "Staring down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law" (2011) 10 *Canberra Law Review* 97, 98.

[28] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [87]–[98].

[29] First Peoples Disability Network, *Submission AD108* [11.43]–[11.49].

[30] See, eg, Justice and Equity Centre, *Submission AD192*, 40–41; NSW Bar Association, *Submission AD211* [494].

[31] See, eg, University of Sydney, *Submission AD91,* 2; Community Industry Housing Association NSW, *Submission AD123*, 2; Law Society of NSW, *Submission AD203,* 45.

[32] See, eg, *Westbourne Grammar School* [2022] VCAT 278; *Woodleigh School* [2022] VCAT 244; *Ivanhoe Grammar School* [2021] VCAT 1452.

undermine the purpose of special measures, being non-discriminatory measures aimed to achieve substantive equality.

Another suggestion is there should be no exceptions in the ADA and any conduct that is prohibited should be permitted only by way of temporary exemptions. One submission argued that exceptions entrench discrimination, whereas temporary exemptions could demonstrate how the unlawful conduct will be addressed and eliminated over time.[33] However, this option could involve significant resource implications for ADNSW.

Question 35: Special measures and exemptions

a. If a special measures provision is introduced, should the ADA continue to provide a procedure for exemption applications? Why or why not?
b. If so, what purpose should exemptions serve?

9.4 The ADA exemptions process

If a formal exemption application process is retained, with or without the adoption of a special measures provision, a key consideration is whether the existing procedure could be improved.

Under the ADA, a duty holder seeking an exemption must apply in writing to ADNSW.[34] In assessing the application, ADNSW is to consider specific criteria outlined in the *Anti-Discrimination Regulation 2019* (NSW) (Regulation). ADNSW may consult with any individuals or bodies it considers appropriate.[35] A decision on whether to grant or refuse the exemption must be made within 60 days.[36]

If an exemption is granted, ADNSW may impose conditions in the order.[37] For instance, ADNSW may ask exemption holders to provide reports demonstrating compliance with the exemption and any conditions attached to it.[38] The order is then published in the NSW Government Gazette.[39]

Exemptions may be granted on a temporary basis, can apply for up to 10 years, and can be renewed after this period through the same application process.[40] ADNSW has the power to vary or revoke an exemption.[41]

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[33] National Justice Project, *Submission AD139*, 9.

[34] *Anti-Discrimination Act 1977* (NSW) s 126(6). Throughout this consultation paper, for simplicity we refer to ADNSW as the body exercising the President's functions. See 3.2.1 of this consultation paper.

[35] *Anti-Discrimination Act 1977* (NSW) s 126(7).

[36] *Anti-Discrimination Act 1977* (NSW) s 126(8).

[37] *Anti-Discrimination Act 1977* (NSW) s 126(2).

[38] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 23.

[39] *Anti-Discrimination Act 1977* (NSW) s 126(1). See, eg, NSW, *Government Gazette*, No 298, 2 August 2024, 1–3.

[40] *Anti-Discrimination Act 1977* (NSW) s 126(3)–(4), s 126(6).

[41] *Anti-Discrimination Act 1977* (NSW) s 126(5).

A person affected by ADNSW's exemption decision may apply to NCAT for review.[42] Applications for review are made under the *Administrative Decisions Review Act 1997* (NSW) rather than an internal review.[43]

Several submissions emphasised the importance of ensuring the exemptions process is timely and accessible.[44] Some supported stronger alignment with the processes in other jurisdictions.[45]

Some options for consideration include:

- adding greater transparency and options for public involvement
- shifting responsibility to determine applications from ADNSW to another body, such as NCAT
- imposing certain limitations on exemptions
- reviewing the exemption period, and
- allowing certain applications to be fast-tracked.

9.4.1 Greater transparency

One issue is whether the ADA should incorporate greater transparency in the decision-making process.

Public engagement measures

An option could be to introduce a public process for notifying, considering and deciding exemption applications. The ADA currently allows ADNSW to consult with any relevant parties or organisations, but this does not extend to a public process that invites submissions from the wider community.[46]

Some other discrimination laws treat exemption applications as a public process. Exemption applications are advertised and the community is invited to make submissions.[47] Previous reviews have emphasised the benefit of a public process. In its 1999 report on the ADA, the NSW Law Reform Commission (NSWLRC) considered there should be transparency in the process of granting exemptions. In its view, the public should be given notice and reasonable opportunity to make written submissions before an exemption is granted.[48]

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[42] *Anti-Discrimination Act 1977* (NSW) s 126(9)–(10).

[43] *Anti-Discrimination Act 1977* (NSW) s 126(11).

[44] Community Industry Housing Association NSW, *Submission AD123*, 2; Aboriginal Legal Service NSW/ACT Ltd, *Submission AD181*, 9; Australian Industry Group, *Submission AD206* [55].

[45] Business Council of Australia, *Preliminary Submission PAD13* [11]–[12]; Australian Industry Group, *Submission AD206* [66]; NSW Bar Association, *Submission AD211* [494].

[46] *Anti-Discrimination Act 1977* (NSW) s 126(7).

[47] See, eg, *Equal Opportunity Act 1984* (WA) s 135(3); *Saab Australia Pty Ltd* [2025] WASAT 23 [17]–[18]; *Jet Aviation Australia Pty Ltd* [2024] WASAT 122 [16]–[18].

[48] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.141]–[6.143].

In its 2015 review, the Australian Capital Territory Law Reform Advisory Council (ACTLRAC) also noted that a public process would:

- promote transparency
- provide parties who have an interest in the application with an opportunity to make their views known, and
- provide the community with an opportunity to learn about how discrimination laws apply and the process by which competing interests may be balanced.

ACTLRAC recommended that the ACT Human Rights Commission (ACTHRC) should be required to notify the public of exemption applications. It recommended that the ACTHRC should call for, receive and consider submissions on whether the exemption should be granted.[49] This has not been implemented.

If NSW were to introduce such measures, a question is whether they should be legislated. Federally, these measures are contained in non-legislative materials.[50] However, the Western Australian (WA) legislation provides:

> The Tribunal shall cause notice of an application for an exemption, a further exemption or the variation of an exemption or further exemption to be given by newspaper advertisement or otherwise, in such form and manner as the Tribunal may direct.[51]

The Australian Human Rights Commission (AHRC) has issued guidelines on its exemptions process under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Sex Discrimination Act*. The process may include:

- publishing the application on the AHRC website with a call for public comments
- inviting persons who may be affected by AHRC's decision to make written submissions commenting on the application, or
- making proposed decisions on applications available to interested parties for comment before the AHRC makes a final decision.[52]

While there may be advantages to this approach, it could have resourcing implications for ADNSW if introduced in NSW. One option to address this concern could be to provide for non-legislative material to guide ADNSW in its public engagement measures.

Publication of decisions and reasons

Another option could be to require the findings and reasons for exemption decisions to be published. Some discrimination laws in other jurisdictions legislate requirements on what information must be published. These include:

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[49] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 21.2, 128–129.

[50] Australian Human Rights Commission, *Temporary Exemptions under the Age Discrimination Act*, Guidelines (2010); Australian Human Rights Commission, *Temporary Exemptions under the Sex Discrimination Act*, Guidelines (2009); Australian Human Rights Commission, *Temporary Exemptions under the Disability Discrimination Act*, Guidelines (2010).

[51] *Equal Opportunity Act 1984* (WA) s 135(3).

[52] Australian Human Rights Commission, *Temporary Exemptions under the Age Discrimination Act*, Guidelines (2010) 4; Australian Human Rights Commission, *Temporary Exemptions under the Sex Discrimination Act*, Guidelines (2009) 4; Australian Human Rights Commission, *Temporary Exemptions under the Disability Discrimination Act*, Guidelines (2010) 4.

- the findings of facts material to the decision
- a summary or reference to the evidence on which the findings were based
- the reasons for making the decision, and/or
- expressly state an individual's right to request a review of an exemption decision.[53]

Published findings and reasons could also assist in educating the community on how discrimination law applies.

9.4.2 The decision-making body

Another issue is whether ADNSW should continue to decide exemption applications, or if this function should shift to another body such as NCAT. We discuss NCAT's functions and powers in greater detail in chapter 6.

In its submission, ADNSW said one advantage of the current process is that "it provides a mechanism for ADNSW to assess the conduct and provides safeguards against potentially unlawful discrimination". However, ADNSW also submitted:

> If exemptions are retained … the Victorian model is preferable where organisations can apply directly to VCAT for an exemption. If someone applies for an exemption to VCAT or [a special measure] is raised as defence to a complaint, then VCAT can make a determination about whether the conduct is a 'special measure' thereby providing certainty to the applicant and the community about the conduct.[54]

Another potential benefit of a judicial or quasi-judicial model is that it could allow ADNSW to act as an independent contradictor in exemption matters. That is, a body appointed to present opposing considerations in the exemptions process. For example, the Victorian Act provides that the Victorian Equal Opportunity Human Rights Commission (VEOHRC):

- must be given a copy of the exemption application, and
- with leave of VCAT, have standing in exemption applications.[55]

Discrimination laws in other jurisdictions differ on the decision-making body for exemption applications. Commissioners determine exemptions in the Australian Capital Territory (ACT), Tasmania and federally under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), and *Sex Discrimination Act*.[56] In Queensland, South Australia (SA), Victoria and WA, exemptions are determined by the Tribunal or Industrial Relations Commission.[57] The relevant Commissioner is given notice of the application and is a party to the matter.[58]

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[53] *Age Discrimination Act 2004* (Cth) s 46; *Disability Discrimination Act 1992* (Cth) s 57; *Sex Discrimination Act 1984* (Cth) s 46; *Equal Opportunity Act 1984* (WA) s 135(3).

[54] Anti-Discrimination NSW, *Submission AD179*, 81.

[55] *Equal Opportunity Act 2010* (Vic) s 91, s 159. See also Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, Final Report (2009) 74–76, rec 56.

[56] *Age Discrimination Act 2004* (Cth) s 44; *Disability Discrimination Act 1992* (Cth) s 55; *Sex Discrimination Act 1984* (Cth) s 44; *Discrimination Act 1991* (ACT) s 109; *Anti-Discrimination Act 1998* (Tas) s 56.

[57] *Anti-Discrimination Act 1991* (Qld) s 113, s 113AA; *Equal Opportunity Act 1984* (SA) s 92; *Equal Opportunity Act 2010* (Vic) s 89; *Equal Opportunity Act 1984* (WA) s 135.

[58] *Anti-Discrimination Act 1991* (Qld) s 113(2); *Equal Opportunity Act 1984* (SA) s 92(4)–(5); *Equal Opportunity Act 2010* (Vic) s 91; *Equal Opportunity Regulations 1986* (WA) reg 24.

The role of the QHRC extends beyond this. The Queensland Civil and Administrative Tribunal (QCAT) must "have regard to any submission made by the Commissioner on the application, including a submission on the process for considering the application".[59]

The QHRC may make a submission on matters including:

- whether there should be a public hearing
- who may be affected by the exemption decision
- whether public consultation should occur, and
- how consultations should be conducted.[60]

There could be some challenges with this approach. For example, some submissions to the QHRC's review noted that the exemptions process can be "too onerous, costly and lengthy".[61]

The resource implications of changing the decision-making body also require consideration. While many exemptions in NSW relate to conduct which could be considered a special measure, such applications may continue to be made through an exemptions process.

9.4.3 Excluding certain protected attributes or unlawful conduct

A further issue is whether temporary exemptions should be available in relation to all forms of unlawful conduct and all protected attributes, or if some should be excluded.

Prohibiting exemptions for sexual harassment, vilification and victimisation

ADNSW can grant an exemption from any part of the ADA or the Regulation.[62] In principle, this means that an exemption could apply to any attribute or provision covered by the ADA. In practice, ADNSW has only been asked to exercise its exemption powers in discrimination based matters. There are no current exemptions granted in relation to sexual harassment, vilification or victimisation.[63]

Discrimination laws in Queensland, SA and Tasmania also allow temporary exemptions to all parts of the Acts.[64] The ACTHRC may grant an exemption from protections against unlawful discrimination, sexual harassment, vilification and victimisation.[65]

In the Northern Territory (NT), WA and federally, exemption applications can only be made in relation to discriminatory conduct.[66]

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[59] *Anti-Discrimination Act 1991* (Qld) s 113(2).

[60] *Anti-Discrimination Act 1991* (Qld) s 113(3).

[61] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 401.

[62] *Anti-Discrimination Act 1977* (NSW) s 126(1).

[63] Anti-Discrimination NSW, "Exemptions and Certifications" (4 March 2026) <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications.html> (retrieved 1 July 2026).

[64] *Anti-Discrimination Act 1991* (Qld) s 113(1); *Equal Opportunity Act 1984* (SA) s 92(1); *Anti-Discrimination Act 1998* (Tas) s 56(1).

[65] *Discrimination Act 1991* (ACT) s 109(1).

[66] *Age Discrimination Act 2004* (Cth) s 44(1); *Disability Discrimination Act 1992* (Cth) s 55(1); *Sex Discrimination Act 1984* (Cth) s 44(1); *Anti-Discrimination Act 1992* (NT) s 59(1); *Equal Opportunity Act 1984* (WA) s 135(1).

Following recent reforms, temporary exemptions cannot be granted in Victoria in relation to vilification.[67] The explanatory memorandum said that "whilst conduct that would otherwise amount to discrimination may be justified in certain circumstances, those same reasons do not apply here because vilification is always unacceptable".[68]

Prohibiting exemptions for discrimination based on certain attributes

The question of whether exemptions should be limited to certain protected attributes was raised in 2020. A private members Bill (2020 Amendment Bill) sought, among other things, to prohibit discrimination based on religious belief and prevent exemptions being granted in relation to this protection.[69] If enacted, this would mean a duty holder could not seek an exemption from the prohibition on religious discrimination.

The 2020 Amendment Bill was reviewed by a parliamentary committee. The committee did not receive any submissions specifically supporting the proposed amendment, but they received some that opposed it.[70] Some submissions expressed that temporary exemptions procedures should be available in relation to all protected attributes under the ADA.[71] Others argued that the exclusion of religious beliefs or activities from the power to grant temporary exemptions would establish religion as a special category under the ADA.[72]

The parliamentary committee commented that the scope of ADNSW's exemptions power should be limited. The committee concluded the provision proposed in the Bill was suitable for a Government Bill.[73]

9.4.4 Exemption period

Another question is whether the 10-year time frame for exemptions remains suitable. When the ADA was introduced, temporary exemptions could only be granted for five years. A further application had to be made to renew the exemption.[74] In 1997, this was amended to extend the period of exemption to 10 years.[75]

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[67] *Equal Opportunity Act 2010* (Vic) s 89(1A), as inserted by *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 8.

[68] Explanatory Memorandum, Justice Legislation Amendment (Anti-vilification and Social Cohesion) Bill 2024 (Vic) cl 8.

[69] Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) sch 1 [3], negatived 23 February 2022.

[70] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.258].

[71] Submissions to the Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*: Australian Discrimination Law Experts Group, Submission No 34 (20 August 2020) 24; Kingsford Legal Centre UNSW Australia, Submission No 52 (21 August 2020) 10; Public Interest Advocacy Centre, Submission No 56 (21 August 2020) 17; NSW Society of Labor Lawyers, Submission No 87 (21 August 2020) 6.

[72] See, eg, Anti-Discrimination NSW, Submission No 55 to the Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (21 August 2020) 12.

[73] Parliament of NSW, *Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, Report 1/57 (2021) [2.272].

[74] *Anti-Discrimination Act 1977* (NSW) s 126(2)–(3) as at 20 May 1997.

[75] *Anti-Discrimination Amendment Act 1997* (NSW) sch 1 [43].

Discrimination laws in other jurisdictions allow for exemptions for a renewable 3-year,[76] or 5-year period.[77]

9.4.5 Option to fast-track certain applications

Some submissions raised concern about ADNSW's current timeframes for issuing exemption decisions.[78] As noted above, some consider this could be addressed through a special measures provision.

Another option could be to provide a fast-track application process for certain types of exemptions. This could apply, for instance, to conduct intended to improve access to:

- education, training, recruitment, employment for Aboriginal and Torres Strait Islander peoples, or
- employment opportunities for women in industries where they are substantially underrepresented.

The power to determine whether an application qualifies for a fast-track process could be conferred on the President of ADNSW. For instance, the ADA could either:

- set out criteria that must be considered in determining if the fast-track procedure applies, or
- state that the fast-track procedure can only apply if certain conditions are met.

Applications that qualify for the fast-track process could be subjected to less scrutiny than those that do not.

A fast-track option could be incorporated into the ADA with or without a special measures provision. If a special measures provision is introduced, the fast-track model could be used to confirm the conduct is a special measure to give duty holders more certainty.

Question 36: The exemptions process

a. What, if any, changes should be made to the process for seeking an exemption? For instance:
   i. Should there be greater transparency and/or options for public involvement in the process?
   ii. Who should be the decision-maker?
b. Should exemptions exclude certain protected attributes or unlawful conduct? If so, what should these be and why?
c. What, if any, other changes should be made to the exemptions process?

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[76] *Discrimination Act 1991* (ACT) s 109(4)(c); *Anti-Discrimination Act 1992* (NT) s 59(5)(a), s 59(6); *Equal Opportunity Act 1984* (SA) s 92(2)(c); *Anti-Discrimination Act 1998* (Tas) s 57(2)(a), s 57(3)(a).

[77] *Age Discrimination Act 2004* (Cth) s 44(3)(c); *Disability Discrimination Act 1992* (Cth) s 55(3)(c); *Sex Discrimination Act 1984* (Cth) s 44(3)(c); *Anti-Discrimination Act 1991* (Qld) s 113(6)(c), s 113(7); *Equal Opportunity Act 2010* (Vic) s 89(2)–(3)(a); *Equal Opportunity Act 1984* (WA) s 135(6)(d).

[78] See, eg, Australian Industry Group, *Submission AD206* [55].

9.5 The decision-making framework

The ADA contains criteria designed to guide ADNSW in exercising their discretion to grant exemptions.[79] Under the ADA, a duty holder seeking an exemption must apply in writing to ADNSW.[80] In assessing the application, ADNSW is to consider:

> (a) whether the proposed exemption is appropriate or reasonable;
> (b) whether the proposed exemption is necessary;
> (c) whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought;
> (d) whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption;
> (e) the public, business, social or other community impact of the granting of the proposed exemption;
> (f) any conditions or limitations to be contained in the proposed exemption.[81]

The Regulation also provides that the listed criteria is not exhaustive. ADNSW can consider "any other matters".[82]

ADNSW asks applicants to provide them with information that meets these criteria, as well as background information about the applicant's business and any anti-discrimination policies or initiatives it has in place.[83] As discussed above, ADNSW may also consult with any relevant person or organisation.[84]

If an exemptions process remains in the ADA, it is necessary to consider what, if any, criteria should apply when the relevant decision-making body decides whether to grant an exemption.

Before considering the specific criteria, we seek your views on whether the ADA should continue to adopt the approach of a non-exhaustive, legislative list of criteria that ADNSW must take into account.

A further key issue is whether ADNSW should be required to consider the objects and purposes of the ADA. If so, how should the objects be determined? And should this be the primary or sole consideration, or one of several relevant considerations?

9.5.1 Legislative or non-legislative criteria

Like NSW, some other jurisdictions have legislated criteria for deciding whether to grant an exemption. But not all do. Some set the criteria out in non-legislative materials. For

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[79] *Auto and General Insurance Company Ltd v Anti-Discrimination Board* [2010] NSWADT 229 [33].

[80] *Anti-Discrimination Act 1977* (NSW) s 126(6).

[81] *Anti-Discrimination Regulation 2019* (NSW) cl 6.

[82] *Anti-Discrimination Regulation 2019* (NSW) cl 6(3).

[83] Anti-Discrimination NSW, "What Should I Include in My Exemption Application?" (28 April 2026) <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/frequently-asked-questions.html#What6> (retrieved 1 July 2026).

[84] *Anti-Discrimination Act 1977* (NSW) s 126(7).

instance, in Queensland and WA, the criteria have been developed in case law.[85] Federally, the AHRC has developed guidelines on the criteria to assess exemptions under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Sex Discrimination Act*.[86]

Previous reviews have recognised the benefits of legislated criteria. The Law Reform Commission of Western Australia (LRCWA) recommended legislated criteria. Submissions to its review regarded the absence of specific legislated criteria as a "significant gap".[87] In its 1999 review, the NSWLRC recommended that the criteria should be set out in the ADA.[88]

9.5.2 Mandatory or discretionary criteria

A related issue is whether the ADA should require ADNSW to take the criteria into account. Other discrimination laws across Australia vary on this point. Like NSW, some require decision-makers to consider certain criteria.[89] However, others list broad criteria that decision-makers may take into account.[90]

A further option is whether an even stronger framework is required. For instance, to only permit ADNSW to grant exemptions if certain criteria are met. In 1999, the NSWLRC proposed that the power to grant exemptions should depend on whether the President is satisfied of specified criteria.[91] The NSWLRC proposed the following amendment to the ADA:

> The President may decide to grant or renew an exemption … only if President is satisfied:
> (a) that the activity for which exemption is sought would or might constitute a contravention of this Act, and
> (b) that:
> (i) the exemption is sought to allow the applicant to make the necessary arrangements for the applicant to comply with the Act, or
> (ii) the irrelevant characteristic sought to be relied on or taken into account by the applicant is a relevant consideration in the particular circumstances, or
> (iii) the activity for which the exemption is sought has a legitimate and beneficial purpose that is consistent with the objects of this Act and may contravene this Act only to a limited extent or in a relatively insignificant respect, and

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[85] See, eg, *BAE Systems Australia Ltd v Commissioner for Equal Opportunity* [2019] WASAT 79 [24]; *Boeing Australia Holdings Pty Ltd* [2003] QADT 21 [12]–[13].

[86] Australian Human Rights Commission, *Temporary Exemptions under the Age Discrimination Act*, Guidelines (2010); Australian Human Rights Commission, *Temporary Exemptions under the Sex Discrimination Act*, Guidelines (2009); Australian Human Rights Commission, *Temporary Exemptions under the Disability Discrimination Act*, Guidelines (2010).

[87] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [4.7], rec 96.

[88] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 50, appendix A: Draft Anti-Discrimination Bill 1999, cl 70.

[89] *Discrimination Act 1991* (ACT) s 109(3); *Equal Opportunity Act 2010* (Vic) s 90.

[90] *Anti-Discrimination Act 1992* (NT) s 59(3); *Equal Opportunity Act 1984* (SA) s 92(6); *Anti-Discrimination Act 1998* (Tas) s 56(2).

[91] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [6.143].

(c) if the activity may contravene a law of the Commonwealth or a State or Territory having similar objects to this Act, an exemption from the terms of that law has been granted or will be sought, and
(d) it is in the public interest to do so.[92]

Arguably, mandatory considerations provide greater certainty and consistency to the decision-making process. However, it could also be argued that a discretionary approach allows for greater flexibility.

9.5.3 Exhaustive or non-exhaustive considerations

Another consideration is whether the exemption criteria should be exhaustive or if the decision-maker should be permitted to consider other relevant matters. Currently, the Regulation allows consideration of any other matters in addition to the listed criteria.[93]

Some other jurisdictions take a similar approach.[94] The ACT Administrative Appeals Tribunal found that even though the Act includes a confined scope of specified matters that must be considered, this "does not exclude other matters from consideration".[95]

Another approach could be to include a reduced set of criteria in a non-exhaustive list. For example, the NT, SA and Tasmania include only two criteria, one of which is broadly worded to allow for non-exhaustive considerations.[96] The SA Act provides:

> In determining an application ... the Tribunal may-
> (a) have regard (where relevant) to the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past discrimination; and
> (b) have regard to other factors that the Tribunal considers relevant.[97]

9.5.4 The relevance of the ADA's objects and purpose

A key issue is whether the ADA should require the decision-maker to consider the objects and purposes of the ADA when determining exemption applications. If so, how should these objects be determined? And should they confine the decision-making power or be part of a range of relevant considerations?

Requiring consideration of the objectives of discrimination law

As we explore in chapter 2, the ADA does not include an objects clause. Nor does the ADA expressly require ADNSW to consider the objectives and purposes of discrimination law when deciding whether to grant an exemption.

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[92] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 70(1).

[93] *Anti-Discrimination Regulation 2019* (NSW) cl 6(3).

[94] *Anti-Discrimination Act 1992* (NT) s 59(3); *Equal Opportunity Act 1984* (SA) s 92(6); *Anti-Discrimination Act 1998* (Tas) s 56(2); *Equal Opportunity Act* 2010 (Vic) s 90.

[95] *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 [51].

[96] *Anti-Discrimination Act 1992* (NT) s 59(3); *Equal Opportunity Act 1984* (SA) s 92(6); *Anti-Discrimination Act 1998* (Tas) s 56(2).

[97] *Equal Opportunity Act 1984* (SA) s 92(6).

Some may argue this should be an explicit consideration. The NSWLRC recognised this in 1999. As set out above, the NSWLRC proposed that an exemption could be granted if, among other things, the President is satisfied that:

> the activity for which the exemption is sought has a legitimate and beneficial purpose that is consistent with the objects of this Act and may contravene this Act only to a limited extent or in a relatively insignificant respect.[98]

Some laws indicate that certain discriminatory conduct could be justified for the purpose of redressing the effects of discrimination. In making or extending an exemption, the matters to which the ACTHRC must have regard include two express matters:

> (a) the need to promote an acceptance of, and compliance with, this Act;
> (b) the desirability, if relevant, of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination.[99]

Discrimination laws in the NT, SA and Tasmania contain similar language on the purpose of redressing past discrimination.[100] Tasmania also refers to the desirability of permitting actions to redress the effect of "prohibited conduct".[101]

In one example, an applicant in SA sought an exemption to request ancestral information so that it could selectively advertise and recruit people of Dieri, Aboriginal and/or Torres Strait Islander descent. In this case, the special measures provision was not relied on due to concerns that the applicant could not prioritise the recruitment in favour of Dieri persons over other Aboriginal and Torres Strait Islanders. The South Australian Civil and Administrative Tribunal (SACAT) found the granting of the exemption would be an appropriate measure to advance the Dieri people and redress some of the inequality experienced in the past.[102]

Including a similar provision in the ADA could be one way of directing attention to the objectives of discrimination law. However, this would not necessarily confine the decision-making power to conduct consistent with such objectives — if that is a desired outcome of reform.

The role of an objects clause

In chapter 2, we ask if the ADA should include an express statement of objectives, purposes and/or principles. If so, we also ask what it should contain and what role it should play. If included in the ADA, such a clause could guide decision-making about exemptions.

However, recent cases have confronted the issue of whether exemptions should be consistent with, and decision-making power confined by, the stated objectives of discrimination law.

The Federal Court of Australia recently concluded that exemptions may be granted under the *Sex Discrimination Act* in circumstances that do not involve so-called "positive

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[98] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 70(b)(iii).

[99] *Discrimination Act 1991* (ACT) s 109(3).

[100] *Anti-Discrimination Act 1998* (Tas) s 56(2)(a); *Equal Opportunity Act 1984* (SA) s 92(6)(a); *Anti-Discrimination Act 1992* (NT) s 59(3)(a).

[101] *Anti-Discrimination Act 1998* (Tas) s 56(2)(a).

[102] *Dieri Aboriginal Corporation RNTBC* [2002] SACAT 42 [18], [22], [24].

discrimination". The AHRC argued, and the Administrative Review Tribunal (ART) found, that exemptions contrary to the Act's stated objects and prohibitions on discrimination should not be permitted.[103]

On appeal, Justice Moshinsky found that the exemption power is constrained by the objects, scope and purpose of the Act. This must be ascertained not only by reference to the Act's stated objects, but by reference to "the Act as a whole".[104] This included the context provided by express exceptions in the Act that permit discrimination in recognition of competing interests. Justice Moshinsky concluded that exemptions under the *Sex Discrimination Act* also permit discrimination in the circumstances specified in the exemption.[105]

Accordingly, Justice Moshinsky found the ART had interpreted the power too narrowly, stating:

> the power to grant an exemption is not limited to such cases [of "positive discrimination"], and an exemption may be granted which serves other interests notwithstanding that it permits a person to engage in acts of discrimination … that would otherwise be prohibited.[106]

However, this does not preclude the AHRC from considering the extent to which a proposed exemption would detract from the stated objectives or permit discriminatory conduct that is otherwise prohibited.[107]

Some previous exemption cases took a similar approach to the Federal Court.[108] For example, in relation to the purpose of exemptions in the ACT legislation, the ACT Administrative Appeals Tribunal stated that "it is necessary to avoid fixing upon the statement of objectives … and to have regard to the broader operation of the Act as a whole".[109]

This approach could encourage consideration of the objectives of discrimination law, while permitting exemptions justified on the grounds of "public interest" or other existing criteria (we consider these criteria below). However, some people may desire a narrower approach that confines exemptions to conduct that is consistent with the purposes of discrimination law.

Alternatives to achieve this could include expressly limiting the exemption-making power to conduct that is consistent with the ADA's stated objects, if an objects clause is introduced.

Another approach could extend the ACT model, using the matters listed in the ACT law as conditions rather than considerations. As one submission to the LRCWA's review stated:

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[103] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [74], [97].

[104] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [97]–[98] (emphasis omitted).

[105] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [98].

[106] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [98].

[107] *Lesbian Action Group Inc v Australian Human Rights Commission* [2026] FCA 432 [99].

[108] See, eg, *Commissioner for Equal Opportunity v ADI Ltd* [2007] WASCA 261 [69]; *Cobham Aviation Services Australia Pty Ltd* [2023] WASAT 21 [22]; *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 [43].

[109] *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 [43].

A stronger provision, to ensure the integrity of a commitment to equal opportunity, would require an exemption to actually be consistent with the aims of the Act by redressing the effect of past discrimination.[110]

Question 37: Decision-making framework

a. Should the exemptions framework be:
   i. guided by legislative or non-legislative material?
   ii. mandatory or discretionary?
   iii. exhaustive or non-exhaustive?
b. Should ADNSW be required to consider whether the exemption would be consistent with the objects and purposes of the ADA? If so, should exemptions be:
   i. limited by the stated objects of the Act (if any), or
   ii. determined as a matter of discretion having regard to the objects, scope and purposes of the Act as a whole?

9.6 The current exemption criteria

When the ADA was originally enacted in 1977, the exemption power was not subject to prescribed criteria. In 2004, the Regulation was amended to include the current criteria.[111] These have not changed since this time.

Some submissions stated that several elements of the criteria are unclear.[112] We outline the existing criteria below and ask if any changes should be made to them.

9.6.1 Whether the proposed exemption is appropriate or reasonable

Currently, this criterion captures a wide range of considerations. These include whether the proposed exemption:

- redresses past or present discrimination
- is contrary to the objects and purpose of the ADA, and
- can achieve its stated objectives.[113]

Other jurisdictions also take a broad approach. For instance, the Western Australian State Administrative Tribunal (WASAT) has considered whether the proposed exemption is "appropriate and reasonable in light of the reasons for which it is necessary". This includes factors such as whether:

- the scope of the proposed exemption is sufficiently confined, and
- there are measures in place to mitigate adverse effects.[114]

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[110] Australian Discrimination Law Experts Group, Submission to the Law Reform Commission of Western Australia, *Project 111: Review of the Equal Opportunity Act 1984 (WA)*, (30 November 2021) 78–79.

[111] *Anti-Discrimination Regulation 2019* (NSW) cl 6.

[112] Community Industry Housing Association NSW, *Submission AD123*, 2; Anti-Discrimination NSW, *Submission AD179*, 81; Aboriginal Legal Service NSW/ACT Ltd, *Submission AD181*, 9.

[113] See, eg, *Auto and General Insurance Company Ltd v Anti-Discrimination Board* [2010] NSWADT 229 [15].

[114] *BAE Systems Australia Ltd v Commissioner for Equal Opportunity* [2019] WASAT 79 [35]–[38].

The LRCWA recommended these criteria, among others, be included in the WA Act.[115]

One related issue is whether the ADA should expressly include human rights considerations as either part of this criterion or as a standalone criterion. For example, the Victorian Act requires consideration of "whether the proposed exemption is a reasonable limitation on the right to equality" as set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[116] The Charter requires VCAT to consider all relevant factors in determining whether any limitation on human rights is justified, including:

> (a) the nature of the right; and
> (b) the importance of the purpose of the limitation; and
> (c) the nature and extent of the limitation; and
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[117]

There is no similar explicit requirement in other jurisdictions with a human rights Act. However, the Acts require decision-makers to consider human rights.[118]

Although NSW does not have a human rights Act, the exemption criteria could instead refer to international human rights obligations and considerations around reasonable limits.

9.6.2 Whether the proposed exemption is necessary

One issue is whether this criterion requires clarification. One submission expressed that the term "necessary" creates confusion.[119] ADNSW has interpreted this to mean that "the exemption is necessary to avoid a contravention of the ADA. However, applicants regularly interpret this to mean whether the exemption is necessary to address discrimination issues".[120]

One of the criteria recommended by the NSWLRC in 1999 aligns with ADNSW's current interpretation of "necessary". That is, "the activity for which exemption is sought would or might constitute a contravention of this Act".[121]

Some jurisdictions provide guidance on the term "necessary" in legislation or additional guidance material. For example, VCAT must consider (among other factors):

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[115] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 96.

[116] *Equal Opportunity Act 2010* (Vic) s 90(b).

[117] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See, eg, *Thales Australia Ltd* [2014] VCAT 1441 [47].

[118] *Human Rights Act 2004* (ACT) s 28, s 30; *Human Rights Act 2019* (Qld) s 58. See, eg, *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 [54]–[79]; *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [36]–[50].

[119] Anti-Discrimination NSW, *Submission AD179*, 81; *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(b).

[120] Anti-Discrimination NSW, *Submission AD179*, 81.

[121] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 70(1)(a).

(a) whether the proposed exemption is unnecessary because –
  (i) an exception or exemption in this Act already applies to the conduct sought to be exempted; or
  (ii) the conduct sought to be exempted would not amount to prohibited discrimination.[122]

The AHRC guidelines define "necessary" to mean there must be "an arguable case that the activities that are subject of the application constitute discrimination contrary to the [relevant] Act". The guidelines include consideration of whether:

- the circumstances are covered by the Act
- any of the permanent exemptions to the Act apply
- any defences to the Act apply
- the circumstances can be brought within the "special measures" or positive discrimination provision of the Act.[123]

9.6.3 Any non-discriminatory ways of achieving the objects or purposes

The Regulation also requires consideration of "whether there are any non-discriminatory ways of achieving the objects or purposes for which the exemption is sought".[124] This requires the decision-making body to consider less restrictive measures.

This is a relevant consideration in other jurisdictions.[125] For instance, QCAT has stated:

> the [a]pplicant needs to establish that there is no other reasonable means of achieving the purpose for which the exemption is sought. It has always been considered relevant to consider whether there are other non-discriminatory ways of achieving the objects or purposes for which the exemption is sought.[126]

The LRCWA recommended the WA Act include an express criterion on whether "there are non-discriminatory ways of achieving the objects and purposes for which the proposed exemption is sought".[127] In Tasmania, the Anti-Discrimination Commissioner considers "whether alternative or temporary measures can address the discriminatory practices, processes or procedures that are currently in place" as a relevant factor.[128]

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[122] *Equal Opportunity Act 2010* (Vic) s 90(a)(i)–(ii).

[123] Australian Human Rights Commission, *Temporary Exemptions under the Age Discrimination Act*, Commission Guidelines (2010) 2–3; Australian Human Rights Commission, *Temporary Exemptions under the Sex Discrimination Act*, Guidelines (2009) 2–3; Australian Human Rights Commission, *Temporary Exemptions under the Disability Discrimination Act*, Guidelines (2010) 3.

[124] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(c).

[125] See, eg, *BAE Systems Australia Ltd* [2019] WASAT 79 [49]–[52]; *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [34].

[126] *Surtie Enterprises Pty Ltd* [2023] QCAT 228 [46].

[127] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 96.

[128] Tasmania, Office of the Anti-Discrimination Commissioner, "Exemptions: How Does the Commissioner Make a Decision?" <https://www.antidiscrimination.tas.gov.au/exemptions> (retrieved 1 July 2026).

9.6.4 Reasonable steps to avoid or reduce adverse effects

The Regulation also requires consideration of whether the applicant "has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption".[129]

Similarly, in WA, the WASAT considers what the applicant has done before seeking an exemption but also what it will continue to do. The LRCWA recommended that the legislation should require the WASAT to consider if the applicants have "taken, and will … continue to take steps to mitigate the potential adverse effects of the proposed exemption".[130]

Factors the WASAT considered relevant in assessing whether the applicant has taken steps to mitigate adverse effects include:

- their policies, procedures and training in relation to exemptions and discrimination laws[131]
- their handling of personal data in employment and recruitment[132]
- whether they are limiting the impact of the exemption to certain positions and numbers of employees[133]
- if they are ensuring employees who are adversely affected by the exemption remain employed and do not suffer financial detriment or lack of opportunity for advancement,[134] and
- if they are implementing an internal audit of compliance as part of the applicant's audit program.[135]

9.6.5 The public, business, social or community interest impact

Next, the Regulation requires consideration of "the public, business, social or other community impact of the granting of the proposed exemption".[136]

In one previous decision, the NSW Administrative Decisions Tribunal noted the importance of this consideration. It stated that "exemptions provisions are designed to allow for circumstances where exclusion or preference based on a protected attribute may be regarded as reasonably necessary and in the public interest".[137]

Other reviews have considered the public interest to be a relevant criterion. In 1999, the NSWLRC recommended that the President must be satisfied that "it is in the public interest"

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[129] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(d).

[130] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 96.

[131] *BAE Systems Australia Ltd* [2025] WASAT 54 [150].

[132] *Jet Aviation Australia Pty Ltd* [2024] WASAT 122 [113]–[116].

[133] *Jet Aviation Australia Pty Ltd* [2024] WASAT 122 [110]–[111]; *Raytheon Australia Pty Ltd* [2008] WASAT 266 [58]–[60].

[134] *Raytheon Australia Pty Ltd* [2008] WASAT 266 [58]–[60].

[135] *Saab Australia Pty Ltd* [2025] WASAT 23 [111].

[136] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(e).

[137] *Auto and General Insurance Company Ltd v Anti-Discrimination Board* [2010] NSWADT 229 [33].

to grant an exemption.[138] Similarly, the LRCWA recommended the WASAT should consider if "it is in the public interest that the exemption be granted".[139]

Other jurisdictions have also regarded the public, private and/or community interest as a relevant factor, even if there is no express requirement to do so.[140] For instance, the SACAT has considered the wider public interest for granting the exemption.[141] For example, an exemption was granted to permit an applicant to advertise for, and employ, only females to support people experiencing domestic and family violence.[142]

This criterion is particularly relevant in defence-related exemptions, which some have questioned. Over the past 20 years, ADNSW – along with tribunals in the ACT, Queensland, SA, Victoria and WA – have granted temporary exemptions to companies that have defence contracts with the United States Government.[143] These exemptions permit companies to engage in racial discrimination by not employing people of specified nationalities or national origin, or by limiting employment opportunities for them.

In such cases, relevant factors have included:

- the national interest of Australia's defence needs and capabilities[144]
- the company's contribution to the economy and community[145]
- whether the public interest is served by consistency and predictability in granting exemptions in similar circumstances[146]
- the interests of uniformity and conformity with decisions in other jurisdictions[147]
- for a renewal application, that there has been no material change.[148]

In contrast, in one case the Northern Territory Anti-Discrimination Commissioner (NTADC) determined it was not in the public interest for this type of exemption to be granted. The

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[138] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) appendix A: Draft Anti-Discrimination Bill 1999, cl 70(1)(d).

[139] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 96.

[140] See, eg, *Pulteney Grammar School v Equal Opportunity Tribunal* [2007] SASC 308 [14]; *BAE Systems Australia Ltd* [2019] WASAT 79 [23]; *Linfox Australia Pty Ltd* [2015] VCAT 528 [56]–[57]; *Raytheon Australia Pty Ltd v Human Rights Commission* [2008] ACTAAT 19 [51]–[52]; *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [34].

[141] See, eg, *Re Dieri Aboriginal Corporation RNTBC* [2022] SACAT 42 [7] considering *Pulteney Grammar School v Equal Opportunity Tribunal* [2007] SASC 308 [14].

[142] *Save the Children Australia* [2022] SACAT 106 [33].

[143] See, eg, NSW, *Government Gazette*, No 81, 1 July 2005, 3495–3496; *Raytheon Australia Pty Ltd v ACT Human Rights and Discrimination Commissioner* [2012] ACAT 37; *Raytheon Australia Pty Ltd* [2008] QADT 1; *Raytheon Australia Pty Ltd* [2011] SAEOT 6; *BAE Systems Australia Ltd* [2012] VCAT 349; *Thales Australia Ltd v Commissioner for Equal Opportunity* [2012] WASAT 222.

[144] See, eg, *BAE Systems Australia Ltd* [2025] WASAT 54 [139]–[140]; *Saab Australia Pty Ltd* [2025] WASAT 23 [100]–[101]; *Linfox Australia Pty Ltd* [2015] VCAT 528 [56].

[145] See, eg, *BAE Systems Australia Ltd* [2025] WASAT 54 [138]; *Saab Australia Pty Ltd* [2025] WASAT 23 [99]; *Linfox Australia Pty Ltd* [2015] VCAT 528 [56].

[146] See, eg, *BAE Systems Australia Ltd* [2025] WASAT 54 [139]; *Saab Australia Pty Ltd* [2025] WASAT 23 [100]–[101]; *Linfox Australia Pty Ltd* [2015] VCAT 528 [58].

[147] *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 [48]; *Linfox Australia Pty Ltd* [2015] VCAT 528 [58].

[148] *BAE Systems Australia Ltd* [2019] WASAT 79 [25], citing *Thales Australia Ltd* [2012] WASAT 222 [16].

NTADC was not satisfied that there was adequate evidence about the connection between an economic downturn and national security.[149]

Some have criticised the use of this criterion in defence-related cases. One argument is that "[t]he broad 'public interest' criterion has opened up the exemptions power so widely that what a discrimination statute promises in one part, it takes away in another".[150]

One submission suggested that the ADA could instead be amended to include an exception for defence cases or provide separate legislation for these cases.[151]

9.6.6 Any conditions or limitations

Finally, the Regulation requires consideration of "any conditions or limitations to be contained in the proposed exemption".[152]

Conditions and limitations may be included in an exemption to mitigate the impact of the proposed conduct. For instance, many defence-related exemptions include conditions requiring regular reporting to ADNSW to ensure appropriate training programs and policies are being implemented.[153]

While other discrimination laws do not express this criterion, exemption orders in other jurisdictions often also include conditions and limitations.[154]

9.7 Other potential criteria

Discrimination laws in other jurisdictions provide other exemption criteria that are not found in the Regulation. This raises the question of whether the ADA should require ADNSW to consider other criteria when assessing exemption applications.

9.7.1 Whether any other person or body supports the application

One issue is whether the ADA should require consideration of whether anyone else supports the exemption application.

For instance, the QCAT or the Queensland Industrial Relations Commission will consider "[w]hether any other persons or bodies other than the applicant support the application".[155] The Queensland Act allows the QHRC to make submissions in relation to an exemption

[149] *Exemption Application by Raytheon Australia Pty Ltd* (NT Anti-Discrimination Commission, ADC2007/027, July 2007) [7.12]–[7.14].

[150] S Rice, "Staring down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law" (2011) 10 *Canberra Law Review* 97, 112.

[151] First Peoples Disability Network, *Submission AD108* [11.47]–[11.50].

[152] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(f).

[153] See, eg, NSW, *Government Gazette*, No 23, 25 January 2024, n2024-0158; NSW, *Government Gazette*, No 257, 5 July 2024, 1–5.

[154] See, eg, *ASC Pty Ltd* [2020] SACAT 30 [16]; *Seeing Machines Ltd* [2022] VCAT 214, 3–6; *BAE Systems Australia Ltd* [2025] WASAT 54 [183]–[192].

[155] *Protech Personnel Pty Ltd* [2019] QIRC 175 [9].

application, and the relevant decision-making body will take into account any submission it provides.[156]

9.7.2 The effect of not granting the exemption

A further question is whether the ADA should require consideration of the effect of not granting the exemption. That is, what will arise if the proposed action is not taken?

Some other jurisdictions have considered this in case law. For instance, in SA, the SACAT does consider the consequence of refusing an exemption by assessing whether:

> the general prohibition would be unreasonably harsh or burdensome in the applicant's particular circumstances … It is to be expected, however, that an applicant for an exemption will need to establish more than that compliance with the relevant prohibition is inconvenient or irksome.[157]

In Queensland, factors relevant in assessing the effect of not granting the exemption include whether:

- there will be significant financial, civil or criminal penalties[158]
- the applicant would be able to provide critical services and support essential to Australia's defence and national security interests,[159] and
- there will be an adverse impact on the economy and employment opportunities.[160]

Some of these factors overlap with existing NSW criteria, such as the "appropriate or reasonable" and "public interest" criteria.[161]

9.7.3 Other considerations

Other criteria may also be relevant. For instance, the Tasmanian Anti-Discrimination Commissioner provides a list of other factors it may consider relevant in assessing exemptions. These include whether:

- any other laws prohibit the conduct that is to be exempted
- an exemption is reasonable and likely to have the beneficial effect planned, and
- other persons affected by the exemption will suffer by being excluded.[162]

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[156] *Anti-Discrimination Act 1991* (Qld) s 113(2). See, eg, *Protech Personnel Pty Ltd* [2019] QIRC 175 [15]–[16]; *Team Blake Pty Ltd* [2024] QIRC 163 [27].

[157] *Pulteney Grammar School v Equal Opportunity Tribunal* [2007] SASC 308 [14].

[158] See, eg, *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [92]; *Saab Australia Pty Ltd* [2025] QIRC 21 [76]; *Ascent Pty Ltd* [2024] QIRC 234 [69].

[159] See, eg, *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [92].

[160] See, eg, *Jet Aviation Australia Pty Ltd* [2024] QIRC 133 [92]; *Saab Australia Pty Ltd* [2025] QIRC 21 [76]; *Ascent Pty Ltd* [2024] QIRC 234 [69].

[161] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(a), cl 6(1)(e).

[162] Tasmania, Office of the Anti-Discrimination Commissioner, "Exemptions: How Does the Commissioner Make a Decision?" <https://www.antidiscrimination.tas.gov.au/exemptions> (retrieved 1 July 2026).

There are limited published cases considering these criteria.[163] Some of these factors may overlap with NSW criteria on whether the exemption is "appropriate and reasonable".[164]

Question 38: The exemptions criteria

What, if any, changes should be made to the exemptions criteria?

[163] See, eg, *Koch* [2025] TASCAT 209 [39]–[41].

[164] *Anti-Discrimination Regulation 2019* (NSW) cl 6(1)(a), cl 6(1)(e).

10 Other proactive and preventative mechanisms

In brief

In this chapter, we consider a range of other possible proactive and preventative mechanisms to promote compliance with the *Anti-Discrimination Act 1977* (NSW) and to achieve substantive equality. These include broader investigation and inquiry powers, as well as a greater role for Anti-Discrimination NSW in complaints processes. We also outline other potential options to support a positive duty to prevent unlawful conduct, if this is introduced in NSW. We also consider powers to seek prosecutions and civil penalties for serious conduct. We ask if any of these mechanisms should be implemented in NSW.

10.1 Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) is based on an "individual complaints-based model".[1] In previous chapters, we considered this model and asked if aspects of the ADA's complaints procedures could be improved and be more accessible. In this chapter, we ask if other measures are needed to improve compliance with the ADA, address systemic discrimination, and promote substantive equality.

One benefit of an individual complaints-based model is that it gives complainants an opportunity to be heard, to express how they feel, and to feel ownership over the outcome. However, there may be many barriers to making a complaint.

These include:

- individuals and groups may lack awareness of the ADA and how to make a complaint
- the time taken for complaints to be made and progress through Anti-Discrimination NSW (ADNSW) and NSW Civil and Administrative Tribunal (NCAT)
- the cost of legal advice and representation
- the negative impacts of alleged discrimination on individuals
- the sometimes re-traumatising nature of making a complaint and going through a complaint resolution process
- the power imbalance that can exist when a respondent is well-resourced, and
- the risk of victimisation where an individual has an ongoing relationship with the respondent.

Many have also questioned the ability of this model to promote substantive equality and achieve systemic change. In 1999, for instance, the NSW Law Reform Commission (NSWLRC) described the individual complaint process as a "reactive and piecemeal

[1] D Allen, "Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions" (2010) 36 *Monash University Law Review* 103, 103.

approach to achieving equal opportunity which neglects the need to deal with systemic discrimination".[2]

Many submissions to our review echoed these concerns. They called for a greater role for ADNSW, or another government agency, to proactively enforce and promote compliance with discrimination law, prevent unlawful conduct and address systemic concerns.[3]

For instance, options could include providing ADNSW with:

- a more proactive role in the complaints process, such as greater powers to assist parties, initiate complaints, or intervene in ADA proceedings
- wider investigation and inquiry powers, beyond its role in the complaints process
- a power to prosecute breaches and/or seek civil penalty orders, and
- wider educative, research and standard-setting powers.

These issues may arise for consideration if NSW introduces a positive duty to take steps to eliminate all, or certain, forms of conduct prohibited by the ADA. Positive duties have been introduced in Victoria, the Australian Capital Territory (ACT), the Northern Territory (NT) and federally under the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*).[4] In our previous consultation paper, we asked if NSW should do the same.[5]

However, some options raised in this chapter might merit consideration even if NSW does not introduce a positive duty. Regardless of whether NSW has such a duty, a key issue is whether proactive enforcement and regulatory powers could better promote compliance with the ADA.

In considering these options, we invite you to reflect on whether they would improve access to justice and better achieve the ADA's objectives. In designing any possible reforms, attention may also need to be given to whether they would create even more complexity (for example, inconsistency or overlap) across different regimes, as well as their resourcing implications.

10.2 An overview of the role of ADNSW

Before considering the potential options for reform, we first outline the existing functions of ADNSW. The ADA confers many of these functions on the President of the Anti-Discrimination Board. In practice these are delegated to the staff of ADNSW. Throughout this consultation paper, for simplicity we refer to ADNSW as the body exercising the President's functions.

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[2] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.192].

[3] See, eg, Equality Australia, *Preliminary Submission PAD07*, 21, 23; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [120]–[124]; Cleaning Accountability Framework, *Preliminary Submission PAD51*, 2; NSW Bar Association, *Preliminary Submission PAD86* [56]–[59]; Anonymous, *Preliminary Submission PAD89*, 39; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Law Society of NSW, *Preliminary Submission PAD31*, 15–16; Shooters Union NSW, *Preliminary Submission PAD05*, 2; Coalition Against Caste Discrimination, *Preliminary Submission PAD28*, 27.

[4] *Equal Opportunity Act 2010* (Vic) s 15; *Discrimination Act 1991* (ACT) s 75; *Anti-Discrimination Act 1992* (NT) s 18A–s 18D; *Sex Discrimination Act 1984* (Cth) s 47C.

[5] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful Conduct*, Consultation Paper 24 (2025) [11.63]–[11.83].

As detailed elsewhere in this consultation paper, ADNSW plays a leading role in administering the ADA complaints process. ADNSW also administers the complaints scheme under the *Conversion Practices Ban Act 2024* (NSW).

The ADNSW President has additional powers to intervene in proceedings before the NSW Industrial Relations Commission (NSWIRC). For example, they can intervene in any proceedings that concern unlawful discrimination under the ADA.[6] They also have the power to seek a variation of an industrial instrument to remove unlawful discrimination.[7] Under current industrial relations laws, all state awards must include a clause that explicitly seeks to prevent and eliminate discrimination on grounds covered by the ADA.[8] The President may also appeal a single member's decision to the Full Bench of the NSWIRC if the President considers that the decision is inconsistent with ADA principles.[9]

The ADA confers other functions on ADNSW too. By resolution of its board, ADNSW can carry out several functions "[f]or the purpose of eliminating discrimination and promoting equality and equal treatment of all human beings".[10] These resolutions are to be implemented by the ADNSW President.[11] Under this discretionary power, ADNSW can:

- review NSW laws
- consult with government, business, industry and community groups about how to improve services and conditions affecting minority groups and other groups experiencing discrimination and inequality
- hold public inquiries
- develop human rights programs and policies, and
- work with academics and others carrying out investigations, research or inquiries regarding discrimination where appropriate, and for those purposes, disclose information obtained under the ADA to those people.[12]

ADNSW can also develop and promote codes of practice.[13]

ADNSW must report annually to the Attorney General regarding the administration of the ADA, any research it has undertaken, and any recommendations for eliminating or amending laws that discriminate on protected grounds.[14]

The Attorney General can also require ADNSW to examine and report on a law, a proposed law, a practice (including an alleged or proposed practice) that conflicts or may conflict with the ADA.[15] This examination is to be implemented by the ADNSW President.[16]

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[6] *Industrial Relations Act 1996* (NSW) s 167(2).

[7] *Industrial Relations Act 1996* (NSW) s 169(4)(b).

[8] *Principles for Review of Awards* [1998] NSWIRComm 661.

[9] *Industrial Relations Act 1996* (NSW) s 187(1)(d).

[10] *Anti-Discrimination Act 1977* (NSW) s 119(1).

[11] *Anti-Discrimination Act 1977* (NSW) s 121A(a).

[12] *Anti-Discrimination Act 1977* (NSW) s 119(1).

[13] *Anti-Discrimination Act 1977* (NSW) s 120A.

[14] *Anti-Discrimination Act 1977* (NSW) s 122.

[15] *Anti-Discrimination Act 1977* (NSW) s 120.

[16] *Anti-Discrimination Act 1977* (NSW) s 121A(b).

While its existing powers are broad, ADNSW submits that budgetary and other constraints limit its ability to exercise them. It emphasises that "[t]he protections of the ADA and the powers of President and board can only be effective if ADNSW has the means and resources to carry out these powers".[17] Many submissions also emphasised the importance of ensuring ADNSW is funded adequately to perform its existing, and any new, functions.[18]

10.3 An increased role for ADNSW in complaints processes

The complaints system can be costly and confusing, especially for people with limited access to legal advice and representation. To address this, options could include conferring new powers on ADNSW (or another agency) to:

- assist the parties in bringing a complaint to NCAT
- initiate complaints on its own motion
- investigate complaints on ministerial referral
- investigate withdrawn complaints
- consider any new positive duty during investigations and conciliations, and/or
- intervene in proceedings or appear as amicus curiae.

Further options are considered elsewhere in this consultation paper. This includes the option to provide ADNSW with the power to enforce settlement agreements made after conciliation (see chapter 7).

10.3.1 Assisting parties to make complaints to NCAT

As discussed in chapter 4, the ADA allows ADNSW to help people at the initial stage of making a complaint to ADNSW.[19] This could be expanded by empowering ADNSW to assist parties to prepare for, and present, their case to NCAT.

Other Australian discrimination laws allow anti-discrimination agencies to do this.[20] For example, under federal law:

- complainants can ask the Australian Human Rights Commission (AHRC) for assistance with preparing their court forms, and
- complainants and respondents can seek assistance based on hardship from the Attorney-General.[21]

In Western Australia, the Commissioner for Equal Opportunity is required to assist complainants with presenting their case to the State Administrative Tribunal of Western

[17] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 22.

[18] See, eg, Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 19; Equality Australia, *Preliminary Submission PAD07*, 21, 23; Legal Aid NSW, *Preliminary Submission PAD87*, 35, 41, 43; Unions NSW, *Preliminary Submission PAD90* [50], [56].

[19] *Anti-Discrimination Act 1977* (NSW) s 88A.

[20] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46PT, s 46PU; *Equal Opportunity Act 1984* (WA) s 93(2), s 93A; *Equal Opportunity Act 1984* (SA) s 95C.

[21] *Australian Human Rights Commission Act 1986* (Cth) s 46PT, s 46PU.

Australia on request.[22] The Commissioner can contribute to some costs and provide assistance or representation on appeal to the Supreme Court of Western Australia.[23]

Similarly, in South Australia, the Commissioner for Equal Opportunity has discretion to provide representation for complainants and respondents in proceedings before the South Australian Civil and Administrative Tribunal (SACAT).[24]

Some submissions said that ADNSW should have a positive obligation to help vulnerable applicants through the complaints process. For instance, by:

- obtaining documents from the state and helping in other procedural matters critical to the presentation of their case,[25] and
- providing information to applicants about what evidence they should gather to support their complaint to NCAT.[26]

Another view is that anti-discrimination agencies should play a greater role in strategically enforcing the law, including assisting complainants to pursue test cases.[27] For instance, the UK Equality and Human Rights Commission (UKEHRC) assists complainants instead of handling complaints itself. This can involve legal advice, legal representation or facilities for settling a dispute.[28] This has also been discussed as an option in the Australian context.[29]

The UKEHRC uses these powers strategically, based on priority areas. Other considerations include the merit of the case, the likelihood of achieving the desired result, and whether a successful outcome would preserve or strengthen the interpretation of the law rather than risk setting an undesirable precedent.[30]

Implementing similar powers in NSW could enable ADNSW to assist with cases that are in the public interest. However, it would require a greater resource allocation. It may also raise questions about ADNSW's independence as a complaint handling agency.

Support and advice needs could be met in other ways. Several submissions argued that free legal services should be funded adequately, so that complainants receive advice and support as early as possible. Some argued that the ADA should require ADNSW to "embed"

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[22] *Equal Opportunity Act 1984* (WA) s 93(2)(a).

[23] *Equal Opportunity Act 1984* (WA) s 93(2), s 93A.

[24] *Equal Opportunity Act 1984* (SA) s 95C.

[25] National Justice Project, *Preliminary Submission PAD39*, 3.

[26] HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 20.

[27] D Allen, "Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions" (2010) 36 *Monash University Law Review* 103, 111; B Gaze and R Hunter, "Access to Justice for Discrimination Complainants: Courts and Legal Representation" (2009) 32 *UNSW Law Journal* 699, 723; T MacDermott, "The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants" (2018) 18 *International Journal of Discrimination and the Law* 22, 33.

[28] *Equality Act 2006* (UK) s 28.

[29] T MacDermott, "The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants" (2018) 18 *International Journal of Discrimination and the Law* 22, 33.

[30] See UK, Equality and Human Rights Commission, "How We Decide Whether to Use Our Powers" (25 June 2021) <www.equalityhumanrights.com/our-work/our-legal-work/how-we-decide-when-to-use-our-legal-powers> (retrieved 16 May 2024).

a process for pro bono referrals to lawyers.[31] In practice, ADNSW refers people to legal services, such as Legal Aid NSW, "when appropriate".[32]

Question 39: Assisting parties

What, if any, changes should be made to ADNSW's power to assist parties to make complaints to NCAT?

10.3.2 The power to initiate complaints

As explored in chapters 4 and 5, one of ADNSW's core functions is to investigate and conciliate complaints. In some situations, it can refer a complaint to NCAT.[33] However, ADNSW does not have the power to initiate complaints or commence a claim in NCAT.

ADNSW can take steps to enforce orders by NCAT in certain circumstances (see chapter 8).[34] However, this occurs infrequently. It also requires the complainant to first pursue their complaint at NCAT, which can be a burdensome process.

To reduce the burden on complainants, one option could be to empower ADNSW to initiate complaints in NCAT or another relevant forum. An amendment to the ADA could empower ADNSW, or another NSW agency, to initiate complaints in a range of circumstances such as where:

- a case is in the public interest, for example because it deals with a systemic issue
- it affects a group or class of people
- a complainant is vulnerable, or
- after an inquiry or investigation.[35]

Some submissions supported empowering ADNSW, or another agency, to investigate and commence proceedings on its own motion, particularly in relation to cases involving systemic discrimination.[36] For example, it was suggested that ADNSW could bring an action where there are several complainants with similar issues, or where the respondent is a large company or government agency.[37]

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[31] Anonymous, *Preliminary Submission PAD89*, 39. See also Dementia Australia, *Preliminary Submission PAD17*, 7; People with Disability Australia, *Preliminary Submission PAD53*, 11; Scarlet Alliance, Australian Sex Workers Association, *Preliminary Submission PAD74*, 6; Greens NSW, *Preliminary Submission PAD85*, 14.

[32] Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 5, 13.

[33] *Anti-Discrimination Act 1977* (NSW) s 95(1).

[34] *Anti-Discrimination Act 1977* (NSW) s 113.

[35] See, eg, Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review,* Final Report (2008) [6.171]; *Human Rights Commission Act 2005* (ACT) s 48(3); *Equality Act 2006* (UK) s 28; R L Banks, "A Rose is a Rose: But not all Discrimination Smells the Same: An Exploration of the Capacity of the Psychology of Stigma, Prejudice and Discrimination to Enhance Discrimination Law" (PhD Thesis, University of Tasmania, 2023) 282.

[36] M Thornton, *Preliminary Submission PAD59*, 4; Community Legal Centres NSW, *Preliminary Submission PAD73* [40]; NSW Bar Association, *Preliminary Submission PAD86* [56]; Women's Legal Service NSW, *Preliminary Submission PAD55* [56].

[37] M Thornton, *Preliminary Submission PAD59*, 3, 4.

The NSWLRC previously recommended giving the President the power to appear in the tribunal in a representative capacity and seek relief on behalf of members of a group.[38]

Models in other jurisdictions

Some other Australian anti-discrimination agencies have the power to initiate complaints.[39] These could provide models for reform.

For example, the ACT Human Rights Commission (ACTHRC) can, on its own initiative, consider matters where a person:

- may be able to make a complaint but has not, or
- has withdrawn their complaint but it is in the public interest for the matter to be considered (for example, because it indicates a systemic problem).[40]

The ACTHRC can prepare a report and refer the matter to the ACT Civil and Administrative Tribunal (ACAT). If so, the ACTHRC is the complainant.[41]

The equivalent powers in Queensland are more restricted. The Queensland Human Rights Commission (QHRC) can refer matters to the Queensland Civil and Administrative Tribunal (QCAT) if a Commissioner-initiated investigation is not resolved at conciliation. In these cases, the QHRC is the complainant.[42] The initial criteria for investigation are:

- If during the course of carrying out the QHRC's functions, a possible case of a contravention of the action against a group or class of people is discovered, the matter is of public concern, and the Minister agrees.
- In limited circumstances when an offence against the Act is alleged to have been committed. For example, improper communication of official information, providing false or misleading information, obstruction, or contempt of the QHRC.[43]

The QHRC considered that this did not give it a sufficient basis to conduct investigations into systemic issues (and, therefore, initiate complaints for determination by QCAT). It found that these deficiencies might explain why this had rarely, if ever, been used.[44]

The South Australian Equal Opportunity Commissioner can lodge a complaint with SACAT if, following an investigation, the Commissioner forms the opinion that the matter should be referred for hearing and determination.[45] Unlike the Queensland model, this does not require ministerial approval at any stage of the complaint or investigation process.

The Tasmanian model is broadest. The Tasmanian Anti-Discrimination Commissioner can investigate any discrimination or prohibited conduct without the lodgement of a complaint if

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[38] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 156.

[39] *Human Rights Commission Act 2005* (ACT) s 48, s 53BA, s 53C; *Anti-Discrimination Act 1991* (Qld) s 155(4), s 155(5); *Anti-Discrimination Act 1998* (Tas) s 60(5), s 60(6); *Equal Opportunity Act 1984* (SA) s 95D(1).

[40] *Human Rights Commission Act 2005* (ACT) s 48(3).

[41] *Human Rights Commission Act 2005* (ACT) s 84, s 53BA, s 53C, s 49, s 3 definition of "complainant".

[42] *Anti-Discrimination Act 1991* (Qld) s 155(4), s 155(5).

[43] *Anti-Discrimination Act 1991* (Qld) s 155(2), s 220, s 221, s 222, s 223.

[44] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 251.

[45] *Equal Opportunity Act 1984* (SA) s 95D(1).

the Commissioner is satisfied that there are reasonable grounds for doing so.[46] In these circumstances, the Commissioner pursues the complaint as if it were the complainant.[47]

Potential conflicts of interest concerns

Another issue is whether this option could conflict with ADNSW's role as an independent complaint-handling body. For example, conflict of interest concerns could arise if ADNSW conciliates a complaint, which does not settle, and later takes enforcement action against the respondent.

Other reviews have considered this issue.[48] For instance, in its 1999 report, the NSWLRC observed that a major criticism of empowering the ADNSW President to initiate complaints is that such powers could:

- conflict with the President's "non-partisan" role in investigation conciliation, and
- lead to perceptions that ADNSW is biased in favour of complainants.[49]

The NSWLRC did not agree with this, finding there were only limited adverse perceptions of bias against ADNSW.[50] It also noted arguments that the specialist expertise of ADNSW makes it well-placed to detect instances and patterns of discrimination, especially in public interest cases which affect a wide group of persons.[51] The NSWLRC ultimately concluded that introducing this power would bring NSW discrimination laws into line with federal and other state legislation.[52]

Options for avoiding possible conflicts or perceptions of bias could include:

- separating complaint handling and other functions in different teams within ADNSW[53]
- empowering a different agency, like SafeWork NSW or a new agency, to regulate compliance with the ADA,[54] and
- adopting a voluntary dispute resolution model, as in Victoria (see chapter 5).[55]

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[46] *Anti-Discrimination Act 1998* (Tas) s 60(2).

[47] *Anti-Discrimination Act 1998* (Tas) s 60(5).

[48] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 256; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) 284–285.

[49] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.208].

[50] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.212].

[51] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.207].

[52] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.211].

[53] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 16.2. See also Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) 284–285.

[54] See, eg, Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 236.

[55] See, eg, Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review*, Final Report (2008) [1.116].

Question 40: Initiating complaints

Should ADNSW be empowered to initiate complaints and/or commence a claim in NCAT? If so, under what circumstances should it be allowed to do so?

10.3.3 Powers to investigate on ministerial referral

Another option could be to provide for ministerial referrals to ADNSW. Currently, the ADA allows the Minister to refer any matter to NCAT as a complaint.[56] This power has never been used.

In 1999, the NSWLRC recommended this be amended to state that the Minister may refer a matter to the [ADNSW] President for investigation. It also recommended that the President should be given the power to make recommendations to the Minister that a particular matter be referred for investigation.[57] It considered the President should be able to consider factors such as:

- the seriousness of the suspected discrimination
- the number of people who may be affected
- whether the conduct is likely to be continuing, or the period that has elapsed since the conduct occurred
- the likelihood of a complaint being made
- if a complaint has been made, the complainant's ability to conduct the matter effectively, and
- the public interest.[58]

The NSWLRC anticipated this would allow the President to investigate suspected unlawful conduct where no complaint had been lodged but there were patterns of discrimination involving duty holders who "persistently breached" the ADA.[59] The NSWLRC suggested that, in these cases, the President could prepare a written complaint based on their findings, which they could then attempt to conciliate with the party under investigation.[60]

A similar process is available in Queensland. The Queensland Human Rights Commissioner may investigate a possible contravention against a group or class of people that is of public concern and if the Minister agrees. The usual complaint processes apply – that is, conciliation, or referral to a tribunal (if it cannot be resolved).[61]

However, the QHRC found this also did not provide a sufficient basis for it to conduct investigations into systemic issues. It noted the process did not allow for other outcomes, such as public reports.[62]

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[56] *Anti-Discrimination Act 1977* (NSW) s 95(2).

[57] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 125.

[58] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 126.

[59] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.218].

[60] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.219], [8.220].

[61] *Anti-Discrimination Act 1991* (Qld) s 155(2)(a), s 155(3).

[62] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 251.

Question 41: Ministerial referrals for investigation

What, if any, changes should be made to ADNSW's power to investigate matters on referral from the Minister?

10.3.4 Powers to investigate withdrawn complaints

Complaints are terminated once they are withdrawn by a complainant.[63] ADNSW does not have the power to continue investigations of these complaints or the circumstances giving rise to a complaint, particularly where the issues are systemic in nature.[64]

However, agencies in other jurisdictions may continue to investigate withdrawn complaints where it appears to be in the public interest, or where the agency is not satisfied it was withdrawn voluntarily.[65] In the Australian Capital Territory (ACT), the individual who made the complaint stops being the complainant and the commission becomes the complainant.[66] The Tasmanian Anti-Discrimination Commissioner can continue investigating a complaint after it is withdrawn if is satisfied that the complaint was not withdrawn voluntarily or it is in the public interest to do so.[67]

The Law Reform Commission of Western Australia recommended that the Commissioner for Equal Opportunity should have the power to investigate matters within the scope of the Act on its own motion. This includes where a complaint has been withdrawn and it is in the public interest.[68]

Question 42: Investigating withdrawn complaints

Should ADNSW be empowered to continue investigating withdrawn complaints? If so, under what circumstances should it be allowed to do so?

10.3.5 A power to consider a positive duty in complaints processes

A further option could be to expressly allow ADNSW to consider a positive duty, if implemented in NSW, when investigating or conciliating individual complaints of unlawful conduct under the ADA.

Some other discrimination laws provide for this. The NT Anti-Discrimination Commissioner can consider whether the positive duty has been complied with when conciliating a complaint.[69] The ACT Human Rights Commissioner can also consider whether the duty has been met when considering a discrimination complaint. The Commissioner may ask for relevant information or documents to be produced.[70]

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[63] *Anti-Discrimination Act 1977* (NSW) s 92B.

[64] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17.

[65] *Human Rights Commission Act 2005* (ACT) s 48(3); *Anti-Discrimination Act 1998* (Tas) s 68(5)(a).

[66] *Human Rights Commission Act 2005* (ACT) s 49.

[67] *Anti-Discrimination Act 1998* (Tas) s 68(5)(a).

[68] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 163.

[69] *Anti-Discrimination Act 1992* (NT) s 102.

[70] *Human Rights Commission Act 2005* (ACT) s 52(3), s 73.

Some submissions support giving NCAT the discretion to consider the positive duty when determining discrimination complaints.[71]

A more significant reform would be to provide people with a freestanding right to claim for breach of the positive duty. However, this is not currently an option in any of the jurisdictions with positive duties in Australia. For example, individuals can raise concerns with the AHRC about whether organisations are complying with the positive duty under the *Sex Discrimination Act*.[72] The AHRC may then decide to investigate a possible breach of the duty (see below). But individuals cannot make complaints to the AHRC or seek remedies for breach of the duty.

Some have expressed support for allowing people to seek a remedy for failure to comply with the duty, such as in the United Kingdom. It has been argued that:

- with minimal enforcement, the Victorian positive duty is having limited impact on employers' behaviour,[73] and
- without an individual remedy, the burden of discrimination is placed back on the victim "who lacks any meaningful, structured and enforceable avenue of complaint".[74]

Another view, however, is that complainants may face the same difficulties as individual complainants in existing complaints processes, such as bearing the burden of proof.[75]

Question 43: Considering breaches of a positive duty

a. If a positive duty was implemented in NSW, should ADNSW be empowered to consider the positive duty during complaints processes? If so, under what circumstances should it be allowed to do so?

b. If a positive duty was implemented in NSW, should there be an individual remedy for failure to comply with the duty?

10.3.6 Intervention and amicus curiae powers

Another option is to provide ADNSW with the power to effectively intervene in proceedings or appear in proceedings as amicus curiae (a "friend of the court").[76] Some have argued that anti-discrimination agencies could play a role in shaping settlement outcomes by helping to develop the law as interveners or amicus.[77]

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[71] Racial Justice Centre Ltd, *Preliminary Submission PAD63*, 11.

[72] See, eg, Australian Human Rights Commission, "The Positive Duty in the Sex Discrimination Act" (2026) <https://humanrights.gov.au/know-your-rights/rights-of-individuals/workplace-rights/positive-duty-sex-discrimination-act> (retrieved 27 May 2026).

[73] Australian Discrimination Law Experts Group, Submission to the Queensland Human Rights Commission *Review of Queensland's Anti-Discrimination Act* (1 March 2022) 40.

[74] Racial Justice Centre Ltd, *Preliminary Submission PAD63*, 11.

[75] D Allen, "An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)" (2020) 44 *Melbourne University Law Review* 459, 499.

[76] NSW Bar Association, *Preliminary Submission PAD86* [58]; N Rees, S Rice and D Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [15.13.9].

[77] A Blackham and D Allen, "Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom" (2019) 31 *Australian Journal of Labour Law* 253, 274.

Both these roles require an individual to bring a complaint. An amicus curiae is a "friend to the court" who assists the court on points of law in particular cases. They are generally not party to the proceedings, do not file pleadings or lead evidence, and they may not lodge an appeal. In contrast, an intervener is party to the proceedings that joins existing litigation to protect their legal interests in cases where a judgment might affect them.

Several anti-discrimination agencies in other Australian jurisdictions can intervene or appear as amicus curiae in proceedings.[78] We heard that implementing intervention and amicus curiae powers comparable to those available in Victoria and federally would allow ADNSW to more effectively address discrimination.[79]

Amicus curiae powers could be strengthened

An option could be to strengthen ADNSW's power to assist NCAT. The ADA allows NCAT to arrange for an ADNSW staff member to appear and assist NCAT with proceedings regarding a complaint.[80] One submission said this power was used in the past to allow ADNSW to instruct counsel to assist the tribunal. However, it is not currently used due to ADNSW's lack of resources.[81]

The federal model provides clearer and more detailed criteria about when AHRC Commissioners can assist the Federal Court as amicus curiae in discrimination cases. An AHRC Commissioner may seek leave to appear as amicus where:

- the Commissioner thinks the orders may affect to a significant extent the human rights of persons who are not parties to the proceedings,
- the Commissioner believes that the proceedings have significant implications for the administration of the relevant legislation, or
- the proceedings involve special circumstances such that the Commissioner is satisfied that it would be in the public interest to assist the court as amicus curiae.[82]

Intervention powers

In 1999, the NSWLRC thought the power to assist NCAT was insufficient. This was partly because the staff member does not represent the complainant.[83] The NSWLRC recommended that the President should be able to intervene in proceedings before the tribunal on behalf of a complainant, where appropriate and with leave.[84]

Other states and territories offer models to consider. For example, the ACTHRC can intervene to make submissions about compensation with ACAT's consent.[85] The South

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[78] *Australian Human Rights Commission Act 1986* (Cth) s 31(j); *Equal Opportunity Act 2010* (Vic) s 159; *Anti-Discrimination Act 1998* (Tas) s 7(b). See also *Human Rights Commission Act 2005* (ACT) s 53E(4).

[79] NSW Bar Association, *Preliminary Submission PAD86* [58].

[80] *Anti-Discrimination Act 1977* (NSW) s 99(1).

[81] Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 10.

[82] *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

[83] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [9.141].

[84] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 146.

[85] *Human Rights Commission Act 2005* (ACT) s 53E(2)(c), s 53E(4).

Australian Commission for Equal Opportunity may assist SACAT in proceedings either at the tribunal's request or with leave.[86]

The AHRC could also provide a model for these powers. It can intervene, with leave of the court, in proceedings that involve issues of race, sex and disability discrimination, human rights issues, and equal opportunity in employment.[87]

The AHRC can apply to intervene when a relevant human rights or discrimination issue arises in a case and the AHRC could provide expert assistance that would not otherwise be available to the court.[88] The AHRC has intervened in several dozen cases to date, such as in considering the meaning of gender identity discrimination, indirect discrimination in education, and the "inherent requirement" defence to discrimination in employment.[89]

Another option could be to expand the list of offices or persons who can intervene in NCAT matters. In NSW, NCAT currently permits intervention in cases from

- the Attorney General
- a minister who administers the legislation that is in issue in the proceedings, and
- any other person who is authorised by a law or procedural rules to intervene in the proceedings.[90]

The ADA could be amended to empower ADNSW to intervene in NCAT matters in cases involving similar criteria to the AHRC model.

Question 44: Intervention and amicus curiae powers

a. What, if any, changes should be made to ADNSW's power to assist NCAT?

b. Should ADNSW be empowered to intervene in NCAT proceedings? If so, under what circumstances should it be allowed to do so?

10.4 Wider investigation and inquiry powers

Another option is whether ADNSW should have wider powers to investigate and report on the conduct of duty holders, independently of the complaints process.

Some have suggested that ADNSW should have broader powers to conduct investigations and inquiries on its own motion.[91] We heard ADNSW should have a "broad and flexible"

[86] *Equal Opportunity Act 1984* (SA) s 96(6).

[87] *Racial Discrimination Act 1975* (Cth) s 20(e); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb); *Disability Discrimination Act 1992* (Cth) s 67(1)(l); *Age Discrimination Act 2004* (Cth) s 53(1)(g); *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o), s 31(j).

[88] *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(o).

[89] *Giggle for Girls Pty Ltd v Tickle* [2026] FCAFC 64; *Hurst v Queensland* [2006] FCAFC 100, 151 FCR 562; Qantas *Airways Ltd v Christie* [1998] HCA 18, 193 CLR 280.

[90] *Civil and Administrative Tribunal Act 2013 No 2* (NSW) s 44(4).

[91] See, eg, Law Society of NSW, *Preliminary Submission PAD31*, 16; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Kingsford Legal Centre, *Preliminary Submission PAD35*, 9; People with Disability Australia, *Preliminary Submission PAD53*, 25.

inquiry function, allowing it to conduct inquiries to investigate patterns of discrimination and monitor compliance with the Act.[92]

Some Australian anti-discrimination agencies have broader powers that could be a model for NSW. For instance, proactive powers to investigate, or inquire into, allegations of systemic discrimination or breaches of a positive duty to prevent unlawful conduct.

10.4.1 Limitations of existing powers

Outside of the complaints process, ADNSW has the power to carry out investigations, research and inquiries relating to discrimination, particularly in relation to certain listed attributes. It is also empowered to hold public inquiries. Both powers have been used in limited cases, likely due to resource and legislative constraints.

Powers to investigate are limited

As noted above, by resolution of its board, ADNSW can carry out investigations, research and inquiries regarding discrimination. In particular, ADNSW is empowered to investigate discrimination against one or more people on the grounds of age, religious or political conviction, mental disability, and membership or non-membership of an industrial organisation. This includes discrimination based on characteristics that apply generally to, or are generally imputed to, people with these attributes.[93]

ADNSW can also carry out investigations, research and inquiries relating to discrimination or racial vilification if Multicultural NSW refers a matter to the ADNSW Board.[94]

Submissions expressed concerns that these powers are limited and not used enough.[95] In reality, the ability of ADNSW to exercise it is limited by resource constraints.[96]

In terms of legislative constraints, some submissions emphasised that ADNSW's investigation power only refers to certain attributes.[97] Some of these attributes are protected by the ADA (for example, age and "mental disability") while others are not (for example, religious or political conviction, membership or non-membership of an industrial organisation).[98] In addition, aside from the power to inquire into racial vilification when requested by Multicultural NSW, there is no ability to investigate other kinds of unlawful conduct outside of the complaints process.

Several submissions said that ADNSW should be able to investigate discrimination involving any protected attribute. It was also argued that the power to investigate racial vilification

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[92] Law Society of NSW, *Preliminary Submission PAD31*, 16. See also Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 151.

[93] *Anti-Discrimination Act 1977* (NSW) s 119(1)(a).

[94] *Anti-Discrimination Act 1977* (NSW) s 119(1)(a), s 119(1)(a1).

[95] See, eg, Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17; Vision Australia, *Preliminary Submission PAD68*, 4; Legal Aid NSW, *Preliminary Submission PAD87*, 43.

[96] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 22.

[97] Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 19; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21; NSW Bar Association, *Preliminary Submission PAD86* [59]; NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14.

[98] *Anti-Discrimination Act 1977* (NSW) s 119(1)(a).

should not require a referral.[99] Instead, it was argued that ADNSW should be able to investigate unlawful conduct more broadly, including discrimination, vilification and sexual harassment.[100]

Public inquiry powers

In addition to its limited investigation powers, ADNSW also has the power to hold public inquiries.[101] The public inquiry power has not been frequently used. In the past, this appears to have involved inviting submissions from the public and holding public hearings.[102] For example, in 1991, ADNSW held a public inquiry into pregnancy discrimination. This involved seeking written submissions from the public and holding a public hearing to explore matters requiring further investigation.[103] The inquiry found that discrimination against pregnant women was widespread. In response, ADNSW prepared a report setting out its findings and recommendations. As pregnancy discrimination was already unlawful at the time, the report focused on detailing the way in which employment philosophies and practices reinforced the disadvantages faced by pregnant women.[104]

We have not received any suggestions for changing the current public inquiry power. However, it is likely that ADNSW is unable to conduct more public inquiries due to the resourcing constraints described above.

Other jurisdictions use the powers more extensively. For example, the AHRC also has the power to conduct public inquiries.[105] It has continued to exercise this power in recent years. For example, in 2020, the AHRC released the *Respect@Work: Sexual Harassment National Inquiry Report* (Respect@Work).[106] The inquiry involved public consultations, submissions, and the publication of a final report. The report made 55 recommendations directed to all levels of government and the private sector for policy and legislative reforms to prevent and address workplace sexual harassment. The Australian Government accepted and implemented all recommendations.[107]

10.4.2 A power to investigate a breach of the positive duty

Positive duties around Australia are primarily enforced through powers to investigate alleged breaches of the positive duty. These investigation powers vary between the

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[99] NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Law Society of NSW, *Preliminary Submission PAD31*, 16; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6–7.

[100] NSW Bar Association, *Preliminary Submission PAD86* [59].

[101] *Anti-Discrimination Act 1977* (NSW) s 119(1)(f).

[102] See, eg, "Pregnancy Inquiry" (1991) 9 *Equal Time* 5; "Enquiry into Hepatitis C Related Discrimination" (2001) 48 *Equal Time* 1.

[103] "Pregnancy Inquiry" (1991) 9 *Equal Time* 5.

[104] "Why Don't You Ever See a Pregnant Waitress? Report of the Inquiry into Pregnancy Related Discrimination" (1993) 18 *Equal Time* 1.

[105] *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f)(i).

[106] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020).

[107] *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth); *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth).

jurisdictions that have a positive duty. In this section, we consider what criteria should be necessary to commence an investigation. We also consider the benefits and disadvantages of shifting the burden of enforcement from individual complaints to state agencies through this approach.

Criteria for commencing investigations

Anti-discrimination agencies typically must meet certain criteria before starting an investigation.

The NT Anti-Discrimination Commissioner can broadly "investigate compliance" with the positive duty to prevent and eliminate discrimination, sexual harassment and victimisation.[108] These are currently the broadest powers to start an investigation in Australia.

Under the *Sex Discrimination Act*, the AHRC can start an inquiry into the positive duty if the AHRC "reasonably suspects that the person is not complying".[109] Some have recommended removing the requirement for AHRC to hold a "reasonable suspicion" to conduct an inquiry. This is because of the concern that it would conflict with the secrecy provisions in the *Sex Discrimination Act* and require employees to put themselves at risk of retaliation by their employer if they raise issues with the AHRC.[110] Secrecy provisions prohibit the unauthorised disclosure of sensitive information held by the government.[111]

By comparison, Victoria has a higher threshold for investigating a contravention of its positive duty to eliminate discrimination and harassment. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) can investigate where:

- the matter raises an issue that is serious in nature, relates to a class or group of people, and cannot reasonably be expected to be resolved by dispute resolution or applying to the Victorian Civil and Administrative Tribunal
- there are reasonable grounds to suspect that one or more contraventions of the Act have occurred, and
- the investigation would advance the Act's objectives.[112]

For example, the VEOHRC recently conducted an own motion investigation into the adequacy of Bakers Delight Holdings' frameworks to prevent and respond to workplace sexual harassment. It selected Bakers Delight Holdings for this investigation because:

- retail is a high-risk industry for sexual harassment
- retail has a high rate of young and casual workers compared to other industries, who may be less likely to make complaints about unlawful behaviour, and

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[108] *Anti-Discrimination Act 1992* (NT) s 18C(1).

[109] *Australian Human Rights Commission Act 1986* (Cth) s 35B(1).

[110] Australian Discrimination Law Experts Group, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (11 October 2022) [35]–[37].

[111] *Sex Discrimination Act 1984* (Cth) s 112, s 92.

[112] *Equal Opportunity Act 2010* (Vic) s 127.

- franchise arrangements can pose complexities for preventing and responding to sexual harassment.[113]

A recent review recommended an investigation power for Queensland based on the Victorian criteria.[114]

However, the VEOHRC has recommended that its own motion investigation and inquiry powers be expanded to be similar to those vested in the AHRC under the positive duty in the *Sex Discrimination Act*. It has also recommended that the Victorian Government should extend the full range of its functions and powers to the regulation of vilification, including to issue practice guidelines, undertake research, conduct legal interventions, undertake compliance reviews, prepare action plans and conduct investigations.[115]

The VEOHRC has also suggested that it should be able to investigate any serious matter that indicates a possible contravention without the current restrictions on this power. These restrictions require the VEOHRC to have a reasonable expectation that the matter:

- relates to a class or group of persons, and
- cannot be resolved by dispute resolution or the Victorian Civil and Administrative Tribunal.[116]

10.4.3 Powers to conduct investigations

Submissions argued that anti-discrimination agencies should be able given clear powers to facilitate investigations, including powers to:

- compel the production of documents and information from witnesses/employers[117]
- enter workplaces[118]
- interview witnesses, and[119]
- issue findings.[120]

Other discrimination laws confer such powers.[121] For example, the AHRC has powers to obtain information and documents and examine witnesses, backed by penalties for failing to

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[113] Victorian Equal Opportunity and Human Rights Commission, *Preventing Sexual Harassment in Retail Franchises: Investigation under the Equal Opportunity Act 2010* (2022) 9, 10.

[114] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 17.2, rec 18.2.

[115] Victorian Equal Opportunity and Human Rights Commission, Submission to the Parliamentary Inquiry, *Anti-Vilification Protections* (31 January 2020) rec 16.

[116] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 476–477; Victorian Equal Opportunity and Human Rights Commission, Submission to the Parliamentary Inquiry, *Anti-Vilification Protections* (31 January 2020) rec 17.

[117] Equality Australia, *Preliminary Submission PAD07*, 21; Cleaning Accountability Framework, *Preliminary Submission PAD51*, 2.

[118] *Fair Work Act 2009* (Cth) s 481.

[119] Cleaning Accountability Framework, *Preliminary Submission PAD51*, 2.

[120] Cleaning Accountability Framework, *Preliminary Submission PAD51*, 2.

[121] *Australian Human Rights Commission Act 1986* (Cth) s 35N, s 21, s 22, s 23; *Anti-Discrimination Act 1991* (Qld) s 156, s 157; *Anti-Discrimination Act 1992* (NT) s 107A, s 107B; *Equal Opportunity Act 1984* (SA) s 94(2a), s 94(3); *Anti-Discrimination Act 1998* (Tas) s 60(5), s 60(6), s 69(1).

comply.[122] The QHRC also recommended they should have powers to compel the production of information and documents (including data) for own motion investigations, as well as the ability to require a person to give information or answer questions at a reasonable time and place.[123]

In addition, the Fair Work Ombudsman can investigate potential breaches of the *Fair Work Act 2009* (Cth) (*Fair Work Act*), where inspectors can inspect business premises, interview people, and require documents to be produced.[124] Unions NSW considered that unions should have similar powers under the ADA to enter workplaces and investigate potential discrimination or sexual harassment.[125]

The AHRC recently recommended that it be given:

- information-gathering powers to monitor and enforce compliance with the positive duty before commencing a formal inquiry, and
- enable better information-sharing with other regulators and the public.[126]

The AHRC argues that the absence of these powers creates unnecessary regulatory complexities and inefficiencies as it cannot obtain critical information from duty holders without commencing a formal inquiry. It considers that these difficulties are likely to be magnified by the introduction of any other positive duties under federal law.[127]

10.4.4 Outcomes after a finding of non-compliance

Submissions suggested a range of responses should be available in relation to a finding of non-compliance. For instance:

- reporting and making recommendations to Parliament
- advocating to government about necessary responses
- entering into enforceable undertakings, which are voluntary legal agreements between a regulator and an individual that has allegedly breached the law
- issuing compliance notices (with the option of applying to NCAT or a court for civil penalties for non-compliance)
- publishing practice guidance for industries and organisations, and
- issuing civil penalties.[128]

Some of these powers are available to anti-discrimination agencies in Australia. For example, the AHRC can use a range of regulatory tools if it finds the duty holder has not complied with the law. These include issuing a compliance notice, which the AHRC can

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[122] *Australian Human Rights Commission Act 1986* (Cth) s 35N, s 21, s 22, s 23.

[123] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 19.1, rec 19.2.

[124] *Fair Work Act 2009* (Cth) s 708, s 709, s 712.

[125] Unions NSW, *Preliminary Submission PAD90* [69].

[126] Australian Human Rights Commission, Submission to Attorney-General's Department, *Disability Discrimination Act 1992 (Cth) Review* (14 November 2025) 54.

[127] Australian Human Rights Commission, Submission to Attorney-General's Department, *Disability Discrimination Act 1992 (Cth) Review* (14 November 2025) 54.

[128] Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 19; Law Society of NSW, *Preliminary Submission PAD31*, 16; NSW Council for Civil Liberties, *Preliminary Submission PAD21* [134]; Inner City Legal Centre, *Preliminary Submission PAD40*, 4.

enforce by seeking an order from the Federal Court or Federal Circuit and Family Court of Australia.[129]

The AHRC, VEOHRC, and the NT Anti-Discrimination Commissioner can all enter into enforceable undertakings.[130]

The NT Anti-Discrimination Commissioner and VEOHRC can also take "any action" they consider appropriate after investigation. This can include referring the matter to a tribunal or preparing a report containing recommendations on how the duty holder can comply.[131] Both bodies can provide a report to the relevant Minister and/or publish it publicly.[132] In the NT, a report on an investigation can be referred to in new complaints or taken into account by the NT Civil and Administrative Tribunal in considering complaints.[133]

By comparison, the AHRC's power to inquire into systemic discrimination is confined to reporting to the Minister and/or publishing a report.[134]

Other reviews have found that anti-discrimination agencies should have a broad range of options for what to do after an investigation.[135] For example, the Queensland review found that, as well as preparing a report, post-investigation powers should include entering into an enforceable undertaking with the duty holder or issuing a compliance notice.[136]

One submission suggested that ADNSW should have the power to investigate suspected breaches of the Act and refer cases involving potential breaches directly to NCAT.[137]

10.4.5 A new power to investigate systemic issues

ADNSW does not have a specific power to investigate systemic issues.[138] Several submissions supported expanding the powers and functions of ADNSW to identify, investigate and challenge systemic discrimination on its own motion and monitor compliance with the ADA independent of a complaint.[139]

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[129] *Australian Human Rights Commission Act 1986* (Cth) s 35F, s 35J.

[130] *Australian Human Rights Commission Act 1986* (Cth) s 35K; *Equal Opportunity Act 2010* (Vic) s 139(2)(b), s 140; *Anti-Discrimination Act 1992* (NT) s 18D(2)(b).

[131] *Anti-Discrimination Act 1992* (NT) s 18D; *Equal Opportunity Act 2010* (Vic) s 139.

[132] *Anti-Discrimination Act 1992* (NT) s 18D(2); *Equal Opportunity Act 2010* (Vic) s 142(4).

[133] *Anti-Discrimination Act 1992* (NT) s 18D(6).

[134] *Australian Human Rights Commission Act 1986* (Cth) s 35Q.

[135] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 18.1, rec 18.2; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 163.

[136] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 18.2.

[137] People with Disability Australia, *Preliminary Submission PAD53*, 26.

[138] Anti-Discrimination NSW, *Preliminary Submission PAD83*, 17.

[139] See, eg, NSW Aboriginal Women's Advisory Network, *Preliminary Submission PAD27*, 14; Coalition Against Caste Discrimination, *Preliminary Submission PAD28*, 27; Law Society of NSW, *Preliminary Submission PAD31*, 16; People with Disability Australia, *Preliminary Submission PAD53*, 11; ACON, *Preliminary Submission PAD44*, 12; Public Interest Advocacy Centre, *Preliminary Submission PAD82*, 19; Legal Aid NSW, *Preliminary Submission PAD87*, 43; Kingsford Legal Centre, *Preliminary Submission PAD35*, 9.

This reform could be important to the effective implementation of a positive duty, if enacted. However, this could also be an option for reform regardless of whether a positive duty is introduced in NSW.

Other jurisdictions provide models for consideration. For example, since 2023, the AHRC has had the power to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination, upon the Minister's request or on its own motion.[140] It has not exercised this power yet.[141]

A power to investigate systemic unlawful discrimination is significant because it allows anti-discrimination agencies to investigate past patterns of alleged unlawful conduct. This serves a different purpose to other proactive powers, such as a positive duty to prevent unlawful conduct, which addresses future conduct. A power to investigate systemic discrimination could also provide another option to address patterns of discrimination, rather than making complex representative complaints and representative applications to court under the *Australian Human Rights Commission Act 1986* (Cth).[142]

The AHRC's power to investigate systemic discrimination grew out of its Respect@Work report and resulting reforms to the *Sex Discrimination Act* and the *Australian Human Rights Commission Act 1986* (Cth). The Respect@Work report found that there are significant cultural and systemic factors driving sexual harassment in the workplace and that addressing these drivers can be challenging. This reform was intended to enable the AHRC to inquire into systemic forms of discrimination that directly impact on substantive equality.[143]

10.4.6 Balancing the shifting burdens of an investigation power

There are some concerns that proactive investigation powers place too high a burden on respondents compared to the individual complaints model.

The VEOHRC considered that expanding its own motion investigation and inquiry powers would help shift the burden of enforcement away from individual complainants.[144] However, another view is that the complaints process is already burdensome for respondents. Own motion powers to investigate systemic discrimination may exacerbate these concerns.[145]

One way of confining this power could be to prescribe factors for the relevant agency to consider when deciding whether to investigate.

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[140] *Australian Human Rights Commission Act 1986* (Cth) s 35L(1), s 35M.

[141] Information provided by the Australian Human Rights Commission (1 June 2026).

[142] *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

[143] Australia, *Parliamentary Debates*, House of Representatives, Second Reading Speech, 27 September 2022, 1627.

[144] Victorian Equal Opportunity and Human Rights Commission, Submission to the Parliamentary Inquiry, *Anti-Vilification Protections* (31 January 2020) rec 17.

[145] Adventist Schools Australia, Australian Association of Christian Schools, Christian Schools Australia, *Preliminary Submission PAD26*, 5.

Question 45: Wider investigation and inquiry powers

c. What, if any, changes should be made to ADNSW's existing power to carry out investigations, research and inquiries regarding discrimination?
d. Should ADNSW have wider powers to investigate and report on the conduct of duty holders, independently of the complaints process? If so:
    i. Under what circumstances should ADNSW be allowed to do so?
    ii. If the power to investigate relates to a breach of a positive duty, what criteria should be necessary to start an investigation?
    iii. What powers should ADNSW have to facilitate investigations?
    iv. What outcomes should be available to ADNSW after a finding of non-compliance?
e. Should ADNSW have the power to investigate systemic issues? If so, under what circumstances should it be allowed to do so?
f. What, if any, changes should be made to ADNSW's power to hold public inquiries?

10.5 Prosecuting breaches of the ADA

ADNSW does not have the power to prosecute breaches of the ADA or refer them for prosecution. This is consistent with other discrimination laws around Australia. However, comparable jurisdictions, such as the work health and safety and Fair Work frameworks, include such powers.

The Fair Work Ombudsman, Safe Work NSW and Safe Work Australia can refer serious breaches of the law to the Director of Public Prosecutions for criminal prosecution.[146] This includes work-related sexual harassment.

The Fair Work Ombudsman can take legal action, such as commencing court proceedings or representing employees in court proceedings.[147] Litigation is reserved for serious breaches of the *Fair Work Act*. But this option can enforce and clarify the law, and deter employers from breaching the *Fair Work Act*.[148] Where the Fair Work Ombudsman takes action against an employer, the outcomes can include compensation to persons affected by the contravention, a civil penalty to be paid to the Commonwealth or an impacted party, injunctions, or that a person take specific steps (like training).

The Australian Securities and Investments Commission (ASIC) can investigate potential breaches of the corporations legislation and prosecute people for offences under this legislation.[149] ASIC can also commence civil proceedings in a person's name for the recovery

[146] *Work Health and Safety Act 2011* (NSW) s 152(h). See, eg, *SafeWork NSW v Qantas Ground Services Pty Ltd (No 4)* [2024] NSWDC 53.

[147] *Fair Work Act 2009* (Cth) s 682(1)(c), s 682(1)(d), s 682(1)(f). See, eg, *Fair Work Ombudsman v Foot and Thai Massage Pty Ltd (No 8)* [2024] FCA 483.

[148] Australia, Fair Work Ombudsman, *Compliance and Enforcement Policy* (2020) 6.

[149] *Australian Securities and Investments Commission Act 2001* (Cth) s 49.

of damages for fraud, negligence, default, breach of duty or other misconduct or recovery of their property, where it appears to be in the public interest.[150]

One question is whether similar powers should be introduced into discrimination law frameworks. Some consider there should be a body with the power to prosecute duty holders for breaches of the ADA.[151] Benefits of this approach could include clarifying the law and deterring people from breaching the law.[152]

Question 46: Criminal prosecutions

Should ADNSW have the power to prosecute, or refer for prosecution, breaches of the ADA? Why or why not?

10.6 Allowing ADNSW to seek civil penalty orders

In chapter 8, we asked whether NCAT should be empowered to order respondents to pay a civil penalty as part of the remedies available when the ADA is breached. A related issue is whether ADNSW, or another body, should be empowered to seek civil penalty orders from NCAT or a court for substantive breaches of the ADA.

This is a power available to regulators in some related jurisdictions. Under the work health and safety and Fair Work frameworks, agencies such as Comcare, SafeWork NSW and the Fair Work Ombudsman enforce the provisions regulating work-related sexual harassment and discrimination. These agencies are all empowered to seek civil penalty orders from the court, in addition to referring matters for criminal prosecution for serious breaches of the law (as discussed above).[153]

The Fair Work Ombudsman can seek different civil penalties for standard and more serious breaches of the law. Since 2022, the Fair Work Ombudsman has been empowered to seek significant penalties of up to:

- 600 penalty units ($198,000) for individuals, 3000 penalty units ($990,000) for a small business, and 15,000 penalty units ($4,950,000) for larger businesses for serious breaches
- for standard breaches, 600 penalty units ($19,800) per individual, 300 penalty units ($99,000) for a small business, and 1500 penalty units ($495,000) for larger businesses for standard breaches.[154]

In contrast, civil penalties are available for breaches of certain procedural matters under the *Australian Human Rights Commission Act 1986* (Cth). This includes a failure to comply with the AHRC's statutory notices or interference with the administration and enforcement of the positive duty.[155] However, the AHRC cannot seek civil penalty orders or refer matters

[150] *Australian Securities and Investments Commission Act 2001* (Cth) s 49, s 50.

[151] Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 10.

[152] T MacDermott, "The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants" (2018) 18 *International Journal of Discrimination and the Law* 22, 34.

[153] *Fair Work Act 2009* (Cth) pt 5-2, s 682; *Work Health and Safety 2011* (Cth) pt 8; *Work Health and Safety Act 2011* (NSW) pt 8.

[154] *Fair Work Act 2009* (Cth) s 539, s 546; *Crimes Act 1914* (Cth) s 4AA.

[155] *Australian Human Rights Commission Act 1986* (Cth) s 23, s 26(1), s 35D.

for criminal prosecution for serious breaches of the law. The AHRC recommended it be given these powers.[156]

There could be a range of benefits to allowing regulators to seek penalty orders for serious breaches of discrimination law. Civil penalties as a regulatory tool can have both punitive and deterrent effects. The AHRC, for instance, sees civil penalties as a coercive option, appropriate where there is an unwillingness to comply, or a serious breach of the law.[157] Another view is that civil penalties are a useful tool where persuasion and education have failed.[158]

Civil penalties may incentivise duty holders to take steps to prevent sexual harassment in connection with work. They may also deter duty holders who might otherwise breach the positive duty.[159]

The availability of civil penalties may also promote negotiations and settlements. For instance, the threat of civil penalties could encourage respondents to enter into enforceable undertakings as an alternative to going to court.[160] The AHRC can enter into enforceable undertakings with duty holders about breaches or suspected breaches of the positive duty to take agreed steps to prevent sexual harassment.[161]

Question 47: Civil penalty orders

a. Should ADNSW be empowered to seek civil penalty orders for substantive breaches of the ADA?
b. If so, which forum/s would be most appropriate to impose a civil penalty, eg NCAT or a court?

10.7 Education, research and guidance

ADNSW has broad powers relating to education and research. It also has the power to develop codes of practice. There may be options for expressly conferring further functions, or clarifying the existing functions, particularly if a positive duty is introduced to the ADA.

[156] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) rec 51; Australian Human Rights Commission, *Speaking from Experience: What Needs to Change to Address Workplace Sexual Harassment* (2025) 68, rec 11.

[157] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 96–101.

[158] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2003) [3.34]–[3.35].

[159] Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report 143 (2025) [14.141].

[160] Australian Human Rights Commission, Submission to Attorney-General's Department, *Disability Discrimination Act 1992 (Cth) Review* (14 November 2025) 52.

[161] *Australian Human Rights Commission Act 1986* (Cth) s 35K.

10.7.1 Education and research powers

The importance of education in addressing discrimination was recognised when the ADA was first introduced.[162] A range of submissions to our review also emphasised the need for education initiatives to:

- raise awareness of, and prevent, discrimination
- help address systemic discrimination and promote substantive equality, and
- help duty holders understand how to comply with a positive duty or other changes to the ADA, if introduced.[163]

Some submissions argued that ADNSW should have broader power to review and research discrimination issues.[164] It was suggested that ADNSW should be able to conduct research proactively so it can identify and address systemic issues, without relying solely on complaints data.[165]

Earlier in this chapter, we discussed possible options for expanding ADNSW's powers to carry out investigations, research and inquiries relating to:

- discrimination on certain specified grounds (on its own motion), and
- discrimination or racial vilification (where a matter is referred by Multicultural NSW).[166]

ADNSW has other, wide statutory functions relating to education and research. By resolution of the board, ADNSW can also:

> (b) acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights,
> (c) arrange and co-ordinate consultations, discussions, seminars and conferences,
> (d) review, from time to time, the laws of the State,
> (e) consult with governmental, business, industrial and community groups and organisations in order to ascertain means of improving services and conditions affecting minority groups and other groups which are the subject of discrimination and inequality,
> (f) hold public inquiries,
> (g) develop human rights programmes and policies, and
> (h) liaise or collaborate with academics and other persons engaged in carrying out investigations, research or inquiries relating to discrimination when it considers it appropriate to do so and, for those purposes, to facilitate disclosure to those persons of information obtained under [the ADA].[167]

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[162] NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 November 1976, 3337, 3338, 3347.

[163] Coalition Against Caste Discrimination, *Preliminary Submission PAD28*, 27; People with Disability Australia, *Preliminary Submission PAD53*, 10–11; Carers NSW, *Preliminary Submission PAD71*, 5; HIV/AIDS Legal Centre and Positive Life NSW, *Preliminary Submission PAD60*, 17; Australian Discrimination Law Experts Group, *Preliminary Submission PAD84*, 3, 6; Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 7.

[164] Sex Workers Outreach Project NSW, *Preliminary Submission PAD77*, 6–7.

[165] NSW Bar Association, *Preliminary Submission PAD86* [58]; NSW, Office of the Advocate for Children and Young People, *Preliminary Submission PAD78*, 21; Greens NSW, *Preliminary Submission PAD85*, 14.

[166] *Anti-Discrimination Act 1977* (NSW) s 119(1)(a), (a1).

[167] *Anti-Discrimination Act 1977* (NSW) s 119(1)(b)–(h).

Further express powers could be considered if a positive duty is introduced into the ADA. For instance, the AHRC has specific educative functions in relation to the positive duty. These include to:

> (a) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for complying with the positive duty in relation to sex discrimination;
> (b) to promote an understanding and acceptance, and the public discussion, of the positive duty in relation to sex discrimination;
> (c) to undertake research and educational programs in relation to the positive duty in relation to sex discrimination ...[168]

In 2023, the AHRC published guidance materials for complying with the positive duty in 2023. This set out seven standards and four guiding principles that the AHRC expects all duty holders to meet to satisfy the positive duty.[169] The standards developed in guidelines issued by state and territory regulators of positive duties reflect the seven standards developed by the AHRC.[170]

Another option could be to expressly recognise data collection as part of ADNSW's research functions. Some have suggested that ADNSW should publicly report deidentified, disaggregated data from conciliations, including:

- the nature of complaints
- outcomes achieved
- the number of parties that were legally represented, and
- the number of complaints accepted, terminated, withdrawn or settled, by protected attribute.[171]

This may help complainants and respondents to understand the likely outcomes of conciliation. It could also be used to see complaint trends, where the ADA may not be operating effectively, or where further policy or law reform may be needed.[172]

A related suggestion is that complaints data should be collected and analysed to identify systemic issues, and that ADNSW should regularly report on its findings.[173]

A significant issue, however, is whether ADNSW is resourced to undertake its existing (and any new) powers effectively.

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[168] *Australian Human Rights Commission Act 1986* (Cth) s 35A(a)–(c).

[169] Australian Human Rights Commission, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (2023).

[170] Australian Human Rights Commission, Submission to Attorney-General's Department, *Disability Discrimination Act 1992 (Cth) Review* (14 November 2025) 49.

[171] Legal Aid NSW, *Preliminary Submission PAD87*, 42; M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) rec 9.1, rec 9.2.

[172] M Nawaz, A Cody and E Golledge, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Kingsford Legal Centre, 2018) 37.

[173] Community Legal Centres NSW, *Preliminary Submission PAD73* [41].

10.7.2 Codes of practice

ADNSW also has the discretionary power to develop and promote codes of practice.[174] Some argue these powers are not used often enough and could be strengthened.[175]

Under the ADA, ADNSW can consult with representative bodies and individuals in various industries to help develop a code of practice.[176] A code of practice is to offer guidance about:

- the kinds of activity that may involve unlawful conduct under the ADA
- means of limiting or avoiding the extent of any unlawful conduct, and
- any other matter that ADNSW considers necessary or convenient in exercising its general functions.[177]

Although a code of practice is not a legally binding document, evidence of a duty holder's compliance with a code may be considered by NCAT in deciding a case.[178] They can also have an educative role, providing guidance to help duty holders understand and meet their legal obligations.

These powers are also found, and are more frequently used, federally. For example, the *Disability Discrimination Act 1992* (Cth) is supported by standards in addition to the guidelines issued by the AHRC. Standards are legally binding regulations set by the Attorney-General under this Act. For example, there are disability standards relating to public transport, education and access to buildings.[179]

10.7.3 A power to conduct voluntary audits

Another option could be to empower ADNSW, or another body, to conduct voluntary audits of duty holders' internal policies and programs. These audits could involve assessing duty holders' compliance with discrimination laws and providing feedback on what duty holders can do to better comply with the law.

In Victoria, VEOHRC can conduct voluntary audits of policies and programs. The AHRC recommended expanding its powers to include empowering it to conduct voluntary audits of policies and programs.[180]

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[174] *Anti-Discrimination Act 1977* (NSW) s 120A(1).

[175] Vision Australia, *Preliminary Submission PAD68*, 4.

[176] *Anti-Discrimination Act 1977* (NSW) s 120A(2).

[177] *Anti-Discrimination Act 1977* (NSW) s 120A(3).

[178] *Anti-Discrimination Act 1977* (NSW) s 120A(4).

[179] *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth); *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

[180] Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021) 124–125.

Question 48: Education, research and guidance

a. What, if any, changes should be made to ADNSW's:
   i. education and research powers?
   ii. power to develop and promote codes of practice?
b. Should ADNSW be empowered to conduct voluntary audits of duty holders' internal policies and programs?

Appendix A: Preliminary submissions

PAD01	Professor Cathy Sherry
PAD02	Intersex Human Rights Australia
PAD03	Confidential
PAD04	Mark Seymour
PAD05	Shooters Union NSW
PAD06	Councillor Nathan Zamprogno
PAD07	Equality Australia
PAD08	Dr Jason M Chin
PAD09	M E Browne
PAD10	Confidential
PAD11	Confidential
PAD12	Australian Christian Lobby
PAD13	Business Council of Australia
PAD14	Diversity Council Australia
PAD15	David A W Miller
PAD16	National Catholic Education Commission
PAD17	Dementia Australia
PAD18	Disability Advocacy NSW
PAD19	Independent Education Union of Australia NSW/ACT Branch
PAD19A	Independent Education Union of Australia NSW/ACT Branch
PAD20	Shooting Industry Foundation Australia
PAD21	NSW Council for Civil Liberties
PAD22	Amazon
PAD23	Australian National Imams Council
PAD24	Australian Industry Group
PAD25	Freedom for Faith
PAD26	Adventist Schools Australia, Australian Association of Christian Schools, Christian Schools Australia
PAD27	NSW Aboriginal Women's Advisory Network
PAD28	Coalition Against Caste Discrimination
PAD29	Associate Professor Mark Fowler
PAD30	Rainbow Labor NSW
PAD31	The Law Society of New South Wales
PAD32	UNSW Allens Hub for Technology, Law and Innovation
PAD33	Australian Feminists for Women's Rights
PAD34	Falun Dafa Association of Australia Inc
PAD35	Kingsford Legal Centre
PAD36	Rainbow Families
PAD37	Catholic Archdiocese of Sydney
PAD38	Marque Lawyers
PAD39	National Justice Project
PAD40	Inner City Legal Centre
PAD41	NSW Ombudsman
PAD42	Mental Health Carers NSW Inc
PAD42A	Mental Health Carers NSW Inc
PAD43	LGB Alliance Australia
PAD44	ACON

PAD45	Fair Game Australia
PAD46	Associate Professor Bruce Baer Arnold and Associate Professor Wendy Bonython
PAD47	Australian Muslim Advocacy Network
PAD48	Confidential
PAD49	NSW Young Lawyers Human Rights Sub-Committee
PAD50	New South Wales Nurses and Midwives' Association
PAD51	Cleaning Accountability Framework
PAD52	NSW Users and AIDS Association
PAD53	People with Disability Australia
PAD54	Jumbunna Institute for Indigenous Education and Research, UTS Sydney
PAD55	Women's Legal Service NSW
PAD56	Presbyterian Church of Australia in New South Wales
PAD57	Respect Inc
PAD58	Hindu Council of Australia
PAD59	Professor Margaret Thornton
PAD60	HIV/AIDS Legal Centre and Positive Life NSW
PAD61	Adrian Buckley
PAD62	Australian Lawyers for Human Rights
PAD63	Racial Justice Centre Ltd
PAD64	Helena Chui
PAD65	Family First Party Australia
PAD66	Neophile
PAD67	Church of Scientology Australia
PAD68	Vision Australia
PAD69	Australian Human Rights Commission
PAD70	Full Stop Australia
PAD71	Carers NSW
PAD72	Feminist Legal Clinic Inc
PAD73	Community Legal Centres NSW
PAD74	Scarlet Alliance, Australian Sex Workers Association
PAD75	Family Advocacy
PAD76	Australian Retailers Association
PAD77	Sex Workers Outreach Project NSW
PAD78	NSW Office of the Advocate for Children and Young People
PAD79	Equal Pay for Equal Play NSW
PAD80	Catholic Schools NSW
PAD81	Sydney University Postgraduate Representative Association
PAD82	Public Interest Advocacy Centre
PAD83	Anti-Discrimination NSW
PAD84	Australian Discrimination Law Experts Group
PAD85	Greens NSW
PAD86	New South Wales Bar Association
PAD87	Legal Aid NSW
PAD88	Catholic Women's League Australia, New South Wales Inc
PAD89	Anonymous
PAD90	Unions NSW
PAD91	Transport for NSW
PAD92	John Grass
PAD93	The Sussan Group
PAD94	Michael Page International
PAD95	Aber Karhani
PAD96	Philip Sacks

Appendix B: Preliminary consultations

Australian Discrimination Law Experts Group (PCAD01)

29 August 2023

Dr Alice Taylor
Associate Professor Anne Hewitt
Professor Beth Goldblatt
Liam Elphick
Peta Spyrou
Dr Robin Banks
Professor Simon Rice OAM
Professor Margaret Thornton

Anti-Discrimination NSW (PCAD02)

20 November 2023

Helen McKenzie, President

Anti-Discrimination NSW staff workshop (PCAD03)

5 December 2023

NSW Civil and Administrative Tribunal (PCAD04)

20 December 2023

Justice Lea Armstrong, President
Judge Susanne Cole, Deputy President and Division Head of Administrative and Equal Opportunity Division and Occupational Division
Theresa Simon, Principal Member

NSW Civil and Administrative Tribunal (PCAD05)

17 March 2025

Justice Lea Armstrong, President
Judge Rashelle Seiden SC, Deputy President and Division Head of Administrative and Equal Opportunity Division and Occupational Division
Acting Judge Nancy Hennessy, Deputy President

Appendix C: Submissions

AD01	Periyar Ambedkar Thoughts Circle of Australia
AD02	LGB Alliance Australia
AD03	Anonymous
AD04	Suzane Nazih Joumaa
AD05	Eva Dhanu
AD06	National Justice Project
AD07	Emeritus Professor Patrick Parkinson AM
AD08	Autistic Self Advocacy Network of Australia and New Zealand, Australian Autism Alliance
AD09	Playgroup NSW
AD10	David A W Miller
AD11	Confidential
AD12	Associate Professor Mark Fowler
AD13	Melos Education
AD14	David Doyle
AD15	Women's and Girls' Emergency Centre
AD16	Australian Federation of Islamic Councils
AD17	Mental Health Coordinating Council
AD18	Confidential
AD19	Muslim Women's Welfare of Australia
AD20	Sheryn Omeri KC
AD21	Patrick Jones
AD22	One Law For All NSW
AD23	Confidential
AD24	Down Syndrome NSW
AD25	Coalition Against Trafficking in Women Australia
AD26	Parents for Trans Youth Equity
AD27	Anonymous
AD28	Anonymous
AD29	InterAction for Health and Human Rights
AD30	Anonymous
AD31	Amazon
AD32	Yuriy Kovalevskyi
AD33	Richard Harwood
AD34	Anonymous
AD35	Transport for NSW
AD36	Anonymous
AD37	Anonymous
AD38	Jamie Clinnick
AD39	Anonymous
AD40	Elvis Sinosic
AD41	Anonymous
AD42	Shaun Piercey

AD43	Remy Chadwick
AD44	Anonymous
AD45	Anonymous
AD46	Northcott Society
AD47	Craig Batten
AD48	Fraser Anderson
AD49	David Wallace
AD50	Mark Robertson
AD51	Diversity Council Australia
AD52	Tanja Gacic
AD53	Adam Knott
AD54	Anonymous
AD55	Confidential
AD56	Dementia Australia
AD57	Vision Australia
AD58	NSW Carers Advisory Council
AD59	Jack Rickwood
AD60	Holly Purcell
AD61	Anonymous
AD62	Anonymous
AD63	Anonymous
AD64	Anonymous
AD65	Muslim Votes Matter
AD66	Independent Education Union of Australia NSW/ACT Branch
AD67	Dr Elpitha Spyrou and Dr Danielle Moon
AD68	Legal Aid NSW
AD69	Lebanese Muslim Association
AD70	Disability Council NSW
AD71	Mental Health Carers NSW Inc
AD72	The Declaration of Biological Truth Australia
AD73	Dr Dominique Allen
AD74	Advocate for Children and Young People
AD75	Drew Duffey
AD76	Anglican Church Diocese of Sydney
AD77	Australian Muslim Advocacy Network Ltd, Alliance Against Islamophobia Ltd, Muslim Legal Network NSW, Muslim Women Australia, Periyar Ambedkar Thoughts Circle of Australia, Shia Muslim Council of Australia, The Muslim Vote
AD78	Anonymous
AD79	Intellectual Disability Rights Service
AD80	Muslim Women Australia
AD81	Baptist Association of NSW & ACT
AD82	Anonymous
AD83	Richard Mather
AD84	Anonymous
AD85	A A
AD86	Canberra Declaration

AD87	Binary Australia
AD88	Tee McNally
AD89	Anglicare Sydney
AD90	Freedom for Faith, Australian Christian Churches, Anglican Church Diocese of Sydney, NSW & ACT Baptist Churches, Presbyterian Church of Australia in NSW, Seventh-day Adventist Church
AD91	University of Sydney
AD92	Renee Spencer
AD93	Capacity Australia
AD94	Association of Independent Schools of NSW
AD95	Free Speech Union of Australia
AD96	Sport NSW
AD97	Professor Anna Hickey-Moody, Associate Professor Joel Windle, Professor Alphia Possamai-Inesedy, Professor Katherine Johnson, Dr James Gardiner, Dr Alexandra Ciaffaglione, Dr Lizzie Maughan, Margaret Lovell.
AD98	End Weight Bias Inc
AD99	Australian Hotels Association NSW
AD100	Caravan, Camping & Touring Industry and Manufactured Housing Industry Association of NSW Ltd
AD101	G E
AD102	NSW Anti-Racism Working Group
AD103	Blind Citizens Australia
AD104	The Anglican Schools Corporation
AD105	Active Watchful Waiting Inc
AD106	Catholic Women's League Australia – New South Wales Inc
AD107	Australian Education Union NSW Teachers Federation Branch
AD108	First Peoples Disability Network
AD109	Christian Schools Australia
AD110	Australian Feminists for Women's Rights
AD111	Touching Base Inc
AD112	Islamophobia Register Australia
AD113	Wesley Mission
AD114	Mining and Energy Union
AD115	People with Disability Australia
AD116	Unions NSW
AD117	Australia Services Union NSW & ACT (Services) Branch
AD118	Eros Association
AD119	Islamic Sciences and Research Academy
AD120	Council for Intellectual Disability
AD121	Carers NSW
AD122	Institute of Public Affairs
AD123	Community Housing Industry Association NSW
AD124	Anonymous
AD125	Scarlet Alliance and Sex Workers Outreach Project NSW
AD126	NSW Libertarian Party
AD127	Mission Australia

AD128	Council of Catholic School Parents NSW/ACT
AD129	Confidential
AD130	Australian Association of Christian Schools
AD131	Anonymous
AD132	Guide Dogs NSW/ACT
AD133	Older Women's Network NSW
AD134	Catholic Archdiocese of Sydney
AD135	Amnesty International Australia
AD136	Human Rights for All
AD137	Respect Inc
AD138	NSW Aboriginal Women's Advisory Network
AD139	National Justice Project
AD140	Wirringa Baiya Aboriginal Women's Legal Centre Inc
AD141	Family Advocacy
AD142	Rainbow Families
AD143	Human Rights Collective
AD144	Church of Scientology Australia
AD145	Ghassan Kassisieh
AD146	Pride in Protest
AD147	Feminist Legal Clinic Inc
AD148	Australian National Imams Council
AD149	Olive Leaf Network Australia
AD150	Anonymous
AD151	NSW Council for Civil Liberties
AD152	NSW Greens
AD153	Catholic Schools NSW
AD154	NSW Aboriginal Land Council
AD155	NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors
AD156	Confidential
AD157	Australian Retailers Association and National Retail Association
AD158	Australian Palestine Advocacy Network
AD159	Trans Justice Sydney and Sydney Bi+ Network
AD160	Australian Centre for Disability Law
AD161	BEING – Mental Health Consumers
AD162	NSW Jewish Board of Deputies
AD163	Olivia Wellesley-Cole
AD164	Executive Council of Australian Jewry
AD165	Australian Christian Lobby
AD166	Redfern Legal Centre
AD167	Australia's Special Envoy to Combat Antisemitism
AD168	Dr Natalie Sheard
AD169	Council on the Ageing NSW
AD170	Rationalist Society of Australia
AD171	Kingsford Legal Centre
AD172	ClubsNSW

AD173	Tenants' Union of NSW
AD174	ACON
AD175	Confidential
AD175A	Confidential
AD176	Enable Women Africa
AD177	NSW Women's Advisory Council
AD178	NSW Young Lawyers Human Rights Law Sub-Committee
AD179	Anti-Discrimination NSW
AD180	Jesuit Social Services
AD181	Aboriginal Legal Service NSW/ACT Ltd
AD182	Confidential
AD183	Associate Professor Anne Hewitt
AD184	NSW Users and AIDS Association
AD185	Equality Australia
AD186	Australian Baha'i Community
AD187	Physical Disability Council of NSW
AD188	Survivors of Coercive Cults and High-Control Groups, Stop Religious Coercion Australia
AD189	Inner City Legal Centre
AD190	ACON Health, National Association of People with HIV Australia, HIV/AIDS Legal Centre, Bobby Goldsmith Foundation, Positive Life NSW
AD191	Australian Discrimination Law Experts Group
AD192	Justice and Equity Centre
AD193	Professor Therese MacDermott, Dr Mareike Riedel and Dr Amira Aftab
AD194	Dr Robin Banks
AD195	Australian Business Industrial and NSW Business Chamber Ltd
AD196	Women's Forum Australia
AD197	Community Restorative Centre
AD198	Australian Lawyers for Human Rights
AD199	Chief Executive Women
AD200	Rev Dr Angus McLeay
AD201	Senior Rights Service
AD202	Professor Beth Goldblatt
AD203	The Law Society of New South Wales
AD204	NSW Nurses and Midwives' Association
AD205	Associate Professor Sarah Ailwood and Professor Karen O'Connell
AD206	Australian Industry Group
AD207	Elisabeth Warren
AD208	SafeWork NSW
AD209	Women's Legal Service NSW
AD210	Confidential
AD211	New South Wales Bar Association
AD212	Hana Seraphim
AD213	Anonymous
AD214	Community Legal Centres NSW

Appendix D: Consultations

Faith Affairs Council (ADC01)

22 May 2025

Right Reverend Dr Michael Stead
Gawaine Powell Davies
Surinder Jain
Zayd Jenzarli
Reverend Dr Steve Bartlett
Reverend Ralph Estherby
Reverend Dr Manas Ghosh
Monica Doumit
Reverend Bill Crews AM
Murray Norman
Monica Chahoud
Dr Ali Al Samail

LGBTIQ+ Advisory Council (ADC02)

10 June 2025

Anna Brown OAM
Benjamin Oh
Brent Mackie
Dr Cris Townley
Ian Roberts
Justin Koonin
Kelly Young
Nicholas Stewart
Sanjay Alapakkam
Veronica Mason

Women's Advisory Council (ADC03)

10 June 2025

Tara Hunter
Belinda Cashman PSM
Mariam Mourad
Julie Perkins

Physical disability organisations (ADC04)

16 June 2025

Annabel Smith, Senior Systemic Advocacy Officer, Physical Disability Council of NSW
Ben McAtamney, National Policy and Advocacy Officer, Deafblind Australia
Melissa Norris, Policy and Systemic Advocacy Officer, Deaf Australia
Corey Crawford, Policy and Advocacy Advisor, Vision 20/20
Lesleigh Butler, Government Relations Advisor, Vision Australia
Bruce Maguire, Lead Policy Advisor, Vision Australia
Jaci Armstrong, Disability Inclusion Advisor, Guide Dogs Australia
Lee Kumutat, National Advocacy and Policy Manager, Guide Dogs Australia

Groups representing older people and carers (ADC05)

16 June 2025

Melissa Docker, Policy Manager, Carers NSW
Gohar Yazdabadi, CEO, Council of the Ageing
Ken Beilby, Principal Solicitor, Seniors Rights Service
Ellie Christen, Policy Engagement Officer, Mental Health Carers NSW

Disability advocacy groups (ADC06)

17 June 2025

Leanna Varga, Systemic Advocacy and Campaigns Manager, Family Advocacy
Julian Laurens, Senior Policy Officer, People with Disability Australia
Sarah Dahlburg, Assistant Principal Solicitor, Mid North Coast Community Legal Centre, Disability Law NSW (part of Advocacy Law Alliance)
Anita Jones, Solicitor, Mid North Coast Community Legal Centre, Disability Law NSW (part of Advocacy Law Alliance)
Joshua Hammer, Senior Policy Officer, First Peoples Disability Network
Dawn Blanch, Goondiwindi Advocate, Newell Advocacy
Peta Barry, Disability Advocate, Action for People with Disability
Dave Belcher, Community Organiser, Community Disability Alliance Hunter

Disability advocacy groups (ADC07)

17 June 2025

Roy Williams, Board member, Capacity Australia
Georgia Cummins-Folino, Policy and Advocacy Officer, Council for Intellectual Disability
Kylie Miskovski, General Manager Policy and Advocacy, Dementia Australia
Christine Regan, Representative, Down Syndrome Australia
Joanne Yates, CEO, Intellectual Disability Rights Services
Michelle Sharkey, CEO, Stroke Recovery Association NSW

Disability advocacy groups (ADC08)

17 June 2025

Cheryl Koch, Chair, Autistic Self Advocacy Network of Australia and New Zealand

Kerry Hawkins, CEO, Community Mental Health Australia

Corinne Henderson, Director, Policy and Systems Reform, Mental Health Coordinating Council (NSW)

Robert Davidson, Capacity Building and Support Officer, Multicultural Disability Advocacy Association

Multicultural groups (ADC09)

23 June 2025

Carmel La Rocca, President, Multicultural Council of Griffith

Clare Ellis, Business and Community Development Manager, Multicultural Council of Wagga Wagga

Jacinta Fintan, Engaging Programs and Partnerships Officer, Hunter Multicultural Communities

Osmond Chiu, Member, Multicultural NSW's Regional Community Network

Employee representatives (ADC10)

24 June 2025

Thomas Costa, Assistant Secretary, Unions NSW

Carol Matthews, Secretary, Independent Education Union

Jillian Whalebone, In-House Counsel, Police Association NSW

Mel Smith, Deputy Secretary (Operations), NSW Teachers Federation

HIV/AIDS, drug and alcohol users' organisations (ADC11)

24 June 2025

Brent Mackie, Director, Policy, Strategy and Research, ACON

Lucy Watson, Manager, Policy, Strategy and Research, ACON

Bethany Rodgers, Strategic Policy Lawyer, HIV/AIDS Legal Centre

Jade Virgona, Project Officer, Aboriginal Corporation Drug and Alcohol Network

Lea-Anne Miller, Board member, Aboriginal Corporation Drug and Alcohol Network

Chris Keyes, Deputy CEO, Network of Alcohol and Other Drugs Agencies

Jane Costello, CEO, Positive Life

Legal assistance sector and public interest advocates (ADC12)

1 July 2025

Georgie Burke, Australian Lawyers for Human Rights

Kerry Weste, Vice President, Australian Lawyers for Human Rights

Timothy Roberts, President, NSW Council for Civil Liberties

Shaquille Robinson, Program Coordinator, Aboriginal Women's Advisory Network
Yusra Metwally, Policy and Advocacy Officer, Aboriginal Women's Advisory Network
Bill Rizopoulos, Chairperson, Racial and Religious Discrimination Legal Service Inc
Jake Davies, Senior Policy Officer, Immigration Advice and Rights Centre
Olivia Lam, Lawyer, Racial Justice Centre
Nina Ubaldi, Law Reform Solicitor, Kingsford Legal Centre
Emily Gray, Law Reform and Advocacy Lead, Women's Legal Service
Emily McCarron, Senior Policy Officer, Australian Centre for Disability Law
Kim Richardson, Principal Solicitor (General Practice), Youth Law Australia
Emma Bastable, Solicitor, Justice and Equity Centre

Legal assistance sector and public interest advocates (ADC13)

7 July 2025

George Newhouse, CEO, National Justice Project
Rosaleen Jeffries, Solicitor, National Justice Project
Heike Fabig, National Justice Project
Courtney Law, Senior Solicitor, Grata Fund
Eloise Parrab, A/Policy and Advocacy Manager, Tenants Union of NSW
Katie Green, CEO, Inner City Legal Centre
Karen Beashel, Principal Solicitor, Inner City Legal Centre
Cecilia Henry, Solicitor, Inner City Legal Centre
Yuva Harish, Solicitor, Inner City Legal Centre
Niamh Joyce, Solicitor, Inner City Legal Centre
Phoebe Mountain, Senior Law Reform Officer, Legal Aid NSW
Mursal Rahimi, Policy Advice and Casework Solicitor, Refugee Advice Casework Service

Ethnic Communities' Council of NSW (ADC14)

7 July 2025

Peter Doukas OAM, Chair
Mary Karras, CEO

Private education sector (ADC15)

7 July 2025

Dr Maria Varlet, Director of Member Services, Christian Schools Australia
Brendan Corr, Principal of Australian Christian College Marsden Park, Christian Schools GenAustralia
Vanessa Cheng, Executive Officer, Australian Association of Christian Schools
Dr Stephen Kennaugh GAICD, President, Catholic Secondary Principals Australia
Professor James Dalziel, Vice-Chancellor, Australian University of Theology
Joseph Watson, Director, Public Affairs, Catholic Schools NSW
Ian Baker, Education Policy Consultant, Catholic Schools NSW

Kate O'Hara Aarons, Policy Manager, Office of the Chief Executive, Association of Independent Schools of New South Wales

Lisa Ridings, Associate Chief Executive: Student Services, Association of Independent Schools of New South Wales

Charles Alexander, Legal Counsel, Association of Independent Schools of New South Wales

Christine Shaw, Co-Executive Director, Australian Council of Jewish Schools

Peter Fowler, Chief Executive Officer, Anglican Schools Corporation NSW

Jennifer Scepanovic, Executive Officer, Project Manager, Council of Catholic School Parents NSW/ACT

Antipoverty and homelessness advocates (ADC16)

8 July 2025

Alannah Daly, Policy Officer, Communications and Strategy, Homeless Persons' Legal Service

Kristin O'Connell, Antipoverty Centre Coordinator, Antipoverty Centre

Vee Blackwood, Director of Policy, Advocacy and Research, Homelessness NSW

Angela Makreska, Senior Policy Officer, Community Housing Industry Association NSW

Anna Schinella, Head of Policy and Advocacy, Y Foundations

Damiya Hayden, Advocacy and Policy Manager, Community Legal Centres NSW

Nikita White, Strategic Campaigner, Amnesty International Australia (NSW)

Shane Todd, Closing the Gap, Policy and Communications, Aboriginal Community Housing Industry Association NSW

Social service providers and peaks (ADC17)

15 July 2025

Stephen Doran, Head of Employee Relations, Life Without Barriers

Liz Newton, Director Lived Experience, Life Without Barriers

Andrew Ford, Group Executive, Community and Mission, Anglicare

Les Maroun, Senior Legal Counsel, Red Cross

David Hunter, Representative, Aruma

Kate Alexander, Senior Lawyer, Aruma

Trevor Perry, Manager Legal and Risk, Northcott

Dalit Tendler, Director of Community Services and Engagement, Jewish Care

Rebecca Taumalolo, Project Lead, People and Culture, Baptist Care

Jonathan Wu, Lawyer, Mission Australia

Justine Lee, Policy and Research Officer, NSW Council of Social Service

Makeeta Stubbings, Lived Experience Advocacy Panel Member, NSW Council of Social Service

Ashlee Law, Equity and Inclusion Specialist, Northcott

Organisations working with prisoners, former prisoners and sex workers (ADC18)

15 July 2025

Rory Gillard, Manager, Advocacy, Research and Policy Unit, Community Restorative Centre

Brett Collins, Coordinator, Justice Action
Alexia Santos de Costa, General Manager Quality Risk and Safety, Australian Community Support Organisation
Na Mon Cheung, Acting CEO, Sex Worker Outreach Project
Soss, NSW Policy Officer, Sex Worker Outreach Project
Carly Nichols, Acting CEO, Respect Inc (Qld)
Janelle Fawkes, Decriminalisation Manager, Respect Inc (Qld)

Children and young people's organisations (ADC19)

15 July 2025

Liam McGovern, Policy Advisor, Office for Youth
Emily Caska, CEO, Playgroup NSW
Ellen Hester, Administration Officer, Playgroup NSW
Annukina Warda, CEO, Multicultural Youth Affairs Network
Ali Rahman, National Clinical Manager, Multicultural Practice, Headspace National
John Leha, CEO, Aboriginal Child, Family and Community Care State Secretariat (AbSec) and BlaQ Aboriginal Corporation
Sharon Broady, Executive Officer, Association of Children's Welfare Agencies

Islamic groups (ADC20)

23 July 2025

Zayd Jenzarli, Advocate, Australian National Imams Council
Rita Jabri Markwell, Legal Advisor, Australian Muslim Advocacy Network
Khal Asfour, Executive Director, Lebanese Muslim Association
Dr Ali Alsamail, Director, Shia Muslim Council of Australia
Cevdet Osman Basiacik, President, Muslim Legal Network (NSW)

Executive Council of Australian Jewry (ADC21)

24 July 2025

Peter Wertheim AM, Co-CEO
Simone Abel, Head of Legal

Multi-faith groups (ADC22)

25 July 2025

Parviz Deamer, Director of Public Discourse, Office of External Affairs, Australian Baha'i Community
Dilbagh Singh, Religious Committee's Assistant Director, Australian Sikh Association
Nishan Singh, Company Secretary, Australian Sikh Association
Pandit Rami, Public Relations Officer, Australian Council of Hindu Clergy

Christian groups (ADC23)

25 July 2025

Monica Doumit, Director, Public Affairs and Engagement, Catholic Archdiocese of Sydney

Edwin Ho, Governance Manager, Baptist Churches of NSW and ACT
Dr Deidre Little, National Bioethics Convenor, Catholic Women's League Australia
Dr Anna Walsh, State Bioethics Convenor, Catholic Women's League Australia
Bishop Michael Stead, Chair, Freedom for Faith (and Sydney Anglicans)
Joshua Rowe, NSW/ACT Director, Australian Christian Lobby
Ross Clifford, Executive Director, NSW Council of Churches
Michelle McEntyre, Manager, Governance and Legal, Catholic Diocese of Maitland and Newcastle
Jenna Field, Senior Employee Relations Specialist, Catholic Diocese of Maitland and Newcastle
Reverend Christopher Pears, Registrar, Anglican Church Diocese of Armidale
Patrick Cooper, Diocesan Financial Administrator, Catholic Diocese of Bathurst

Rationalist Society of Australia (ADC24)

25 July 2025

Si Gladman, Executive Director, Rationalist Society of Australia

LGBTQIA+ groups (ADC25)

28 July 2025

Heather Corkhill, Legal Director, Equality Australia
Teddy Cook, Senior Advisor and Chair, TransEquality Council
Dr Morgan Carpenter, Executive Director, InterAction for Health and Human Rights
Anna Pye, President, Trans Pride Australia
Arden Cassie, President, Hunter Gender Alliance
Barbara Taylor, Parent Representative, Parents for Trans Youth Equity
Dr Siobhan Irving, Treasurer and Academic Advisor, Sydney Queer Muslims

Women's groups (ADC26)

28 July 2025

Anna Kerr, Principal Solicitor, Feminist Legal Clinic
Emeritus Professor Bronwyn Winter, Co-Convenor and Public Officer, Australian Feminists for Women's Rights

Women's groups (ADC27)

29 July 2025

Rose Khalilizadeh, Chairperson, Diverse Women in Law
Shazya Khan, Project Coordinator, Women of Colour Australia
Sarah Lambert, Manager Sector Capacity Building and Communications, Women's Health NSW
Brenda Bailey, Volunteer Consultant, The Older Women's Network
Nemat Kharboutli, Manager, Linking Hearts Service, Muslim Women Australia
Brianna Delahunty, Manager, Policy and Research, Chief Executive Women
Faten El Dana, Religious Advisor, Muslim Women's Welfare of Australia

Christian school principals (ADC28)

29 July 2025

Dr Rachel Carling, Director of Public Policy, Christian Schools Australia
Ian Liney, Executive Officer NSW/ACT, Christian Schools Australia
Kojo Akomeah, Director, Public Affairs and Religious Liberty, Adventist Education
Phillip Nash, Executive Principal, Melos
Joe Van Bentum, Principal, Green Point Christian College
Geoff Peet, Principal, Maitland Christian School
Darren Milligan, Principal, Wyong Christian Community School
Brendan Corr, Principal, Australian Christian College Marsden Park
Graeme Jolliffe, Principal, Nowra Christian School
Jeff Allen, Principal, Nambucca Valley Christian Community School
Peter Downey, Principal, Oxford Falls Grammar School
Kylie Bull, Principal, Burrabadine Christian School
Steve Walton, Principal, Cedar Christian College

Domestic and family violence organisations (ADC29)

13 August 2025

Althea Mackenzie, Deputy CEO, Women and Girls Emergency Centre
Karen Bevan, CEO, Full Stop Australia
Emily Dale, Head of Advocacy, Full Stop Australia

Aboriginal community members (ADC30)

20 August 2025

Confidential participants

Aboriginal community members (ADC31)

20 August 2025

Confidential participants

Aboriginal community members (ADC32)

20 August 2025

Confidential participants

Aboriginal community members (ADC33)

21 August 2025

Confidential participants

Aboriginal community members (ADC34)

21 August 2025

Confidential participants

Victorian Equal Opportunity and Human Rights Commission (ADC35)

9 October 2025

Mary Tanner, Dispute Resolution and Enquiries Service
Aimee Cooper, Head of Legal

Australia Human Rights Commission (ADC36)

10 December 2025

Hugh de Krester, President
Darren Dick, Senior Policy Executive
Ella Kurchova, Legal Director
Rachel Holt, Senior Executive, Investigation and Conciliation
Christine Ratnasingham, Director, Sex Discrimination
Alison Pooley, Senior Lawyer

Australian Human Rights Commission (ADC37)

7 July 2026

Dr Anna Cody, Sex Discrimination Commissioner
Lara Renton, Senior Lawyer, Deputy General Counsel
Jody Ball, Deputy Director, Investigation and Conciliation Service
Ella Kurchova, Senior Director, Positive Duty Team
Alison Pooley, Senior Lawyer, Positive Duty Team
Evdokia Papastamouli , Paralegal, Positive Duty Team

State and territory anti-discrimination commissions (ADC38)

7 July 2026

Jane Vasey, Deputy Commissioner, Queensland Human Rights Commission
Jeswynn Yogaratnam, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission
Josie Hullick, Director, Northern Territory Anti-Discrimination Commission
Lo Badcock, Senior Complaints and Community Engagements Officer, Northern Territory Anti-Discrimination Commission
Lauren Matthews, Special Counsel, Victorian Equal Opportunity and Human Rights Commission
Michelle Mead, Head of Dispute Resolution and Enquiries, Victorian Equal Opportunity and Human Rights Commission

NSW Industrial Relations Commission (ADC39)

14 July 2026

The Honourable Justice Ingmar Taylor, President
William Brazier, Associate to the President
Adam Irwin, Researcher to the Hon Justice Taylor

Fair Work Commission (ADC40)

14 July 2026

The Honourable Justice Adam Hatcher, President
Commissioner Sarah McKinnnon, National Practice Leader, Sexual Harassment

NSW Civil and Administrative Tribunal (ADC41)

20 July 2026

Deputy President Judge Rashelle Seiden SC
Deputy President Anne Britton
Deputy President Nancy Hennessy ADCJ
Kate Robinson, Principal Member
Dr Juliet Lucy, Principal Member
Louise Clegg, Divisional Registrar
Bronte Newman, Associate

Victorian Civil and Administrative Tribunal (ADC42)

20 July 2026

Vice President Judge Melissa Daly, Head of the People's Rights and Responsibilities Division
Senior Member Charles Powles, Lead Member of the Human Rights Practice Area, People's Rights and Responsibilities Division
Letischa Bien, Senior Judicial Support Officer to Vice President Melissa Daly

NSW Law Reform Commission

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