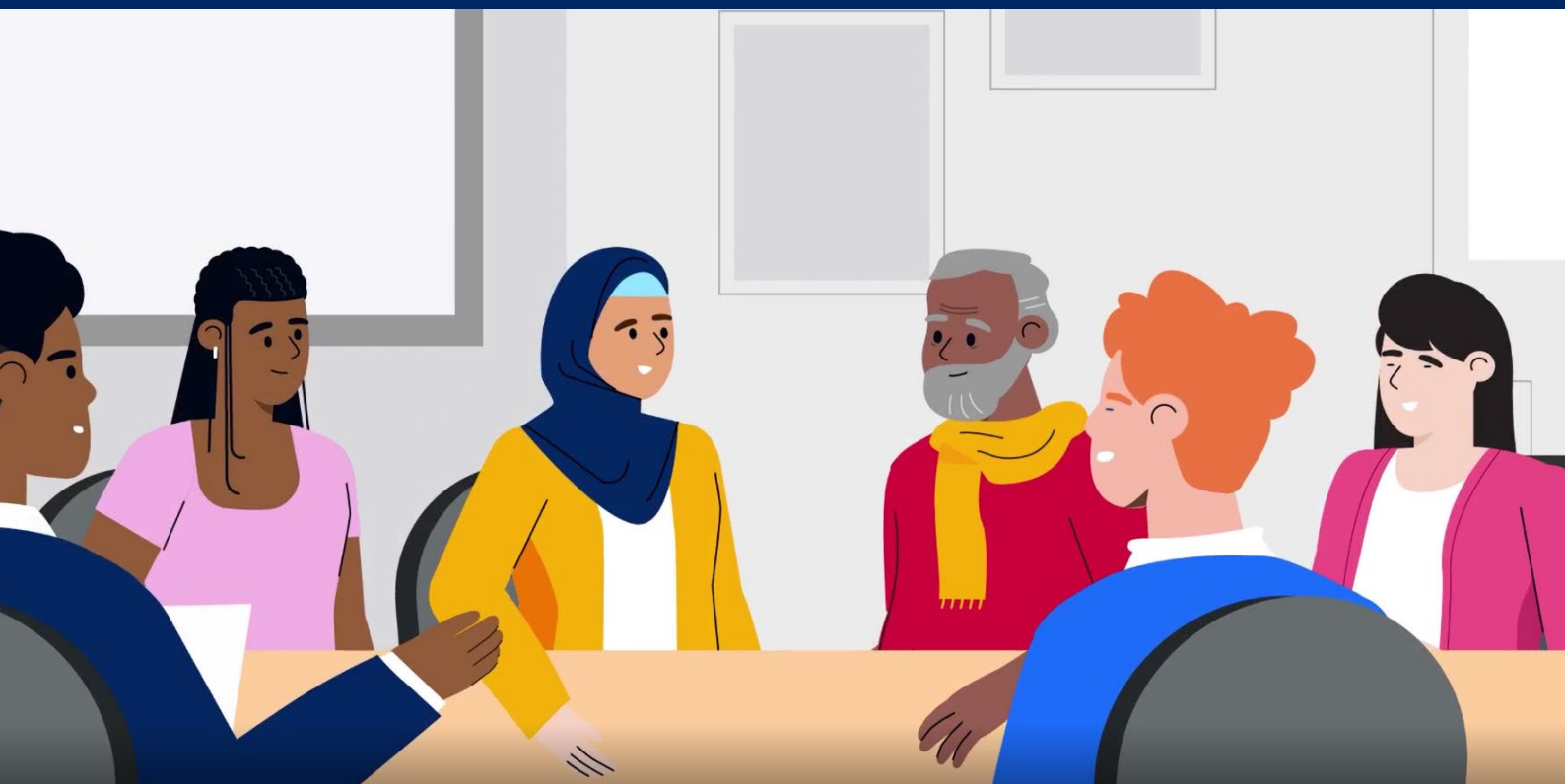


Review of the *Anti-Discrimination Act 1977* (NSW)

Procedures and Compliance Community Summary

July 2026



© New South Wales Law Reform Commission, Sydney, 2026

Copyright permissions

You may copy, distribute, display, download and otherwise freely deal with this publication for any personal or non-commercial purpose, on condition that you include proper acknowledgment on all uses.

However, you must obtain permission from the NSW Law Reform Commission if you wish to:

- charge others for access to the publication (other than at cost)
- include all or part of the publication in advertising or a product for sale, or
- modify the publication.

Disclaimer

While this publication has been formulated with due care, the NSW Law Reform Commission does not warrant or represent that it is free from errors or omission, or that it is exhaustive.

This publication deals with the law at the time it was first published and may not necessarily represent the current law.

Readers are responsible for making their own assessment of this publication and should verify all relevant representations, statements and information with their own professional advisers.

Other publication formats

The NSW Law Reform Commission is committed to meeting its obligations under state and Commonwealth anti-discrimination legislation to ensure that people with disability have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission via email: nsw-lrc@dcj.nsw.gov.au.

About us

The NSW Law Reform Commission is an independent statutory body that provides law reform advice to the NSW Government.

The Commission consists of:

- The Hon Tom Bathurst AC KC (Chairperson)
- The Hon Justice Anna Mitchelmore (Deputy Chairperson and Commissioner), and
- Kate Eastman AM SC (Commissioner).

The Commission is supported by the NSW Law Reform Commission and Sentencing Council Secretariat, NSW Department of Communities and Justice.

Contact details

NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124 Australia
Email: nsw-lrc@dcj.nsw.gov.au

Website: <http://www.lawreform.nsw.gov.au>

Acknowledgement of Country

The NSW Law Reform Commission acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that have contributed to this review.

Content warning

This document deals with content that some people may find distressing. This includes discrimination, sexual harassment and vilification. We also refer to concepts and language used in the *Anti-Discrimination Act 1977* (NSW) that can be offensive or upsetting.

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

Contents

Glossary.....	vi
Introduction	1
The NSW <i>Anti-Discrimination Act</i>	1
Our review	1
About this community summary	2
How to have your say	2
Next steps.....	3
Objectives and structure of the ADA	4
The ADA's objectives	4
The ADA's structure	5
Complaints process overview.....	5
Stages in the complaints process.....	5
Dispute resolution models	6
Perspectives on the ADA model	6
Complaints to ADNSW	7
Who can make a complaint.....	7
How to make a complaint.....	8
When ADNSW can decline a complaint.....	9
Investigation	10
Conciliation.....	10
When the complaints process ends.....	11
Complaints to NCAT.....	12
When complaints are referred to NCAT.....	12
Direct access to NCAT	13
Access to other courts or commissions.....	13
Settlement agreements.....	13
Confidentiality clauses	13
Enforcing settlement agreements	14
Remedies and enforcement.....	14
NCAT's powers to order remedies.....	14
Some ideas for new remedies.....	16
Remedies with systemic effect.....	16
Enforcing NCAT orders.....	17
Costs orders	17
When NCAT can award costs.....	18
A different model.....	18

Costs on appeal.....	18
Other proactive and preventative steps.....	19
Increasing ADNSW's role in complaints processes	19
Investigation and inquiry powers	20
Prosecuting breaches.....	20
A power to seek civil penalty orders.....	21
Education, research and outreach.....	21
Exemptions	21
Role and purpose of exemptions.....	22
Exemption process.....	22
Exemption considerations.....	22
Conclusion	23

Glossary

Word or phrase	Meaning
ADA	The <i>Anti-Discrimination Act 1977</i> (NSW).
Anti-Discrimination NSW	An independent body that receives complaints and has other functions under the ADA.
Area or protected area	Areas in which discrimination or sexual harassment are prohibited by the ADA, like work.
Attribute or protected attribute	Personal characteristics that are protected by the ADA, for example, race or sex.
Civil penalty	A monetary fine that a court or tribunal can impose.
Complainant	A person who brings a complaint to ADNSW or NCAT about unlawful conduct under the ADA.
Conciliation	A private process where an independent conciliator helps disputing parties try to resolve their issues through facilitated discussion.
Costs order	A court or tribunal order that directs one party to pay another party's legal expenses.
Damages	Financial compensation awarded to a complainant for harm or loss suffered because of unlawful conduct.
Direct discrimination	When someone with a protected attribute is treated less favourably than someone without that attribute, because of that attribute.
Duty holder	A person or body that has duties towards others under the ADA, for example, schools to students, or employers to employees.
Exemption	Permission granted by ADNSW under the ADA that allows a duty holder to temporarily do something that might otherwise be unlawful under the ADA.
Formal equality	The idea that everyone should be treated the same regardless of their differences or personal characteristics.
Indirect discrimination	When a rule or requirement that applies to everyone unfairly disadvantages people who have a protected attribute.
Mandatory order	A tribunal order that requires a respondent to take specific action to address unlawful conduct. For example, to provide an apology, provide training to staff, or employ a person.
NSW Civil and Administrative Tribunal or NCAT	The independent tribunal that hears and makes decisions about disputes under the ADA.

Word or phrase	Meaning
NSW Law Reform Commission, NSWLRC or “we/us”	The independent body conducting this review of the ADA, and the authors of this paper. We give expert law reform advice to the NSW Government, and where appropriate, recommend changes to the laws we review.
Party or parties	The people or organisations who either make a complaint (complainants) or who the complaint is made against (respondents).
Remedy/remedies	An order that a court or tribunal makes in favour of a complainant if their claim is successful. For instance, remedies under the ADA can include an apology or damages.
Respondent	A person or organisation that responds to a complaint against them under the ADA.
Sexual harassment	Unwelcome, sexual behaviour towards a person that makes them feel offended, humiliated or intimidated.
Special measures	Benefits, programs or policies that support some or all members of a disadvantaged group. They are implemented for the sole purpose of promoting substantive equality and redressing historical disadvantage. This is not regarded as discrimination.
Substantive equality	A concept that recognises that treating everyone the same can reinforce disadvantage. It focuses on fair outcomes and removing barriers to opportunities.
Systemic discrimination	Unfair treatment caused by policies, practices, or broader systems that disadvantage certain groups.
Unlawful conduct	Behaviour or acts prohibited by the ADA. This includes discrimination, vilification, sexual harassment, victimisation and unlawful advertisements.
Victimisation	When someone punishes or causes disadvantage to another person because that person exercised their rights under the ADA.
Vilification	When someone says or does something, by a public act, that incites hatred towards, serious contempt for, or severe ridicule of a person or group based on a protected attribute of that person or members of the group.

Introduction

The NSW *Anti-Discrimination Act*

The *Anti-Discrimination Act 1977* (ADA) is an important law in NSW. It makes discrimination, sexual harassment and vilification unlawful in many areas. For instance, in work, education and accommodation. It also protects people against victimisation.

The ADA protects people from discrimination and vilification based on specific characteristics, like their race. It also protects people from sexual harassment in some settings, like work.

Importantly, the ADA enables people to make complaints about unlawful conduct. It also includes mechanisms to enforce or encourage compliance. In this paper, we focus on these complaints processes and compliance mechanisms.

Our review

The NSW Attorney General asked us to review the ADA. We've been asked if the ADA could be modernised and simplified to better promote equal rights and reflect community standards.

Our role is to examine the ADA and recommend changes where needed. We haven't made any decisions yet about the issues raised in this review.

The diverse experiences and views of our community are vital to our work. When we started this review, we asked the public to share their thoughts about the ADA. We received 98 preliminary submissions from a range of individuals and organisations. They outlined concerns and suggestions for improving the law.

In 2025, we released our first consultation paper in this review. That paper focused on "Unlawful Conduct". We asked what the ADA should cover — what behaviour should be unlawful, who should be protected, and who should hold duties to others.

The paper outlined a range of issues raised in preliminary submissions. We also set out some potential options for changing the law. We developed these after considering public feedback and conducting research into laws across Australia and internationally.

We received 215 submissions to that consultation paper and over 2,500 responses to a community survey. We met with many community organisations to hear their views.

We've now released a second consultation paper on "Procedures and compliance". Among other things, our second consultation paper focuses on complaints procedures, what happens if the ADA is breached, and how the ADA can be enforced. We ask if these aspects of the ADA could be improved. We also ask what else could be done to encourage and promote compliance with the ADA.

About this community summary

This community summary is a simplified, shorter version of our consultation paper on “Procedures and compliance”.

This community summary doesn’t cover everything in our consultation paper. Instead, it highlights a range of important issues and concerns that have been raised with us so far.

It also outlines some ideas we’ve heard to change the ADA. Most of these issues relate to how easy the ADA is to use and if its processes are fair, efficient and effective.

Our full consultation paper has a more complete explanation of the issues and other potential reform options.

How to have your say

To have your say, you can:

- [complete our survey](#), which complements this community summary
- answer the questions in our Easy Read consultation paper, or
- make a submission in response to the questions raised in our consultation paper.

You can find these documents on [the ADA project page on our website](#).

The due date is **2 October 2026**.

Answer our survey

You can [complete our survey online](#). Or you can download the survey in PDF, fill it out, and email your responses to adareview@dcj.nsw.gov.au. Please write “ADA Survey Response” as the subject. Please tell us if you want us to keep your responses confidential or anonymous.

Answer our Easy Read questions

We’ve also published an Easy Read version of the consultation paper. This has simplified information and questions about the ADA. It covers the issues discussed in both consultation papers.

You can email your responses to adareview@dcj.nsw.gov.au. Please write “Easy Read Response” as the subject. Please tell us if you want us to keep your responses confidential or anonymous.

Make a submission

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

Our consultation paper has questions to help guide your submission. You don’t need to answer all these questions. And you don’t need to be limited by them — you can raise other issues and ideas too. Our website has more information on [how to make a submission](#).

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

Please tell us if you want your submission to be kept confidential or anonymous. You can find our [privacy and information management policy](#) on our website.

Next steps

To help us develop our recommendations, we'll keep gathering information through community input and research.

We'll present our views in a final report to the NSW Attorney General. The report will be tabled in NSW Parliament and published on our website. After that, our role ends.

The NSW Government will consider our report and decide how to respond.

Our [website](#) has more information about law reform and [what we do](#).

Objectives and structure of the ADA

Throughout this review, many people have told us that complaints processes must be fair, clear, effective and accessible. But before we explore these issues, we consider two foundational issues that have been raised with us.

The first is whether the ADA should clearly state its objectives. This could be important for many reasons. For instance, it could help guide ADNSW and NCAT as they perform their roles under the ADA.

The second is whether the ADA's structure could be improved. This could make it easier for everyone to understand and use the law.

The ADA's objectives

Many people say the core aims of discrimination law are to prevent discrimination and to provide a remedy when it occurs. Everyone has the right to an effective remedy when their rights are breached. This includes when they experience discrimination.

However, unlike some other discrimination laws, the ADA doesn't have a clear, modern statement that sets out its objectives (that is, why the law was made and what it aims to achieve). Many have told us it should. They say a statement of objectives could:

- help decision-makers, such as courts and tribunals, understand and apply the law
- guide, or potentially direct, ADNSW and NCAT on how they are to perform their roles, and
- educate the public by stating why the law was made and the community standards it reflects.

The ADA could set out a range of objectives or key principles. For instance, some other discrimination laws say their objective is to:

- promote equality
- eliminate and prevent unlawful conduct
- recognise or promote international human rights treaties and principles
- give people a way to seek a remedy if they experience unlawful conduct
- give powers and functions to key agencies like ADNSW and NCAT (for instance, to handle complaints)
- recognise the connection between discrimination and social disadvantage
- recognise how discrimination harms individuals, groups and our society
- address systemic and intersectional discrimination, and
- promote community education.

The ADA's structure

The ADA is a complex law. Many people told us that it's difficult to read and isn't structured logically. We've heard it uses language that is complicated, outdated and sometimes even offensive. This can make it hard for people to know what their rights are and what to do if their rights are breached. It can also make it hard for duty holders to understand their responsibilities and how to comply with the ADA.

Some say the ADA should be fully updated or even replaced. For example, the ADA could be restructured to reduce unnecessary repetition and inconsistencies. Or its language could be simplified so that more people can understand it. Another idea might be to include examples to help explain the law.

Complaints process overview

The ADA sets up a two-stage complaints process. People can make a complaint if they think they have experienced discrimination or other conduct prohibited by the ADA.

Stages in the complaints process

The complaint is made to ADNSW

The first step is to make a complaint to ADNSW. ADNSW is the independent body that receives complaints and undertakes other functions under the ADA. ADNSW isn't a court or tribunal, and its role isn't to decide if the alleged unlawful conduct happened. The role of ADNSW is to investigate a complaint and, if appropriate, help the parties try to resolve it through conciliation.

If the parties reach an agreement, they may make what's known as a "settlement agreement". This records what the parties have agreed and what they commit to do. For instance, a respondent might agree to pay compensation, apologise or put new policies in place so the conduct doesn't happen again. Or the parties might agree to keep their agreement confidential.

The complaint may be referred to NCAT

If the parties don't reach an agreement, the complainant might take the second step in the complaints process. That is, they might make a complaint to NCAT.

NCAT can hear and determine ADA complaints. If NCAT decides a complaint has been proven, it can order the respondent to provide remedies to address the harm caused by their conduct.

ADA complaints can't be made to NCAT directly. Complainants must first go through the ADNSW process. ADNSW can then refer the complaint to NCAT in certain situations, including if there's no agreement and a complainant asks for it.

Dispute resolution models

Most Australian discrimination laws have a similar complaints process. Victoria, however, has a more flexible dispute resolution model.

Key features include that:

- complainants can go to the Victorian Civil and Administrative Tribunal directly, whether or not they participate in the dispute resolution service offered by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)
- the VEOHRC dispute resolution process is voluntary — VEOHRC can't require the parties to participate
- VEOHRC aims to start dispute resolution as early as possible and doesn't need to investigate a complaint first, and
- VEOHRC can offer different forms of dispute resolution that respond to the parties' needs, not only conciliation.

As you read about the ADA complaints model, we invite you to consider if you prefer the Victorian approach.

Perspectives on the ADA model

A key question in our review is whether the ADA's complaints process is effective, efficient and fair to both complainants and respondents. We've heard many different views.

Some say the system overburdens complainants, which can discourage them from making complaints. Others say the ADA allows complaints without merit to be made, which unfairly impacts respondents – particularly where they aren't well-resourced.

Many have told us the complaints process should be culturally safe, trauma-informed and accessible. This includes for Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, people from LGBTQIA+ communities, people with disability, children and young people, people with low literacy, and people from rural and regional NSW.

A complaints-based model can give people a chance to be heard and to feel ownership over the outcome. However, many think there are limits to what this model can achieve.

For example, this model relies on people making a complaint. But there are many reasons why someone might not do this. For instance, a lack of legal knowledge or support, costs, accessibility issues, and the fear of being victimised. A power imbalance can exist where a respondent is well-resourced. Also, the process can be slow, stressful and sometimes retraumatising.

The ADA largely focuses on addressing the harm experienced by the complainant. Some say it doesn't do enough to prevent unlawful conduct or to promote change that could benefit a wider range of people (for instance, a whole workplace or industry).

In the next sections, we share some ideas we've heard for changing the ADA complaints process. Some are about improving the existing model. Others suggest proactive options for addressing and preventing unlawful conduct, which could benefit the wider community. Some ideas involve giving new roles and powers to ADNSW or a similar government agency.

Complaints to ADNSW

The first stage in the ADA complaints process involves making a complaint to ADNSW. In this section, we outline:

- who can make a complaint to ADNSW
- how complaints may be made to ADNSW
- when ADNSW may decline a complaint (and when those decisions can be reviewed)
- ADNSW investigation and conciliation procedures, and
- timeframes for finalising a complaint.

So far, we've heard a range of ideas for changing aspects of this system. Some seek to make the process more accessible, inclusive and easier for complainants to navigate. Others seek to meet the needs of respondents, including by ensuring there are safeguards against complaints that have no merit.

Who can make a complaint

The ADA contains rules about who can make a complaint to ADNSW. Some say the rules are too wide, but others think they're too restrictive.

A complaint can be made by:

- one or more persons on their own behalf
- one or more persons on their own behalf, as well as on behalf of another person or persons
- a parent or guardian of someone who lacks legal capacity to make a complaint (the ADA says this could be, for example, due to age or disability), or
- a representative body, on behalf of one or more named persons.

An agent, including a lawyer, can make a complaint on behalf of any of the people listed above.

Different rules apply to vilification complaints. They can only be made if each person on whose behalf the complaint is made:

- has the relevant protected attribute (for example, race), or
- claims to have that protected attribute, and there is no sufficient reason to doubt this.

Complaints made on behalf of others

The ADA lets some people and organisations make complaints on behalf of other people or groups of people. We've heard that it should be easier to make a complaint on behalf of someone else. Some say this could help when people aren't willing or able to come forward on their own.

One idea is for the ADA to clearly say that certain representatives, like support workers or trade unions, can make a complaint to ADNSW on behalf of other people.

Another idea could be to simplify the process for complaints by representative bodies. The ADA says a “representative body” is an organisation that represents and promotes the interests of people with a protected attribute (such as sex or race).

To make a complaint on their behalf, the representative body must show ADNSW that:

- everyone on whose behalf the complaint is made has agreed to the complaint, and
- the body has a “sufficient interest” in the complaint.

Some think these criteria are too strict. For example, some argue that representative bodies shouldn’t have to name everyone on whose behalf the complaint is made or get their permission. There’s a view that removing these requirements could better protect people’s privacy and make it easier to address issues that affect a wide range of people.

Different criteria apply to representative complaints if they reach NCAT. To simplify the process, one option could be to apply the same criteria for representative complaints at ADNSW and at NCAT.

Another idea could be to make the ADA’s criteria consistent with the rules applying to representative complaints under other laws. For instance, the criteria for making representative complaints in the federal courts.

Restricting who can make complaints

Others say the ADA should be more restrictive. For instance, by:

- only allowing people who are personally or directly affected by the alleged conduct to make a complaint, or
- not allowing trade unions or other advocacy groups to bring test cases.

They argue this may reduce or prevent complaints without merit, which may burden respondents unfairly.

How to make a complaint

It’s free to make a complaint to ADNSW. Complaints:

- must be in writing
- don’t have to follow a particular format or include a specific level of detail, and
- can be changed later.

Some people think the ADA should remove certain barriers to making a complaint. For instance, by clearly stating that ADNSW can receive:

- oral complaints, such as those made using voice recordings, to make the process more accessible, or
- anonymous complaints, to protect a complainant’s privacy and reduce the risk of victimisation.

Others argue that the ADA’s requirements could be tightened to discourage people from making complaints without merit. Suggestions include:

- imposing a lodgement fee, which can be waived or refunded in some situations, and
- requiring complainants to include more detail about their allegations.

The ADA allows ADNSW to help people to make a complaint but doesn't say what this can or should involve. In practice, ADNSW provides support such as arranging translations or transcribing complaints made over the phone. Some argue that ADNSW should do more to help complainants throughout the complaint process. For instance, by making the process more accessible to people with disability. Others say that respondents should receive assistance to respond to a complaint.

When ADNSW can decline a complaint

Part of ADNSW's role is to decide whether to decline or accept a complaint. When ADNSW accepts a complaint, it doesn't mean the complainant has proven the respondent breached the ADA. It just means that the complaint handling process can continue.

The ADA allows ADNSW to decline a complaint for many reasons. These include where:

- it's clear the alleged conduct wouldn't breach the ADA
- the conduct happened more than 12 months before the complaint is made
- the complaint is frivolous, vexatious, misconceived, or lacks substance
- the matter is better dealt with elsewhere
- no further action is needed due to the nature of the conduct, or
- it's not in the public interest to take further action.

Importantly, ADNSW can choose to decline a complaint for those reasons, but it doesn't have to. It can do so either before, during or after the investigation process. The rules differ depending on the stage of the process.

Options for changing ADNSW's powers

Some say ADNSW should instead be *required* to decline complaints in certain situations. This might reduce the burden on respondents, especially where the complaint lacks merit.

Others suggest that the ADA should expressly allow complaints to be declined for other reasons, too. For example, where:

- the complaint was dealt with elsewhere
- the complaint duplicates an earlier complaint, or
- the conduct and/or respondent has no connection to NSW.

However, others support the current, flexible approach. They say it's important to allow ADNSW to choose whether to decline or accept a complaint, case by case.

Some people argue for even more flexibility. For example, ADNSW may decline a complaint if the conduct happened more than 12 months before the complaint is made. But there can be many reasons why someone doesn't, or can't, make a complaint within 12 months. Because of this, some say the time frame should be extended, for instance, to 2 years.

Others think the ADA should recognise that sometimes discrimination isn't a one-off event — it can continue over time. In those situations, they say ADNSW should look at when the conduct stopped. The 12-month timeframe could apply from that point in time.

Review of declined complaints

Another issue is whether NCAT should be able to review a decision by ADNSW to decline a complaint. Different rules apply depending on when ADNSW declines the complaint.

NCAT can't review ADNSW's decision to decline a complaint before investigating it.

However, a complainant can ask ADNSW to refer their complaint to NCAT if ADNSW declines a complaint:

- during investigation, or
- at any time if someone making a complaint on behalf of others is not acting in the best interests of those people.

Some don't agree with this distinction. They think complainants should be able to ask NCAT to review ADNSW's decision to decline a complaint, regardless of when that decision is made.

On the other hand, some question the existing right to seek a referral to NCAT when a complaint is declined. There's a view it uses scarce resources and could allow complaints without merit to go to NCAT. Others disagree, arguing that removing this right would be unfair to complainants and weaken protections.

Investigation

If ADNSW accepts a complaint, the next stage is investigation.

The ADA doesn't say what an investigation should involve. ADNSW usually sends the complaint to the respondent and asks for a response. If the respondent replies, their response is shared with the complainant, who can reply if they wish.

ADNSW can require people to produce information or documents relating to the complaint. People can be fined if they don't comply.

Some people think ADNSW should have stronger powers to encourage respondents to engage with complaints. For instance, by:

- giving ADNSW the power to require respondents to respond to a complaint in writing
- allowing parties to ask ADNSW to request documents and to seek a review if ADNSW decides not to do this, and
- create a power to compel insurers to provide certain data, particularly when insurers claim an exception to the protections against disability discrimination.

Conciliation

After investigation, the next step is usually conciliation.

An independent conciliator from ADNSW helps the parties talk through the issues and try to reach an agreement.

Conciliation is voluntary and private. It's usually quicker and more flexible than going to court or a tribunal. This can encourage people to take action if they think they've experienced discrimination or other forms of unlawful conduct. But some say the process could be improved.

Legal representation

If a party wants a lawyer to represent them in conciliations, they need to ask ADNSW for permission. Some say this helps to reduce costs and keep the conciliation process simple, fair and efficient.

But others say parties should have a right to legal representation, without having to ask for permission. They say this could reduce power imbalances and help parties who need support.

Requiring attendance at conciliation

ADNSW can require a respondent and/or a complainant to attend conciliation. If they don't, individuals can be fined up to \$1100, and corporations can be fined up to \$5500.

Some say this power could be strengthened, for example by:

- increasing the fines, or
- allowing ADNSW to require other relevant people to attend a conciliation, for example, people who could give information or help resolve the complaint.

Some say this could increase participation and resolve complaints more quickly. Others say that forcing parties to participate goes against the spirit of conciliation — to be successful, conciliation relies on a willingness to participate and work towards a resolution.

Allowing ADNSW to prioritise certain complaints

Some think the ADA should clearly allow parties to ask ADNSW to prioritise their complaint, so it is dealt with more quickly. To make the process clear and transparent, the ADA could say when ADNSW can do this. For instance, the ADA might allow ADNSW to prioritise a complaint if someone's job or housing is at risk.

When the complaints process ends

ADNSW can bring the complaint process to an end if:

- the parties settle or resolve the complaint during investigation or conciliation
- the complainant withdraws the complaint in writing, or
- the complainant doesn't respond when ADNSW requests information or documents, or doesn't provide a current contact address.

Some think ADNSW should be required to finalise complaints within a certain timeframe. They argue this would increase the likelihood of settlement and reduce stress for the parties. Another view is that strict time limits are impractical, because complaint handling times vary and may depend on factors beyond ADNSW's control.

Complaints to NCAT

Under the ADA, ADNSW can refer a complaint to NCAT in some situations. NCAT can hear the complaint and decide if the respondent breached the ADA. If so, NCAT can order the respondent to do certain things (that is, order remedies) to address the harm their conduct caused.

In this section, we outline when complaints can be referred to NCAT. We also invite you to consider whether complainants should be able to go:

- directly to NCAT, without going through the ADNSW process, or
- to other tribunals or a court.

When complaints are referred to NCAT

ADNSW will refer a complaint to NCAT where:

- ADNSW thinks the complaint can't be resolved by conciliation
- ADNSW tried unsuccessfully to resolve the complaint by conciliation
- the nature of the complaint means a referral would be appropriate
- all parties want the complaint referred and it's appropriate to refer it
- the complaint is unresolved after 18 months, a party requests referral and no other party objects, or
- the complainant requests referral within 21 days after ADNSW declines the complaint:
- during investigation, or
- at any time, if a complaint was made for someone else.

ADNSW may also decide to refer complaints to NCAT if it orders a party to provide information or documents, and they don't comply.

Some think that ADNSW's powers to refer a complaint should be expanded. Suggestions include allowing ADNSW to refer a complaint to NCAT if:

- ADNSW decides a respondent failed to properly engage with the complaints process
- it's clear, at first sight, that the parties won't reach an agreement at conciliation
- a party requests it, at any time
- ADNSW decides that a referral is appropriate, at any time
- ADNSW doesn't accept a complaint for investigation, or
- the complaint isn't resolved after 12 months (the timeframe is currently 18 months).

Direct access to NCAT

Another issue is whether complainants should be able to go directly to NCAT, rather than first going through ADNSW.

Some say this could simplify the complaint process. They argue this could lead to faster outcomes, especially where conciliation is unsuitable or the situation is urgent. It could also give people more choice, flexibility and a more direct access to remedies.

Others raise concerns about the potential increase to NCAT workloads, and whether it will lead to complaints without merit going to NCAT. They say ADNSW plays an important role by “filtering” out those complaints before they reach NCAT.

Access to other courts or commissions

The ADA doesn’t allow ADNSW to refer complaints to any other tribunal or to a court. This means a complainant must make any related non-ADA claims (for example, under employment or negligence law) in other tribunals or courts.

One idea could be to allow NCAT or another NSW body to deal with discrimination and related claims together, in one place. This may reduce costs for all parties.

Another idea could be to allow, or even require, complainants to make work-related ADA complaints to the NSW Industrial Relations Commission and/or the NSW Industrial Court instead of NCAT. This could allow parties to benefit from the employment law expertise in this system. It could also create efficiencies by reducing overlapping and multiple complaints.

However, allowing other courts and tribunals to hear and decide ADA complaints could lead to further complexity. It may also increase inconsistency between the procedures and decisions made by different courts and tribunals.

Settlement agreements

Parties who resolve a complaint at ADNSW or NCAT usually enter into a settlement agreement. This document records what the parties agreed to. For example, the parties may agree to compensation, policy changes, staff training or disciplinary action.

Confidentiality clauses

Settlement agreements often include confidentiality clauses, also known as non-disclosure agreements. These prevent parties from sharing details of the complaint or agreement with others, or sometimes even sharing that an agreement exists.

Confidentiality clauses can have benefits. For example, they may help parties reach agreement faster, avoiding stress. They may also prevent or reduce harm to careers or reputations and avoid unwanted publicity.

However, another view is that these clauses reduce accountability, allow parties to hide unlawful conduct, and don’t prevent future breaches. Some say they can harm complainants’ wellbeing, reinforce power imbalances, and limit the development of anti-discrimination law.

Some say the ADA should limit when confidentiality clauses can be used. Victoria recently restricted the use of confidentiality clauses in workplace sexual harassment claims. There, a confidentiality clause will only be enforceable if:

- the complainant clearly expresses that they want the clause, and requests it
- the complainant is given a copy of the proposed clause and has at least 21 days to review it (unless they want less time)
- each party acknowledges these preconditions have been met, and
- neither the complainant's employer, the respondent, or anyone acting on their behalf, has unduly influenced or pressured the complainant into the clause.

Another option could be to develop best practice guidelines or model confidentiality clauses, which parties can voluntarily use.

Enforcing settlement agreements

ADNSW doesn't have the power to enforce settlement agreements made at conciliation. NCAT can't enforce settlement agreements made during its processes, either. If a respondent doesn't comply with a settlement agreement, it's ultimately up to the complainant to try to enforce it in court.

It can be complicated and time-consuming to enforce a settlement agreement. We've heard some suggestions to simplify this process. These include giving ADNSW powers and a greater role in enforcing settlement agreements. We refer to other suggestions for ADNSW's powers and functions later in this summary.

Remedies and enforcement

NCAT's powers to order remedies

The ADA lists the remedies that NCAT can order if it decides a respondent has breached the ADA. NCAT can order the respondent to:

- pay the complainant damages of up to \$100,000 to compensate them for any loss or damage they suffered because of the respondent's conduct
- stop any conduct that is unlawful under the ADA
- take action to redress the complainant's loss or damage
- publish an apology for, or retract, the unlawful conduct
- void parts of a contract or agreement that breach the ADA, and/or
- for vilification complaints only, develop and implement a program or policy aimed at eliminating unlawful discrimination.

NCAT can also decide to take no further action.

A key issue in our review is whether NCAT's powers to order remedies are too limited. This draws attention to whether ADA remedies are appropriate and effective to address the harm experienced by individuals. But it also raises the question of whether more could be done to create remedies that address systemic issues and benefit the wider community.

Another issue is whether there are clear and accessible steps that complainants can take if a respondent doesn't comply with a remedy ordered by NCAT.

Below we set out some ideas we've heard for changing NCAT's existing powers to order remedies.

Compensation (damages)

There are concerns that the amounts awarded as compensation in ADA complaints are too low. We've heard that the amounts awarded:

- may not properly reflect the harm suffered by complainants
- do little to discourage discrimination, and
- may discourage people from making complaints, especially if complainants must use the amount awarded to pay for their own legal expenses.

We've heard significant criticism about the \$100,000 "cap" on compensation. This is all that NCAT can order each respondent to pay, even where the complainant's loss or damage is greater than this. We've received suggestions to address these concerns. These include, for instance:

- increasing or removing the \$100,000 compensation cap
- adding principles in the ADA to guide NCAT as it assesses damages
- expressly defining or clarifying in the ADA, the types of harm that can be compensated (including, for example, psychological harm)
- giving ADNSW the power to make submissions to help NCAT decide an appropriate remedy, and
- allowing NCAT to order "exemplary damages", which are additional amounts awarded to punish respondents and deter future breaches.

Mandatory orders

NCAT can order a respondent to take any reasonable action to redress a complainant's loss or damage. These are known as mandatory orders. Among other things, NCAT can require respondents to provide staff training, review decisions, or re-employ a complainant. Some say the ADA should:

- clarify when NCAT can make mandatory orders and what forms they could take, for example, by including examples
- allow NCAT to make a mandatory order in complaints made by a representative on behalf of others – currently, NCAT is unable to do this.

Programs or policies aimed at eliminating unlawful conduct

NCAT can order respondents to develop or implement programs or policies to prevent unlawful conduct. But it can only do this in vilification complaints. Some say NCAT should have this power in all ADA complaints. This could promote consistency and better address systemic discrimination.

Some ideas for new remedies

Some think that NCAT should have clearer or stronger powers to order remedies. Suggestions include giving NCAT a wide, general power to make any orders that it thinks are appropriate in a particular case.

Other options could involve giving NCAT a clear power to:

- order respondents to pay a civil penalty (or fine) for breaching the ADA
- declare, in a formal statement, that the respondent acted unlawfully, or
- order a respondent to attend or provide workplace training, or to re-employ a complainant.

There could also be clearer powers to make specific orders in sexual harassment cases. For instance, orders that:

- stop a respondent from contacting a complainant
- require respondents to attend counselling or training, or
- make a business take action to correct their wrongdoing.

NCAT may be able to use its existing powers to make some of these orders already. Even so, some say the ADA could express NCAT's powers more clearly. This could help ensure that everyone knows these powers are available. It may also encourage NCAT to make these types of orders where appropriate.

Remedies with systemic effect

As well as addressing the complainant's harm, some say remedies could — and should — benefit the wider community where appropriate. That is, have “systemic effect”.

For instance, remedies could be used to:

- educate duty holders and the wider community about discrimination and other conduct
- deter future unlawful conduct, or
- encourage duty holders to change their policies and practices, which could prevent the conduct happening to others.

Examples might include orders to issue a public apology, make or change workplace policies, or improve access to services or facilities.

NCAT may be able to use its existing powers to make orders like this. For instance, it could make mandatory orders. But some argue that there may be better outcomes if the ADA encouraged or required NCAT to consider making orders with systemic effect.

Some options might include adding a new objectives clause that:

- recognises one of the purposes of the ADA is to address and prevent systemic discrimination, and/or
- guides (or directs) decision-makers, like ADNSW and NCAT, to consider the objectives of the ADA as they exercise their functions, including when they decide remedies.

Enforcing NCAT orders

If a respondent doesn't comply with a remedy ordered by NCAT, it can be difficult, time-consuming and costly for complainants to try to enforce it. This may delay or prevent people from getting an appropriate remedy. It may also reduce compliance with the ADA.

It's an offence not to comply with a non-monetary order made by NCAT under the ADA. The maximum penalty is \$11,000 for corporations and \$5,500, 12 months' imprisonment, or both for individuals. There could be arguments for increasing these penalties to match the higher penalties available in the industrial relations system, for instance.

If a respondent doesn't comply with an NCAT order, a complainant can try to enforce it in court. This is complex and expensive, especially for individuals.

ADNSW can take steps to enforce NCAT orders if it's in the public interest and, for individual complaints, if the complainant agrees. A question is whether ADNSW should be allowed to take enforcement steps in a wider range of cases and, if so, whether it has enough resources to do so.

Costs orders

Complainants and respondents often need legal help to navigate the ADA and understand their options. This can become expensive without legal aid or other free or low-cost legal help. The cost of legal advice and representation can be a barrier to making a complaint.

In NCAT, except in special circumstances, each party pays their own legal expenses (known as "costs") regardless of who wins. This is known as a "no costs" model. It differs from what usually happens in courts. There, the general rule is that the unsuccessful party pays some or all the successful party's legal expenses, as well as their own.

A "no costs" model can protect complainants if their claim is unsuccessful. This is because they won't have to pay the respondent's costs in most cases. Some say this improves access to justice, as it reduces the financial risk of bringing a complaint to NCAT.

However, we've heard significant concerns about this model. One criticism is that it doesn't do enough to reduce the barriers faced by complainants. Complainants may be unable to afford legal advice. They may end up out of pocket even if they win, especially if the compensation awarded to them is low. This may discourage people from bringing complaints, particularly where there is a power imbalance between the parties.

On the other hand, some think the "no costs" model encourages weak or vexatious claims. This is because respondents must usually pay their own costs, even if they win. Some say this is an unjustifiable burden on them.

We've heard a range of suggestions for addressing these different considerations. Key issues raised with us are whether the ADA should:

- make special costs rules for complaints without merit
- adopt a different model to reduce the costs risks to complainants, and/or
- address the costs of appeals.

When NCAT can award costs

NCAT can order one party to pay the other party's costs in special circumstances. In deciding if it should make such an order, NCAT can consider factors such as whether:

- a party's behaviour disadvantaged the other party unnecessarily or caused delay in the hearing process
- the complaint lacked merit, or
- a party didn't cooperate with NCAT.

We heard a suggestion to allow NCAT to award costs in other situations. For instance, one view is that NCAT should be able to order a complainant to pay all the respondent's legal expenses, at the highest rate possible, if:

- ADNSW declined a complaint because it lacked merit
- the complaint is referred to NCAT, and
- NCAT confirms ADNSW's decision.

A different model

Some think the ADA should adopt a completely new approach to costs. In 2024, a new model was introduced in federal law. It applies to complaints made to federal courts under the *Australian Human Rights Commission Act 1986* (Cth).

It is known as the "equal access" or "asymmetrical" model. Under this model, respondents pay the complainant's legal costs if the complainant wins. If the complainant is unsuccessful, each party pays their own costs. A complainant can only be ordered to pay the respondent's costs in certain situations. For instance, where:

- the complainant started the court proceedings vexatiously or without cause
- the complainant behaved unreasonably and this increased the respondent's costs, or
- the respondent wins, and they don't have significant power or financial advantage over the complainant.

Supporters of this model say it improves access to justice. It was introduced into federal law to reduce power and resource imbalances, reduce the risks faced by complainants, and provide clear rules. It may encourage parties to settle earlier and improve compliance with the ADA.

However, others say it increases the costs risks for respondents, pressures them to settle and may increase the risk of complaints without merit.

Costs on appeal

Some have raised concerns about the financial risks that complainants face if

- a respondent successfully appeals an NCAT decision in the Supreme Court, or
- if the complainant appeals an NCAT decision and loses.

When this happens, the usual court rules about costs apply. That is, the complainant would usually be ordered to pay the respondent's costs if the respondent wins. Some say this can discourage people from bringing complaints or from appealing NCAT decisions.

If a new costs model for the ADA is introduced, one question is whether it should also apply when ADA decisions are appealed in higher courts. Some say this could protect complainants from an unexpected costs order where:

- the complainant didn't start the appeal, or
- a respondent made only a limited settlement offer during the appeal process.

Other proactive and preventative steps

In previous sections, we outlined the existing complaints process under the ADA. Some think the ADA needs to give ADNSW (or another government agency) new powers to encourage compliance, address systemic discrimination and promote substantive equality.

In our last consultation paper, we asked if the ADA should require duty holders to take steps to prevent or eliminate unlawful conduct. This is known as a “positive duty”. For example, it could require duty holders to implement better policies, keep records or provide training on ADA obligations.

If a positive duty is introduced in NSW, there may be a need for ADNSW to take on new roles and functions to promote and enforce it.

But even without a positive duty, ADNSW could potentially be given a greater role in proactively enforcing and promoting compliance with the ADA. Below, we outline some suggestions we've heard. Some argue this could:

- reduce the burden on individuals to make a complaint
- allow the law to be enforced even when individuals can't or won't act, and
- help prevent and address conduct that affects a group of people or the wider society.

On the other hand, it could be argued that this might overlap with the role of other agencies. Any changes in ADNSW's role may also require further resources.

Increasing ADNSW's role in complaints processes

Some say that giving ADNSW an expanded role in complaints procedures would address some of the limitations of the individual complaints-based model.

Options could include giving new powers to ADNSW, or another agency, to:

- support the parties to bring a complaint to NCAT
- initiate complaints itself, without requiring someone to make a complaint, such as when the issue affects a wide group of people
- investigate complaints that a government minister refers to it
- investigate complaints that have been withdrawn, and/or
- participate in NCAT hearings to provide input and help NCAT on legal issues.

Others, however, say that care must be taken to avoid giving ADNSW powers that conflict with its role as an independent complaint-handling body.

If a positive duty is introduced, another suggestion could be to allow ADNSW to consider it during investigations and conciliations. A more significant reform would be to provide people

with a freestanding right to complain about an alleged breach of the positive duty. This is not a feature of other Australian discrimination laws. While some support this option, others doubt it would address the limitations of a complaints-based model.

Investigation and inquiry powers

We've heard suggestions to widen and strengthen ADNSW's powers to conduct investigations and inquiries. This could include a power to investigate and report on unlawful conduct, separate from the complaints process.

While ADNSW has some investigation powers already, they're limited to investigating discrimination based on certain protected attributes. Some say these powers should be broader, expressly covering all protected attributes and all forms of unlawful conduct.

Some also support ADNSW having a broad and flexible power to conduct public inquiries. While ADNSW already has this power, it doesn't often hold inquiries. This is likely due to resourcing concerns.

If resourced to do so, ADNSW could use these powers to examine patterns of unlawful conduct and monitor compliance with the ADA. This could include monitoring the implementation of a positive duty, if it becomes part of the ADA. Some also say there should be a specific power to investigate and inquire into systemic issues.

As part of an expanded inquiry role, some suggest ADNSW could have powers to:

- report and make recommendations to Parliament
 - advocate to government about what to do in response
 - enter into a voluntary legal agreement with a duty holder that has allegedly breached the law
 - issue a notice requiring a duty holder to comply with the law (with the option of applying to NCAT or a court to issue penalties if the duty holder doesn't comply with the notice)
 - publish guidelines for industries and organisations, or
 - issue civil penalties.
-

Prosecuting breaches

The ADA doesn't allow ADNSW to prosecute breaches of the ADA. It can't refer breaches for prosecution, either. This is the same as other discrimination laws in Australia.

However, some employment laws give other agencies this power. The Fair Work Ombudsman, Safe Work NSW and Safe Work Australia can refer serious breaches of employment or work health safety laws to the Director of Public Prosecutions for criminal prosecution. This includes work-related sexual harassment.

Some say a government agency should have the power to prosecute duty holders for breaches of the ADA. They say this might help clarify the law and deter people from breaking it.

A power to seek civil penalty orders

Civil penalties already apply under the ADA to some procedural breaches, such when a person fails to comply with an ADNSW notice to attend conciliation. A question is whether ADNSW should be able ask NCAT to impose a civil penalty when a duty holder breaches the ADA's prohibition on discrimination, sexual harassment, vilification and/or victimisation.

Regulatory agencies have this power under employment or work health safety laws in relation to work-related sexual harassment and discrimination.

There could be a range of benefits to allowing ADNSW to seek civil penalty orders for serious breaches of discrimination law. As well as punishing duty holders for breaching the ADA, civil penalties can encourage duty holders to take steps to prevent unlawful conduct. Some say they can be useful where other methods, like persuasion and education, have not convinced a duty holder to comply with the law.

Education, research and outreach

ADNSW already has powers to provide education and to carry out research and community outreach. Some say it should have stronger powers to do this. For instance, if a positive duty was introduced, ADNSW could be given specific powers to educate duty holders and issue guidelines about how to meet their obligations.

Others told us that data collection and reporting about complaints and conciliations should be recognised specifically as part of ADNSW's research functions. This could help to identify systemic issues.

Another option could be to allow ADNSW to conduct voluntary audits of duty holders' policies and programs. ADNSW could assess their compliance with the ADA and provide advice on ways to improve.

Exemptions

The ADA allows duty holders to apply to ADNSW for temporary exemptions from the ADA. Exemptions permit a duty holder to undertake conduct that would otherwise be unlawful under the ADA. Exemptions can apply for up to 10 years, although duty holders can apply for this to be renewed.

Exemptions are often used to:

- run programs, like targeted employment or education initiatives, for particular groups to promote substantive equality and address historical disadvantage (also called “special measures”), or
- allow discriminatory conduct because another important interest outweighs equal treatment.

If special measures were introduced to the ADA, a key question is whether the exemptions procedure is still needed. If so, what purpose should exemptions serve? And should the current exemption process or criteria change?

Role and purpose of exemptions

In our previous consultation paper, we asked if the ADA should allow duty holders to implement special measures without having to apply for an exemption. We heard a lot of support for this idea. Some argued this would help promote substantive equality and be more consistent with other discrimination laws across Australia.

This raises the issue of whether an exemption process would be required if there's no need to seek approval to undertake a special measure. Some think there could be, as duty holders might still apply for an exemption for certainty or to reduce their legal risk. Others think this would cause overlaps and complications.

Exemptions can also be used for other situations, such as when certain discriminatory conduct is seen as justified (for example, in the public interest). There could still be a role for an exemption procedure in dealing with applications of this type. For example, ADNSW have granted temporary exemptions to some companies with defence contracts with the United States Government. This allows the companies to engage in racial discrimination in employment because it is considered to be in the public interest.

However, there are different views on whether these types of exemptions should be allowed under the ADA. Some think exemptions should only be used for actions that promote substantive equality, while others think they should be available in the public interest more broadly.

Exemption process

If the exemption process remains part of the ADA, a key issue is whether it could be improved. Currently, a duty holder must make a written application to ADNSW to seek an exemption. Exemptions are temporary and must meet set criteria. ADNSW decisions about exemptions can be reviewed by NCAT.

Some argue the process should be quicker, more accessible and more in line with discrimination laws in other parts of Australia. Some ideas for change could include:

- making the process more transparent and giving the public a chance to be involved
- shifting decision-making powers about exemptions from ADNSW to NCAT
- limiting exemptions, so they are only available for certain conduct or protected attributes
- changing the duration of exemptions, or
- introducing a fast-track process for certain types of applications.

Exemption considerations

The ADA includes a list of factors that ADNSW is to consider when deciding whether to grant an exemption. However, ADNSW is not limited to considering these factors — it can take other matters into account, too.

ADNSW is to consider:

- whether the proposed exemption is appropriate or reasonable
- whether the proposed exemption is necessary

- whether there are non-discriminatory ways of achieving the exemption’s purpose
- whether the applicant has taken reasonable steps, or can take such steps, to avoid or reduce adverse impacts before seeking the exemption
- public, business, social or other community impacts of granting the exemption, and
- any conditions or limitations to be contained in the proposed exemption.

We’ve heard concerns that these criteria are unclear and hard to use. Questions include whether the tests are too vague or overlap, and whether key ideas like “necessary” and “reasonable” could be clarified.

Adding clarity may improve consistency across exemption decisions, and transparency around decision-making. It could also help duty holders understand what factors they should consider, or justifications they may need to provide, when seeking an exemption.

Discrimination laws across Australia include other considerations too. For instance:

- whether any other person or body supports the application
- the effect of not granting the exemption, or
- whether other laws already prohibit the proposed conduct.

A key question is whether ADNSW should be required to consider the objects and purpose of the ADA when granting exemptions. As we outlined earlier, the ADA doesn’t have a clear statement of its objectives and purpose. It doesn’t require ADNSW to consider the ADA’s objects when making exemption decisions.

Such a requirement could help align exemption decisions with the broader aims of discrimination. These include addressing past disadvantage and promoting equality.

However, it raises other questions about whether those aims should:

- guide decision-making along with other factors, or
- limit the availability of exemptions, so that only conduct consistent with those aims will be permitted.

Conclusion

We welcome your views on the issues in this paper. You can:

- [complete our survey](#)
- answer our Easy Read questions, and/or
- make a submission.

See “[How to have your say](#)” in this community summary for instructions.

We look forward to hearing from you.

NSW Law Reform Commission

Locked Bag 5000
Parramatta NSW 2124
E: nsw-lrc@dcj.nsw.gov.au
W: www.lawreform.nsw.gov.au