



THE UNIVERSITY  
of ADELAIDE

NSW Law Reform Commission  
Locked Bag 5000  
Parramatta  
NSW 2124  
By email: [nsw-lrc@dcj.nsw.gov.au](mailto:nsw-lrc@dcj.nsw.gov.au)

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**Submission to NSW Law Reform Commission Review on the Anti-Discrimination Act 1977 (NSW)**

I am making this submission as an academic with expertise in discrimination and equality law and policy, and a member of the Australian Discrimination Law Experts Group. My submission is focused on the questions raised in Part 6.1 and Part 11.3 of the Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct: Consultation Paper released in May 2025 by the New South Wales Law Reform Commission.

I am happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let me know if I can be of further assistance in this inquiry

This submission may be published.

Yours sincerely

Anne Hewitt  
Associate Professor  
The University of Adelaide Law School

**Anne Hewitt, Adelaide Law School**  
The University of Adelaide SA 5005 AUSTRALIA  
[www.adelaide.edu.au](http://www.adelaide.edu.au)

# Submission to NSW Law Reform Commission Review on the Anti-Discrimination Act 1977 (NSW)

<b>Glossary</b> .....	<b>2</b>
<b>Response to Part 6.1 Discrimination at work – coverage</b> .....	<b>2</b>
<b>Consultation paper question 1</b> .....	<b>2</b>
Recommendation 1: .....	4
Recommendation 2: .....	4
<b>Consultation paper question 2</b> .....	<b>4</b>
Recommendation 3: .....	6
<b>Consultation paper question 3</b> .....	<b>6</b>
Recommendation 4: .....	7
Recommendation 5: .....	7
<b>11.3: A positive duty to prevent or eliminate unlawful conduct</b> .....	<b>7</b>
<b>Consultation paper question 11.3.1</b> .....	<b>7</b>
Recommendation 6: .....	8
Recommendation 7 .....	9
Recommendation 8.....	9
Recommendation 9.....	9

## Glossary

<b>ADA (NSW)</b>	<i>Anti-Discrimination Act 1977 (NSW)</i>
<b>ADA (NT)</b>	<i>Anti-Discrimination Act 1992 (NT)</i>
<b>ADA (Tas)</b>	<i>Anti-Discrimination Act 1998 (Tas)</i>
<b>EOA (Vic)</b>	<i>Equal Opportunity Act 2010 (Vic)</i>
<b>SDA</b>	<i>Sex Discrimination Act 1984 (Cth)</i>

## Response to Part 6.1 Discrimination at work – coverage

### Consultation paper question 1

Should the definition of employment include voluntary workers? Why or why not?

Protection against harassment and discrimination should extend to volunteers in addition to paid workers. Extending protection would be consistent with legislative protections in other jurisdictions, and other workplace protections, including workplace health and safety protections. Conversely,

exclusion of volunteers from protections is not consistent with the protective principles informing legislative prohibitions of discrimination and harassment.

It must be acknowledged that distinguishing between volunteers and those engaged in other forms of unpaid work may be complex, as there is no agreed definition of 'volunteer'. However, a logical definition was provided by Stewart and Owens in their 2013 analysis of unpaid work. They defined volunteering as:

unpaid work that is performed with the primary purpose of benefiting someone else or furthering a particular belief, rather than gaining experience or contacts that may enhance employability.<sup>1</sup>

According to this definition, altruistic intent is at the heart of true volunteer work. If this is accepted, then volunteers are contributing their time without pay, for the primary benefit of an organisation or charitable purpose, rather than themselves as individuals. In light of this, it is logical and appropriate to extend protections against inappropriate workplace behaviours, including discrimination and harassment, to them. Excluding volunteers from such protections increases their potential vulnerability in the workplace, in a context where their contribution is important to achieve a variety of beneficial outcomes across sectors. In addition, exclusion of volunteers from the scope of protection may discourage individuals from engaging in volunteer work, to the detriment of the community broadly. Alternatively, people seeking to engage in voluntary activity could be precluded from doing so on discriminatory grounds, which would have negative impacts on the individual and also on sectors relying on volunteers.

Volunteering is crucially important in Australia, at multiple levels. For individuals, engaging in volunteer work can create opportunities for social connection and meaningful engagement, which promotes individual wellbeing. Volunteering also promotes community wellbeing, by facilitating networks and relationships, and connection to place. More broadly, volunteer work contributes to the achievement of important outcomes, in areas as diverse as animal welfare, arts and culture, community services, disaster relief, environmental conservation, and health service. If Australia wishes to continue to reap positive individual, community and national outcomes from volunteer work, it is important that any disincentives to volunteering are minimised. Extending prohibitions against discrimination and harassment to include volunteer workers would remove one potential disincentive. It would also serve as a firm statement about the importance of volunteer workers, and the value of volunteering generally, within New South Wales.

Extension of protection to volunteers would be consistent with other jurisdictions, which already protect unpaid and/or volunteer workers from discrimination and sexual harassment. For example:

- The ADA (Tas) provides coverage through defining protection as extending to people in relation to '22(1)(a) employment or occupation in any capacity, with or without

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<sup>1</sup> Andrew Stewart and Rosemary Owens (2013) *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* (Report for the Fair Work Ombudsman) <<https://www.fairwork.gov.au/sites/default/files/migration/763/UW-complete-report.pdf>> 5.

remuneration'. The scope of section 22 means that harassment by a voluntary supervisor or co-worker of a paid worker, harassment by a paid supervisor or co-worker of a voluntary worker and harassment by a voluntary supervisor or co-worker of a voluntary worker are all prohibited.

- The EOA (Vic) explicitly extends protection from sexual harassment to 'an unpaid worker or volunteer' as if they were an employee. The EOA (Vic) offers broad protection against sexual harassment through the prohibition of harassment in 'common workplaces'. Under section 94, 'A person must not sexually harass another person at a place that is a workplace of both of them'. This applies whether or not they are both employees, or employed by the same or different employers. 'Workplace' is defined broadly as 'any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment'. This appears broad enough to encompass those undertaking unpaid work experience or internships.
- The SDA protects a variety of non-traditional workers, including volunteers, against sexual (and sex-based) harassment.

### **Recommendation 1:**

Protections against discrimination and harassment in the ADA (NSW) should be extended to unpaid and volunteer workers by extending protections to cover 'workers' defined consistently with the model Work Health and Safety Act.

### **Recommendation 2:**

In the alternative to Recommendation 1, the definition of employment within the ADA (NSW) should include voluntary and unpaid workers.

### **Consultation paper question 2**

Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment? Why or why not?

A limited approach to protections against workplace discrimination, which extends protections only to those engaged in 'employment', leads to critical distinctions in terms of the protections offered to participants in a workplace. If a participant is determined not to be an employee, but instead is categorised as a volunteer, or a learner, this can put these participants in the workplace in a precarious position.

All workers are potentially vulnerable to being the subjected of discrimination or harassment at work. There has been extensive analysis of the consequences of exclusion of independent contractors, however this is not the full extent of the problem. Those engaging in work experience and formal learning in the workplace, who are often young, eager to develop professional contacts, skills and experience that may assist them secure a job, and may be relying on the work experience placement to complete their degree or qualify for admission to a profession are also examples of vulnerable

participants in the workplace. There is evidence that these participants are being subject to problematic discrimination and harassment. For example, Newman, Daley and Bogo have reported discrimination against gay and lesbian students engaged in workplace learning.<sup>2</sup> The AHRC report into sexual harassment and assault in universities also reported that for two per cent of the students who had been sexually harassed or sexually assaulted in a university setting in 2015 or 2016, the most recent incident had occurred in a workplace as part of their university studies.<sup>3</sup> Perpetrators included colleagues and clients at a workplace outside the university. In the USA, a 2018 survey of former interns found that the vast majority of the 22 respondents (82 per cent) had been aware of their colleagues experiencing sexual harassment, and half had personally experienced sexual harassment in their internships.<sup>4</sup>

Development of professional reputation and connection are likely to be particularly high value for those seeking employment, who might be engaged in formal learning in the workplace or in work experience, and anything which impacts on this will be a significant factor in decision-making. For this reason, ostracism, retaliation and career damage are likely to be particularly feared, and work experience participants may feel compelled to accept any conditions offered in order to become and remain employable in their chosen field. This puts those undertaking unpaid work experience at particular risk of sexual harassment and other forms of discrimination at work.<sup>5</sup> It is essential, then, these non-traditional workers are protected by discrimination law, including from sexual harassment.

For these reasons, the scope of the coverage of the ADA (NSW) should be extended in line with the approach in the SDA to protections against sexual harassment and sex-based harassment. This could be done by extending protections to apply to ‘workers’ as defined by the model Work Health and Safety Act 2011. That section includes not only direct employees and contractors, but their subcontractors and employees, labour hire workers, outworkers, trainees, unpaid work experience students and volunteers. The definition is replicated below (emphasis added).

#### 7 Meaning of worker

(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

(a) an employee; or

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<sup>2</sup> P Newman, M Bogo & A Daley (2009) “Breaking the silence: sexual orientation in social work field education” 45(1) *Journal of Social Work Education* 7–28.

<sup>3</sup> Camilla Gebicki et al, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Australian Human Rights Commission, 2017) 68.

<sup>4</sup> BA Rudolph Foundation (2018) *Rise up: Interns, their workplace rights, and the tools to end sexual harassment* (BA Rudolph Foundation)

<sup>5</sup> See, for example: A Hewitt, D Bo, A Rosin & W McKay (2024) “Decent Work, Meaningful Education or Potential Exploitation? The Role of Universities in Ensuring the Quality of Academic Internships in Australia, Finland and France” 40(4) *The International Journal of Comparative Labour Law and Industrial Relations* 495-530; A Hewitt, L Grenfell, H Abiyat, M Hendry, J Howe & S Whittaker (2022). “Weighing the Cost of Expectations that Students Complete Legal Work Experience” 32(1) *Legal Education Review* 109-128; and A Hewitt (2022) “Is legislation governing tertiary work experience effective? Exploring the regulatory role played by Australian Universities” 50(1) *Federal Law Review* 62-85.

- (b) a contractor or subcontractor; or
- (c) an employee of a contractor or subcontractor; or
- (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- (e) an outworker; or
- (f) an apprentice or trainee; or
- (g) a student gaining work experience; or
- (h) a **volunteer**; or
- (i) a person of a prescribed class.

For consistency with the SDA and for consistency with the WHS legislation, the ADA (NSW) should also adopt this wide definition of worker, instead of a more limited definition of employment.

However, The ADA (NSW) should go further than the SDA, in that the broader coverage should apply to all grounds covered in the ADA (NSW), not just harassment. This extension is logical, in that many of the individuals covered by the broad definition of 'worker' who are excluded from protections limited to employees, are groups which are vulnerable to other forms of workplace discrimination, and/or whose engagement in the workplace should be encouraged (including through providing them legislative protections) for broad social reasons.

This analysis applies to those gaining workplace experience (discussed above). Work experience can be an important element in facilitating transition to meaningful employment, and for individuals to develop relevant professional skills. It is also often required for admission to particular professions. For these reasons, work experience fulfil important educational and social functions, and those engaging in it should be extended legislative protections.

Similarly, categories of non-traditional worker such as volunteers (also discussed above), may be vulnerable in the workplace. At the same time volunteer work serves important individual, community and national goals. Because of the dual vulnerability of volunteers, and the important role of volunteering in the community, those engaging in it should be extended legislative protections.

### **Recommendation 3:**

The ADA (NSW) should extend all protections against discrimination and harassment to 'workers' defined consistently with the model Work Health and Safety Act.

### **Consultation paper question 3**

Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not? [Anne, Robin, Sarah A]

It is my submission there is no reason to exclude local government members from protection against any form of discrimination or harassment.

While they are not employees in a legal sense, local government members are engaging in valuable work for the community, and should therefore be protected against all forms of prohibited inappropriate workplace behaviours. This should include protection against all forms of harassment and discrimination covered by the ADA (NSW).

Excluding local government members from particular protections has no solid theoretical or practical rationale, and is inconsistent with the objectives of equality legislation. In addition, it makes the cohort potentially vulnerable to age discrimination, and could undermine the capacity or willingness on individuals of a variety of ages to stand for election as local government members. Given the evidence that diverse leadership benefits decision making and performance in an organisation,<sup>6</sup> there is a strong incentive to ensure diversity in local government. Limiting legislative protections for the cohort is therefore inadvisable.

No significant regulatory burden or administrative challenges should arise from extending all of the ADA (NSW) protections to local government members. Two alternative methods for doing that are proposed below. The first, which requires extending protections to a broadly defined category of “worker” which includes those categories included in the definition adopted in the model Work Health and Safety Act 2011 and local government members is to be preferred.

#### **Recommendation 4:**

Local government members should be included in legislative protections against all form of discrimination or harassment included in the revised Act. Ideally, this would be done by extending protections to workers, and defining ‘workers’ in the ADA (NSW) to include elected public officials who serve the community such as local government members.

#### **Recommendation 5:**

In the alternative to Recommendation 4, local government members be protected from age discrimination while performing work in their official capacity.

### **11.3: A positive duty to prevent or eliminate unlawful conduct**

#### **Consultation paper question 11.3.1**

Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not?

There is clear precedent in other jurisdictions for the development and implementation of a positive duty. The ADA (NSW) should include a positive duty to eliminate discrimination, sexual harassment, and

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<sup>6</sup> See, for example, L Martins (2020) ‘Strategic Diversity Leadership: The Role of Senior Leaders in Delivering the Diversity Dividend’ 46(7) *Journal of Management* 1191-1204.

victimisation and other forms of prohibited conduct should be included in the ADA, as has been achieved under s18B of the ADA (NT)

Positive equality duties are a 'fourth generation' of equality law that seek to encourage proactive and preventative approaches to achieving equality. By integrating equality into organisational decision-making and processes they respond to the problematic nature and limited effect of prohibitions which rely upon individual complaints, and are a necessary component of an effective equality law in the current context.

In its Respect@Work Report, the Australian Human Rights Commission found that the key benefit of a positive duty would be to shift the burden of enforcement off individuals, and onto organisations. This is done by requiring organisations to take proactive and preventative action to prevent discrimination and harassment. Positive duties are ongoing (not complaints-based) and proactive (not reactive).

Introduction of a positive duty would shift the focus away from individual complaints, which place an undue burden and cost on individuals who are often under resourced, and may be dissuaded from using formal processes by the time and cost implications, as well as the risks associated with complaints. Instead, positive duties create a mechanism for creating systemic change.

Such a duty already exists in other jurisdictions in Australia and internationally. It is also consistent with the right to equality and non-discrimination under international law.

**Recommendation 6:**

The ADA (NSW) should incorporate positive duties across all attributes.

**Consultation paper question 13.1.2**

If so:

- (a) What should duty holders be required to do to comply with the duty?
- (b) What types of unlawful conduct should the duty cover?
- (c) Who should the duty holders be?
- (d) What attributes and areas should the duty apply to?

Positive duties aim to mainstream equality by integrating equality into organisational decision-making and processes.

Positive duties already exist in several other jurisdictions in Australia, which can provide guidance for how a positive duty in the ADA (NSW) could operate.

For example, in Victoria those who have a duty not to discriminate under the EOA (Vic) (including employers) 'must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.' What is 'reasonable and proportionate' depends on:

- the size of the business;

- the nature and circumstances of the business;
- available resources;
- business and operational priorities; and
- practicability and the cost of the measures.

In addition, the *Victorian Gender Equality Act 2020* (Vic) imposes duties to promote gender equality on public sector organisations, requiring them to:

- (a) consider and promote gender equality; and
- (b) take necessary and proportionate action towards achieving gender equality in developing policies and programs and delivering public services.

### **Recommendation 7**

ADA (NSW) adopt a positive duty similar to that in the Gender Equality Act 2020 (Vic), but which applies to all grounds. All those who have a duty not to discriminate under the ADA (NSW) should be subject to the positive duty.

To be effective, positive duties need to be supported by four interlocking mechanisms: self-regulation by organisations; consultation and engagement; central scrutiny; and individual enforcement. Positive duties should:

- apply to both the public and private sectors;
- require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity;
- require consultation and engagement, and include general principles for how engagement processes should be conducted;
- be enforceable by a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws;
- give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.

### **Recommendation 8**

Positive duties under the ADA (NSW) should be enforceable by a direct cause of action to the relevant tribunal. In addition, Anti-Discrimination NSW should be given statutory powers to receive and conciliate complaints relating to positive duties.

However, statutory power without the resourcing to use it will inevitably prove ineffectual.

### **Recommendation 9**

Anti-Discrimination NSW should be adequate resources to enable it to receive and conciliate complaints relating to positive duties.