

# National Justice Project

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Submission to the NSW Law Reform Commission's  
review of the *Anti-Discrimination Act 1977* (NSW)

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2 October 2026



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## About the National Justice Project

The National Justice Project (NJP) welcomes the opportunity to make a submission to the review of the *Anti-Discrimination Act 1977 (NSW)*.

NJP is an independent, not-for-profit human rights legal and advocacy organisation. We fight for justice, fairness and inclusivity by tackling systemic discrimination through the power of strategic legal action, education, partnerships and advocacy. We represent individuals, families and communities who have experienced discrimination, racism and other forms of systemic injustice, including in interactions with government agencies, healthcare systems, police, child protection systems, correctional settings and other public institutions. We support clients through litigation, complaints and advocacy on issues relating to discrimination, government accountability and access to justice.

NJP also develops and implements initiatives that expand access to justice and strengthen community participation. We envision a society where everyone feels safe and supported to speak out against injustice and access fair and appropriate outcomes. This includes [Hear Me Out](#) (HMO), an AI-powered tool designed to make it easier for people to find and access complaints systems. HMO helps people identify the most appropriate avenue for making a complaint and assists them to prepare complaints in plain language, making the process clearer and helping to ensure concerns reach the right authorities.

This submission is informed by the experiences of our clients, their families and communities, as well as our staff. We work extensively alongside people who face heightened risks of discrimination and significant barriers to justice, including First Nations people, refugees and people from culturally and linguistically diverse communities, people with disability and anyone facing discrimination.

We recognise that Aboriginal and Torres Strait Islander peoples have experienced generations of exclusion, discrimination and harm through colonial laws, institutions and government systems. The ongoing impacts of colonisation, systemic racism, deaths in custody, and the erosion of First Nations laws and governance have contributed to profound distrust of legal and administrative systems,<sup>1</sup> including mechanisms for complaints, accountability and redress. These experiences continue to create unique and enduring barriers to accessing justice and increase the risk of re-traumatisation when engaging with legal and complaints processes.

## Purpose of this Submission

This review presents an important opportunity to modernise the *Anti-Discrimination Act 1977 (NSW)* ('the ADA') so that it reflects contemporary understandings of equality and discrimination, aligns with human rights principles, and provides effective pathways to justice and redress for both individual and systemic discrimination.

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<sup>1</sup> Australian Human Rights Commission (AHRC), *National Anti-Racism Framework* (Nov 2024), p. 31.  
[https://humanrights.gov.au/\\_data/assets/file/0021/47334/NARF\\_Full\\_Report\\_FINAL\\_DIGITAL\\_ACCESSIBLE.pdf](https://humanrights.gov.au/_data/assets/file/0021/47334/NARF_Full_Report_FINAL_DIGITAL_ACCESSIBLE.pdf).

Anti-discrimination law plays a critical role in protecting rights, promoting equality and enabling participation in economic, social and public life. Its purpose is not only to provide remedies after discrimination occurs, but also to prevent discrimination, address systemic disadvantage and promote substantive equality.<sup>2</sup> While the ADA has played an important role in protecting people from discrimination, its framework remains largely focused on individual complaints after harm has occurred. In NJP's experience, many of the most significant harms arise from systemic factors embedded within laws, policies, institutional practices and public systems. Further, even where harm is demonstrated, the current framework does not always provide an effective avenue for redress, as the ADA's evidentiary requirements can make it difficult for complainants to establish unlawful discrimination, limiting the Act's capacity to remedy harm and drive change. Reform is therefore needed to strengthen the ADA's capacity to prevent, identify and address systemic discrimination, alongside providing effective redress for individual instances of unlawful conduct.

The need for reform is also reflected in the practical barriers that limit access to the current scheme. Despite our extensive work with people who have experienced discrimination and systemic injustice, NJP has rarely relied upon the NSW anti-discrimination framework to pursue remedies on behalf of clients. This reflects persistent barriers including evidentiary hurdles, limited mechanisms for addressing systemic discrimination, unequal power dynamics between complainants and respondents, barriers to legal representation, and concerns regarding the accessibility and cultural safety of complaints processes.

This submission is organised around the National Justice Project's strategic reform framework, which focuses on three interconnected areas: **Human Rights & Equality, Accountability & Access to Justice, and Care, Safety & Support**. These pillars reflect both the systemic barriers experienced by communities affected by discrimination and the reforms needed to create fairer, safer and more accountable systems and institutions.

Within this framework, NJP advocates for an anti-discrimination system that:

- promotes human rights and substantive equality;
- recognises and addresses systemic and structural discrimination;
- improves access to justice for communities at most risk of discrimination;
- embeds cultural safety, trauma informed practice and community participation;
- ensures institutional accountability for preventing discrimination.

Finally, legislative reform must be accompanied by adequate funding and resourcing. New rights, powers and responsibilities will only achieve their intended purpose if Anti-Discrimination NSW, the New South Wales Civil and Administrative Tribunal (NCAT), legal assistance services and community organisations are appropriately resourced to implement them effectively.

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<sup>2</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) and Equal Rights Trust (ERT), *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (Dec 2022), p. x. <https://www.ohchr.org/en/publications/policy-and-methodological-publications/protecting-minority-rights-practical-guide>.

## Recommendations

**Recommendation 1:** Insert an objects clause that includes promotion of substantive equality, human rights and the elimination of discrimination, and require the Act to be interpreted consistently with relevant international human rights obligations.

**Recommendation 2:** Ensure reform of the ADA complements broader human rights reform, including the introduction of a Human Rights Act for New South Wales.

**Recommendation 3:** Amend the ADA to recognise and address systemic discrimination and promote substantive equality, including through the objects clause and the adoption of a statutory definition of systemic discrimination.

**Recommendation 4:** Replace the current comparator-based tests with a simplified framework based on unfavourable treatment and disadvantage, enabling discrimination to be assessed by reference to its actual impact rather than the existence of a suitable comparator.

**Recommendation 5:** Introduce a positive duty requiring organisations and public authorities to take reasonable and proportionate steps to prevent discrimination, harassment and victimisation, supported by appropriate compliance, monitoring and enforcement mechanisms.

**Recommendation 6:** Review and update the ADA's structure and protected attributes and expressly recognise intersectional discrimination, including discrimination arising from the interaction of multiple protected attributes and forms of disadvantage.

**Recommendation 7:** Strengthen access to justice under the ADA by creating simpler and more accessible complaint pathways, improving legal and advocacy support, strengthening protections against victimisation, and reducing procedural barriers that discourage people from reporting and pursuing discrimination complaints.

**Recommendation 8:** Strengthen disclosure obligations and improve access to relevant information in discrimination matters, including greater flexibility for courts and tribunals to draw reasonable inferences from available evidence.

**Recommendation 9:** Introduce burden-shifting mechanisms that require respondents to explain conduct capable of supporting an inference of discrimination, including the reasonableness of conditions, requirements or practices in indirect discrimination matters.

**Recommendation 10:** Expand the powers of Anti-Discrimination NSW to identify, investigate and address systemic discrimination, including through own-motion investigations, compliance reviews, public inquiries, information-gathering powers and other regulatory enforcement mechanisms.

**Recommendation 11:** Expand representative complaint mechanisms, standing provisions and public interest proceedings to enable systemic discrimination affecting groups and communities to be effectively identified and addressed.

**Recommendation 12:** Expand available remedies and enforcement powers to address systemic discrimination, including organisational reform orders, compliance measures, reporting and monitoring requirements, and other remedies capable of driving institutional change.

**Recommendation 13:** Reform the compensation and costs framework to ensure meaningful redress for discrimination, including a human-rights-informed approach to damages, recognition of cumulative and intersectional harm, removal of compensation caps, and costs protections that improve access to legal representation and enforcement.

**Recommendation 14:** Recognise cultural safety and inclusion as guiding principles of the anti-discrimination framework and complaints process, and ensure complaint mechanisms are culturally appropriate, culturally accessible and responsive to the needs of affected communities.

**Recommendation 15:** Require Anti-Discrimination NSW, conciliators and tribunals to adopt trauma-informed practices, including early identification of support needs, appropriate procedural flexibility, improved communication and case management, and measures that minimise re-traumatisation during complaint processes.

**Recommendation 16:** Strengthen the public education, community engagement and promotional functions of Anti-Discrimination NSW to improve awareness and understanding of equality, non-discrimination and rights under the Act.

**Recommendation 17:** Strengthen community participation and ongoing monitoring of the ADA, including consultation with affected communities and collection of data to evaluate the effectiveness of reforms.

# 1. Human Rights & Equality

## 1.1 Alignment with Human Rights Principles

States have an obligation under international human rights law to respect, protect and fulfil the rights to equality and non-discrimination for all. Comprehensive anti-discrimination legislation is a key mechanism through which governments give effect to these obligations and provide practical protections against discrimination.<sup>3</sup>

Unlike many contemporary anti-discrimination statutes, the ADA does not contain an objects clause that clearly articulates the purpose and principles underpinning the Act. NJP supports the inclusion of an objects clause that expressly recognises the role of the ADA in promoting equality, preventing all forms of discrimination, and advancing human rights. Such a clause should guide interpretation, administration and future reform of the Act, while recognising that anti-discrimination law forms part of a broader human rights framework.

NJP also supports legislative recognition that the ADA should be interpreted, so far as possible, consistently with Australia's international human rights obligations. Aligning the ADA with established human rights principles would assist in ensuring that anti-discrimination protections remain responsive to contemporary understandings of equality and non-discrimination.

While this review provides an important opportunity to strengthen anti-discrimination protections in NSW, reform of the Act should complement, rather than replace, broader human rights reform. In our experience with justice, policing, custodial, healthcare, child protection and other settings involving the exercise of state power, discrimination often occurs alongside wider human rights harms. A modern anti-discrimination act should therefore operate as part of a wider legislative framework that gives effect to Australia's human rights obligations, including through the introduction of a Human Rights Act for New South Wales.

**Recommendation 1:** Insert an objects clause that includes promotion of substantive equality, human rights and the elimination of discrimination, and require the Act to be interpreted consistently with relevant international human rights obligations.

**Recommendation 2:** Ensure reform of the ADA complements broader human rights reform, including the introduction of a Human Rights Act for New South Wales.

## 1.2 Systemic Discrimination & Substantive Equality

### Define Systemic Discrimination

The current Act is primarily directed towards individual acts of discrimination and is not well equipped to identify, prevent or address systemic discrimination. While individual complaints remain an important avenue for redress, many of the most significant forms of discrimination arise through

<sup>3</sup> OHCHR & ERT, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (Dec 2022), p. x.

laws, policies, institutional practices and organisational cultures that create or perpetuate disadvantage.

NJP supports a shift from a framework focused primarily on individual incidents and formal equality towards one that advances substantive equality and recognises the structural nature of discrimination. A modern anti-discrimination framework should acknowledge that discrimination is often embedded in systems, practices and decision-making processes, producing unequal outcomes even in the absence of overt discriminatory intent.

The need for stronger recognition of systemic discrimination has been identified in a range of recent reform processes, including the Australian Human Rights Commission's *National Anti-Racism Framework*, which highlights the importance of and need for comprehensive anti-discrimination laws capable of addressing systemic racism and structural inequality. The Framework also supports stronger preventative and regulatory mechanisms to identify and address systemic discrimination.<sup>4</sup>

The ADA should expressly recognise systemic discrimination in both its objects and operative provisions. A statutory definition would assist in identifying and addressing discriminatory patterns and practices that affect groups and communities, rather than limiting the Act's operation to individual complaints. Potential models include the *National Anti-Racism Framework*, which incorporates definitions of systemic racism and related concepts of institutional and structural racism.<sup>5</sup> Legislative models can also be found in the *Australian Human Rights Commission Act 1986* (Cth),<sup>6</sup> which defines systemic unlawful discrimination as discrimination affecting a class or group of people that is continuous, repetitive or forms a pattern, and the *Discrimination Act 1991* (ACT), which expressly recognises the need to identify and eliminate systemic causes of discrimination and to progressively realise equality in practice.<sup>7</sup>

Recognition of systemic discrimination should be accompanied by an express commitment to substantive equality, acknowledging that discrimination is often the product of historical, structural and institutional disadvantage rather than isolated acts of unequal treatment. This approach is reflected in the *Equal Opportunity Act 2010* (Vic), which incorporates a number of mechanisms designed to promote substantive equality, including its objects clause (s3), definitions of direct and indirect discrimination (ss8-9), the obligation to make reasonable adjustments for people with disability (ss20-23), provisions relating to special measures (s12), and the statutory duty not to engage in discrimination, sexual harassment or victimisation (s15).<sup>8</sup> Together, these provisions recognise that achieving equality may require proactive measures to address disadvantage and unequal outcomes.

**Recommendation 3:** Amend the ADA to recognise and address systemic discrimination and promote substantive equality, including through the objects clause and the adoption of a statutory definition of systemic discrimination.

<sup>4</sup> AHRC, *National Anti-Racism Framework* (Nov 2024), p. 31.

<sup>5</sup> AHRC, *National Anti-Racism Framework* (Nov 2024), p. 36.

<sup>6</sup> *Australian Human Rights Commission Act 1986*, s35L(2).

<sup>7</sup> *Discrimination Act 1991* (ACT), s4.

<sup>8</sup> *Equal Opportunity Act 2010* (Vic).

### Reform the Comparator Test

The current NSW framework relies on multiple comparator-based tests across different attributes and forms of discrimination. This approach is highly technical, difficult to apply and increasingly disconnected from contemporary understandings of discrimination. Requiring complainants to identify an appropriate comparator can operate as a significant barrier to establishing discrimination, particularly where discrimination arises through institutional practices, structural disadvantage or systemic patterns of exclusion.

NJP supports replacing the current comparator-based framework with a simpler and more coherent model based on the concepts of **unfavourable treatment** and **disadvantage**, similar to that adopted in the ACT.<sup>9</sup> Under this approach, direct discrimination occurs where a person is treated unfavourably because of a protected attribute, while indirect discrimination occurs where a condition, requirement or practice disadvantages a person because of a protected attribute.

A disadvantage-based framework better reflects the realities of how discrimination is experienced. Rather than requiring often artificial comparisons between groups or individuals, it allows courts and tribunals to focus on the actual impact of conduct, policies and practices. This would better align the Act with principles of substantive equality and strengthen its capacity to identify and address systemic discrimination.

Importantly, replacing the comparator test would enable greater consideration of statistical, systemic and pattern-based evidence demonstrating disproportionate impacts on particular groups. This would improve the Act's ability to address discrimination arising from institutional arrangements and decision-making processes, even where there is no obvious comparator or overt discriminatory intent.

**Recommendation 4:** Replace the current comparator-based test with a simplified framework based on unfavourable treatment and disadvantage, enabling discrimination to be assessed by reference to its actual impact rather than the existence of a suitable comparator.

## 1.3 Positive Duty to Prevent Discrimination

The current anti-discrimination framework is largely reactive, relying on individuals to identify discrimination and pursue remedies after harm has occurred. NJP supports the introduction of a positive duty requiring organisations and public authorities to take reasonable and proportionate steps to prevent discrimination, harassment and victimisation. Such a duty would widen the focus of the ADA beyond responding to individual complaints towards proactive identification and prevention of discrimination before harm occurs.

A positive duty is particularly important in relation to state government agencies and public authorities. In many of the areas in which NJP works, including policing, healthcare, child protection and detention, discrimination is often experienced through institutional practices, systems and decision-making processes rather than isolated incidents. By requiring organisations and public authorities to actively identify and mitigate discrimination risks, a positive duty would strengthen the

<sup>9</sup> *Discrimination Act 1991* (ACT), ss4AA, 8.

Act's capacity to prevent and address systemic discrimination and embed equality considerations within the exercise of public power and delivery of public services.

The ADA is uniquely positioned to undertake this role. While Commonwealth anti-discrimination laws provide important protections in other areas such as employment, they are not designed to provide comprehensive oversight of discrimination within state government systems and services. A strengthened NSW framework would therefore play a distinct and complementary role by embedding equality obligations within the institutions responsible for exercising public power and delivering public services.

Recent reform initiatives support this approach. The AHRC's *National Anti-Racism Framework* recommends positive duties to prevent racism, supported by regulatory oversight and compliance powers.<sup>10</sup> Equality duties have been recognised internationally<sup>11</sup> as an important mechanism for operationalising the rights to equality and non-discrimination by integrating those obligations within organisational systems, policies and decision-making processes.

Similar duties have been adopted in Victoria, Queensland,<sup>12</sup> and the Commonwealth.<sup>13</sup> Comparable proactive obligations also apply to public authorities in the ACT under the *Human Rights Act 2004* (ACT).<sup>14</sup> Of particular relevance is the *Equal Opportunity Act 2010* (Vic), which imposes a positive duty to eliminate discrimination, sexual harassment and victimisation and empowers the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to monitor and enforce compliance.<sup>15</sup> This model demonstrates how positive duties can support institutional accountability and systemic reform beyond resolution of individual complaints.

NJP also supports stronger employer and organisational responsibility for discrimination, sexual harassment and victimisation. Positive duties are most effective when coupled with clear legal accountability, creating incentives for organisations to invest in prevention, education and training rather than responding only after harm has occurred.

**Recommendation 5:** Introduce a positive duty requiring organisations and public authorities to take reasonable and proportionate steps to prevent discrimination, harassment and victimisation, supported by appropriate compliance, monitoring and enforcement mechanisms.

## 1.4 Protected Attributes & Intersectionality

The ADA should be reviewed to ensure that its protected attributes reflect contemporary understandings of discrimination and equality. Consideration should also be given to mechanisms

<sup>10</sup> AHRC, *National Anti-Racism Framework* (Nov 2024), p. 16.

<sup>11</sup> OHCHR & ERT, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (Dec 2022), p. xv.

<sup>12</sup> *Anti-Discrimination Act 1991* (Qld) pt 2A (as inserted by the *Respect at Work and Other Matters Amendment Act 2024* (Qld)).

<sup>13</sup> *Sex Discrimination Act 1984* (Cth) s47C.

<sup>14</sup> Section 40B of the *Human Rights Act 2004* (ACT) makes it unlawful for a public authority to act incompatibly with human rights or to fail to give proper consideration to relevant human rights when making decisions. See also *Discrimination Act 1991* (ACT), Part 9, ss74-76.

<sup>15</sup> *Equal Opportunity Act 2010* (Vic), ss15, 139.

that enable the recognition of new and emerging grounds of discrimination over time. International guidance has recognised the value of an “other status” provision, or similar mechanism, to ensure anti-discrimination protections can respond to evolving forms of discrimination and exclusion.<sup>16</sup>

The Act should also explicitly recognise intersectional discrimination. Many people experience discrimination arising from the interaction of multiple protected attributes, and these experiences cannot always be adequately understood by examining each attribute in isolation. For example, Aboriginal women, women with disability, and people from culturally and linguistically diverse backgrounds with disability may experience unique and compounded forms of discrimination. The Act should therefore permit claims based on combined protected attributes and recognise the cumulative effects of intersecting forms of disadvantage.

Explicit recognition of intersectional discrimination would better reflect the realities of discrimination and assist in identifying patterns of disadvantage that may otherwise remain invisible. This is particularly important given the limited collection of intersectional data across many institutions and service systems.<sup>17</sup>

NJP also supports the adoption of a more coherent and simplified legislative framework, while retaining attribute-specific protections where necessary to address particular forms of discrimination and disadvantage.

**Recommendation 6:** Review and update the ADA's structure and protected attributes and expressly recognise intersectional discrimination, including discrimination arising from the interaction of multiple protected attributes and forms of disadvantage.

## 2. Accountability & Access to Justice

### 2.1 Access to Justice Barriers

#### Complex and Inaccessible Complaint Systems

Effective anti-discrimination protections depend not only on the existence of legal rights, but on the ability of people to access and enforce those rights in practice. Many people who experience discrimination never make a complaint or pursue formal remedies because complaints and accountability systems can be difficult to navigate, especially so for people already experiencing vulnerability or disadvantage.

Jurisdictional complexity,<sup>18</sup> overlapping complaint bodies, fragmented review mechanisms and inconsistent processes can create confusion, delay and frustration for complainants. Uncertainty

<sup>16</sup> OHCHR & ERT, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (Dec 2022), p. xii.

<sup>17</sup> Commonwealth of Australia, *Working for Women: A Strategy for Gender Equality* (Strategy, Department of the Prime Minister and Cabinet, 2024). <https://genderequality.gov.au/sites/default/files/2024-03/working-for-women-a-strategy-for-gender-equality.pdf>.

<sup>18</sup> Attorney-General's Department (Cth), 'Australia's Anti-Discrimination Law' (Web Page, 1 October 2026). <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/>

regarding the most appropriate forum, available remedies and interaction between different complaint pathways may also create barriers to timely and effective resolution.

Analysis of users of NJP's *Hear Me Out* platform has highlighted these challenges. The most common barriers included vulnerability of complainants, difficulty identifying the appropriate complaints body, delays or lack of response from agencies, barriers to review and appeal processes, and challenges obtaining information and records.<sup>19</sup> These findings suggest that existing complaint systems remain overly complex and inaccessible, particularly for people seeking to challenge powerful institutions. These are the very challenges that NJP established the *Hear Me Out* platform to address by assisting people to navigate complaint pathways and pursue accountability.<sup>20</sup>

Accessibility barriers are further compounded by literacy and language difficulties, financial disadvantage, geographic isolation and limited access to legal assistance. Complaint pathways should therefore be simple, accessible and capable of supporting diverse communities to participate effectively.

### **Fear of Reporting and Low Confidence in the System**

Many people who experience discrimination do not report it or utilise complaints processes it because they fear retaliation or lack confidence that complaints will lead to meaningful outcomes. Fear of adverse treatment, reputational harm, immigration consequences, loss of employment or other opportunities, and further victimisation can discourage reporting,<sup>21</sup> particularly where misconduct is normalised or organisational cultures discourage complaints.<sup>22</sup> Low reporting rates should not be interpreted as evidence that discrimination is uncommon but may instead reflect low confidence in institutions and complaints processes. A national study of racism in Australian universities, for example, found that only 6% of people who experienced direct racism made a formal complaint.<sup>23</sup>

These barriers are heightened for particular communities. First Nations peoples may face longstanding distrust arising from experiences of systemic racism and discrimination. Migrant and refugee communities may fear immigration consequences or lack awareness of their rights. People with disability frequently report being dismissed or disbelieved when raising concerns, while LGBTIQ+ people may fear being outed through complaints processes or perceive that harms affecting their communities are not treated seriously.<sup>24</sup>

<sup>19</sup> Analysis of *Hear Me Out* complainant experiences (2026).

<sup>20</sup> <https://www.hearmeout.org.au/>.

<sup>21</sup> Australian Human Rights Commission, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Nov 2022), p. 129.

<sup>22</sup> Tim Prenzler, Troy Allard, Steven Curry and Stuart McIntyre, 'Complaints Against Police: The Complainants' Experience' (2010) 1(1) *The Journal of Criminal Justice Research* 1; Department of Justice and Community Safety (Vic), *Cultural Review of the Adult Custodial Corrections System: Safer Prisons, Safer People, Safer Communities* (Final Report, December 2022), Pt. 5.

<sup>23</sup> Caitlin Cassidy, 'Taunts, Harassment and Assaults: Landmark Report Finds Racism at Australian Universities Is "Systemic"', *The Guardian* (online, 17 February 2026). <https://www.theguardian.com/australia-news/2026/feb/17/australian-university-racism-study-report>.

<sup>24</sup> Victorian Equal Opportunity and Human Rights Commission, *Proud, Visible, Safe: Equality and Safety for LGBTI Students at Victorian Schools* (2019), p. 42

Confidence in anti-discrimination systems is shaped not only by accessibility, but also by whether complainants believe complaints will lead to meaningful outcomes. According to Anti-Discrimination NSW's 2023-24 *Annual Report*, of 1,670 complaints received, only 250 (15%) were resolved through settlement and 166 (9%) were referred to NCAT. Remaining matters were declined, withdrawn, abandoned or otherwise resolved through administrative processes.<sup>25</sup> While these outcomes may occur for a range of reasons, they highlight the importance of understanding why complaints discontinue and whether existing barriers prevent complainants from progressing through the system.

**Recommendation 7:** Strengthen access to justice under the ADA by creating simpler and more accessible complaint pathways, improving legal and advocacy support, strengthening protections against victimisation, and reducing procedural barriers that discourage people from reporting and pursuing discrimination complaints.

## 2.2 Power Imbalances & Evidentiary Issues

Anti-discrimination claims frequently involve significant power imbalances between complainants and respondents. Government agencies, employers and other large organisations often have access to substantially greater legal, financial and administrative resources than individual complainants. These disparities are particularly significant where complainants are self-represented or seeking to challenge large institutions or systemic discrimination.

### Disclosure and Access to Evidence

Power imbalances are compounded by information asymmetries.<sup>26</sup> Respondents commonly control the documents, records, policies and decision-making processes that are central to proving a claim, making discrimination difficult to establish, particularly where the alleged conduct arises through institutional practices, policies or patterns of conduct rather than a specific action or decision.

NJP supports reforms to strengthen disclosure obligations and improve access to relevant information at an earlier stage of complaint, investigation, mediation and conciliation processes. Greater access to documents and other relevant information would assist in addressing information imbalances and reduce the burden on complainants seeking to establish discrimination.

Courts and tribunals should also be empowered to draw reasonable inferences where relevant evidence is held by a respondent and is not produced without adequate explanation. In many discrimination matters, an overly strict approach to evidence may effectively shield discriminatory conduct from scrutiny where the relevant information remains under the control of the respondent.

### Burden of Proof

The burden of proof remains a significant barrier to access to justice in discrimination matters. Discriminatory conduct is often subtle, informal or difficult to document, meaning that complainants

<sup>25</sup> Anti-Discrimination NSW, *Anti-Discrimination NSW Annual Report 2023–24* (Annual Report, 2024), p 18.

<sup>26</sup> See our prior submission: National Justice Project, *Submission No AD06 to NSW Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW)* (Submission)(1 July 2025).  
<https://lawreform.nsw.gov.au/documents/Current-projects/ada/submissions/ad06.pdf>

may be required to establish discriminatory intent or motivation without access to the information necessary to do so.

Relevant evidence is often held by the respondent, who is generally far better placed than the complainant to explain the reasons for their conduct and produce the information necessary to determine whether discrimination occurred. NJP therefore supports a rebuttable presumption of discrimination once a complainant establishes facts capable of supporting an inference of discrimination, with the evidential burden shifting to the respondent to demonstrate that the conduct was not discriminatory. Similarly, in indirect discrimination matters, respondents should bear the burden of establishing that a condition, requirement or practice was reasonable.

Comparable burden-shifting approaches have been adopted in a number of jurisdictions. Section 136 of the *Equality Act 2010* (UK)<sup>27</sup> requires a respondent to prove that discrimination did not occur once facts are established from which discrimination could be inferred. A similar reverse-onus approach operates in the adverse action provisions of the *Fair Work Act 2009* (Cth), reflecting the practical reality that employers are often best positioned to explain the reasons for their actions.<sup>28</sup> Similar approaches are reflected in other Australian anti-discrimination regimes. The Victorian Act places the burden on respondents to establish the reasonableness of a condition,<sup>29</sup> requirement or practice in indirect discrimination matters, while the ACT framework provides a model for shifting the evidential burden once a complainant establishes facts supporting an inference of discrimination.<sup>30</sup>

**Recommendation 8:** Strengthen disclosure obligations and improve access to relevant information in discrimination matters, including greater flexibility for courts and tribunals to draw reasonable inferences from available evidence.

**Recommendation 9:** Introduce burden-shifting mechanisms that require respondents to explain conduct capable of supporting an inference of discrimination, including the reasonableness of conditions, requirements or practices in indirect discrimination matters.

## 2.3 Addressing Systemic Discrimination

Addressing systemic discrimination requires mechanisms that extend beyond individual complaint resolution. This includes independent oversight, representative and public interest proceedings, and regulatory powers capable of identifying and addressing discriminatory practices at an institutional level.

### Independent Oversight and Systemic Accountability

Experience across a range of public institutions demonstrates the limitations of relying on internal

<sup>27</sup> *Equality Act 2010* (UK), s136.

<sup>28</sup> See *Shum v Southern Migrant and Refugee Centre Inc (No 3) [2025]*, which applied the reverse-onus provisions in s361 of the *Fair Work Act 2009* (Cth), illustrating how burden-shifting mechanisms can assist in circumstances where the respondent is best placed to explain the reasons for a decision; see also Megan Kavanagh, 'Prove It or Lose It: The Reverse Onus of Proof on Employers in Adverse Action Claims', Colin Biggers & Paisley (Web Page, 23 July 2025) <https://www.cbp.com.au/insights/publications/prove-it-or-lose-it-the-reverse-onus-of-proof-on-employers-in-adverse-action-claims>.

<sup>29</sup> *Equal Opportunity Act 2010* (Vic), s9(2).

<sup>30</sup> *Human Rights Commission Act 2005* (ACT), s53CA.

complaints processes to address systemic wrongdoing. For example, concerns have long been raised regarding the lack of transparency and independence of internal police complaint processes, highlighting the limitations of relying on institutions to investigate allegations concerning their own conduct and the corresponding low substantiation rates for complaints.<sup>31</sup> Similar issues may arise whenever organisations are responsible for investigating complaints concerning their own practices and decision-making.

These limitations are particularly significant where allegations involve institutional culture, systemic discrimination or patterns of conduct affecting multiple individuals. Independent oversight mechanisms are therefore essential to ensure discriminatory practices can be identified, investigated and addressed effectively.

### **Representative Complaints and Public Interest Proceedings**

The current framework places responsibility for pursuing discrimination claims largely on individual complainants, even where the alleged discrimination affects groups, communities or classes of people. This can leave widespread or systemic discrimination unaddressed.

NJP supports broader standing provisions that enable advocacy organisations, community organisations and representative bodies to bring complaints and proceedings on behalf of affected groups. Representative complaints and public interest proceedings can improve access to justice, reduce the burden on individual complainants and ensure systemic issues can be addressed even where affected individuals are unable or unwilling to participate directly. Recent reforms to federal anti-discrimination laws provide a useful model for representative proceedings in matters involving systemic discrimination.<sup>32</sup>

Consideration should also be given to mechanisms that allow matters involving significant public interest issues or systemic discrimination to proceed beyond private resolution where broader accountability or systemic reform is required.

### **Strengthening the Role of Anti-Discrimination NSW**

NJP supports a broader regulatory role for Anti-Discrimination NSW in identifying, investigating and addressing systemic discrimination. Strengthening Anti-Discrimination NSW's regulatory functions would also complement the positive duty framework discussed in Part 1. A positive duty creates obligations on organisations and public authorities to prevent discrimination, but effective implementation requires independent mechanisms capable of monitoring compliance, investigating concerns and promoting institutional accountability.

Comparable reforms in Victoria demonstrate that anti-discrimination agencies can effectively combine individual complaint resolution with broader compliance, investigative and systemic

<sup>31</sup> Police Accountability Project, *Independent Investigation of Complaints against the Police* (Policy Briefing Paper, 2017) pp. 4, 9; Independent Broad-based Anti-corruption Commission, 'Victoria Police Handling of Complaints Made by Aboriginal People' (18 May 2022), <https://www.ibac.vic.gov.au/victoria-police-handling-complaints-made-aboriginal-people>.

<sup>32</sup> Justice and Equity Centre, *Recent Changes to Federal Discrimination Powers and Complaint Processes* (Fact Sheet, 29 May 2023). [https://jec.org.au/wp-content/uploads/jec-publications/13190/23.05.29-Fact-Sheet\\_Recent-changes-to-federal-discrimination-powers-and-complaint-processes.pdf](https://jec.org.au/wp-content/uploads/jec-publications/13190/23.05.29-Fact-Sheet_Recent-changes-to-federal-discrimination-powers-and-complaint-processes.pdf).

functions. VEOHRC provides a useful model, maintaining accessible individual complaint services while also undertaking regulatory, compliance and systemic reform activities. Notably, these broader functions have not displaced its complaint-resolution role, with VEOHRC continuing to achieve relatively high rates of dispute resolution and user satisfaction.

Drawing on the Victorian model, Anti-Discrimination NSW should be empowered to:

- conduct own-motion investigations into systemic discrimination;<sup>33</sup>
- undertake compliance reviews of organisational policies, practices and systems;<sup>34</sup>
- conduct public inquiries into systemic discrimination and institutional practices;<sup>35</sup>
- investigate compliance with positive duties;<sup>36</sup>
- obtain information and documents necessary to conduct investigations;<sup>37</sup>
- negotiate enforceable undertakings;<sup>38</sup> and
- publish findings, recommendations and guidance addressing systemic discrimination.<sup>39</sup>

**Recommendation 10:** Expand the powers of Anti-Discrimination NSW to identify, investigate and address systemic discrimination, including through own-motion investigations, compliance reviews, public inquiries, information-gathering powers and other regulatory enforcement mechanisms.

**Recommendation 11:** Introduce representative complaint mechanisms, broader standing provisions and public interest proceedings to enable systemic discrimination affecting groups and communities to be effectively identified and addressed.

## 2.4 Remedies, Enforcement & Compliance

### Systemic Remedies and Enforcement

Many incidents of discrimination arise from broader organisational practices, policies or cultures. In these circumstances, individual remedies are likely to be insufficient to address underlying causes of harm, prevent future discrimination or achieve meaningful institutional change.

NJP supports expanding the range of available remedies to include measures capable of addressing systemic discrimination and promoting organisational reform. Consideration should be given to enabling organisational reform orders, reporting and monitoring requirements, policy and practice reviews, mandatory action plans, training and education measures, independent audits and other remedies directed at addressing the underlying causes of discrimination where it reflects broader institutional practices or failures.

Where systemic investigations identify discriminatory practices, public authorities and organisations should be required to respond to recommendations and demonstrate the steps taken to address

<sup>33</sup> *Equal Opportunity Act 2010* (Vic) pt 9 s127.

<sup>34</sup> *Equal Opportunity Act 2010* (Vic) s151.

<sup>35</sup> *Equal Opportunity Act 2010* (Vic) s139.

<sup>36</sup> *Equal Opportunity Act 2010* (Vic) Part 9.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Equal Opportunity Act 2010* (Vic) s139.

identified concerns. Stronger compliance and enforcement mechanisms are necessary to ensure that findings of systemic discrimination lead to meaningful institutional change.

Conciliation and negotiated settlement remain important features of anti-discrimination frameworks and can provide efficient and accessible resolution for many complainants. However, excessive reliance on private settlement may limit opportunities for public findings, the development of discrimination jurisprudence and broader institutional learning. In some circumstances, complaints may be resolved without any formal acknowledgment of wrongdoing, even where they raise significant public interest or systemic issues. Anti-discrimination frameworks should include pathways for significant matters to generate findings, guidance, precedent and systemic reform, rather than relying exclusively on private resolution.

### **Damages and Recognition of Harm**

Remedies should appropriately reflect the nature and impact of discrimination. This includes recognising the cumulative effects of discrimination, particularly where discrimination arises from intersectional discrimination or the interaction of multiple protected attributes or forms of disadvantage.

NJP supports consideration of a similar model to the ACT's *Human Rights Commission Act*,<sup>40</sup> which requires that human rights considerations are taken into account when assessing damages. Such an approach recognises that discrimination affects not only material interests, but also dignity, equality, participation and other fundamental rights.<sup>41</sup> A human-rights-informed approach to remedies would assist courts and tribunals to better reflect the seriousness of discriminatory conduct and ensure compensation remains responsive to contemporary community expectations regarding equality and non-discrimination. It would also support recognition of the broader impacts of discrimination, including psychological harm, loss of dignity and reduced participation in public life.

The current cap on compensation should be removed. If a statutory cap is to be retained, it should be increased to align with compensation available under federal anti-discrimination laws. This would help ensure remedies provide meaningful redress in serious cases, appropriately recognise the harms caused by discrimination, and strengthen the Act's deterrent effect.

### **Legal Representation and Costs**

Many discrimination complainants are self-represented and may struggle to identify and articulate legally actionable discrimination claims. The complexity of discrimination law can result in complaints failing, even where substantial discrimination has occurred.

Access to legal representation is also limited. Discrimination matters can be difficult to run economically, particularly where complainants have limited financial resources and available remedies may be modest. As a result, there may be insufficient incentives for legal practitioners to undertake discrimination matters, leaving many complainants without legal assistance.

<sup>40</sup> *Human Rights Commission Act 2005* (ACT), s53E(3).

<sup>41</sup> See *Complainant 202258 v Southern Restaurants (Vic) Pty Ltd (Discrimination)* [2025] ACAT 3, where human rights considerations under s53E(3) informed an award of \$80,000 in general damages, reflecting the impact of discrimination on the applicant's dignity, equality and maternal rights.

The ADA should adopt a costs framework similar to the applicant costs protection regime recently introduced in federal anti-discrimination proceedings. Reducing the risk of adverse costs orders would improve access to legal representation and remove a significant barrier to enforcing anti-discrimination rights, while maintaining appropriate protections against unreasonable or vexatious conduct. Such a framework would also help address the substantial resource imbalance that often exists between complainants and institutional respondents.

**Recommendation 12:** Expand available remedies and enforcement powers to address systemic discrimination, including organisational reform orders, compliance measures, reporting and monitoring requirements, and other remedies capable of driving institutional change.

**Recommendation 13:** Reform the compensation and costs framework to ensure meaningful redress for discrimination, including a human-rights-informed approach to damages, recognition of cumulative and intersectional harm, removal of compensation caps, and costs protections that improve access to legal representation and enforcement.

## 3. Care, Safety & Support

### 3.1 Cultural Safety

Cultural safety and inclusion should be embedded throughout the anti-discrimination framework and complaints process. Complaint mechanisms must be culturally appropriate, responsive and accessible to the communities they serve.

NJP supports the recommendation of the AHRC's *National Anti-Racism Framework* that governments work with First Nations communities to develop and implement recognised cultural safety standards.<sup>42</sup> Cultural safety is particularly important for First Nations peoples, whose experiences of racism, exclusion and institutional harm highlight the need for community-led and culturally appropriate responses to discrimination.

Complaint processes should also recognise the needs of culturally and linguistically diverse communities. Language barriers, limited familiarity with legal systems, concerns regarding authority, visa-related fears and experiences of exploitation may affect engagement with complaints processes. Access to interpreters, plain-language resources and culturally appropriate communication and mediation processes should therefore be available throughout the complaints process.

People with disability may also face barriers arising from failures to recognise disability-related needs, behaviours and communication styles. Complaint mechanisms should support meaningful participation through reasonable adjustments, supported decision-making, accessible communication options and oral complaint pathways.

The language used throughout the Act should reflect contemporary community expectations and promote dignity, inclusion and respect. NJP supports a review of descriptors and terminology to

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<sup>42</sup> AHRC, *National Anti-Racism Framework* (Nov 2024).

ensure the Act remains culturally appropriate, respectful and consistent with contemporary understandings of equality and discrimination.

**Recommendation 13:** Recognise cultural safety and inclusion as guiding principles of the anti-discrimination framework and complaints process, and ensure complaint mechanisms are culturally appropriate, culturally accessible and responsive to the needs of affected communities.

## 3.2 Trauma-Informed Processes

People reporting discrimination, racism, harassment, abuse and other harmful conduct often engage with complaint processes after experiencing significant distress or trauma. However, complaint systems are frequently designed around institutional processes rather than the needs of complainants. Complainants may be required to repeatedly recount traumatic experiences,<sup>43</sup> navigate complex procedures and advocate for themselves across multiple stages of a complaint. These requirements can contribute to re-traumatisation, reduce participation and increase the likelihood that complainants disengage from the process before a matter is resolved.<sup>44</sup>

NJP supports the adoption of trauma-informed practices throughout complaint handling, conciliation, investigation and review processes. This requires more than awareness or training. Trauma-informed principles should be embedded in procedure design, communication practices, case management and decision-making processes. Complaint bodies and tribunals should be equipped to identify complainants who may require additional support and respond with appropriate procedural flexibility. Consideration should also be given to measures that reduce the need for complainants to repeatedly recount traumatic experiences, improve communication and support, and ensure complaints processes are designed around safety, participation and wellbeing rather than administrative convenience.

**Recommendation 14:** Require Anti-Discrimination NSW, conciliators and tribunals to adopt trauma-informed practices, including early identification of support needs, appropriate procedural flexibility, improved communication and case management, and measures that minimise re-traumatisation during complaint processes.

## 3.3 Public Education and Community Participation

Communities most affected by discrimination should play a central role in the implementation, monitoring and review of the Act. Meaningful consultation and participation improve the legitimacy and effectiveness of anti-discrimination frameworks and help ensure that reforms remain informed by lived experience.

Ongoing monitoring and evaluation are important to ensure that anti-discrimination laws and policies are achieving their intended objectives. NJP supports the collection and publication of disaggregated data to monitor equality outcomes and assess the effectiveness of reforms. Mechanisms should also be established to support ongoing consultation with communities affected

<sup>43</sup> Mental Health and Wellbeing Commission, *Guidelines for Trauma-Informed Mental Health Complaints Resolution* (2025) p. 7.

<sup>44</sup> *Ibid* p. 5.

by discrimination and their representative organisations throughout implementation and future reform processes.

Anti-Discrimination NSW should continue to play a strong educational, promotional and community engagement role. Public awareness initiatives, community outreach, culturally appropriate engagement and training programs can improve understanding of rights and responsibilities under the Act and contribute to the prevention of discrimination before harm occurs.<sup>45</sup> Institutions responsible for implementing the Act should be informed by ongoing engagement with affected communities and a commitment to learning from lived experience and emerging issues.<sup>46</sup>

**Recommendation 16:** Strengthen the public education, community engagement and promotional functions of Anti-Discrimination NSW to improve awareness and understanding of equality, non-discrimination and rights under the Act.

**Recommendation 17:** Strengthen community participation and ongoing monitoring of the ADA, including consultation with affected communities and collection of data to evaluate the effectiveness of reforms.

## Conclusion

The National Justice Project welcomes this important review and the opportunity to contribute to the development of a more effective, accessible and equitable anti-discrimination framework for NSW. The reforms proposed in this submission are directed towards ensuring the law better recognises and responds to systemic discrimination, promotes accountability, strengthens access to justice, and supports safer and more inclusive communities.

We thank the NSW Law Reform Commission for considering our submission and would welcome any questions or further opportunities to engage throughout the review process.

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<sup>45</sup> OHCHR & ERT, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* (Dec 2022), at p. xviii.

<sup>46</sup> *Ibid*, at p. xvii.