

Submission: Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)

Ensuring a strong voice for all people with Down syndrome, their families and carers

August 2025



DOWN SYNDROME
NEW SOUTH WALES





About Down Syndrome NSW

The Down Syndrome Association of NSW was established in 1980 by parents of young people with Down syndrome. As the children of the founding members grew to adolescence and adulthood, so too our services extended to all life stages. We now provide information and support, advocacy, capacity building workshops, training in schools, community participation programs, pre-natal expert advice, new parent resources and support and specialist employment preparation and connection to the people of NSW.

We are an enthusiastic team of professionals with expertise in our relevant fields of service provision, support and advocacy. Some of us have lived experience with a family member with Down syndrome, some bring a range of expertise and industry experience. We are here to support our members with Down syndrome achieve their full potential.

We provide services and supports currently to all people with Down syndrome in NSW, their families and carers across the full lifespan including:

- Information and support;
- Library and resources;
- Workshops and training;
- Parent support networks and regional hubs;
- Prenatal and early years resources and support;
- Inclusive education support, teacher training and behaviour management;
- Transition to school, school years and teens support and advice;
- Post school years transitions including travel training,
- Community engagement and participation for children, teens and adults;
- Accessibility support to participate in events and access infrastructure.
- Health, sexuality and ageing advice, advocacy and support;
- Guardianship and wills resources;
- Self advocacy, capacity building and mentoring;
- Individual advocacy support, advice and resources;
- Systemic advocacy, policy submissions and research.
- Policy, lobbying and proactive government relations;
- Community capacity building, awareness, inclusion and social capital.





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Introduction

Down Syndrome NSW (DSNSW) welcomes the opportunity to contribute to the Law Reform Commission's (LRC) review of the Anti-Discrimination Act 1977 (NSW). As the peak body supporting people with Down syndrome and their families across New South Wales, we advocate for the full inclusion, respect, and equal treatment of individuals with Down syndrome in all areas of life.

This submission outlines key concerns with the current legislative framework and recommends reforms to ensure that people with Down syndrome and other intellectual disabilities are properly protected from discrimination and supported to participate fully in society.

NSW as Leader

DSNSW sees the LRC review as an opportunity for the Anti-Discrimination Act (ADA) to meet and exceed the highest provisions and requirements of similar across Australia. In this way, NSW could establish a legal benchmark and lead a range of protections for people with disability in Australia.

A positive duty to prevent discrimination

DSNSW strongly recommends that the ADA should have a preventative role in addressing unlawful discrimination, vilification, harassment and sexual harassment in addition to its corrective role. We have made recommendations throughout the submission to include a positive duty requirement on duty holder bodies.

Protected Attributes

Intersectionality

This submission focusses specifically on the rights of people with Down syndrome as well as the preventing and addressing the circumstances of discrimination, harassment, vilification and victimisation. It is important to note that a person with Down syndrome is a unique individual who may also be part of populations with other protected attributes. Consequently, the multiple harms from discrimination and other unlawful conduct could cumulatively intensify the impacts on people with more than one protected attribute. Accordingly, intersectionality must be recognised and considered under an updated ADA.

People with psychosocial disability

DSNSW recommends the inclusion of people with psychosocial disability, mental health including addiction, and people who use assistance animals in the ADA.

Aboriginal and Torres Strait Islander people

Further, we recommend that the definition of race should clearly indicate and include Aboriginal & Torres Strait Islander people, after direct consultation with indigenous Australians. The Australian Bureau of Statistics Census 2021 shows that the highest





proportion of Aboriginal and Torres Strait Islander people live in NSW. DSNSW is concerned that the people with Down syndrome in this population should be supported to exercise their rights, interests and abilities in the same way as other residents of NSW.

Carers

We agree that discrimination against carers should be unlawful in ADA protected areas such as employment, education, in the provision and receipt of goods and services, as well as in accommodation, health, housing etc. The legislation must expand to include other areas as protected areas under the ADA.

Definition of Disability

DSNSW contends that the ADA definitions of disability (i.e. malfunction, malformation, disfigurement etc.) are outdated, could be offensive, and that the social model of disability forms part of the definition.

For better definitions of disability, DS NSW refers the LRC to several sources, including those referenced below. We note, however, that while these definitions are preferable, they still include some language that may offend people with disability and their families in Australia. Accordingly, DSNSW encourages the LRC to use more contemporary language while retaining the comprehensive scope and depth in these definitions. DS NSW recommends the following:

- United Nations definition from the UN Convention on the Rights of persons with disabilities to which Australia is a signatory.
- The Commonwealth Disability Discrimination Act 1992 (DDA) uses a definition from the Australian Human Rights Commission and includes a broad definition of eight disability types.
- 'The Victorian Public Sector Commission, in line with the United Nations Convention on the Rights of Persons with Disabilities, recognises the definition of disability as including those who have long-term physical, mental, intellectual or sensory impairments that, in interaction with various attitudinal and environmental barriers, may hinder their full and effective participation in society on an equal basis with others.' Taken from Victorian Government Disability Access and Inclusion Plan 2021-2025.

Social model of disability

DSNSW notes that the best definitions of disability explicitly identify that societal barriers can be as limiting as any physical, psychosocial or other feature that adversely impacts the ability and capacity of a person to live the life they choose and to participate in society.

Examples of societal barriers have been grouped into these general areas:

- *Physical barriers*: lack of ramps or elevators, lack of accessible public transport
- *Attitudinal barriers*: prejudice, negative stereotypes, preconceived assumptions e.g. diagnostic overshadowing, and the failure to acknowledge or recognise intersectionality. In this barrier, diagnostic overshadowing occurs when healthcare professionals attribute a person's physical symptoms to their





psychosocial or intellectual disability, rather than investigating other potential causes such as biological determinants.

- *Organisational barriers*: policies and practices that exclude people with disability from employment, using goods and services, health, housing, education etc
- *Communication barriers*: lack of accessible formats for information or communication

DSNSW recommends that the best definition of disability in an updated ADA could be achieved by using a co-design method that includes experts with disability in the development of the definition.

Use of the term reasonable

DSNSW strongly recommends that tests for what is reasonable should be modelled on the approach used in the Victorian Equal Opportunity Act 2010. Similarly, the NSW ADA could also set out what factors would not be considered reasonable.

When discrimination is prohibited

DSNSW strongly recommends that tests for what is reasonable should be modelled on the approach used in the Victorian Equal Opportunity Act 2010.

Discrimination at work

DSNSW supports arguments by Council for Intellectual Disability NSW that discrimination at work should cover all areas of employment. Discrimination at work can begin with employment advertising, the process to apply for a job, the interview process and in decisions to hire. This can disproportionately affect people with Down syndrome and other intellectual disabilities. DSNSW would like to see fair treatment for people with disability in applying for, attaining, maintaining and being paid for jobs they can do.

Proving discrimination in employment and education

The *Community Summary* suggests that the ADA could only allow discrimination where it is reasonable, proportionate and justifiable. The current ADA requires that the burden of proving when discrimination is not reasonable, proportionate and justifiable falls solely on the complainant (the person with disability or other protected attribute.) DSNSW strongly recommends that an employer or other duty holder must have a positive duty to demonstrate that any proposed discrimination is reasonable, proportionate and justifiable prior to considering any discriminatory action.

How and when can unjustifiable hardship be used at work and in education to allow organisations or entities to discriminate against people with disability? DSNSW recommends that the ADA should contain explanations of what is not an unjustifiable hardship for educators, employers and other duty holders. Again, there must be a positive duty required of the duty holder to demonstrate any unjustifiable hardship before considering any discriminatory action.





DSNSW recommends that there should be a positive duty in the ADA to consider and employ people with disability and that potential employers should first consider a person's potential and ability to do a job with reasonable adjustments.

DSNSW recommends there should be a positive duty or requirement to accept applications from people with disability for education, ensuring reasonable adjustments.

Discrimination in goods and services

DSNSW recommends that the ADA specifically prohibits discrimination relating to someone's ability to access and use premises, and in superannuation services and insurance.

Accommodation

Aligning with other discrimination laws in Australia, the ADA should explicitly require accommodation providers to allow a person with disability to make reasonable alterations because of their disability.

Extending the protected areas

DSNSW recommends that the ADA should apply to conduct in public generally and that it should be unlawful to discriminate:

- on the basis of carer's responsibilities in areas other than work, as explained.
- in access to premises
- the disposal of interests in land (selling, renting and buying)
- government functions and administration of laws including police
- requests for information
- sport and competitions
- strata committees and owners' corporations
- health and medical services

Tests for discrimination

In determining direct discrimination, DSNSW recommends replacing the 'comparator test' with the 'unfavourable treatment' test. Used in some other discrimination laws, the unfavourable treatment test asks if someone was treated unfairly due to their protected attribute.

In identifying indirect discrimination, DSNSW recommends replacing the complex and difficult 'disproportionate impact' test with a 'disadvantage test'. Some other jurisdictions use this test to ask if a requirement or condition disadvantages the person because of their protected attribute, and whether the requirement or condition is reasonable. Accordingly, DSNSW recommends that the ADA sets out the factors that can help people work out if a condition is reasonable.

Burden of proof

As described, under the ADA the burden of proof is held solely by the complainant, in this case person with disability particularly the person with Down syndrome. Many people with Down syndrome and/or intellectual disability may be unable to complain or may not even





know to complain or may not have the personal resources to make a complaint, thereby intensifying the impact of discrimination. This in itself could be seen as discriminatory. DSNSW recommends that the burden of proof is shared by both the complainant and the duty holder, as explained above.

DSNSW is concerned that the use of a 'proportionality test' as described in the *Community Summary* would be very confusing for people with Down syndrome and their families and supporters, as well as for others like them. Accordingly, the use of the suggested 'proportionality test' is not supported by DSNSW.

Making a complaint

The current complaints-based model assumes people with intellectual disability and their families can navigate complex legal systems. This is often not the case, and it unfairly shifts the burden onto the victim.

DSNSW recommends the following broad strategies:

- Simplify the complaints mechanism.
- Establish a supported decision-making framework, introduce plain language processes, and provide advocacy and legal support throughout proceedings

Vilification

Disability must be included in the protected attributes for ADA prohibition of vilification. Further, DSNSW recommends that the list of protected attributes for discrimination should also apply to vilification, harassment and sexual harassment. DS NSW notes that the Disability Royal Commission Final Report Volume 4 on Human Rights recommends the strengthening of legal protections against vilification and harassment.

DSNSW agrees that the ADA definition of vilification should be aligned with s93Z of the Crimes Act, to include social media & other electronic communication, graffiti, acts on private land.

DSNSW recommends that the 'harm-based test' for vilification replaces the hard to prove 'incitement test'. We contend that a test which could show significant harm to the person is clearer and fairer than a test that must prove incitement of hatred towards another person or group.

Harassment and sexual harassment

Harassment and Sexual harassment must be unlawful wherever it occurs and for whomever perpetrates it. DSNSW recognises that, regardless of the offender, the impact on the victim is the same, especially for a person with Down syndrome or other disability.

DSNSW understands that the consequences for the harasser should vary, depending on the situation e.g. an offender with Down syndrome might not fully understand the impact of their actions.





As already stated, DSNSW recommends that the protected attributes that are covered under discrimination must equally apply to harassment and sexual harassment.

Other Unlawful Acts

Victimisation

The ADA must protect against victimisation i.e. when a person is punished or disadvantaged because they exercised their ADA rights.

DSNSW agrees that victimisation should cover threats of victimisation and also victimisation based on more than one reason.

Unlawful advertisements

DSNSW sincerely questions whether there are any legitimate grounds to publish an advertisement that contravenes the ADA. Ignorance is no excuse or defence.

Liability

DSNSW recommends that the defence that employers can use to be excused from liability under the ADA by saying that they did not authorise the employees to do the unlawful behaviour is not necessary and should be removed from the ADA.

Artificial intelligence (AI)

Where AI is used by an organisation/company/entity that is discriminatory, or constitutes vilification or harassment, then responsibility for harm rests with the person or company that uses it or implements the decision to use it.

Exceptions to the ADA

Religious bodies

Exceptions should not apply to religious bodies for harassment, vilification or victimisation. Further, discrimination exceptions for religious bodies must include safeguards before an exception can apply. This means that duty holders must be required to show that the discrimination is reasonable and proportionate before an exception can be considered.

Private education authorities

Exceptions for private education authorities

- Must not permit discrimination against LGBTQIA+ people
- Must not permit discrimination against people with disability
- Are outdated, unjustified and not inclusive
- Must require accountability (impose a positive duty) from the duty holders (private education authorities) to justify their conduct





Voluntary bodies and non-profit

Similar to the above, exceptions to voluntary and other non-profit bodies should never apply to harassment, vilification or victimisation. Further there should be a positive duty imposed on voluntary and other non-profit bodies to justify their intention to use discrimination.

Broad exceptions

DSNSW agrees that the broad exceptions should be limited to enable equality and inclusivity. Additionally, any intended restriction must be demonstrated as reasonable and proportionate prior to its use.

Sport

DSNSW agrees that limiting the broad exceptions to allow equality and inclusivity is both acceptable and desirable. Further we contend that any proposed restriction must be demonstrated as reasonable and proportionate by the duty holder before it can be implemented.

Promoting Substantive Equality

DSNSW sees this review of the ADA as an opportunity to improve the lives and opportunities of vulnerable people in NSW. In this way the ADA should do more in working towards substantive equality. Accordingly, DSNSW recommends that the ADA should

- Require some duty holders to provide adjustments for people with disability
- Enable duty holders to implement 'special measures' for people with disability who have experienced disadvantage, thereby allowing people with disability to be treated differently in a positive way in order to improve the exercise of their rights
- Include a positive duty to prevent discrimination and other unlawful conduct.
- Include the duty to provide adjustments as part of the test for discrimination, or it could be identified as a separate duty.

Duty to prevent or eliminate unlawful conduct

DSNSW agrees with the approach that requires duty holders to take reasonable and proportionate steps to prevent or eliminate unlawful conduct. DSNSW rejects the argument that such a positive duty would be too hard or too expensive for duty holders. DSNSW contends that duty holders should take a reasonable and proportionate approach to their positive duty so as to improve equity and equality, fair treatment and improved opportunity for people with Down syndrome and other disabilities.

Public Education and Sectoral Guidance

Without public awareness and institutional change, legislative reform will be ineffective. Schools, employers, service providers and the broader community need clear guidance on inclusive and non-discriminatory practice.

DSNSW recommends that funding be provided for public education campaigns, sector-specific training, and enforceable guidelines for compliance.





Conclusion

DSNSW commends the Law Reform Commission on this review of the Anti-Discrimination Act 1977 (NSW). We agree the ADA must be reformed to reflect contemporary values of equality, inclusion, and human dignity. People with Down syndrome deserve legal protections that are strong, accessible, and effective in practice, not just in principle.

Down Syndrome NSW stands ready to work with the NSW Government and Law Reform Commission to co-design laws and systems that ensure people with Down syndrome and other disabilities can live a life free from discrimination.





About Down Syndrome

Down syndrome is a genetic condition, sometimes referred to as Trisomy 21. It is the most common genetic disability. There are approximately 13,000 people in Australia with Down syndrome. The birth rate in Australia for Down syndrome is one in every 1,100 births.

Most people have 23 pairs of chromosomes, making 46 in total. People with Down syndrome have 47 chromosomes in their cells, having an extra of chromosome 21.

People with Down syndrome have:

- Areas of strengths and other areas where they need support;
- Some level of intellectual disability;
- Some characteristic physical features;
- Increased risk of some health conditions;
- Some developmental delays and learning difficulties.

Down syndrome is a genetic condition, it is not an illness or a disease. It is nobody's fault. There is no cure and it does not go away. In the 1950's, the life expectancy for people with Down syndrome was as low as 15 years of age. In recent times, progress in medical and social sciences has improved the quality of life enjoyed by people with Down syndrome. In Australia today, the life expectancy of Down syndrome averages 60 years of age.

This is a milestone to be celebrated, however it also presents us with the first generation of people with Down syndrome who will, in the main, outlive their parents. This creates an even greater need for representative associations like Down Syndrome NSW to provide critical services, supports and advocacy at all stages across the lifespan.

With the right supports, people with Down syndrome are able to live full and active lives in their communities. From education, to employment, to community participation, to relationships and housing options, people with Down syndrome enjoy the same needs and aspirations just like everyone else. However, achieving these goals can be harder for people with Down syndrome, with some level of support needed to help them achieve the kind of life that most people take for granted.

Down Syndrome NSW proudly works with passion to support all people with Down syndrome to live inclusive, valued and active lives.





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