

WOMEN SPEAK AUSTRALIA

SUBMISSION TO THE NSW LAW REFORM COMMISSION

REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

CONSULTATION PAPER 25: PROCEDURES AND COMPLIANCE

25 SEPTEMBER 2026

ABOUT WOMEN SPEAK AUSTRALIA

Women Speak Australia (WSA) is a national women's rights advocacy organisation.

WSA advocates for the protection of women's sex-based rights and protections, including privacy, bodily integrity, safety, health, sport, services, employment, participation in public life, and protections associated with pregnancy and motherhood. We also advocate for appropriate safeguarding of children.

Our submission is concerned particularly with ensuring that procedural and structural reforms to the Anti-Discrimination Act 1977 (NSW) do not inadvertently alter the substantive meaning or operation of the rights and protections established by Parliament.

This submission responds to selected questions in Consultation Paper 25 that are directly relevant to those matters. It does not attempt to answer every question in the Consultation Paper.

Our central concern is that procedural reform should not become a mechanism for changing the substantive scope of the Act by interpretation. In particular, the Act should continue to distinguish between **sex**, **transgender status** and **homosexuality**, which are presently addressed as distinct protected grounds.

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?**

Yes, provided the objectives accurately reflect the Act and do not operate to recast its substantive provisions.

WSA supports an express objects clause because a clear statement of purpose can assist courts, tribunals, regulators, employers, service providers and members of the public to understand the

purpose of the legislation.

However, an objects clause must not become an indirect means of changing the protected attributes established by Parliament.

The current Act protects **sex**, **transgender status** and **homosexuality** through separate provisions. Those grounds are not interchangeable. An objects clause should therefore not collapse them into a single concept of identity.

In particular, an objects clause should not use "gender identity" as a synonym for sex, woman or man unless Parliament expressly decides to make such a substantive change to the Act.

The distinction matters because sex can be materially relevant to circumstances involving privacy, bodily integrity, safety, pregnancy and motherhood, sport, intimate services, accommodation, searching, custody and other areas in which the law may legitimately recognise differences between males and females.

An objects clause should therefore assist decision-makers to interpret the Act consistently with its enacted purposes, rather than authorise them to create new protected attributes or override specific provisions.

WSA considers that the objects should include the prevention and elimination of unlawful discrimination, the protection of the rights and interests of people protected by the Act, and the promotion of equal enjoyment of rights.

At the same time, the objects should recognise that equality before the law does not necessarily require identical treatment in every circumstance. Where Parliament has determined that a relevant difference exists, treating materially different circumstances differently can be consistent with equality.

The objects should therefore be framed so that they do not establish an automatic hierarchy between protected characteristics.

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?

WSA supports objects and principles centred on the prevention and elimination of unlawful discrimination, equality before the law, recognition of relevant differences, and effective access to protection and remedies.

In particular, the Act should:

- recognise sex as an independent protected attribute and make clear that sex-based discrimination can be addressed in its own right;
- recognise that relevant differences may justify lawful differential treatment where necessary to protect legitimate interests;

- recognise the importance of privacy, bodily integrity and safety;
- recognise pregnancy and motherhood as circumstances in which sex can be materially relevant;
- recognise the particular rights and interests of children;
- provide mechanisms capable of addressing demonstrated systemic discrimination; and
- provide clear and accessible mechanisms through which unlawful discrimination can be challenged and remedied.

The objects should also recognise that the Act contains circumstances in which **sex-specific distinctions are lawful or may be lawfully maintained**, including where sex is materially relevant to privacy, safety, sport, employment or particular services.

Existing provisions dealing with sex-specific circumstances should remain visible and intelligible within any restructured Act. An objects clause should not be used to make those provisions effectively subordinate to another protected characteristic.

WSA supports mechanisms capable of addressing systemic discrimination where evidence demonstrates that laws, policies, practices or institutional arrangements discriminate against women because of their sex. The Act should provide clear criteria for identifying systemic discrimination rather than relying on broad or subjective concepts.

WSA also recognises that sex-based discrimination may intersect with other characteristics or circumstances. However, recognition of intersectional discrimination should not obscure, dilute or replace sex as an independent ground of discrimination. Women are discriminated against as females, and sex-based discrimination must remain identifiable and capable of being addressed in its own right.

Similarly, WSA supports a beneficial and remedial approach to anti-discrimination law, but considers that clear statutory drafting should remain the primary means of establishing rights, obligations, exceptions and remedies.

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?

Yes, but only if the instruments are named and the effect is interpretive only.

WSA supports express recognition of relevant international human-rights instruments and principles within an objects, purposes or principles clause.

International human-rights obligations provide important context for the protection of women and children and can assist in interpreting and applying anti-discrimination legislation consistently with Australia's international obligations.

However, recognition of international human-rights instruments should operate within the constitutional and statutory framework of NSW. It should inform the interpretation and

application of the Act rather than substitute for legislation enacted by Parliament or create open-ended obligations beyond the statutory text.

b. If so:

i. What instruments or principles should be recognised?

WSA considers that the following are particularly relevant:

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

CEDAW is directly relevant to the purpose of protecting women from discrimination because of sex and should be recognised as an important framework for understanding sex discrimination and the rights and protections of women.

The Convention on the Rights of the Child (CRC).

The CRC should also be recognised because children are rights-holders in their own right. Their rights to protection, privacy, bodily integrity, safety and development require particular consideration in the application of anti-discrimination law.

The Act should also recognise relevant general human-rights principles, including:

- dignity;
- equality before the law;
- non-discrimination;
- respect for bodily integrity and privacy; and
- the principle that limitations on rights should be prescribed by law, directed towards a legitimate purpose, necessary and proportionate.

WSA does not consider it necessary for the objects clause to become an exhaustive list of every international instrument to which Australia is a party. Recognition should remain focused on instruments and principles directly relevant to the purposes of the Act.

ii. What effect should any such recognition have?

Recognition should inform the interpretation and application of the Act, while preserving the role of Parliament in determining the rights, obligations, exceptions and protections established by NSW law.

International instruments should not, merely by being referenced in the objects clause:

- create freestanding rights or obligations not contained in the Act;
- override clear statutory language;
- create an unrestricted power to expand the operation of the Act; or
- establish an automatic hierarchy in which one protected characteristic necessarily prevails over another.

Where rights or legitimate interests come into tension, the Act should provide clear principles for resolving the issue.

WSA supports the principle that limitations on rights should be prescribed by law, directed towards a legitimate purpose and necessary and proportionate to that purpose.

This is particularly important where the exercise of one person's rights or interests may affect the privacy, bodily integrity, safety or sex-based rights of another person.

Question 4: Structure

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

The Commission notes that the Anti-Discrimination Act has developed through numerous amendments and that its structure can be difficult to navigate.

WSA supports improvements to the structure and accessibility of the legislation.

However, simplification should not come at the expense of substantive legal distinctions.

The current Part-based structure may be old, but it performs important legal work.

Sex, transgender status and homosexuality have different statutory histories, different provisions and different legal consequences. They should not be merged merely because doing so would make the Act appear simpler.

Sex must remain an independently identifiable protected attribute, with a clear statutory meaning and clear provisions addressing circumstances in which sex is relevant.

A consolidated structure should make it easier for a person to identify:

- the relevant protected attribute;
- the applicable discrimination test;
- the relevant area of public life;
- any applicable exception or special measure; and
- any relevant sex-specific protection.

The Act should not replace sex with gender, or transgender grounds with an undefined gender-identity attribute that then decides who is a woman for the sex provisions. Sex, transgender status and other protected grounds raise different factual and legal questions and those distinctions should remain visible in the legislation.

The Act should also make clear that equality does not necessarily require identical treatment where relevant differences are material to a legitimate purpose. This is particularly important in relation to privacy, bodily integrity, safety, pregnancy and motherhood, sport, services and employment involving intimate or personal care.

WSA supports the use of practical examples and scenarios to make the Act more accessible.

Such examples should include realistic circumstances involving sex-based discrimination as well as lawful sex-specific distinctions, so that women, employers, service providers and other members of the community can understand both their rights and their obligations.

WSA therefore supports structural simplification where it improves accessibility while preserving the visibility, meaning and substance of sex-based rights and protections.

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?

Yes, but the exemption process should have a clearly defined and limited role.

WSA considers that a general special measures provision and an exemption mechanism serve different purposes and should not become interchangeable.

A special measures provision should allow appropriate measures to address demonstrated disadvantage or promote substantive equality without requiring organisations to obtain an exemption merely because the measure involves differential treatment.

An exemption mechanism may nevertheless remain necessary for circumstances that are genuinely outside the scope of a special measures provision, including unforeseen or specialised circumstances where conduct may otherwise contravene the Act but there is a demonstrated and legitimate justification for permitting it.

The continued availability of exemptions should not, however, encourage organisations to seek exemptions as a precautionary substitute for understanding and applying the Act.

Most importantly, an exemption process should not be used instead of clear statutory provisions where Parliament has determined that particular conduct is lawful.

b. If so, what purpose should exemptions serve?

Exemptions should serve a limited and exceptional purpose.

They should provide a temporary and reviewable mechanism for circumstances where:

- the proposed conduct would otherwise contravene the Act;
- the conduct has a clearly identified legitimate purpose;
- the circumstances are not adequately addressed by an existing exception or special measures provision; and
- the decision-maker is satisfied, on evidence, that the exemption is justified.

An exemption should not be necessary where an existing statutory exception already makes the

conduct lawful.

In particular, legitimate sex-specific protections should not be made dependent on an exemption merely because they involve differential treatment. Where sex is materially relevant to privacy, bodily integrity, safety, pregnancy, motherhood, sport, services or another legitimate purpose, the Act should clearly identify the circumstances in which sex-specific treatment is lawful.

An exemption should therefore not become a mechanism by which established sex-based protections are repeatedly negotiated, weakened or made unnecessarily temporary.

Question 36: The exemptions process

a. What, if any, changes should be made to the process for seeking an exemption?

WSA supports greater transparency, clearer procedural requirements and meaningful consideration of the interests of people who may be affected by an exemption.

The process should require an applicant to identify:

- the conduct for which the exemption is sought;
- the statutory provision that would otherwise apply;
- the purpose of the proposed conduct;
- the evidence demonstrating why the exemption is required;
- alternatives considered; and
- the expected effect on people who may be affected.

i. Should there be greater transparency and/or options for public involvement in the process?

Yes.

Where an exemption could materially affect a defined group of people, there should be appropriate public notification and an opportunity for affected individuals and representative organisations to make submissions.

The level of consultation should be proportionate to the likely impact of the exemption. Not every application will require a lengthy public process, but exemptions with significant implications for privacy, safety, bodily integrity or access to sex-specific services should not be determined without an opportunity for relevant affected interests to be heard.

Public participation should not become a popularity test. The decision should remain evidence-based and determined according to the statutory criteria.

Decisions should include reasons and, subject to legitimate privacy considerations, sufficient information about the basis for the decision to enable public understanding and accountability.

ii. Who should be the decision-maker?

WSA does not consider that the choice between ADNSW and NCAT can be determined independently of the broader design of the exemptions system.

Whichever body is responsible should be required to apply clear statutory criteria, consider evidence and the interests of affected people, give reasons for its decision, impose appropriate conditions where necessary and provide an effective avenue for review.

If responsibility is transferred from ADNSW to a tribunal or another body, the reform should not reduce accessibility or create unnecessary procedural complexity.

b. Should exemptions exclude certain protected attributes or unlawful conduct? If so, what should these be and why?

WSA supports excluding certain forms of unlawful conduct from the exemption power.

In particular, exemptions should not be available to permit:

- sexual harassment;
- vilification; or
- victimisation.

These forms of conduct are qualitatively different from a limited and justified distinction between people on the basis of a protected attribute. Allowing an exemption from protections against such conduct could undermine the fundamental purpose of those protections.

WSA does not consider that one protected attribute should automatically be excluded from the exemption framework simply because it is a protected attribute.

However, an exemption permitting differential treatment on the basis of sex should be subject to particularly clear criteria and should not be used to circumvent an existing statutory exception that lawfully recognises the relevance of sex.

c. What, if any, other changes should be made to the exemptions process?

WSA supports:

- clear statutory timeframes;
- written reasons for decisions;
- publication of exemptions, subject to appropriate privacy protections;
- clear conditions and limitations;
- effective review rights;
- a requirement to reconsider an exemption where circumstances materially change; and
- a duration no longer than reasonably necessary to achieve its legitimate purpose.

WSA supports the possibility of a fast-track process for genuinely straightforward applications, provided that eligibility for fast-tracking is clearly defined and the process does not remove necessary scrutiny or the opportunity for affected people to be heard.

A maximum exemption period of ten years should not become the default. The duration should correspond to the circumstances relied upon and should be no longer than necessary.

Question 37: Decision-making framework

a. Should the exemptions framework be:

i. Guided by legislative or non-legislative material?

Legislative material.

The core criteria governing exemptions should be contained in the Act rather than being left primarily to guidelines or other non-legislative material.

Guidelines may provide useful administrative guidance, examples and procedural information, but they should supplement rather than replace clear statutory criteria.

ii. Mandatory or discretionary?

Mandatory core criteria.

The decision-maker should be required to consider specified core criteria in every exemption application.

This would promote consistency, transparency and accountability while still allowing the decision-maker to exercise judgment when applying the criteria to the particular circumstances.

iii. Exhaustive or non-exhaustive?

WSA supports a mandatory core list of criteria with limited flexibility to consider other matters that are genuinely relevant to the particular application.

A completely exhaustive list may prevent consideration of unusual circumstances. However, an unrestricted non-exhaustive discretion could make the decision-making framework uncertain and difficult to scrutinise.

Any additional considerations should therefore be relevant to the statutory purpose and capable of being explained and justified.

b. Should ADNSW be required to consider whether the exemption would be consistent with the objects and purposes of the ADA?

Yes.

The decision-maker should be required to consider whether the proposed exemption is consistent with the objects and principles of the Act.

i. Should exemptions be limited by the stated objects of the Act?

Yes.

The stated objects should provide a substantive boundary for the exercise of the exemption power.

An exemption should not be granted where it would fundamentally undermine the purposes and principles established by Parliament.

This does not mean that every exemption is inconsistent with the objects of an anti-discrimination Act. An exemption exists precisely because there may be circumstances in which conduct that would otherwise be unlawful is justified.

The objects should therefore guide and constrain the exemption power rather than operate as an automatic prohibition.

The objects must, however, themselves be drafted carefully. They should not be expressed in a way that inadvertently undermines an existing lawful sex-specific exception, special measure or certification.

ii. Should exemptions instead be determined as a matter of discretion having regard to the objects, scope and purpose of the Act as a whole?

The decision-maker should consider the Act as a whole, including its objects, protected attributes, substantive prohibitions, exceptions and other relevant provisions.

However, this should operate within the statutory boundaries established by the stated objects and criteria rather than as an unrestricted discretionary power.

The decision-maker should be required to explain how the proposed exemption is consistent with the purposes of the Act and why the exemption is justified in the particular circumstances.

The relationship between the objects clause and the exemption framework is important. If an objects clause were drafted in a way that treated gender identity as determining the meaning of sex, that interpretation could affect whether a sex-specific service was considered consistent with the objects when an exemption was assessed.

For this reason, the objects and principles of the Act must be drafted consistently with its substantive sex-specific provisions. An objects clause should guide interpretation of the Act, not inadvertently undermine provisions that Parliament has otherwise made lawful.

Question 38: The exemptions criteria

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

WSA supports replacing broad and potentially uncertain criteria with a clearer statutory framework requiring consideration of the following matters.

1. Whether the proposed conduct would otherwise contravene the Act

The decision-maker should first establish that an exemption is actually required.

If the conduct is already lawful under an existing exception, special measure or other provision of the Act, an exemption should not be necessary.

2. The legitimate purpose of the proposed conduct

The applicant should identify a specific and legitimate purpose for the conduct.

General assertions of convenience, preference or administrative ease should not be sufficient.

3. Evidence demonstrating the need for the exemption

The need for an exemption should be supported by evidence appropriate to the circumstances.

The decision-maker should not rely solely on assertions by the applicant where the exemption may materially affect other people.

4. Necessity

The decision-maker should consider whether the exemption is genuinely necessary to achieve the stated purpose.

5. Less discriminatory alternatives

The decision-maker should consider whether the same legitimate purpose could reasonably be achieved by a less discriminatory means.

Where an alternative is available, the applicant should explain why it is not reasonably practicable or effective.

6. Impact on affected people

The decision-maker should expressly consider the effect of the exemption on people who may be affected by it.

This should include consideration of effects on privacy, bodily integrity, safety, access to services, employment and other relevant interests.

Where an exemption may affect women or girls as a defined group, those effects should be expressly considered.

7. Measures to avoid or reduce adverse effects

Applicants should identify reasonable measures that can be taken to avoid or minimise adverse effects.

The decision-maker should be able to impose appropriate conditions where necessary.

8. Public, social and community impact

The broader public interest should be considered, but it should not operate as an unrestricted power to override statutory protections.

The interests of people directly affected by an exemption are themselves part of the public interest and should not be overlooked.

9. Consistency with the objects and principles of the Act

The decision-maker should consider whether the exemption is consistent with the objects and principles established by Parliament.

10. Conditions and safeguards

Exemptions should be capable of being narrowly framed and subject to conditions, safeguards, reporting or review where appropriate.

11. Duration

An exemption should last only for the period reasonably necessary to achieve its legitimate purpose.

Renewal should not be automatic. A renewed exemption should be reconsidered against the statutory criteria and any changed circumstances.

12. Existing sex-specific protections

The criteria should make clear that an exemption is not a substitute for a proper statutory exception.

Where sex is materially relevant to privacy, bodily integrity, safety, pregnancy, motherhood, sport, services, employment or another legitimate purpose, the legislation should clearly identify lawful sex-specific distinctions wherever possible.

Women should not be required to rely on a temporary exemption mechanism to preserve protections that are properly recognised as legitimate consequences of the material difference of sex.

Similarly, where an existing statutory exception or certification already makes conduct lawful, that conduct should not be treated as requiring a further exemption merely because it involves differential treatment.

CONCLUSION

WSA supports modernisation of the Anti-Discrimination Act 1977 (NSW) where reform makes the legislation clearer, more coherent and more accessible.

However, simplification should not come at the expense of substantive protections.

For WSA, a central principle of the review should be that sex remains an independently identifiable and legally meaningful protected attribute. The Act should recognise that equality does not always require identical treatment and that sex-specific protections may be necessary to protect privacy, bodily integrity, safety, health, pregnancy and motherhood, sport, services and participation in public life.

The Act should provide clear statutory guidance about when differential treatment is unlawful, when it is lawful because of an express exception or other provision, and when an exemption may properly be granted.

An exemption should be exceptional, evidence-based, transparent, proportionate and limited in duration. It should not become a substitute for clear legislation or a mechanism for making legitimate sex-based protections unnecessarily provisional.

The objects, principles, exceptions, special measures and exemptions should operate coherently. An objects clause should assist interpretation of the Act as a whole, but should not inadvertently undermine substantive provisions that Parliament has enacted.

WSA supports an Anti-Discrimination Act that protects people from unlawful discrimination while remaining clear about the material characteristics and legitimate interests that the law is intended to protect.

Dr Elizabeth Caballero
Founder & President
Women Speak Australia

<https://womenspeak.au/>