



NUAA preliminary submission for the NSW Anti-Discrimination Act review

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1. Background

The NSW User's and AIDS Association (NUAA) is a peer-based harm reduction organisation that works to improve the health, human rights and dignity of people who use drugs in NSW. NUAA represents people who have living and lived experience of illicit drug use across NSW and provides advice across a range of policy areas including harm reduction, hepatitis C treatment and AOD treatment. We are also a service provider with a diverse range of programs including a fixed needle and syringe program with a suite of harm reduction services including a clinical service, vein care, hepatitis C point of care testing and linkage to treatment, postal NSW and take home naloxone, peer education, publications and resources, DanceWise NSW – a peer education and harm reduction initiative operating at music festivals in NSW and PeerLine a peer-based telephone support line for people who use drugs in NSW. We also play a crucial role representing people with lived and living experience of drug use in policy and research.

NUAA is primarily funded by the NSW Ministry of Health with additional project-specific funding from NSW Local Health Districts, research centres and donations. NUAA is an association registered under Associations Incorporation Act 2009 (NSW) and accredited under the Australian Services Excellence Standards (ASES), a quality framework certified by Quality Innovation and Performance (QIP).

2. Introduction

NUAA welcomes the opportunity to make submissions regarding the NSW Law Reform Commissions review of the NSW Anti-Discrimination Act 1977 (the Act) and supports anti-discrimination reform as an urgent area of priority for the NSW Law Reform Commission. NUAA believes that anti-discrimination reform is needed to better promote equal enjoyment of rights and improve opportunity for redress to the groups of people most at risk of experiencing discrimination in NSW. In particular, this submission focusses on improving the Act to better promote equal enjoyment of rights for people who use illicit drugs in NSW.

As a peer-led organisation that represents people who use drugs in NSW, NUAA believes that the current NSW Anti-Discrimination Act fails to provide people who use illicit drugs in NSW any protection from vilification. NUAA condemns the Act's current power to make lawful the ability to discriminate against people who may be viewed as experiencing prohibited drug dependence in the area of employment regardless of whether intoxication is present (section 49 PA of the Act).

The legislative history of s 49 PA indicates the provision's stigmatising nature and its incompatibility with the Act's purpose to reduce discrimination in NSW. S 49 PA of the Act was introduced into the legislation

in April 2002 as a political reaction to the decision made in *Marsden*.¹ In this case, the Federal Court found that dependence on illegal drugs constituted a disability under federal disability discrimination legislation. This resulted in a significantly stigmatising media campaign based on the assumption that people who use drugs do not deserve legal protection.² The campaign led to state and federal governments proposing legislation limiting legal protection from discrimination for people experiencing a dependence to illegal drugs on the basis of their drug use.³ In NSW, s49 PA was inserted into the Act and provided that in relation to discrimination in employment, it was not unlawful to discriminate against a person on the ground of disability if (a) the disability relates to the person's 'addiction to a prohibited drug', and (b) the person is 'actually addicted' to a prohibited drug at the time of the discrimination. Under this section, prohibited drugs do not include methadone or buprenorphine.⁴ It is important to note that similar attempts to change legislation at the federal level failed due to human rights concerns, which underscores the problematic nature of the NSW regulation.⁵

For these reasons, this submission outlines NUAA's support for urgent anti-discrimination reform, including the repeal of s 49 PA, the introduction of a protective attribute 'health status' that is inclusive of people who use alcohol and other drugs and the inclusion of positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life; so that NSW Anti-discrimination law can accurately reflect contemporary community anti-discrimination standards.

3. Submissions

This submission makes the following requests:

- The Anti-Discrimination Act be modernised to meet national and international human rights obligations and national harm reduction commitments;
- Section 49PA of the Anti-Discrimination Act be repealed;
- There should be no exceptions to unlawful discrimination against people who use illicit drugs under the Act;
- Any legislative reform should take a strengths-based approach and ensure that any changes are not inherently deficit based and do not perpetuate stigma against certain groups of people;
- NUAA request the consideration of the inclusion of 'health status' as an expansive protected attribute that includes people who use alcohol and other drugs to improve redress against discriminatory behaviour, and;
- NUAA support the inclusion of positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life.

The section below discusses in detail our submissions:

¹ *Marsden v Human Rights Equal Opportunity Commission & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* (HREOC, No H98/51, 30 August 1999); [2000] FCA 1619

² Gibson, F. (2009). Drugs, discrimination and disability, *Journal of Law and Medicine*, Vol 17, No 3.

³ Gibson, F. (2009). Drugs, discrimination and disability, *Journal of Law and Medicine*, Vol 17, No 3.

⁴ Gibson, F. (2009). Drugs, discrimination and disability, *Journal of Law and Medicine*, Vol 17, No 3.

⁵ Bunn, R. (2019). Conceptualizing Addiction as Disability in Discrimination Law: A Situated Comparison. *Contemporary Drug Problems*, 46(1), 58–77. <https://doi.org/10.1177/0091450918819519>; Gibson, F. (2009). Drugs, discrimination and disability, *Journal of Law and Medicine*, Vol 17, No 3.

1. The Anti Discrimination Act should be modernised to meet national and international human rights obligations and harm reduction commitments.

The Anti-Discrimination Act should be revised to align with Australia's agreed International and national obligations to ensure the better promotion of equal enjoyment of rights and reflect contemporary community standards for people who use illicit drugs. As it currently stands, people who use illicit drugs are explicitly targeted by the Act in which it is made lawful to discriminate against a person based on 'addiction to a prohibited drug' in the area of employment (see s 49 PA).⁶ The limited scope of the exception, extending only to 'prohibited' drugs and not alcohol or other legal substances that people can also experience dependence with, demonstrates the malicious intention of the section to specifically punish, through making discrimination lawful, people who use illicit drugs.

NUAA argues that at an international level, this exception is in breach of Australia's International Human Rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁷ Both conventions contain fundamental principles relating to non-discrimination, equality before the law and the equal protection of the law (Art. 2 and 26 ICCPR, Art. 2 ICESCR). Art. 12 ICESCR guarantees to everyone the enjoyment of the right to health, which includes caring for the wellbeing of people who use drugs. Moreover, in September 2023, the UN High Commissioner in his Report to the Human Rights Council (Report) denounced the failure of punitive drug policies and called for a new approach to drug policies including the protection of human rights, including the right to health, ensuring equality and non-discrimination in any drug policy approaches.⁸ In its recommendations, the Report specifically calls for adoption of drug policies that recognise and advance the rights of people who use drugs (Report, Recommendation G). The Report, as well as the 2019 Ministerial Declaration, underline the need for social reintegration measures on a non-discriminatory basis.⁹ From this perspective, s 49 PA breaches Australia's international obligations. Not only does it not protect people from discrimination, but it specifically targets a vulnerable population and singles that group of people out for additional stigmatisation, directly preventing social reintegration. As signatories of mentioned conventions and in recognition of recent international calls for systemic drug policy reform, NUAA assert that anti-discrimination legislation is not an appropriate mechanism to codify punitive drug policy and that section 49PA should be removed.

At a National level, NUAA argues that the current Act is also in conflict with Australia's contemporary drug policy approach. The National Drug Strategy outlines Australia's commitment to harm minimisation, that is made up of three pillars; demand reduction, supply reduction and harm reduction. For the purpose of this

⁶ NSW Anti-Discrimination Act 1977 No 48, Division 4 Exceptions to Part 4A, Section 49AP
<<https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048#sec.49PA>>

⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁸ Report of the Office of the United Nations High Commissioner for Human Rights, A/HR/54/53
<<https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session54/list-reports>>

⁹ Ministerial declaration on strengthening our actions at the national, regional and international levels to accelerate the implementation of our joint commitments to address and counter the world drug problem <https://www.unodc.org/documents/commissions/CND/2019/Ministerial_Declaration.pdf>

submission we focus on the third pillar, harm reduction.¹⁰ Harm reduction is defined as “reducing the adverse health, social and economic consequences of the use of drugs, for the user, their families and the wider community”.¹¹ As it currently stands, the operation of section 49 PA increases the risk of adverse health, social and economic harms by making it lawful to discriminate in employment against a person who uses illicit drugs. Access and engagement in employment significantly shapes a person’s social and emotional wellbeing, including but not limited to, access to food, housing and healthcare. Access to employment being a conditional right because a person uses illicit drugs, fundamentally a health issue, is antithetical to the notion of harm reduction. Consequently, s 49PA does not minimise harms as required by the National Strategy, but invites and exacerbates such harms.

Importantly, section 49 PA does not require any assessment or establishment of a person’s impairment in performing their employment obligations. The section enables a person to be discriminated against solely based on their ‘addiction’ or perceived ‘addiction’ status to a prohibited drug. Consequently, a person’s job performance and ability to execute all required tasks may be of an exceptional standard, but their employment can still be terminated by the employer because of the status of a prohibited drug ‘addicted’ person. Additionally, the use of the term ‘addiction’ in section 49 PA makes it unclear how this is determined by the employer. Terms such as ‘addiction’ or ‘addict’ have no agreed definition within the AOD or medical profession, raising serious concerns around arbitrary decision-making and discriminatory behaviour within the scope of the exception. Furthermore, this section of the Act fails to reflect contemporary medical treatments, such as the use of medicinal cannabis and/or the use of psilocybin and MDMA in psychedelic assisted therapy.

Moreover, s 49 PA prevents access to services. By enabling employers to lawfully discriminate against people, section 49 PA creates barriers to harm reduction services and other AOD treatment services as a result of a person not wanting to risk being identified as a ‘person addicted to prohibited drugs’ and risk losing their job or having any aspect of their employment negatively impacted, irrespective of their work performance.¹² The impact of people not accessing these services significantly risks increased harm to both the individual and the broader community. This includes but is not limited to, an increase in avoidable transmission of blood borne viruses such as HIV and hepatitis C amongst people who inject drugs by people not feeling that it is safe to engage with health services, such as Needle and Syringe programs or Medically Supervised Injecting Centres. As well as barriers to accessing AOD treatment services or broader peer-based harm reduction services that reduce harms associated with any drug use. It is urgent that section 49PA is repealed from the Act and that there are no exceptions to unlawful discrimination against specific groups of people.

2. Section 49PA counters the purpose of the Act

NUAA believes that the exemption in section 49 PA is in direct conflict with the purpose of the legislation and this further supports our calls for the section to be repealed. The purpose of the Act is to “render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of

¹⁰ National Drug Strategy 2017-2026 < <https://www.health.gov.au/sites/default/files/national-drug-strategy-2017-2026.pdf>>

¹¹ [National Drug Strategy 2017–2026 | Australian Government Department of Health and Aged Care](#)

¹² NSW Anti-Discrimination Act 1977 No 48, Division 4 Exceptions to Part 4A, Section 49AP
<<https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048#sec.49PA>>

opportunity between all persons”.¹³ As stated above, the operation of section 49 PA, fails to promote or protect equal opportunity between all persons by making equal opportunity in the area of employment conditional on whether a person can be deemed to be experiencing “addiction to a prohibited drug”.¹⁴ Moreover, there are already adequate measures under other existing legislation to support employers in dismissing or managing employees who demonstrate performance problems. Anti-discrimination legislation is not the appropriate, or fit for purpose, mechanism for this purpose. To this end, section 49 PA should be repealed.

3. There should be no exceptions to unlawful discrimination against people who use illicit drugs under the Act

NUAA believes that there should be no attributes or areas of public life where it is appropriate to make lawful the discrimination against people who use illicit drugs. Any exception to unlawful discrimination against people who use illicit drugs risks positioning people who use illicit drugs as less deserving of protection than other people. Allowing for lawful discrimination against people “addicted to prohibited drugs” perpetuates harmful stigmatising narratives and dangerous stereotypes about people who use illicit drugs. These historical narratives have been ingrained over time as a result of misinformation and targeted political and criminal vilification from the global ‘war on drugs’.¹⁵

Exceptions to unlawful discrimination, such as section 49PA, encourage ongoing harm towards people who use illicit drugs and societal indifference towards experiences of harm experienced by people who use illicit drugs, that can have dire consequences for individuals who use illicit drugs, their families, friends and loved ones. Discrimination against people who use drugs can, and has occurred, in health care settings, employment, government settings, AOD services and has commonly involved, but not limited to, people being refused service, experiencing negligent/ mistreatment, being subject to inappropriate drug testing, experiencing abuse and/or violence and subsequently having significant adverse effects on peoples mental and physical well-being.¹⁶ It is critical that any anti-discrimination legislation uphold the principles of anti-discrimination and equal opportunity for all groups of people, and not strengthen discrimination and stigmatisation as it currently does through s 49 PA.

4. Ensure that any legislative changes to the anti-discrimination act are not inherently deficit based and do not perpetuate stigma against certain groups of people

In the Commission’s review of the Act, NUAA urge for the consideration of person-centered, non-stigmatising, strengths-based language when referring to different groups of people, including if necessary,

¹³ NSW Anti-Discrimination Act 1977 No 48, < <https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048#statusinformation>>

¹⁴ NSW Anti-Discrimination Act 1977 No 48, Division 4 Exceptions to Part 4A, Section 49AP <<https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048#sec.49PA>>

¹⁵ Cohen A, Vakharia SP, Netherland J, Frederique K. How the war on drugs impacts social determinants of health beyond the criminal legal system. *Ann Med.* 2022 Dec;54(1):2024-2038. doi: 10.1080/07853890.2022.2100926. PMID: 35852299; PMCID: PMC9302017.

¹⁶ Camila Couto e Cruz, Caroline L. Salom, Paul Dietze, Lucinda Burns, Rosa Alati, The association between experiencing discrimination and physical and mental health among people who inject drugs, *International Journal of Drug Policy*, Volume 65, 2019, Pages 24-30; NSW Users and AIDS Association, Dr Mary E Harrod, Justin Mckee, Tony Iltis, What helps and what hurts: perspectives on clinical care from people who use drugs and alcohol in NSW, NSW Health Centre for Alcohol and Other Drugs 2022.

referring to people who use illicit drugs. The use of the term 'addiction' in section 49 PA when referring to the use of prohibited drugs is problematic, as terms such as 'addiction' or 'addict' have no agreed definition within the AOD or medical profession and historically have been used to disempower and pathologise people who use illicit drugs. To assist in this process, NUAAs encourages the Commission to review our Language Matters Guide attached in this submission.¹⁷

5. Consider the inclusion of 'health status' as an expansive protected attribute that includes people who use alcohol and other drugs to improve redress against discriminatory behaviour.

The social stigma attached to drug use as a result of prohibition policies and the criminalisation of illicit drugs means that all people who use illicit drugs are at increased risk of experiencing discriminatory treatment across any area of public life. Discrimination against people who use drugs has significant adverse effects on peoples mental and physical well-being.¹⁸ To reduce the harms associated with discriminatory treatment against people who use drugs there needs to be stronger and more accessible pathways to recourse against discrimination.

NUAA support the introduction of a protected attribute for 'health status' that would be inclusive of people who use drugs and/or alcohol (irrespective of their degree of use). The development of a 'health status' protective attribute would help shift NSW anti-discrimination law away from a deficit-based approach and better align to NSW's commitment to implementing a person-centred, health-based approach to alcohol and other drug policy.¹⁹ Making this protected attribute would also provide opportunities for people who have experienced this type of discrimination the ability to seek redress, which is a critical step in fighting stigma and discrimination. Having access to these legal protections, over time will help reduce experiences of discrimination against people who use drugs and improve service delivery outcomes for people who use drugs and/or alcohol.

6. A modernised 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 introduction of a positive duty in the Anti-Discrimination Act, in the form of legal obligations for relevant entities to take proactive and meaningful action to prevent discriminatory practice, would embed greater responsibility on those entities to ensure anti-discrimination measures and/or protections are in

¹⁷NSW Users and AIDS Association, Language Matters

<https://static1.squarespace.com/static/61bc083a85af43143a2eb69a/t/6216f3bbdb1f52421f010aa6/1645671355889/languageAll_matters_-_online_-_final.pdf>

¹⁸ Camila Couto e Cruz, Caroline L. Salom, Paul Dietze, Lucinda Burns, Rosa Alati, The association between experiencing discrimination and physical and mental health among people who inject drugs, International Journal of Drug Policy, Volume 65, 2019, Pages 24-30; NSW Users and AIDS Association, Dr Mary E Harrod, Justin Mckee, Tony Iltis, What helps and what hurts: perspectives on clinical care from people who use drugs and alcohol in NSW, NSW Health Centre for Alcohol and Other Drugs 2022.

¹⁹ Queensland Network of Alcohol and other Drug Agencies (QNADA), Submission to the review of the Anti-Discrimination Act 1991 <Sub.055-Queensland-Network-of-Alcohol-and-Other-Drug-Agencies-Ltd-QNADA_Redacted.pdf (qhrc.qld.gov.au)>

place and better protect different groups of people. ²⁰ For people who use alcohol and/or drugs a positive duty could include organisations/relevant entities implementing:

- the obligation to ensure clients and consumers know their right to receive non-discriminatory and inclusive service, including avenues for recourse if this right is breached.
- formal and informal education and training around discrimination including where and how it can manifest and develop the practical tools to challenge systemic discrimination in their organisations.
- Internal assessment procedures to determine when criminal record checks are required and what, if any, criminal histories are relevant for different types of employment.

These are some examples of proactive measures that a positive obligation could enable to better implement a more proactive approach to reducing the risk of certain groups of people, in this case people who use alcohol and/or drugs, experiencing discrimination across different areas of life.²¹

4. Conclusion

NUAA calls for the urgent reform of the NSW Anti-discrimination Act to, at a minimum, ensure the Act complies with its own legislative purpose; to promote equal opportunity between all persons, ensure our legislation takes the necessary steps to meet Australia's obligations under International Human Rights Law and is consistent with our national obligations to implement a harm reduction approach to drug policy. NUAA calls for the repeal of section 49 PA and affirms that there should be no attributes or areas of public life where it is appropriate to make lawful the discrimination against people who use illicit drugs and would also align to federal discrimination legislation.

In considering how best to modernise the Act to reflect contemporary community standards NUAA puts forward the consideration of including the protected attribute 'health status' to include people who use drugs or alcohol, in any degree, as a way to shift anti-discrimination protections away from a deficit-based approach and provide people who use drugs and/or alcohol the opportunity for legal protection and redress from vilification in all areas of public life. A protective attribute will help to challenge the persistent and harmful stigma and discrimination experienced by people who use drugs and alcohol which have resulted from the ongoing, historically, punitive measures that target people who use illicit drugs and actively promote equal opportunity and enjoyment of rights for people who use illicit drugs in NSW.

²⁰ Queensland Network of Alcohol and other Drug Agencies (QNADA), Submission to the review of the Anti-Discrimination Act 1991 <[Sub.055-Queensland-Network-of-Alcohol-and-Other-Drug-Agencies-Ltd-QNADA_Redacted.pdf \(qhrc.qld.gov.au\)](#)>

²¹ Victorian Equal Opportunity & Human Rights Commission, Positive Duty; For organisations <[Main office: 267 Broadway, Glebe NSW 2037 \(02\) 9171 6659 PeerLine: 1800 644 413
NSP: 345 Crown Street Surry Hill NSW 2010
nuaa.org.au @nuaansw](https://www.humanrights.vic.gov.au/for-organisations/positive-duty/#:~:text=Under%20the%20Equal%20Opportunity%20Act,someone%20has%20made%20a%20complaint.></p></div><div data-bbox=)