



Anti-Discrimination
New South Wales

**Anti-Discrimination NSW Submission to the
NSW Law Reform Commission
Anti-Discrimination Act Review
October 2023**

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Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the NSW Law Reform Commission (the **Commission**) for the opportunity to make a submission to its review of the *Anti-Discrimination Act 1977 (ADA)*.

ADNSW administers the ADA which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. Sexual harassment, as well as vilification on the grounds of race, transgender status, homosexuality and HIV/AIDS is also unlawful.

ADNSW works to eliminate discrimination in NSW by:

- Answering enquiries
- Resolving complaints
- Raising awareness about discrimination and its impacts
- Managing applications for exemptions from the ADA
- Advising the government about discrimination issues

Since its commencement on 1 June 1977, the ADA has provided protection from discrimination to the NSW community on certain grounds and in areas of public life. Although the ADA was pioneering when it was introduced almost 50 years ago, it has fallen behind best practice standards locally and internationally. The protection against discrimination, harassment, and vilification available to people in NSW should be no less than at the federal level, or in other state and territories around Australia.

The last large-scale review of the ADA was undertaken by the Commission in 1999 and culminated in 160 recommendations. Many of these recommendations have not been implemented. Today, several aspects of the ADA are inconsistent with anti-discrimination laws in other state and federal jurisdictions and many of the provisions are out of step with contemporary practices and community expectations. Since its conception, piecemeal amendments have resulted in an Act that is difficult to navigate for people affected by discrimination, who are often at a disadvantage. It is also difficult for duty holders, such as employers, small businesses, and educational institutions to understand what their obligations are under the law.

Human rights and anti-discrimination law across jurisdictions in Australia is complex, with various overlapping and inconsistent laws. ADNSW considers that any proposed legislative change to the ADA should be thought about in this broader context, along with the views of the NSW community, particularly those likely to be affected by unequal treatment and discrimination.

ADNSW welcomes this comprehensive review by the Commission in consultation with the NSW community. As the Attorney General Michael Daley pointed out, there have been monumental shifts in society, demographics and attitudes since the ADA came into force in 1977. The current review provides an opportunity to benefit from the experience of almost 50 years of anti-discrimination laws to ensure the new ADA reflects best practice, delivers genuine and effective solutions for people experiencing discrimination, and improves equality of opportunity for all people in NSW.

Not only has the ADA languished without review since 1999, but this review also takes place in the context of a broader reconsideration of discrimination laws in Australia . In the Summary Report of its position paper *Free and Equal: A reform agenda for federal discrimination laws*¹, the Australian Human Rights Commission summarises some of the key problems with discrimination laws, most of which also apply to the ADA, as follows:

“First, addressing discrimination is heavily reliant on individuals to bring complaints, rather than on more systemic approaches to building cultures of prevention – within businesses, services and the institutions of public life.

The focus should shift to preventing discrimination, rather than reacting to it, after the fact.

Secondly, the regulatory framework is out of date and needs strengthening. There should be a full range of regulatory responses available to target discrimination of different kinds, at different levels of severity, and to engender understanding and certainty about legal obligations. Federal discrimination laws do not provide adequate support to the business sector to take proactive efforts to address potential discrimination.

Thirdly, the discrimination system, while offering a range of options, can be difficult to navigate, and legal remedies difficult to access, with the result that many meritorious claims may not be pursued in the courts. Individuals need the tools to obtain access to justice.

*Fourthly, with, for now, four sets of federal discrimination laws, alongside state and territory instruments – and overlapping regimes such as Fair Work – the mix of discrimination laws is complex and sometimes inconsistent, which leads to difficulties in applying the law. There are also gaps in protection, so some people are not protected at all by discrimination laws, or are unable to obtain access to a remedy for discriminatory conduct”.*²

ADNSW welcomes this comprehensive review by the Commission in consultation with the NSW community. ADNSW has divided its submission into three parts:

- a. Key issues for reform
- b. Broader policy reforms
- c. The role and functions of the Anti-Discrimination Board

¹ Free & Equal: A reform agenda for federal discrimination laws – Summary Report, Australian Human Rights Commission 2021 <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>

² Ibid, page 7

1. Key issues for reform

ADNSW has identified priority areas for reform based on our day-to-day experience administering the ADA, collaboration with anti-discrimination and human rights agencies in other Australian jurisdictions and feedback from governmental and community stakeholders.

Structure of the ADA

ADNSW supports the drafting of a more modern Act with a clearer structure and framework.

The current structure of the ADA is difficult to navigate and understand, which raises issues around accessibility for people affected by discrimination and could potentially create a barrier to access to justice.

The ADA's style and form are inconsistent with other more recently drafted legislation in other Australian states (such as the [Discrimination Act 1991 \(ACT\) \(ACT Act\)](#), the [Anti-Discrimination Act 1991 \(Qld\) \(Queensland Act\)](#), the [Anti-Discrimination Act 1992 \(NT\) \(NT Act\)](#) and the [Anti-Discrimination Act 1998 \(Tas\) \(Tasmanian Act\)](#)). Unlike other jurisdictions which include a consolidated list of attributes upfront, the ADA details each protected attribute, or 'ground of discrimination' under a separate Part (for example, [Part 2 – Racial Discrimination](#) and [Part 4 – Discrimination on the ground of disability](#)). Under each Part, the ADA sets out the areas of public life in which discrimination on that ground is prohibited, and exceptions when discrimination is permitted. Areas of life and exceptions for each ground can be either overlapping and repetitive with other Parts, or inconsistent, making the Act difficult to navigate and for users to understand their rights and responsibilities.

A modernised Act could take a similar form to other jurisdictions, such as consolidated lists of protected attributes, areas of public life in which discrimination is prohibited and exceptions to the Act.

A clear and accessible ADA would assist complainants and respondents, many of whom are self-represented, to better understand their rights and obligations under the law. A more consistent and uniform Act would also assist other users of the ADA including courts, Tribunals and legal practitioners to perform their duties.

Re-drafting the ADA could also positively impact ADNSW's effectiveness in delivering its core statutory function which is to eliminate discrimination and promote equality in NSW.

Reform of grounds

The terminology and language used in the grounds in the ADA which cover LGBTQI+ groups are out of step with contemporary language, other state and federal jurisdictions and the grounds covered by section 93Z of the [Crimes Act 1900³ \(NSW Crimes Act\)](#), which replaced the serious vilification provisions in the ADA.

Homosexuality, as it is currently drafted in the ADA, may not cover people who identify as bisexual, pansexual or asexual. Similarly, the existing transgender provisions are binary and contain references

³ In 2018, criminal provisions for serious vilification on the grounds of race, homosexuality, transgender status and HIV/AIDS status were removed from the ADA and the broader offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status was introduced into the *Crimes Act 1900* (NSW).

to living as a member of the “opposite sex”. These provisions may not cover individuals with a non-binary, genderqueer, gender neutral, agender or other gender identity.

ADNSW receives comparatively fewer complaints and enquiries from people in the LGBTQI+ community than complaints on other grounds. Our long-standing connection with LGBTQI+ communities and advocacy organisations leads us to believe that this is based on the need for urgent law reform in this area.

In addition, religious belief and activity is not explicitly covered as a ground in the ADA (however, ethno-religion is included in the definition of ‘race’), whereas this attribute is protected in all other Australian jurisdictions except NSW, South Australia and the Commonwealth.

On 12 November 2023, religious vilification will become unlawful under the ADA as the [Anti-Discrimination Amendment \(Religious Vilification\) Act 2023 \(Religious Vilification Act\)](#) will come into force. It will become unlawful to do a public act that incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, because of their religious belief, affiliation or activity, or because they do not have a religious belief or affiliation, or do not engage in religious activity. This means that while religious vilification will become unlawful, protection against discrimination based on a religious belief or activity will not be explicitly protected in the ADA.

As described in more detail below, ADNSW supports amending the grounds in the ADA to include protection based on the following attributes:

- Sexual orientation;
- Gender identity;
- Intersex (or sex characteristics); and
- Religion or religious belief.

Sexual Orientation

The ground of ‘homosexuality’ should be amended to provide protection from discrimination for a broader range of sexual orientations in NSW.

Homosexuality is a protected attribute under the ADA and dealt with under [Part 4C](#). The ADA defines homosexuality as male or female homosexual. The issue with the use of the term ‘homosexual’ is that it is too narrow and does not account for diverse sexual orientations, such as bisexual, heterosexual, pansexual (people who experience sexual attraction towards other persons regardless of their gender identity) or asexual (people who feel little to no sexual attraction to any persons). The definition of homosexuality in [section 4](#) of the ADA also reinforces binary concepts of gender by limiting protection to homosexual men and women.

Other Australian jurisdictions offer protection based on ‘sexual orientation’ or sexuality. The [Sex Discrimination Act 1984](#) (Cth) (SDA), defines sexual orientation as follows:

sexual orientation means a person’s sexual orientation towards:

- a) *persons of the same sex; or*

- b) *persons of a different sex; or*
- c) *persons of the same sex and persons of a different sex*

Gender Identity

The ground of transgender status should be changed and extended to cover variations in gender identities, such as persons who identify as gender fluid, gender queer or non-binary.

Transgender grounds are dealt with under [Part 3A](#) of the ADA. Under the ADA being transgender or a transgender person is a protected attribute where a person “identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex” and includes a person “who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”.

The issues with the existing provisions include that they conflate concepts of intersex status and transgender status, although these are unrelated. Gender identities including non-binary and gender queer persons are not protected.

In NSW, section 93Z of the [NSW Crimes Act](#) defines gender identity as the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth. This definition is also employed in the SDA.

The [Victorian Gender Equality Act 2020 \(Victorian Act\)](#) also uses the term “gender identity” throughout, whilst similarly the [Queensland Act](#) makes it unlawful to discriminate based on gender identity. [The Tasmanian Act](#) protects both gender expression and gender identity. The Western Australian Law Reform Commission (**WA Law Reform Commission**) recently recommended that the WA legislation should use the term ‘gender identity’.⁴

Although the ADA provides protection to all transgender persons, the legislation differentiates between a transgender person and a ‘recognised transgender person’. A ‘recognised transgender person’ is defined in [section 4](#) of the ADA as ‘a person the record of whose sex is altered under Part 5A of the [Births, Deaths and Marriages Registration Act 1995](#) or under the corresponding provisions of a law of another Australian jurisdiction’. ADNSW considers this distinction as inappropriate and supports removing this definition from the ADA.

‘Gender identity’ is defined in the Victorian Act as:

a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.

The WA Law Reform Commission recommended a similar definition be used in the WA legislation.⁵

⁴ [Review of the Equal Opportunity Act 1984 \(WA\)](#), Law Reform Commission Western Australia, Project 111 Final Report, p. 82.

⁵ *Ibid*, p. 82.

Intersex status or sex characteristics

ADNSW supports including protection against discrimination for people with innate variations of sex characteristics (intersex). However, ADNSW acknowledges that terminology is contested in this area and supports seeking the views of stakeholders to ensure that language used in the ADA appropriately reflects people subjected to discrimination.

The ADA currently provides protection based on sex discrimination. Coverage extends to characteristics that generally appertain to persons of a particular sex. For example, breastfeeding is described as a characteristic that appertains generally to women. The ADA confuses and conflates the concepts of sex, gender identity and gender expression and uses binary language to describe sex, including references to 'the opposite sex'.

The SDA was amended in 2013 to include "intersex status", and the Australian Capital Territory and South Australia also provide coverage on this ground. Tasmania's legislation refers to "intersex variations of sex characteristics". After considering the views of stakeholders, the WA Law Reform Commission recommended that a new protected attribute of sex characteristics should be included in the WA legislation.⁶

Section 93Z of the [NSW Crimes Act](#) defines "intersex status" as the status of having physical, hormonal or genetic features that are:

- a) neither wholly female nor wholly male, or
- b) a combination of female and male, or
- c) neither female nor male.

Intersex Human Rights Australia has expressed a preference for protection on the grounds of "sex characteristics", on the basis that many definitions of 'intersex status' refer to what intersex people lack and conflate intersex with gender identity. This position has received support from the Public Interest Advocacy Centre⁷, which recommended that "the protected attribute of intersex status in the SDA should be replaced with 'sex characteristics' based on the definition in the Yogyakarta Principles plus 10⁸ and also used by the United Nations.

Religion or religious belief

Religion or religious belief should be a separate protected attribute in the ADA. On 3 August 2023, the NSW Parliament passed the [Religious Vilification Act](#) to amend the ADA to include protection against religious vilification. However, religion is not included as a separate ground of discrimination in the ADA. Most Australian jurisdictions expressly include religious belief (or similar term) as a separate protected attribute and this lack of coverage in NSW is unusual.

Issues with current protections

Under the ADA, race is defined as including colour, nationality, descent and ethnic, ethno-religious or national origin. None of these terms are defined in the Act. All but the term 'ethno-religious' were

⁶ Ibid, p. 116.

⁷ [From Leader to Laggard: the case for modernising the NSW Anti-Discrimination Act](#), Public Interest Advocacy Centre, 6 August 2021, p. 4.

⁸ <http://yogyakartaprinciples.org/principles-en/yp10/>

taken from the Convention on the Elimination of all forms of Racial Discrimination, which Australia ratified in 1975 and which also did not define them.

In adding 'ethno-religious origin' as a subset of 'race' in 1994, the Government intended to balance the protection of all religious groups with a long-established culture and history from discrimination and vilification, with protecting freedom of expression, including religious freedoms. It is evident from extrinsic material that the government's intention at the time was that ethno-religious groups would include Jews, Sikhs and Muslims.

Cases on whether Muslims are an ethno-religious group under the ADA have come before the NSW Administrative Decisions Tribunal and NSW Civil and Administrative Tribunal (**NCAT**). The Tribunals' Appeal Panels have generally ruled that Muslims are covered by the ADA as an ethno-religious group; however single member decisions have not been so consistent.

The NCAT decision of *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 considered the history of case law on the question of whether Australian Muslims are an ethno-religious group under the ADA. Earlier cases tended to give the term '*ethno-religious*' a narrow interpretation while more recently the Appeal Panel has taken a wider view. In *Ekeremawi*, the NCAT members preferred the broader approach, which involves consideration of several factors that may be relevant to determining whether a particular group shares an ethno-religious origin. The evidence that is provided to NCAT about these factors will therefore be the key issue in deciding whether a group shares an ethno-religious origin.

The NCAT members found that, in the case of *Ekeremawi*, the evidence provided did "*not support a finding that Muslims living in Australia are a 'race' by reason of a common ethnic or ethno-religious origin*", however they made it clear that different, or additional evidence might have led to a different result on this point.

This decision appears to suggest that the question of whether Muslims share an 'ethno-religious origin' for the purposes of the ADA will be a question of fact to be determined by the NCAT on the evidence in each individual case. This situation makes it difficult for ADNSW to provide clear advice to members of the public about when the ADA applies. ADNSW can still accept complaints from Muslims on the ground of race (ethno-religious origin), however this lack of clarity may discourage individuals from lodging a complaint (this view is supported by community feedback to ADNSW's community engagement team). If a matter proceeds to conciliation the uncertainty may also act as a disincentive to settlement. Eventually, if the matter fails to resolve and is referred to NCAT, the burden of providing evidence of a shared ethno-religious origin may be onerous, particularly for self-represented litigants.

Together, these factors reduce the ability for Muslims to seek redress for racial discrimination and vilification, protections that the NSW Parliament intended to be available to ethno-religious groups, including Jews, Sikhs and Muslims, since 1994.

Religion in other jurisdictions

Religion is a separate protected attribute in most other Australian jurisdictions. Tasmanian legislation includes separate attributes of "religious belief or affiliation" and "religious activity". Queensland, Northern Territory and Victorian legislation includes "religious belief or activity". South

Australian law includes “religious appearance or dress”. Western Australia refers to the ground of “religious or political conviction”, however the WA Law Reform Commission has recommended that these be separated into two grounds.⁹

The Australian Capital Territory refers to “religious conviction”. Victoria defines religious belief or activity as: holding or not holding a lawful religious belief or view; engaging in, not engaging in or refusing to engage in a lawful religious activity. The Northern Territory includes Aboriginal spiritual belief or activity in their definition of religious belief and activity. Tasmanian legislation includes the following definitions: *religious activity* means engaging in, not engaging in, or refusing to engage in, religious activity; *religious belief or affiliation* means holding or not holding a religious belief or view.

⁹ Ibid, p. 110.

2. Broader reforms

As well as priority areas for reform, ADNSW has identified the potential for broader policy reforms. These include:

- Reconsideration of the scope of exceptions in the ADA;
- Expansion of the vilification provisions;
- Review areas of public life covered;
- Re-consideration of the powers of the President; and
- Introduction of special measures provisions across all grounds.

Review scope of exceptions

There are a significant number of exceptions in the ADA, many of which are outdated and do not align with current community and societal expectations. Many exceptions are also inconsistent with anti-discrimination legislation in other jurisdictions and across different grounds in the ADA which makes it difficult for practitioners and the public to understand and navigate the law. ADNSW supports reconsidering many of the current exceptions and ensuring that they have clear and consistent public policy rationales that are supported by the NSW community.

Exceptions for ‘private educational authorities’

ADNSW supports a reconsideration of the scope and breadth of the exceptions for ‘private educational authorities’ in the ADA. The ADA provides exceptions from the ADA for ‘private education authorities’ (including religious schools) to discriminate in the areas of education and employment on the grounds of:

Sex	sections 25(3)(c) and 31A(3)(a)
Transgender status	sections 38C(3)(c) and 38K(3)
Marital or domestic status	sections 40(3)(c) and 46A(3)
Disability	sections 49D(3)(c) and 49L(3)(a)
Homosexuality	sections 49ZH(3)(c) and 49ZO(3)
Age	section 49ZYL(3)

NSW is the only jurisdiction in Australia that allows private educational institutions to discriminate based on the above grounds. The Australian Law Reform Commission (**ALRC**) is currently conducting an Inquiry into Religious Educational Institutions and Anti-Discrimination Laws. In its Consultation Paper released on 27 January 2023 the ALRC proposed to remove and narrow the exceptions for religious educational institutions in anti-discrimination law by amending the SDA and *Fair Work Act 2009* (Cth) (**FWA**).

The NSW Law Reform Commission’s 1999 Review of the ADA (**NSWLRC 1999 ADA Review**) recommended that the exception for private educational authorities in relation to education be

repealed on all grounds and a limited exception for educational institutions which operate in accordance with religious tenets for the grounds of sex, domestic status, sexuality, transgender and religion should be provided in the Act.¹⁰ The NSWLRC 1999 ADA Review also recommended that the exceptions for private educational authorities in employment should only apply to religious educational authorities; and only on the grounds of sex, pregnancy, domestic status, sexuality and transgender status.¹¹

It is concerning under the ADA it is lawful to sack a teacher at a private school because of their marital status if they seek a divorce. Further, it is also concerning that a private school could lawfully discriminate against a person with a disability when considering their admission. Students, teachers and staff who may have been discriminated against when applying for admission, participating in school life or when applying for a job based on grounds protected under the ADA have no redress against these actions under the current law.

Exceptions for small businesses, partnerships and private households

ADNSW supports a reconsideration of the exceptions currently available for small business, partnerships and private households under the ADA. The NSWLRC 1999 ADA Review recommended that the small business and the partnership exceptions be repealed.¹²

Under the ADA, the provisions that apply to partnerships are limited to firms consisting of 6 or more partners (meaning that there is an exception that allows discrimination in partnerships consisting of fewer than six partners) on the grounds of race, sex, disability, age, carer's responsibilities, marital or domestic status and transgender status¹³.

Small businesses (up to 5 employees) and employment in a private household are excepted from the obligations on employers not to discriminate based on sex, disability, age (only private households), carer's responsibilities, marital or domestic status and transgender status when hiring and firing¹⁴.

Exception to sexual harassment provisions

[Section 22G\(2\)](#) provides an exception from the sexual harassment provisions when providing, or offering to provide, accommodation in private households.

Exceptions in sport in relation to transgender persons

ADNSW supports a reconsideration of the exception in [section 38P](#), which provides for unconditional transgender discrimination in any sporting activity for members of the sex with which the transgender person identifies. Other jurisdictions allow discrimination in competitive sporting

¹⁰ [Review of the Anti-Discrimination Act 1977 \(NSW\) \[1999\] NSW Law Reform Commission 92](#), Recommendations 20 – 22.

¹¹ Ibid, Recommendation 16.

¹² Ibid, Recommendation 14 - 15.

¹³ Exceptions in ADA on ground of race - section 10A(2); sex - section 27A(2); disability - section 29G(2); age - section 49ZYE(2); carer's responsibilities - section 49Y(2); marital or domestic status- section 42A(2); and transgender status - section 38F(2).

¹⁴ Exceptions in ADA on ground of sex - section; disability - section 49D(3); age - section 49ZYB(3); carer's responsibilities - section 49V(3); marital or domestic status- section 40(3); and transgender status - section 38C(2).A

activity for people aged 12 and over where the strength, stamina or physique of competitors is relevant.¹⁵

Exceptions for religious bodies

The ADA allows for very broad exceptions for religious bodies on all grounds in the ADA. Section 56(d) states that:

Nothing in this Act affects any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

ADNSW submits that this exception is too broad and should be reconsidered. 'A body established to propagate religion' is not defined in the ADA and could include a number of organisations set up to provide social and public services in the NSW community. An example of an unintended consequence of this provision is that an accommodation provider with a religious affiliation could arguably rely on this exception to refuse to a single, unwed mother access to services. Social services, particularly ones that receive government funding, should be equally accessible to all people in NSW who require assistance.

The case of *OV v OW v Members of Board of Wesley Mission Council* [2010] NSWCA 155¹⁶ goes into detail about the exception for religious bodies in the ADA.

Areas of public life protected

The areas in which the ADA prohibits discrimination are work, education, registered clubs, accommodation, and goods and services, however coverage varies between protected attributes.

ADNSW can identify several areas of public life where the ADA does not provide coverage and recommends the following changes be considered.

Employment

More complaints are made about discrimination in employment than in any other area under the ADA¹⁷, however not all forms of working relationships are covered by the ADA. The ADA does not expressly cover unpaid or volunteer workers in the definition of employees, except in the sexual harassment provisions ([section 22B\(9\)](#)). Therefore, this group is not covered against discrimination. Other Australian jurisdictions including the Australian Capital Territory, Queensland and South Australia recognise this work as a form of employment.

ADNSW supports expanding the definition of employment to include unpaid and voluntary workers. The relationship that volunteers have with an employer is very similar to that which a paid employee or contract worker has with an employer. Volunteering plays an important role in the NSW community and economy and takes place across many industries and contexts including in not-for-

¹⁵ *Sex Discrimination Act 1984* - section 42, *Equal Opportunity Act (Vic)* - section 72(3), *Anti-Discrimination Act (Qld)* - section 111.

¹⁶ <https://www.caselaw.nsw.gov.au/decision/549ff4d53004262463c5fbe8>

¹⁷ *Anti-Discrimination NSW Annual Report 2020 – 2021*, <https://antidiscrimination.nsw.gov.au/documents/annual-reports/anti-discrimination-annual-report-2021-22.pdf>, p. 43.

profit organisations, in the private sector and government organisations. Australian census data shows that almost 20 percent of the NSW population engages in voluntary work.¹⁸

New and emerging forms of work, such as those in the gig economy, are not provided for in the ADA. Approximately 250,000 Australians are part of the gig economy¹⁹ and a national survey in 2019 found that NSW had the highest levels of participation in digital platform work compared with other states and territories. Workers tend to be younger (aged 18 – 34), male, temporary visa holders rather than permanent residents or citizens and students who are otherwise unemployed and who speak a language other than English at home.²⁰

The ADA provides coverage for contract workers; however, it can be unclear how to identify the ‘employer’ in the context of the gig economy. Academic research has shown that it can be uncertain whether the ‘employer’ is the company or the customer who used the company to pay for a service.²¹ This presents challenges for someone to bring a complaint of discrimination under the current provisions and may result in a worker not having an avenue for redress.

Registered Clubs

A registered club is defined in section 4 of the ADA as the same as in the [Registered Clubs Act 1976](#) which is a club that holds a club licence granted under the [Liquor Act 2007](#). This definition is very narrow and does not extend to many community or sporting clubs that operate in NSW. ADNSW supports consideration being given to expanding the definition of clubs to include community and sporting clubs over a minimum size and regardless of whether they sell alcohol.

Accommodation

The area of accommodation relates to the provision of rental accommodation. It does not extend to strata committees and owners corporations. Moreover, except for sexual harassment, discrimination is not prohibited in the sale and disposition of land.

Consideration should be given to extending the accommodation provisions to include strata committees, owner corporations and the sale and disposal of land. A further option is to impose a positive duty to make reasonable accommodation in all areas, particularly on the grounds of disability and carer responsibilities, subject to a defence of unjustifiable hardship.

Goods and services

The area of goods and services only extends to a refusal to provide the goods and services, and the terms on which they are provided. It does not extend to the manner in which the goods or services are provided, allowing for differential treatment of customers with protected attributes. ADNSW supports including in the Act the manner in which goods and services are provided.

¹⁸ [Region summary: New South Wales](#), Australian Bureau of Statistics, accessed 8 September 2023. Statistics across the last three census show 16.9% (in 2011), 18.1 (in 2016) and 13% (in 2021) of people aged 15 years or over undertook voluntary work for an organisation or group. It is noted that the lower statistic in 2021 may be due to less volunteering opportunities available during the Covid-19 pandemic.

¹⁹ [Uncertainty, money worries and stress – gig workers need support and effective ways to cope](#), The Conversation, 11. March 2022.

²⁰ [Report No. 1 - Select Committee on the impact of technological and other change on the future of work and workers in New South Wales - The gig economy - First report](#), NSW Parliament, p. 6.

²¹ Blackham, Alysia. “We are All Entrepreneurs Now’: Options and New Approaches for Adapting Equality Law for the ‘Gig Economy’”. *International Journal of Comparative Labour Law and Industrial Relations* 34, no. 4 (2018): 413–434.

Vilification

Vilification is prohibited under the ADA on the grounds of race (Part 3), homosexuality (Part 4C), transgender grounds (Part 3A) and HIV/AIDS status (Part 4F). The ADA makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons based on the above grounds. ADNSW supports a consideration of expanding anti-vilification protections beyond the existing grounds to ensure that people in NSW live without abuse based on attributes protected under anti-discrimination law.

The grounds covered by the ADA are inconsistent with those in section 93Z of the [NSW Crimes Act](#), which creates an offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. This gap between the grounds in the ADA and section 93Z means that there is a gap in coverage for vilification on the grounds of religion, sexual orientation, intersex or gender identity that does not meet the threshold for criminal conduct, as there are no directly equivalent civil vilification provisions in the ADA.

Other state and territory jurisdictions provide protection against vilification in the civil law on other grounds. For example, the ACT legislation makes it unlawful to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the grounds of disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics or sexuality.²² Recently, the Victorian government held an inquiry into anti-vilification protections in Victoria. The Victorian government's Legal and Social Affairs Committee released a report in March 2021 which found that vilification is common for many Victorians, including people from culturally and linguistically diverse backgrounds, from particular faith groups, who are Aboriginal and Torres Strait Islander, who identify as LGBTQI+ and with a disability.²³ The Victorian government is currently conducting consultations on expanding anti-vilification laws beyond race and religion to include gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDS status and personal association. It is also examining how to ensure that Victorians can make vilification complaints based on multiple attributes.²⁴

It can be difficult to prosecute perpetrators under the serious vilification provisions in [the NSW Crimes Act](#). Section 93Z has multiple elements that must be established to the criminal standard of proof in the criminal context, meaning there are potentially 'easier' options available to prosecutors. In 2021, it was reported that since the new laws were introduced in 2018, only two prosecutions had occurred under section 93Z. Both offenders were initially convicted, however both had to be annulled as the police had not obtained the consent of the Director of Public Prosecutions which is a requirement under section 93Z(4).²⁵

Definition of public act

A 'public act' is defined in the ADA as:

²² *Discrimination Act 1991* (ACT) - section 67A.

²³ [Response to the Inquiry into Anti-Vilification Protections](#), Victorian Government, accessed 4 September 2023.

²⁴ [Strengthening Victoria's laws against hate speech and hate conduct](#), Engage Victoria, accessed 4 September 2023.

²⁵ [NSW police botch the only two race hate prosecutions under new laws](#), The Guardian, 2 March 2021.

- a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the above grounds

‘Public act’ in section 93Z(5) of the [NSW Crimes Act](#) is defined as:

- a) *any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and*
- b) *any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public, and*
- c) *the distribution or dissemination of any matter to the public.*

For the avoidance of doubt, an act may be a public act even if it occurs on private land.

The definition of ‘public act’ in the ADA is not clear, differs from the definition in the [NSW Crimes Act](#) and does not reflect developments in jurisprudence. Unlike the criminal definition, the definition in the ADA does not explicitly cover the dissemination of materials through social media, which is the primary method of communication for many people in the NSW population and is a platform used for hate speech. The definition in NSW criminal law clarifies that conduct can be considered public even if it occurs on private land.

In the case of *Eker mawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79²⁶ a police exercise that took place in a public station was a public act, even though it was closed to the general public by the police to the extent possible throughout the exercise. More recently, in the case of *Wolf v Secretary, Department of Education* [2023] NSWCATAD 202²⁷ the NCAT Appeal Panel found that a teacher teaching a class within a NSW High School was a ‘public act’ and that comments made during that class constituted racial vilification.

ADNSW considers that the definition of ‘public act’ in the ADA should be updated to reflect developments in jurisprudence, and to clarify who is liable for hate speech posted online and shared on social media.

Process Issues and Complaints Procedure

Standing to lodge a complaint

ADNSW submits that standing to make a complaint under the ADA is too restrictive and consideration should be given to expanding the people and bodies permitted to make a complaint under the Act.

²⁶ <https://www.caselaw.nsw.gov.au/decision/5cc8dd12e4b0196eea406988>

²⁷ <https://www.caselaw.nsw.gov.au/decision/189aa91fbcc79feb334385d1>

The President's powers to deal with complaints are dealt with in [Part 9](#) of the ADA. Under sections 87A, 87B and 87C of the ADA, complaints may be made by individuals, on behalf of an individual by a lawyer or representative body or by a group of people.

Requirement for complaint in writing

Under section 89 of the ADA, there is a requirement that a complaint must be made in writing. In ADNSW's 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.

ADNSW can assist people to meet the requirement in section 89 to make the complaint in writing by transcribing their complaint over the phone. Complainants may also provide their complaint in a different format, for example a video or voice recording, and ADNSW can write out the complaint and return it to the complainant for endorsement. Complaints can also be written in a language other than English or recorded in Auslan and ADNSW will have these complaints translated without charge to the complainant.

However, some of these methods require access and proficiency in technology, which some complainants do not have. ADNSW supports the utilisation of technology to enable people with a disability to lodge a complaint. An option for reform may be to amend the form of complaints in section 89 of the ADA to allow ADNSW to voice-record complaints. However, laws that restrict recording private conversations and sharing content with third parties would need to be considered²⁸ given that, as part of the investigation and conciliation process, a copy of the complaint is shared with the respondent to the complaint to afford them procedural fairness.

Powers of the President

As noted above, the President can only investigate complaints made by individual complainants or representative complaints made on behalf of named individuals. The provisions rely on an individual to identify that they have been subjected to unlawful discrimination and to enforce their rights. The individualised nature of the complaints process presents difficulties for people who are already marginalised, particularly those experiencing disability who are dealing with discrimination and has the potential to re-traumatise complainants.

Whether the complaint is resolved through conciliation, or an outcome is reached by the Tribunal, the current process results in an individualised remedy which may address the unlawful discrimination experienced by a complainant on a case-by-case basis, however, it does not address more widespread discrimination that may be affecting a group or class of people.

Under the ADA the President does not have power to initiate investigations, continue investigations where the complainant withdraws or investigate systemic issues. ADNSW often receives complaints from multiple complainants which relate to the same issue. For example, people with a disability may be experiencing the same accessibility issue lodging an online application through a government website. However, rather than ADNSW being able to proactively engage directly with a respondent to address the issue, ADNSW relies on receiving individual complaints from multiple complainants raising the same accessibility issue. The President can only seek to resolve these complaints by conciliation.

²⁸ See the *Surveillance Devices Act 2007* (NSW).

ADNSW supports a review of the individual complaint mechanism and encourages consideration being given to whether the President should have the power to initiate complaints on behalf of a class of complainants.

Exemptions

The provisions in the ADA that deal with equal opportunity measures should be reformed. The current process under the ADA for people and organisations to undertake ‘special measures’ to achieve substantive equality is confusing and cumbersome for ADNSW to administer, and for the public. Unlike many other Australian jurisdictions, ‘special measures’ provisions only exist in relation to race and age discrimination, however individual programs and activities can be certified as special needs program or activity by the Attorney General under section 126A.

The lack of broader ‘special measures’ provisions is out of step with other jurisdictions, and exemption processes under section 126 and section 126A create an administrative burden for organisations and programs seeking to implement such measures.²⁹

Sections 126 and 126A

The ADA allows for exemptions (under [section 126](#)) and certifications ([section 126A](#)) to be granted to allow favouring certain groups of people to improve access to certain jobs, programs, services or facilities.

Section 126 exemptions are granted by the President or their delegate for a period of up to 10 years. In exercising their function under section 126, the President must consider the six factors in [section 6](#) of the *Anti-Discrimination Regulation 2019 (Anti-Discrimination Regulations)*.

Exemptions generally relate to employment or recruitment. Exemptions can be granted to favour a group of people based on their age, disability, homosexuality, marital or domestic status, race, sex, transgender status or carer’s responsibility (employment only).

Certification under section 126A is an approval granted by the NSW Attorney General for programs, activities or facilities that promote access for groups of people that have one of the characteristics protected by the ADA. These characteristics include disability, homosexuality, marital status or domestic status, sex (including pregnancy, breastfeeding and sexual harassment), transgender status, carer’s responsibilities (employment only).

Certification cannot be given for a special needs program targeted to people of a particular race or age group. [Section 21](#) (race) and [section 49ZJR](#) (age) of the ADA specifically provide exceptions that allow these programs.

There are also exceptions under the ADA relating to ‘genuine occupational qualifications’. For example, [section 14](#) includes an exception for providing persons of a particular race with ‘services for the purpose of promoting their welfare where those services can most effectively be provided by a person of the same race’.

²⁹ The Australian Human Rights Commission’s guide on [Targeted recruitment of Aboriginal and Torres Strait Islanders](#) outlines how NSW is the only jurisdiction where people are required to undertake an application process to designate roles for Aboriginal and Torres Strait Islanders.

[Section 31](#) allows discrimination on the ground of sex where being a person of a particular sex is a genuine occupational qualification for the job.

Background to sections 126 and 126A

Section 126 was included in the ADA when it was enacted in 1977 as a transitional measure. The original purpose of the provision was to allow a specified time for people to plan before being compelled to comply with the ADA where immediate compliance would be unreasonable.³⁰ It has subsequently evolved into a different use.

The NSWLRC 1999 ADA Review noted that the availability of the then section 126 was almost unlimited and should be reformed so that there was transparency in decision making, that the public was notified of an exemption and that the decision was reviewable by the then ADT.³¹ Reforms included the amendment of the Anti-Discrimination Regulations in October 2004 to introduce the six factors to consider in relation to exemption orders.³² Section 126 also now includes a provision allowing an affected person to seek merits review of exemptions decisions.

Aside from these changes, section 126, which was intended as a transitional measure, has been retained since the commencement of the ADA.

Section 126A was introduced in 1994. It was intended for 'programs including management skills for particular groups in the community, technical jobs for women and women's and Aboriginal housing co-operatives'.³³ When it was introduced the then Attorney General stated that ministerial approval would ensure that only appropriate programs and activities were exempted.³⁴ However, the NSWLRC 1999 ADA Review noted that it could see 'see no justification for requiring special needs programs and activities for women, men or people of a particular marital status to be certified by the Minister'.³⁵ Furthermore, because programs based on race and age did not require certification, this created confusion in the community.

The NSWLRC 1999 ADA Review recommended that section 126A be repealed and that 'more general exclusion is required in relation to...special needs programs and activities'.³⁶ However, this recommendation was not implemented and the provision and process remains unchanged.

Need for broad 'special measures' in the ADA

Significant social movements (such as "Me Too" and "Black Lives Matter") have led people to act against discrimination and inequality in the workplace³⁷ and an increased interest in recruitment for targeted roles. In the last six years, applications for exemption and certification have increased by 92.5%. In FY2017/2018, ADNSW received 40 applications and in FY2022/2023 the rate of applications had almost doubled to 77. The resourcing implications of this increase has impacted ADNSW's ability to focus on other strategic projects. The current provisions date back to the 1970s

³⁰ NSW Law Reform Commission, op. cit.

³¹ Ibid.

³² NSW Government Gazette, [Number 153](#), 1 October 2004.

³³ Parliamentary Debates (Hansard) Legislative Council, New South Wales, [4 May 1994](#).

³⁴ Parliamentary Debates (Hansard) Legislative Council, New South Wales, [4 May 1994](#).

³⁵ NSW Law Reform Commission, op. cit.

³⁶ NSW Law Reform Commission, op. cit.

³⁷ [Workplace Inclusion Drives Have Almost Trebled Since BLM Protests](#), Survey Shows, The Guardian, 17 April 2022.

and early 1990s when equal opportunity measures were not as widespread or commonly used as they are in contemporary society.

The current scheme including sections 126, 126A, 21, 49ZJR and the exceptions is inefficient and difficult for the public to understand and for ADNSW to administer. The operations of sections 126 and 126A overlap which creates confusion in the community about which process is relevant to their activity.

ADNSW supports introducing special measure provisions for all protected grounds to advance equality, further the objects of the Act and provide benefit for protected groups.

3. The role and functions of the Anti-Discrimination Board

As part of its terms of reference, the NSW LRC has been asked to consider:

- the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination
- the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws; and
- the interaction between the Act and Commonwealth anti-discrimination laws³⁸.

The Anti-Discrimination Board is an independent statutory authority consisting of 5 members (including the President) appointed by the NSW Governor, with broad discretionary powers that include to:

- carry out investigations, research and inquiries relating to discrimination
- acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights,
- arrange and co-ordinate consultations, discussions, seminars and conferences,
- review, from time to time, the laws of the State,
- consult with governmental, business, industrial and community groups and organisations to ascertain means of improving services and conditions affecting minority groups and other groups which are the subject of discrimination and inequality,
- hold public inquiries,
- develop human rights programmes and policies, and
- 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 this Act³⁹.

The President has additional mandatory functions in relation to the investigation and conciliation of complaints of unlawful discrimination and vilification.

Under section 86 of the ADA, staff are employed in the Public Service under the *Government Sector Employment Act 2013* to enable the President and the Board to exercise these functions, with strict secrecy provisions preventing disclosure of information obtained during the exercise of functions under the ADA to those outside ADNSW⁴⁰.

ADNSW staff are employees of the Department of Communities and Justice (**DCJ**) with DCJ providing shared services in relation to human resource management, information technology, payroll, financial and associated business services. DCJ also manages ADNSW's budget allocation and capital expenditure.

A comparison of the spending per capita of each State, Territory and Commonwealth Anti-Discrimination/Equal Opportunity body (where these figures are publicly available) shows that

³⁸ Anti-Discrimination Act review, Terms of reference 10-12

³⁹ ADA, section 119

⁴⁰ ADA, section 124A

ADNSW has fewer resources than many of its counterparts. The following table shows the extent of that discrepancy.

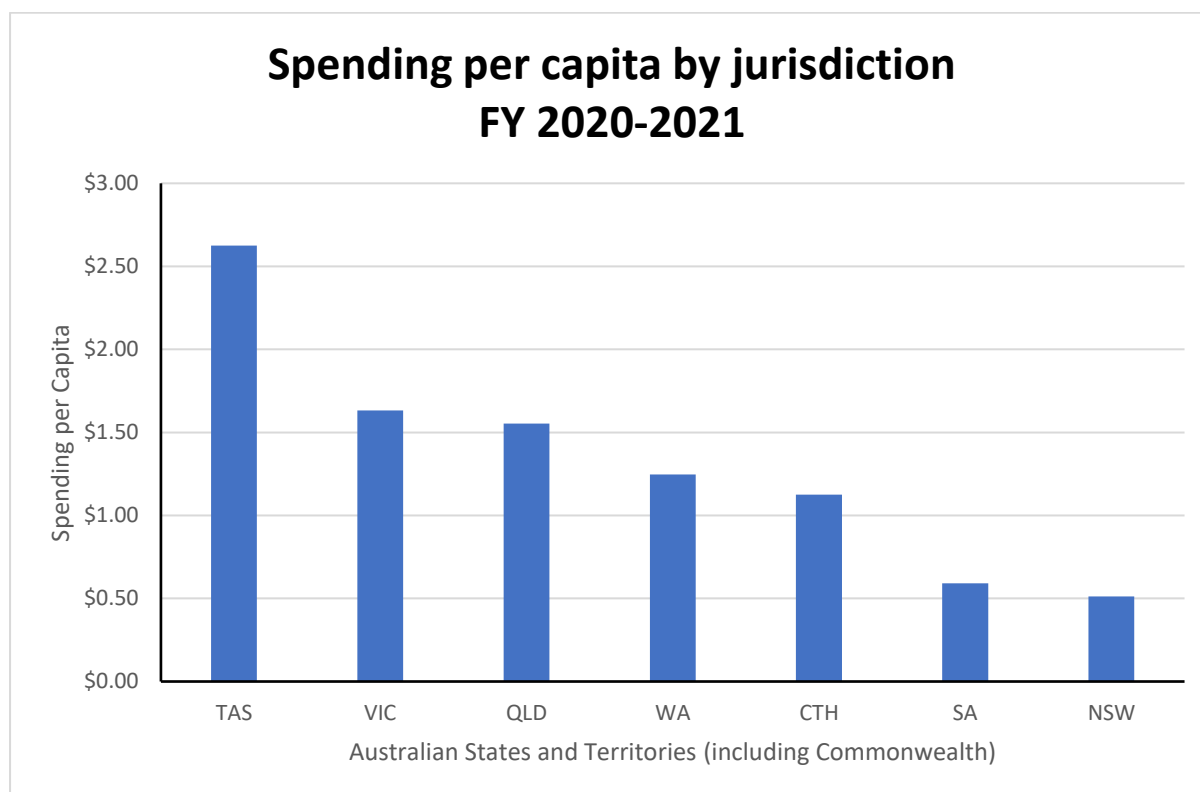


Table 1: Spending per capita by jurisdiction 2020-2021

The 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. Despite the broad, aspirational functions conferred by the ADA, in practice the Board’s ability to perform its functions is limited by budgetary and other constraints.

In considering the purpose and functions of the Board and its powers to address systemic discrimination, the Commission should examine what mechanisms exist to ensure that the Board is able to fully discharge these powers, taking into account the jurisdictional context of the ADA in relation to other state, territory and Commonwealth anti-discrimination and human rights laws.

Questions that may be relevant to the Commission’s consideration could include:

- the organisational context of ADNSW, together with its funding and reporting arrangements;
- whether the Board should manage and be accountable for its own budget?
- how to ensure the Board is adequately funded to perform all the functions conferred upon it?
- whether the appointment of a part time President is consistent with the breadth of the role and the importance of anti-discrimination legislation?
- whether the Board should have broader human rights functions in line with many of its State and Territory counterparts?

Conclusion

As Australia's most populous state, NSW is one of the most culturally diverse states in the world. It is home to more than 8 million people, who come from more than 300 cultures, practice 148 religions and speak more than 280 languages⁴¹. Almost 20% of people have a disability, and while the exact figure is not known, reports estimate that around 11 percent of the population identifies as lesbian, gay, bisexual, transgender, or intersex⁴².

The original goal of the ADA - to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons – remains a worthy and necessary aim. We must continue to strive for the achievement of substantive equality for Aboriginal and/or Torres Strait Islander people, progress towards gender equality, and ensure fair treatment of people from marginalised minority groups.

This review provides a unique opportunity to ensure that the ADA is responsive to the needs of this diverse NSW community; that it demonstrates best practice, delivers genuine and effective solutions for people experiencing discrimination, and improves equality of opportunity for all people in NSW.

ADNSW again thanks the Commission for the opportunity to provide input at this stage of its review of the ADA.

Helen McKenzie
President
Anti-Discrimination Board of NSW

⁴¹ <https://multicultural.nsw.gov.au/communities/>

⁴² <https://www.statista.com/topics/5810/lgbtq-life-in-australia/#topicOverview>