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

August 2025



THE NATIONAL JUSTICE PROJECT

The National Justice Project (**NJP**) is a proudly independent not-for-profit human rights legal and civil rights service. Our mission is to fight for justice, fairness and inclusivity by eradicating systemic discrimination. Together with our clients and partners we work to create systemic change and amplify the voices of communities harmed by government inaction, harm and discrimination.

Through legal action, advocacy, education, and collaborative projects, we challenge systemic discrimination by defending and promoting the rights of people who have experienced racism and discrimination in healthcare and legal systems, immigration detention, prisons and juvenile detention, and policing.

ACKNOWLEDGEMENT OF FIRST NATIONS PEOPLES' CUSTODIANSHIP

The National Justice Project pays its respects to First Nations Elders, past and present, and extends that respect to all First Nations peoples throughout this country. The NJP acknowledges the diversity of First Nations cultures and communities and recognises First Nations peoples as the traditional owners and ongoing custodians of the lands and waters on which we work and live. We acknowledge and celebrate the unique lore, knowledges, cultures, histories, perspectives and languages that Australia's First Nations Peoples hold. The NJP recognises that throughout history the Australian health and legal systems have been used as an instrument of oppression against First Nations Peoples. The NJP seeks to strengthen and promote dialogue between the Australian legal system and First Nations laws, governance structures and protocols. We are committed to achieving social justice and to bring change to systemic problems of abuse and discrimination.

TERMS OF REFERENCE

Dear Sir/Madam,

We refer to the review and report on the Anti-Discrimination Act 1977 (NSW) (the 'ADA') pursuant to section 10 of the Law Reform Commission Act 1967 (NSW). We note the following Terms of Reference outlining the scope of this review:

ToR1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

ToR2. whether the range of attributes protected against discrimination requires reform

ToR3. whether the areas of public life in which discrimination is unlawful should be reformed

ToR4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

ToR5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

ToR6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

ToR7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

ToR8. exceptions, special measures and exemption processes

ToR9. the adequacy and accessibility of complaints procedures and remedies

ToR10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

ToR11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

ToR12. the interaction between the Act and Commonwealth anti-discrimination laws

ToR13. any other matters the Commission considers relevant to these Terms of Reference

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OVERVIEW

EXECUTIVE SUMMARY

In addition to our preliminary submission,¹ we would like to emphasise that, in our experience, the *Anti-Discrimination Act 1977* (NSW) ('ADA') and the complaints regime it established is no longer fit for purpose. In fact, it seems created to discourage anyone to use it to pursue justice.

We at NJP hardly ever refer our clients to this system; we advise our clients to use the Federal anti-discrimination regime established by the *Australian Human Rights Act 1986* (Cth), the *Race Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

There are several reasons why:

- The ADA is an outdated poorly structured piece of legislation, marked by unclear definitions, obsolete language, and a lack of internal cohesion
- It contains artificial tests that seem designed to fail.
- The ADA is constructed on a philosophical basis of formal equality based on treating everybody alike rather than substantive equality that aims to ensure everyone equal opportunities to participate in society and fulfil their potential. This approach is out of step with NSW's moral and legal obligations under the *Inclusion Act 2014* (NSW) and the United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD').
- The ADA's process is legalistic and inaccessible, offering no meaningful mechanism for addressing systemic issues.

In addition to these overarching concerns, there are some specific issues that warrant stand-alone elaboration.

Our general recommendation is for the ADA to be repealed and replaced by new legislation that is contemporary, clear, and fit for purpose.

In summary, we would recommend that the NSW government repeal the ADA and creates new anti-discrimination legislation Act. This Act should:

In General:

- Use gender-neutral or inclusive language
- Be written in Plain English, using clear structure that is easy to navigate
- Be constructed on the philosophical basis of substantive equality, in line with NSW obligations
- Be built around reducing systemic discrimination
- Include additional grounds in a non-exclusive list of protected attributes, or preferably, an open ended, non-exhaustive list
- Include positive duties

¹ National Justice Project (NJP), *Anti-Discrimination Act Review - Preliminary Submissions* (29 September 2023).

- Contain a “disadvantaging test” rather than the artificial distinction between direct and indirect discrimination
- Clarify the definition of “public life”
- Broaden the area of “provision of goods and services” to include “and facilities” in line with federal legislation
- Only allow temporary exemptions that must be linked to Action Plans.
- Allow a special measures procedure
- Establish a cost regime that protects complainants
- Improve procedure for representative complaints
- Give ADNSW power to initiate own motions
- Comply with international human rights standards

On Race:

- Update the definition of “race”
- Include specific recognition of Aboriginal and Torres Strait Islander people would be an important practical and symbolic step
- Permit Special measures without formal consent

On Sex and Transgender:

- Use gender-neutral and non-binary language throughout
- Permit **No** exemption for private educational authorities (in work and education)
- Permit **No** general exemptions in sport and limit exemptions to adults in high performance competitive sport where strength, stamina or physique are crucial
- Permit Special measures without formal consent

On Disability:

- Use language that reflects social model of disability rather than deficit terminology
- Include a duty to make reasonable adjustments
- Include a specific reference to the provision of access
- No exemption for private educational authorities (in work and education)
- Include provision to the gradual dismantling of the special education regime
- Permit Special measures without formal consent

Finally, the rights in any anti-discrimination law are meaningless if the forums charged with enforcing them are inaccessible or unsafe for those most affected. First Nations peoples, in particular, face systemic barriers when seeking justice in the Administrative and Equal Opportunity Division of NCAT, including culturally unsafe processes, tolerance of State actor non-disclosure, privileging of documentary over oral evidence, and adversarial tactics that retraumatise vulnerable witnesses. We recommend legislating mandatory, ongoing cultural safety obligations for NCAT in discrimination matters. The Victorian Civil and Administrative Tribunal’s Koori Inclusion Action Plan might provide a model but at least it should include, the recruitment of First Nations members, community partnerships, tribunal users groups and procedural safeguards. Without these reforms, the Anti-Discrimination Act will continue to be under-utilised by those who most need its protection.

SUBMISSIONS

GENERAL

Australia's reliance on a model of formal equality² (focussed on treating everyone the same) has moved us from world leader to laggard in Anti-discrimination law, both Federally and in NSW.

Rather than reducing discrimination, the judicial preoccupation with formal equality has entrenched inequalities. As Justice Brennan observed in *Gerhardy v Brown*:

Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social cultural or any other field of public life'.³

The same applies to NSW. Our current *Anti-discrimination Act 1977* (NSW)('ADA') is no longer fit for purpose.

The ADA was a transformative legislation in its time. But for the NSW anti-discrimination regime to remain relevant, the Act needs modernising and simplifying. Given the many amendments, the Act has become unruly and hard to navigate. It contains unnecessary duplications, the structure is needlessly complicated, and different sections use different terminology and definitions.

In addition, the language used in the ADA is legalistic and no longer suitable.

Ideally the ADA is repealed and replaced with a new piece of anti-discrimination legislation. This new Act should be re-written based on the principles of Plain English, with a clear and easy to navigate structure, and words and terminology understandable to all.

A truly purposeful anti-discrimination regime should move away from formal equality towards achieving substantive equality⁴ and be built around reducing systemic discrimination and disadvantage and impose positive duties.

Preferably, the newly drafted Act will first outline the protected attributes (or grounds), then outline prohibitions and any exceptions, followed by the enforcement process and institutional setup. Clearly organised and structured, this would make the Act much easier to understand and would increase consistency between the application of non-discrimination provisions between different protected attributes.

Language (ToR1)

Language used should be easy to understand and non-gendered language such as by using "they" or the "complainant" rather than "he" or "she" or even "he or she". This is especially important now after the changes made after the passing of the *Equality*

² Alice Taylor, *Interpreting Discrimination Law Creatively - Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, Paperback, 2025) 35–36, 38–39.

³ *Gerhardy v Brown* [1985] 159 CLR 70 129.

⁴ Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712; Sandra Fredman, *Discrimination Law* (Clarendon Law Series, Oxford University Press, Third Edition, 2022) <<http://ebookcentral.proquest.com/lib/mqu/detail.action?docID=845863>>; Taylor (n 2) 35–36, 43–44.

Act 2024 (NSW) and the *Births, Deaths and Marriages Registration Act 1995* (NSW) now explicitly recognising nonbinary and not specified gender markers.

Narrow Grounds (ToR2, ToR3)

The current approach in the ADA is a narrow one, protected grounds are listed in an exhaustive list. This is a temporal approach that has inherent limitations: as societal norms change, new grounds may need to be added. This is what has historically happened to the ADA, resulting in the current complicated structure.

If NSW decides to remain with the narrow grounds approach, then, as other (preliminary) submissions have pointed out, grounds or protected attributes would need to be added to bring the legislation in line with community expectations and Federal provisions and those in other States/Territories.

Grounds to be added would be gender identity, intersex (what the United Nations refer to as sexual orientation and gender identity and expression ('SOGIE')),⁵ immigration status, genetic information, class, religion, lawful sexual activity, and political belief, etc. It would also be beneficial to specifically mention intersectionality.

An alternative approach would be to use an open ended, non-exhaustive list such as used in the *European Convention on Human Rights 1950*, the *EU Charter of Fundamental Rights 2000*⁶, the *Canadian Charter of Rights and Freedoms*⁷ and the *Constitution* of South Africa.⁸ Such as non-exhaustive list allows the flexibility to incorporate societal changes without requiring legislative revisions and amendments.

Definitions (ToR4)

The definition of “direct discrimination” and “indirect discrimination” and the habit of Australian courts to interpret both concepts as mutually exclusive is increasingly being questioned.⁹ The differences between both concepts are legal contortions of real-life experiences that are confusing, complicated and artificial.¹⁰

The concept of a comparator in direct discrimination is particularly questionable. There is often no sensible comparison to be made, and the concept is inherently assimilatory¹¹. The definition of indirect discrimination is cumbersome and almost unusable. But fundamentally, the distinction is unworkable, and a “disadvantaging test”¹² (which requires no comparator) would be a more suitable approach.

⁵ ‘Independent Expert on Sexual Orientation and Gender Identity’, OHCHR <<https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity>>.

⁶ Charter of Fundamental Rights and Freedoms of the European Union [2012] OJ C326/391.

⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c11

⁸ Fredman (n 4) 171–172.

⁹ Taylor (n 2) 99–100, 106–109.

¹⁰ Fredman (n 4) 311–313.

¹¹ Ibid 254–58; Minow, Martha, ‘Sources of Difference’ in Minow, Martha (ed), *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, 1990) 49.

¹² Fredman (n 4) 217–218.

As the distinction between private and public life becomes increasingly blurry, a clear definition of “public life” and its boundaries would be beneficial.¹³

Unlike the Federal Legislative regime, the section of the Act that addresses the provision of goods and services does not include a reference to the provision of facilities.

Exceptions (ToR8, ToR11)

Exceptions (other than special measures) fundamentally undermine credibility of anti-discrimination legislation and entrench existing discrimination with little or no sense of improvement. Therefore, the NJP contends as a matter of principle there should be no exceptions in anti-discrimination legislation.

Any exceptions that are permitted should be temporary exemptions that need to be applied and re-applied for to the NSW Anti-discrimination Board (now known as Anti-Discrimination NSW, or ADNSW) within a set timeframe.

Temporary exemptions must be linked to Action Plans that state existing barriers and clearly outline how and when these barriers will be addressed. Compliance with these Action Plans then provides a mechanism for review when an extension for exceptions is deliberated by ADNSW.

Special Measures (ToR8, ToR11)

Modern discrimination laws permit special measures to address historical or systemic disadvantage experienced by a particular group, aiming to promote their equal access to opportunities. These measures recognize that treating everyone the same, without acknowledging past or present inequalities, may actually reinforce existing discrimination.

Under the current legislative regime, positive exemptions, designed to create special measures, require a formal application under s 126A of the Act. Specific permission can be granted by the NSW Attorney-General if the Attorney-General is satisfied that the primary purpose of the special needs program or activity is the promotion of equal or improved access for members of a group affected by discrimination on one of the grounds listed in the legislation. This procedure is cumbersome and seems contrary to the aims of the legislation. A new Act should permit special measures and programs under defined conditions to create greater clarity and security and obviate the need for a formal exemption by the Attorney-General in line with the Federal legislative regime.

Special measures are not considered unlawful discrimination; rather, they are a way to achieve substantive equality, meaning they address the root causes of inequality rather than just treating everyone formally the same. The current legislation presents a barrier to achieving that goal.

Complaints Procedures & Cultural Safety (ToR9)

The two-step complaints model system is complicated and cumbersome. It places a double burden on the complainant – first to have their complaint accepted by the Anti-

¹³ John B Thompson, ‘Shifting Boundaries of Public and Private Life’ (2011) 28(4) *Theory, Culture & Society* 49.

Discrimination Board of NSW ('ADNSW') which has limited remit. When no agreement can be reached in conciliation, complainants have the option of taking their issue the Equal Opportunity division of the NSW Administrative Tribunal ('NCAT').

Both ADNSW and NCAT are limited in the remedies that they can offer. While the same is true for the Australian Human Rights Commission since 1995,¹⁴ the Commission is more flexible in its scope, and the Federal Court has at least the potential for sufficient compensation and damages. Ideally the powers of ADNSW are increased to make binding determinations in the manner of some Special Tribunals. Alternatively, a provision should be made for ADNSW to refer complaints directly to NCAT if it is prima facie clear that a conciliation will not be reached.

The effectiveness of any anti-discrimination regime depends not only on the substantive rights it enshrines, but also on the fairness and accessibility of the forums that adjudicate those rights. Our 2019 submission to the NSW Civil and Administrative Tribunal (NCAT) Statutory Review documented serious procedural and cultural safety shortcomings in the Administrative and Equal Opportunity Division, particularly for First Nations applicants. These included systemic tolerance of non-disclosure by State actors, privileging of documentary over oral evidence (contrary to First Nations communication traditions), adversarial cross-examination that retraumatises vulnerable witnesses, and the absence of culturally respectful support for unrepresented litigants. To ensure the Anti-Discrimination Act is implemented in a way that is genuinely accessible and just, statutory reforms should require NCAT to adopt and maintain culturally safe practices when hearing discrimination matters. This should include mandatory, ongoing cultural safety training for all members, recruitment targets for First Nations members and staff, mechanisms to protect vulnerable witnesses, and structured partnerships with Aboriginal legal and community organisations. The Victorian Civil and Administrative Tribunal's Koori Inclusion Action Plan provides a proven model for embedding such reforms, with its emphasis on cultural safety, Koori recruitment strategies, community engagement, and the establishment of culturally competent member pools. Adopting a similar, legislatively mandated cultural inclusion framework in NSW—together with measures such as a First Nations "Users Group" and accessible procedural guidance—would help dismantle the procedural barriers that currently deter First Nations peoples from exercising their rights under anti-discrimination law. We annex our submission to the NCAT review in this regard.

Cost and Compensation (ToR11)

A cost protection provision such as is in force in s 1317AH of the *Corporations Act 2001* (Cth), preventing a court from ordering the complainant to pay the other party's costs unless the proceedings were instituted vexatiously or without reasonable cause. Alternatively, the new cost provisions in the federal model under the *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) introduce a useful model providing protection from adverse cost orders for complainants.

In the absence of a cost protection provision, the limited compensation available to a complainant makes proceeding a discrimination complaint to NCAT a dangerous

¹⁴ *Brandy v HREOC* [1995] 183 CLR 254.

gamble for most people – many belonging to already disadvantaged sections of our society. Removing a cap on remedies would be an additional step in the right direction.

It is our client's experience that this process is fraught, traumatic, difficult to understand for anyone in a disadvantaged position. We would like to refer here to our 2019 submission to the NSW Civil and Administrative Tribunal Statutory Review for issues and recommendations that largely remain unaddressed.¹⁵

Systemic Issues and Representative Complaints (ToR10)

We would like to reiterate the point we made in our preliminary review submission:¹⁶ the current system depends on individual complaints and has insufficient provisions to address systemic issues.

Relying only on individual complaints places too heavy a burden on already disadvantaged sections of society. Representative complaints should be permitted to ADNSW and to NCAT or a court. Additional powers should be given to ADNSW to initiate own motions to action systemic discrimination.

The process to make representative complaints should be simplified and the ADNSW given powers to refer cases direct access to NCAT if it is clear no conciliation can be reached.

Positive Duties (ToR10)

NSW Legislation does not include an equivalent to the positive duty to prevent sexual harassment in the workplace, as established under Australian law in section 47C of the [Sex Discrimination Act 1984 \(Cth\)](#).

That section requires employers and PCBUs to take reasonable and proportionate measures to eliminate unlawful sex discrimination, including sexual harassment, as far as possible.

Similar positive duties could be established to prevent other forms of discrimination, for example the Standards that can be established by the Minister under section 31 of the *Disability Discrimination Act 1992 (Cth)*. These standards can create specific duties related to reasonable adjustments, strategies to prevent harassment and victimisation, and unjustifiable hardship provisions for people with disabilities.

Other Matters (ToR3, ToR5, ToR7, ToR9)

- The provisions around vilification are currently inconsistent with those under the *Crime Act 1900 (NSW)*
- Vilification provisions should be expanded to other attributes (incl race, religion, disability) (question 4.3 in CP24) and brought in line with that under federal legislation in s 18C(1)(a) of the *Race Discrimination Act 1975 (Cth)*
- Harassment prohibitions should be expanded to race, disability (as is in Federal legislation)
- Shift burden of proof from complainant to respondent in NCAT EO proceedings

¹⁵ National Justice Project (NJP), Submission to the NSW Civil and Administrative Tribunal Statutory Review (15 July 2019).

¹⁶ National Justice Project (NJP) (n 1).

- Update the definition of Clubs beyond that of the Registered Clubs, to include incorporated associations

RACE – Part 2 of the ADA

- Definition of race should be brought into line with that under the *Race Discrimination Act 1975* (Cth) and add class, immigrant status and language
- Mentioning Aboriginal and Torres Strait Islander people would send an important symbolic step in NSW

SEX – Part 3 of the ADA

- As we have noted above, the binary language used in the Act needs to be amended to allow for officially recognised genders of intersex or indeterminate sex, and non-binary. Equally, the definition of “homosexual” (in s 4(1)) is outdated and incomplete.

TRANSGENDER – Part 3A of the ADA

Language (ToR1, ToR2)

Since July 2025, section 32A of the *Births, Deaths and Marriages Registration Act 1995* (NSW) now recognises 5 different gender descriptors – being female, male, non-binary, non-specified, and any descriptor prescribed by the regulations.¹⁷ Therefore, the ADA’s definition of “transgender” requires revision to move away from the current binary “opposite sex” approach.

In addition, the distinction between recognised and not recognised transgender person is outdated and redundant, especially since changing a gender marker has become significantly simplified and, given that “outing” someone as transgender is now a criminal offense in NSW under section 71(b) of the *Amendment of Crimes (Domestic and Personal Violence) Act 2007*.

We would suggest an updated definition of “transgender person” as *a person whose gender identity does not exclusively align with their sex assigned to them at birth*.

Section 38C(3)(b) and 38K(3) - Private Education (ToR3)

Section 38K of the ADA exempts private educational authorities from prohibiting discrimination in the provision of education on transgender grounds. A similar exemption exists in section 38C(3)(b) regarding employment of transgender staff at private educational authorities.

Article 28 of the United Nations *Convention on the Rights of the Child*¹⁸ makes that education is a human right for all children on the basis of equal opportunity.

¹⁷ Equality Act 2024 (NSW).

¹⁸ *United Nations Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Lawful discrimination against students does not align with the values of inclusion and equality upheld by most of the NSW population, and indeed the majority of faith-based schools, in relation to the education of children.

NJP believes this is neither in line with society's expectations nor justified in a system where private educational providers receive significant funding from the NSW government.¹⁹ In summary, NJP suggests repealing sections 38C(3)(b) and 38K(3) of the ADA.

Section 18P – Transgender Exclusion in Sport (ToR3)

Section 18P of the ADA makes it lawful to exclude a transgender person from 'participation in any sporting activity for members of the sex with which the transgender person identifies' while not applying to coaching or sports administration.

There is a temptation to suggest amending section 18P of the ADA along the same lines as the provisions in section 42 of the *Sex Discrimination Act 1984* (Cth). However, NJP has reservations about this approach.

If any exceptions are to be granted there should be broad consultation, and any limits should be based on equity, for example that lawful discrimination should strictly apply only to transgender adults engaged in high performance competitive sport where strength, stamina or physique are crucial and where lawful discrimination is fair, relevant, reasonable, and proportionate. This is in line with both the Sports Australia Guidelines on Participation in Community Sport²⁰ and the Transgender and Gender-Diverse Inclusion Guidelines for High Performance Sport, as developed between the Australian Institute of Sport (AIS) and the Australian Human Rights Commission (AHRC).²¹

There is no scientific research to support the discrimination against trans athletes at any age (before or after puberty). There is currently no substantial research evidence of any biological advantages that would impede the fairness of trans women competing in elite women's sport.²² Indeed, scientific review found that biomedical factors related to puberty do **not** predict athletic performance, whereas social factors (such as nutrition, training and access to equipment) greatly impact an athlete's performance.²³ Research does show that women are consistently given less opportunities to engage

¹⁹ Department of Education NSW Government, 'Funding', *Funding* (17 December 2024) <<https://education.nsw.gov.au/schooling/non-government-schools/funding.html>>; Department of Education Australian Government, 'Reports on school funding', *Reports on School Funding* (Text, 24 March 2025) <<https://www.education.gov.au/schooling/reports-school-funding>>.

²⁰ Australian Human Rights Commission, 'Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport', (June 2019).

²¹ Australian Sports Commission Australian Government, 'Transgender & Gender-Diverse Inclusion Guidelines for HP Sport' (2019) <https://www.ausport.gov.au/ais/position_statements/content/transgender-gender-diverse-inclusion-guidelines-for-hp-sport>.

²² Canadian Centre for Ethics in Sport (CCES) E-Alliance, *Transgender Women Athletes and Elite Sport: A Scientific Review* (2022) 40.

²³ Ibid Executive Summary.

in competitive sports – they receive less suitable facilities, equipment, less coaching, and less support, funding and publicity than their male peers.²⁴

Research however does show that anti-trans sports bans harm all women and girls. The unwarranted focus on transgender people in sports has serious implications for non-trans athletes. It buys into the biological stereotyping of women as inherently weaker than men which has historically been applied to keep women out of sports.

DISABILITY – Part 4A of the ADA

Medical Model of Disability and Deficit Language (ToR1)

The language around, and definition of, disability in section 4 of the ADA is particularly problematic. Disability is described in terms of “malfunction, malformations, disfigurement” and “disorder, illness or disease”, terminology that sits firmly in an old medical approach of disability rather than the social model embraced by the CRPD. The *Disability Inclusion Act 2014* (NSW) in its objectives, made clear that the State has a responsibility to facilitate the exercise of human rights of people with disability and support the principles of the UN CRPD.²⁵

The definition of disability should be grounded in human rights model. The Committee on the Rights of Persons with Disabilities states ‘[t]he human rights model of disability recognizes that disability is a social construct, and impairments must not be taken as a legitimate ground for the denial or restriction of human rights.’²⁶

Article 2 of the CRPD defines disability as ‘a long-term physical, mental, intellectual, or sensory impairment which, in interaction with various barriers, may hinder full and effective participation in society on an equal basis with others.’²⁷

Disability discrimination is then defined as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’²⁸

²⁴ National Women’s Law Center, Testimony of Fatima Goss Graves, President and CEO of National Women’s Law Center to the US House Committee on Oversight and Accountability Subcommittee on Health Care and Financial Services on the Importance of Protecting Female Athletics and Title IX (5 December 2023); Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (Research Report) 29–42; ‘Key Challenges Facing Women and Girls in Australian Sport’ <<https://www.playlikeagirlaustralia.com/blog/key-challenges-facing-women-and-girls-in-australian-sport/>>; Admin, ‘Facts and Figures: Women in Sport’, UN Women Australia (8 July 2024) <<https://unwomen.org.au/facts-and-figures-women-in-sport/>>.

²⁵ *Convention on the Rights of Persons with Disabilities*, 2007 opened for signature 13 December 2006, 2515 UNTD 3 (entered into force 3 May 2008) (‘CRPD’).

²⁶ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) Equality and Non-Discrimination* (No CRPD/C/GC/6, 26 April 2018) [9].

²⁷ CRPD (n 25) article 1.

²⁸ *Ibid.*

This is a much more equitable and just approach than the current NSW (and federal) approach, which differentiates between direct and indirect discrimination, and requires a comparator. It also allows for a more flexible interpretation of disability without requiring the listing of such auxiliary aids such as assistance animal or disability aid.

Adjustments and Access (ToR3, ToR7)

Unlike the federal *Disability Discrimination Act 1992* (Cth) (DDA),²⁹ the ADA does not impose a duty to make any adjustments for people with disability. In fact, the word “adjustment” does not appear at all in the current version of the ADA.

This is entirely out of step with obligations under the CRPD which contains the general obligation to provide “reasonable accommodation,” defined in article 2 as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.³⁰

The lack of any requirement to make accommodations or adjustment for people with disability is further contrary to requirements under the *Disability Inclusion Act 2014* (NSW) which states very clearly that “[e]ach public authority must (...) prepare and make a plan (a disability inclusion action plan) setting out the measures it intends to put in place (in connection with the exercise of its functions) so that people with disability can access general supports and services available in the community and can participate fully in the community”³¹ and “A Disability Inclusion Action Plan must (...) include strategies to support people with disability, such as accommodating the specific needs of people with disability.”³²

Indeed, a failure to make adjustments should be discrimination in itself, as is the case under the *Disability Discrimination Act 1992* (Cth).

Yet oddly, while there is no requirement to make adjustments, the ADA does have unjustifiable hardship provisions – area of work (ss 49D(4)(b), 49E(3)(b), 49F(2)(b), 49I(3)), education (ss 49L(4) and (5)), provision of goods and services (s 49M(2)), accommodation (s 49N(6)) and Registered Clubs (s49O(5)). Without a duty to make adjustments, this is unbalanced and places an unfair burden on people with disability.

This current lack of requirement to make adjustments is one of the most important reasons why we would almost always refer people to Federal legislation rather than the NSW ADA.

A new Act should contain a standalone duty to make adjustments as recommended by both the Disability Royal Commission³³ and the Australian Human Rights

²⁹ *Disability Discrimination Act 1992* (Cth) ss 5(2)(a), 5(2)(b), 6(2)(b), 6(2)(c). (*‘DDA’*).

³⁰ CRPD (n 25) article 4.

³¹ *Disability Inclusion Act 2014* (NSW) s 12(1).

³² *Ibid* s 12(3)(b)(iii).

³³ *Final Report: Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (Royal Commission into Violence, Abuse, Neglect & Exploitation of People with Disability, 2023) 204, Recommendations 4.25 and 4.26 (*‘Final Report’*).

Commission’s 2021 review of federal legislation.³⁴ If provisions around inherent requirements in work are to remain, they too should be tempered by a requirement to make adjustments – including a requirement to consult with people with disability on the necessary adjustments (as currently proscribed in the Federal Disability Standards for Education)³⁵ and suggested by the Disability Royal Commission.

It would be visionary for NSW include a reference to positive duties and to legislate a commitment to the principles of universal design. The CRPD defines “universal design” as ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design’ while noting that “Universal design” shall not exclude, ‘assistive devices for particular groups of persons with disabilities where this is needed.’³⁶

Similarly, unlike the federal discrimination legislation, the ADA has no reference to providing access. This is a serious oversight to be remedied and specific mention of access to premises and facilities should be added in the new Act.

Section 49L - Education (ToR3, ToR8)

While s 49L makes it unlawful for educational authorities to discriminate against a person on the ground of disability, s 49L(3)(a) provides an exemption to private educational authorities. The same applies in s 49D, which prohibits discrimination against applicants and employees but exempts private educational authorities in subsection s 49(3)(c). In addition, sections 49L(4) and (5) make it lawful to discriminate against students who require adjustments that would impose unjustifiable hardship on the educational authority. It is hard to think of a justifiable reason for private educational authorities to be allowed to discriminate against students and staff with disability other than allowing blatant ableism. This provision should not stand today.

Furthermore, research is clear that special education is counterproductive for both students with disability and those without.³⁷ Therefore, section 49L(3)(b) which refers to special schools should be abolished. Rather than building new special schools and exempting special schools in anti-discrimination legislation, NSW should take the lead and commit to a planned abolition of special schools.

NJP supports Commissioner Kayess³⁸ in wanting the government to honour a commitment to the development of a National Roadmap for Inclusive Education, a key principle of which is to provide equal access to mainstream education for students with

³⁴ ‘Free and Equal: A Reform Agenda for Federal Discrimination Laws (2021) | Australian Human Rights Commission’ <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>.

³⁵ Disability Standards for Education.

³⁶ CRPD (n 25) article 2.

³⁷ Australia Alliance for Inclusive Education, ‘Inclusive Education - What Does the Research Say?’, *Australian Alliance for Inclusive Education* (5 February 2017) <<http://allmeansall.org.au/research/>>; Inclusion 4 All, ‘Driving Change: A Roadmap for Achieving Inclusive Education in Australia’, *Australian Coalition for Inclusive Education* (29 September 2020) <<https://acie.org.au/2020/09/30/driving-change-a-roadmap-for-achieving-inclusive-education-in-australia/>> (‘Driving Change’); *Final Report: Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (n 33).

³⁸ ‘Commissioner Says Queensland “ignoring” Advice on Inclusive Education’, *ABC News* (online, 3 August 2025) <<https://www.abc.net.au/news/2025-08-04/queensland-faces-backlash-over-plan-for-new-special-schools/105595274>>.

disability.³⁹ A step in the right direction would be for the ADA in NSW to include a mechanism to gradually abolish exemptions for special schools.

CARER – Part 4B (ToR3)

The definition of ‘carer’ should be aligned with that in the *Carers (Recognition) Act 2010* (NSW). It is important to note ‘carer’ and ‘parent’ do not always overlap – there are young carers who may still be attending school. They in particular would benefit from clear anti-discrimination legislation – especially if attending private educational providers.

In line with s 5 of the *Carers (Recognition) Act 2010* (NSW) and s 4 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the definition (and protections) of carer should extend to add ‘family, carer or kinship responsibilities (as currently exist in the ACT).

We also support the recommendations of Sophie Adams who has made a separate submission in relation to these matters as she is a former member of our team and a carer herself with lived experience.

END

³⁹ Australia Alliance for Inclusive Education (n 37); All (n 37).

Annexure

Submission to the NSW Civil and Administrative Tribunal Statutory Review

15 July 2019

National Justice Project
22 Cooper Street
Surry Hills NSW 2010



ABOUT THE AUTHORS

This submission has been drafted on behalf of two First Nations Applicants by Lucy Schroeder, an Aurora Scholar at the National Justice Project, together with Penelope Han, Emma Henke and Jacqueline Hickman, who are student members of the Australian National University's Interdisciplinary Social Justice Research Hub, an initiative lead by Mary Spiers Williams of the National Centre for Indigenous Studies.

The submission was initiated, and its preparation mentored and supervised by Adjunct Professor George Newhouse of the National Justice Project.

A INTRODUCTION AND TERMS OF REFERENCE

On 30 May 2019 the Department of Justice announced that it is conducting a review of the *Civil and Administrative Tribunal Act 2013*, which established the NSW Civil and Administrative Tribunal (NCAT).

The purpose of the review is to find out how well it is working, and to look at reforms that could strengthen access to justice for people in NSW.⁴⁰

The review seeks submissions on a broad range of issues relating to the operation of the Civil and Administrative Tribunal Act 2013. In particular, answers to the following questions:

- Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?
- Is NCAT accessible and responsive to its users' needs?
- Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?
- Does NCAT resolve legal disputes quickly, cheaply and fairly?
- Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?
- Does NCAT need additional powers to be able to enforce its decisions?

The focus of these Submissions is on the experience of First Nations peoples in the **Administrative and Equal Opportunity Division** of NCAT.

⁴⁰ https://www.ncat.nsw.gov.au/Pages/announcements/20190530_ncat_statutory_review.aspx

B EXECUTIVE SUMMARY

The experience of First Nations peoples in our Courts and tribunals, including NCAT, is often fraught, can be traumatic and contributes to intergenerational trauma.

In these submissions we share the experience of two First Nations people (the “Applicants”) who were parties to proceedings in the NSW Civil and Administrative Tribunal (‘NCAT’) and who experienced a range of processes and procedures which resulted in feelings of injustice and re-traumatisation.

The background identifies critical issues in the First Nations Applicants’ attitudes towards and perceptions of the tribunal process, focusing on the lack of trust First Nations people have in the colonial legal system.

The balance of this submission then explores specific examples of matters of concern to the Applicants generally in a chronological order, reflecting their journey, and concludes with recommendations to address them.

These include:

- (a) Difficulties in understanding the processes in the Administrative and Equal Opportunity division, the jurisdiction and limits of the tribunal and choice of venue, how to obtain documentary evidence held by an experienced litigant and how to present and prove their case in the context of a tribunal hearing.
- (b) Difficulties in evidence gathering – in particular, obtaining essential documents from the respondents
- (c) The credibility of documentary evidence over oral evidence;
- (d) The systemic racism inherent in the prejudice against oral evidence whilst at the same time tolerating the State department losing critical documentary evidence and taking steps to deny documentary evidence to applicants; and
- (e) The adversarial nature of the Administrative and Equal Opportunity Division’s processes; and
- (f) The lack of cultural awareness of tribunal members.

The final section of this report suggests a way forward, it examines:

- 1 Culturally aware and safe practices
- 2 The VCAT Koori Inclusion action plan as a model for reform

This submission is an amalgam of complaints and is not a personal criticism of any particular tribunal member. It is focused on improving the process

SUMMARY RECOMMENDATIONS

The NCAT members code of conduct must be updated to mandate the provision of culturally respectful practices and additional support for unrepresented or First Nations litigants.

- 1 NCAT members should ensure they uphold the member code of conduct.
- 2 The Tribunal should take positive steps to improve accessibility and the provision of legal advice, particularly on: the jurisdictional limits, alternatives to the Administrative and Equal Opportunity Division of NCAT, the case that each party needs to meet and how to gather evidence in the Administrative and Equal Opportunity Division, particularly for individuals with low literacy levels.
- 3 NCAT members in the Administrative and Equal Opportunity Division must ensure that all relevant documentation is produced and shared between the parties, especially in matters where a power imbalance exists between the parties, such as between First Nations people and State Actors.
- 4 Costs should automatically be awarded against State Actors where they fail to act as a model litigant.
- 5 NCAT should ensure that the oral submissions of First Nations people are treated with legitimacy by training its members in cultural awareness and by reforming its rules and procedures in relation to reception and treatment of such evidence.
- 6 NCAT must take positive steps to protect First Nations witnesses from aggressive questioning and bullying during cross examination particularly where a power balance exists and to limit the use of extensive cross examination to matters where it is necessary, even where both parties are represented by lawyers.
- 7 All NCAT Members should complete Cultural Awareness training in order to achieve cultural safety for First Nations Applicants.
- 8 NCAT should review its current cultural awareness and cultural safety training and implement a frequent, long-term, ongoing programme of training that engenders respect for our diverse First Nations cultures, and that develop self-reflexive practices critiquing each member's own culture and standpoint.
- 9 NCAT should recruit more First Nations tribunal members and other employees. NCAT should also develop community partnerships with First Nations communities, such as Elder programmes and with Aboriginal community organisations and legal services.
- 10 NCAT should review its processes and implement processes and policies, including codes of conduct, that are culturally safe.
- 11 NCAT should establish a "Users Group" which includes representatives of some or all of the NSWACT Aboriginal Legal Service, the Aboriginal Tenants Service, Aboriginal Elders and community groups and leaders.

C BACKGROUND

First Nations communities have experienced exclusion and marginalisation from the legal system like no other group in Australia.⁴¹ After more than 200 years of a colonial history of violence and racism, state institutions have a duty to take steps to identify, ameliorate and eliminate racial discrimination and its effects.

Systemic discrimination, deaths in custody, the imposition of colonial law and the dismantling of First Nations laws have produced a profound distrust in the Australian system.⁵ This distrust in the legal system 'affects all aspects of the interaction between Indigenous Australians and access to justice.'⁴²

First Nations people have often experienced intergenerational trauma in which legal and administrative systems have failed to protect them. First Nations people are more likely to have personal prior experience of legal and administrative systems working 'against them' instead of 'for them.'⁴³ This mistrust in the legal institutions such as NCAT is exemplified by a First Nations applicant to NCAT who reported to us that the *"whole system is stacked against us"* and went on to say:

"This whole discrimination system is not built for Aboriginal people...It feels like because I am Aboriginal, I am on trial and because they are professionals the question is why they would lie, so it is almost like saying I am lying."

The Children's Court Magistrate Sue Duncombe, who presides over a specialised "Koori" Court has acknowledged this history and observed that *"we have a moral, ethical and legal responsibility to change that record"*.

The NSW Koori court has embarked on institutional change and personal change of those working within the courts, changing the way that they think about the legal service delivery and developing insight into the way that First Nations peoples experience court processes and the legal system generally.

⁴¹ Christine Coumarelos et al, 'LAW Survey: Legal needs of Indigenous people in Australia, Updating Justice No 25' (Report No 25, Law and Justice Foundation of New South Wales, 2013) 31; Judicial Commission of New South Wales, *Equality before the Law Bench Book* (Emerald Press Pty Ltd, 2016) 2202 [2.2.2].

⁴² Productivity Commission, 'Access to Justice Arrangements Inquiry Report No 72' (Report No 72, 5 September 2014) 763.

⁴³ Pascoe Pleasance et al, 'Reshaping legal assistance services: Building on the Evidence Base: A discussion paper' (Discussion Paper, Law and Justice Foundation of New South Wales, 2014) 13. ⁵

<https://www.vcat.vic.gov.au/resources/koori-inclusion-action-plan-2017-18>

The Victorian Civil and Administrative Tribunal (**VCAT**) has also confronted these issues and now aims to address them by implementing a Koori Inclusion Action Plan⁵. Their plan strives to ensure that services and support for First Nations people are culturally safe and culturally responsive.

D CASE STUDY

This submission was instigated by of Aboriginal and Torres Strait Islander peoples (“**First Nations People**”) who complained to the National Justice Project about their experience in the NSW Civil and Administrative (“**NCAT**”). They felt humiliated by the process, demeaned by the power imbalance and were left with the feeling that they had been “re-traumatised”.

Their experience offers some insight into how First Nations peoples may experience NCAT processes. The First Nations Applicants’ (the “**Applicants**”) journey was deeply concerning; it indicates an urgent need for reform of NCAT processes and culture generally. The NCAT’s fiveyear review provides an opportunity to improve the way that First Nations People navigate NCAT and the way that they are treated by NCAT.

The anonymised written statements of the Applicants have formed the basis of this submission. This submission uses their experience to illustrate the how First Nations people feel when they come up against more powerful and better resourced respondents, particularly governments, government departments and semi government authorities (**State Actors**) and large corporations.

Although the objectives of NCAT are to:

- enable the resolution of proceedings justly, quickly, cheaply and with as little formality as possible
- ensure that it is accessible and responsive to the needs of all of its users
- ensure that its decisions are timely, fair, consistent and of a high quality
- ensure that it is accountable and has processes that are open and transparent

This case study shows that NCAT is not achieving its objectives in so far as they relate to First Nations People and is an example of how power imbalances, cultural differences and poor processes combine to prevent access to justice and can result in the re-traumatisation of First Nations applicants within the tribunal setting.

E SUBMISSIONS

(a) Complexity of the tribunal system

A key object of NCAT is to “ensure that the Tribunal is accountable and has processes that are open and transparent”.⁴⁴ This is set out in its constitutive legislation. NCAT recognises that self-represented parties need such support. The Tribunal publishes self-help guides on its website, such as: “Getting Help” and “How we can and cannot assist”. Whilst these efforts to promote accessibility of the Tribunal’s procedures are positive, they are insufficient.

NCAT processes can be complex and involve formal procedures, such as summonses to obtain documents and formal hearings (including witness examination and cross examination). These processes privilege sophisticated parties with vast resources, but actively deter those who suffer social disadvantage. In many ways, these processes institutionalise discrimination against First Nations people. This is reflected by the following statement from an Applicant:

“The way the NCAT is set up at present it is not a safe place for people who are the targets of discrimination and I truly believe it could be doing harm to those people and stopping other people from coming forward. So, you could say that the NCAT could be adding to discrimination rather than stopping it out.”

In practice, the Tribunal’s processes in discrimination proceedings were seen by the Applicants as highly legalised, technical, formalistic and adversarial. The individuals who sought redress through NCAT felt that they were unable to progress their matter without legal assistance. The Applicants statement below reinforces the alienating effect of these processes, especially in regards to First Nations persons:

“All complainants should be afforded legal representation as the whole system is based on legal argument and legal terminology and once again in my case, my legal team had to work around the way I wrote the initial complaint. If they had been able to assist with this initially, my complaint would have been worded the best way to fit the guidelines, so I feel I was even discriminated against in this process.”

Even though tribunal members are required to promote the efficient conduct of proceedings⁴⁵, by:

- clearly identifying the issues and orders in dispute;
- facilitating the resolution or narrowing of issues in dispute, where appropriate;
- adjourning proceedings only when necessary in the interests of justice and fairness;

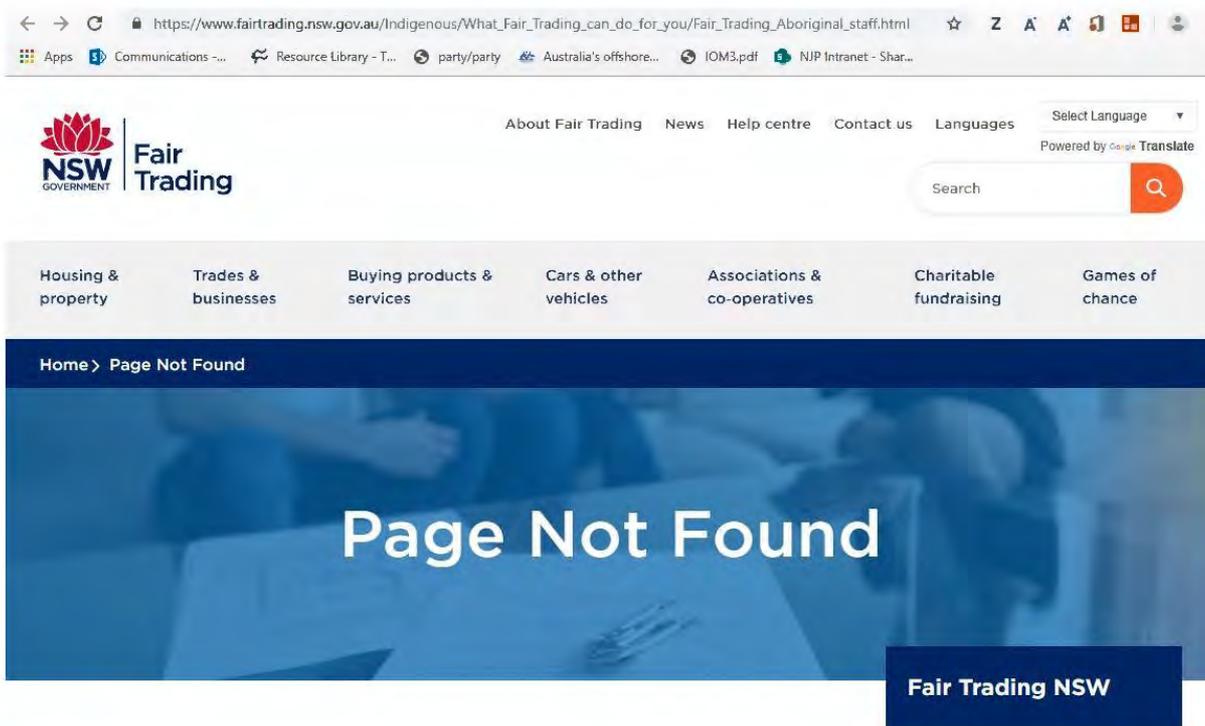
⁴⁴ *Civil and Administrative Tribunal Act 2013 No 2*

⁴⁵ NSWCAT Member Code of Conduct, at paragraph 20

- ensuring that any interlocutory orders and applications do not unnecessarily delay the final determination of proceedings.

The Applicants did not feel supported by that process.

The Applicants felt that NCAT's Administrative and Equal Opportunity Division did not offer meaningful legal support and that its registrars, employees and members failed to adequately explain tribunal processes to them. Furthermore, at the time of writing these submissions, the authors noticed that the some of the links directing First Nations People towards help from Aboriginal Employees at NCAT were broken and returned the error message "Page Not Found" - see the image below.⁴⁶



The lack of culturally appropriate assistance adversely prejudices First Nations Litigants in particular. As one Applicant commented:

“The NCAT process was never explained to me and no other options like Human rights commission were ever put forward. It wasn’t until lawyers took over and explained to me the whole process [that I understood what was happening].”

NCAT's written resources are inadequate for the needs of many First Nations people and other people who have low literacy. For instance, more than 40% of First Nations people have low

⁴⁶ https://www.fairtrading.nsw.gov.au/Indigenous/What_Fair_Trading_can_do_for_you/Fair_Trading_Aboriginal_staff.html.

literary, with this figure rising to 70% in remote areas. This is further emphasised by one Applicant's statement:

"If we look at the Literacy and Numeracy rates of Aboriginal people, then this process will discriminate against a large number of them if they cannot be part of the review in a verbal setting. Statistically speaking these people come from the most disadvantaged parts of the community and these are the people most likely to be discriminated against."

Producing information that is not specifically prepared to assist people with low literacy does not enhance access to justice for them. Alternative means of communicating complex information to people with low literacy have been developed in other dispute resolution forums. NCAT must take steps improve accessibility of its procedures and resources through multimedia platforms, as well as easy English writing packages and assistance lines. Taking these steps will ensure that NCAT realises its key objects in practice and meets the needs of First Nations People.

Recommendations:

- 1 The NCAT members code of conduct must be updated to mandate the provision of culturally respectful practices and additional support for unrepresented or First Nations litigants.**
- 2 NCAT members should ensure they uphold the member code of conduct.**
- 3 The Tribunal should take positive steps to improve accessibility and the provision of legal advice, particularly on: the jurisdictional limits, alternatives to the Administrative and Equal Opportunity Division of NCAT, the case that each party needs to meet and how to gather evidence in the Administrative and Equal Opportunity Division, particularly for individuals with low literacy levels.**

(b) Tolerance of non-disclosure or non-supply of documents

In the case study, the tribunal was seen to tolerate and even excuse the non-disclosure or non-supply of critical documents by the State Actor, without making adverse findings against them. The Applicants noted that the State Actor failed to conduct themselves as a model litigant and that when they secured the assistance of lawyers the State Actor was totally unconcerned about the threat of legal costs for their conduct.

The Applicants felt that the system was unfair to them because their cultural practise were not to use extensive written documentation, and so they were reliant upon the respondents to produce relevant documentary evidence.

One Applicant remarked *"we must prove everything we have said and done, [and we have to] rely on the government and public servants to produce the information"*. The respondent, a state actor, controlled the release of documentary evidence which would have confirmed the Applicant's oral

evidence. The respondent appeared to do everything within its power to deny the applicants access to critical documents. In some cases, it attempted to deny the relevance of the documents, in other cases it attempted to rely on confidentiality and privilege and finally, it claimed that documents had been lost. The missing documents mysteriously appeared in a later Freedom of Information request. The conduct of the respondent and the tribunal's tolerance of it, created an advantage for the state actor, increasing the power imbalance between the parties and was an added barrier to the First Nations Applicants in obtaining justice.

Recommendation:

- 4 **NCAT members in the Administrative and Equal Opportunity Division must ensure that all relevant documentation is produced and shared between the parties, especially in matters where a power imbalance exists between the parties, such as between First Nations people and state actors.**
- 5 **Costs should automatically be awarded against State Actors where they fail to act as a model litigant**

(c) Privileging of documentary evidence

NCAT emphasises the importance of written documentation in its hearings, implying that oral sources lack reliability and materiality.⁴⁷ NCAT's own website states it

"...decides cases on the evidence presented at the hearing... [litigants] will need to provide the Tribunal and the other party with relevant documents in support of [their] case ... [such as] character references, medical reports, contracts, letters, emails, invoices, phone records, minutes of meetings, plans and drawings...."

NCAT's ostensible preference for written documentation unfairly prejudices First Nations People. Oral communication is the well-established, primary form of communication in Indigenous Australian communities,⁴⁸ one that draws upon an extraordinary lineage of knowledge sharing that continues until this day. Conversely, written record keeping is a characteristic of Australia's colonial history.⁴⁹ As one Applicant remarked: ***"Aboriginal people do not carry notebooks or diaries around to record information, whereas many defendants are from government and have a whole***

⁴⁷ Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 23.

⁴⁸ 'Storytelling in Aboriginal and Torres Strait Islander cultures', *Queensland Curriculum & Assessment Authority* (Web Page, 25 July 2018) <<https://www.qcaa.qld.edu.au/about/k-12-policies/aboriginal-torresstrait-islander-perspectives/resources/storytelling>>.

⁴⁹ Cunneen and Grix (n 1) 23.

written system to fall back on.” As discussed above, this issue was emphasised by the Respondent’s failure to provide essential documentarian and NCAT’s toleration of this behaviour.

NCAT’s stated privileging of documentary evidence over oral testimony does not reflect contemporary attitudes about the reliability and veracity of oral testimony. It ignores the importance of hearing the evidence of vulnerable parties and witnesses who do not keep thorough written records but whose stories are not necessarily untrue. This practice results in First Nations Applicants feeling unheard, invalid or not believed within the tribunal.

Oral evidence can be invaluable in proving truth. This permissibility of oral evidence was emphasised in the case of *Milliripim v Nabalco*, where Blackburn J held:

No difficulty arose in the reception of the oral testimony of the ... [First Nations people] ... as to their religious beliefs, their manner of life, their relationship to other Aboriginals, their clan organization and so forth. ... the witness spoke from his own recollection and experience, and secondly, that he did not touch on the question of the clan relationship to particular land ... no question of hearsay is at this stage involved: what is in question is only the personal experience and recollection of individuals.⁵⁰

In that case, oral evidence was persuasive and illuminated information not contained within documentary evidence. It is paradoxical that the Federal Court of Australia in 1971 had a more progressive stance on documentary evidence than a tribunal that is established to simplify and increase access to justice for legally naïve parties.

NCAT’s privileging of documentary evidence over the Applicant’s oral evidence, while simultaneously failing to uphold the Respondent’s obligation to provide documentary evidence made the Applicant feel discriminated against.

Record-keeping is inherently discretionary unless it is systematised and government staff implicated in poor conduct are unlikely to record incidents of abuse or wrongdoing towards First Nations people.⁵¹ One Applicant expressed the opinion that ***“Sometimes these documents are changed to suit the defendant or in our case lost or not handed over or argued to be irrelevant.”*** By requiring evidence be presented in written form, NCAT is, in most cases involving First Nations People, privileging the evidence of the Respondents.

Recommendation:

- 6 NCAT should ensure that the oral submissions of First Nations people are treated with legitimacy by training its members in cultural awareness and by reforming its rules and procedures in relation to reception and treatment of such evidence.**

⁵⁰ *Milliripim v Nabalco Pty Ltd* (1971) 17 FLR 141.

⁵¹ Maithri Panagoda, ‘Stolen generations litigation in NSW’ [2013] (May/June) *Precedent* 34.

(d) The adversarial process

One of the most disturbing events which took place during the tribunal process was the crossexamination of a witness that was particularly vulnerable (all parties and the tribunal members knew that this individual had experienced a mental breakdown). The witness was effectively taken apart by an experienced and bullying barrister. There was no need for the hectoring and violence of that barristers' approach. It was as if the Respondents wanted to intentionally re-traumatise the Applicant through the tribunal process. The tribunal members did not appear to be concerned about the cultural safety of the witness or even their emotional safety. We acknowledge that the process must be fair, but the failure to intervene in situations of gratuitous bullying of a witness which was distressing should never have happened, particularly in a jurisdiction which is supposed to be informal and responsive to the needs of all of its users.

Although the NCAT Members code of conduct requires members to "control the proceedings in such a way as to create an environment in which participants can and are encouraged to treat other participants courteously and respectfully [and to] be aware of and responsive to cultural and other sensitivities in relation to forms of address, conduct and dress."

That did not occur in the Applicant's case.⁵²

Recommendation:

- 7 NCAT must take positive steps to protect First Nations witnesses from aggressive questioning and bullying during cross examination particularly where a power balance exists and to limit the use of extensive cross examination to matters where it is necessary, even where both parties are represented by lawyers.**

(e) Training of Members

First Nations Applicants identified that the gap between the tribunal members' life experiences and the lived experience of First Nations People as a key shortcoming of NCAT.

The lived experience of First Nations People is contextualised within a history of colonisation which has led to disadvantage, racism, a lack of acknowledgement of cultural differences and exclusion. Kado Muir notes that 'legal institutions do not understand Indigenous society ... [they do] not understand their relationship with the land, their belief systems, their history'.⁵³

⁵² NSWCAT Members Code of Conduct at paragraph 17.

⁵³ Kado Muir, 'Reconciling through Understanding', Native Title (2015/2016) 19(2) AILR 59 Newsletter (Online), May and June 1999, 3 ff

This criticism is highlighted by a First Nations Applicant who queried whether the members:

“know what it is like to be discriminated against, do they know people who have been discriminated against.”

Recommendations:

- 8 All NCAT Members should complete Cultural Awareness training in order to achieve cultural safety for First Nations Applicants.**
- 9 NCAT should review its current cultural awareness and cultural safety training and implement a frequent, long-term, ongoing programme of training that engenders respect for our diverse First Nations cultures, and that develop self-reflexive practices critiquing each member’s own culture and standpoint.**

F WHERE TO FROM HERE

Cultural Safety

In Australia, the concept of cultural safety has been widely accepted, particularly by organisations that represent and/or provide services to Aboriginal and Torres Strait Islander peoples.

An individual experiences cultural safety as an environment: where there is no assault on, challenge to or denial of their identity, their way of being and their needs. Cultural safety is borne of shared respect, shared meaning, shared knowledge and experience, and involves learning, living and working together with dignity, and truly listening.⁵⁴ Cultural safety empowers individuals and enables First Nations Peoples to contribute to the achievement of positive outcomes and participate in an alien system. It encompasses a reflection on individual cultural identity and recognition of the impact of personal culture on professional practice.⁵⁵

It is necessary to distinguish the related concepts of cultural safety and cultural competency. Cultural competency is ‘a set of congruent behaviours, attitudes, and policies that come together in a system, agency, or amongst professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations’.⁵⁶ Cultural competency has been criticised by Critical Race and Indigenous Scholarship. While well intentioned, it is impossible to truly be competent in another’s culture. This belief can engender problematic attitudes. Thus, the goal

⁵⁴ Robyn Williams, 'Cultural safety — what does it mean for our work practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213-214.

⁵⁵ Maryann Bin-Sallik, 'Cultural Safety: Let's Name It' (2003) 32 *The Australian Journal of Indigenous Education*, 21-28.

⁵⁶ Council of Australian Governments, 'Prison to Work Report' (Report, 2016) 23.

of NCAT should be the creation of a culturally safe environment, rather than attempting to attain cultural competence.

Cultural safety is vital to effective service delivery to First Nations peoples and is directly related to the level of access to justice afforded to First Nations peoples.⁵⁷ Service providers who do not create culturally safe environments are incapable of providing an effective service to First Nations Applicants.⁵⁸ A First Nations Applicant queried whether NCAT members had ‘cultural competency training to understand the circumstances of Aboriginal people’. In addition, one Applicant remarked:

“Do they know any statistics around education levels, crime rates, incarceration rates, domestic violence and how these statistics are used against Aboriginal people to discriminate and to stereotype and put all Aboriginal people into categories?”

Currently, NCAT has minimal procedures or guidelines which directly relate to implementing culturally safe processes for First Nations people. The NCAT Annual Report for 2017/18 states that NCAT Registry staff attended a workshop to provide greater understanding of how NCAT can better assist Aboriginal people at the tribunal.⁵⁹ The NCAT Accessibility Committee have liaised with the Professional Development Committee of NCAT to encourage education and training on awareness of matters particular to Aboriginal and Torres Strait Islander Communities.⁶⁰

An essential element of creating a culturally safe environment is cultural awareness. For decades, cultural awareness programs have been implemented to improve relationships with First Nation People. Anderson and Wild recommended ‘intensive and ongoing cultural awareness training’ to ‘increase the competence and capability of government employees to know, understand and incorporate Aboriginal cultural values in the design, delivery and evaluation of programs and services that affect their communities’.⁶¹ Community-based programs can provide service providers the opportunity to learn from First Nations peoples.⁶²

⁵⁷ National Aboriginal and Torres Strait Islander Legal Services, Submission No 78 to Productivity Commission, *Access to Justice Arrangements*, (8 November 2013).

⁵⁸ *Ibid.*

⁵⁹ NSW Civil and Administrative Tribunal, *NSW Civil and Administrative Tribunal Annual Report 2017-2018* (Report, 2018) 18-19.

⁶⁰ *Ibid* 90.

⁶¹ Pat Anderson and Rex Wild, *‘Ampe akelyernemane meke mekarle: ‘little children are sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse’* (NTA Government, 2007).

⁶² Terri Farrelly and Bronwyn Carlson, ‘Towards Cultural Competence in the Justice Sector’ (2011) 3 *Indigenous Justice Clearinghouse* 1.

In the experience of the Applicants, a culturally safe, wraparound model where First Nations community service providers deliver services together with legal practitioners is fundamental to effective service delivery for First Nation applicants.

The VCAT Koori Inclusion Action Plan

The issue of cultural safety has been addressed by the Victorian Civil and Administrative Tribunal (VCAT) which aims to become a culturally safe environment and improve communication, engagement and partnerships with the Koori Community by adopting the Koori Inclusion Action Plan. A key action in the Koori Inclusion Action Plan is 'developing and implementing a cultural awareness training program specifically for VCAT members' and 'establishing a pool of culturally competent members who can be directed to hear Koori specific matters.'⁶³

We support the imposition of ongoing cultural awareness training to improve service delivery in order to create a culturally safe environment. This training should be frequent, long-term, ongoing and engender respect for the diversity of First Nations cultures. It must be undertaken in conjunction with Aboriginal organisations and legal services. Critical to the success of such programmes, is that individuals and organisations are encouraged to develop insight into their own cultural-centric practices and attitudes, in other words, to engender self-reflexive practices critiquing one's own culture and standpoint and be sensitive to others.

Effective change will only come in partnership with First Nations communities and we recommend implementing mechanisms that enable the involvement of the NSW/ACT Aboriginal Legal Service, the Aboriginal Tenancy Service, Aboriginal Elders and community groups and leaders in governance, processes and decision making.

VCAT's implementation of the Koori Inclusion Action Plan 2017-18 provides a relevant and valuable example of an initiative aimed at encouraging Koori participation in VCAT. This submission notes that VCAT's plan's primary objective is to drive changes to organisational behaviour, based on principles of cultural safety, respect and responsiveness, to ensure that VCAT's processes and practices proactively overcome exclusion through participation. The VCAT Plan includes appointing a new Koori Engagement Project Officer and establishing a recruitment and employment strategy to encourage Koori employment at no less than 2.5% of all VCAT employees.⁶⁴

Those objects should apply equally to NCAT for the benefit of First Nations People of NSW.

⁶³ Victoria Civil and Administrative Tribunal, 'Koori Inclusion Action Plan 2017-18'
<<https://www.vcat.vic.gov.au/resources/koori-inclusion-action-plan-2017-18>>

⁶⁴ Victoria Civil and Administrative Tribunal (n 22).

Recommendations:

- 10 NCAT should recruit more First Nations tribunal members and other employees. NCAT should also develop community partnerships with First Nations communities, such as Elder programmes and with Aboriginal community organisations and legal services.**
- 11 NCAT should review its processes and implement processes, including codes of conduct to ensure that they are culturally safe.**
- 12 NCAT should establish a “Users Group” which includes representatives of some or all of the NSWACT Aboriginal Legal Service, The Aboriginal Tenants Service, Aboriginal Elders and community groups and leaders.**