NUAA Submission to the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977

29 August 2025

NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124

By email: adareview@dcj.nsw.gov.au

Dear Commissioners,

Thank you for the opportunity to provide a submission on Consultation Paper 24 - Unlawful Conduct as part of the review of the *Anti-Discrimination Act 1977*.

People who use or have used drugs, including those currently on prescribed treatment, experience discrimination when seeking healthcare and employment. This discrimination has a disproportionate impact on people with intersecting identities such as Aboriginal People who are more likely to be involved with treatment or criminal justice systems on the basis of their drug use.

The Act as it stands explicitly allows discrimination against people based on their health status. While protections have been built into the Act, we argue that these are inadequate and contribute to the stigma and discrimination experienced by people with lived or living experience of drug use.

NUAA would like to endorse the following submissions:

- Scarlet Alliance and the Sex Workers Outreach Project (SWOP NSW)
- HALC (HIV/AIDS legal Centre), ACON, the National Association of People Living with HIV Australia (NAPWHA), Positive Life NSW and the Bobby Goldsmith Foundation
- Evidence provided by the Network of Alcohol and other Drugs Agencies

- The Inner City Legal Centre, particularly relating to the establishment of a trauma-informed complaints mechanism

NUAA strongly recommends that reforms the Act to align with national and international best practice to better support the rights of our most vulnerable communities.

Sincerely yours,

Mary Ellen Harrod
Chief Executive
NSW Users and AIDS Association

About NUAA

NUAA is the peer-based organisation representing people with lived and living experience of drug use across New South Wales. NUAA has worked since 1989 to improve the health and human rights and dignity of people who use drugs and to address the stigma and discrimination our communities experience.

Our organisation provides harm reduction services, health promotion, workforce development, advocacy and research. Our services include postal and outreach needle and syringe programs, hepatitis C testing and treatment linkage, workforce development, peer education and resources, overdose prevention and festival-based harm reduction targeted at young people. We are also partnering with NSW Health on the 12-month drug checking trial.

NUAA plays a crucial role in research and policy development and ensuring the voices of people who use drugs are heard in decisions that affect our lives. We have first-hand insight into the discrimination experienced by people who use or have used drugs. Our members and service users regularly report experiences of discrimination that profoundly impact their health, wellbeing, and capacity to participate fully in society.

Executive Summary

This submission argues for fundamental reform to align the Act with evidence-based public health approaches, human rights obligations, and Australia's commitment to harm reduction.

NUAA recommends:

- Repeal of **sections 49P and 49PA**, which explicitly permit discrimination against people who use drugs and people living with blood-borne viruses.
- Introduction of **"health status" as a protected attribute**, ensuring coverage for people who use alcohol and other drugs, people living with BBVs and STIs, and those with episodic or non-disability health conditions.
- Implementation of **positive duties** requiring organisations to take reasonable steps to prevent discrimination, harassment, and vilification, and to promote equality.
- Addition of **"irrelevant criminal record" as a protected attribute**, to reduce systemic barriers to employment and participation, particularly for Aboriginal and Torres Strait Islander Peoples.

- Extension of protections so that **all attributes apply across all existing prohibited areas** of public life (work, education, goods and services, accommodation, registered clubs).
- Expansion of prohibited areas to include **"government functions and the administration of laws"**, covering discrimination in policing, courts, and administrative decision-making.

The reforms we propose are not radical departures but necessary alignments with contemporary understanding of discrimination, health, and human rights. They reflect approaches proven effective in other jurisdictions and are supported by extensive empirical evidence. The cost of maintaining the status quo—measured in lives lost, health deterioration, and perpetuated cycles of marginalisation—far exceeds any perceived challenges of reform.

Issues in the Current Act

Section 49PA: A License to Discriminate

Section 49PA stands as an anomaly in Australian anti-discrimination law, providing employers with an unconditional right to discriminate on the basis of an employee being "addicted to a prohibited drug."

Section 49PA was introduced in 2002 as a direct response to the Federal Court's decision in *Marsden v HREOC* [2000] FCA 1619 (2000) which accepted the argument that Wayne Edward Marsden had been discriminated against by his local RSL club on the basis of opioid dependence. This decision established that discrimination based on drug dependency is unlawful under the Disability Discrimination Act.

Section 49PA of the NSW Anti-Discrimination Act was explicitly introduced to permit discrimination based on "addiction to a prohibited substance".[1] has no equivalent in any other Australian jurisdiction.

While this amendment explicitly states it is not intended to permit discrimination against people in medicated treatment for opioid dependence, in practice the provision's operation may create profound injustices. We believe this amendment should be repealed for the following reasons:

[1] Legislative Council Anti-Discrimination Amendment (Drug Addiction) Bill Hansard – Extract (2002) C0602.pdf accessed August 2025.

The amendment is inconsistent with anti-discrimination principles:

Section 49PA explicitly excludes one group of people from the protections that other people with disabilities receive under the legislation. This exclusion singles out one group – people who use drugs – for lesser protections thereby entrenching structural stigma and discrimination. This type of structural stigma can be observed across multiple contexts with people who have lived or living experience of illicit drug use experiencing stigma and discrimination at some of the highest rates observed in any other group.[2] These experiences have real-world impacts on the health and well being of people in NSW.[3][4]

The language is outdated and imprecise:

Section 49PA of the *Anti-Discrimination Act 1977 (NSW)* relies on the terms *"addiction"* and *"actually addicted"*. These terms are no longer recognised in medical practice and lack any legal definition within the Act. Their continued use creates unnecessary ambiguity and undermines the purpose of anti-discrimination protections.

The DSM-5 (2013) and the ICD-11 (2019, effective 2022) have replaced "addiction" with "substance use disorder" and "disorders due to substance use", respectively. These frameworks set out specific, clinically verifiable diagnostic criteria. By contrast, the Act relies on undefined, outdated terminology that is not clinically anchored.

The absence of a precise definition can lead to inconsistency with employers, service providers, and courts left to apply their own subjective understanding based on perceptions, stereotypes, and moral judgement of "addiction," leading to unpredictable and uneven outcomes. It entrenches a moralistic framing of substance use rather than the current understanding treating it as a health issue.

Other jurisdictions have modernised their statutes to reflect health-based terminology, reducing stigma and ensuring decisions are tied to objective assessment of capacity, risk, and impairment, not prejudice.

While there are legal carve-outs for prescribed medication such as methadone and cannabis, the overall imprecision and moralistic framing of Provision 49PA means that people using these medications are routinely discriminated against.

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[2] E.g. Centre for Social Research in Health, UNSW Stigma Snapshot Stigma snapshot People who inject drugs (2021)
[3] NUAA (2002) What helps and what hurts. NUAA+Stigma+Project+Report+14+04+2022+R.pdf
[4] Alchol and Drug Foundation (2019). Alcohol and other drugs stigma: A background paper. ADF_Stigma_background_paper.pdf

The Act creates barriers to treatment and recovery

Provision 49PA creates perverse incentives that undermine public health objectives. Sigma and fear of discrimination are well-known barriers to seeking treatment for substance use and other health conditions. These fears are especially acute for certain groups such as mothers who having their children removed. Section 49PA discourages disclosing issues to employers or health services and undermines honesty and engagement between health services and health service users and, as a result, undermine workplace health and safety.

Section 49PA has a disproportionate impact on marginalised communities

People who use drugs are disproportionately from already marginalised groups — Aboriginal and Torres Strait Islander people, LGBTQ+ communities, people with mental health conditions, and people living with HIV or hepatitis C.

Section 49PA compounds existing disadvantage by providing legal cover for employers and service providers to discriminate against them.

Section 49P: Perpetuating Blood-Borne Virus (BBV) Stigma

Section 49P permits discrimination against people with infectious diseases if deemed "reasonably necessary to protect public health." This provision perpetuates stigma and discrimination without advancing legitimate public health objectives, particularly regarding blood-borne viruses (BBVs) such as HIV and hepatitis C.

The provision fails to reflect contemporary medical understanding of these conditions. For HIV, the international U=U (undetectable equals untransmittable) consensus, endorsed by over 1,000 organisations globally including all major Australian HIV organisations, confirms that people with undetectable viral loads cannot sexually transmit HIV.[5] While there is less evidence for blood-to-blood transmission of HIV, there

[5] See for example CDC (Centers for Disease Control and Prevention). "Undetectable = Untransmittable (U=U)." *CDC Global HIV & TB*, 2023. Available at: https://www.cdc.gov/global-hiv-tb/php/our-approach/undetectable-untransmittable.html or ASHM (Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine). *U=U: Guidance for Healthcare Professionals*. Sydney: ASHM, 2022. Available at: https://ashm.org.au/resources/uu-ashm-guidance-for-healthcare-professionals

is a consensus that there is a negligible to no risk in blood exposures where the source of the viral load is undetectable.[6]

Modern antiretroviral therapy has transformed HIV into a manageable chronic condition with life expectancy approaching that of the general population. The framing of HIV as an exception relies on the decades old perception of HIV as a death sentence and significantly contributes to stigma against people living with HIV[7] and LBTQ+ people more generally.[8]

Hepatitis C, while more transmissible than HIV, is now curable in over 95% of cases with direct-acting antiviral treatments, with cure meaning complete elimination of the virus from the body.

Despite these medical realities, section 49P enables discrimination based on outdated fears and misconceptions. Healthcare workers report being excluded from certain procedures, people in food service face termination despite no transmission risk, and individuals across various sectors experience discrimination justified by "public health" concerns with no evidentiary basis. The provision essentially marks people living with BBVs as inherently dangerous, reinforcing stigma that deters testing and treatment.

Existing frameworks under the Public Health Act 2010 (NSW), Work Health and Safety Act 2011 (NSW), and professional infection control guidelines adequately address any genuine transmission risks without enabling discrimination. Standard precautions in healthcare settings, food safety protocols in hospitality, and universal workplace safety measures provide appropriate protection without singling out individuals based on their health status. The additional discriminatory power granted by section 49P serves no public health purpose while causing significant harm to affected individuals and communities.

[6] UNAIDS. *Undetectable = Untransmittable (U=U): Public Health and HIV Prevention Consensus Statement*. Geneva: UNAIDS, 2018. Available at: https://www.unaids.org/sites/default/files/media_asset/undetectable-untransmittable_en.pdf

[7] The Body “AIDS Pioneer Regrets "Grim Reaper" Demonization of Gay Men” Available at AIDS Pioneer Regrets "Grim Reaper" Demonization of Gay Men

[8] Star Observer “Architect of ‘Grim Reaper’ TV campaign compares AIDS crisis to MDMA use. Available at: Architect of 'Grim Reaper' TV campaign compares AIDS crisis to MDMA use - Star Observer

Protected Attributes: Health Status

We propose introducing 'health status' as a protected attribute, comprehensively defined to ensure clear protection while maintaining practical application. This attribute should be defined as: "A person's past, present or presumed physical or mental health condition, including but not limited to substance use or substance use disorders, BBVs or sexually transmissible infections, episodic or chronic health conditions, and mental health conditions".

This definition deliberately adopts broad language to ensure comprehensive protection while providing specific examples to guide interpretation. The inclusion of "past" and "presumed" status recognises that discrimination often occurs based on history or assumptions rather than current reality. A person who injected drugs decades ago may still face discrimination, as may someone wrongly assumed to use drugs based on treatment status, appearance or associations.

International precedents support this approach. Canadian human rights tribunals have recognised that substance use and dependence constitute grounds requiring protection from discrimination, with employers required to accommodate workers with substance use disorders to the point of undue hardship.[9] There is growing recognition—in academic and UN-affiliated circles—that people who use drugs face stigma and discrimination, particularly regarding the right to health care, violating their human rights and obligations under international conventions to ensure non-discriminatory, quality healthcare.

The health status formulation avoids requiring people to identify as "disabled" to access protection. Many people who use drugs, particularly those who use occasionally or recreationally, do not identify as having a disability and find such framing inappropriate and stigmatising. Similarly, people living with HIV or hepatitis C may not consider themselves disabled, particularly given modern treatments. The health status attribute provides protection without imposing medicalised identity categories.

3.2 Protected Attributes: Irrelevant Criminal Record

The addition of 'irrelevant criminal record' as a protected attribute addresses the cascading disadvantage created by drug criminalisation. With possession and use

[9] Canadian Human Rights Commission, Impaired at Work – A guide to accommodating substance dependence. Available at Impaired at Work – A guide to accommodating substance dependence

offences constituting most of the drug-related criminal justice contact, many in our community carry records that create lifelong barriers despite representing no ongoing risk.

The attribute should protect against discrimination based on criminal records except where directly relevant to inherent position requirements, specific legislative requirements apply (such as Working with Children checks), or serious violent or sexual offences are involved. This approach balances rehabilitation and reintegration objectives with legitimate safety considerations.

Evidence demonstrates the disproportionate impact of criminal record discrimination on marginalised communities. Aboriginal and Torres Strait Islander people's overrepresentation in drug and other prosecutions means criminal record discrimination has racially disparate impacts. Young people who receive criminal records for youthful drug experimentation may face decades of employment and educational exclusion.

Positive Duties: Prevention Rather Than Reaction

The introduction of positive duties represents a fundamental shift from reactive complaints-based enforcement to proactive prevention of discrimination. We propose duties modelled on but extending beyond recent amendments to the Sex Discrimination Act 1984 (Cth), requiring organisations to take reasonable and proportionate steps to eliminate discrimination, harassment and vilification, promote substantive equality, and address systemic barriers.

These duties should be scalable based on organisational size and resources, with enhanced obligations for public sector agencies, health service providers, large employers, and educational institutions. Small organisations might fulfil duties through basic policy development and staff awareness, while large institutions would be expected to undertake comprehensive audits, develop detailed action plans, provide regular training, and report publicly on progress.

The implementation of positive duties would require organisations to examine their policies and practices for discriminatory impact, even where discrimination is not intentional. A hospital might discover that requiring photo identification for all services discriminates against people experiencing homelessness who use drugs. An employer might recognise that blanket drug testing policies without connection to safety requirements discriminate against people on opioid substitution therapy. A housing provider might identify that criminal history checks for minor offences create discriminatory barriers.

Evidence from jurisdictions with positive duties demonstrates their effectiveness.

- The United Kingdom's public sector equality duty has shifted organisational cultures toward inclusion, embedding a culture of prevention rather than reactive compliance, with discrimination complaints decreasing as prevention improves.[10]
- Victoria's positive duty, introduced in 2020, frames prevention of discrimination and harassment part of a healthy workplace culture similar to workplace health and safety.[11] This approach has already shown benefits in workplace culture change.[12]
- Canadian accommodation requirements have normalised or workplace adjustments for people with substance use disorders, improving both inclusion and productivity.[13]

Prohibited Areas: Government Functions

At present, NSW law prohibits discrimination in areas like work, education, accommodation, and services — but not in how government departments, police, or other public authorities exercise their functions. Adding "exercise of public functions and administration of laws" as a prohibited area would explicitly ban discrimination in government decision-making and the delivery of public authority such as policing.

Government and government service should strive to be more accountable, not less. This change would address the current protection gap where discrimination is most damaging. This would cover police interactions, court proceedings, child protection decisions, and administrative determinations by government agencies.

Narrow exemptions would apply for legitimate law enforcement activities directly connected to criminal investigation and prosecution. However, general police powers, administrative decisions, and service provision would be covered, preventing discriminatory targeting through stop and search powers, differential treatment in custody, and exclusion from government services based on drug use.

[10] House of Commons Library The Public Sector Equality Duty and Equality Impact Assessments Available at The Public Sector Equality Duty and Equality Impact Assessments
[11] Victorian Equal Opportunity and Human Rights Commission: Positive Duty. Available at Positive duty | Victorian Equal Opportunity and Human Rights Commission
[12] Victorian Equal Opportunity and Human Rights Commission: Investigation: Preventing sexual harassment in retail franchises. Available at Investigation: Preventing sexual harassment in retail franchises | Victorian Equal Opportunity and Human Rights Commission
[13] Meister, S.R. (2018). A Review of Workplace Substance Use Policies in Canada: Strengths, Gaps and Key Considerations. Ottawa, Ont.: Canadian Centre on Substance Use and Addiction

International examples demonstrate feasibility and benefits. Canada's human rights laws cover government services and have driven bias-free policing frameworks and human-rights-aligned policies in law enforcement.[14][15] New Zealand's Human Rights Act (Part 1A) includes public functions; alongside 2019 drug-law reforms and Police guidance, agencies have implemented health-based, non-discriminatory approaches when interacting with people who use drugs.[16]

Implementation

Co-Design and Partnership

Effective implementation must involve meaningful partnership with affected communities. People who use drugs must be central to developing guidance materials, designing education campaigns, and evaluating effectiveness. This participation requires resourced participation, recognising the expertise of lived experience.

NUAA and other peer organisations should be funded to provide input throughout implementation, deliver training to key stakeholders, and support community members to understand and exercise their rights. International evidence shows that peer involvement in anti-discrimination initiatives improves both effectiveness and acceptance.[17]

Monitoring and Evaluation

A comprehensive monitoring framework should track implementation and impact. Key indicators might include: complaints data disaggregated by attribute and area; healthcare utilisation by people who use drugs; employment rates among people in

[14] Royal Canadian Mounted Police 2023 Police Intervention Options Report. Available at 2023 Police Intervention Options Report | Royal Canadian Mounted Police
[15] Ontario Human Rights Commission. Policy on eliminating racial profiling in law enforcement. Available at Policy on eliminating racial profiling in law enforcement | Ontario Human Rights Commission
[16] New Zealand Legislation: Human Rights Act 1993, Part 1ADiscrimination by Government, related persons and bodies, or persons or bodies acting with legal authority. Available at Human Rights Act 1993 No 82 (as at 01 July 2024), Public Act Part 1A Discrimination by Government, related persons and bodies, or persons or bodies acting with legal authority – New Zealand Legislation
[17] See for example Kohrt (2021) **Collaboration With People With Lived Experience of Mental Illness to Reduce Stigma and Improve Primary Care Services**A Pilot Cluster Randomized Clinical Trial in JAMA 4(11) or WHO (2024) Ensuring quality health care by reducing HIV-related stigma and discrimination: technical brief

drug treatment; housing stability for people with drug-related histories; and qualitative research on experiences of discrimination.

Regular review mechanisms should ensure the legislation remains effective and responsive. We propose five-yearly reviews involving affected communities, with capacity for interim adjustments if monitoring reveals problems. This ensures the Act evolves with changing circumstances and emerging evidence.

Conclusion

We are presented with a key opportunity to strengthen our human rights protections in NSW and achieve better health outcomes. We have a strong collaborative model that would allow us to effectively implement these changes and we urge the Law Reform Commission to take advantage of this review to implement the considered and evidence based changes noted in this and other related submissions.