

## **Mental Health Carers NSW Inc.**

# **Review of the Anti-Discrimination Act 1977 (NSW)**

**Submission to the NSW Law Reform Commission**

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Authored By:

Mr Jonathan Harms

Dr Alyce Cannon



**Mental Health  
Carers NSW**

For general inquiries:

02 9332 0777

[mhcnadmin@mentalhealthcarersnsw.org](mailto:mhcnadmin@mentalhealthcarersnsw.org)

## About Mental Health Carers NSW (MHCN)

Mental Health Carers NSW (MHCN) is the peak body for carers of people who experience mental health challenges in NSW. MHCN is a community managed organisation that provides systemic advocacy, capacity development and education for the carers, family, friends, and kin of those experiencing mental health challenges across NSW.

In Australia, there are approximately 354,000 mental health carers who, each year, provide 186 million hours of unpaid support.<sup>1</sup> Due to the demands of their caring role, carers are at a high risk of developing mental health issues, as well as experiencing loneliness and social isolation. MHCN supports mental health carers and advocates for services and systems that support them in their caring role. MHCN ensures the voices of mental health carers in NSW, and the people they care for, are represented in policy and service reform processes. We work to uphold the rights of carers and consumers to equitable, accessible, and adequately funded mental health services.

MHCN empowers mental health carers to become champions for mental health reform and advocacy. We engage regularly with carers so they can inform our policy priorities and advocacy; for example, every month we convene the *Carers of Forensic and Corrections Patients Network* meetings, and peer led *Mental Health Carer Connection* meetings.

MHCN also provides the Disability Advocacy Futures Program. This program engages in systemic advocacy on behalf of those who experience psychosocial disability. In this role MHCN advocates to non-Health state government services under the Disability Advocacy Futures Program.

MHCN is funded by the NSW Ministry of Health and the NSW Department of Communities and Justice. We are a foundation member of Mental Health Carers Australia.

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<sup>1</sup> Diminic, S., Lee, Y. Y., Hielscher, E., Harris, M. G., Kealton, J., & Whiteford, H. A. (2021). 'Quantifying the Size of the Informal Care Sector for Australian Adults with Mental Illness: Caring Hours and Replacement Cost', *Social Psychiatry and Psychiatric Epidemiology*, 56(3): 387–400.

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## Executive Summary

Mental Health Carers NSW welcomes the opportunity to make this submission to the Law Reform Commission's *Review of the Anti-Discrimination Act 1977*. Highlighting and addressing mental health and disability discrimination and stigma; including the needs and rights of those caring for people experiencing these issues, underpins most of MHCN's advocacy. Our stakeholders frequently report a lack of understanding and the lack of reasonable adjustments in education, employment, housing, and health and disability services.

MHCN is pleased to offer recommendations to update the language, terminology, and protocols in the Act to deliver inclusive, accessible, and proactive protections for people with lived experience of mental health concerns, psychosocial disability, coexisting concerns, and to ensure that families, carers, and kin are equally protected from discrimination, harassment, or vilification.

This submission focuses on the need for a modernised legislation that recognises the social determinants of health and how these perpetuate inequities.<sup>2</sup> It highlights a critical need for legislative reforms to:

- Reflect the intersectional experiences of people living with disability.
- Include psychosocial disability, mental health concerns.
- Extend protections to carers, families, and kin.
- Address systemic discrimination against disability and mental health concerns, and
- Promote substantive equality for people with mental health concerns and carers.

MHCN has long advocated that psychosocial disability, mental health concerns, and cognitive impairment should become protected attributes in the *NSW ADA*.<sup>3</sup> MHCN has also advocated that the legislation take active measures to prohibit vilification of people who experience mental health concerns, their families, carers, and kin.

MHCN's ongoing discussions with carers and consumers (of mental health services) affirm that protection against stigma and vilification requires urgent attention. The *NSW ADA* must reflect contemporary knowledge and experiences of disability, mental health concerns, and caring. In doing so, it can promote inclusion and substantive equality by proactively addressing barriers that perpetuate discrimination and disadvantage.

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<sup>2</sup> World Health Organisation, *Social Determinants of Health*. [https://www.who.int/health-topics/social-determinants-of-health#tab=tab\\_1](https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1)

<sup>3</sup> Mental Health Carers NSW (2023). *Review of the Anti-Discrimination Act 1977*. <https://www.mentalhealthcarersnsw.org/wp-content/uploads/2024/07/Review-of-the-Anti-Discrimination-Act-1977-29-September-2023.pdf>

## Scope of this Submission

This submission addresses the following terms of references as published by the Committee regarding:

- Could the Act be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards?
- Are there attributes protected against discrimination which require reform?
- Whether the areas of public life in which discrimination is unlawful should be reformed.
- Are the existing tests for discrimination clear, inclusive and reflect modern understandings of discrimination?
- Are protections against vilification adequate including whether these protections should be harmonised with the criminal law?
- Should the ADA include positive obligations to prevent harassment, discrimination, vilification, and to make reasonable adjustments to promote full and equal participation in public life?
- Are there any exceptions, special measures and exemption processes that might apply to people with mental health concerns and psychosocial disability in the ADA?
- How adequate and accessibility are complaints procedures and remedies?
- How do the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws affect the NSW ADA?

This submission refers to contents from the following NSW Law Reform Council:

- NSW Law Reform Commission 2025, Anti-Discrimination Act Review – Consultation Paper on Unlawful Conduct. [https://lawreform.nsw.gov.au/documents/Current-projects/ada/cp24/ADA\\_CP24.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/cp24/ADA_CP24.pdf)
- NSW Law Reform Commission 2025, Community Summary – Anti-Discrimination Act Review. [https://lawreform.nsw.gov.au/content/dam/dcj/law-reform-commission/documents/Currentprojects/ada/cp24/ADA\\_CP24\\_Summary.pdf](https://lawreform.nsw.gov.au/content/dam/dcj/law-reform-commission/documents/Currentprojects/ada/cp24/ADA_CP24_Summary.pdf)
- NSW Law Reform Commission Website – Anti-Discrimination Act Review. Easy Read Version. <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review.html>

## Abbreviations

- AHRC – Australian Human Rights Commission
- DDA – Disability Discrimination Act 1992
- DRO – Disability Representative Organisation
- MHCN – Mental Health Carers NSW
- NSW ADA – NSW Anti-Discrimination Act 1977
- PIAC – Public Interest Advocacy Centre (now the Justice and Equity Centre)
- PWDA – People With Disability Australia

## Recommendations

### 1. Modernise Terminology and Protections

Updating the terminology of the *NSW ADA* is more than a semantic change because it directly influences rights, protections, and social attitudes. Modernising language signals that people living with disability, mental health concerns, and carers, families, and kin are valued members of the community whose dignity and rights must be respected and protected.

#### **Consistency Across Frameworks**

MHCN advocates for a modernised *NSW ADA* featuring a clearer framework, consistent structure, and contemporary, respectful language. Currently, the Act's structure is not aligned with other states. It itemises each protected attribute and area of public life separately, creating repetition and confusion that make it difficult for people to understand their rights, responsibilities, and complaints options.

#### **Adopt a Social Model**

Words matter because they shape perceptions and experiences. The *NSW ADA*'s current definition of disability is clinical, overly medicalised, outdated, and potentially offensive. Words such as "malfunction", and "disfigurement" or archaic labels like "handicapped" or "mentally ill person" do not reflect person-centred language guidelines.<sup>4</sup>

This reform is an opportunity for legislation to align with a modern, social model of disability. The *NSW ADA*'s language and definitions do not reflect international standards or align with

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<sup>4</sup> NSW Anti-Discrimination Act 1977 Section 4, Part 4A (c).

national programs.<sup>5</sup> For example, the *Disability Discrimination Act 1992* lists a wider range of disabilities, including mental health concerns yet it also does not use person-centred language (i.e., uses malfunction instead of condition).<sup>6</sup> All disabilities covered by the National Disability Insurance Scheme (NDIS) must also be listed in the *NSW ADA's* protected attributes. Aligning the *NSW ADA's* terminology with the *Disability Discrimination Act 1992 (Cth)* and the *United Nations Convention on the Rights of Persons with Disabilities* will promote consistency and improve legal clarity.<sup>7</sup>

MHCN supports updating the *NSW ADA's* definition of disability and recommends it explicitly include psychosocial disability, mental health concerns, addictions, and the use of assistance animals to ensure full inclusivity.<sup>8</sup> We also recommend extending protections from discrimination based on actual or presumed genetic predisposition to a disability or mental health concerns. Adopting modern, person-first language, such as “person with disability” or “person with mental health concern” recognises people as individuals first, not by their condition.<sup>9</sup> Respectful, accurate language can challenge stereotypes and advance substantive equality.

### **Recognise Carers, Families, and Kin**

MHCN also recommends that the *NSW ADA* be amended to replace the existing protected attribute of “status of parent or carer” with “family, carer, or kinship responsibilities”, better reflecting the diversity of care relationships and experiences. This legislation must be extended to include prohibitions on the publication of the identity of forensic patients, or identifying details such their addresses, places of incarceration, release or residence, or those of their families and carers.<sup>10</sup>

### **Additional Protected Attributes**

Finally, following the *Anti-Discrimination Amendment (Religious Vilification) Act 2023*, the *NSW ADA* should be amended to explicitly include religion or religious belief as a protected attribute. MHCN also supports calls to modernise the *NSW ADA's* language to recognise all

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<sup>5</sup> People With Disability Australia (2021). *PWDA Language Guide: A Guide to Language About Disability* <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>

<sup>6</sup> <https://www.legislation.gov.au/C2004A04426/2018-04-12/text>

<sup>7</sup> DDA: <https://www.legislation.gov.au/C2004A04426/2018-04-12/text>

CRPD: <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>

<sup>8</sup> Mental Health Carers NSW (2023). *Review of the Anti-Discrimination Act 1977*.

<sup>9</sup> Katterl, S., (2023). ‘Words that Hurt: Why Mental Health Stigma is Often Vilification, and Requires Legal Protection’, *Alternative Law Journal* 48(1): 47-54.

<sup>10</sup> MHCN (2023). *Review of the Anti-Discrimination Act 1977*.

LGBTIQ+ sexual orientations and gender identities, aligning with terminology used by other states and as covered by the *Crimes Act 1990* (NSW Crimes Act).<sup>11</sup>

In sum, MHCN proposes the NSW ADA reforms:

- Update language to person-first terms (e.g., “person with disability,” “person living with mental health condition”) to promote respect and reduce stigma.
- Remove outdated, clinical, and potentially offensive terms like “malfunction” and “handicapped.”
- Align the *NSW ADA*’s framework and structure with other states to reduce repetition and confusion.
- Clarify rights, responsibilities, and complaint processes for easier public understanding.
- Include psychosocial disability, mental health concerns, addictions, and use of assistance animals.
- Protect against discrimination based on actual or presumed genetic predisposition to disability or mental illness.
- Prohibit the vilification of people with psychosocial disability, mental health concerns, or addictions and their families and carers
- Prohibit the publication of the identities or personal details of forensic patients and their families and carers
- Ensure all disabilities covered by the National Disability Insurance Scheme (NDIS) are included.
- Harmonise terminology with the *Disability Discrimination Act 1992 (Cth)* and align with international standards, such as the *United Nations Convention on the Rights of Persons with Disabilities*.
- Replace “status of parent or carer” with “family, carer, or kinship responsibilities” to reflect diverse care roles.
- Fully recognise and protect all LGBTIQ+ sexual orientations and gender identities consistent with other states and the NSW Crimes Act 1990.
- Include religion or religious belief as a protected attribute, consistent with the *Anti-Discrimination Amendment (Religious Vilification) Act 2023*.

## 2. Explicit Protections for Mental Health, Psychosocial Disability, and Carers

People living with psychosocial disability and mental health concerns experience high levels of discrimination, yet these forms of discrimination are not adequately recognised or protected under the *NSW ADA*. While the Commonwealth has a *Disability Discrimination Act*

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<sup>11</sup> Public Interest Advocacy Centre (2021). *From Leader to Laggard: The Case for Modernising the NSW Anti-Discrimination Act*.

1992 (DDA), there is no federal *Disability Rights Act* despite calls from advocacy and disability representative organisations nationwide including the Disability Royal Commission.<sup>12</sup>

### ***Align with NSW Crimes Act***

The NSW ADA does not explicitly prohibit harassment based on disability. Vilification is prohibited only on the grounds of race, homosexuality, transgender, and HIV/AIDS status. This does not align with the *NSW Crimes Act* Section 93Z, which includes race, religion, sexual orientation, gender identity, intersex status, and or HIV/AIDS status.

### ***Improve Protection Against Vilification***

The federal *Disability Discrimination Act* only offers limited protection against vilification as it focuses on discrimination rather than conduct that incites hatred, contempt, or ridicule. There must be express protection against vilification for people with disability, mental health concerns, and their families and carers.

The NSW *Anti-Discrimination and Crimes Legislation Amendment (Disability) Bill 2024*, now stalled by adjournment in the Legislative Council, provides a strong model for reform. It proposed:

- Making it unlawful to vilify a person on the ground of disability, including by inciting hatred, serious contempt, or severe ridicule.
- Introducing “offensive behaviour” provisions to prohibit insulting, humiliating, or intimidating conduct based on disability, race, religion, sexual orientation, gender identity, intersex status, or HIV/AIDS status.

MHCN recommends expanding NSW ADA’s protected attributes to include mental health concerns alongside disability and psychosocial disability. The evidence is clear:

- Experiences of violence, vilification, discrimination and harassment based on mental health concerns are rampant.
- People with psychosocial disability are more likely to experience violence and harassment than those without disability.<sup>13</sup>
- In recent consultations with carers and consumers, MHCN found widespread reports of discrimination and vilification in multiple areas of public life.

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<sup>12</sup> Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability (2023). *Final Report – Volume 4. Realising the Human Rights of People with Disability*.  
<https://disability.royalcommission.gov.au/publications/final-report-volume-4-realising-human-rights-people-disability>

<sup>13</sup> Mahomed, F., (2016). ‘Stigma on the Basis of Psychosocial Disability: A Structural Human Rights Violation’, *South African Journal on Human Rights* 32: 490-509.

### ***Raise Awareness of Psychosocial Disability and Mental Health Concerns***

Psychosocial disability is widely misunderstood in Australia. It involves the environs, systems, and impairments related to mental health concerns that impact an individual's capacity to exercise their full rights and participate in society. Psychosocial disability arises when a person with a mental health condition engages in an environment that presents barriers to their equality.<sup>14</sup> Limited awareness of the experiences and diversities of psychosocial disability contributes to ongoing stigma and discrimination, which increases social exclusion.<sup>15</sup> This results in higher rates of disengagement from services, supports, and society to minimize the perceived risk of continued stigma and discrimination.<sup>16</sup> All this contributes to worse mental health and to complicate or prevent recovery in affected individuals and communities.

MHCN compared data from the Australian Human Rights Commission (AHRC) on the number of complaints since 2017–2018 related to psychosocial disability under the *Disability Discrimination Act 1992* (Cth) (DDA). While the periods 2022–2023 and 2023–2024 may see a decline in the number of complaints raised, psychosocial disability remained the highest percentage complaint of all disability related issues raised to the AHRC.

<b>Reporting Year</b>	<b>Number of Complaints</b>	<b>Percentage of Total Disability Complaints</b>
2023-2024	372	21%
2022-2023	392	22%
2021-2022	793	31%
2020-2021	506	31%
2019-2020	396	27%
2018-2019	393	32%
2017-2018	303	26%

<sup>14</sup> <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/psychosocial-what-is.aspx>

<sup>15</sup> Morgan, A.J., Wright, J., & Reavley, N.J., (2021). 'Review of Australian Initiatives to Reduce Stigma Towards People with Complex Mental Illness: What Exists and What Works?', *International Journal of Mental Health Systems*, 15(1): 10.

<sup>16</sup> Temple, J.B., Kelaheer, M., & Williams, R., (2018). 'Discrimination and Avoidance Due to Disability in Australia: Evidence from a National Cross Sectional Survey', *BMC Public Health* 18: 1347.

The data shows that the AHRC consistently receives a high volume of psychosocial disability complaints. These indicate systemic issues in critical need of an updated and reformed NSW ADA.

### ***Raise Awareness of Caring***

This longstanding issue also affects carers, families, and kin. In 2009, the House of Representatives; *Family, Community, Housing and Youth Committee* identified vicarious stigma and discrimination towards carers as reasons many chose not to disclose their caring role.<sup>17</sup> The Australian Human Rights Commission has likewise recommended that protections for carers extend to all areas of public life.<sup>18</sup>

Reforming the language in the *NSW ADA* can close gaps in protection. Broader legislative coverage can reduce systemic harassment and violence. The *Commonwealth Racial Discrimination Act 1975* makes discrimination unlawful in “the political, economic, social, cultural or any other field of public life”, which is a far wider scope than the *NSW ADA*.

MHCN proposes that the *NSW ADA*:

- Add disability, psychosocial disability, and mental health concerns as explicit protected attributes.
- Extend protection to carers, families, and kin who experience discrimination linked to mental health and disability stigma.
- Align vilification provisions with the NSW Crimes Act to ensure consistent protection.
- Such reforms would strengthen legal safeguards, encourage identifying and reporting discrimination, and improve access to services and support.

### **3. Implement Positive Duties for Reasonable Adjustments**

The *NSW ADA* does not impose proactive obligations on employers or service providers to prevent harassment, discrimination, or vilification. It also lacks any *positive duty* to make reasonable adjustments.<sup>19</sup>

A positive duty means taking active steps to ensure that people with disability, mental health concerns, and caring responsibilities can access and participate equally. Unlike the

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<sup>17</sup> Parliament of Australia, House of Representatives Standing Committee on Family, Community, Housing, and Youth (2009). *Carer Identification, Demographics, and Supports and Services*. [https://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=fchy/carers/report/chapter2.htm](https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fchy/carers/report/chapter2.htm)

<sup>18</sup> Australian Human Rights Commission (2013). *Investing in Care: Recognising and Valuing Those Who Care*: p.7. [https://www.humanrights.gov.au/sites/default/files/UnpaidCaringVolume1\\_2013.pdf?\\_ga=2.138121264.12793862](https://www.humanrights.gov.au/sites/default/files/UnpaidCaringVolume1_2013.pdf?_ga=2.138121264.12793862)

<sup>19</sup> People with Disability Australia (2023). *Making NSW Discrimination Laws Work for People with Disability*. [https://pwd.org.au/wp-content/uploads/2023/09/PWDA.SUB\\_NSW\\_Anti\\_Discrimination.Act\\_Review.2023-2023-09-29.pdf](https://pwd.org.au/wp-content/uploads/2023/09/PWDA.SUB_NSW_Anti_Discrimination.Act_Review.2023-2023-09-29.pdf)

Commonwealth *Disability Discrimination Act 1992*, the NSW ADA imposes no legal requirement on employers or providers to prevent discrimination against people living with psychosocial disability, mental health concerns, or carers.

Section 26 of the NSW ADA allows the NSW Anti-Discrimination Board to grant temporary exemptions so organisations can implement positive measures such as targeted recruitment, that might otherwise be considered discriminatory. However, these exemptions are limited in scope and time.

To promote substantive equality for people with disability, mental health challenges, and/or caring duties, the NSW ADA should include stronger protections and positive duties to provide reasonable adjustments.

Employment is the area where the most discrimination complaints are made under the NSW ADA.<sup>20</sup> MHCN supports:

- Expanding the definition of “employment” to include volunteers and unpaid workers.
- Introducing higher penalties for organisations that fail to take reasonable steps to promote participation.
- Placing the burden on organisations to demonstrate they attempted compliance before claiming an adjustment is unreasonable.

The NSW Department of Communities and Justice's *Disability Inclusion Volunteering Guidelines* provide a useful framework for ensuring that reasonable adjustments are made for people with disability, including volunteers and unpaid workers.<sup>21</sup>

### **Examples from Other Jurisdictions**

There are opportunities to learn from other states and territories. The *Respect at Work* reforms via the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* introduced a positive duty on employers at the federal level to *proactively* prevent and eliminate discrimination, sexual harassment, and vilification. Similarly, Part 2A, Section 18B of the Northern Territory *Anti-Discrimination Amendment Bill 2022* requires employers to take all reasonable steps to prevent employees from being subjected to discrimination and harassment and holds employers liable for harassment by third parties. The NSW ADA contains no equivalent obligation, which should be addressed.

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<sup>20</sup> Anti-Discrimination NSW Annual Report 2020 – 2021: p.43.

<https://antidiscrimination.nsw.gov.au/documents/annual-reports/anti-discrimination-annual-report-2021-22.pdf>

<sup>21</sup> <https://dcj.nsw.gov.au/documents/community-inclusion/volunteering-in-nsw/dcj-div-guidelines.pdf>

### ***State and Federal Legislative Interface***

Individuals often face difficulties navigating overlaps and gaps in state and federal legislation. The interaction between the *NSW ADA* and Commonwealth anti-discrimination laws is inconsistent; sometimes overlapping, sometimes in direct contradiction. This leaves individuals unsure of their rights and organisations services unsure of their duties.<sup>22</sup>

This negatively impacts people living with psychosocial disability, mental health challenges as well as families, carers, and kin. For example, the *NSW Mental Health Act 2007* and the *Work, Health, and Safety Act 2011* include provisions that affect to people living with psychosocial disability and mental health challenges yet do not provide the same protections as the *NSW ADA*. In some cases, such as forced medication or restrictive practices in clinical and aged care setting, the *Mental Health Act 2007* can override any protections one might be afforded under the *NSW ADA*.

This creates situations where consumers and carers, families, and kin experiencing rights violations with no clear resolution. People should not need a law degree to understand when and how their rights can be upheld.

Therefore, the *NSW ADA* should:

- Introduce clear positive duties for employers and providers to make reasonable adjustments and prevent discrimination
- Expand employment protections for volunteers and unpaid workers
- Clarify the legal interface between the *NSW ADA*, the *MHA*, and other relevant laws to prevent rights from being overridden in clinical settings.
- Provide clear, accessible guidance to stakeholders on which laws apply in which contexts.

Until these reforms are made, the *NSW ADA* must clearly set out what laws apply, where they apply, and how they interact, so that human rights are not lost in legislative gaps.

## **4. Improve Process Issues and Complaints Procedures**

The *NSW Anti-Discrimination Act* must actively promote accessibility and inclusion, rather than a reactive, complaints-based system. At present, the process is often confusing, complex, and inaccessible. One major flaw is that the burden of proof falls entirely on the individual who has experienced discrimination, who may not have the resources to pursue action. Additionally, the 'comparator test' is outdated because it creates practical

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<sup>22</sup> Australian Human Rights Commission (2014). *A Quick Guide to Australian Discrimination Laws*.  
[https://humanrights.gov.au/sites/default/files/GPGB\\_quick\\_guide\\_to\\_discrimination\\_laws\\_0.pdf](https://humanrights.gov.au/sites/default/files/GPGB_quick_guide_to_discrimination_laws_0.pdf)

complications around how to select the correct comparator.<sup>23</sup> This forces people to weigh the significant time, effort, and emotional toll involved in pursuing their rights. The process should instead be trauma-informed, culturally safe, and genuinely accessible.

### ***Balancing Responsibility of the Burden of Proof***

MHCN supports the ACT Law Reform Advisory Council's recommendation that, while complainants should still have to demonstrate a *prima facie* case that they have been treated unfairly, the burden of proof should then shift to the respondent, who must show that they did not treat the person unfavourably because of a protected attribute.<sup>24</sup>

### ***Issues with Complaints Process***

Moreover, the definitions of direct and indirect discrimination in the *NSW ADA* are outdated and convoluted, discouraging people from making complaints. As noted by Public Interest Advocacy Centre in 2023, this "may cause issues where a complainant alleges one type of discrimination where the other may in fact be more relevant".<sup>25</sup> Instead, the definition in section 8(1)(a) of the *Discrimination Act 1991* (ACT) is preferred, as: "For this Act, discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else".<sup>26</sup>

The problem of indirect and direct discrimination as it currently stands in the *NSW ADA* is compounded because many individuals experience discrimination on intersecting grounds, for example disability and sexual orientation, race and gender identity, religion and mental health condition to name just a few.<sup>27</sup> Because the *NSW ADA* contains strict distinctions between protected attributes, it does not account for the reality that discrimination can be against multiple attributes simultaneously. The result is that a complainant may select the 'wrong' attribute or is unable to identify the discrimination clearly using the 'comparator test' when making a complaint. It is counterintuitive that a complainant should have to pick the right prejudice for the basis of their complaint or go unheard; or that being discriminated against on more than one ground should make it harder and not easier to make a complaint.

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<sup>23</sup> Australian Government Attorney-General's Department (2011). *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*  
<https://www.ag.gov.au/sites/default/files/2020-03/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws.pdf>

<sup>24</sup> <https://www6.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ACTLRAC/2015/3.html>

<sup>25</sup> Public Interest Advocacy Centre (2023). *Preliminary Submission to NSWLRC Review of Anti-Discrimination Act 1977*: 8-9.

<sup>26</sup> Australian Capital Territory, *Discrimination Act 1991* (ACT).  
[https://www.austlii.edu.au/au/legis/act/consol\\_act/da1991164/s8.html](https://www.austlii.edu.au/au/legis/act/consol_act/da1991164/s8.html)

<sup>27</sup> Ibid.

### ***Lack of Accessibility***

A further barrier is Section 89, which requires all complaints be made in writing and prohibits anonymous submissions. This can deter vulnerable people who fear retaliation, and it can exclude those with intellectual, cognitive, or psychosocial disabilities, people who need interpreters, or those without access to technology, support persons, or advocacy services. Allowing voice-recorded complaints could be a practical and inclusive adjustment. To ensure genuine accessibility, MHCN recommends direct consultation with people with disability, culturally and linguistically diverse communities, carers, and advocacy organisations to identify the most effective changes to the *NSW ADA's* complaints process.

In sum, MHCN recommends that:

- The definition of direct discrimination should be amended by removing the comparator test and adopting a definition similar to that contained in section 8(1)(a) of the Discrimination Act 1991 (ACT).
- Ensure that tests for discrimination account for the intersection of different attributes.
- Balance the burden of proof by shifting some responsibility to respondents.
- Consult with affected stakeholders to develop a complaints process that is culturally-safe, trauma-informed, and accessible.
- Allow for mixed-methods to lodge complaints.

In conducting this review of the NSW ADA, Mental Health Carers NSW identified several areas for the NSW Law Reform Commission to develop protections against discrimination, harassment, or vilification against people with disability, people with mental health concerns, and families, carers, and kin. MHCN hopes that this is an opportunity for legislators to meet with advocates, lived experience representatives, and DROs to better understand the unique issues they face and how our legislation can be updated to ensure their rights are upheld.

## **Contact**

Mr Jonathan Harms – CEO.

Dr Alyce Cannon – Psychosocial Disability Policy & Research Coordinator.