

Review of the Anti-Discrimination Act 1977 (NSW)

Consultation Paper: Unlawful Conduct Community Summary



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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.

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 document deals with content that some people may find distressing. This includes discrimination, sexual harassment, and vilification (including hate speech).

We also refer to concepts and language used in the *Anti-Discrimination Act 1977* (NSW) that can be offensive or upsetting.

Our website [lists some free services](#) you can contact if you need support.

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Glossary

Table 1: Glossary

Word or phrase	Meaning
ADA	The <i>Anti-Discrimination Act 1977</i> (NSW).
Anti-Discrimination NSW	The independent body that administers the ADA. Its role includes accepting and conciliating complaints under the ADA.
Area of public life, or protected area	Areas in which discrimination or sexual harassment are prohibited by the ADA, like work.
Attribute or protected attribute	Personal characteristics that are protected by the ADA, for example, race or sex.
Complainant	A person who brings a complaint to Anti-Discrimination NSW or the NSW Civil and Administrative Tribunal about unlawful conduct under the ADA.
Direct discrimination	When someone with a protected attribute is treated less favourably than someone without that attribute, because of that attribute.
Duty holder	A person or body that has duties towards others under the ADA, for example, schools to students, employers to employees.
Indirect discrimination	When a rule or requirement that applies to everyone unfairly disadvantages people who have a protected attribute.
LGBTQIA+	An acronym for “lesbian, gay, bisexual, transgender, queer, intersex and asexual”, with a “+” to capture any other diverse gender identities and sexual orientations.
NSW Civil and Administrative Tribunal	The independent tribunal that hears and makes decisions about disputes under the ADA.
NSW Law Reform Commission, NSWLRC or “we/us”	The independent body conducting the review of the ADA, and the authors of this paper. We give expert law reform advice to the NSW Government.
Respondent	A person or organisation that responds to a complaint against them under the ADA.
Sexual harassment	Unwelcome, sexual behaviour towards a person that makes them feel offended, humiliated or intimidated.
Unlawful conduct	Behaviour or acts prohibited by the ADA. This includes discrimination, vilification, sexual harassment, victimisation and unlawful advertisements.

Word or phrase	Meaning
Victimisation	When someone punishes or causes disadvantage to another person because they exercised their rights under the ADA.
Vilification	When someone says or does something, by a public act, that incites hatred towards, serious contempt for, or severe ridicule of a person or group based on a protected attribute of that person or members of the group.

Introduction

The *Anti-Discrimination Act 1977* (NSW) (ADA) is an important law in NSW. It prohibits discrimination, vilification, sexual harassment and victimisation. It also provides a way for people to address such conduct by making a complaint.

The ADA was made in 1977, almost 50 years ago. At the time it was groundbreaking. But Australia has changed a lot since the 1970s. There are concerns that the ADA doesn't meet human rights standards, fails to protect many vulnerable people, and is extremely difficult to use.

The Attorney General has asked us to review the ADA. We've been asked to consider if the ADA could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards. At its core, this review asks: can the ADA better serve our community?

Our role is to examine the ADA and, where necessary, make recommendations for change.

Our work so far

To understand the issues, and whether the ADA needs to change, we've researched laws across Australia and internationally. We also asked the public to identify their key concerns with the ADA and to suggest ideas for improving the law.

Organisations and individuals let us know their initial views about the ADA by making preliminary submissions. You can find [a range of preliminary submissions](#) on our website.

We haven't yet formed a view about any of the issues raised in this review. We are now seeking more public input to help us consider the strengths and weaknesses of the ADA, and to identify possible options for reform.

About this community summary

This community summary aims to help you understand the ADA and our review, and to share your views and experiences. It summarises our larger consultation paper on unlawful conduct under the ADA.

The consultation paper explains the ADA in detail. It also sets out some concerns and ideas that we've heard from the community and found in our research. You can find the consultation paper on the ADA project page on our website.

This community summary is shorter, less technical and more accessible than the consultation paper. You can read this instead of, or as well as, the consultation paper.

Both set out key issues about the ADA, including:

- what conduct should be unlawful, and when
- who should be protected
- who should be held responsible for unlawful conduct
- when exceptions are appropriate, and
- whether the ADA should do more to promote substantive equality.

How to have your say

We invite you to share your thoughts on the ADA.

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

- complete our [online survey](#)
- answer the questions in our Easy Read consultation paper, or
- make a submission.

You can find these on our website: www.lawreform.nsw.gov.au.

The due date for survey responses, answers to our Easy Read questions, and submissions is **15 August 2025**.

Submissions and Easy Read responses can be emailed to adareview@dcj.nsw.gov.au.

Answer our survey

You can [complete our survey online](#). Or you can download the survey in Word or PDF, fill it out, 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 be kept confidential or anonymous.

Answer our Easy Read questions

We’ve also published an Easy Read version of the consultation paper. This contains simplified information and questions about the ADA that you might like to answer.

When you send your answers to us, please tell us if you want them to be kept confidential or anonymous.

Make a submission

If you want to give a more detailed response to our review, you can make a submission.

Our consultation paper has questions to help guide your submission. But you don’t need to answer them all. And you can raise other issues and options that we haven’t covered in the consultation paper or this summary.

Our website has more information on [how to make a submission](#).

We usually publish submissions on our website, unless they’re confidential or unsuitable for publication. We may also refer to them in our final report.

Please tell us if you want your submission to be kept confidential or anonymous.

You can find our [privacy and information management policy](#) on our website.

Next steps

We'll seek community feedback

We'll gather feedback through submissions, our survey, Easy Read responses and consultations.

We'll release a second consultation paper and community summary that focuses on the procedures for enforcing the ADA. These include complaint processes and other options to address unlawful conduct. We'll ask for your views on those aspects of the ADA too.

We'll develop recommendations

We'll consider everything we've heard about the ADA from the community, and what we've learned from our research.

We'll use this information to help develop recommendations to the NSW Government. .

We'll report to the Attorney General

We'll present our recommendations to the NSW Attorney General in a final report.

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

After that, our role ends. The NSW Government will consider our report and recommendations, and decide how to respond.

More information on our work

Our website has more [information on how we review a law](#).

About the *Anti-Discrimination Act*

Before we look at the details of the *Anti-Discrimination Act 1977 (NSW) (ADA)*, we outline what it is and what it does.

What the ADA covers

The ADA prohibits four main categories of conduct: discrimination, vilification, sexual harassment and victimisation. It defines who is entitled to be protected from this conduct, who can be held responsible for it, and when.

Who the ADA protects

The ADA only prohibits discrimination and vilification that's based on certain characteristics – such as race. These are called “protected attributes”.

The ADA also protects against sexual harassment, and this doesn't require anyone to prove they have a protected attribute.

When the ADA applies

The ADA sets out the specific circumstances, relationships and areas of life in which discrimination, vilification and sexual harassment is unlawful.

In general, discrimination law is concerned with how people are treated in public, for example, at work. The ADA doesn't apply to personal or family relationships or private interactions that occur, for example, at home.

There are many exceptions in the ADA. These exclude certain conduct, or certain duty holders, from the ADA's coverage. Some apply to certain forms of conduct, others to certain areas or attributes, and some apply across the whole Act.

How the ADA can be enforced

The ADA has a system for making complaints and resolving disputes about discrimination, vilification, sexual harassment and victimisation.

Some people have rights to protection. If they make a complaint about conduct under the ADA, they are called a complainant.

Many people have responsibilities under the ADA. They are called duty holders. For example, employers have duties to protect their employees. A duty holder that has a complaint made about them is called a respondent.

Complaints must first be made to Anti-Discrimination NSW, who can assist the complainant and respondent to reach an agreement. If that's unsuccessful, a complaint can be made to the NSW Civil and Administrative Tribunal.

Other laws also apply

Australia has other laws that prohibit discrimination, vilification and harassment. Some cover the whole country, while others only apply in NSW or other states and territories.

The ADA also operates alongside employment law protections against discrimination and sexual harassment at work.

The rights to equality and non-discrimination are also protected by seven international human rights treaties that Australia is a party to. These rights are the foundation of the ADA and other discrimination laws.

Discrimination

Discrimination laws promote the enjoyment of rights to equality and non-discrimination. The rights to equality and non-discrimination are among the cornerstones of human rights.

Under the ADA, it's unlawful to discriminate against someone based on a protected attribute.

A complainant needs to:

- show that the conduct happened in a specific area of activity, relationship and place that is recognised by the ADA (we call this a “protected area”), and
- meet the test for discrimination.

The protected attributes

In general, the ADA prohibits discrimination based on:

- age
- carer's responsibilities
- disability
- homosexuality
- marital or domestic status
- race
- sex, and
- transgender grounds.

Discrimination based on any other characteristic, for example political belief or activity, isn't unlawful.

So far in our review, we've heard a range of concerns about the way the ADA expresses and defines some existing attributes. Some think that the ADA should protect against discrimination based on other attributes, too.

We summarise these views below.

Age

The ADA protects people against discrimination based on their age or the age of their relatives or associates.

There are exceptions that allow otherwise unlawful age discrimination. These include exceptions about credit applications, driver licences and laws about the legal capacity or welfare of people under 18.

The ADA also separately protects against compulsory retirement due to age. This doesn't apply to judges or some other office holders. Some say this protection against compulsory retirement should be integrated into the prohibition against age discrimination.

Carer's responsibilities

This includes legal guardians or carers, and people caring for a dependent child or any immediate family member who needs care or support.

Some people say this should be widened to reflect the diverse cultures and relationships in our community. For example, it could include other family structures or kinship responsibilities.

Disability

The ADA's definition of disability is broad. It focuses on differences or impairments to a person's functions or body. Other discrimination laws in Australia do this too.

Some people like that the definition is broad and flexible. But others say the definition should more clearly cover psychosocial disability, mental illness or addiction, or the use of an assistance animal.

There are criticisms about the words used to define disability, including "malfunction", "malformation", and "disfigurement". Many people find these offensive and outdated.

We've also heard concerns that the definition reflects the "medical model" of disability. The medical model says people are disabled by their medical problem. It doesn't consider how the environment can cause, worsen or reduce disability.

Some say the ADA should reflect the "social model" of disability instead. This says people are disabled by barriers to their participation in society and enjoyment of their human rights. These barriers can be physical, like inaccessible bathrooms, or social, like prejudice and discrimination.

Homosexuality

The ADA prohibits discrimination and vilification based on homosexuality. This is defined as a "male or female homosexual". It doesn't cover other sexual orientations and is defined in binary terms.

Other discrimination laws in Australia use different terms like "sexual orientation" or "sexuality". Some are much broader than the ADA, and cover asexuality, bisexuality, heterosexuality, emotional, affectional and sexual attraction, and "sexual relations".

Marital or domestic status

This covers people who are single, married (living together or apart), divorced, widowed, or in a de facto relationship and living together.

Some think this attribute could be wider. For example, it could cover other relationship arrangements, like de facto partners who live apart, former de facto partners, or the surviving de facto partner of someone who has died.

Race

The ADA protects against racial discrimination and vilification. "Race" is defined to include colour, nationality, descent, ethnic origin, ethno-religious origin, and national origin. While this is broad, there may be gaps.

The concept "ethno-religious origin" isn't clearly defined and has been interpreted inconsistently. Many say there should be a specific protection against discrimination based on religion.

Some say the definition of “race” should clearly prohibit discrimination based on caste, immigrant status and language. Others suggest making these separate protected attributes.

Another issue is whether the definition should clearly refer to Aboriginal and Torres Strait Islander peoples. This could affirm their right to be free from racial discrimination.

Sex

The ADA prohibits sex discrimination. It protects against pregnancy and breastfeeding discrimination against women as part of its coverage of sex discrimination. Some say pregnancy and breastfeeding should be covered separately.

Another issue is whether the ADA should continue to use binary concepts (for example, “male or female” and the “opposite sex”) in relation to sex discrimination.

A further view is that this attribute should refer to “gender” rather than “sex” discrimination. “Sex” refers to characteristics associated with biological sex. “Gender” is considered part of someone’s personal and social identity; how they feel, present themselves or are recognised in the community.

Transgender grounds

The ADA prohibits discrimination and vilification on “transgender grounds”.

The ADA defines a “transgender person” as someone who:

- identifies, or has identified, as a member of the opposite sex by living as such or seeking to, or
- if their sex is “indeterminate”, identifies as a member of a particular sex by living as such.

This applies whether or not the record of their sex has been altered under the relevant law. It also includes anyone who is thought of as a transgender person, whether or not they are transgender “in fact”.

We heard concerns that these concepts are too narrow and expressed in binary terms.

Many other laws across Australia more broadly protect against discrimination or vilification based on “gender identity”, and some think NSW should too.

Ideas for extending the existing protections

Some say the ADA should more widely cover discrimination based on:

- a protected attribute that someone had in the past or will have in the future (not just what they have now), and
- a protected attribute that their relative or associate has.

Another idea is that the ADA should protect against “intersectional discrimination”.

The ADA only protects against discrimination based on a single protected attribute.

But people can experience discrimination based on more than one attribute, or a combination of protected attributes. For example, Aboriginal women may experience discrimination based on both race and sex. This kind of discrimination can compound disadvantage. Some say the ADA should recognise this.

Ideas for new protected attributes

Many people think it should be unlawful to discriminate based on other attributes, too. We've received a range of suggestions from the community so far.

For example, unlike many other Australian discrimination laws, the ADA doesn't protect against religious discrimination.

Some other ideas include changing the ADA to protect against discrimination based on:

- irrelevant criminal record
- domestic and family violence
- genetic information
- health status and irrelevant medical history
- industrial activity
- religion
- sex characteristics
- lawful sexual activity
- physical features or appearance
- political belief or activity
- profession, trade, occupation or calling
- sex work, or
- socio-economic status.

When discrimination is prohibited

The ADA only prohibits discrimination if it happens:

- at work
- in education
- when goods and services are provided
- when accommodation is provided, or
- in certain activities of registered clubs.

Notably, carer's discrimination is only unlawful at work and not in other areas, like education.

Work

The ADA prohibits discrimination in work. It protects people with all protected attributes and covers many work situations. It lists different types of work relationships and explains what kinds of discrimination are unlawful in each.

But some people say the ADA should have a different definition of who is responsible for work discrimination. They argue the focus should be on whether someone has been discriminated against at work, not whether they have a particular employment relationship.

There are also concerns about certain gaps in coverage.

For example:

- It's unclear if the ADA covers unpaid workers and volunteers, or gig economy workers (people who connect with consumers through apps and websites).
- The ADA prohibits discrimination by local government members against fellow members while doing official functions. However, this doesn't protect against age discrimination.

Exceptions allow discrimination in private households, small businesses and in relation to people under 21.

The ADA allows some duty holders to discriminate against someone based on disability or carer's responsibilities if they can't carry out the "inherent requirements" of the job. Discrimination is also allowed if:

- someone needs a special arrangement to help them meet those job requirements, and
- it would cause the duty holder "unjustifiable hardship" to provide it.

Some say the ADA should require employers to make adjustments that enable a person to do their job. Discrimination would only be allowed if the person still couldn't meet the job requirements despite the adjustments. We discuss this more at page 26, below.

Another idea is that the ADA should only allow discrimination where it is reasonable, proportionate and justifiable.

Education

In general, the ADA prohibits discrimination against students and prospective students in education.

But there are broad exceptions for private educational authorities, including religious schools, which we discuss later in this summary.

Single-sex schools can refuse to enrol a student of a different sex. One issue is whether they should be able to exclude transgender students. Some say the ADA should clarify that they aren't allowed to.

We've also heard concerns about disability discrimination in education. Some students with disability need unique services, facilities, or adjustments. Schools can discriminate against students with disability if providing adjustments would cause the school "unjustifiable hardship".

The provision of goods and services

It's unlawful to discriminate in the terms on which goods or services are provided. The ADA doesn't define "goods". But it says that "services" includes banking, entertainment, food, transport, trades and use of public facilities.

Some say the ADA should also prohibit discrimination in the way the good or service is provided.

Others think the ADA could more clearly prohibit discrimination:

- relating to someone's ability to access and use premises, and
- in superannuation services and insurance.

Accommodation

It's unlawful for a principal or agent to discriminate against someone by:

- rejecting, deferring or de-prioritising their accommodation application
- refusing or limiting benefits linked to their accommodation
- evicting or causing them any other disadvantage, or
- offering the accommodation on discriminatory terms.

Another issue is whether the ADA should better protect disability rights in accommodation. The ADA doesn't clearly require accommodation providers to allow a person with disability to make reasonable alterations to accommodation that they need because of their disability. Some other discrimination laws in Australia do.

Registered clubs

The ADA prohibits registered clubs from discriminating against members and potential members. A "registered club" is a club that is licensed to serve alcohol under the *Liquor Act 2007* (NSW). Other discrimination laws in Australia use a broader definition that covers more groups and public clubs.

Exceptions allow registered clubs to discriminate in specific situations, including where the club:

- is established to provide benefits to people of a particular race or age, or with a particular disability, or
- membership is only open to members of one sex.

Ideas for extending the protected areas

Some say discrimination should be prohibited in more areas. Ideas could include:

- Making it unlawful to discriminate based on carer's responsibilities in other areas, and not only at work.
- Applying the ADA to conduct in public life generally, not just the protected areas listed currently in the ADA. This would significantly expand its coverage.

Other ideas could include making it unlawful to discriminate in:

- access to premises
- the disposal of interests in land (including selling, renting and buying)
- government functions and the administration of laws
- requests for information
- sport and competitions, or
- strata committees and owners' corporations.

The tests for discrimination

Complainants must satisfy one of two legal tests to prove unlawful discrimination. These reflect two types of discrimination: direct and indirect discrimination.

There are mixed views on the tests for discrimination in the ADA. Some think they are appropriate. Others think they are too complicated and outdated.

Some people think there shouldn't be a distinction between direct and indirect discrimination. They argue one test, rather than two, may be simpler and easier to prove.

The discrimination tests in the ADA have different steps or "elements". Figure 1, below, sets out the elements of each test.

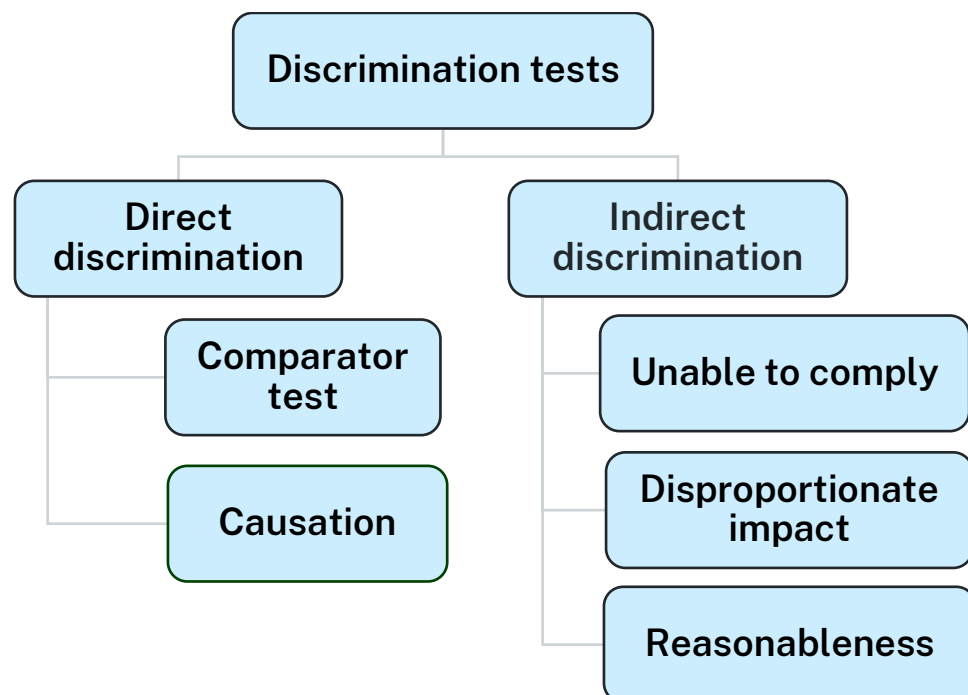


Figure 1: Steps in the tests for discrimination

Direct discrimination

Direct discrimination is when someone with a protected attribute is treated less favourably because of that attribute, than someone without that attribute is treated.

This promotes "formal equality". This concept of equality focuses on treating people the same way.

To prove direct discrimination, a complainant must show that:

- they were, or would've been, treated differently (and less favourably) to another person without that attribute (the "comparator test"), and
- a reason they received that treatment was because they had a protected attribute, or a characteristic that people with that attribute have or are presumed to have ("causation").

Many say this test is too complicated. It can be very hard to identify an appropriate comparator. For example, if a woman is fired for being pregnant, it's unclear if the comparator should be a man, a non-pregnant woman, or a menopausal woman. Often, a real-life comparator can't be found, so a hypothetical one is used.

Another option is to replace the comparator test with an "unfavourable treatment" test. Some other discrimination laws in Australia use this test. It asks if someone was treated unfavourably because of their protected attribute.

It can also be hard to prove the conduct occurred because of a protected attribute. Complainants often don't have access to evidence to prove why the respondent treated them this way.

Indirect discrimination

Indirect discrimination happens when a rule or requirement that applies to everyone unfairly disadvantages people with a protected attribute. Prohibiting this type of discrimination moves beyond formal equality and towards "substantive equality".

Substantive equality recognises that some people need to be treated differently to promote an equal outcome or equal access to opportunity.

Imagine a situation where job applicants must attend an interview in a room that can only be accessed by stairs. While the requirement applies equally to everyone, it wouldn't result in an equal outcome for an applicant who uses a wheelchair. They wouldn't be able to comply with the requirement without adjustments, like a lift. But applicants who don't use a wheelchair may be able to comply.

We consider adjustments below at page 26.

What complainants must prove

To prove indirect discrimination, a complainant must show that the respondent imposed a requirement or condition on them.

The complaint must also show that:

- they are unable to comply with the requirement or condition
- a substantially higher proportion of people who don't have their protected attribute can comply with it (that is, a "disproportionate impact"), and
- the requirement or condition isn't reasonable in the circumstances.

Concerns about indirect discrimination

We've heard a range of concerns about the test for indirect discrimination.

Some think the need to prove "disproportionate impact" is too complex and technical. It sometimes requires specialist data. And it requires a comparator group, which can be hard to identify.

Instead of asking if there was a disproportionate impact, some other discrimination laws use a "disadvantage test". This asks if a requirement or condition disadvantages a person because they have a protected attribute, and if the requirement or condition is reasonable. This could be easier to prove.

Other issues have been raised about the need to show the requirement or condition isn't reasonable. Some say this is vague, confusing, and difficult to prove. Some also say the ADA should list factors that can help people work out if a requirement or condition is reasonable.

Others think the ADA should have a “proportionality test”. This would ask if the requirement or condition is a proportionate way for the duty holder to achieve a legitimate goal. Some say this balances people’s rights with the needs of organisations. However, others say it could be confusing.

The burden of proof

We’ve heard concerns about who is required to prove these tests. Under the ADA, complainants have the “burden of proof”. This means they must prove each part of the discrimination tests.

But it can be hard for complainants to collect evidence, particularly where the discrimination was the result of stigma or unconscious bias. It’s particularly hard without legal representation. These difficulties can discourage people from making a complaint.

Some say the ADA should shift some of the burden of proof to respondents. For example, in relation to indirect discrimination, the ADA could require the respondent to prove a requirement or condition *is* reasonable — rather than requiring the complainant to prove that it *isn’t* reasonable.

Vilification

Vilification laws aim to protect communities from hate speech, supporting social inclusion and cohesion.

Under the ADA, vilification occurs when a person, by a public act, incites hatred towards, serious contempt for, or severe ridicule of, an individual or group based on a protected attribute of the individual or a member of the group.

NSW has civil and criminal protections against different types of vilification. The ADA provides civil protections. Under section 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*), it is a criminal offence to threaten or incite violence based on a protected attribute. In this review, we focus on the civil vilification protections under the ADA.

The protected attributes

The ADA prohibits vilification based on:

- race
- homosexuality
- “transgender grounds”
- being “HIV/AIDS infected”, and
- religious belief, affiliation or activity (this also includes not having a religious belief or affiliation, or not engaging in religious activity).

Should more attributes be protected?

Some say more attributes should be protected from vilification, recognising that people from other groups can experience hate-based conduct. There are a few ways this could be achieved.

One way could be to use the same list of attributes for both discrimination and vilification. Currently, the ADA doesn’t protect against vilification based on age, carer’s responsibilities, disability, marital or domestic status, or sex. The ADA prohibits discrimination based on these attributes. However, people disagree on whether it’s appropriate to protect the same groups from both discrimination and vilification.

Another idea could be to align the scope of the civil and criminal vilification protections. The *Crimes Act* offence, which we mention above, covers:

- sexual orientation (as opposed to only “homosexuality” in the ADA)
- gender identity (as opposed to “transgender grounds” in the ADA), and
- people of intersex status (who are not covered at all in the ADA, under either the discrimination or vilification protections).

Some people also think the *Crimes Act* uses more modern and inclusive language to describe the protected attributes than the ADA.

Another option could be to protect other groups from vilification, potentially based on the list of possible new attributes we set out on page 9, above.

Another issue is whether the ADA should prohibit intersectional vilification too. For example, where someone’s vilified because of their race and their sexual orientation.

Protection against religious vilification

A protection against religious vilification was added to the ADA in 2023. This makes it unlawful, by a public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group, because they:

- have or don't have a religious belief or affiliation, or
- engage, or don't engage, in religious activity.

Some see this as an important protection for people of faith in the context of growing intolerance. Others, while generally supporting protections against religious vilification, say the law is unclear, too broad and doesn't balance the right to freedom of speech.

When is vilification is prohibited

The prohibition of vilification when there is a "public act".

The ADA defines "public act" broadly. It includes:

- any form of public communication, like speeches or radio broadcasts
- other conduct that can be observed by the public, like gestures, or displaying emblems or flags, and
- distributing or circulating any matter to the public, knowing it promotes or expresses hatred, serious contempt or ridicule of a person or group based on their protected attribute.

Whether something is a "public act" depends on the circumstances. It has been found to include some, but not all, online acts and social media activities. In some situations, acts directed at sections of the public, or small groups of people, can be considered public.

Views differ about the ADA's definition of "public act". Some think it's unclear and inconsistent. Others think it's too broad and should be narrowed to preserve freedom of speech and religion.

Some say the ADA's definition should be consistent with the section 93Z of the *Crimes Act*. This expressly covers social media and other electronic communication, graffiti, and acts on private land.

The test for vilification

The ADA has an "incitement-based" test for vilification. It focuses on whether the public act incited, or was capable of inciting, hatred towards, serious contempt for, or severe ridicule of a person or group, in a third-party audience.

Some say this test is unclear, difficult to prove, and ignores the harm to victims.

A "harm-based" test is another approach. Harm-based tests focus on the impact of the conduct on the targeted person or group. For example, the test might ask whether the conduct is reasonably likely to offend, humiliate, insult, intimidate or ridicule them.

Some argue harm-based tests better reflect how people experience vilification. This is because they focus on the impact on the targeted group, not a third-party audience. Harm-based tests might also be easier to prove.

Some other vilification laws incorporate both a harm-based and an incitement-based test. They prohibit a wide range of conduct.

However, some people support the ADA's existing test. They say a lower standard might limit free speech.

Exceptions

The ADA has broad exceptions that apply to a range of unlawful conduct, including to vilification. We outline some of these below, starting at page 22.

Other specific exceptions apply to vilification. There are exceptions for:

- the fair reporting of an act of vilification
- acts done reasonably, and in good faith, for academic, artistic, scientific or research purposes, or other purposes in the public interest, and
- a specific defence to defamation.

Public interest exceptions to transgender, HIV/AIDS and religious vilification allow for religious instruction or religious discussion. The public interest exception to racial vilification doesn't expressly include these purposes.

There are mixed views on the exceptions to the vilification protections. Some think they should be kept to safeguard freedom of speech and freedom of religion. Others think they should be clarified or narrowed.

Harassment

The ADA prohibits sexual harassment. This is unwelcome sexual behaviour. It can include sexually suggestive comments, questions, gestures and physical contact.

The test for sexual harassment

To prove sexual harassment, a complainant must satisfy a four-step test.

Complainants must show:

- what the respondent did and the sexual nature of their conduct
- the conduct was directed to, or done in relation to, the complainant
- the conduct was unwelcome to the complainant, and
- that a reasonable person, with knowledge of all the circumstances, would anticipate that the complainant would be offended, humiliated or intimidated by the conduct.

There are concerns that the ADA hasn't kept pace with other sexual harassment laws, especially the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*). After recent changes, this federal law now puts more emphasis on victims, gender and intersectionality.

Some say the ADA test is too hard for victims. Some other harassment laws use a lower standard — that a reasonable person would anticipate *the possibility* that the conduct would offend, humiliate or intimidate the victim.

There are also concerns that the ADA doesn't clarify:

- what should be considered when determining if a reasonable person would anticipate that the conduct would offend, humiliate or intimidate, and
- what “conduct of a sexual nature” is.

In contrast, some other harassment laws:

- list factors that should be considered when working out if a reasonable person would anticipate offence, humiliation or intimidation, and
- specify that conduct of a sexual nature includes oral or written statements.

Where sexual harassment is prohibited

The ADA prohibits sexual harassment against anyone, regardless of their attributes or characteristics, if it happens in a protected area.

These protected areas are:

- employment
- education
- goods and services
- accommodation
- land dealings
- sport
- state programs
- bodies that confer trade or occupational qualifications, and
- employment agencies.

Some say sexual harassment should be unlawful in more areas, including:

- all the areas that are protected from discrimination
- any area of public life, or
- any area of public or private life, to capture harassment in places like the home or on the street.

The ADA also specifies who is prohibited from sexually harassing another person. Sometimes, only a person with authority in a relationship is prohibited from sexually harassing a person without that authority.

There are limits to the ADA's coverage. In education, for instance, the ADA doesn't prohibit a student from sexually harassing another student.

Some say sexual harassment should be prohibited no matter who does the conduct.

Ideas for extending the protections

Other sex-based conduct

As well as sexual harassment, some people say the ADA should prohibit the following "sex-based conduct":

- harassment "on the ground of sex", or sex-based harassment, and
- subjecting someone to a workplace that is "hostile on the ground of sex".

Sex-based harassment is when someone does or says something unwelcome or demeaning towards someone else, because of their sex.

A hostile work environment based on sex is when someone's actions create a workplace that is offensive, intimidating, or humiliating for people of a certain sex.

The *Sex Discrimination Act* prohibits these forms of sex-based conduct.

There could be benefits to also making this conduct unlawful under the ADA. It could capture things that aren't clearly covered by the ADA, like sexist behaviour or actions that aren't directed at a specific person. Unlike the test for sexual harassment, the conduct doesn't need to be sexual.

But some argue this change could lead to confusion and create overlaps. The same conduct could be considered sex discrimination, sex-based harassment and sexual harassment.

Other forms of harassment

The ADA doesn't prohibit harassment based on protected attributes. For example, it's not unlawful to harass someone based on their sex, race, or because they are transgender.

Currently, someone who experiences offensive, intimidating or humiliating treatment based on a protected attribute might be able to make a discrimination or vilification complaint. But the tests for discrimination and vilification aren't designed to capture harassment. Some instances of harassment might not meet those tests.

Some people think the ADA should prohibit harassment based on certain protected attributes. They argue it could better reflect the reality of people's experiences of harassment.

One idea could be to protect the same attributes against both discrimination and harassment. However, some other harassment laws in Australia protect a more limited range of attributes from harassment.

Other unlawful acts

Victimisation

The ADA prohibits victimisation. This is when someone is punished or disadvantaged because they exercised, or were suspected of exercising, their rights under the ADA.

For example, it might arise where someone is refused a promotion at work or humiliated publicly because they made a complaint.

Some say the prohibition against victimisation should be expanded to cover threats of victimisation and victimisation based on multiple reasons.

Unlawful advertisements

Under the ADA, it's unlawful to publish an advertisement that indicates an intention to do something prohibited by the ADA. An "advertisement" includes any notice, sign, label, circular or similar thing. For example, an ad in a newspaper that indicates a job will be offered only to members of a particular sex.

It's a defence if a person believed, on reasonable grounds, that it wasn't an offence to publish the advertisement. One question is whether this defence is appropriate.

Liability

Another issue is whether the ADA holds the right people responsible — or "liable" — for unlawful conduct.

Duty holders can be held directly liable for anything they do that's unlawful under the ADA. Anyone who helped or made another person do something unlawful under the ADA can also be liable for that conduct.

Sometimes, employers can be liable for their employee's unlawful conduct.

Two defences can excuse employers from liability under the ADA. These are that the employer:

- took all reasonable steps to prevent their employee from doing the unlawful behaviour, or
- didn't authorise their employee to do the unlawful behaviour.

There are concerns that the second defence is unnecessary. The ADA is the only discrimination law in Australia that provides this defence.

An emerging issue is who should be responsible for decision-making by artificial intelligence (AI). For example, it can be unclear who's liable when a computer program makes automated decisions instead of a person.

One idea could be to make individuals or companies liable for decisions made by computer programs that they use. Defences like the two listed above could be available.

Exceptions

Exceptions allow duty holders to do what would otherwise be unlawful under the ADA.

The ADA's exceptions are complex. Some only apply to specific attributes, conduct, areas, or duty holders. But others are broader. Some apply across the whole ADA. They cover large parts of the community and apply in many situations.

A big question is whether the ADA's exceptions are appropriate. And if exceptions are needed in certain areas, what tests should duty holders meet before they can use an exception? For example, international human rights law generally recognises that a policy or practice is not discriminatory if it pursues a legitimate aim, and it's appropriate, necessary and proportionate to that aim.

It's impossible to set out all the exceptions in the ADA in this summary. However, we outline several controversial, broad exceptions below. Our full consultation paper has more detail on these exceptions. It discusses other exceptions, too.

Exceptions for religious bodies

The ADA has broad exceptions for religious bodies. This is a complex and sensitive issue. It raises questions about the best way to accommodate intersecting human rights.

Many religious bodies say they need the exceptions to protect religious freedoms and to operate according to their faith. Others say the exceptions should be removed or narrowed to protect other people's rights to equality, non-discrimination and access to services.

Training and appointment of religious personnel

Nothing in the ADA affects the ordination, appointment or training of members of religious bodies, such as priests, ministers or members of a religious order.

These exceptions are closely tied to the exercise of religious freedom, and we heard general support for them.

Appointing any other person in any capacity

A more controversial exception allows a "body established to propagate religion" to discriminate in appointing a person to any role — including non-religious roles.

The ADA doesn't define what a "body established to propagate religion" is. It will depend on the facts of each case.

Some think this exception is too broad. For example, some say it should only apply if the teaching, observance or practice of religion is an inherent requirement of the role or a genuine occupational requirement.

Others want further safeguards like tests of reasonableness and proportionality. Some think the exception should be changed so employers can only terminate employees if they breach a written policy and an agreement to follow the organisation's ethos.

Any other acts or practices

A related issue is whether religious bodies should be allowed to discriminate in any other acts or practices.

The ADA doesn't apply to any of the acts or practices of a "body established to propagate religion" that are:

- in line with the doctrines of that religion, or
- necessary to avoid "injury to the religious susceptibilities" of that religion's followers.

This exception applies to all forms of unlawful conduct, all protected attributes, and in all protected areas. Some say this exception is too broad.

Some people are particularly concerned that the exception could be accessed by religious bodies that provide social services. Religious organisations often provide essential services. Many receive public funding to deliver them. Some people think it's unfair to allow such organisations to discriminate and argue it denies equal access to services.

Others consider religious bodies need this exception so they can act according to their faith.

Some say there are ways to limit the exception's scope, while still respecting the freedom of religion. For example, some options could include:

- limiting the exception to certain attributes only, for instance, to only allow discrimination based on religious belief or activity, or other specific attributes
- limiting the exception to discrimination that is reasonable or proportionate, or
- replacing the wide exception with targeted exceptions that are appropriate to specific areas of public life.

Harassment, vilification and victimisation by religious bodies

The exceptions for religious bodies cover sexual harassment, victimisation and vilification, not just discrimination. There is a view they should only apply to discrimination. Harassment or victimisation can't be justified under international human rights law.

Another view is that these exceptions need to cover vilification to protect religious teaching and religious freedom. Others are concerned these exceptions may be used to express harmful and offensive views.

Adoption services

The ADA has an exception for faith-based organisations providing adoption services. This covers organisations that are made or controlled by a religious organisation, and that are legally allowed to provide adoption services.

The ADA excludes their policies and practices concerning adoption services from the prohibitions on discrimination and vilification based on homosexuality or transgender grounds. However, this doesn't allow discrimination against a child who is or may be adopted.

There are conflicting views about this exception. Some argue it's important for faith-based adoption agencies, because same sex adoption is incompatible with some religious views about child raising. Others argue that faith-based adoption services shouldn't be allowed to discriminate if they receive public funding to provide these services.

It's possible that faith-based adoption service providers may also be able to rely on the general exception for religious bodies, which we outline above on page 22.

Exceptions for private educational authorities

The ADA has exceptions that allow "private educational authorities" to discriminate in work or in education based on sex, transgender grounds, marital or domestic status, disability and homosexuality. The education exception also applies to age discrimination.

These exceptions apply to a wide range of private education institutions including non-government or independent schools, and colleges. Religious schools form a large part of the private school sector.

Some say these exceptions allow religious schools, in particular, to maintain their ethos and identity, protect freedom of religion, and allow parents the freedom to choose a school environment that aligns with their faith.

However, there are also concerns that the exceptions:

- can permit discrimination against LGBTQIA+ people and their supporters
- permit discrimination against people with disability
- are outdated, unjustified and undermine inclusivity, and
- apply unconditionally, without requiring duty holders to justify their conduct.

These are the only exceptions in Australia that apply broadly to any private educational authorities. Other parts of Australia have exceptions that only apply to religious educational authorities.

Discrimination in work

Private educational authorities can discriminate in work, for example:

- in deciding who to employ and the terms of employment
- by denying or limiting access to promotions, transfers, training or other benefits, or
- by dismissing an employee or subjecting them to other detriment.

Some think these exceptions are too broad. They think they should either be removed or changed so they apply more narrowly. Some argue there should be safeguards in place before an exception can apply. For instance, the ADA could require duty holders to show the discrimination is reasonable and proportionate. Our consultation paper has more details on these options.

Discrimination in education

Private educational authorities can discriminate in education, for example by:

- refusing admission
- admitting students subject to certain terms
- denying or limiting access to benefits, or
- expelling students or causing them any other disadvantage.

For example, under the ADA, a private school can expel a student based on their disability or because they identify as transgender.

As with the work exceptions, some argue the education exceptions should be removed, made narrower and/or include additional safeguards.

Voluntary bodies

The ADA includes a broad exception for non-profit bodies, which applies across the ADA. It allows these organisations to discriminate by restricting who can be a member or when providing member benefits and services.

One view is that voluntary bodies should be exempt from the ADA because they're private groups. They need independence to maintain a specific culture or autonomy.

Others say the ADA should apply to voluntary bodies. Some receive substantial public funding and benefits, and provide important community services.

Some think the exception should be removed. Another option could be to narrow the exception. For instance, it could cover discrimination but no other forms of unlawful conduct. And voluntary bodies could be required to justify their act.

Sport

The ADA allows duty holders to exclude people from sporting activities based on race, sex, transgender grounds, disability and age.

One question is whether these exceptions balance rights to equality and non-discrimination, while ensuring sport remains fair.

Some other Australian discrimination laws have similar sport-related exceptions, but they are more limited. For example, some only apply to competitive sport, to people over the age of 12, or where the restriction is reasonable or proportionate.

Promoting substantive equality

A significant issue is whether the ADA should do more to promote substantive equality.

Some say the ADA should:

- require duty holders to provide adjustments for some people with protected attributes
- make it easier for duty holders to implement “special measures” for groups who have experienced disadvantage, allowing these groups to be treated differently to best promote their rights, or
- include a positive duty to prevent discrimination and other unlawful conduct.

A duty to provide adjustments

Adjustments are requirements for duty holders to support people with certain attributes to participate in the community. Adjustments can come in many forms, like a building access ramp.

Duties to provide adjustments most commonly apply in relation to disability. This is because the *Convention on the Rights of Persons with Disabilities* requires countries to ensure that reasonable accommodation is provided to people with disability. However, a duty to provide adjustments could extend to other attributes too.

The ADA doesn’t clearly require duty holders to provide adjustments. Many think it should, arguing that this could:

- prevent discrimination
- promote equality
- reduce the burden on people to seek adjustments to support their participation and inclusion, and
- clarify rights and obligations.

A duty to provide adjustments could form part of the test for discrimination or even be introduced as a separate duty.

Special measures

“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. That’s because the purpose of a special measure is to secure the advancement of a group, so they can exercise and enjoy human rights and fundamental freedoms equally with others.

Examples include targeted employment programs for people from culturally and linguistically diverse communities or Aboriginal and Torres Strait Islander peoples.

Under the ADA, duty holders must apply for an exemption or a certification to implement special measures. These processes can be time consuming or difficult for duty holders and may discourage them from implementing fairer policies.

Other discrimination laws in Australia generally permit duty holders to implement special measures. Many people think the ADA should do this too.

A duty to prevent or eliminate unlawful conduct

Some other discrimination laws require duty holders to take steps to prevent unlawful conduct.

In Australia, the most common approach is to require duty holders to take “reasonable and proportionate” steps to prevent or eliminate unlawful conduct. For example, this could require duty holders to implement better policies, keep records, or provide training on ADA obligations.

Such a duty could:

- address underlying and systemic causes of discrimination
- clarify rights and responsibilities
- reduce the need for victims to make a complaint to address discrimination, and
- help duty holders avoid complaints and reputational damage.

But some say this duty is unnecessary and might conflict with duties in employment laws and federal discrimination law. Some also say it would be too hard or expensive for duty holders to comply with.

Conclusion

Please share your thoughts on the ADA. The diverse experiences and views of our community are vital to this review.

Your input, and our research, will inform the recommendations we make about the ADA in our final report to the NSW Attorney General.

You can have your say by completing [our survey](#), answering our Easy Read questions or making a submission. Please see page 2 of this summary for more information.

We look forward to hearing from you.

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