Anti-Discrimination Act NSW (1977) review

Submission to the Law Reform Commission

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About Disability Advocacy NSW (DA)

DA has over 35 years of experience providing individual advocacy to people with disability (PWD) of any age. The organisation services over two thirds of NSW, making it the largest individual disability advocacy organisation within NSW.

While DA has a presence in Sydney, it has a strong commitment to regional, rural and remote (RRR) areas in NSW. With local disability advocates – on the ground - in Western Sydney, Armidale, Bathurst, Broken Hill, Ballina, the Blue Mountains, Coffs Harbour, Dubbo, Newcastle, Central Coast, Port Macquarie, Tamworth, Gosford, Taree, Ballina – DA has firsthand insights and observations of the lived experiences of PWD and their families living in these areas. They are arguably some of the most disadvantaged people in our communities who experience widespread disability discrimination on multiple fronts – both in daily interactions, and entrenched systemic discrimination within service systems.

In addition to individual advocacy, DA has a commitment to championing the collective rights of people with disability across NSW. Our systemic advocacy staff work in collaboration with PWD impacted by unfair treatment, and those who support them to:

- Investigate and analyse unfair or unjust treatment of people with a disability.
- inform government and other relevant institutions, as well as the broader community, to any unfair or unjust treatment and recommend changes to the practices, policies, and laws to challenge unfair/unjust practices, policies and laws
- Advocate and lobby for change relevant to clients and the disability community
- Support marginalised communities to engage in public policy, to self-advocate, and work collectively to achieve meaningful systemic reform.

In this submission, we focus on the *Anti-Discrimination Act NSW* (1977), its effectiveness and adequacy for PWD experiencing discrimination in NSW. In drafting this submission, we considered both recorded instances where people with disability have come to DA for support with a discrimination matter and engaged directly with experienced advocates to canvas their thoughts about the current Act and the functioning of the ADB.

In addition to this submission, we invite members of the committee to conduct site visits to our offices alongside our Policy and Communications Lead (contact details below) to hear more from PWD who experience discrimination.

Contact

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Policy and Communications Lead at DA

The Anti-Discrimination Act NSW and its relevance for PWD

DA welcomes the opportunity to make this submission regarding the *Anti-Discrimination Act* NSW (1977) review. For the purposes of this submission, DA has considered the types of matters where our advocates have supported people with disability, in which the advocate has identified the matter type as '*discrimination*', which could fall under the jurisdiction of the Act. We have observed that while disability discrimination exists at the core of the unfair treatment that we see in our advocacy matters at DA, the Act and the Anti-Discrimination Board (ADB) are often underutilised, due to their perceived ineffectiveness in achieving fair outcomes for people with disability.

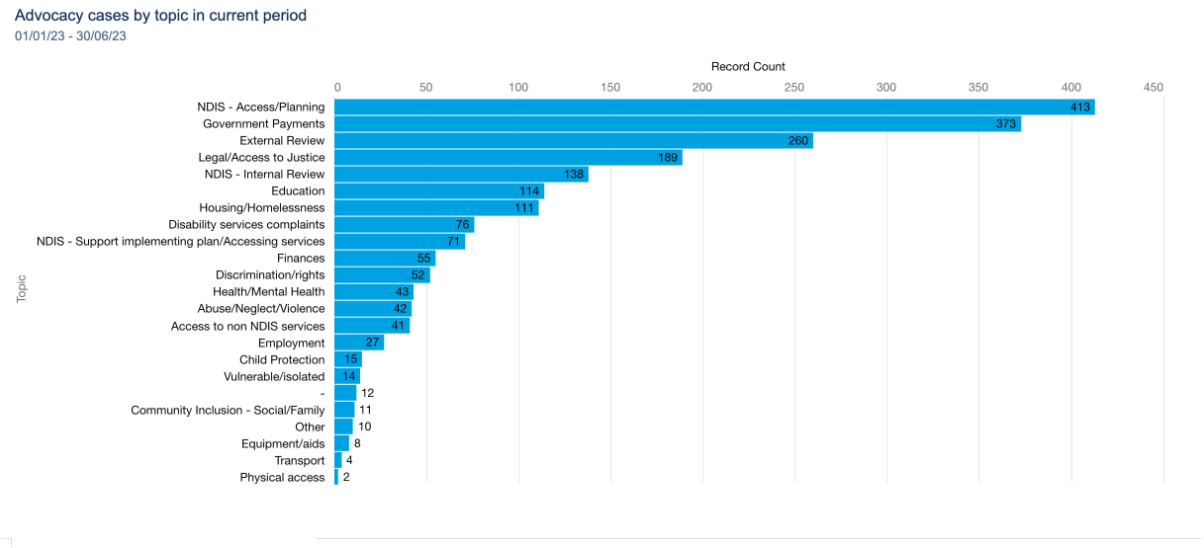
This submission briefly outlines reasons for this perception, addressing the following terms of reference:

- Adequacy and accessibility of complaints procedures;
- The protections, processes and enforcement mechanisms that exist in human rights laws.

To do this, we discuss the issues with the use and the relevance of the *Anti-Discrimination Act* NSW (1977), the ADB and the Australian Human Rights Commission (AHRC) to disability advocacy matters that involve discrimination. We focus on education matters involving reasonable adjustments as these are most common types of matters that draw on the Act in our advocacy work.

Disability Discrimination with DA advocacy matters: Seemingly small but largely problematic

Discrimination (and rights) matters reflect a significantly small proportion of the advocacy matters at DA. As reflected in Figure 1 (below) within a six-month, DA provided advocacy support to 52 'discrimination/rights' matters, accounting for only 2.5% of a total of 2.1 thousand matters.



Yet, disability discrimination arguably underpins most advocacy matters. Such matters the Act addresses include employment, housing, and disability services (including NDIS service providers, and access issues). In many of these matters, we see the very definition of discrimination - where PWD are treated less favourable and do not receive the same opportunities because of their disability. Additionally, there are unreasonable policies that have an unfair effect on PWD. For instance, in advocacy matters involving:

- Employment: there is often lack of reasonable adjustments made, unfair expectations about work output and practice, unfair dismissal, and exclusion from the workforce because of an individual's disability

- Housing: PWD are often unable to access secure, stable and affordable housing, due to stigma and covert discrimination where landlords and agents prefer people without disability. Additionally, PWD can be disadvantaged in securing housing as they are more likely to be on lower incomes than non-disabled people, making it challenging to find and compete for properties that are both affordable and accessible.
- Education: we frequently encounter a lack of reasonable adjustments made for students with disability, resulting in exclusion from classroom activities, suspensions and expulsions. Students with disability are often misrecognised as 'naughty' children and therefore receive punitive disciplinary action rather than support and adjustments. Disability services: Service providers treat PWD differently based on being a NDIS participant. Some disability services overcharge with rates that are vastly higher than those for non-NDIS participants. Other services refuse to provide a service to a non-NDIS participant, on the basis that they can charge higher rates for NDIS participants, on account of the scheme's generous price guide.

Underutilisation of the Anti-Discrimination Act: Other avenues sought to resolve issues.

Many of the advocacy matters listed above will frequently not draw on the *Anti-Discrimination Act*, nor will they lodge complaints to the ADB. Instead, advocates - alongside their clients - will follow alternative avenues to pursue fair outcomes. For instance, employment issues may utilise Fair Work Trading, housing matters may be referred to NSW Civil and Administrative Tribunal; disability services issues involving the NDIS services will typically make complaints to the NDIS Safeguards Commission. Lastly, education matters will often involve directly working with schools and/or the Department of Education (DOE). Going directly to the source of the complaint is often considered a more effective way of achieving a satisfactory outcome for the client compared to going to the ADB.

The Anti-Discrimination Act and education matters

The most prevalent advocacy issues that draw on the *Anti-Discrimination Act NSW (1977)* involve disputes involving reasonable adjustments within schools at public schools. Possibly reasons for this a significant proportion of matters do not resolve satisfactorily for parents of

children with disability via internal review within a school. Therefore, parents may feel compelled to pursue matters as formal discrimination complaints. This is often fuelled by a lack of alternative options for schooling, which is a common issue in regional, remote and rural areas - families are essentially a 'captive market'. Consequently, they have limited choices to go elsewhere. There may also be a perception that education disputes are generally 'safer' matters (compared to other advocacy issues listed in Figure 1, p. 5) to pursue a discrimination complaint, given the fact that all NSW children are required to have access to appropriate educational opportunities.

Many times, education issues stem from a lack of communication or a lack of understanding of the students' disability. Therefore, in the first instance, advocates will work with parents and teaching staff to find solutions and resolve issues. If attempts to resolve matters with the school and the Department of Education (DOE) are unsuccessful advocates can assist client with complaints made to the ADB.

The two parts of the legislation that advocates often refer to are:

1. The organisation or school are required to make **reasonable adjustments.**
2. However, this cannot cause **undue hardship** to the organisation or the school etc.

It is often difficult to obtain a good result for these matters based on these two sections of the Act. The issue is that while it may be discriminatory to not provide an adjustment, a school (or organisation) can legally refuse to provide an adjustment if it is deemed 'unreasonable' because it places undue economic hardship on the school or organisation. For under-resourced schools and organisations, this is understandable as providing an adjustment may lead to strain and economic adversity. However, a core issue that is not well regulated is some schools (and organisations) simply fail to abide by law and refuse to provide adjustment due to misinformed discriminatory attitudes.

Furthermore, the *Anti-Discrimination Act NSW* (1977) does not address disability discrimination within private schools. Complaints of this nature can be made to the AHRC. However, for many families this is not viable option due to the material and cognitive resources needed to engage with matters at AHRC (discussed in more detail below).

In such instances, when schools or organisations do not provide 'reasonable' adjustments due to disability discrimination, PWD experience forms of exclusion (e.g., suspensions, expulsions) and do not enjoy the same benefits of full and equal participation in public and social life.

Accessibility and adequacy of resolving complaints.

The ADB is a no cost jurisdiction, making it accessible in terms of cost for PWD. However, in our interactions with the ABD, they are often unable to take on matters due to limited resources. Advocates are more likely to recommend that clients try to resolve instances where discrimination might have occurred with the school directly, noting that the ADB primarily acts as a conciliation service. Additionally, in many cases there does not seem to be a resolution because the ADB seemingly have no powers to enforce action on an organisation or school. The ADB clearly states that complainants are expected to participate in the complaint process, which takes, on average 5 months to finalise, based on the ABD's last annual report,

As an alternative to the ADB, complaints can be lodged with the AHRC. In such instances, clients can go through the process with mediation and conciliation with the support of an advocate. However, if they do not have a good case at discrimination law, schools (or organisations) are unlikely to make allowances or propose reasonable adjustments. For the client to progress the matter further, it needs to escalate to court, which can involve legal, advice, representation and costs. Many any of our clients do not have the monetary ability to do this.

Additionally, when education issues go to the AHRC, schools and organisations will often have legal representation. This creates a power imbalance, where there is a legal team against the client and a non-legal advocate. Moreover, the actual school representatives that are responsible for the breach do not generally attend mediation. For families and/or students, this is disappointing as they are the ones who have seemingly breached the rights of the student. A core issue here is that the mediation then becomes a legal argument between legal representatives versus a layperson (usually family) about how their family member was

mistreated. If the DOE lawyers adopt the position that there has been no breach of the legislation, they are unlikely to admit any fault or make any allowances or engage meaningfully in mediation.

This type of interaction at the AHRC can be distressing for families. The unfair treatment they or their family member have experienced is dismissed, denied and or minimised. It also potentially results in a situation where the family has invested time and energy an adversarial process, which may impact their future relationship with the school, or in extreme cases, could even result in victimisation of the subject of the complaint and/or their family. It is not uncommon, even in instances where there has been an acknowledgement from the school that actions were discriminatory, for families to decide to transfer their children to alternative schools. In this, victimisation is a risk that can occur as result of lodging a complaint. While the ADB recognises that victimisation can occur on its website, it does not elaborate on what protections it can offer (if any) to those who might experience victimisation.

Overall, the *Anti-Discrimination Act NSW* (1977) offers little recourse for PWD experiencing discrimination within the advocacy matters at DA. Those experiencing discrimination must weigh up the potential positives to be gained through lodging a complaint through the ADB verses the labour, time and potential adverse retaliatory consequences of pursuing this mechanism for resolution – noting that a complaint to the ADB can be construed as an adversarial act. This is no opportunity to report complainant anonymously and the ABD has no proactive monitoring or auditing function across entities and departments to which the Act applies. There is a perpetual problem where PWD are expected to proactively attempt to enforce their own legal rights, via mechanisms which lack the punitive power to compel the broadscale compliance we need if we are to realise a truly inclusive society.

As largest disability advocacy provider in the state, discrimination exists at the core of disability advocacy issues, yet matters are seldom resolved through the application of the Act and through the ABD. Instead, other avenues are sought, because they are more effective. This indicates significant reforms are required both to the Act and in the operation of the ADB. Reforms should be informed through co-design with relevant key stakeholders, including advocacy organisations, legal services, and the communities to which the Act applies.

Recommendations

- We endorse the recommendation that the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life.
- The onus should be placed on entities to which the Act applies to demonstrate understanding and knowledge of the Act, and the incorporation of the Act across all aspects of operation. A good example of this is the requirement for Local Government Areas (LGAs) to prepare Disability Inclusion Action Plans (DIAPs), as a proactive commitment to applying the principles of the *Disability Inclusion Act NSW* (2014) - DIAPs have been successful in facilitating more inclusive practices across LGAs, both in terms of supporting staff, and enhancing service delivery to people with disability. The ADB could then be tasked with reviewing and sign off on such plans, like the role currently played by the NSW Disability Council
- In addition to positive obligations, there needs to be greater penalties when organisations, businesses and or schools fail to take *reasonable* action to promote equal and full participation. To do this, the ABD needs to be granted more powers to enforce reasonable adjustments.
- Defining 'reasonable' within *the Act* requires greater consideration and clarity. Schools, business and organisations need to be able to demonstrate to the ABD that an adjustment is 'unreasonable'. Tighter parameters need to be applied in terms of reasonableness, with a greater onus on the entity to demonstrate why compliance is not possible, with a requirement to demonstrate plans to address any obstacles to compliance in a timely manner. This should be done with a view to building on overall compliance across the state over time.