The Law Society OF NEW SOUTH WALES

Our ref: Cross-Committee:RMsb231026

23 October 2026

The Hon Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
GPO Box 31
SYDNEY NSW 2001

By e-mail: adareview@dcj.nsw.gov.au

Dear Mr Bathurst,

REVIEW OF THE *ANTI-DISCRIMINATION ACT 1977* (NSW) – PROCEDURES AND COMPLIANCE

The Law Society of New South Wales is grateful for the opportunity to contribute to the NSW Law Reform Commission's (**NSWLRC**) review of the *Anti-Discrimination Act 1977* (NSW) (**ADA**). The Law Society's Human Rights, Employment Law, Litigation Law and Practice and Indigenous Issues Committees contributed to this submission.

This stage of the NSWLRC's consultation, which focuses on procedures, enforcement and compliance, is of particular importance. As noted in our preliminary submission, improving the accessibility and understanding of anti-discrimination law is central to facilitating its purpose of preventing and eliminating discrimination and harassment.[1] From an access to justice perspective, many complainants in anti-discrimination matters are self-represented, and the current structure and wording of the ADA may hinder their ability to fully understand their rights and bring a claim.

Our responses to the questions in the Consultation Paper[2] are set out at Attachment A. In addition, we make the general observations below for your consideration.

Adequate and sustained funding for the NSW anti-discrimination regime

Many of the options contemplated in the Consultation Paper would involve a significant expansion of the role, functions and powers of Anti-Discrimination NSW (**ADNSW**). The successful implementation of these reforms will depend on increased and sustained funding for ADNSW, together with continued investment in the expertise, skills and capacity of its staff.

The NSW Civil and Administrative Tribunal (**NCAT**) is empowered to resolve anti-discrimination complaints referred to it by the Anti-Discrimination Board of NSW.[3] It is probable that changes to both the

[1] Law Society of New South Wales, Submission to the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, 29 September 2023.
[2] New South Wales Law Reform Commission, Review of the *Anti-Discrimination Act 1977* (NSW) – Procedures and Compliance (Consultation Paper, July 2026).
[3] *Anti-Discrimination Act 1977* (NSW) s 93A.

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substance of the ADA as well as the procedures and remedies for complaints would increase filings in NCAT's Equal Opportunity Division. In this respect, we note that NCAT is already experiencing capacity pressures in terms of Member availability, case management and operational infrastructure.[4] Reform to the ADA must therefore be accompanied by commensurate and ongoing funding so that NCAT can deal with complaints referred to it in accordance with its statutory obligations, including to resolve disputes as justly, quickly, cheaply and with as little formality as possible.[5]

Balancing access to justice and the efficient administration of complaints

Our members have observed that the increasing availability of generative AI tools is making it easier for individuals to prepare and lodge complaints, potentially contributing to higher complaint volumes. In this context, reforms to improve access to the complaints process should be accompanied by appropriate procedural safeguards to ensure that complaints with no reasonable prospects of success can be identified and managed appropriately.

We note that there is a need to balance access to justice for complainants with the impact that unmeritorious complaints can have on respondents, particularly not-for-profit organisations and charities.

Broader context of anti-discrimination and anti-vilification law reform

We commend this review as reform of the ADA to create a modern, workable anti-discrimination regime for NSW is long overdue and should be a priority. A strong civil anti-discrimination regime can work in concert with appropriately tailored criminal laws to send a strong signal to the community on matters of discrimination, encourage cultural change and compliance, and provide effective remedies for those who experience discrimination and related unlawful conduct.

It is important to emphasise, however, that laws, whether they are criminal or civil, cannot be expected to address discriminatory conduct in isolation. Current threats to social cohesion are underpinned by diverse factors such as economic exclusion and sociocultural trends, including the spread of misinformation and disinformation. Solutions therefore may involve a range of educative measures (e.g., ensuring all students study civics and are educated in, and understand, their democratic rights and responsibilities) through to support for and funding of community-based health, wellbeing, housing, sports and artistic programs.[6]

Given that ADNSW is the government body tasked with eliminating discrimination, it should also be appropriately funded to undertake educative and preventative work in the field. This is important to ensure a measured, evidence-based approach to counter the rise in misinformation and disinformation, including online, which may exacerbate discriminatory views and conduct. Its education and outreach functions could also include providing guidance on the types of conduct that do not constitute unlawful discrimination under the ADA. This may assist in improving public understanding of the scope and operation of the ADA and reduce the incidence of complaints that fall outside its scope.

We also note that a number of ongoing inquiries may usefully inform the NSWLRC's current review. In particular, consideration should be given to any recommendations arising from the Royal Commission into Antisemitism and Social Cohesion, as well as the inquiry by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs into racism, hate and violence directed at Aboriginal and Torres Strait Islander peoples. The

[4] The Law Society of New South Wales, Submission to the Attorney General of New South Wales, *Investment in Access to Justice*, 18 June 2026, 4.
[5] *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d).
[6] The Law Society of New South Wales, Submission to the Honourable John Sackar AM KC, *Review of criminal law protections against the incitement of hatred* (5 August 2025).

extensive evidence gathered through both inquiries may assist in informing recommendations that appropriately respond to contemporary experiences of discrimination, vilification and hate-based conduct.

Relationship between reforms to the ADA and federal anti-discrimination laws

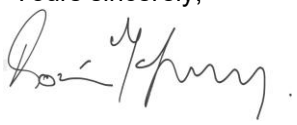
The Law Society supports harmonisation, where appropriate, between NSW and Commonwealth anti-discrimination laws, including on matters of procedure and compliance. However, this should not prevent the NSWLRC from recommending updates in NSW that may go beyond the protections available under Commonwealth law, with a view to creating a contemporary anti-discrimination regime that is informed by best practice.

Relationship between reforms to the ADA and human rights legislation

The Law Society has a long-standing position in support of dedicated human rights legislation both federally and in NSW. We suggest that such a framework would serve an educative purpose within the community and could assist in ensuring that legislation which raises issues around the balance of rights and freedoms is subject to expert human rights analysis and detailed parliamentary scrutiny, for example through statements of compatibility.

Thank you for the opportunity to participate in this review. Questions at first instance may be directed to Sonja Hewison, A/g Head of Commercial and Advisory Law Reform, at (02) 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours sincerely,



Ronan MacSweeney
President

Attachment

ATTACHMENT A

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?

In the Law Society's view, the ADA should include an express statement of its objectives, purposes and/or principles. In this respect, we note that the anti-discrimination legislation in Victoria,[7] Western Australia,[8] the ACT,[9] and the Northern Territory[10] all contain such statements, which can assist commissions, tribunals and courts in their interpretive task. As noted below, for example, an objectives clause can also be particularly helpful when considering the way in which exemptions should be provided for under the ADA.[11]

In addition, we consider that a clear statement of objectives, purposes and/or principles serves an educative purpose and sends a strong message about the importance of preventing and eliminating discrimination, promoting substantive equality, and fostering inclusive participation in public life.

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?

We suggest that the *Equal Opportunity Act 2010* (Vic) (**Victorian Act**) provides a useful model, noting that some adaptation would be required given that NSW does not currently have standalone human rights legislation. We support the Victorian Act's focus on promoting substantive equality and note that Victorian courts have interpreted the legislation beneficially in light of its "emphatic" objects, which leave "little if any room to read down general words by implication".[12]

As recommended by the Queensland Human Rights Commission in its review of Queensland's anti-discrimination legislation, we support recognition in the objects of the "cumulative and compounding impact" of intersectional disadvantage experienced by people who face discrimination on multiple grounds.[13]

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?

The Law Society supports expressly recognising international human rights instruments and principles within the ADA. This would assist NCAT and the courts to draw upon relevant international human rights law as an interpretive aid when applying the ADA. It would also serve an educative purpose by informing the public about the treaties entered into by the Australian Government and the sources of the rights in international law that have informed the development of anti-discrimination law.

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[7] *Equal Opportunity Act 2010* (Vic) s 3.
[8] *Equal Opportunity Act 1984* (WA) s 3.
[9] *Discrimination Act 1991* (ACT) s 4.
[10] *Anti-Discrimination Act 1992* (NT) s 3.
[11] See response to Question 35 of this Consultation Paper.
[12] See *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1, [61].
[13] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (July 2022) 14.

We suggest that it would be appropriate to refer to the core human rights treaties to which Australia is a party, which contain significant protections relating to equality and non-discrimination. These include the following:

- International Covenant on Civil and Political Rights[14];
- International Covenant on Economic, Social and Cultural Rights[15];
- International Convention on the Elimination of All Forms of Racial Discrimination[16];
- Convention on the Elimination of All Forms of Discrimination against Women[17];
- Convention on the Rights of the Child[18]; and
- Convention on the Rights of Persons with Disabilities.[19]

We consider that the objects should also reference the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**)[20], particularly given the long history of discrimination, both structural and interpersonal, experienced by First Nations people.[21]

The principle that anti-discrimination legislation should be construed beneficially is well established in Australian law.[22] The effect of recognising these international treaties and principles should be to guide the interpretation of the ADA consistently with Australia's international human rights obligations.

Question 4: Structure

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

As noted in our preliminary submission to the NSWLRC, improving the accessibility and understanding of anti-discrimination law is central to facilitating its purpose of preventing and eliminating discrimination and harassment. From an access to justice perspective, many complainants in anti-discrimination matters are self-represented, and the current structure of the ADA may hinder their ability to fully understand their rights and bring a claim.

We support the changes outlined in the Consultation Paper, including the replacement of the multiple attribute-specific parts of the current ADA with a consolidated list of protected attributes. We also support the inclusion of a section that sets out the test for discrimination that applies across all attributes, with separate provisions setting out the areas of coverage and any exceptions.[23]

The Consultation Paper raises the option of including examples or hypothetical scenarios in the ADA.[24] While examples serve an educative function, we consider they would be better placed in guidance material. The inclusion of detailed examples in the ADA itself may make it unnecessarily lengthy and difficult to navigate, particularly as the law develops over time.

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[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[15] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[16] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).
[17] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).
[18] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[19] *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[20] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (adopted 13 September 2007).
[21] See discussion on the implementation of UNDRIP in Australian Human Rights Commission (Aboriginal and Torres Strait Islander Social Justice Commissioner), *A Fair and Just Future for First Peoples*, Social Justice Report 2025.
[22] *AB v Western Australia* [2011] HCA 42, [24].
[23] Consultation Paper, 28.
[24] Consultation Paper, 29.

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?

We acknowledge the concerns set out in the Consultation Paper that the current terminology of "complaint" and "complainant" may be perceived as overly legalistic and carry negative connotations for complainants.[25] Terms such as "application" and "applicant" arguably provide a more neutral alternative.

On balance, however, we support retention of "complaint" and "complainant", noting these terms are used in Commonwealth anti-discrimination legislation.[26] As individuals alleging discrimination will often have a choice as to whether to pursue their matter under state or Commonwealth law, maintaining consistent terminology across jurisdictions serves to improve the accessibility of the anti-discrimination framework.

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 consider that it may be appropriate to remove the requirement that representative body complaints may only be made on behalf of people who are personally affected by conduct or events that may be unlawful.[27]

We agree with the analysis of the NSWLRC in its 1999 review of the ADA (**1999 Review**), which recognised that permitting complaints by persons or organisations that are not personally affected can assist in addressing systemic discrimination and advancing the broader public interest objectives of anti-discrimination law. We also note the NSWLRC's observation that most elements of open standing are already available under the existing framework.[28]

If the requirement is to be removed, it is appropriate that there are safeguards to prevent people with no interest making a complaint. One possible approach would be to permit complaints by a person or organisation with a "sufficient interest" in the matter. It could be open to the President of ADNSW to make guidelines with examples of what constitutes sufficient interest. Another approach could be a requirement for a person or representative body that is not personally affected to seek leave to make a complaint, accompanied by a discretion to dismiss complaints where the "sufficient interest" of the complainant is not made out.

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?

We note that this question raises complex issues around substituted and supported decision-making. At the current time, there is no legislative framework for supported decision-making in NSW. The existing legislative frameworks dealing with decision-making are predominantly found in the *Guardianship Act 1987* (NSW) and the *Powers of Attorney Act 2003* (NSW).[29] These rely on a combination of the best interests test and substituted decision-making model, and do not incorporate the principles of supported decision-making.

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[25] Consultation Paper, 50.
[26] *Australian Human Rights Commission Act 1986* (Cth) s 3(1) definition of "complainant", definition of "complaint".
[27] *Anti-Discrimination Act 1977* (NSW) s 101(3)(a)(ii).
[28] NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) [8.14] – [8.18].
[29] See further discussion in Parliament of New South Wales, Parliamentary Research Service, *Supported decision-making for people living with dementia in NSW* (Research Paper, October 2025).

As noted in a recent submission on this issue, the Law Society encourages the introduction of a legislative framework for supported decision-making with a focus on enabling people to exercise their legal capacity and make decisions that impact them.[30] In our view, however, this reform should be implemented consistently across all relevant legislation, rather than in a piecemeal fashion, including through amendments to the ADA.

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?

Representative bodies can make a complaint if they satisfy ADNSW that each person on whose behalf they are making the complaint consents to the complaint being made on their behalf, and the body has a "sufficient interest" in the complaint.[31] Some of our members have suggested that the current consent requirements may present practical barriers to representative complaints, particularly where discrimination affects a large number of people and obtaining consent from every affected individual is difficult or impractical. This may limit the capacity of the ADA to address systemic discrimination. At the same time, it is important to ensure that individuals who do not wish to be involved in the representative proceedings, or who wish to pursue individual claims, are not disadvantaged.

The Law Society suggests examining whether a model analogous to the Federal Court's representative proceedings "opt-out" regime[32] could assist in reducing barriers to group complaints while preserving appropriate opportunities for affected individuals to pursue individual claims. However, any such reform would require careful consideration of issues including group definition, representation, and the management of additional or parallel complaints. The conduct of representative proceedings would need to be carefully monitored to ensure that individuals who have not expressly consented to participate are not exposed to victimisation or other forms of adverse conduct.

Question 9: Vilification complaints

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

In a previous submission to the NSWLRC, the Law Society did not support the introduction of a harm-based test into the NSW criminal vilification offence under s 93Z of the *Crimes Act 1900* (NSW).[33] We agree with the conclusions reached by the NSWLRC that such a test is insufficiently certain for the purposes of the criminal law.[34]

For the purposes of the civil regime, however, we consider that it may be appropriate to enact a harms-based test in addition to a separate incitement-based test, provided that the harms-based test is accompanied by adequate safeguards to protect freedom of speech in line with the exceptions provided for in s 18D of the *Racial Discrimination Act 1975* (Cth). We support the approach in Victoria, whereby the harms-based test should include an objective assessment of the conduct from the perspective of a reasonable person with that same attribute.[35]

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[30] The Law Society of NSW, submission to the to the Committee on Ageing and Disability, *Inquiry on supported decision-making in NSW* (19 March 2026).
[31] *Anti-Discrimination Act 1977* (NSW) s 87C(1).
[32] See *Federal Court of Australia Act 1976* (Cth) ss 33J–33K.
[33] The Law Society of NSW, submission to the NSW Law Reform Commission, *Serious racial and religious vilification* (17 April 2024).
[34] NSW Law Reform Commission, *Serious racial and religious vilification* (Final Report, September 2024), 57.
[35] *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 9, inserting *Equal Opportunity Act 2010 (Vic)* s 102D(1)(b).

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?

As noted in the Consultation Paper, the requirements for a complainant to make a complaint under the ADA are not onerous. The complaint is not required to be made in any particular form and it can be lodged in a variety of ways.[36] We do not consider it necessary for there to be the introduction of a filing fee in circumstances where there is currently no fee for making a complaint under the ADA.

We consider that the requirement that a complaint should be made in writing should be retained, provided that ADNSW is able to provide appropriate assistance to those complainants who may need support to meet that requirement.

The ADA allows ADNSW to assist a person to make a complaint, but does not specify the type or extent of the assistance that may be provided to complainants. We do not consider that it is necessary to amend the ADA to provide greater specificity as to the assistance which can be provided, but we would support ADNSW continuing to address such issues on a case-by-case basis.

We acknowledge that anonymous complaints may make the investigation of complaints more difficult and may adversely affect procedural fairness for respondents. However, complainants may have legitimate concerns about their safety, privacy or other interests if their identity is disclosed. Rather than permitting complaints to be made anonymously, consideration could be given to the approach adopted in Queensland and the Northern Territory, whereby the relevant decision-maker may make orders prohibiting the disclosure of the identity of a person involved in a complaint in certain circumstances.[37]

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?

While adopting a stricter approach to complaints made in more than one jurisdiction may, on its face, seem desirable to reduce "forum shopping", it could have unintended consequences. Many complainants are self-represented and may have difficulty understanding the implications of commencing proceedings in one jurisdiction rather than another. It is therefore appropriate to retain flexibility for situations where a complainant subsequently obtains legal advice that it would be more appropriate for their claim to be commenced in another jurisdiction.

In this context, we also note the observations of the Legislative Council Portfolio Committee No 5 in its review of the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (NSW) regarding circumstances where the same facts give rise to claims in multiple jurisdictions pursuing different objectives.[38] For example, the same conduct may be relevant to both a workers compensation claim and a complaint under the ADA. In these circumstances, a person should not necessarily be prevented from accessing the anti-discrimination regime simply because they have pursued another legal avenue in relation to the same factual circumstances.

[36] Consultation Paper, p. 59.
[37] *Anti-Discrimination Act 1992* (NT) s 100; *Anti-Discrimination Act 1991* (Qld) s 145.
[38] NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, Report 55 (September, 2020) [3.82].

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?

We agree with the conclusion reached by the NSW Legislative Council Portfolio Committee No. 5 that ADNSW's power to decline complaints should remain discretionary.[39] As noted in our submission on the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (NSW)[40], such a change may negatively affect vulnerable individuals. For example, there may be individuals with meritorious complaints who are unable to articulate them at the initial stage due to language barriers, a lack of legal assistance, disability and/or cognitive impairment. Limiting ADNSW's discretion to decline a complaint may curtail the ability of those individuals to have their complaints investigated by ADNSW and assessed on their merits.

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?

ADNSW has a discretionary power to decline a complaint (in whole or in part) if all or part of the alleged conduct occurred more than 12 months before the complaint was made.[41]

The Law Society supports extending this time limit to two years, which is in line with the Commonwealth regime.[42] We support consistency between the State and Commonwealth regimes and agree with the conclusion of the Law Reform Commission of Western Australia that a two-year limitation period strikes an appropriate balance between ensuring access to justice for complainants and minimising potential prejudice to respondents arising from delayed claims.[43]

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?

Under s 92 of the ADA, the President already has discretion to decline a complaint at any stage of an investigation on a number of grounds, including where "the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance". There are different views among our members on whether ADNSW should be empowered to decline a complaint before it is accepted for investigation.

Some members have suggested that there be no change to the current powers to ADNSW, noting that those most at risk of discrimination are often also the least able to set out the legal basis for their complaint, particularly where they live with disability or experience English language barriers. There is a risk that meritorious complaints could be characterised as misconceived simply because the complainant is unable to clearly articulate their claim at the application stage.

Other members have observed that the widespread availability of generative AI tools may contribute to an increase in the volume of complaints lodged with ADNSW, including complaints that are misconceived or lacking

[39] Ibid, rec 1. See discussion at [2.98] – [2.102].
[40] The Law Society of NSW, Inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (Submission 30 April 2020).
[41] *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).
[42] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b)
[43] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) rec 133, 251–252.

in substance. In the context of increasing complaint volumes, a power to decline clearly frivolous, vexatious or misconceived complaints at an earlier stage may assist ADNSW to manage its caseload efficiently and avoid unnecessary delays in the investigation of meritorious complaints.

We would support ADNSW being empowered to refer a potentially vexatious complainant to the Attorney General to consider applying for a vexatious proceedings order, but importantly, appropriate safeguards would need to apply to ensure that access to justice is not impeded and that such powers are used only sparingly. We note that any such application would ultimately be determined by the Supreme Court under the *Vexatious Proceedings Act* 2008 (NSW). Judicial consideration of vexatious proceedings orders has consistently emphasised the serious nature of such orders, which are not made lightly.[44]

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?

In our view, the existing grounds contained within the ADA are sufficient for ADNSW to decline unmeritorious complaints during the complaints stage.[45]

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)?

We suggest that it is appropriate for ADNSW to notify the complainant before a complaint is declined by ADNSW and allow the complainant to make submissions in relation to the proposed decision. This would give a complainant an opportunity to obtain legal advice and further articulate the basis of their complaint. We suggest, in the interests of procedural fairness, that the respondent should be notified at the same time this occurs and is also provided the opportunity to make any relevant submissions.

It is appropriate to offer an avenue of merits review for a complaint that is declined by ADNSW. We agree with the recommendation in the 1999 Review that a complainant should be able to have their complaint referred to NCAT if it was declined for any reason. This may be more expedient and in the interests of fairness than the current arrangement whereby a complainant can only seek judicial review in the Supreme Court.[46]

[44] *Potier v Attorney General (NSW)* (2015) 89 NSWLR 284, [17].
[45] See ss 87B(3)(b), 89B(2) and 92(1).
[46] *Supreme Court Act 1970* (NSW) s 69.

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?

As noted in the Consultation Paper, a respondent may choose not to respond to the complaint filed against it.[47] While ADNSW has the power to compel the production of information or documents from both the complainant and the respondent[48], in the experience of our members, this does not always occur.

The absence of a written response from a respondent presents a significant barrier to understanding the strength of a complaint and identifying settlement options ahead of a conciliation. This is particularly apparent, for example, in matters where there is a significant power imbalance between the individual complainant and the respondent. Our members have cited examples where they were required to lodge a request for access to information under the *Government Information Public Access (GIPA) Act 2009* (NSW) on behalf of their client (a complainant) to obtain information relevant to the complaint.

We suggest it may be appropriate, and in the interests of the timely resolution of matters, for ADNSW to require respondents to provide a written response, and any information or documents sought, if they are likely to assist the parties to resolve the dispute through conciliation and are relevant to the complaint. This would clarify the issues in dispute and encourage early settlement.

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:
- **What criteria should guide ADNSW in deciding whether to use this power, and**
- **Should these criteria be expressed in the ADA?**

Legal Representation

The Law Society supports a change to the ADA to allow for a right to legal representation in all ADNSW complaint processes.

The absence of the right to legal representation is sometimes cited as a way of maintaining the informality of conciliations. We note, however, that in many anti-discrimination matters (for example, matters involving an employee as the complainant and their workplace as the respondent), there are significant power imbalances from the outset. An unrepresented complainant, for example, will typically be at a disadvantage to a respondent from a large workplace, who may be represented at the conciliation by corporate counsel or an otherwise senior employee with legal training and/or knowledge. Our members have noted that in these cases, the unrepresented complainant may feel intimidated, and be unable to participate meaningfully in the conciliation.

Further, complainants may experience vulnerabilities, including disability, low literacy or poor English language skills. Legal assistance could help these complainants better understand the conciliation process. It could also promote settlement, as a lawyer could assist a client to realistically assess the merits of their matter and its prospects of success if it proceeds to NCAT or the courts. Further, a lawyer is well-placed to advise their client, both complainant and respondent, as to the risk of costs orders that may arise, which can further assist complaints to be resolved in a timely manner.

[47] Anti-Discrimination NSW, "How We Handle Complaints" (4 December 2024).
[48] *Anti-Discrimination Act 1977* (NSW) s 90B(1).

Legal representation may also improve the efficiency of the complaints process. As generative AI tools become more widely available, parties may produce extensive submissions and supporting material that are not always focused on the issues at hand.

Attendance at conciliations

We support measures that encourage meaningful participation in conciliation. In the experience of our members, the failure of respondents to engage in conciliation can unnecessarily prolong the resolution of complaints and result in matters being referred to NCAT that may otherwise have been resolved at an earlier stage.

While we do not consider it desirable to increase the penalty for not complying with a notice to attend, it may be appropriate to consider costs consequences where a party unreasonably refuses to attend a conciliation as provided for in Queensland.[49]

Power to prioritise and expedite complaints

We suggest that it would be appropriate to expressly empower ADNSW to prioritise or expedite conciliations in certain situations. While the power should remain discretionary, the ADA could include a non-exhaustive list of factors to guide the decision-maker's discretion. These might include whether:

- the alleged discriminatory conduct and underlying relationship is ongoing;
- the complainant is experiencing, or is at risk of experiencing, significant harm if the matter is not dealt with promptly;
- the complaint concerns urgent issues affecting a person's health, safety, employment, housing or access to services; or
- there are other exceptional circumstances, such as serious illness or limited life expectancy, that justify expedited resolution.

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 adoption of a more flexible dispute resolution framework, including by expanding the range of dispute resolution options available through ADNSW and providing more choice in how disputes are resolved. We consider the recommendations made by the Western Australian Law Reform Commission in this respect to be sound, and equally applicable to the NSW context. First, the ADA should empower ADNSW to tailor the dispute resolution process to the nature of the dispute. Second, the parties should be permitted to resolve a complaint by consent on the papers, without having to attend a conciliation conference.[50]

It is important that dispute resolution processes are responsive to the needs of diverse communities. This includes ensuring that complaint handlers, conciliators and decision-makers receive culturally informed training. Additional accommodations may also be required, such as access to Aboriginal liaison officers and other measures designed to promote culturally safe participation in the complaints process.

[49] *Anti-Discrimination Act 1991* (Qld) s 160.
[50] Law Reform Commission of Western Australia, Review of the Equal Opportunity Act 1984 (WA), Project 111, Final Report (2022) [10.1.2.1], rec 143, rec 144.

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 consider that the current provisions of the ADA that deal with terminating a complaint are appropriate. We note that it is also important that ADNSW is able to keep complaints open in appropriate circumstances in the interests of justice and the effective administration of the anti-discrimination regime, for example, where a police investigation or court proceedings in relation to the same or related conduct are ongoing.

Question 21: Timeframes for finalisation

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

In our view, parties should be permitted to request that ADNSW refer unresolved complaints before 18 months have lapsed. In the experience of our members, most matters are resolved, or reach a point at which further conciliation is unlikely to be productive, well before the expiry of the current 18 month period. In such circumstances, requiring parties to remain in the conciliation process may result in unnecessary delay, additional costs and frustration for both complainants and respondents.

We consider that a referral timeframe of between six and nine months would be more appropriate. This would encourage the timely progression of complaints while preserving adequate opportunity for investigation and conciliation. Any reduction in the referral period should, however, be accompanied by appropriate resourcing of ADNSW to ensure that matters are actively managed and assessed throughout the complaints process.

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?**

We consider that the grounds on which ADNSW may or must refer an unresolved complaint to NCAT should include that all reasonable attempts at conciliation have been exhausted.

In our view, parties should be permitted to request that ADNSW refer unresolved complaints before 18 months have lapsed. In the experience of our members, most matters are resolved, or reach a point at which further conciliation is unlikely to be productive, well before the expiry of the current 18-month period. In such circumstances, requiring parties to remain in the conciliation process may result in unnecessary delay, additional costs and frustration for both complainants and respondents.

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?

There are different views among our members on whether participation in dispute resolution with ADNSW should be voluntary, allowing complainants to apply directly to NCAT without first bringing their complaint to ADNSW. Direct access to NCAT may, in some cases, result in a more efficient resolution of disputes, benefiting both

complainants and respondents. However, anti-discrimination matters often lend themselves to alternative dispute resolution processes, which can be less adversarial than formal proceedings and provide parties with a meaningful opportunity to be heard. For some complainants, the opportunity to tell their story and engage in a facilitated resolution process may be an important outcome in itself.

If direct access to NCAT were permitted under the Act, it would be appropriate for NCAT to be empowered to refer matters back to ADNSW for conciliation where it considers that a negotiated resolution may still be possible. This is consistent with processes for court-ordered mediation in other NSW jurisdictions.[51]

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 suggest adopting the criteria for bringing representative proceedings used in the federal jurisdiction.[52] These criteria are well understood, have been the subject of extensive judicial consideration, and provide a clear and workable framework for group claims. We note that these criteria also apply under the *Australian Human Rights Commission Act 1986* (Cth) for representative complaints without a minimum number of seven class members, and support this approach for the ADA, noting that the minimum may operate to exclude otherwise suitable representative proceedings involving a smaller group of affected persons.[53]

We consider that the same criteria should apply to representative proceedings brought in both ADNSW and NCAT. Applying different tests at different stages of the anti-discrimination process would introduce unnecessary complexity and may create confusion for applicants and respondents alike.

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? If ADA cases were heard by these courts, which costs model should be applied?
b) 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?

In addition to the limited circumstances where courts can hear ADA complaints, we suggest that it is appropriate for this to occur where ADA claims arise out of the same facts, matters or controversy as another claim properly before the court e.g., breach of contract, negligence etc. This is a more efficient approach that may better encourage settlement between the parties.

While some members have reported that matters were resolved more quickly after being transferred to a court, we note that expedited resolution may reflect the parties' strategic decisions and willingness to settle once court proceedings have commenced rather than any inherent procedural advantage of the court itself. Further, the question of whether additional pathways to the courts are required will depend, in part, on any broader reforms to the ADA. For example, if NCAT's powers to award compensation are expanded, there may be less need for complainants to commence proceedings in a court solely to seek a higher quantum of damages.

We suggest empowering ADNSW to refer an unresolved work-related complaint to the NSW Industrial Relations Commission and/or Industrial Relations Court of NSW where their specialist employment jurisdiction is relevant and where the complainant requests this. Consideration could also be given to providing a concurrent

[51] See, for example, Supreme Court of NSW, *Practice Note SC Gen 6*, cl 8.
[52] *Federal Court of Australia Act 1976* (Cth) s 33C(1).
[53] *Australian Human Rights Commission Act 1986* (Cth) ss 46PB(1), 46PO(2A).

discrimination jurisdiction in the NSW Industrial Relations Commission and/or Industrial Relations Court of NSW to be able to hear and determine work-related discrimination matters. Given the specialist employment/industrial expertise of these bodies, this may offer a more efficient resolution of the matter.

A practical model which could be followed is that which operates in Queensland. After investigation and unsuccessful conciliation by the Queensland Human Rights Commission, work-related complaints may be referred to the Queensland Industrial Relations Commission for hearing and determination, while other complaints go to the Queensland Civil and Administrative Tribunal.[54] We would recommend retaining complementary anti-discrimination and industrial pathways rather than creating a single forum, with safeguards against duplicated relief. The ADA should also stipulate in what circumstances a matter could be referred to or be dealt with by the NSW Industrial Relations Commission and when it should be dealt with by the Industrial Relations Court of NSW.

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 note that there are differing views among our members on the use of non-disclosure agreements, including whether it would be appropriate for NSW to adopt legislation similar to that which now applies as a result of the *Restricting Non-disclosure Agreements (Sexual Harassment at Work) Act 2025* (Vic). It is generally recognised that confidentiality provisions can play an important role in facilitating the settlement of complaints and may be sought by either complainants or respondents for legitimate reasons. However, it is critical that such agreements are entered into voluntarily and that complainants are not subject to pressure, duress or undue influence when agreeing to confidentiality obligations.

We support the development of non-legislative best practice guidance and model confidentiality clauses for use in ADA matters. Such guidance could emphasise that confidentiality provisions should be voluntary, clearly explained, drafted in plain language, and no broader than is reasonably necessary in the circumstances. Consideration could also be given to encouraging parties to obtain independent legal advice before entering into agreements containing confidentiality provisions and ensuring that such provisions do not prevent individuals from obtaining legal, medical or psychological support, reporting unlawful conduct to regulators or law enforcement agencies, or complying with legal obligations.

We further recommend that consideration be given to amending the ADA to introduce a prohibition on any person threatening, commencing or maintaining a civil proceeding, including defamation, breach of confidence or contract proceedings, for the purpose of punishing or deterring a disclosure about sexual harassment or sex discrimination. The protection could cover disclosures made without malice to a broad range of recipients, including support people and institutions, and should not depend on the disclosure being made through a formal complaint or the allegation later being substantiated. The law should preserve the ability to pursue a genuine civil claim for a proper purpose; it should target proceedings used to punish, deter or silence disclosures.

[54] *Anti-Discrimination Act 1991* (Qld) s 166.

Question 27: Enforcing settlement agreements

What, if any, changes should be made to the procedures for enforcing settlement agreements made during conciliation at ADNSW, or NCAT proceedings?

We do not consider that there needs to be any substantive change in this area or an extension of the time periods by which any agreement must be registered.

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?

(a) Cap on compensation for loss and damage

At the current time, the maximum amount of compensation that NCAT can award a respondent to pay a complainant is $100,000.[55]

Our members hold a a diversity of views on whether the cap should be removed. Some members favour removing the cap, noting that this would align NSW with most other Australian jurisdictions.[56] Removing the cap may deter discriminatory conduct and allow for compensation awards that can better reflect the effects of some types of discriminatory conduct on the complainant. It may also strengthen the deterrent effect of the anti-discrimination regime by encouraging businesses to address systemic causes of discrimination, rather than treating compensation awards as simply a cost of doing business. It is arguable that this approach also recognises the human rights objectives of anti-discrimination legislation and reinforces the importance of providing effective remedies for unlawful discrimination.

Other members support the retention of the cap, with relevant adjustments in line with inflation. They noted concerns that NCAT, unlike a court, is not bound by adversarial procedures and the rules of evidence, and suggest that these procedural safeguards are appropriate when a complainant seeks an award of damages that exceeds $100,000 (or as indexed). Members also raised procedural concerns about a tribunal in which legal representation is not routinely available being empowered to award substantial sums in damages. The assessment of larger and more complex damages claims, including exemplary damages, may be more appropriately undertaken by a court.

While we acknowledge that there are arguments both for and against retaining the cap, its continued application may encourage complainants to bring discrimination claims in the Commonwealth jurisdiction. This could undermine the effectiveness of the NSW anti-discrimination regime, particularly if the Government is minded to enact broader reforms to its content and structure.

(b) Powers to award compensation under the ADA

We support the previous recommendation of the NSWLRC in its 1999 Report, namely that the remedies available in representative complaints under the ADA be broadened to mirror those in the *Federal Court of*

[55] *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).
[56] Only Western Australia and the Northern Territory have a compensation cap. See *Equal Opportunity Act 1984* (WA) s 127B(1) and *Anti-Discrimination Act 1992* (NT) s 88(1)(b).

Australia Act 1976 (Cth), including discretion to award damages to the group, sub-group or individual members of the group.

(c) Compensation for offenders in custody

We note that the ADA currently prevents offenders in custody from receiving payment of a compensation award for discrimination that occurs in custody, or failure by the state (and its agents) to comply with an NCAT order made in connection with a complaint about such breaches.[57]

Our members are concerned that this provision, which was introduced in 2007, may reduce accountability for discrimination that occurs in the NSW prison system. It is important that discrimination is addressed in the prison context to ensure a safe environment that does not detract from the rehabilitation of offenders. This is particularly important given the significant over-representation of Aboriginal and Torres Strait Islander people in the prison system, and the well-documented history of racism and discriminatory treatment experienced by First Nations peoples within Australian institutions.

We consider that the approach adopted in Victoria outlined in the Consultation Paper strikes an appropriate balance.[58] This approach allows for offenders to receive some compensation while holding remaining money on trust to pay any judgment debt owing by the offender to a creditor or any damages owed to the victim, with the remaining money to be paid to the offender. In our view, this appropriately recognises both the importance of providing a remedy for discrimination, while acknowledging the interests of victims and creditors. Some of our members have suggested that the $10,000 limit on payments under the Victorian Act may be too low, however, and it would be appropriate to allow for payments with a higher maximum.

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?

While NCAT is empowered to make so-called mandatory orders in defined matters i.e., orders that a respondent take any reasonable act or course of conduct to redress loss or damage the complainant has suffered, in the experience of our members, these orders are not frequently made. We therefore suggest it would be useful to include examples of the types of orders that NCAT could make, such as those cited in the Consultation Paper.[59] These types of orders, which can be directed to training and reforms to organisational practices, may have a wider systemic impact than the award of damages to the impacted individual.

We also consider it appropriate that mandatory orders should be made available in representative complaints, noting their availability in all other jurisdictions excluding Western Australia.[60] To support the effectiveness of this mechanism, we consider that the President should be empowered to oversee compliance with such orders.

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?

It would be appropriate to extend NCAT's power to require respondents to develop or implement programs or policies aimed at eliminating certain unlawful conduct beyond vilification to other forms of unlawful conduct. Such

[57] *Anti-Discrimination Act 1977* (NSW) s 111A.
[58] *Corrections Act 1986* (Vic) ss 104V, 104W, 104ZG, 104ZH, 104ZI, 104ZJ.
[59] Consultation Paper, 131.
[60] *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).

remedies can help drive systemic change within organisations and workplaces and may send a strong signal to others operating in the same industry. Further, they may assist in addressing the underlying causes of unlawful conduct, reducing the likelihood of future complaints and promoting long-term compliance with anti-discrimination obligations.

As with mandatory orders discussed above, there may be a reluctance on the part of some NCAT members to make use of these remedies in practice. Consideration should therefore be given both to encouraging their use and to establishing an appropriate mechanism for monitoring compliance with any orders made.

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?**

The Law Society considers that it is appropriate to replace NCAT's existing powers to order specific remedies in ADA matters with a broad power to make any orders "as it sees fit". Such a framing may give NCAT greater discretion to make orders that are more appropriately tailored to the facts of the matter before them, while also facilitating orders directed at addressing systemic discrimination and promoting broader organisational change. At the same time, we consider it desirable for the legislation to provide a note referring to a non-exhaustive list of examples of the types of orders that may be made. This would preserve flexibility while providing guidance to parties and decision-makers as to the intended scope of the power.

The Consultation Paper also suggests that the ADA could be amended to expressly provide for other types of remedies, for example in (b)(i) to (v) above, coupled with a broad power to make any orders as it sees fit, as described above. We generally support providing examples of the types of orders available under the ADA, noting the importance of declarations etc. for some complainants. However, we do not consider it necessary to highlight distinct remedial provisions for sexual harassment. Consistent with our support for a simplified and harmonised anti-discrimination framework, remedies should generally be available across all forms of unlawful discrimination and harassment, unless there is a compelling reason to differentiate between them.

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?

In our view, ADNSW should be empowered, in the same way as the Australian Human Rights Commission, to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination, either at the request of the Minister or on its own motion. We agree that such a power should be appropriately constrained and exercised transparently. This could be achieved by prescribing factors under the ADA relevant to the decision to commence an inquiry, such as the seriousness and scale of the alleged conduct, the number of people potentially affected, and whether the matter raises issues of broader public interest.

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?**

We support the increase of maximum penalties for non-compliance of NCAT non-monetary orders and agree that an appropriate comparison point may be the higher maximum penalties which can apply under industrial laws for failing to comply with orders for remedies in workplace sexual harassment cases.

Under s 113 of the ADA, the President may "take steps" to enforce NCAT orders where they consider it to be in the public interest to do so. Provided the complainant consents, we do not consider the public interest requirement serves a clear purpose. Once NCAT has made an order, the substantive merits of the matter have already been determined, and there appears to be limited justification for imposing an additional public interest threshold.

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 support adoption of the Commonwealth equal access costs regime for proceedings under the ADA.[61] Failure to do so may encourage complainants to pursue claims in the Commonwealth jurisdiction, where more favourable costs protections are available, undermining the accessibility and effectiveness of the State regime.

A key concern prior to the introduction of the federal model was that many applicants were unable to obtain legal representation. Access to legal representation is critical to ensuring that people alleging unlawful discrimination or other unlawful conduct can effectively vindicate their rights and obtain appropriate remedies. The equal access model appropriately balances these considerations. Applying such a model, NCAT would retain a discretion to award costs where proceedings are vexatious or a party's unreasonable conduct has caused unnecessary expense, providing sufficient protection against unmeritorious claims. Conversely, where a respondent is found to have engaged in unlawful discrimination or other conduct, it is appropriate that they bear the reasonable legal costs incurred by the successful applicant.

Further, we are concerned that requiring applicants to provide security, typically by paying money into court, may operate as a significant barrier to justice and effectively prevent people of limited means from pursuing otherwise meritorious complaints.

[61] *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.

CHAPTER 9: EXEMPTIONS 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 purpose should exemptions serve?

In our view, the ADA should continue to provide a procedure for exemption applications if a general special measures provision is introduced. Although a special measures provision would reduce the need to seek exemptions for measures directed at achieving substantive equality, it may not be possible to anticipate every circumstance in which an exemption is justified. The exemption procedure should therefore address limited circumstances that fall outside the scope of special measures but in which departure from the ADA's general prohibitions is nevertheless warranted. Any exemption should be assessed on a case-by-case basis and consistently with the objects, scope and purpose of the ADA.

If the ADA includes a broad objects and purposes clause, exemptions should be granted only where they are consistent with, and further, those objects and purposes. This would ensure that the exemption process remains aligned with the broader objectives of the legislation and does not undermine its protections.

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?**
- **iii. Should exemptions exclude certain protected attributes or unlawful conduct? If so, what should these be and why?**
- **iv. What, if any, other changes should be made to the exemptions process?**

We support greater transparency and opportunities for public participation in the exemptions process. This could include publishing exemption applications and inviting submissions from affected individuals, communities and other interested parties, particularly where an application may have broader implications. Reasons for decisions should also be published to promote transparency, consistency and accountability. We consider that ADNSW should remain the decision-maker, given its specialist expertise in administering the ADA.

We do not consider that exemptions should exclude particular protected attributes or forms of unlawful conduct. As noted above, it may not be possible to anticipate every circumstance in which an exemption could be justified. Applications should instead be assessed individually against clearly defined statutory criteria and consistently with the objects and purposes of the ADA.

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?**
- **iv. 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:**
- **v. limited by the stated objects of the Act (if any), or**
- **vi. determined as a matter of discretion having regard to the objects, scope and purpose of the Act as a whole?**

Where the activity for which the exemption is sought would or might constitute a contravention of the ADA, we consider there should be criteria set out in the legislation for deciding whether to grant an exemption. We support the criteria in the NSWLRC's 1999 Review, in addition to the requirement that the ADNSW must consider whether the exemption would be consistent with the objects and purposes of the ADA. To allow the appropriate degree of flexibility, it would also be appropriate to require the decision maker to consider any other relevant factors.

In considering consistency with the objects and purposes of the ADA, it would be appropriate for exemptions to be determined as a matter of discretion having regard to the objects, scope and purpose of the Act as a whole.

Question 38: The exemptions criteria

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

Where the activity for which the exemption is sought would or might constitute a contravention of the ADA, we consider there should be criteria set out in the ADA for the ADNSW in deciding whether to grant an exemption. We support the criteria in the NSWLRC's 1999 Review, in addition to the requirement that the ADNSW must consider whether the exemption would be consistent with the objects and purposes of the ADA. To allow the appropriate degree of flexibility, it would also be appropriate to require the decision maker to consider any other relevant factors.

We also support the expansion of the relevant criteria to include consideration of whether any other persons or bodies other than the applicant support the application, as is the case in matters before the Queensland Civil and Administrative Tribunal or the Queensland Industrial Relations Commission.[62]

CHAPTER 10: OTHER MECHANISMS

Preliminary remarks on Chapter 10

Chapter 10 of the Consultation Paper is directed to a wide range of proactive and preventative measures to promote compliance with the ADA. Many of the proposals contemplate a significant expansion to the role of ADNSW, including investigation and inquiry powers.

We suggest that it is important to distinguish between the functions that should form part of an effective anti-discrimination framework and the wider question of whether all functions should be carried out by ADNSW or whether another body is best placed to adopt the investigatory and prosecutorial role.

Question 39: Assisting parties

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

From an access to justice perspective, it is important that parties can obtain assistance to pursue complaints before NCAT. However, we consider that this assistance would be more appropriately provided through adequately funded independent legal assistance services. An actual or perceived conflict may arise if ADNSW provides substantive assistance to one party, given its role as an independent conciliator of complaints.

Reform to the anti-discrimination framework should therefore be accompanied by adequate, demand-driven funding for specialist legal assistance services that deal with anti-discrimination matters.

[62] Consultation Paper, p. 171.

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?

There should be capacity for complaints or proceedings to be initiated in the public interest, particularly where the conduct is systemic, affects a broader class of people or may not otherwise be effectively challenged by an individual complainant. As noted above, however, consideration should be given to separating this enforcement function from ADNSW's current role as an impartial conciliator of individual complaints.

The ADA should set out transparent criteria for initiating any such proceedings, including whether the matter raises issues of significant public interest, involves systemic or repeated conduct, affects a vulnerable group, and/or is unlikely to be pursued effectively through an individual complaint.

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 agree with the NSWLRC's proposal from the 1999 Review that the ADA be amended to provide that the Minister may refer a matter to the President for investigation and that the President should be given the power to make recommendations to the Minister that a particular matter be referred for investigation. We also agree with the factors outlined in the 1999 Review that the President could consider when exercising these powers, including:

- the seriousness of the suspected discrimination;
- the number of people who may be affected;
- whether the conduct is likely to be continuing, or the period that has elapsed since the conduct occurred;
- the likelihood of a complaint being made;
- if a complaint has been made, the complainant's ability to conduct the matter effectively; and
- the public interest.[63]

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?

It may be desirable in some circumstances for ADNSW to continue to have the power to investigate a complaint that has been withdrawn.

We note, however, that a complainant may withdraw their complaint for a myriad reasons specific to their circumstances, including health reasons, and due to threats, coercion, family or domestic violence, or a fear of retaliation. Any such power to continue to investigate a matter should therefore be exercised only in exceptional circumstances, following consultation with the complainant and after a careful assessment of the risks to their safety, privacy and wellbeing. The complainant's views should be given substantial weight, and the investigation should not continue where the risks to them cannot be appropriately managed.

If public interest concerns remain, we suggest that ADNSW consider whether the relevant conduct could be investigated independently without relying on the withdrawn complaint.

[63] Consultation Paper, 182. NSW Law Reform Commission, Review of the *Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 126.

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?

As noted in our previous submissions[64], we support a positive duty that covers all conduct prohibited by the ADA. In our view, a focus on systemic discrimination could assist more people than a solely complaints-based regime, as businesses would be required to account for their cultures and organisational practices.

If a positive duty is introduced in NSW, we suggest that ADNSW should be empowered to consider compliance with that duty during the complaints process. This should include circumstances where the subject matter of an individual complaint indicates there may be a broader or systemic failure by the duty holder in breach of the duty.

Some of our members support the proposal of an individual remedy for a failure to comply with the positive duty, noting that without this, it may have limited practical effect.[65] Such an approach may complement the systemic and preventative purpose of the positive duty rather than leaving enforcement solely to the regulator.

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?

The Law Society supports reform that would empower NCAT to receive *amicus curiae* submissions from ADNSW where such submissions would assist in its understanding of significant or complex questions arising in particular proceedings. We consider that it is appropriate to adopt the model which currently applies to the Australian Human Rights Commission, namely that an Australian Human Rights Commissioner may seek leave to appear as *amicus* where:

- the Commissioner thinks the orders may affect to a significant extent the human rights of persons who are not parties to the proceedings;
- the Commissioner believes that the proceedings have significant implications for the administration of the relevant legislation; or
- the proceedings involve special circumstances such that the Commissioner is satisfied that it would be in the public interest to assist the court as amicus curiae.[66]

Further, the Australian Human Rights Commission is able to intervene, with the leave of the court and subject to any conditions imposed by the court, in proceedings that involve race, sex and disability discrimination, human rights and equal opportunity in employment.[67]

It may be appropriate to also consider whether only ADNSW should be empowered to intervene, or whether other persons and organisations may be permitted in addition to those currently provided for under s 44(4) of the *Civil and Administrative Tribunal Act 2013* (NSW). For example, research institutes and other suitably qualified non-government organisations may be able to provide NCAT with relevant, evidence-based insights on particular discrimination issues, including statistical data and comparative analysis from other jurisdictions. Any intervention

[64] Law Society of New South Wales, Submission to the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, 29 September 2023; and

[65] Consultation Paper, 184.

[66] Consultation Paper, 185. See also *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

[67] Consultation Paper 186. See also *Racial Discrimination Act 1975* (Cth) s 20(e); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb); *Disability Discrimination Act 1992* (Cth) s 67(1)(l); *Age Discrimination Act 2004* (Cth) s 53(1)(g); *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 31(j).

should be subject to procedural fairness and conducted in a manner that does not impede the efficient conduct of proceedings or the discharge of NCAT's statutory functions.

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?**

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 powers to hold public inquiries?

As noted in our preliminary submission to the NSWLRC, discrimination laws in NSW are focused to a large degree on addressing individual complaints rather than systemic discrimination.[68] We consider it to be in the public interest that ADNSW is empowered to address systemic discrimination in a more meaningful way.

ADNSW (or another appropriately resourced enforcement body) should be given a broad and flexible inquiry function to conduct referred, as well as own-motion inquiries. The purpose of such inquiries is twofold. First, they would enable identified patterns of discrimination to be investigated. Second, they would allow for general compliance monitoring. It is important that the investigating body has sufficient powers to obtain relevant information and documents, engage with affected communities and duty holders, conduct public inquiries where appropriate, and publish findings and recommendations.

One example of how this could be achieved is found in s 127 of the Victorian Act, which sets out the criteria for conducting an investigation including, for example, where the matter 'raises an issue that is serious in nature' and there are reasonable grounds to suspect contraventions have occurred.

If such investigatory powers are to be conferred on ADNSW (or another body), consideration should be given to providing for a range of outcomes following a finding of non-compliance. These could include regulatory mechanisms such as preparing a report to Parliament, the issuing of enforceable undertakings, compliance notices, and an application to a court/tribunal to seek civil penalties for non-compliance. See discussion at Question 47 below.

Question 46: Criminal prosecutions

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

The Law Society supports, in principle, the view that there should be a body to refer suspected criminal breaches of the ADA to the appropriate authorities for investigation and, where appropriate, prosecution. As noted in the Consultation Paper, comparable referral powers exist in other Commonwealth and NSW regulatory regimes, including corporations[69] and work, health and safety legislation[70].

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[68] The Law Society of New South Wales, Submission to the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, 29 September 2023; and The Law Society of New South Wales, Submission to the NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW) – Unlawful Conduct*, 1 September 2025.

[69] *Australian Securities and Investments Commission Act 2001* (Cth) s 49.

[70] *Fair Work Act 2009* (Cth) ss 682(1)(c), 682(1)(d), 682(1)(f); *Work Health and Safety Act 2011* (NSW) s 152(h).

However, we note that, to date, ADNSW has never operated as an investigative or prosecutorial authority and may lack the necessary expertise and institutional capacity to undertake this work. We suggest that consideration therefore be given to conferring this function on a properly resourced specialist enforcement body. This is particularly relevant if, as contemplated in Chapter 10 of the Consultation Paper, a more robust investigation and enforcement framework is introduced for the NSW anti-discrimination regime.

Question 47: Civil penalty orders

a) Should ADNSW be empowered to seek civil penalty orders for substantive breaches of the ADA?

b) If so, which forum/s would be most appropriate to impose a civil penalty, eg NCAT or a court?

The Law Society supports the introduction of civil penalties for substantive breaches of the ADA. As identified in the Consultation Paper, such penalties can perform a "punitive and deterrent" function and may incentivise organisations and employers to take active steps to prevent discrimination and harassment.[71]

As noted above, a broader question is whether ADNSW should be empowered to seek civil penalty orders, as occurs with other regulators such as SafeWork NSW, or whether this function should be conferred on a properly resourced specialist enforcement body.

We note that NCAT is already empowered to impose civil penalties in some circumstances.[72] However, given that proceedings where ADNSW seeks civil penalties for substantive breaches of the ADA may be relatively rare, it may be preferable for penalties in relation to these matters to be imposed by a court.

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 practice?

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

ADNSW already has wide statutory functions related to education and research.[73] From our perspective, the principal issue is therefore not the scope of the current powers, but whether ADNSW is adequately resourced to exercise them. As noted in our preliminary remarks, education is one of the most effective means of raising awareness and preventing discrimination. ADNSW should therefore receive sufficient and sustained funding to perform this function effectively. It is important that any educational initiatives be developed in partnership with, and embed the perspectives of, people with lived and living experience of discrimination. This should include drawing on the expertise of affected communities, for example Aboriginal and Torres Strait Islander perspectives on cultural safety and anti-racism.

ADNSW also has the discretionary power to develop and promote codes of practice.[74] In the federal context, we note that such codes and/or standards can provide helpful guidance around compliance for particular sectors and settings. For example, standards have been prescribed to clarify the rights and obligations arising under the *Disability Discrimination Act 1992* (Cth), including with respect to education, public transport and access to premises.[75] There are also examples of codes of practice in NSW law, for example the Work Health and Safety

[71] Consultation Paper, 196.
[72] *Civil and Administrative Tribunal Act 2013* (NSW) s 77.
[73] *Anti-Discrimination Act 1977* (NSW) s 119.
[74] *Anti-Discrimination Act 1977* (NSW) s 120A(1).
[75] *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth); *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

Codes of Practice that prescribe legally enforceable minimum standards under the *Work Health and Safety Act 2011* (NSW).[76]

We support the development of codes of practice that could clarify aspects of the ADA and the obligations on duty holders in different settings. These should be developed in consultation with affected communities and employers/other duty holders. We suggest these codes may be particularly useful if a positive duty is introduced into the ADA.

[76] *Work Health and Safety Act 2011* (NSW) ss 274 & 275.