Justice and Equity Centre

NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper 2

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About the Justice and Equity Centre

The Justice and Equity Centre stands for a society that is fair and free from discrimination and disadvantage. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we use the law and policy advocacy to challenge injustice and inequality. We do this through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We collaborate and partner in our work with people and communities who are experiencing marginalisation and disadvantage and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQA+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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1. Introduction

The Justice and Equity Centre welcomes the opportunity to provide this submission in response to the NSW Law Reform Commission's Second Consultation Paper as part of its review of the *Anti-Discrimination Act 1977* (NSW) ('ADA').

This is another important step towards replacing the outdated and ineffective NSW *Anti-Discrimination Act* with legislation that genuinely protects vulnerable groups in the community.

While the first consultation paper addressed important questions including who should be protected, against what types of behaviour, and in what circumstances, the procedural and operational questions raised by the second paper are no less important. Without a system that is accessible and effective for those harmed or at risk of harm, discrimination protections can be rendered largely meaningless.

That objective accordingly informs our answers to the consultation paper's questions: ensuring the protections offered under the ADA can be accessed by those who need them, without unnecessary barriers and in a timely and cost-effective way. We draw particularly on best-practice from other Australian jurisdictions.

Chapter 2: Objectives and Structure

Question 1: A statement of objectives, purposes and/or principles

Should the ADA include an express statement of objectives, purposes and/or principles? Why or why not?

Yes, the ADA should include an express statement of objects. This would provide an opportunity to update the framing of the law, ensure the introduction of the ADA more accurately reflects its significantly broader scope five decades after its introduction, and take into account the additional protections and other changes that we would anticipate will be adopted as a result of the current review.

The benefits of a statement of objects include those outlined in the consultation paper, such as providing a clear, public statement of the purpose of the law, as well as helping to educate the public and performing a normative role in setting community standards. It would also aid statutory interpretation (discussed in greater detail in response to Question 3, below), and guide decision-makers such as Anti-Discrimination NSW ('ADNSW') in exercising their functions under the ADA.

Question 2: Contents of an objects, purposes or principles clause

If a new objects, purposes or principles clause is added to the ADA, what should it contain?

A new objects clause should accurately reflect the expanded scope of the updated legislation, including an objective of addressing, and eliminating, all forms of discrimination, vilification, sexual harassment and victimisation. It should also include its role in promoting the progressive realisation of equality, to the greatest extent possible.

Section 3 of the *Equal Opportunity Act 2010* (Vic) ('Victorian Act') offers a useful model for NSW.[1] It already includes many of the further options identified in section 2.2.2 of the Consultation Paper, including the need to address systemic discrimination, the relationship between discrimination and social disadvantage, the role of adjustments, accommodations and special measures in helping to achieve substantive equality, the importance of promoting community education, and the functions of the Victorian Equal Opportunity and Human Rights Commission (the equivalent of ADNSW) in dispute resolution.

We also support explicit recognition that 'discrimination based on a combination of attributes can have a cumulative harmful effect', as recommended by the Queensland Human Rights Commission as part of its review of the *Anti-Discrimination Act 1991* (Qld),[2] as well as that the ADA is remedial legislation with a beneficial purpose (similar to section 4AA of the *Discrimination Act 1991* (ACT)[3]).

Question 3: International human rights instruments and principles

a. If a new objects, purposes or principles clause is added to the ADA, should it expressly recognise international human rights instruments and principles? Why or why not?

b. If so:

i. what instruments or principles should be recognised, and

ii. what effect should any such recognition have?

We support the new objects clause including recognition of international human rights instruments and principles, subject to the comments below. These instruments include the:

- International Covenant on Civil and Political Rights ('ICCPR'),
- International Covenant on Economic, Social and Cultural Rights ('ICESCR'),
- International Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'),
- Convention on the Rights of the Child ('CRC'),
- Convention on the Rights of Persons with Disability ('CRPD'),
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), and
- United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').

The inclusion of these instruments and principles would help to place the ADA, and its focus on the right to equality and freedom from discrimination, within a broader context of human rights.

However, care should be taken to ensure the primary focus of this legislation remains addressing discrimination, and that undue emphasis on other human rights does not undermine this fundamental purpose.

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1 With the exception of sub-section 3(b), unless and until NSW adopts a Human Rights Act of its own.

2 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 20.

3 Although again noting the absence of a Human Rights Act in NSW, meaning that sub-section 4AA(b) would be omitted.

This issue arose in the context of the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW).[4] We strongly opposed this Bill, which prioritised the right to religious freedom over and above the right to freedom from discrimination, even for people of minority faiths. It did so via narrow and selective preferencing of some international human rights instruments and principles (including the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR), while excluding those listed above (other than the ICCPR).

The 2020 Bill also sought to compel all duty-holders under the ADA, including the Minister, ADNSW, NCAT and Courts, to have 'fundamental regard' to these select instruments when 'carrying out functions and making determinations under' the ADA.

We are concerned to avoid similar issues here. Accordingly, while we support an objects clause including the seven core conventions and UNDRIP as an aid to courts in interpreting the ADA, for example to inform the beneficial purpose of the legislation that may help to resolve ambiguity, we do not support explicitly requiring decision-makers to have regard (or 'fundamental regard') to these documents.

Any recognition of human rights instruments should not give rise to an enforceable duty. For example, if the ADA was to provide that a decision-maker '*may* have regard' to relevant human rights instruments, it would be appropriate to include a provision like sub-section 10A(2) of the *Australian Human Rights Commission Act 1986* (Cth), which clarifies that 'Nothing in this section imposes a duty on the Commission that is enforceable by proceedings in a court'.

We also urge the Commission to reject calls in submissions made by organisations such as the Australian Christian Lobby to privilege the right to freedom of religion by expressly recognising it in the ADA's objects clause. Any such recognition should be considered in the context of a general Human Rights Act – which we support, but is distinct from the work of an anti-discrimination law.

Question 4: Structure

Could the structure of the ADA be improved? If so, how?

Yes, the structure of the ADA could be significantly improved.

The current structure is unworkable. Its division into different Parts addressing discrimination on the basis of different attributes including relevant tests, scope and attribute-specific exceptions, and other Parts prohibiting vilification on the basis of some although not all attributes, contributes to a lack of both understanding and usability of this important legislation.

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[4] Public Interest Advocacy Centre, *Submission re the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*, 21 August 2020, available at: https://jec.org.au/wp-content/uploads/jec-publications/13867/20.08.21-PIAC-Submission-Anti-Discrimination-Amendment-Religious-Freedoms-and-Equality-Bill-2020.pdf

This has real-world consequences. The ADA is practically impenetrable for people seeking its protection, meaning they are unable to benefit from it. It also fails to provide effective guidance as to the obligations it imposes on people, businesses, organisations and agencies.

The ADA's structure should reflect the structure common in other jurisdictions, such as the *Discrimination Act 1991* (ACT), with initial Parts establishing the tests for discrimination and the attributes that are protected, subsequent Parts focusing on the scope of these protections (i.e. the areas of life in which discrimination is prohibited), before further Parts detail both general exceptions (which apply to every attribute), and exceptions that apply only to specific attributes.

In addition to making the ADA more accessible for people seeking its protection and subject to its obligations, this structure would also support increased consistency in the protections offered under the Act, by removing inconsistencies that have developed over time through the addition of Parts covering new attributes.

We also support the inclusion of examples or hypothetical scenarios to help explain the law, in line with the approach of jurisdictions like Queensland, Victoria and the ACT. This would assist with improved comprehension of the ADA's protections, especially by people who have been subjected to mistreatment and are considering making a potential complaint.

Chapter 4: Making a complaint to ADNSW

Question 5: Complaint terminology

Should the ADA use the words 'complaint' and 'complainant'? If not, what should be used instead?

Yes, the ADA should continue to use the words 'complaint' and 'complainant'. These terms are understandable, consistent with terms used by other Australian jurisdictions, and appropriately reflect the nature of discrimination complaints, which involve allegations that anti-discrimination provisions have been breached by one party.

While we consider that the terms 'complaint' and 'complainant' should be retained, we support amendments to refer to the ADNSW complaint resolution process as 'dispute resolution' rather than 'complaint handling', as has been adopted in Victoria,[5] and recommended by the Queensland Human Rights Commission.[6]

This change would reflect other changes that would improve the accessibility and effectiveness of opportunities for dispute resolution within NSW's anti-discrimination framework. Those other changes are discussed throughout this submission.

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5 *Equal Opportunity Act 2010* (Vic) s 4, pt 8.

6 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 149.

Question 6: Persons personally affected

a. *Should the ADA restrict who can make a complaint to those personally affected by the conduct? Why or why not?*
b. *If so, what language should be used to describe who can make a complaint?*

We do not consider it desirable or necessary to change the ADA to restrict who can make a complaint. We agree with the conclusion of the NSWLRC set out in section 4.3.1 of the consultation paper that restricting making a complaint to those 'personally affected' is unnecessary.

Restricting who can make a complaint to those 'personally affected' by the conduct would impose unnecessary barriers to making a complaint for many potential complainants who already experience disadvantage and barriers to navigating complaints systems. It could also restrict the ability of representative bodies to bring complaints on behalf of individuals or affected groups, limiting an important mechanism for addressing systemic discrimination that removes some of the burden otherwise carried by individual complainants.

Question 7: ADNSW powers in complaints made on behalf of others

What, if any, changes should be made to ADNSW's powers in relation to complaints made on behalf of others?

At present, 'unless the complaint is made on behalf of a person who lacks legal capacity', ADNSW may require the person(s) who the complaint is being made on behalf of to show that they consented to the complaint being made on their behalf, and/or for the person(s) making the complaint to prove that they have the authority to act in the complaint handling process.

We support removing reference to 'legal capacity' in this section and removing the entire exception for persons who 'lack legal capacity'. The existence of a guardian, financial manager or other substitute decisionmaker should not prevent a person from making a complaint or instructing another person to make a complaint on their behalf. ADNSW should be empowered and required to provide support and/or adjustments to enable a person who requires decision-making support to participate in the complaint in a way that meets their will and preferences.

Specifically, we suggest amending:

- Section 87A(1)(b), to remove express reference to a parent or guardian of person who lacks legal capacity. This could be replaced with:
    - 'a person on another person's behalf' (without mentioning guardianship); or
    - 'a supporter, parent, guardian, or representative of a person who requires decision-making support in relation to a complaint'.
- If s 87A(1)(b) is amended, s 87B(2) should also be amended to remove the exception for complaints made on behalf of person who lacks legal capacity, so that ADNSW can interrogate whether a complaint is made with the person's consent and authority.
- Section 87B(3) should be amended to remove reference to 'lacks legal capacity' and to replace reference to 'acting in the best interests' in this section with a test based on the person's 'will and preferences'.

Reform of this kind would reflect the language of the *Convention on the Rights of Persons with Disabilities*,[7] and recommendations made by the Disability Royal Commission and the UN Committee on the Rights of Persons with Disabilities to replace 'best interests' determinations in decision-making law with determinations based on the best interpretation of 'wills and preferences'.[8] We consider these changes could be made to the ADA even while reform of the guardianship framework in NSW is yet to occur.

Question 8: Requirements for making a complaint on behalf of others

What, if any, changes should be made to the requirements under the ADA for making complaints on behalf of others?

The ADA should be amended to improve the accessibility of the representative complaint pathway. This would help to lessen the burden on people who have experienced discrimination to make complaints and obtain remedies. It could also enhance access to justice, make the ADNSW dispute resolution process more efficient and create opportunities to address systemic discrimination.[9]

The ADA currently allows a representative body to make a complaint on behalf of a named person or persons. However, both the definition of 'Representative body' and the requirements for making a representative complaint are restrictive, limiting the practical operation of these provisions.

A 'Representative body' is one that represents (or purports to represent) a group of people within NSW, whether or not the group authorises them to do so, and has, as its primary object, the promotion of the interests or welfare of the group.[10]

Representative bodies are allowed to make complaints if they satisfy ADNSW that each person on whose behalf the complaint has been brought consents to the complaint being made on their behalf.[11] The representative body bringing the complaint must also have a 'sufficient interest' in the complaint, requiring that the conduct is of genuine concern to the representative body because of how it could, or does, adversely impact the body's interests, or the interests or welfare of the group of people that the body represents.[12]

Consent requirement

We recommend that the requirement for individuals to be named and to consent to their inclusion in s 87C(1)(a) should be amended to align with discrimination frameworks adopted federally and

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7 *Convention on the Rights of Persons with Disabilities,* opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 12(4).

8 *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report* (Final Report, September 2023) vol 6, 17; Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12 Equal Recognition Before the Law,* 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [21].

9 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 11.

10 *Anti-Discrimination Act 1977* (NSW) s 87.

11 *Anti-Discrimination Act 1977* (NSW) s 87C(1)(a).

12 *Anti-Discrimination Act 1977* (NSW) s 87C(1)(b).

in Queensland, which require representative complaints to 'describe or otherwise identify' class members, but do not require group members to be individually named or their consent obtained.[13]

However, if the requirement to name each person is retained, the requirement of consent should also be retained.

Primary object and sufficient interest test

We consider that the 'primary object' requirement in the definition of 'representative body' and the 'sufficient interest' test at s 87C(1)(b) should be removed, to ensure that potential representative bodies with a legitimate interest in bringing a complaint are not excluded due to a restrictive or contested interpretation of the representative body's objects or interests, or the interests or welfare of the group of people that the body represents. This is consistent with the approach in Commonwealth anti-discrimination legislation which does not impose either of these requirements on a prospective representative body.[14]

Question 9: Vilification complaints

What, if any, changes should be made to the requirements for making a vilification complaint under the ADA?

Consistent with our submission to the first consultation, we support the introduction of a harm-based test to the ADA, to exist alongside the separate incitement-based test. If the harm-based test is introduced, any criteria introduced to limit who can bring a complaint should be guided by legislation in Victoria and/or Queensland.

In Victoria, a person can bring a dispute to VEOHRC if they claim someone contravened the incitement-based test 'in relation to' them. Conduct claimed to be unlawful vilification under the new harm-based test is 'in relation to' a person if they (a) have the relevant protected attribute, and (b) are part of the audience for the alleged conduct.[15]

Queensland permits harm-based vilification complaints to be brought by a person who was subjected to the alleged contravention, as well as an agent, or a person authorised in writing by the commissioner to act on behalf of a person who was subjected to the alleged contravention and who is unable to make or authorise a complaint. A 'relevant entity' may also complain to the commissioner if certain conditions are met.[16]

We suggest requirements for bringing a complaint align with the Victorian approach, as well as ensuring representative complaints can be made for vilification in accordance with the ADA's provisions regarding representative complaints.

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13 *Australian Human Rights Commission Act 1986* (Cth) s46PB; *Anti-Discrimination Act 1991* (Qld) ss 146-147.
14 *Australian Human Rights Commission Act 1986* (Cth) s 46P, s46PB, s 46PC.
15 *Equal Opportunity Act 2010* (Vic) ss 123(1A), 123(1B).
16 *Anti-Discrimination Act 1991* (Qld) s 134.

Question 10: The procedures for making a complaint

What, if any, legislative changes should be made to the procedures for making a complaint to ADNSW?

Fee: There is currently no fee for making a complaint to ADNSW. This reflects the position in all Australian jurisdictions and should not change in NSW. We do not agree that a lodgement fee would be an effective or appropriate way to reduce potentially vexatious complaints.

Form: Currently, complaints to ADNSW must be in writing but are not required to be in any particular form. We support consideration of how to make this process more accessible for complainants, including amendment of the ADA to provide that oral complaints be permitted in exceptional circumstances, in alignment with anti-discrimination legislation in the ACT and Victoria.[17]

Detail required: The current drafting of the ADA does not require complaints to follow a prescriptive form or include specific details. As the consultation paper recognised, in practice ADNSW asks complainants for more information if it determines that further details are required. We consider the existing requirements strike an appropriate balance between achieving accessibility for complainants and procedural fairness for respondents. Requiring complainants to provide further specific details is unnecessary, and risks creating real barriers to accessibility for complainants. This is a particular concern for complainants with less legal literacy or other vulnerabilities that may create challenges for detailed and prescriptive written complaint preparation.

Anonymous complaints: We acknowledge that requiring complainants to list their name and contact details may be a barrier to making a complaint for some people. As the consultation paper recognised, allowing people to make anonymous complaints or use pseudonyms may encourage more people to take action against alleged unlawful conduct, and to prevent harm or victimisation of complainants. However, we also acknowledge the practical requirement of identifying a complainant for conciliation and dispute resolution processes, as well as the need to preserve procedural fairness for the respondent.

Given this tension, we support the continued operation of ADNSW's online reporting tool, which permits individuals to report discrimination anonymously, and also support the approach adopted in the Northern Territory and Queensland that enables commissioners to prohibit the disclosure of identify of a person involved in a complaint where it is considered necessary to protect the person's work security, privacy, or any human right.[18]

Question 11: Complaints made in more than one jurisdiction

Should the ADA prevent a person from making a complaint to ADNSW if they have previously made a complaint about the same conduct in another Australian jurisdiction? Why or why not?

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17 *Human Rights Commission Act 2005* (ACT) s 44(4); *Equal Opportunity Act 2010* (Vic) s 115(1).

18 *Anti-Discrimination Act 1992* (NT) s 100; *Anti-Discrimination Act 1991* (Qld) s 145.

No, we do not consider it necessary or beneficial for the ADA to take a stricter approach to complaints made in more than one jurisdiction. As the consultation paper recognises and the Law Reform Commission of WA has acknowledged, discrimination laws are complex and choosing the appropriate forum in which to bring a discrimination complaint is complicated.[19] There is accordingly a significant risk that complainants interested in commencing proceedings (particularly those who are self-represented) will initially select an inappropriate forum in which to pursue their complaint.[20]

Matters involving discrimination may also involve other intersecting areas of law, like unfair dismissal or workers compensation. In some cases, it may be appropriate to pursue different avenues for redress where different remedies are available. The ADA should not prevent this.

Question 12: The discretion to decline a complaint

a. *Should the ADA require ADNSW to decline a complaint in specified circumstances? Why or why not?*
b. *If so, in what circumstances should ADNSW be required to decline a complaint?*

No, the ADA should not require ADNSW to decline a complaint in specific circumstances. We consider that ADNSW's existing discretion to decline a complaint is sufficient and appropriate. We also agree with the Parliamentary Committee's conclusions that requiring ADNSW to decline complaints could undermine the intentions of the ADA and prevent the investigation of legitimate claims.[21]

Question 13: The time limit for complaints

a. *What, if any, changes should be made to the 12-month time limit to lodge complaints with ADNSW?*
b. *Should the ADA expressly provide for situations involving a course of conduct that spans more than 12 months before a complaint is lodged?*

Increase time limit: The 12-month time limit to lodge complaints should be increased to 24-months, consistent with the ACT and Federal jurisdictions,[22] and as recommended by the Law Reform Commissions of Queensland and Western Australia.[23] Increasing the time limit would align ADA processes with those of the AHRC and improve the adequacy and accessibility of the ADA.

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19 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA), Project 111*, Final Report (2022) rec 141.
20 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA), Project 111*, Final Report (2022) rec 141.
21 NSW, Legislative Council Portfolio Committee No 5, *Anti- Discrimination Amendment (Complaint Handling) Bill 2020,* Report 55 (2020) [2.102], rec 1.
22 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b); *Human Rights Commission Act 2005* (ACT) s 78(1)(a).
23 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 18, rec 8.1; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA), Project 111*, Final Report (2022) 248.

As the Respect@Work report recognised, there are complex reasons why an applicant may delay making a complaint immediately after an alleged incident of sexual harassment. This can include 'the impact of the harassment on their mental state, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation'.[24] We consider the reasons identified by the report to be applicable to all forms of discrimination.

We also note that it can take people who have experienced or are experiencing discrimination some time to recognise they have been discriminated against, obtain appropriate advice, and prioritise making a complaint, increasing the risk that the 12-month limit lapses before a complainant is prepared to make a complaint.

Specific time limits for child complainants: We support the Queensland Human Rights Commission's recommendation that the 24-month time limit should only be calculated from the date that the child turns 18, not the date of the alleged discrimination, unless there is a substantial prejudice to the respondent.[25]

Conduct spanning more than 12 months: We also support New South Wales Law Reform Commission's recommendation that the ADA should expressly provide that where there has been a course of conduct over a period of time, the limitation period is calculated from the termination of the conduct.[26]

Question 14: Frivolous, vexatious or misconceived complaints

a. *What, if any, changes should be made to the powers of ADNSW to decline frivolous, vexatious or misconceived complaints?*
b. *Should ADNSW be empowered to refer a complainant to the Attorney General to consider applying for a vexatious proceedings order? Why or why not?*

Currently, ADNSW may decline a complaint at any stage *during investigation* if satisfied that a complaint 'is frivolous, vexatious, misconceived or lacking in substance'. We do not consider it necessary or appropriate to reform the ADA to allow ADNSW to refuse to accept a complaint on these grounds.

A determination that a complaint is frivolous, vexatious or misconceived is more appropriately made during investigation or post conciliation, when more information relating to the complaint is available. As the evidence does not indicate that there has been an increased number of vexatious complaints being made to ADNSW or referred to NCAT,[27] we consider that introducing

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24 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 575 ('Respect@Work Report') cited in Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA), Project 111*, Final Report (2022) 248.

25 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 18, rec 8.2.

26 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 107.

27 NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020,* Report 55 (2020) [2.63]–[2.73].

a power of ADNSW to refuse to accept complaints prior to investigation would have little procedural benefit, but would risk meritorious complaints being declined.

Similarly, we do not consider it necessary to empower ADNSW to refer a complainant to the Attorney General to consider applying for a vexatious proceedings order. As ADNSW may decline a complaint at any point during investigation on the basis of the complaint being vexatious, and NCAT officers can recommend the Attorney General apply for a vexatious proceedings order under the *Vexatious Proceedings Act 2008* (NSW), we consider the existing regime to be sufficient and to strike an appropriate balance between dealing with vexatious litigants and preventing people with genuine complaints from being inappropriately barred.

Question 15: Further potential grounds to decline complaints

Should any new grounds to decline complaints be added to the ADA? If so, what should these be?

We do not consider it necessary or appropriate to reform the ADA to require ADNSW to decline a complaint on the grounds described in the consultation paper. ADNSW's current discretionary power to decline a complaint at any stage during investigation is sufficient.

Question 16: Reviewing a decision to decline a complaint

a. *What, if any, changes should be made to the notification procedures that apply when ADNSW considers declining, or declines, a complaint at the pre-investigation stage?*
b. *When ADNSW declines a complaint before investigation, what, if any, rights should a complainant have to seek a review or have the substantive complaint heard and determined by a court or tribunal?*
c. *What, if any, changes should be made to a complainant's ability to seek referral to NCAT if ADNSW declines their complaint:*
    i. *during investigation, or*
    ii. *at any stage, in relation to complaints made on behalf of another person(s)?*

Notification to respondents: We do not support amendments that would require ADNSW to notify a respondent about a complaint on receipt, before ADNSW has decided whether to accept it for investigation. We consider that the current process for determining that a complaint is frivolous, vexatious, or lacking in substance at any stage during the investigation strikes a sufficient balance between ensuring both accessibility for complainants and procedural fairness for respondents.

As has been discussed in our response to question 14, we consider that there are risks associated with determining complaints are frivolous, vexatious or lacking in substance prior to investigation. We are concerned that providing respondents with the opportunity to request a complaint against them is declined before that complaint is investigated may skew power inappropriately in favour of respondents, with the risk of meritorious complaints being unfairly refused.

Notification to complainants: We support the ability for complainants to amend their complaints or provide additional information prior to their complaints being denied. Specifically, we support the introduction of reforms recommended by the NSW Legislative Council, which would amend s 89B(3) to require the President to give a complainant reasonable notice of their intention to refuse to accept a complaint, to allow the complainants to either make submissions as to why the complaint should not be dismissed, or to amend the complaint.

Complainant rights to review or court determination: Currently, if ADNSW declines to accept a complaint for investigation, the complainant's only avenue for review of that decision is judicial review in the Supreme Court, which is costly and complex. As almost one third of all complaints are declined by ADNSW at the pre-investigation stage,[28] we consider that expanding the opportunities for complainants to seek review of decisions to decline their complaint would support the purpose of the ADA.

We specifically support complainants having the opportunity to seek referral to NCAT for a merits review of the decision to decline their complaint at pre-investigation. However, while we support this reform, we appreciate that NCAT may require additional resources in order to appropriately respond to merits review applications that may follow. If, due to resourcing, it is not considered appropriate to expand the pathway for referral to NCAT to include complaints declined at pre-investigation stage, we recommend ADNSW introduce an alternate pathway for merits review of these decisions.

Chapter 5: Dispute resolution

Question 17: Powers to compel information and responses

What, if any changes should be made to ADNSW's powers to compel information or documents and require written responses to complaints?

Powers to compel: Early disclosure of material from respondents can promote the resolution of complaints. It is therefore important that ADNSW has the power to compel information or documents, particularly from respondents, to facilitate engagement in the conciliation process. This includes information to assist in identifying a respondent or respondents, where that may be difficult for the complainant to do on their own. It also includes compelling information to enable an investigation to proceed even when a respondent chooses not to respond to the complaint.

We also support the introduction of an additional power to enable ADNSW to compel insurers to provide actuarial or statistical data, particularly in response to insurers claiming an exception to the prohibition on disability discrimination. In our submission to the first consultation,[29] we supported amending the insurance exception to align with the approach taken in the ACT – this

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28 Anti-Discrimination NSW, *Annual Report 2024–25* (2025) 16; *Anti-Discrimination Act 1977* (NSW) s 89B.

29 Justice and Equity Centre, *Submission to NSW Law Reform Commission Review of Anti-Discrimination Act 1977: First Consultation Paper*, 29 August 2025, available at: https://jec.org.au/publication/preliminary-submission-to-the-nsw-law-reform-commission-review-of-the-anti-discrimination-act-1977-nsw/.

would require insurers relying on the exception to provide the actuarial and statistical data they have relied on. Empowering ADNSW to compel this information would support that provision.

Mandatory responses from respondents: It may assist ADNSW to have clearer guidance as to when powers of compulsion should be used. If ADNSW is properly empowered and exercises its powers to compel information or documents, written responses may not be necessary.

However, written articulation of a respondent's position can be helpful for the applicant's understanding of what may have happened and may have the effect of prompting a respondent to properly turn their mind to the merit of the applicant's complaint at an earlier stage. These are elements that increase the likelihood of an applicant and respondent being able to come to an agreement about the resolution of a dispute. In the absence of stronger powers to compel information or documents, requiring a written response may be appropriate.

Question 18: Conciliation at ADNSW

a. *Should there be a right to legal representation in ADNSW complaint processes? Why or why not?*
b. *What, if any changes could be made to the ADA to promote attendance at ADNSW conciliation?*
c. *Should the ADA expressly empower ADNSW to prioritise or expedite complaints? If so:*
    i. *what criteria should guide ADNSW in deciding whether to use this power, and*
    ii. *should these criteria be expressed in the ADA?*

Right to legal representation: We support legal representation being available to complainants in ADNSW dispute resolution processes without the requirement to seek leave.

In our experience, legal representation can assist complainants to understand their rights, identify the relevant legal issues, formulate realistic outcome proposals and engage constructively in conciliation. This support is particularly important where there is a power imbalance between the complainant and respondent, given respondents are commonly better resourced and have greater access to relevant documents and information. In these circumstances, legal representation can help ensure complainants are able to participate effectively and that conciliation remains fair and meaningful.

ADNSW should retain appropriate control over the conduct of conciliation to preserve procedural fairness, informality and efficiency. However, this should not require complainants to seek leave to be legally represented.

Reform to promote attendance at conciliation:

We consider it may be appropriate to introduce additional powers of compulsion for ADNSW, like those introduced in Queensland. In Queensland, instead of issuing a penalty for failing to comply with a direction to participate in conciliation, the QHRC can take other steps, including filing a

direction with the court so that the direction is enforceable, or directing a party that has not participated without reasonable excuse to pay the other's costs.[30]

We also support introduction of provisions adopted in WA and federally to empower ADNSW to require attendance from anyone who could give relevant information, or whose presence would be conducive to resolving the complaint.[31]

Power to expedite or prioritise complaints: ADNSW should have the power to provide expedited conciliations on application of a party. The criteria for assessing whether a conciliation should be expedited should be publicly available and any considerations or guidelines for triaging and prioritising complaints should have principal consideration as to whether there is substantial risk of the alleged discrimination continuing or being repeated and the harm that it is causing or may cause.

Question 19: Flexible dispute resolution

a. *Should NSW adopt a more flexible dispute resolution system, like the Victorian model? Why or why not?*
b. *If so, what should the key features of this system be?*

We support the introduction of a more flexible dispute resolution system, as has been enacted in Victoria, and recommended by the Law Reform Commissions of Western Australia and Queensland.[32]

In Victoria, the dispute resolution process starts when the person bringing the dispute informs VEOHRC that they wish to proceed. Unlike NSW, there is no requirement to investigate a complaint before providing dispute resolution services. A potential benefit of this model is that it allows VEOHRC to try to resolve disputes earlier, without first having to investigate. Adopting this model may mean that disputes under the ADA are resolved more efficiently and effectively, for the benefit of everyone.

The following principles apply to the services offered by VEOHRC and should be adopted in the ADA:

1) dispute resolution to be provided as early as possible,
2) the type of dispute resolution offered should be appropriate to the nature of the complaint,
3) the dispute resolution process should be fair to all parties, and
4) dispute resolution should be consistent with the objectives of the Act.[33]

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30 *Anti-Discrimination Act 1991* (Qld) ss 159, 160, 160(1).
31 *Australian Human Rights Commission Act 1986* (Cth) ss 46PJ(2)(b), 46PJ(3); *Equal Opportunity Act 1984* (WA) s 87(2)(c).
32 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 9.1; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984* (WA), Project 111, Final Report (2022) rec 143, [10.1.2.1]
33 *Equal Opportunity Act 2010* (Vic) s 112.

Unlike the model adopted in Victoria, we do not support enshrining the principle of voluntary dispute resolution into the ADA. We consider that the ADA can be made more flexible and better suited to a broader range of dispute resolution options, without removing the requirement for parties to attend conciliation (or an alternative type of dispute resolution appropriate to the nature of the complaint). We are concerned that moving to voluntary dispute resolution may result in respondents declining to engage in the resolution process, undermining the effectiveness of ADNSW as a complaint-handling body.

Question 20: Terminating a complaint

What, if any, changes should be made to the reasons or procedures available to ADNSW to terminate a complaint?

We do not consider any changes need to be made to the circumstances in which ADNSW can terminate a complaint. Provided the 'revival' process is retained, we consider the current approach adequately balances people retaining the ability to have their complaints dealt with and the need for ADNSW to terminate inactive or stalled complaints.

Question 21: Timeframes for finalisation

Should the ADA include any timeframes for ADNSW complaint handling procedures? If so, what should those timeframes be?

We generally agree that addressing and investigating complaints quickly is beneficial for complainants and supports resolution of complaints. We do however recognise that without expanding the resources available to ADNSW, the imposition of timelines for complaint investigation may result in less thorough complaint handling.

The ADA currently provides that if a complaint has not been resolved within 18 months, a party to the complaint may request the President refer the complaint to NCAT. We suggest this time period could be substantially reduced, to encourage more timely complaint handling and provide parties with more options if their complaint has not been resolved through ADNSW. For example, we support parties being able to request referral to NCAT if their complaint has not been resolved within 6 months, with immediate request for referral to NCAT available in relation to complaints of a serious nature.

We also support the introduction of provisions requiring complaints of a certain serious nature to be investigated by ADNSW within a certain period of time. These time frames could be based on models introduced in the Fair Work Commission and apply to complaints regarding sexual harassment or discrimination involving criminal behaviour, or behaviour occurring for a prolonged period of time or against a large or vulnerable class of people. It may also be appropriate to enable complainants bringing complaints of this nature to seek immediate referral to NCAT, so that they are able to seek interim or injunctive relief to prevent further harm.

Chapter 6: Complaints to NCAT

Question 22: Referral to NCAT

a. *Should the grounds on which ADNSW may or must refer an unresolved complaint to NCAT change? If so, what should change?*
b. *Should the ADA allow parties to request that ADNSW refer an unresolved complaint to NCAT before 18 months has passed? If so, should the ADA specify a different timeframe (for instance, 12 months)?*
c. *Should the ADA expressly allow ADNSW to refer a complaint to NCAT at any stage of the complaints process? If so, under what circumstances should this be allowed?*

Grounds for referral: Yes, the grounds on which ADNSW may or must refer unresolved complaints should be expanded.

Section 93C should be amended to expressly list a new ground for referral, so that if the ADNSW President is of the opinion that a respondent is failing or refusing to properly participate in or engage with an investigation, including by refusing to provide information, the President may refer the complaint to the Tribunal.

While this is already implicitly available under s 93C, we consider that making this an express ground would assist with achieving legislative clarity and encourage respondents to participate in the process as early as possible.

Timeframe for referral: Yes, s 93B(1) should be amended to so that a party to a complaint may request the President refer the complaint to the Tribunal if it has not been declined, terminated or otherwise resolved within 6 months.

Referral at any time: We also support the NSW Law Reform Commission's recommendation to expressly empower ADNSW to refer a complaint to NCAT at any stage in the complaints process. We consider that the drafting proposed by NSWLRC referred to at 6.2.4 of the consultation paper is appropriate to achieve this aim.

Question 23: Direct access to NCAT

Should complainants have the option to make complaints to NCAT directly, that is, without first making a complaint to ADNSW? If so, in what circumstances should this be available?

We support complainants being able to request immediate referral to NCAT from ADNSW. This reform, dependent on introduction of the amendments discussed in our response to question 22 and at 6.2.4 of the consultation paper, would involve retention of the requirement for complaints to commence in ADNSW, but offer the opportunity for immediate referral to NCAT where appropriate. Complainants should be able to indicate their preference for immediate referral to NCAT when filing their compliant.

We agree with suggestions in preliminary submissions that direct access to NCAT may allow complaints to be resolved earlier, particularly in circumstances where a respondent's

unwillingness to conciliate is the primary reason for delay.[34] We also acknowledge reports that introduction of a direct access pathway to VCAT has not led to an overwhelming number of claims in Victoria.[35] However, we consider that there is value in retaining the requirement to commence proceedings in ADNSW.

Preserving the requirement to file a complaint with ADNSW would enable ADNSW to continue to assist complainants to prepare and file complaints, identify where further information is required, and screen complaints once received. If requested by a complainant and deemed appropriate by ADNSW, complaints could be referred immediately to NCAT, facilitating an early/direct access pathway to NCAT, without shifting the complaint filing, screening and early information gathering processes to NCAT. We consider that this model would increase the accessibility of NCAT to complainants, while minimising the potential resourcing impacts for NCAT if a direct access option was introduced.

Question 24: Representative proceedings

a. *What criteria should apply for bringing representative proceedings under the ADA in NCAT?*
b. *Should the same criteria apply for bringing representative proceedings to ADNSW and NCAT under the ADA?*

We support reform to the ADA to adopt new criteria for bringing representative proceedings in ADNSW and NCAT. The criteria should be based on the model adopted in the *Federal Court of Australia Act 1976* (Cth), without the requirement for seven class members.

To facilitate this reform, the requirements at sections 87C(1) and 101(3) should be amended so that a representative body intending to make a complaint must satisfy the President or the Tribunal that: (a) all the complainants are in respect of, or arise out of, the same, similar or related circumstances; and (b) all the complaints give rise to a substantial common issue of law or fact.

We support these criteria being the same for NCAT and ADNSW under the ADA. However, should there be barriers to reform to the NCAT criteria, we would support changes to the criteria for making representative complaints to ADNSW alone. The ADA provides NCAT with a discretionary ability to deal with representative complaints that do not meet the legislative requirements at s 101(3), minimising the risk that NCAT will be unable to deal with ADNSW representative complaints if the representative complaint criteria for each body are not immediately aligned.[36]

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34 Kingsford Legal Centre, *Preliminary Submission on the Anti-Discrimination Act 1977 (NSW) Review 2023,* 29 September 2023, available at: https://www.unsw.edu.au/content/dam/pdfs/law/klc/law-reform-submissions/2023/2023-Preliminary-submission-to-the-NSW-Law-Reform-Commission-on-the-Anti-Discrimination-Act-1977-(NSW).pdf 9.

35 Australian Discrimination Law Experts Group, *Submission to the Queensland Human Rights Commission Review into the Anti-Discrimination Act,* 1 March 2022, available at: https://research.bond.edu.au/en/publications/submission-to-the-queensland-human-rights-commission-review-into-/ 30.

36 *Anti-Discrimination Act 1977* (NSW) s 101(3)(b).

We also support NSWLRC's recommendation to introduce a comprehensive set of procedural and machinery provisions to deal with the conduct of representative complaints.

Question 25: Other potential pathways

a. *Should the Local Court, District Court or Supreme Court of NSW be able to hear and determine complaints under the ADA? If so, in what circumstances?*
b. *If ADA cases were heard by these courts, which costs model should be applied?*
c. *Should the NSW Industrial Relations Commission and/or Industrial Relations Court of NSW be able to hear and determine work-related complaints under the ADA? If so, in what circumstances?*

We consider it would be more useful to increase the amount of compensation able to be ordered by NCAT than it would be to expand the existing power of other courts to hear and determine ADA complaints. As the NSWLRC has recognised, there would be significantly less need for courts to hear ADA cases if the tribunal had the power to award higher compensation than is permitted under the current cap, as well as to order other remedies as may be required.[37]

However, there are two exceptions to this. The first is in relation to representative complaints that are not resolved at conciliation. We support reform to provide complainants in representative complaints a choice of forum, enabling them to choose whether to have their unresolved complaint referred to NCAT (a 'no costs' jurisdiction), or NSW Supreme Court (a 'costs' jurisdiction). We agree with QHRC that providing a pathway for representative complaints to be heard in costs jurisdictions may improve complainant's chances of finding conditional legal representation,[38] increasing the capacity of representative complaints processes to effect systemic change and secure redress for a large number of people who have been discriminated against.

The second is where a complaint must be determined by a court exercising judicial power because the complaint raises matters of federal law, having regard to the High Court's decision in *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16. A clear pathway for referral of such matters from NCAT to a relevant court must be maintained to ensure complainants are not disadvantaged.

Where courts do hear and determine discrimination matters, including those matters involving federal law, greater costs protections for complainants are necessary, specifically via the introduction of an equal access costs model like that introduced federally in the AHRC,[39] and discussed in our responses to question 34.

We do not support the NSWIRC taking on a greater role in hearing and determining discrimination complaints. We consider an additional forum would increase complexity and confusion for complainants, and that those with specialised knowledge and understanding of the

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37 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) [8.190]
38 Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 11.4.
39 *Australian Human Rights Commission Act 1986* (Cth) s 46PSA, as inserted by *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth) sch 1 pt 1 s 3.

NSW ADA at ADNSW and NCAT are best placed to manage and determine complaints under the ADA.

Chapter 7: Settlement agreements

Question 26: Confidentiality clauses in settlement agreements

a. *Should the ADA include conditions that must be met before a confidentiality clause in a settlement agreement is enforceable? If so:*
    i. *what should those conditions be?*
    ii. *Should they apply to all types of unlawful conduct under the ADA, or only some?*
b. *Should NSW adopt non-legislative best practice guidelines and/or model non-disclosure clauses for parties to use when drafting settlement agreements in ADA complaints?*

We support restricting the use of non-disclosure agreements ('NDAs') and confidentiality clauses in settlement agreements relating to all forms of unlawful conduct under the ADA. The damaging impacts of confidentiality clauses in sexual harassment cases are well-documented.[110] We consider those impacts apply equally to complaints of discrimination and vilification.

In our experience, confidentiality and non-disparagement clauses are overused by respondents in settlements and are often included as a standard term. As well as preventing disclosure of the settlement terms, these clauses can require complainants to keep confidential or restrict their ability to speak about broader matters including the facts and circumstances leading to discrimination and the impact it has had on the complainant, or the respondent's policies or practices. This may limit the applicant's ability to talk with others about what happened to them or to advocate for systemic changes. Our clients often feel they have no choice but to agree to confidentiality terms when negotiating a settlement of their claim.

We support introduction of preconditions for enforceability of confidentiality clauses and NDAs that are modelled on the *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic) ('Victorian Act'). The ADA should expressly provide that confidentially clauses in settlement agreements are unenforceable unless certain preconditions are met. The preconditions in the Victorian Act, set out in the Consultation Paper at 7.2.1 provide an appropriate model.

These preconditions should apply to both confidentiality clauses in settlement agreements, and any NDA that parties intend to exist alongside a settlement agreement. They should apply to all types of unlawful conduct under the ADA. Any framework to restrict confidentiality clauses should also include non-disparagement clauses, which have a similar effect of silencing our clients, and limiting or preventing their systemic advocacy.

The ADA should also include provisions similar to those in Victoria that allow for termination of NDAs by complainants after 12 months in certain circumstances, prohibits NDAs from preventing

disclosure of relevant information to government and other relevant bodies or for the purposes of workplace investigations or references.[40]

Best practice guidelines for such clauses would be welcome but are unlikely to impact the overuse of such clauses on their own. A legislative approach is required. Relevantly, the AHRC's recent *Speaking from Experience* report finds that NDAs continue to be overused, notwithstanding implementation of the Respect@Work recommendation to develop guidance on the use of NDAs.[41] The AHRC is now recommending legislative change to restrict the use of NDAs.[118]

Question 27: Enforcing settlement agreements

What, if any, changes should be made to the procedures for enforcing settlement agreements made during:

a. *conciliation at ADNSW, or*
b. *NCAT proceedings?*

ADNSW: Currently, if a party to an ADNSW conciliation does not act consistently with the terms of a settlement agreement, the other party has limited options to seek enforcement of those terms. These limitations seriously undermine the effectiveness of the ADNSW complaint resolution process and may discourage potential complainants from filing in ADNSW due to perceived unenforceability of remedies.

The ADA should empower ADNSW to enforce agreements and remove the requirement for parties to register their settlement agreements. At a minimum, s 91A(6) should be amended to remove the reference to 'not later than 6 months after the date of the agreement'. However, it would be preferable for broader reform, based on the Tasmanian model.

In Tasmania, there is no requirement to register signed settlement agreements with the tribunal. Settlement agreements are held on file by the Anti-Discrimination Commissioner. A person, or the Commissioner at the request of a person, can seek enforcement by filing a certified copy of the agreement in the Supreme Court, with an affidavit stating the extent to which the agreement has not been complied with. The agreement is then enforceable as if it were an order of the Court.[42] We consider this to be a direct and efficient model for parties to ensure the terms of their agreement are enforceable.

NCAT: We similarly support reform to simplify the process of enforcing agreements arrived at during NCAT proceedings. The examples from Tasmania and Queensland discussed at 7.3.3 of the consultation paper would be appropriate models for NSW to base reform upon, each requiring

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40 See 7.2.1 of the Consultation Paper.

41 See, e.g., Regina Featherstone and Sharmila Bargon, *Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@ Work Report* (Final Report, 6 March 2024); Victoria Treasury and Finance Department, *Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases* (Discussion Paper, 12 August 2024).

42 *Anti-Discrimination Act 1998* (Tas) ss 90(1)(b)–(c), s 90(2).

parties to sign a settlement agreement and have it recorded by or filed with the tribunal, following which the agreement would then be enforceable as if it were a tribunal order.[43]

We recognise that both options would continue to be limited by existing restrictions on NCAT's powers to make orders, as NCAT can only register the terms of an agreement that it could have ordered had it determined the complaint. In practice this would exclude terms concerning payment of compensation in amounts that exceed the cap on compensation awardable by NCAT (currently $100,000).[44]

If the compensation cap was increased or removed (as we have argued for in our response to question 28), these reforms would be adequate. If the cap is retained, however, we suggest s 91A should be amended so that any signed agreement held by ADNSW may be enforced in NCAT, even if its terms were outside what could be ordered by NCAT.

Chapter 8: Remedies, enforcement and costs

Question 28: Compensation

a. *Should the ADA cap the amount that can be awarded as compensation for loss or damage? If so, what should the cap be?*
b. *What, if any, changes should be made to NCAT's powers and procedures to award compensation under the ADA? If so, which reform options do you suggest and why?*
c. *Should the ADA be changed to allow persons in custody to receive a compensation award made by NCAT against the State of NSW and its agents?*

Compensation cap: The cap on compensation should be removed or significantly increased.

We share the concerns cited in the consultation paper that the current cap may discourage complainants from bringing proceedings in the NSW discrimination jurisdiction. The cap means that awards available can fail to properly compensate complainants for the harms suffered, create hurdles for parties seeking enforcement of settlement agreements (see discussion of this in question 27), make it more difficult to find legal representatives willing to assist parties on a conditional or contingency basis, and increase the risk that legal fees of represented complainants will exceed damages awarded, even in the event of a successful outcome.

We support removing the cap, to align with other jurisdictions. If a cap is retained, we suggest it should be substantially higher than the current $100,000 limit, and support the Jumbunna Institute's recommendation to tie the cap to the jurisdictional limit of the District Court, currently $1,125,000.

NCAT's powers to award compensation: In addition to increasing or removing the compensation cap, we support amendments to clarify the types of 'loss or damage' that complainants may receive damages for under section 108(2)(a). The introduction of a non-

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43 *Anti-Discrimination Act 1991* (Qld) s 189; *Anti-Discrimination Act 1998* (Tas) s 94.
44 *Anti-Discrimination Act 1977* (NSW) s 91A(8).

exhaustive list of the types of loss and damage compensable under this section would clarify the intended scope of the section. The list should be drafted with consideration of comparable provisions in ACT, NT and Qld,[45] and include express reference to certain emotional and psychological impacts as compensable forms of loss and damage.

We also support NSWLRC's recommendation to broaden NCAT's powers to award remedies in representative complaints to mirror those in the *Federal Court of Australia Act 1976* (Cth).

Compensation for people in custody: We support reform to s 111A of the ADA to remove the restriction on access to compensation for persons in custody. The blanket restriction on access to compensation is inappropriate, discourages people in custody from bringing discrimination complaints, and reduces accountability for unlawful discrimination.

If the provision is not removed, it should be amended to be less restrictive. We support reform to align NSW with the Victorian model discussed on page 130 of the consultation paper. At a minimum, the ADA should be amended to enable persons in custody to receive any compensation remaining after a victim restitution order or eligible victim claim is paid, consistent with the *Civil Liability Act 2002* (NSW).[46]

Question 29: Mandatory orders

What, if any, changes should be made to the 'mandatory orders' power in the ADA? For instance, should this power be available in representative complaints?

We support recommendations to introduce a non-exhaustive list to the ADA, detailing examples of mandatory orders that NCAT may make.[47] It would also be beneficial to empower NCAT to appoint the President of ADNSW to monitor compliance with a mandatory order, both with respect to individual and representative complaints, as previously recommended by the NSWLRC.

We strongly support reform to ensure mandatory orders are available in representative complaints. Such orders are available in representative complaints in all other jurisdictions, except WA,[48] and would be an effective tool for addressing systemic discrimination if implemented in NSW.

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45 *Human Rights Commission Act 2005* (ACT) s 53E(3)(b); *Anti-Discrimination Act 1992* (NT) s 88(3); *Anti-Discrimination Act 1991* (Qld) s 209.

46 *Civil Liability Act 2002* (NSW) s 26J, s 26L, s 26M, s 26Q, s 26R, s 26S.

47 Kingsford Legal Centre, *Preliminary Submission on the Anti-Discrimination Act 1977 (NSW) Review 2023,* 29 September 2023, available at: https://www.unsw.edu.au/content/dam/pdfs/law/klc/law-reform-submissions/2023/2023-Preliminary-submission-to-the-NSW-Law-Reform-Commission-on-the-Anti-Discrimination-Act-1977-(NSW).pdf 8.

48 *Equal Opportunity Act 1984* (WA) s 127(b)(iii); *Equal Opportunity Act 2010* (Vic) s 125(a)(iii); *Anti-Discrimination Act 1998* (Tas) s 89(1)(b); *Equal Opportunity Act 1984* (SA) s 96(1)(c); *Anti-Discrimination Act 1991* (Qld) s 209(1)(c); *Anti-Discrimination Act 1992* (NT) s 88(1)(c); *Human Rights Commission Act 2005* (ACT) s 53E(2)(b); *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4)(b).

Question 30: Programs or policies

Should NCAT's power to order respondents to develop or implement programs or policies be extended to all forms of unlawful conduct under the ADA?

Yes. We support the expansion of NCAT's power to order respondents to develop or implement programs or policies in relation to all forms of unlawful conduct under the ADA.

Question 31: Potential new remedies

a. *Should NCAT's existing powers to order specific remedies in ADA matters be replaced with a broad power to make any orders 'as it sees fit'?*
b. *Should the ADA be amended to expressly provide for:*
    i. *a power to make declarations*
    ii. *specific orders for training and employment*
    iii. *specific orders in sexual harassment cases*
    iv. *civil penalties, or*
    v. *any other orders currently not provided for?*

NCAT's powers to order remedies: We do not support NCAT's existing powers to order specific remedies being replaced with a broad power to make orders as it sees fit, although we support adding 'any other order that NCAT sees fit' to the list, to provide flexibility.

Having an articulated list can be helpful for an applicant thinking about what they might want from a proceeding, and to provide options to the parties to incorporate into any negotiated agreement to resolve a matter.

The current list of orders at section 108(2) should be amended to expressly include additional orders. This could be achieved by replacing the current s 108(2) with the list of orders the tribunal may make in Queensland,[49] or adopting a number of orders from that list, including providing that the tribunal may make:

- an order requiring the respondent to implement programs to eliminate unlawful discrimination,
- an order requiring the respondent to do specified things to redress loss or damage suffered by an affected person because of the contravention, including employing, reinstating or re-employing a person; or promoting a person; or moving a person to a specified position within a specified time, and
- an order requiring the respondent to pay interest on an amount of compensation.

We also support empowering NCAT to make orders requiring respondents to deliver education and training, to make declarations, and express reference to the specific orders and remedies that NCAT may make in sexual harassment matters, consistent with the ALRC recommendation to the Federal Court. These would include orders to:

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[49] *Anti-Discrimination Act 1991* (Qld) s 209.

- restrain a respondent from engaging in particular conduct (such as approaching the complainant, or attending a particular place),
- require a respondent to participate in a program of counselling, training, mediation, rehabilitation or assessment, and
- require a respondent to take corrective action to prevent further sexual harassment if they are running a business or undertaking where sexual harassment occurred.

Question 32: Orders with systemic effect

a. *Should the ADA be amended to encourage NCAT to consider systemic issues when deciding appropriate remedies under its existing powers? If so, what changes do you support?*
b. *Does NCAT require clearer or more expansive powers to make orders with systemic effect? If so, what changes do you support*

Yes, the ADA should be amended to require (not just encourage) NCAT to consider systemic issues when making determinations about remedies. As the consultation paper acknowledges, NCAT has existing powers to order remedies with systemic effect.[50] Amending the ADA to *require* NCAT to consider systemic discrimination would result in NCAT more proactively contemplating the systemic nature of discrimination, ideally leading to greater use of the power to make systemic orders.

This reform would be both strengthened and complemented by simultaneous reform to include 'addressing systemic discrimination' as an express object of the act, and the clarification and expansion of NCAT's powers to make orders with systemic effect, as discussed in response to question 31.

Question 33: Enforcing NCAT orders

a. *Should the penalty for failing to comply with a non-monetary order of NCAT be increased? If so, what should it be?*
b. *Should there be specific penalties for failing to comply with certain NCAT orders? If so, what should they be?*
c. *What, if any, changes should be made to the circumstances in which the ADNSW President can take steps to enforce an NCAT order?*
d. *Should any other changes be made to the process for enforcing an NCAT order made under the ADA?*

Penalties for non-compliance We support NSWLRC's recommendation to increase maximum penalties for corporations, though consider it would be appropriate to align maximum penalties in ADNSW with those of the Fair Work Commission, where the maximum penalties are 60 units (currently $21,840) for individuals, and 300 units ($109,200) for corporations.

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50 *Anti-Discrimination Act 1977* (NSW) s 108(2)(b)–(e).

Specific penalties: In addition to increasing the maximum penalties for non-compliance with non-monetary orders, we support the introduction of additional penalties for non-compliance with other orders, including fines similar to those introduced in Tasmania.[51]

ADNSW enforcement powers: We consider that the ADA should be amended to empower ADNSW to enforce NCAT orders in any circumstances, not just when it is 'in the public interest to do so'. As is the practice in Victoria, ADNSW should be empowered to enforce an order of NCAT on behalf of an individual applicant if that applicant consents. The applicant could then enforce the NCAT order as if it were a court order.[52]

Reform of this kind would alleviate the burden currently placed on individual complainants to enforce orders in court and increase the enforceability of the ADA as a whole, strengthening the capacity of the legislation to deter and remedy discrimination.

Question 34: Costs

a. *Should the existing circumstances in which NCAT may award costs under the ADA be expanded or clarified? If so, how?*
b. *In what circumstances, if any, should parties be required to provide security for costs in ADA proceedings in NCAT?*
c. *Should an equal access / asymmetrical costs model apply to ADA proceedings in NCAT? Why or why not?*
d. *If the ADA is amended to introduce an equal access / asymmetrical costs model, should this model apply when NCAT decisions are appealed in higher courts?*

We strongly support an asymmetrical costs (equal access) costs model for all proceedings brought under the ADA. This would bring NSW in line with federal discrimination laws, encourage potential complainants who would otherwise be dissuaded by costs risks to bring meritorious discrimination claims to ADNSW, and encourage potential respondents to both proactively ensure that discrimination does not occur in their operations, and make reasonable attempts to settle early when it does.

The public interest is served when victim-survivors of unlawful discrimination can exercise their rights to bring discrimination complaints, increasing public exposure and remedy of discrimination and benefiting the wider community.[53] Complainants already bear the financial and non-financial burdens of the complaint process, in addition to the loss or damage they may have experienced as a result of the initial discrimination itself. The equal access model remedies this imbalance by reducing the costs burden for complainants and increasing the financial penalty potentially associated with discriminatory behaviour, furthering the ADA's aim of eliminating discrimination.

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51 *Anti-Discrimination Act 1998* (Tas) s 92(4).
52 *Equal Opportunity Act 2010* (Vic) s 126(2).
53 Public Interest Advocacy Centre and Grata Fund, *Joint Submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws* (Submission, 14 April 2023) available at: https://assets.nationbuilder.com/gratafund/pages/745/attachments/original/1681777362/20230414_-_Grata_PIAC_Joint_Submission_to_AGD_Costs_Consultation_encl_Report.pdf?1681777362 5-6.

The provision should apply to all proceedings under the ADA, including appeals and in other courts empowered to hear matters under the ADA, in the same way as the Commonwealth provision.

Chapter 9: Exemption procedures

Question 35: Special measures and exemptions

a. *If a special measures provision is introduced, should the ADA continue to provide a procedure for exemption applications? Why or why not?*
b. *If so, what purposes should exemptions serve?*

Yes, even if a special measures provision is introduced (which we strongly support), the ADA should continue to provide a procedure for exemption applications.

We agree with the comments of the Victorian Civil and Administrative Tribunal ('VCAT') on pages 152 and 153 of the Consultation Paper, that in most circumstances organisations intending to engage in 'special measures'-type conduct should make 'their own assessment' and, if satisfied, 'simply get on with engaging in that conduct'. However, there may be circumstances in which it is unclear whether the conduct neatly fits within the prescribed criteria for 'positive discrimination'. In these cases, organisations should have access to an exemption process to clarify that their conduct is permitted, rather than assume a risk of adverse consequences.

We also support the retention of an exemption process to recognise that there may be circumstances in which conduct may be unlawful under the ADA, and not constitute positive discrimination, but the conduct can be justified as advancing a legitimate and non-discriminatory purpose.

Question 36: The exemptions process

a. *What, if any, changes should be made to the process for seeking an exemption? For instance:*
    i. *Should there be greater transparency and/or options for public involvement in the process?*
    ii. *Who should be the decision-maker?*
b. *Should exemptions exclude certain protected attributes or unlawful conduct? If so, what should these be and why?*
c. *What, if any, other changes should be made to the exemptions process?*

We support changes to the process for seeking an exemption that provide greater transparency, including increased opportunity for public involvement. This includes allowing the decision-maker to undertake a public consultation process, inviting submissions from the wider community.

This may not be appropriate in all circumstances, therefore the consultation process should be optional, governed by non-legislative guidelines similar to those issued by the Australian Human

Rights Commission (as discussed on page 156 of the Consultation Paper).[54] However, it should be mandatory for the decision-maker to publish its findings and reasons for exemption decisions.

ADNSW should remain the decision-maker, being best-suited to undertaking public consultation processes. However, this would require ADNSW being provided with increased resources to adequately perform this function.

The exemption process should only apply in relation to discrimination, and not in relation to sexual harassment, vilification or victimization, for which we do not believe there can be a legitimate purpose (noting that vilification provisions already exclude a range of acts done reasonably and in good faith).

Exemptions should be available in relation to all protected attributes, to avoid any hierarchy of rights.

We support reducing the exemption period from 10 years to 5 years, while allowing for exemptions to be renewed. This ensures regular scrutiny of whether the exemption is still necessary and justified.

Finally, we do not support a fast-track process. If the exemption process is retained primarily for scenarios where it is unclear whether the conduct neatly fits within the prescribed criteria for 'positive discrimination', or in relation to clearly unlawful conduct for which there is a legitimate, non-discriminatory purpose, both of these types of applications should be properly scrutinised by the decision-maker.

Question 37: Decision-making framework

a. *Should the exemptions framework be:*
   i. *Guided by legislative or non-legislative material?*
   ii. *Mandatory or discretionary?*
   iii. *Exhaustive or non-exhaustive?*
b. *Should ADNSW be required to consider whether the exemption would be consistent with the objects and purposes of the ADA? If so, should exemptions be:*
   i. *Limited by the stated objects of the Act (if any), or*
   ii. *Determined as a matter of discretion having regard to the objects, scope and purposes of the Act as a whole?*

We suggest exemptions are determined in accordance with a list of non-exhaustive criteria in the ADA according to process set out in public guidelines published by ADNSW, similar to the guidelines issued by the Australian Human Rights Commission.

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54 'The process may include:
- Publishing the application on the AHRC website with a call for public comments
- Inviting persons who may be affected by AHRC's decision to make written submissions commenting on the application, or
- Making proposed decisions on applications available to interested parties for comment before the AHRC makes a final decision.'

The framework should be discretionary rather than mandatory, to provide ADNSW with flexibility in determining whether to grant an exemption. This is appropriate if the exemption framework is operating as a safeguard to be applied in limited circumstances, rather than used to consider and approve conduct that would ordinarily be considered special measures.

We also suggest that ADNSW should have regard to the objects, scope and purposes of the Act as one discretionary factor in determining whether to grant an exemption, to retain flexibility.

Question 38: The exemptions criteria

What, if any, changes should be made to the exemptions criteria?

The current list of prescribed criteria in clause 6(1) of the *Anti-Discrimination Regulation 2019* (NSW) largely serves the purpose of providing appropriate guidance for assessing applications for exemptions, subject to the following changes.

We suggest that clause 1(a) is amended to read 'whether the proposed exemption is appropriate or reasonable, having regard to the objects of the Act'.

The criterion in clause 1(b), 'whether the proposed exemption is necessary', should be clarified along the lines of the interpretation adopted by ADNSW, specifically 'whether the exemption is necessary to avoid a contravention of the Act'.

The criterion in clause 1(e), 'the public, business, social or other community impact of the granting of the proposed exemption', should be deleted. These are matters that can be considered in the context of whether the exemption is appropriate, reasonable and necessary.

Chapter 10: Other mechanisms

Question 39: Assisting parties

What, if any, changes should be made to ADNSW's power to assist parties to make complaints to NCAT?

While we support ADNSW being able to assist parties to make complaints, we note the need to preserve the independence – and perceived independence - of ADNSW in the complaint handling process. We consider it would be more effective to ensure complainants have access to legal representation, and to increase the funding for legal services to assist complainants to make complaints, specifically Community Legal Centres, the Aboriginal Legal Service and Legal Aid.

Question 40: Initiating complaints

Should ADNSW be empowered to initiate complaints and/or commence a claim in NCAT? If so, under what circumstances should it be allowed to do so?

We support empowering ADNSW to conduct investigations and issue reports into systemic discrimination, but query the appropriateness of ADNSW initiating individual complaints. This may

undermine the independence of ADNSW in the complaint handling process and may have significant resource implications.

Question 41: Ministerial referrals for investigation

What, if any, changes should be made to ADNSW's power to investigate matters on referral from the Minister?

We support removal of the power for a Minister to refer a matter for investigation for similar reasons as were outlined in response to question 40. We are concerned that exercise of the power could compromise the independence and impartiality of ADNSW.

Question 42: Investigating withdrawn complaints

Should ADNSW be empowered to continue investigating withdrawn complaints? If so, under what circumstances should it be allowed to do so?

We do not support this proposed reform. We do not consider it appropriate for ADNSW to be the complainant in a matter and consider that it would be inappropriate for complaint proceedings to continue in a complainant's name after that complainant had withdrawn their complaint. The potential benefits associated with empowering ADNSW to continue investigating withdrawn complaints could similarly be achieved by empowering ADNSW to undertake investigations, inquiries and research on its own motion, which we have discussed in response to question 45.

Question 43: Considering breaches of a positive duty

a. *If a positive duty was implemented in NSW, should ADNSW be empowered to consider the positive duty during complaints processes? If so, under what circumstances should it be allowed to do so?*
b. *If a positive duty was implemented in NSW, should there be an individual remedy for failure to comply with the duty?*

Power to consider the positive duty: Yes, if a positive duty is implemented in NSW, ADNSW should be expressly required to consider whether the duty has been contravened as part of a conciliation or investigation of a complaint.

ADNSW should also be empowered to request or compel production of information or documents relevant to the potential contravention of the positive duty, to investigate this aspect of the complaint more completely and have the power to make recommendations and findings in respect of any contravention of the duty, in addition to its complaint handling function.

These changes, if introduced, would bring NSW in line with NT and the ACT,[55] and support the introduction of the positive duty in NSW. As ADLEG has noted, for any positive duty to have the

[55] *Anti-Discrimination Act 1992* (NT) s 102; *Human Rights Commission Act 2005* (ACT) s 52(3), s 73.

desired outcome, the regulator of that duty must have a range of powers available to them to support such a duty, and sufficient sanctions available in the case of non-compliance.[56]

Incorporating consideration of the positive duty into the complaint process would also broadly contribute to shifting the burden away from individuals who experience discrimination, harassment or vilification, and instead encourage proactive prevention by those in a position to effect change.

Individual remedy for non-compliance with duty: If a positive duty is implemented, an individual complainant should have the right to bring a claim for breach of the duty. While we recognise that people seeking an individual remedy will face the same difficulties as those complaining of other discriminatory acts, this should be an option available to people, to promote accountability.

Question 44: Intervention and amicus curiae powers

a. *What, if any, changes should be made to ADNSW's power to assist NCAT?*
b. *Should ADNSW be empowered to intervene in NCAT proceedings? If so, under what circumstances should it be allowed to do so?*

NCAT currently permits intervention from any person 'authorised by a law or procedural rules to intervene'.[57] The ADA should be amended to expressly empower ADNSW to seek leave to intervene or appear as *amicus curiae* in NCAT proceedings, in terms similar to those currently enjoyed by the AHRC. Reform of this kind would align New South Wales with other Australian jurisdictions,[58] and enable ADNSW to more effectively address discrimination.[59]

Question 45: Wider investigation and inquiry powers

a. *What, if any, changes should be made to ADNSW's existing power to carry out investigations, research and inquiries regarding discrimination?*
b. *Should ADNSW have wider powers to investigate and report on the conduct of duty holders, independently of the complaints process? If so:*
    i. *Under what circumstances should ADNSW be allowed to do so?*
    ii. *If the power to investigate relates to a breach of a positive duty, what criteria should be necessary to start an investigation?*
    iii. *What powers should ADNSW have to facilitate investigations?*
    iv. *What outcomes should be available to ADNSW after a finding of non-compliance?*

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56 Australian Discrimination Law Experts Group (ADLEG), *Submission to the Australian Human Rights Commission National Inquiry into Sexual Harassment in Australian Workplaces* (Submission, 4 March 2019) available at: https://humanrights.gov.au/?a=45901 35.

57 *Civil and Administrative Tribunal Act 2013 No 2* (NSW) s 44(4).

58 NSW Bar Association, *Review of Anti-Discrimination Act 1977 (NSW): Preliminary Submission* (18 October 2023) available at: https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD86.pdf [58].

59 NSW Bar Association, *Review of Anti-Discrimination Act 1977 (NSW): Preliminary Submission* (18 October 2023) available at: https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD86.pdf [58].

c. *Should ADNSW have the power to investigate systemic issues? If so, under what circumstances should it be allowed to do so?*
d. *What, if any, changes should be made to ADNSW's power to hold public inquiries?*

We support strengthening and broadening ADNSW's powers to undertake investigations, inquiries and research, on its own motion. This should apply not only in the event that a positive duty is introduced to the ADA, but also more generally, especially in relation to issues of systemic discrimination.

Current limits on existing powers, restricting the ability of ADNSW to investigate discrimination in relation to a small number of attributes, and racial vilification but only if Multicultural NSW refers a matter to them, should be removed. ADNSW should be able to conduct an investigation in relation to all protected attributes, and all forms of misconduct (including discrimination, vilification, sexual harassment and victimisation).

In terms of the power to investigate a breach of a positive duty, we support the straight-forward approach of s 18C(1) of the *Anti-Discrimination Act 1992* (NT), which broadly allows the NT Commissioner to 'investigate compliance' with the positive duty to prevent and eliminate discrimination, sexual harassment and victimisation. In practice, resourcing limits will compel ADNSW to prioritise positive duty breaches that affect significant cohorts of people, or are particularly serious.

When conducting investigations, both in relation to breaches of a possible positive duty and also systemic discrimination, we support stronger and clearer powers for ADNSW. This includes those listed at s 10.4.3 of the Consultation Paper (such as to compel the production of documents and information from witnesses or employers, to enter workplaces, to interview witnesses and to issue findings).

We also support providing ADNSW with a range of available options after a finding of non-compliance. In particular, ADNSW should be able to report and make recommendations to Parliament and advocate to government about necessary responses, publish practice guidance for industries and organisations, and enter into enforceable undertakings.

We also support ADNSW having the power to issue compliance notices and, in appropriate cases, seek civil penalties from a court. We note the importance of appropriate resourcing to carry out these types of enforcement functions.

Expanding ADNSW's regulatory and enforcement functions need not be incompatible with its role in conciliating individual complaints. The AHRC provides an existing model in which complaint-handling and regulatory enforcement functions coexist, in the context of enforcing a positive duty. However, expanding ADNSW's enforcement role would need to come with safeguards to preserve confidence in its complaint-handling function. These could include appropriate separation between complaint-handling and enforcement functions, published criteria for enforcement action, requirements of impartiality and procedural fairness in regulatory investigations, and appropriate review mechanisms for decisions.

As indicated above, we support the power of ADNSW to investigate systemic issues of unlawful conduct, independent of receiving an individual complaint. This could be based on the Australian

Human Rights Commission's new powers to investigate systemic discrimination, although we support this being solely an own motion power rather than following a Minister's request.

ADNSW should retain an expansive power to undertake public inquiries on a wide range of topics and be properly funded to be able to perform this role.

Question 46: Criminal prosecutions

Should ADNSW have the power to prosecute, or refer for prosecution, breaches of the ADA? Why or why not?

We do not support reform to empower ADNSW to criminally prosecute breaches of the ADA. Empowering ADNSW to criminally prosecute breaches would significantly change the operation of ADNSW as a neutral complaint handling agency. We consider that amending the ADA to provide for stronger investigation, regulation, and enforcement powers from ADNSW is a sufficient alternative with ability to clarify the law and deter breaches of anti-discrimination legislation.

Question 47: Civil penalty orders

a. *Should ADNSW be empowered to seek civil penalty orders for substantive breaches for the ADA?*
b. *If so, which forum/s would be most appropriate to impose a civil penalty, eg NCAT or a court?*

We support the introduction of civil penalties for serious or systemic breaches of the ADA. Civil penalties recognise that discrimination is a public wrong affecting the broader community. They can provide an important deterrent and encourage investment in prevention and compliance, where individual complaints and remedies may not.

As noted above, with appropriate resourcing for undertaking enforcement functions, ADNSW could have the power to seek civil penalties in significant matters, particularly where conduct is systemic, affects multiple people, demonstrates repeated non-compliance, or involves substantial breaches of any positive duty. Recognising that such penalties play a different role to individual remedies, there would need to be appropriate limits and clear guidance for ADNSW regarding when a penalty should be considered.

Given civil penalties perform a regulatory and deterrent function that is distinct from the primarily remedial role of NCAT in determining individual discrimination complaints, it may be most appropriate for such penalties to be determined by a court. This would preserve NCAT as an accessible forum focused on redress for people who experience discrimination, while allowing ADNSW to take separate enforcement action in appropriate cases.

Question 48: Education, research and guidance

a. *What, if any, changes should be made to ADNSW's:*
    i. *Education and research powers?*

ii. Power to develop and promote codes of practices?

b. *Should ADNSW be empowered to conduct voluntary audits of duty holders' internal policies and programs?*

ADNSW should retain broad powers to educate the community about issues relating to discrimination, vilification and sexual harassment, as well as to undertake research on a wide range of matters related to these topics.

We strongly support explicitly including data collection as part of this research function, including publicly reporting deidentified, disaggregated data from conciliations. This would assist not just complainants but also practitioners in understanding likely outcomes, and also to identify systemic issues and law reform priorities.

We support an expanded ability of ADNSW to develop codes of practice. We agree with the observation that this ability has been underused by ADNSW, and we are not aware of any current codes of practice operating under this provision. In contrast, the Victorian Equal Opportunity & Human Rights Commission, which has the power to issue authoritative guidance, has a range of such guidance documents which can be considered in VCAT when hearing cases of discrimination, sexual harassment, vilification and victimisation.[60] We suggest ADNSW could use its codes of practice function more often to develop similar, authoritative practice guidance.

Such codes will be more effective at changing behaviour if they are binding and enforceable. In principle, we support ADNSW having the ability to develop legally binding guidance, such as disability standards as can be made under the *Disability Discrimination Act 1992* (Cth). However, developing standards is a specialised function which would require substantial resources, including to consider and avoid inconsistency with Federal or other standards.

We support in-principle the ability of ADNSW to conduct voluntary audits of duty holder's internal policies and programs, subject to appropriate resourcing.

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[60] Victorian Equal Opportunity and Human Rights Commission, *Equal Opportunity Practice Guidelines* (Web Page) <https://www.humanrights.vic.gov.au/for-organisations/guidelines/>.