



IMPROVING DISCRIMINATION COMPLAINT PROCEDURES IN NSW

Submission in response to the second consultation paper in the Review
of the *Anti-Discrimination Act 1977* (NSW)

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EQUALITYAUSTRALIA.ORG.AU

TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
BACKGROUND: BARRIERS TO JUSTICE FOR LGBTIQ+ PEOPLE IN NSW	4
RESPONSE TO CONSULTATION QUESTIONS	4
Chapter 2: Objectives and Structure	4
Qs 1-3: Statement of objectives, purposes and/or principles	4
Q 4: Structure of the ADA	5
Chapter 4: Making a Complaint to ADNSW	6
Q 5: Complaint terminology	6
Q 6: Person personally affected	6
Q 8: Requirements for making a complaint on behalf of others	7
Q 9: Vilification complaints	8
Qs 10-16: Procedures for making and receiving complaints	9
Chapter 5: Dispute Resolution	13
Q 17: Power to compel information	13
Q 18: Conciliation at ADNSW	13
Q 19: Flexible dispute resolution	13
Chapter 6: Complaints to NCAT	14
Q 22-23: Referral to NCAT and direct access to NCAT	14
Q 24: Representative proceedings	15
Chapter 7: Settlement agreements	16
Q 26: Confidentiality clauses in settlement agreements	16
Chapter 8: Remedies, enforcement and Costs	17
Q 28: Compensation	17
Q 29: Mandatory orders	18
Q 30: Programs or policies	18
Q 31: Potential new remedies	19
Q 32: Orders with systemic effect	19
Q 33: Enforcing NCAT orders	19
Q 34: Costs	20
Chapter 9: Exemption Procedures	20
Q 36: The exemptions process	20
Chapter 10: Other Mechanisms	22
Q 39: Assisting parties	22
Q 40 and 41: Initiating complaints	22
Q 44: Intervention and amicus curiae powers	23
Q 45: Wider investigation and inquiry powers	23

Q 46: Criminal prosecutions.....	24
Q 47: Civil penalty orders.....	25
Q 48: Education, research and guidance	25

EXECUTIVE SUMMARY

Equality Australia is grateful for the opportunity to make a submission to the New South Wales Law Reform Commission (**the Commission**) in response to the second consultation paper on procedures and compliance (**consultation paper**) in the Review of the *Anti-Discrimination Act 1977* (NSW) (**the ADA**).

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people. Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people. Improving discrimination laws across Australia is one of our key policy goals. This is Equality Australia's third submission to the Review.

In our preliminary submission, we addressed our priorities for reform so that anti-discrimination laws in NSW work to address and prevent discrimination, harassment and vilification, no matter where they work, study or access goods, services and accommodation.¹ Our submission on Consultation Paper 24 on Unlawful conduct was an extension of these views.²

In this submission, we set out our responses to the consultation questions outlined in the NSW Law Reform Commission's July 2026 consultation paper on procedures and compliance. We remain of the view that the underlying legal infrastructure of the ADA needs a significant overhaul.

With respect to procedures and compliance, our priorities reforms are:

Representative complaints: Modernise and expand representative complaint mechanisms to improve access to justice for groups affected by unlawful conduct under the ADA.

Direct access to NCAT: Create more flexible pathways to ensure urgent and significant public interest matters can proceed efficiently and directly to NCAT.

Removing the compensation cap: Remove the statutory cap to ensure remedies adequately reflect the harm suffered and provide effective redress for complainants.

Costs reform: Remove financial barriers to enforcing rights by introducing a specialist costs regime.

Anonymity orders: Better protect complainants from unnecessary harm by empowering ADNSW to immediately suppress the identity of persons involved in complaints.

Improving exemptions process: Increase transparency, accountability and participation in exemption decisions.

Positive duty and systemic enforcement: Equip ADNSW with modern regulatory powers to address serious and systemic discrimination.

Our detailed recommendations with respect to these priority reform areas and other suggested amendments to the ADA are provided throughout this submission.

¹ Equality Australia, [An Equality Act for NSW: Preliminary submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 \(NSW\)](#) (2023).

² Equality Australia, [Modern, Fair, Equal: Making Discrimination Laws Work for LGBTIQ+ Communities, Submission by Equality Australia to the NSW Law Reform Commission's Review of the Anti-Discrimination Act 1977 \(NSW\): Unlawful Conduct](#) (August 2025).

BACKGROUND: BARRIERS TO JUSTICE FOR LGBTIQ+ PEOPLE IN NSW

Like many other groups with experiences of marginalisation, LGBTIQ+ people in NSW face significant barriers to making and pursuing discrimination complaints. These barriers can arise at every stage of the process, from recognising that conduct may constitute discrimination, to making a complaint, participating in conciliation and pursuing a matter through the tribunal and court processes if it does not resolve.

Many people may be reluctant to complain because of the personal nature of discrimination, concerns about being outed, fear of retaliation or further discrimination, and a lack of confidence that making a complaint will lead to a meaningful outcome. These barriers can be particularly acute where the respondent is an employer, service provider, government agency or other organisation with significantly greater resources and power than the complainant.

Complex procedures, the requirement to be able to write complaints and respond in writing can all present barriers to access, which can be significant for our communities, particularly given the limited resourcing and availability of Legal Aid and LGBTIQ+ specific community legal support. LGBTIQ+ communities are more likely to trust and engage with LGBTIQ+ community-controlled organisations, which are well placed to provide culturally safe, accessible and appropriate support.

We encourage the Commission to identify ways to make the complaints process more accessible and reduce barriers to access. Our responses to this consultation paper make recommendations towards this goal.

The process should minimise unnecessary formality and administrative burdens, while ensuring that complainants have a meaningful opportunity to resolve complaints without needing to proceed to costly and potentially inaccessible Tribunal proceedings.

RESPONSE TO CONSULTATION QUESTIONS

CHAPTER 2: OBJECTIVES AND STRUCTURE

Qs 1-3: Statement of objectives, purposes and/or principles

The ADA should include an express statement of objects or purposes. This would assist in the interpretation and application of the legislation, while also providing an important educative function for people seeking to understand their rights and obligations under the ADA, including potential respondents.

The objects or purposes clauses in the ACT and Victorian legislation, as well as the exposure draft of the Queensland Anti-Discrimination Bill 2024,³ provide useful models. In particular, the objects or purposes should expressly recognise the existence of, and particular harms caused by, intersectional and systemic discrimination, and clarify that the ADA is designed to address these harms.

Reference to human rights in an objects or purposes clause is particularly important in NSW, given the absence of comprehensive human rights legislation applying at the state level. An objects clause could provide an important statement of the human rights principles that underpin the ADA and guide its interpretation and application.

Care should be taken, however, to avoid tying the objects clause to an exhaustive list of particular international instruments or principles. The experience in Queensland demonstrates the risk of this approach: references to specific UN instruments can become outdated as international human rights law develops over time.

At the same time, there is value in expressly recognising the international human rights framework from which anti-discrimination law derives. In particular, the ADA should acknowledge that it gives effect, in part, to Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR), while making clear that the ADA should also be understood in the context of Australia's broader international human rights obligations. The

³ Queensland, [Anti-Discrimination Bill 2024](#) (Consultation Draft, 2024) Preamble and clause 8.

Universal Declaration of Human Rights could also be expressly recognised as an important source informing the development and interpretation of the rights protected by the ADA.

We therefore suggest a formulation along the following lines:

This Act gives effect, in part, to Australia's obligations under the International Covenant on Civil and Political Rights and other applicable international human rights obligations, and recognises the rights and freedoms affirmed in the Universal Declaration of Human Rights.

This would identify the ICCPR as a core source without creating an exhaustive list of international instruments. It would also avoid the need to determine in advance which particular instruments or principles should be included, such as the Siracusa Principles or the Yogyakarta Principles. Those materials could remain relevant to the interpretation and application of the ADA where appropriate, without being given exclusive or privileged status through an exhaustive legislative list.

Consideration should also be given to including an express provision permitting NSW Civil and Administrative Tribunal (**NCAT**), and courts on appeal, to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights when interpreting the ADA. There are useful precedents in the human rights legislation of Queensland, Victoria and the ACT.⁴

A provision of this kind would provide an important mechanism for ensuring that the ADA is interpreted consistently with Australia's international human rights obligations, while allowing the law to evolve alongside developments in international human rights jurisprudence.

RECOMMENDATIONS

1. That the new ADA include an express objects clause that:

- recognises the promotion of substantive equality, dignity and human rights, including the particular harms of systemic and intersectional discrimination; and
- recognises that the ADA gives effect, in part, to Australia's international human rights obligations, including under the ICCPR and the UDHR, without creating an exhaustive list of relevant instruments or principles.

2. That the new ADA include an interpretive clause that permits NCAT and NSW courts to consider relevant international law and judgments when interpreting the ADA.

Q 4: Structure of the ADA

The ADA requires a fundamental overhaul of its structure. The NSW ADA has been amended repeatedly and incrementally over almost 50 years, resulting in a framework that is cumbersome, repetitive and difficult to navigate. Its structure also contains drafting inconsistencies and provisions that are unnecessarily complex. This is particularly evident in the way discrimination is addressed separately for different protected attributes, often requiring similar concepts, tests and exceptions to be repeated throughout the ADA.

The new Act should adopt a modern, coherent structure that is easier for individuals, organisations, legal practitioners and decision-makers to understand and apply. Useful models are the Victorian, Northern Territory, ACT and Queensland legislation.

A suggested structure is set out below:

Objects and purposes – setting out the purposes of the ADA, including its human rights and equality objectives.

Interpretation and key concepts – including definitions and concepts such as discrimination, direct and indirect discrimination, reasonable adjustments or accommodations, systemic discrimination, victimisation and relevant causation principles.

Protected attributes – a single, comprehensive list of the attributes protected by the ADA.

⁴ S 48(3) of the *Human Rights Act 2019* (Qld) provides that international law and relevant judgments may be considered in interpreting a statutory provision; s 32(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) contains a similar provision; and s 31(1) of the *Human Rights Act 2004* (ACT) permits international law and relevant judgments of foreign and international courts and tribunals to be considered in interpreting a human right.

Prohibited conduct – explaining the meaning of discrimination, harassment, victimisation, vilification and other prohibited conduct.

Areas of public life – setting out the circumstances in which discrimination is prohibited, such as work, education, goods and services, accommodation and clubs and the exceptions specific to these areas.

Exceptions and exemptions – with general exceptions applying across the ADA, followed by temporary exemption processes.

Positive duties and systemic discrimination – establishing clear obligations to prevent and eliminate unlawful conduct, including mechanisms for addressing systemic discrimination.

Complaints, investigation, conciliation and Tribunal proceedings – setting out the enforcement framework and the powers of the ADNSW and the Tribunal. Requirements for making a complaint, anonymity provisions, representative complaints and conciliation, and the regulatory powers to review compliance with the ADA / the positive duty, and burden of proof provisions.

Remedies, compliance and enforcement – including Commission and Tribunal powers, remedies and mechanisms for addressing systemic issues.

This would represent a significant improvement on the current NSW approach, which is largely organised on an attribute-by-attribute basis. For example, the current Act contains separate Parts dealing with sex discrimination and other forms of discrimination, with similar concepts and rules consequently repeated across different Parts.

Our suggested approach has several advantages:

- avoids unnecessary repetition, makes the ADA easier to navigate and understand;
- allows common principles to be expressed once rather than replicated across multiple Parts;
- makes the ADA more adaptable, where new protected attributes or changes to the names or definitions can be more easily be achieved.

RECOMMENDATION

3. Repeal and replace the ADA, creating a new, modern structure, removing the attribute-by-attribute approach. The drafting should include a single list of attributes and avoid repetition.

CHAPTER 4: MAKING A COMPLAINT TO ADNSW

Q 5: Complaint terminology

While we acknowledge there are differing views on the potential connotations of the terms ‘complaint’ and ‘complainant’, we consider it would be appropriate to retain terms throughout the ADA as they are generally well understood and consistent with discrimination laws in most Australian jurisdictions. Consistency of terminology across jurisdictions allows members of the community to better understand and navigate complaints pathways.

RECOMMENDATION

4. That the ADA retain the terms ‘complaint’ and ‘complainant’ in the ADA.

Q 6: Person personally affected

Complaints can be made to ADNSW by: one or more persons on their own behalf; one or more persons on their own behalf, as well as on behalf of an organisation; a parent or guardian of a persons without legal capacity to lodge a complaint; or a representative body on behalf of one or more named persons. Agents, including Australian legal practitioners, can also bring complaints on behalf of these listed people.

We do not consider that complaints should be restricted to only people who are personally affected by conduct or events that may be unlawful. Currently, this restriction only applies in representative body complaints before NCAT. Maintaining broader standing is important to ensure the complaints system remains accessible and capable of responding to systemic discrimination.

In particular, not-for-profit representative organisations that advocate for a particular group (such as a union, disability rights organisations or LGBTIQ community organisation) should be able to lodge representative complaints on behalf of their affected community. Such pathways are available to varying degrees under ACT law

and Queensland, and have been recommended by the Law Reform Commission of Western Australia.⁵

The current open framing, which allows complaints by people and organisations who are not personally affected by the alleged discriminatory conduct, has not opened the floodgates to complaints. Rather, it supports the accessibility of the complaint system and provides an avenue for addressing matters relating to systematic discrimination affecting a group of people other than through individual complaints.

Requiring complainants at the outset to demonstrate they were personally and directly affected by the conduct in question would impose an unnecessary procedural and evidential burden and create additional barriers to accessing the complaints process. This requirement also appears unnecessary, given there is likely to be limited motivation to make a complaint where the complainant has not been affected, and NCAT could not grant a remedy to a person who has not experienced the treatment. LGBTIQ+ people already face several barriers when making discrimination complaints, in part due to the limited availability of specialised legal assistance in NSW and a lack of trust in systems. These barriers are often compounded where individuals experience intersecting forms of disadvantage.

RECOMMENDATION

5. That the ADA does not restrict who can make complaints to those personally affected by the conduct.

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

Naming and obtaining the consent of group members

We recommend the ADA be amended to allow representative complaints to be made without needing to name the individual group members. Requiring every person on whose behalf a representative complaint is brought to be identified and provide consent creates a significant barrier to addressing systematic discrimination.

Representative complaints are intended to provide a mechanism for challenging conduct that affects a class of people, not just to secure remedies for individuals. They provide a vehicle for addressing discriminatory policies or practices that have a wider impact on a community. In some circumstances it may be impossible to identify and seek the consent of every group member. Allowing representative complaints to proceed without naming group members would better support the resolution of these systemic issues.

This model already exists federally under the *Australian Human Rights Commission Act 1986* (Cth), which requires that a representative complaint must ‘describe or otherwise identify the class members’ and may be lodged ‘without the consent of class members’.⁶

Similarly in Queensland, representative complaints must ‘describe or otherwise identify the class members’ and can be brought ‘without the consent of class members’.⁷ The ADA clarifies that in describing, or otherwise identifying the member of the class, ‘it is not necessary to name them or specify how many there are’.⁸ We recommend that NSW adopt a similar approach to Queensland.

We consider that where a group is described (and therefore individual group members are not named), it is appropriate for the complaint to be lodged without the consent of group members. This enables complaints to be brought to address sensitive systemic issues without exposing individual group members to personal or privacy risks that may arise from being publicly associated with the complaint.

If the requirement that group members be named is retained, we consider a representative complaint should only be able to be lodged with the consent of group members. There are a variety of reasons why an individual may not be interested in being named in a representative complaint, including concerns about being publicly ‘outed’ or other privacy considerations, or fear of being subject to harassment and victimisation. The requirement to obtain consent before a person is named in a complaint ensures that they have autonomy over their level of involvement.

⁵ *Discrimination Act 1991* (ACT) s 121A; Queensland Human Rights Commission, [Building Belonging: Review of Queensland's Anti-Discrimination Act 1991](#) (2022), recs 11.1-11.4 and at 180-186; Law Reform Commission of Western Australia, [Review of the Equal Opportunity Act 1984 \(WA\)](#) (May 2022), recs 135-140 and at 252-255.

⁶ *Australian Human Rights Commission Act 1986* (Cth) s 46PB.

⁷ *Anti-Discrimination Act 1991* (Qld) ss 146-147.

⁸ *Anti-Discrimination Act 1991* (Qld) s 147.

RECOMMENDATIONS

6. That the ADA allow representative complaints to be made without needing to name the individual group members, as in Queensland where complaints need only ‘describe or otherwise identify the class members’ and can be brought without their consent.
7. If the requirement that group members be named is retained, a representative complaint should only be able to be lodged with the consent of the group members.

The ‘sufficient interest’ test for representative bodies

The ADA provides that before a complaint can be made by a representative body, the President must be satisfied that the body has a ‘sufficient interest’ in the complaint and that the conduct ‘is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect: (i) the interests of the body, or (ii) the interests or welfare of the group of people it represents or purports to represent’.⁹

We consider this test should be simplified. We recommend drawing from the more accessible model in Queensland where a representative complaint may be made by a ‘relevant entity’ whose primary purpose is to promote the interests or welfare of a people with a particular attribute.¹⁰ Our views on this model are outlined in more detail below.

Q 9: Vilification complaints

Our views on the incitement-based and harm-based vilification models are outlined in our submission in response to Consultation Paper 24.¹¹ If the harm-based vilification test is introduced, we recommend adopting criteria for bringing a complaint similar to the approaches in either Victoria or Queensland.

In Victoria, a complaint can be brought by a person who claims another person has contravened the relevant part of the Act in relation to them. For the contravention to be ‘in relation’ to the person, the person must have the relevant protected attribute and be part of the audience for the contravention.¹²

In Queensland, a complaint can be brought by a person who was subjected to the alleged contravention, an agent of the person, 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.¹³ A relevant entity may complain to the commissioner, however the commissioner may accept the relevant entity’s complaint only if satisfied that the complaint is made in good faith, and the relevant alleged contravention is about conduct that has affected or is likely to affect relevant persons for the relevant entity, and it is in the interests of justice to accept the complaint.¹⁴

Queensland’s ‘relevant entity’ provision was inserted to recognise that many vilifying acts are directed at a group, rather than an individual, and in such cases individuals within an affected group could be reluctant to make a complaint for fear being singled out.¹⁵ The landmark case of *GLBTI v Wilks and Anor*,¹⁶ which enabled the Gay Lesbian Bisexual Transgender Intersex Anti-Violence Committee Inc (GLBTI Commission) to make a successful sexuality vilification complaint and for a public apology to be issued, illustrates the utility of the ‘relevant entity’ provision.

We reject the idea referred to in the consultation paper that the ADA should require complainants to provide evidence that the conduct of the respondent had a direct effect on them, either individually or as a member of a

⁹ *Anti-Discrimination Act 1977* (NSW) s 87C.

¹⁰ *Anti-Discrimination Act 1991* (Qld) s 134.

¹¹ Equality Australia, [Modern, Fair, Equal: Making Discrimination Laws Work for LGBTIQ+ Communities, Submission by Equality Australia to the NSW Law Reform Commission’s Review of the Anti-Discrimination Act 1977 \(NSW\): Unlawful Conduct](#) (August 2025) 43-48.

¹² *Equal Opportunity Act 2010* (Vic) ss 113(1)-113(1B).

¹³ *Anti-Discrimination Act 1991* (Qld) s 134(1).

¹⁴ *Anti-Discrimination Act 1991* (Qld) ss 134(3)-134(4).

¹⁵ Explanatory Note, *Discrimination Law Amendment Act 2002* (Qld), 16-17.

¹⁶ *GLBTI v Wilks and Anor* [2007] QADT 27.

defined group. This would impose an unnecessary burden on complainants by requiring them to divulge personal information at an early stage in the complaints process, creating an unreasonable evidentiary threshold when most complaints are brought by unrepresented complainants.

RECOMMENDATION

8. Amend the requirements for representative body complaints to be similar to the ‘relevant entity’ model in Queensland.

Qs 10-16: Procedures for making and receiving complaints

A fee for making complaints

We strongly support retaining the approach of not charging fees for making a complaint to ADNSW. No Australian jurisdiction charges a fee for the lodgement of a complaint to an anti-discrimination body or commission. Charging fees would present an unnecessary barrier to accessing justice and deter individuals from pursuing genuine complaints.

Introducing fees is not the solution to dealing with vexatious complaints. Other mechanisms are already incorporated in the ADA to deal with vexatious complaints, such as ADNSW’s discretion to decline the complaint at any stage of the investigation if it is frivolous, trivial, vexatious, misconceived or lacking in substance.¹⁷

The form of complaints

To support the accessibility of the complaint process, an amendment should be made to the ADA to expressly allow for complaints to be made verbally, as in the ACT and recommended by the Queensland Human Rights Commission.¹⁸ We do not consider it necessary to limit verbal complaints only to exceptional circumstances, provided there are measures in place to ensure there is procedural fairness for the respondent. For example, requiring that verbal complaints be transcribed by ADNSW and provided to the respondent to ensure that have adequate opportunity to respond.

Other accessibility features could be the ability to lodge an audio or video file that could be transcribed by ADNSW – this would be beneficial for anyone with limited written English.

The detail required in a complaint

The consultation paper acknowledges that ADNSW asks complainants for more information if there are insufficient details to decide whether to accept a complaint for investigation. This process allows complainants who are not familiar with discrimination law and the complaints system to be able to articulate their complaint with a sufficient level of detail.

If a requirement to set out ‘reasonable details’ of the alleged conduct is introduced, as recommended by the 2020 NSW parliamentary committee recommendation,¹⁹ it will be important for ADNSW to retain the ability to work with complainants to support them to articulate their complaint before assessing whether there are ‘reasonable details’ to accept the complaint for investigation. Imposing new requirements to disclose a greater level of detail in complaints may prevent otherwise meritorious complaints from being accepted.

Allowing anonymous complaints

We support the approach adopted in NT and Queensland of enabling Commissioners to prohibit the disclosure of the identity of a person involved in a complaint, rather than enabling anonymous complaints. We consider it important in the interests of procedural fairness that the respondent have sufficient information to be able to respond to the complaint. This also enables ADNSW to meaningfully investigate and conciliate complaints.

¹⁷ *Anti-Discrimination Act 1977* (NSW) s 94.

¹⁸ *Human Rights Commission Act 2005* (ACT) s 44(4); Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 15.

¹⁹ NSW, Legislative Council Portfolio Committee No 5, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020, Report 55* (2020) [2.106], rec 4; *Anti-Discrimination Act 1977* (NSW) ss 89B, s 92.

Enabling the identity of a complainant to be immediately suppressed can be highly beneficial to protecting the privacy and safety of complainants, who may otherwise be subjected to victimisation or further harassment.

For example, had the identities of the applicants in the successful gender identity vilification cases against Kirralie Smith²⁰ been suppressed at an early stage of the proceedings, the applicants could have been protected from further harm. Instead, the applicants were subjected to ongoing harassment by the respondent and her supporters. One of the applicants applied to the Local Court for an Apprehended Personal Violence Order (APVO), which was granted at appeal on the basis that she had a reasonable fear of ongoing intimidation and harassment by the respondent.²¹ The decision to grant the APVO was upheld by the Court of Appeal.²²

Supporting people to make and respond to complaints

We support retaining the ability of ADNSW to provide assistance to a person making a complaint, as this promotes the accessibility of the complaints systems for all members of the community. We do not support the idea raised in the consultation paper to limit assistance to complainants with ‘single complaints about substantive wrongs’. This would arbitrarily limit the circumstances in which ADNSW can provide support to complainants and would reduce ADNSW’s ability to properly consider complaints and determine whether to accept them.

Complaints made in more than one jurisdiction

We consider the ADA should not prevent a person from making a complaint to ADNSW if they have previously made a complaint about the same conduct in another jurisdiction. It is already challenging for members of the public to navigate the available federal and state and territory complaints pathways, especially in circumstances where they are self-represented. In practical terms, there is limited to no benefit for complainants in maintaining multiple complaints about the same conduct, since NCAT will not compensate a person twice for the same incident.

There are also significant process differences between each cause of action, including very short time frames for unfair dismissal. This can require complainants to choose a jurisdiction even before they have had an opportunity to obtain legal advice, potentially resulting in them pursuing a less beneficial avenue simply because it has a shorter limitation period. Complainants should not get locked into a complaint pathway because of a lack of resources to obtain advice.

We agree with the NSW parliamentary committee’s finding that restricting complaints to the one jurisdiction could have negative consequences for complainants and the discrimination jurisdiction more broadly, for example where an employee subject to discriminatory conduct in the workplace wants to make a workers compensation claim and bring a discrimination action.²³ Many complainants already have concurrent WorkCover and discrimination matters, and tribunals simply reduce the final damages awarded by the amount paid in lost wages under worker’s compensation.

It would not be in the interests of justice to expect complainants with limited understanding of the legal system to have to carefully choose which complaint pathway to utilise, and therefore which remedies to seek, simply because their complaints have partially overlapping conduct.

The power to decline a complaint

We consider that it would not be appropriate for ADNSW to be required to decline a complaint during an investigation in all of the circumstances set out in section 92 of the ACT; for example, where only part of a complaint is lacking in substance or where the complainant should be pursuing a more appropriate remedy.

Rather, we recommend retaining a discretion to decline a complaint in some circumstances and adopting a narrower list of circumstances in which ADNSW must decline complaints, including complaints that are frivolous, trivial or vexatious cases, as in the ACT, Queensland, and federally in relation to the Australian Human Rights

²⁰ *Smith v Blanch; Smith v Dennis* [2026] NSWSC 879.

²¹ *Blanch v Smith* [2024] NSWDC 631.

²² *Smith v Blanch* [2025] NSWCA 188.

²³ NSW, Legislative Council Portfolio Committee No 5, [Anti-Discrimination Amendment \(Complaint Handling\) Bill 2020, Report 55](#) (2020) [3.82]

Commission.²⁴

The time limit for complaints

We consider that ADNSW should retain their discretion to decline a complaint about conduct that occurred after a certain period of time, rather than making this a mandatory refusal. Further, the current time limit for making a complaint of 12 months after alleged conduct occurred should be extended to two years, as exists in the ACT and federally in relation to the Australian Human Rights Commission, and as recommended by the Queensland Human Rights Commission and Western Australia Law Reform Commission.²⁵ We consider the arguments for extending the time limit to far outweigh those in favour of retaining the 12 month limit, as is reflected in the consultation paper.

The ADA should expressly provide that the time limit for making a complaint does not commence until a child turns 18, unless there is a substantial prejudice to the respondent, as recommended by the Queensland Human Rights Commission.²⁶

We also consider that the law should expressly deal course of conduct discrimination, harassment and vilification complaints, noting that many forms of this conduct is not experienced as a single discrete event. We support the NSW Law Reform Commission's recommendation that the limitation period should start from the final incident in the course of conduct.²⁷

Frivolous, vexatious or misconceived complaints

We consider the post-conciliation stage to be the most appropriate point for ADNSW to have the power to decline a complaint on the basis that it is 'frivolous, vexatious, misconceived or lacking in substance'. By that stage, the parties will have had an opportunity to participate in conciliation and ADNSW will have a more complete understanding of the factual and legal issues in dispute. This reduces the risk of potentially meritorious complaints being dismissed prematurely and preserves the important role of conciliation as the primary dispute resolution mechanism under the ADA.

This approach is also supported by the existing legislative framework. The ADA already enables the President to decline complaints that do not meet threshold jurisdictional requirements, including where the alleged conduct could not amount to a contravention of the Act, where the complaint is out of time, where the conduct attracts a specific statutory penalty, where a vilification complaint does not satisfy the requirements of the Act, or where the President is not satisfied that the complaint was made by or on behalf of the complainant.²⁸ These provisions provide an effective mechanism for filtering out complaints that fall outside ADNSW's jurisdiction or otherwise fail to meet the statutory requirements for a complaint, without requiring complainants to establish a prima facie case at the outset.²⁹

Whether a complaint is frivolous, vexatious, misconceived or lacking in substance is a different question that will often depend on a fuller appreciation of the facts and circumstances. In our view, that assessment is best made after conciliation has been attempted, when ADNSW is better placed to evaluate the substance of the complaint while still ensuring procedural fairness for all parties – even then because it effectively amounts to summary dismissal, it should be used sparingly.

In our view, it is unnecessary to empower ADNSW to refer a complainant to the Attorney General to consider applying for a vexatious proceedings order. We are not aware of any similar powers being granted to discrimination complaint handling bodies in other Australian jurisdictions. We consider the existing power for judicial officers,

²⁴ *Anti-Discrimination Act 1991* (Qld) ss 139, s 141(1); *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a), s 46PH(1D); *Human Rights Commission Act 2005* (ACT) ss 78(2)(c)(ii), s 78(2)(c)(iv).

²⁵ *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b); *Human Rights Commission Act 2005* (ACT) s 78(1)(a); Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) rec 8.1, 161; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (May 2022) rec 133, 251–252.

²⁶ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) 15.

²⁷ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 107.

²⁸ *Anti-Discrimination Act 1977* (NSW) s 89B.

²⁹ *Anti-Discrimination Act 1977* (NSW) s 89.

members and registrars of courts or tribunals to recommend the Attorney General consider applying to the Supreme Court for a ‘vexatious proceedings’ order to be sufficient.³⁰

Further potential grounds to decline complaints

We do not support requiring that ADNSW decline a complaint before investigation in the circumstances outlined on pages 73-76 of the consultation paper.

Reviewing a decision to decline a complaint

We do not consider it necessary for ADNSW to have to notify a respondent about a complaint immediately upon receipt and before making a decision about whether to accept it for investigation. This stage of the complaints process is intended to be a preliminary assessment of whether the complaint falls within jurisdiction and it is appropriate for ADNSW to make this threshold decision independently. Requiring ADNSW to seek and consider a respondent’s views before deciding whether to accept the complaint would add complexity, delay and resource demands. Respondents are able to raise concerns about potentially vexatious or unmeritorious complaints at later stages of the process. Advising all potential respondents about complaints is likely to cause unnecessary distress where many complaints are not even progressed to conciliation.

These reforms also appear unnecessary when considered against ADNSW’s existing complaint-handling outcomes. Available data indicates that approximately 60% of complaints are accepted and proceed through the complaints process, with 31.8% of complaints declined at the preliminary assessment stage and a further 9.4% declined following investigation. This demonstrates that ADNSW already exercises a significant gatekeeping function and has effective mechanisms to identify and decline matters that fall outside jurisdiction or otherwise do not warrant progression. The overall acceptance rate is not unusually high and is broadly consistent with complaint acceptance and filtering practices across jurisdictions. Expanding powers to decline complaints at an earlier stage, or requiring respondents to be notified before a complaint is accepted for investigation, is unlikely to deliver substantial efficiency benefits.

Currently, in the event a complaint is not accepted to proceed to conciliation, a complainant can only seek judicial review which is an inaccessible and costly avenue. We recommend introducing a pathway for merits review of decisions by ADNSW to decline a complaint before investigation, as is available in Tasmania and recommended by the Queensland Human Rights Commission and Law Reform Commission of Western Australia.³¹

A complainant can seek referral to NCAT where ADNSW declines a complaint during an investigation, or at any time in certain circumstances involving complaint made on behalf of other persons. We do not consider any changes should be made to this referral pathway, which serves an important purpose in providing oversight of ADNSW’s decisions and safeguarding against premature termination of complaints.

RECOMMENDATIONS

- 9.** Retain current approach of charging no fee for making a complaint to ADNSW.
- 10.** Amend the ADA to expressly allow for complaints to be made verbally.
- 11.** Enable ADNSW to immediately suppress the identity of a person involved in a complaint.
- 12.** Retain the ability of ADNSW to provide assistance to a person making a complaint.
- 13.** Retain the ability for a person to make a complaint to ADNSW where they have previously made a complaint about the same conduct in another jurisdiction.
- 14.** Retain ADNSW’s discretion to decline a complaint during investigation, but adopt a narrower list of circumstances in which ADNSW must decline complaints, including where complaints are frivolous, trivial or vexatious cases.
- 15.** Extend the time limit for making a complaint from 12 months to two or three years.

³⁰ *Vexatious Proceedings Act 2008* (NSW) ss 8(6)–(7).

³¹ *Anti-Discrimination Act 1998* (Tas) ss 65 and 72; Queensland Human Rights Commission, *Building Belonging: Review of Queensland’s Anti-Discrimination Act 1991* (2022) 162; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (May 2022) rec 152.

16. Amend the ADA to expressly provide that the limit only commences when a child turned 18, unless there is substantial prejudice to the respondent.
17. Amend the ADA to expressly deal with course of conduct discrimination, harassment and vilification complaints. The limitation period should start from the final incident in the course of conduct.
18. Introduce a pathway for merits review of decisions by ADNSW to decline a complaint before investigation.

CHAPTER 5: DISPUTE RESOLUTION

Q 17: Power to compel information

The consultation paper considers introducing compulsory written responses. We are not convinced that this would improve resolution rates or increase access to justice for people who have experienced discrimination. Instead, it may increase the time and formality involved before a matter can proceed to dispute resolution. More formal written documentation is unlikely to assist, particularly where respondents are often legally represented while complainants are not. There is also a risk that the requirement could encourage respondents to obtain legal representation at an earlier stage and divert resources towards complex legal responses rather than resolution through conciliation.

We would prefer to see a more accessible conciliation process that is less process- and paper-based and therefore see limited benefit in introducing such a requirement.

To help facilitate the outcome of insurance complaints, ADNSW should have the powers necessary to obtain actuarial or statistical data where these matters arise. Otherwise, complainants have no way to dispute an unevicenced claim that discrimination is based on actuarial or statistical data from a reasonable source.

Q 18: Conciliation at ADNSW

Leave should continue to be required for legal representation at a conciliation conference, although in practice leave would only be refused in the most exceptional circumstances. ADNSW should also be permitted to impose reasonable restrictions on representation where appropriate. For example, a respondent may seek to attend with both in-house counsel and external legal representatives, which may unnecessarily exacerbate an existing power imbalance. The requirement to seek leave provides an appropriate mechanism for ADNSW to set parameters around the scope and conduct of legal representation.

ADNSW should also be expressly required to consider whether legal representation on one side may create or exacerbate a power imbalance. Where a respondent is legally represented but a complainant is not, it should be clear that ADNSW may take all reasonable steps necessary to mitigate the impact of that imbalance while maintaining its impartial role. This is particularly important where the respondent is a government body or otherwise very well resourced, and the complainant is unrepresented. Steps to mitigate could be for example to change to a shuttle process, ensure regular breaks, or adjourn so that an unrepresented party can go away to consider the implications of a conciliation agreement rather than being expected to sign immediately.

We are unconvinced that it's necessary for the prioritisation of complaints to be legislated if it already forms part of ADNSW policy – but would encourage publication of that policy on the website, and for ADNSW's complaint form and accompanying information make sure it's clear to potential complainants that they can ask for this, and the circumstances in which they will be given priority. The risk of legislative provisions might be they lead to less rather than more discretion and flexibility, depending on how they are drafted.

Q 19: Flexible dispute resolution

To ensure an equitable process, conciliators need sufficient flexibility to tailor the process to the nature of the complaint and the needs of the parties. We support removing unnecessary red tape and rigid procedural requirements that may impede this.

Investigation usually has a limited role in the resolution of individual discrimination complaints in Australia. Investigators will be unable to resolve factual disputes between the parties, particularly because discriminatory conduct is often undocumented and disputes may ultimately turn on competing accounts and questions of credibility. In these circumstances, over-investment in investigation prior to conciliation adds limited value to the complaint-handling process, particularly where the Tribunal will ultimately be the appropriate forum to determine contested questions of fact if a matter does not resolve through conciliation.

Resources devoted to individual complaints would therefore be better directed towards a more effective and accessible conciliation process, drawing on aspects of the Victorian approach, rather than towards investigative processes that may not materially assist in resolving the underlying dispute. Changes that should be considered include a triage process for all complaints to ensure the most urgent and meritorious matters are dealt with first, tailoring the process depending on the complexity and needs of the parties, allowing for flexibility in whether to hold shuttle, conference processes, or no process at all where a complaint is particularly intractable and will be better off moving to Tribunal quickly.

Instead, investigation powers should be applied to more serious or systemic forms of discrimination addressed on own-motion by the ADNSW – we discuss this in response to question 45.

We would not support removing the compulsory nature of attendance at conciliation. For many complainants, the requirement to participate in conciliation is an important mechanism for encouraging early resolution before a matter proceeds to a Tribunal process that is likely to be costly and inaccessible. Without this lever, there is a real risk that respondents will have less incentive to engage in early resolution and that many complainants, who may already face significant barriers to pursuing their claims, will ultimately abandon their complaints.

RECOMMENDATIONS

19. Give ADNSW appropriate powers to require insurers, to provide relevant actuarial, statistical and other information necessary to substantiate claims that discriminatory treatment is based on actuarial or statistical data from a reasonable source.

20. Retain the requirement for leave to be legally represented at conciliation, require as part of ADNSW's decision-making whether representation exacerbates a power imbalance and to take reasonable steps to mitigate that imbalance, and expressly permit ADNSW to place restrictions on this representation to ensure an equitable process.

21. Provide ADNSW with broad discretion to tailor the conciliation process to the nature and complexity of the complaint and the needs of the parties, including through triage and the use of conference, shuttle and other appropriate dispute resolution processes.

22. Retain the compulsory nature of attendance at conciliation, recognising its importance in encouraging early resolution and preventing respondents from avoiding the conciliation process, while allowing ADNSW sufficient flexibility to determine where and how conciliation should occur.

CHAPTER 6: COMPLAINTS TO NCAT

Q 22-23: Referral to NCAT and direct access to NCAT

Under the ADA, the complaints process is initiated by filing a complaint with ADNSW. If a complaint cannot be resolved following a conciliation conference, the ADNSW may then refer the matter to NCAT. This reflects the position in all other Australian jurisdictions where, except in Victoria,³² an individual cannot go directly to a court or tribunal but must first lodge a complaint with the relevant agency.

However, reviews into the Queensland and Western Australian anti-discrimination laws made recommendations that the complaints process should be more flexible, with a focus on dispute resolution.³³

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.³⁴ We consider that this lengthy time period creates undue delay and uncertainty for all parties.

While the vast majority of matters would proceed through ADNSW, there are compelling reasons to allow certain matters to be fast-tracked or to bypass ADNSW dispute resolution altogether. This may include matters that are

³² *Equal Opportunity Act 2010* (Vic) s 122.

³³ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (2022) recs 9.1-9.15 and at 165-172; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (May 2022) recs 143, 152 and at 258-259, 266-268.

³⁴ *Anti-Discrimination Act 1977* (NSW) s 93B(1).

urgent; public interest matters that are highly unlikely to resolve through conciliation; or matters where it is important for the case to be determined on the evidentiary record, such as those involving systemic discrimination.

Allowing parties to have direct access to NCAT would enable them to seek interim or injunctive relief where necessary to prevent further harm arising from the conduct complaint of, pending final determination of the dispute.

We recommend either establishing a direct pathway to NCAT, similar to the Victorian model, allowing complainants a choice between proceeding through the ADNSW conciliation or commencing NCAT proceedings; or providing a right to elect to proceed at any time directly to NCAT that is limited to genuinely urgent matters or matters raising significant public interest issues, including potential public interest litigation.

RECOMMENDATIONS

23. Either:

- establish a direct pathway to NCAT, allowing complainants to choose between either proceeding with ADNSW conciliation or commencing NCAT proceedings; or
- provide a right of election to proceed directly to NCAT at any time if matter is genuinely urgent or raises significant public interest issues.

Q 24: Representative proceedings

The criteria for NCAT representative complaints

Currently, NCAT must not permit a complaint to be dealt with as a representative complaint unless it is satisfied it is made in ‘good faith’, which helps to mitigate the risk of representative complaints being made against the wishes or interests of group members.³⁵ There is a lengthy list of factors that NCAT is to satisfy itself of in considering whether a complaint is made in good faith.³⁶ Where these requirements are not satisfied, NCAT may still determine ‘the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint’.³⁷

We consider the current NCAT criteria for representative complaints to be overly complex and challenging to understand. To address this, we recommend that the same simplified criteria apply for bringing representative proceedings to ADNSW and NCAT under the ADA.

We recommend adopting Queensland’s criteria for determining the level of cohesiveness within a group required before a matter may proceed as a representative complaint.³⁸ A recent example of where this was usefully applied is QCAT’s recent approval of a representative complaint against the Queensland Government’s ban on gender affirming care for transgender children in public hospitals.³⁹ The complaint was brought by the LGBTI Legal Service on behalf of every young person affected by the ban. The Human Rights Commissioner had previously decided to treat the complaint made to the Commission as a representative complaint, however this assessment did not bind QCAT. The Tribunal was independently satisfied the statutory criteria for the group’s cohesiveness was met and exercised its discretion to deal with the complaint as a representative complaint.

Our views on our preferred criteria for representative body complaints, drawing from the ‘relevant entity’ model in Queensland, and on representative complaint consent requirements, are outlined above under Chapter 4.

Adding procedural provisions

To improve the clarity and accessibility of the law for all parties, we consider it would be helpful for the ADA to include comprehensive procedural and machinery provisions for dealing with representative complaints, as

³⁵ *Anti-Discrimination Act 1977* (NSW) s 101(2).

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

³⁷ *Anti-Discrimination Act 1977* (NSW) s 101(3)(b).

³⁸ *Anti-Discrimination Act 1994* (Qld) s 194.

³⁹ *SP by PY v State of Queensland* [2026] QCAT 245.

recommended by the NSWLRC.⁴⁰ The need to provide Tribunal members with guidance on handling representative complaints is illustrated by the same QCAT matter referred to in the section above. The Tribunal noted that:

‘The Tribunal, unlike, for example, the Federal Court of Australia, does not have regulations, rules or Practice Directions regulating representative actions. The registry is also not experienced in running large scale representative proceedings. Those matters, while they are not a basis for concluding a matter is not a representative action, may be a reason for it not to proceed as one.’⁴¹

While the Tribunal in this matter did not consider the lack of precedent of experience in the Tribunal in running representative complaints to be an insurmountable obstacle, the case illustrates that greater direction in the form of procedural and machinery provisions would assist NCAT in handling representative complaints.

RECOMMENDATIONS

- 24. Apply the same simplified criteria for representative complaints made to ADNSW and NCAT.
- 25. Adopt similar criteria to Queensland for determining level of cohesiveness of groups in representative complaints.
- 26. Insert comprehensive procedural and machinery provisions for dealing with representative complaints.

CHAPTER 7: SETTLEMENT AGREEMENTS

Q 26: Confidentiality clauses in settlement agreements

We support safeguards around the use of confidentiality and non-disclosure clauses in settlement agreements, but would prefer an approach that preserves an appropriate degree of flexibility. The circumstances in which complaints are resolved through ADNSW are variable, and a clause that is appropriate in one matter may be inappropriate in another.

Confidentiality can be as important for complainants as it is for respondents. A person who has experienced discrimination, vilification, or harassment may want to resolve a complaint and move on without the circumstances of the complaint, or the amount of any settlement, being discussed publicly.

Non-disparagement clauses can also be important in protecting complainants from further harm. For example, we are aware of circumstances in which complainants have experienced online victimisation or public criticism by respondents following the making of a complaint.

There is also a risk that overly restrictive regulation of confidentiality clauses could inadvertently reduce complainants' bargaining power and make early resolution less likely. Confidentiality can be one of the few meaningful bargaining tools available to a complainant in a settlement negotiation. Respondents may be particularly motivated to resolve complaints where settlement provides certainty and protects their public reputation. Removing the ability to negotiate confidentiality could therefore result in more matters proceeding to the Tribunal, rather than improving access to justice.

The greater concern is where confidentiality clauses are included as standard terms, rather than being genuinely negotiated between the parties. Confidentiality should not be used to silence a complainant where there is no legitimate reason for doing so or where the clause operates primarily for the benefit of the respondent. ADNSW should be transparent about any confidentiality or non-disparagement provisions proposed as part of a settlement, and conciliators should be able to draw parties' attention to terms that are unusually broad, oppressive or otherwise unfair.

It is also important to distinguish between different forms of confidentiality. There is a significant difference between a clause that prevents a complainant from ever discussing their own experience of discrimination or harassment and one that simply requires the parties to maintain discretion about the amount paid to settle a complaint. The latter may be entirely reasonable and mutually beneficial, while the former may have significant implications for a complainant's autonomy and access to support.

⁴⁰ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Report 92 (1999) rec 141.

⁴¹ *SP by PY v State of Queensland* [2026] QCAT 245 [52].

At a minimum, any legislative framework should ensure that confidentiality clauses are not imposed as standard terms, are proportionate in scope and duration, do not prevent a complainant from obtaining support or making disclosures required or permitted by law, and are entered into freely and with a proper understanding of their effect. There should also be safeguards against confidentiality provisions being used to prevent organisations from identifying and addressing systemic discrimination or harassment.

We would support ADNSW developing clear guidance or model clauses to assist parties and conciliators in distinguishing appropriate confidentiality provisions from clauses that are unnecessarily broad or unfair. Such guidance should make clear that confidentiality is a matter for negotiation between the parties rather than an automatic or standard feature of settlement agreements.

RECOMMENDATIONS

27. Require any confidentiality provision included in a settlement facilitated by ADNSW to be proportionate in scope and duration, freely agreed to by the parties and not imposed as a standard term.

28. Ensure confidentiality provisions do not prevent a complainant from obtaining legal, medical, psychological, theological or other support, making disclosures required or permitted by law, or reporting further discrimination, vilification or harassment.

29. Require ADNSW conciliators to draw the parties' attention to confidentiality or non-disparagement provisions that are unusually broad, oppressive or otherwise unfair, including provisions that prevent a complainant from discussing their own experience.

30. ADNSW should develop and publish guidance or model clauses on the appropriate use of confidentiality and non-disparagement provisions in settlement agreements, including guidance distinguishing confidentiality about the terms or amount of a settlement from restrictions on discussing the underlying conduct.

CHAPTER 8: REMEDIES, ENFORCEMENT AND COSTS

Q 28: Compensation

The Consultation Paper acknowledges that the ADA's compensation cap of \$100,000, which also applies to multiple complaints of vilification or where two or more complainants make a complaint about the same public act, is one reason for generally low compensation awards by NCAT. We agree with the criticisms of this cap set out on page 123 of the consultation paper.

We recommend removing the statutory cap for compensation entirely, as is the case for: discrimination complaints in all other jurisdictions except Western Australia and the Northern Territory;⁴² discriminatory conduct under the *Work Health and Safety Act 2011* (NSW);⁴³ and sexual harassment and general protection claims under the *Fair Work Act* (Cth).⁴⁴ A fixed statutory cap inevitably becomes out of date and fails to recognise the seriousness of complaints made under the ADA. When applied to the most serious of complaints, a cap provides an arbitrary limit that reduces complainants' ability to be properly compensated for the harm they have experienced. Retaining a cap of any amount, even a substantially higher amount than currently, risks creating a perception that complaints under the ADA are of lesser importance than comparable civil claims where no such restriction applies.

The ADA allows for compensation to be awarded for both loss and damage suffered by a complainant.⁴⁵ We consider it would be helpful for the ADA to set out a non-exhaustive list of types of loss and damage to guide the determination of appropriate awards. This list should expressly include psychological damage to ensure that psychological impacts are adequately factored into the assessment of compensation. There should also be consideration of the broader harms an individual may experience as a result of discriminatory conduct, including

⁴² *Equal Opportunity Act 1984* (WA) s 127(b)(i); *Anti-Discrimination Act 1992* (NT) s 88(1)(b); *Anti-Discrimination Regulations 1994* (NT) reg 2.

⁴³ *Work Health and Safety Act 2011* (NSW) s 111(a).

⁴⁴ *Fair Work Act 2009* (Cth) s 545(2)(b).

⁴⁵ *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).

‘offence, humiliation, embarrassment and intimidation’, as in the NT and Queensland.⁴⁶ This would acknowledge that discrimination causes a broad range of harms that are less easily quantified and would help to ensure that awards of compensation reflect individuals’ lived experiences of harm. This is particularly important for complaints arising from repeated or systemic discrimination.

We recommend that NCAT should be required to specifically consider the newly inserted objects and purposes of the Act when determining and calculating damages. Our recommendation to include an express statement of objects and purposes is outlined under Chapter 1.

RECOMMENDATIONS

- 31. Remove the statutory cap for compensation under the ADA.
- 32. Insert a non-exhaustive list of types of loss and damage suffered to guide the determination of awards of compensation.
- 33. Require NCAT to consider the objects and purposes of the Act when determining and calculating damages.

Q 29: Mandatory orders

We consider it important for mandatory orders to be available in representative complaints, consistent with the approach taken in every Australian jurisdiction except Western Australia.⁴⁷ Mandatory orders allow NCAT to require a respondent take a broad range of specific actions to address and prevent unlawful conduct, such as to amend a procedure, publish a correction, implement staff training or take other remedial actions. The availability of these orders is particularly important for representative complaints, which are often brought to address systemic discrimination affecting a broader group of people rather than a specific individual. In such complaints, compensation alone is unlikely to remedy the underlying cause of the discrimination or prevent it from continuing or recurring.⁴⁷ We also agree with the NSWLRC’s recommendation that NCAT should have the power to appoint the President of the Anti-Discrimination Board to monitor compliance with a mandatory order.⁴⁸

RECOMMENDATIONS

- 34. Amend the ADA to make mandatory orders available in representative complaints.
- 35. Insert illustrative examples of the types of mandatory orders that could be made.
- 36. Empower NCAT to appoint the President of the Anti-Discrimination Board to monitor compliance with a mandatory order.

Q 30: Programs or policies

In our view, NCAT’s power to order respondents to develop or implement programs or policies should be extended to all forms of unlawful conduct under the ADA. Such orders are an effective means of addressing underlying causes of systemic discrimination, harassment, vilification and other unlawful conduct. Extending this power would also align with the broader direction of contemporary discrimination law, including the introduction of positive duties in a number of jurisdictions. These reforms reflect the principle that responsibility for addressing unlawful conduct should rest with those with control over the systems and environments that gave rise to the conduct, rather than solely on those individuals affected by the conduct.

RECOMMENDATION

- 37. Extend NCAT’s power to order respondents to develop or implement programs or policies to all forms of unlawful conduct under the ADA.

⁴⁶ *Anti-Discrimination Act 1992* (NT) s 88(3); *Anti-Discrimination Act 1991* (Qld) s 209.

⁴⁸ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 (1999) rec 150, [10.57].

Q 31: Potential new remedies

We consider the ADA should be amended to set out a more comprehensive exhaustive list of the orders NCAT may make if a complaint is proven, rather than the alternative option to confer a broad discretionary power to make orders as NCAT sees fit. We recommend adopting a list of orders similar to the approach in Queensland, where the legislation specifies that the tribunal may make one or more of the listed orders.⁴⁹ This approach provides greater certainty and transparency for all parties and ensures that they have an understanding of the types of orders that may be made if a complaint succeeds. A broad discretionary power can create uncertainty and inconsistency in outcomes.

We also suggest that this list should include a new express power to make declarations. Declaratory relief may be important where a complainant seeks public recognition that the conduct they experienced was unlawful or where a complaint arises from a systemic issue. We consider orders for training and employment are sufficiently covered by NCAT's power to make mandatory orders and could be included as illustrative examples for this power.

RECOMMENDATIONS

38. Amend the ADA to set out a more comprehensive exhaustive list of orders NCAT may make, rather than a broad discretionary power to make orders 'as it sees fit'.

39. Insert a new express power to make declarations.

Q 32: Orders with systemic effect

We support requiring NCAT to consider systemic issues when determining remedies. As noted in the consultation paper, NCAT already has powers to order remedies with systemic effect, including mandatory orders, injunctions, apologies and retractions, directions about publication, and ordering the development of policies and procedures for vilification complaints. Requiring decision-makers to specifically consider whether the complaint arises from a systemic issue would encourage greater use of these remedies in appropriate cases, moving beyond a sole focus on addressing harm suffered by an individual complainant. It would recognise the broader public interest and societal value of discrimination law in addressing the underlying sources of systemic issues.

RECOMMENDATION

40. Require NCAT to consider whether a complaint arises from a systemic issue when determining appropriate remedies.

Q 33: Enforcing NCAT orders

Currently, if a respondent fails to comply with an NCAT order, a complainant can try to enforce the order in a court through lengthy and costly proceedings. Alternatively, the ADNSW President can take steps to enforce NCAT orders if they believe it is in the public interest to do so or, either with the individual complainant's consent or on their own motion in relation to a representative complaint.⁵⁰

We recommend opening the circumstances in which ADNSW can take steps to enforce an order beyond 'public interest' cases. We suggest adopting the model in Victoria, where the Victorian Equal Opportunity and Human Rights Commission can apply to enforce an order of the Tribunal if a person has failed to comply with the order, and if the applicant consents the Commission may enforce the order on their behalf.⁵¹ This would help address the significant power imbalance that often exists between complainants and respondents in discrimination matters. Empowering ADNSW to apply to enforce orders in any circumstance would improve access to justice, strengthen the practical effectiveness of NCAT remedies, and increase incentives for respondents to comply with orders.

RECOMMENDATION

41. Empower ADNSW to apply to enforce an order of NCAT upon application in any circumstance, not just where

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

⁵⁰ *Anti-Discrimination Act 1977* (NSW) s 113.

⁵¹ *Equal Opportunity Act 2010* (Vic) s 126.

there is a public interest to do so, as per the Victorian approach.

Q 34: Costs

Where a discrimination complaint is brought in NCAT, each party to the proceedings in the Tribunal is required to pay their own costs.⁵² However, where a matter is appealed against a decision of the NCAT to the District or Supreme Courts, complainants may be liable for an adverse costs order if they are ultimately unsuccessful.⁵³

Discrimination complaints go to fundamental injustices and harms to dignity. For this reason, the usual costs recovery approach that might work well in a commercial dispute, or a dispute where monetary damages are likely to be higher or more readily calculable, are not appropriate in the discrimination context and discourage worthy complaints from people who have been discriminated against. Further, it still costs money to obtain legal advice and representation when someone has been discriminated against, and those costs are really part of the harm that the complainant has suffered and would not have been incurred but for the discriminatory conduct. A model which requires successful complainants to bear their own costs, and worse, consider the risk of an adverse costs order if their matter is appealed beyond NCAT, is a barrier to justice.

As outlined in our preliminary submission,⁵⁴ we support an asymmetric costs regime for discrimination complaints. This would ensure that successful complainants can recover their reasonable legal costs while unsuccessful complainants are protected from adverse costs orders unless they have instituted the proceedings vexatiously or without reasonable cause or have caused the respondent to incur costs through unreasonable acts or omissions. This should apply throughout the life of the matter, including appeals.

Asymmetric costs regimes recognise that:

- a complainant is unlikely to be insured (while the respondent is likely to have insurance and/or greater financial resources);
- a complainant may have no choice but to proceed to court (particularly if the respondent has filed an appeal against an NCAT decision);
- a complainant is not always able to reliably predict the prospects of the claim at the outset, given information is often held by the respondent, and the respondent decides what evidence they will lead in defence; and
- a respondent can significantly increase the risks of an adverse costs order on the complainant by offering a relatively modest settlement offer in an appeals process.

We recommend adopting a costs regime for discrimination complaints similar to section 1317AH of the *Corporations Act 2001* (Cth) or section 46PSA of the *Australian Human Rights Commission Act 1986* (Cth).

RECOMMENDATION

42. Introduce a new costs regime for discrimination complaints, similar to section 1317AH of the *Corporations Act 2001* (Cth) or section 46PSA of the *Australian Human Rights Commission Act 1986* (Cth).

CHAPTER 9: EXEMPTION PROCEDURES

Q 36: The exemptions process

The exemptions process should be designed to ensure that exemptions are granted only where properly justified, following a transparent process that enables affected communities to have a meaningful opportunity to participate.

Exemption processes can have significant consequences for LGBTIQ+ people and can be inappropriately used to exclude LGBTIQ+ people from areas of public life. Exemption decisions can also have implications beyond the

⁵² *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1).

⁵³ Uniform Civil Procedure Rules 2005 (NSW) r 42.1.

⁵⁴ Equality Australia, [An Equality Act for NSW: Preliminary submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 \(NSW\)](#) (2023) 20-21.

individual applicant's circumstances, by shaping how discrimination law is understood and signalling to other businesses and organisations when exclusion of particular groups may be considered permissible.

It is therefore critical that organisations representing affected communities have an opportunity to make submissions on exemption applications.

Consultation with affected groups

Where consultation with affected groups is discretionary,⁵⁵ exemption applications can proceed to be granted without sufficient input from those most directly affected.

Insufficient or no consultation leads to a risk that exemptions will be granted without the decision-maker having the benefit of relevant evidence about their potential real world impact.

By contrast, Queensland Civil and Administrative Tribunal refused to grant an exemption to discriminate on the basis of gender identity in *Kalwun Development Corporation Limited* [2026] QIRC 89, where Equality Australia and other stakeholders had an opportunity to provide submissions – the decision is clear about the impact of these submissions on the outcome.

These examples demonstrate the importance of ensuring that affected communities have a genuine opportunity to participate before an exemption is granted. Exemption applications set the standard for discrimination law and will be followed by other businesses and organisations when deciding who they can exclude.

The Australian Human Rights Commission process provides a suitable model for NSW. We note that ADNSW only publishes the exemption applications that have been granted. Instead, exemption applications should be published on the relevant body's website, with an opportunity for public comment, and organisations likely to be affected should be specifically invited to make submissions. The process should also provide sufficient time for interested parties to respond and should require the decision-maker to consider submissions received. Part of the considerations for the decision-maker should include what was heard from submissions.

The ADA should also confirm that the findings and reasons for decisions should be published. This would ensure transparency and accountability and assist the community to understand how the competing interests involved in exemption applications have been assessed.

Maximum timeframe

The current 10-year maximum period is too long for what is supposed to be a limited and temporary exemption from anti-discrimination protections. The maximum period should instead be reduced to five years, with the possibility of renewal through a further (possibly truncated) application process. A five-year period would provide greater assurance that exemptions remain justified in light of changing circumstances, while avoiding the need for organisations to repeatedly apply for exemptions over unnecessarily short periods.

Considerations

We strongly support requiring decision-maker considerations on exemptions to include the purposes or objects of the ADA (we discuss what these should include in Chapter 1 of this submission). This would help ensure that exemption decision-makers do not lose sight of the broader objectives of discrimination law and the outcomes it is intended to achieve.

RECOMMENDATIONS

43. Require all exemption applications to be publicly notified and published on the relevant body's website, with sufficient time for interest parties to make submissions, for the decision-maker to be required to invite submissions where an outcome may be adverse for a particular group, and to consider those submissions in determining the outcome.

44. Require the decision-maker to consider submissions received from affected individuals and organisations before determining an exemption application.

⁵⁵ This is currently the situation in NSW - ADNSW may consult those considered 'appropriate' in the circumstances). See *Anti-Discrimination Act 1977* (NSW) s 126(7).

45. Require findings and reasons for decisions on exemption applications to be published, subject to appropriate protections for confidential or sensitive information.

46. Reduce the maximum period for which an exemption may be granted from 10 years to five years.

47. Require decision-makers determining exemption applications to have regard to the purposes and objects of the Anti-Discrimination Act, as well as the interests of persons likely to be affected by the exemption.

CHAPTER 10: OTHER MECHANISMS

Q 39: Assisting parties

While we recognise that there are many barriers to LGBTIQ+ people and other marginalised communities bringing complaints, we are unconvinced that an expanded role for ADNSW in assisting complainants is the most effective way to address these.

Further funding for dedicated LGBTIQ+ community legal services in NSW, and increasing capacity of Legal Aid NSW to assist at the Tribunal stage would be a better use of resources in our view – particularly because there are challenges with ADNSW maintaining its impartial role which is critical to running a successful conciliation service. Legal service providers should be funded to provide independent legal advice to clients at the early stage of determining which avenue is most appropriate for pursuing their complaint.

If there is to be a government-funded service to support clients pursue their cases, we suggest instead the model of the Office of Human Rights Proceedings (Te Tari Whakatau Take Tika Tangata), which is an independent office within the New Zealand Human Rights Commission. Its director is statutorily independent and makes decisions about whether to provide legal representation to people who want to take unlawful discrimination proceedings to the Human Rights Review Tribunal.

New Zealand has effectively separated the relevant functions as follows:

- *Human Rights Commission*: complaints, information, mediation and dispute resolution;
- *Office of Human Rights Proceedings*: independent statutory decision-maker about publicly funded legal representation;
- *Human Rights Review Tribunal*: determines the legal claim and remedies.

Under s 92B of the *Human Rights Act 1993* (NZ), the Human Rights Commission can bring proceedings before the Human Rights Review Tribunal on behalf of a class of people affected by a discriminatory practice. This provides an important mechanism for addressing systemic discrimination, rather than requiring each individual affected person to pursue their own case.

A similar power for ADNSW to investigate serious or systemic complaints would be highly complementary to the proposed NZ approach, and could help ensure that patterns of discrimination affecting groups of people are identified and addressed. We discuss this further in response to question 45.

RECOMMENDATIONS

48. Prioritise additional government funding for dedicated LGBTIQ+ community legal services and increase the capacity of Legal Aid NSW to assist people to pursue discrimination complaints and proceedings.

49. Establish an independent statutory office modelled on the New Zealand Office of Human Rights Proceedings, separate from ADNSW, which would retain its independent and impartial complaint-handling functions.

50. Ensure the functions of complaint handling, conciliation, publicly funded legal representation and determination of discrimination claims remain appropriately separated to preserve ADNSW's impartiality and the integrity of the conciliation process.

Q 40 and 41: Initiating complaints

We would support the option of ADNSW, once they have become aware of a serious or systemic issue, being able to initiate an investigation of a matter in the absence of a complaint. We discuss this further in response to question 45 below. However, we do not think it is appropriate for ADNSW to take up the role of 'complainant' as this compromises its independence and impartiality, undermining trust in the organisation. A preferred role is as

intervener or *amicus curiae* as set out below.

For the same reason we would support removal of the power for a Minister to refer a matter for investigation – while it hasn’t occurred to date, there is real risk of political interference in an independent body.

Q 44: Intervention and *amicus curiae* powers

ADNSW should be equipped with an express capacity to intervene in proceedings or appear as *amicus curiae*. In our view, human rights statutory body interventions have had a significant and positive impact on the development of anti-discrimination and human rights law, particularly federally, in Victoria, ACT and Queensland. Commissions have a unique role in bringing an independent, expert and public-interest perspective to litigation, including by ensuring that the broader implications of a case for equality and human rights are properly considered.

Such a power would not mean ADNSW becomes a party to proceedings or to advocate for either side. Rather, it would enable ADNSW to assist courts and tribunals in cases raising significant or novel issues concerning discrimination and human rights. In practice, we anticipate that ADNSW would exercise this power selectively, with its interventions likely to be most valuable in matters involving significant questions of legal principle or the development of anti-discrimination law, particularly at appellate level.

The existing NCAT framework expressly contemplates intervention by people who are authorised by legislation or procedural rules.⁵⁶ The ADA should expressly provide for organisations with relevant expertise or a substantial public interest in the proceedings to seek leave to intervene or appear as *amicus curiae*. The legislation or regulations should establish clear criteria for granting leave, including the organisation’s expertise or interest in the issues, whether its participation would assist NCAT or the court, and whether its intervention would add a perspective or submissions not adequately represented by the parties.

RECOMMENDATION

51. The ADA should allow for interventions or *amicus curiae* with leave of the Tribunal or appellate court:

- for ADNSW, where proceedings that involve an issue arising under the ADA or involving an interpretation of the ADA, in circumstances where the President considers that the intervention is appropriate;
- for organisations with relevant expertise or substantial public interest in the proceedings.

Q 45: Wider investigation and inquiry powers

ADNSW should be given an express and effective own-motion investigation power, building on the existing but under-utilised and inadequate investigative functions in s 119(1)(a). Own-motion investigation powers should not be limited by contravention, or by attribute, as is the case under the current provision.

Individual complaints are necessarily focused on the experience of an individual complainant and depend on that person having the capacity, resources and willingness to pursue a complaint. Many individual complaints settle on the basis of financial compensation or an apology, without then addressing the underlying cause of discrimination, provided limited to no societal benefit. Most end with a non-disclosure agreement, and there is little to no visibility of these outcomes, with few matters even reaching NCAT, let alone an appellate court.

The individual complaints model is also poorly suited to identifying and addressing discriminatory practices that affect large numbers of people, particularly where those affected may be reluctant or unable to come forward, or where the discriminatory conduct is embedded in an organisation’s policies, practices or systems.

A regulatory investigation can instead identify patterns of conduct, examine the practices giving rise to discrimination, and require appropriate remedial action. This is a major gap required to be addressed in NSW’s anti-discrimination framework.

Threshold for investigation

ADNSW should be able to commence an investigation where it has reasonable grounds to suspect serious or systemic non-compliance, including on the basis of information obtained through its complaints function, its own

⁵⁶ S 44(4)(c) of the *Civil and Administrative Tribunal Act 2013* (NSW), permits “any other person” to intervene where authorised by the Act, enabling legislation or procedural rules.

research and monitoring, referrals from other bodies, or information provided confidentially by affected people or community organisations. This would require ADNSW to be deeply connected to the communities that most experience discrimination, which means sufficient resources being dedicated to community and stakeholder engagement to identify and prioritise the systemic issues most suitable for investigation.

Additionally, ADNSW should be able to commence an investigation into compliance with the positive duty on its own motion. We support adopting the approach in the *Australian Human Rights Commission Act 1986* (Cth), which permits the Commission to inquire into compliance with the positive duty where it reasonably suspects that a person is not complying.⁵⁷ This provides an appropriate threshold for regulatory intervention, enabling ADNSW to act proactively where there are reasonable grounds for concern, without requiring an individual complaint or proof of a contravention before an investigation can commence. Any such power should, consistently with the federal model, be accompanied by appropriate procedural fairness protections. Drafting should also ensure that the exercise of the power does not inadvertently engage or conflict with applicable secrecy provisions, as highlighted as a concern in the consultation paper.

The simplified threshold in the federal model is preferable to the approach in *Equal Opportunity Act 2010* (Vic).⁵⁸ We do not consider it helpful to require consideration of whether a matter is unlikely to be resolved through dispute resolution or an application to the Tribunal. This risks defeating the purpose of the positive duty: those processes are reactive and impose significant barriers on individuals, which the positive duty is intended in part to overcome.

The positive duty should operate alongside, and independently of, individual complaint processes. ADNSW should therefore be able to investigate suspected non-compliance proactively, without first requiring an individual complaint or exhaustion of other processes. We consider that the federal model provides an appropriate threshold: ADNSW should be able to commence an investigation where it reasonably suspects non-compliance with the positive duty.

Regulatory powers

For investigations to be effective, ADNSW should have sufficient powers to carry out a regulatory role including compelling production of documents and information, entering workplaces, conducting interviews with witnesses and issuing findings.

While the primary focus should be on educating duty holders to prevent further breaches, we support the full suite of regulatory tools being available as set out in the consultation paper:

- *reporting and making recommendations to Parliament*
- *advocating to government about necessary responses*
- *entering into enforceable undertakings, which are voluntary legal agreements between a regulator and an individual that has allegedly breached the law*
- *issuing compliance notices (with the option of applying to NCAT or a court for civil penalties for non-compliance)*
- *publishing practice guidance for industries and organisations*
- *issuing civil penalties.*

These powers are necessary to make ADNSW's regulatory role effective and credible. Education and guidance should be the primary tools for promoting compliance, but a regulator must also be able to escalate its response where voluntary measures are inadequate or non-compliance is serious or persistent. A graduated suite of powers would allow ADNSW to respond proportionately, while providing a meaningful incentive for duty holders to comply. It would also enable ADNSW to identify systemic issues and drive broader improvements in organisational practice, rather than relying on individual complaints to secure change.

Q 46: Criminal prosecutions

We do not support giving ADNSW a general power to prosecute breaches of the ADA as criminal offences. This would represent a significant and, in our view, unnecessary expansion of the enforcement framework. Unlawful discrimination encompasses a very broad range of conduct, including conduct that may be inadvertent or arise

⁵⁷ *Australian Human Rights Commission Act 1986* (Cth) s 35B(1).

⁵⁸ *Equal Opportunity Act 2010* (Vic) s 127.

from inadequate policies or practices. Criminal prosecution would be a disproportionate response in many such circumstances and could be weaponised against the very communities that experience discrimination the most.

This does not mean that ADNSW should lack effective enforcement powers. As outlined above, ADNSW should have a graduated suite of regulatory powers, including investigation powers, enforceable undertakings, compliance notices and the ability to seek civil penalties. These mechanisms would provide meaningful deterrence and accountability while allowing responses to be proportionate to the nature and seriousness of the conduct.

Q 47: Civil penalty orders

Although we consider it unlikely that civil penalties would be imposed frequently in practice, their availability would provide a strong incentive for compliance and for duty holders to negotiate enforceable undertakings. They could therefore form an important part of a graduated regulatory scheme. Civil penalties should be reserved for serious or persistent non-compliance and deployed in a proportionate manner, with clear statutory criteria and published guidance setting out the limited circumstances in which they may be appropriate.

Q 48: Education, research and guidance

In our view, implementation of the positive duty should initially focus on education and guidance. Therefore, we support expanding ADNSW's role in researching and reporting on systemic issues and developing codes of practice on specific areas or topics. These resources would provide practical, context-specific guidance to duty holders about their obligations and promote consistent and effective compliance with the positive duty. Without such guidance, duty holders may struggle to understand how their obligations apply in particular settings and what effective compliance looks like in practice.

Priorities for guidance materials should be developed in close consultation with, and ideally through co-design with, affected communities. This would help ensure that guidance is informed by lived experience and addresses the practical barriers and issues faced by those most affected.

For example, guidance on inclusive recruitment and employment practices could help duty holders identify and address barriers faced by LGBTIQ+ employees, such as unnecessary requirements to disclose sex or gender information, exclusionary HR systems or workplace policies, or inadequate processes for responding to harassment of LGBTIQ+ people.

Additionally, ADNSW could have a role in undertaking desktop reviews of specific discrimination, vilification or harassment issues. This role would be strengthened by powers to require information from relevant duty holders, enabling ADNSW to build an evidence base for research and identify and report on systemic discrimination.

For example, ADNSW could undertake a desktop review of whether people with innate variations in sex characteristics face higher insurance premiums or less favourable terms because of their genetic history, using information requested from insurers to establish an evidence base and identify any systemic discrimination, making recommendation for changes in practice.

RECOMMENDATIONS

52. Give ADNSW an express own-motion power to investigate serious or systemic discrimination, without limiting that power by protected attribute or requiring a formal complaint to have been made.

53. Create a minimum threshold for commencing an own-motion investigation where ADNSW has reasonable grounds to suspect serious or systemic non-compliance with the ADA – whether that suspicion is formulated on the basis of a serious of complaints, information obtained through research and monitoring, or information provided by affected people or organisations.

54. Give ADNSW an express power to investigate compliance with the positive duty on its own motion where it reasonably suspects that a duty holder is not complying with the positive duty, without requiring an individual complaint or exhaustion of other complaint or dispute resolution processes.

55. Ensure ADNSW's own-motion investigation powers are accompanied by appropriate procedural fairness protections and safeguards against inappropriate use of compulsion powers.

56. Give ADNSW the powers necessary to conduct effective investigations, including powers to compel the production of documents and information, require answers to questions, conduct interviews and enter relevant workplaces or premises.

57. Give ADNSW a power to make and publish findings and recommendations arising from its investigations, including recommendations to organisations, industries and government.

58. Give ADNSW a graduated suite of regulatory powers to promote and enforce compliance, including education and guidance, recommendations to Parliament and government, enforceable undertakings, compliance notices, and the imposition of civil penalties (limited to serious or persistent non-compliance).

59. Ensure ADNSW has power to develop and publish practice guidance for industries and organisations to assist duty holders to understand and comply with their obligations.

60. Ensure ADNSW has sufficient resources for community engagement, research and monitoring to identify and prioritise serious and systemic issues for investigation, particularly those affecting communities that face significant barriers to making individual complaints.

61. Ensure ADNSW's regulatory framework supports a graduated and proportionate approach, with education and guidance as the primary means of promoting compliance but stronger regulatory measures available where non-compliance is serious, persistent or voluntary measures are inadequate.